Trade, Labor and International Governance – An Inquiry into the Potential Effectiveness of the New International Labor Law

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Globalization has led states and civil society groups to seek new and more effective governance in international labor law. The United States and Canada have each concluded a path-breaking, controversial and still-evolving series of international trade-related labor agreements with their trading partners. These agreements, and ongoing critiques that continue to influence their development, have been shaped by a particular model of governance. That model seeks, in the interests of effectiveness, a set of sharply defined rules and court-like adjudication processes directly linked to economic sanctions. The potential effectiveness of this governance model has received no systematic evaluation. This article undertakes the first such assessment. Drawing on game theory, it first sets out a stylized picture of the likely interests of industrialized and developing economy states in international labor standards. It then assesses, in the light of international relations theory and empirical research into the effectiveness of international labor law and analogous regimes, the potential capacity of competing models of governance to exert required international influence. It examines in a similar manner the particular challenges for international governance posed by the political, policy and administrative complexity of raising labor standards through the necessary sustained state interventions. It concludes that the new international trade and labor agreements offer important potential gains in effectiveness for international labor law. However, in their present form these agreements are unlikely to lead to widespread improvements in respect for even the most fundamental of labor standards. This is because they rely too heavily on a complaints adjudication model of governance. The influence of adjudication is likely to be too episodic, too uninformed, too lacking in strategic focus, too divisive and too easily contained to handle the problem of raising labor standards on its own, or even as the principal strategy within a more complete toolkit of approaches. The paper then points towards an alternative and more promising approach described as Leveraged Deliberative Cooperation, grounded in New Governance theory and experience under the United-States Cambodia Textiles Agreement.

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I. Introduction

Recent years have witnessed a series of innovations in international governance linking labor standards compliance to international trade law. Most notably, the United States and Canada have pressed for and obtained agreements linking labor standards with new international trade agreements.[1] Following his election, United States President Obama committed to seeking to revise the first and most important of these agreements, the North American Agreement on Labor Cooperation (NAALC), in order to make it more

[1] The U.S. negotiates labor chapters of international trade agreements, while Canada continues to negotiate labor side agreements in tandem with its free trade agreements. Setting aside this difference in form, these agreements are currently the most extensive attempts to strengthen governance in international labor affairs. Canada has negotiated a series of trade agreements which are accompanied by international labor obligations. The first was the North American Agreement on labor Cooperation (NAALC), with the United States and Mexico, which came into force in 1994 alongside the North American Free Trade Agreement. Since then, Canada has continued to negotiate labor side agreements in tandem with its free trade agreements, while the United States has moved to incorporate labor chapters directly into its free trade agreements. Canada now has labor side agreements with Chile, Costa Rica, Peru, Colombia and Jordan, the full text of which can be found at http://www.hrsdc.gc.ca/eng/lp/ila/index.shtml. The US has labor chapters in free trade agreements with a growing number of countries in several parts of the world, especially Latin America and Asia. The full texts of these agreements can be found on the website of the United States Trade Representative: http://www.ustr.gov/trade-agreements/free-trade-agreements.

effective.[2] Meanwhile controversy over the perceived ineffectiveness of provisions to deal with the labor aspects of a free trade agreement between the United States and Colombia threatens to derail it.[3] At the global level, stalemate over the trade and labor linkage within the World Trade Organization (WTO) has given rise to strong pressures for deep reforms to the International labor Organization (ILO).[4]

Despite the intense controversy that attends it[5], this drive to link trade and labor issues is hardly surprising. Both history and contemporary politics strongly suggest that pressures to develop more effective means of international coordination to ensure respect for labor standards will increase as international economic integration deepens.[6] The policy arguments for responding to these pressures are well founded[7] and states have legitimate interests in acting upon them.[8] The "trade and labor" issue is almost certainly here to stay.

What is surprising is that there has been little systematic inquiry into the likely effectiveness of the new international governance structures being deployed in the service of trade-related labor standards. Both defenses and critiques of these new approaches tend to rely upon pre-conceived notions about what is likely to work in international labor affairs. Even within the scholarly literature one finds no systematic attempt to gain insights into what is required for effective international labor agreements, despite a growing body of directly relevant theoretical analysis and empirical research. Most programmatic arguments are based instead on fairly general impressions of what has apparently made international trade law or other regimes in arguably analogous fields relatively effective. Faced with this absence of inquiry, one may legitimately ask whether the significant political capital required to sustain the trade and labor linkage is being well invested, and whether the policy aims behind the linkage are being well served.

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[2] North American Agreement on Labor Cooperation [NAALC], U.S.-Can.-Mex., Sept. 14, 1993, 32 ILM 1499 [hereinafter NAALC]. *See PM, Obama talk Trade, Afghanistan, Pledge 'Clean Energy Dialogue'*, CBC NEWS, Feb. 19, 2009, http://www.cbc.ca/canada/story/2009/02/19/obama-visit.html (noting the topics of discussion during President Obama's visit to Ottawa).

[3] Greg Hitt, *Obama is Optimistic About U.S., Colombia Free Trade Deal,* WALL ST. J., June 29, 2009, http://online.wsj.com/article/SB124631235097070395.html.

[4] Brian Langille, *The ILO and the New Economy: Recent Developments,* 15 INT'L. J. COMP. LAB. L. & IND. REL. 230 (1999) [hereinafter Langille, *ILO and the New Economy*].

[5] Clyde Summers, *The Battle in Seattle: Free Trade, Labor Rights, and Societal Values*, 22 U. PA. J. INT'L ECON. L. 61 (2001).

[6] On the roles of concerns about the impacts of international economic integration on working conditions and national labour policy autonomy as a driving force behind the creation of the International Labor Organization, see JOHN W. FOLLOWS, ANTECEDENTS OF THE INTERNATIONAL LABOUR ORGANIZATION (1951), and THE ORIGINS OF THE INTERNATIONAL LABOUR ORGANIZATION (James Shotwell ed.,1934).

[7] CHRISTIAN BARRY & SANJAY REDDY, INTERNATIONAL TRADE AND LABOR STANDARDS (Columbia University Press 2008).

[8] *See infra* Part III.

This paper takes some first steps to fill this gap. It draws upon research into the effectiveness of key international labor law and analogous legal regimes, at the international and domestic levels, to provide a theoretically and empirically grounded assessment of both the model of governance that is shaping both aspirations and initiatives in the field of trade-related labor standards and its proposed alternatives. The dominant model relies mainly on "enforcing" labor standards through potential use of economic leverage (in the form of trade sanctions or international fines) deployed through complaint-based procedures analogous to adjudication. Scholars have criticized reliance on each element of this approach. I argue nonetheless that the new international trade and labor agreements offer important potential gains in effectiveness for international labor law. However, in their present form these agreements are unlikely to lead to a widespread improvements in respect for even the most fundamental of labor standards, even if their governance mechanisms are more fully developed and put to use. This is because they rely too heavily on a complaints adjudication model of governance. The the influence of adjudication is likely to be too episodic, too uninformed, too lacking in strategic focus, too divisive and too easily contained to handle the problem of raising labor standards on its own, or even as the principal strategy within a more complete toolkit of approaches. The paper then points towards an alternative and arguably more promising approach.

Consistent with recent international relations and international legal analysis, the argument of this paper focuses on how the interests of states with respect to labor standards may align or diverge, and how international governance can influence those interests effectively over time. This perspective is essential but often lost sight of in debate over trade-related labor standards. The task of international governance is to influence political relationships between and within sovereign states. When international law is effective it shapes national level politics and policy making rather than triumphing over them. The analogy to enforcement of laws at the domestic level is misleading to the extent that it suggests otherwise.

The argument proceeds in four steps. Following this introduction Part II identifies the specific issues for inquiry raised by the competing models of governance which advocates and scholars have proposed to enhance the effectiveness of international labor law in an integrating international economy. Part III characterizes the problem structure facing international governance by setting out a stylized picture of the likely interests industrialized and developing economy states in international labor standards, and from that picture drawing general conclusions about the type of influence likely required in order for governance to be effective. Part IV assesses the potential capacity of competing models of governance to exert such influence in the light of relevant international relations theory and empirical research into the effectiveness of international labor law and analogous regimes. Part V examines in a similar manner the particular challenges for international governance posed by the political, policy and administrative complexity of raising labor standards through the necessary sustained state interventions. The conclusion summarizes and identifies policy implications.

This is of necessity, given the lack of prior research into its basic questions, an exploratory work. It is intended to initiate rather than end discussion, by providing a grounded theoretical framework and by reviewing available evidence in its light. It provides a clearer view of the interests at play in trade and labor agreements between industrialized and developing states, and how international governance might help to align those interests to raise labor standards on the ground. I believe that it is sufficiently probative to create an onus to rethink the governance model of today's labor chapters in trade agreements and labor side agreements. It also implies that states asking for such provisions should look more closely at the political and economic conditions within potential trading partners, in order to realistically assess the chance that such provisions will succeed in making a difference on the ground.

The paper will focus on the task of greatest practical significance facing international labor law today, that of helping ameliorate working conditions in much of the developing world. There are of course important limits to what can be expected of international labor law. It governs the actions of states. States do have a vital role to play in improving working conditions.[9] However, even states in advanced industrialized economies have limited capacity to regulate the informal sector of their economies, a sector which tends to account for much of the work done in developing countries.[10] Nonetheless it remains relevant to ask how international labor law can be effective within economic sectors that lie within the practical reach of regulation. As industrialization proceeds in developing countries these sectors are likely to account for an increasingly significant share of global production.

The paper focuses upon the principles and rights identified in the International Labor Organization's Declaration on Fundamental Principles and Rights at Work[11] and the terms "labor standards" or "core labor standards" are used accordingly. This is done

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[9] For a discussion of the role of the state in implementing core labour standards see section V(A) below. For an assessment of the potential and limitations of transnational models of regulation applying directly to non-state actors, see JAN MARTIN WITTE, DEUTSCHE GESELLSCHAFT FUR TECHNISCHE ZUSAMMENARBEIT, REALIZING CORE LABOUR STANDARDS – AHE POTENTIAL AND LIMITS OF VOLUNTARY CODES AND SOCIAL CLAUSES (2008).

[10] *See generally* U.S. DEPARTMENT OF LABOR, BUREAU OF INTERNATIONAL LABOR AFFAIRS, WORK WITHOUT PROTECTIONS: CASE STUDIES OF THE INFORMAL SECTOR IN DEVELOPING COUNTRIES (G.K. Schoepfle & J.F. Perez-Lopez eds., 1993).

[11] International Labor Organization [ILO], Declaration on Fundamental Principles and Rights at Work, June 18, 1998, 37 I.L.M. 1233. The Declaration articulates an obligation assumed by all members of the International Labour Organization, arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely:

(a) freedom of association and the effective recognition of the right to collective bargaining;
(b) the elimination of all forms of forced or compulsory labour;
(c) the effective abolition of child labour; and
(d) the elimination of discrimination in respect of employment and occupation.
See Article 2 of the Declaration.

mainly to restrict the analysis of the paper to a manageable set of issues. It does not imply an argument that this list of principles and rights is necessarily a complete response to the problems that have driven people and states to pursue international labor standards in a global economy.[12] The Declaration is however an important starting point, politically because it establishes a global consensus that diminishes the possibilities for resistance to labor standards implementation, and analytically because it poses a relatively well studied set of challenges. If international governance is to successfully address more complex visions of social justice, it would do well to learn from attempts to implement elements of this more modest approach which enjoys global consensus support.

For the purposes of this inquiry I will define effectiveness as significant changes for the better in level of compliance by states with international labor standards, significant new action by states to achieve this end, significant changes in the behaviour of employers consistent with this end, or the maintenance of high level of compliance over a significant period of time.[13]

II. Trade and Labor Linked: Issues Raised by the Emerging Governance Approach and its Proposed Alternatives

Contemporary debate over how to improve respect for labor standards in the international economy has generated four proposed governance models. This Part sets out the basic elements and propositions of each model, beginning with the one that currently enjoys the greatest political support in North America.

A. The Emerging Governance Model in Current Trade and Labor Agreements: Adjudication and Sanctions-Based Constitutionalism

The thinking about international governance that underlies today's North American model of trade and labor agreement can be seen most clearly by uncovering its origins and evolution. The move to link labor standards to international trade agreements began in the early 1990's. It reflected a growing sense among policy makers in North America and Europe that the longstanding mechanisms of the International Labor Organization were insufficiently effective to address the challenge of raising labor standards in the

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12 For a more encompassing view of what labor standards should be included in international trade agreements see ROBERTO MANGABEIRA UNGER, FREE TRADE REIMAGINED (Princeton University Press 2007).

13 Given the problem structure of diverging interests between and within states with respect to labor standards in an integrated international economy, and the relatively demanding requirements of international labor standards in the relevant trade and labor agreements it makes sense to overlap the definition of effectiveness with compliance in this way. For a treatment of the difference between compliance with and effectiveness of international law, see Kal Raustiala, *Compliance and Effectiveness in International Regulatory Cooperation*, 32 CASE W. RES. J. INT'L L. 387 (2000).

global economy.[14] With significant deepening of international trade relations through bilateral and subregional trade agreements on the agenda, the Canadian government began to negotiate labor cooperation agreements in tandem with free trade agreements, and the United States, after negotiation one such agreement in the North American Agreement on labor Cooperation, began to insist upon labor chapters in free trade agreements themselves.[15]

These labor cooperation agreements and labor chapters evolved out of the model established in the first such agreement, the North American Agreement on labor Cooperation (NAALC), which was implemented in tandem with the North American Free Trade Agreement between Canada, Mexico and the United States.[16] The NAALC contained a general obligation to provide for "high labor standards" within the domestic laws of each member state, and a set of detailed obligations to effectively and transparently administer those laws.[17] To implement those obligations and to further the larger purposes of the Agreement, the NAALC deployed three governance strategies. The first can be fairly described, with the benefit if hindsight, as a complaints-driven dispute settlement system.[18] The second governance strategy is that of structured international cooperation.[19] Finally, the NAALC provides a mechanism for systematic monitoring and public reporting of information on labor markets, labor laws, and the

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[14] European Commission, *Communication from the Commission to the Council, the European Parliament and the Economic and Social Committee – Promoting Core Labour Standards and Improving Social Governance in the Context of Globalization*, COM (2001) 416 final (July 18, 2001); Gary Yerkey, *Sen. Baucus Says No "Fast Track" Next Year without Strong Links to Labor, Environment,* DAILY LABOR REPORT (BNA), Dec. 6, 2000, at A-9 (quoting the views of the ranking Democrat on the Senate Committee on Finance); Corbett Daly, *Levin Says Bush Administration Cannot Force-Feed Fast Track Bill to Congress,* DAILY LABOR REPORT (BNA), Feb. 2 2001, at A-11 (ranking Democrat on the House of Representatives Ways and Means Subcommittee on Trade stating that international trade cannot be left to the ILO because "leaving it to the ILO means leaving it to unenforceability").

[15] *See* NAALC, *supra* note 2. For the legal mandate under which most U.S. labor chapter have been negotiated, see the Trade Act of 2002, Pub. L. No. 106-200, sec. 2102.

[16] North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, 32 I.L.M. 289.

[17] NAALC, *supra* note 2, at arts. 2-7.

[18] NAALC, *supra* note 2. The NAALC requires each party to provide a mechanism by which their own nationals can file "public communications" raising concerns about the administration or enforcement of labor laws in the territory of another party. The Agreement requires that such communications be reviewed by the National Administrative Office of the state receiving the communication: *Id.* at art. 16(3). The public communications process can lead to deeper engagement in diplomatic and adjudicative processes to resolve concerns or differences about alleged failures to effectively enforce national labor laws, first through consultations between senior officials and responsible Ministers, next through an independent assessment conducted by an ad hoc body called an Evaluation Committee of Experts, and finally through international arbitration: *Id.* at pts. 4 and 5. Failure to implement an arbitral award may lead to the imposition of trade sanctions or international fines: *Id.* at arts. 39-41, Annex 39, Annex 41A, Annex 41B. Though these diplomatic and adjudicative processes can be initiated by states independently of any public communication, in practice all steps taken in such channels have followed public communications considered to be well founded following a review by a National Administrative Office.

[19] The Agreement calls upon the Council, comprised of the three party states to promote cooperative activities between the Parties regarding a wide range of labor-related matters: *Id.* at art. 11.

administration and enforcement of such laws in each of the party states. [20]

The NAALC was the result of a complex bargain, and it has been heavily criticized by labor and human rights organizations and academics from its inception. Those criticisms eventually influenced policy makers and the direction taken by future labor chapters and cooperation agreements. The criticisms focused almost entirely upon the structure of legal obligations and their enforcement. [21]

The evolution of labor chapters and cooperation agreements has largely reflected this focusing of attention and debate. Their latest iterations, the Canada-Colombia Agreement on labor Cooperation (CCALC) and Chapter 17 of the U.S. Colombia Free Trade Agreement (USCFTA), contain significant changes to the NAALC model aimed to make substantive international obligations more enforceable.[22] They provide obligations to reflect internationally recognized fundamental principles and rights at work in national laws.[23] The USCFTA closes loopholes that may have allowed national authorities to avoid obligations to effectively enforce national laws by pleading that resources had been allocated elsewhere in good faith.[24] Timelines in consultation, review and enforcement processes have been significantly shortened.[25]

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[20] *Id.* at arts. 10.1.8 and 14.1.2. This monitoring and reporting was to have been carried out by an independent international Secretariat based in Washington D.C., established under Part 3 of the Agreement. It has however not been carried out in so far as it pertains to the administration and enforcement of labor laws, topics integrally related to the core set of obligations in the Agreement. See the web site of the Commission for Labor Cooperation, www.naalc.org where there is a complete absence of any report on the subject.

[21] The central points of the critiques were that (1) NAALC obligations with respect to substantive labor standards were too vague to be meaningful; (2) that NAALC enforcement mechanisms were too slow and too uncertain because of the extended timelines provided in the Agreement and the extent of discretion granted to government authorities over whether and how they would be engaged; (3) that key aspects of the labor standards universe had been left out the scope of issues that could be referred to dispute settlement and enforcement channels; and finally (4) that as a result of the foregoing the prospect to applying economic leverage through trade sanctions or fines to improve labor standards was too uncertain and remote to have any influence on state behaviour. *See, e.g.,* Marley S. 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 (2003). A small number of critics argued that the cooperative program dimension of the Agreement should be strengthened to provide a strategic focus to such work, enhance the chances of achieving sustainable improvements in labor laws, policies and programs, and to provide a basis for ongoing constructive international relations in labor affairs. *See, e.g.,* Rainer Dombois, Eric Hornberger & Jens Winter, *Transnational Labor Regulation and the NAFTA - A Problem of Institutional Design?* 19 INT'L J. COMP. LAB. L. & IND. REL. 421 (2003). The monitoring and reporting mechanisms established by the Agreement were largely ignored in subsequent debates.

[22] United States-Colombia Trade Promotion Agreement, U.S.-Col., Nov. 22, 2006, (not in force), http:// www.ustr.gov/trade-agreements/free-trade-agreements/colombia-fta [hereinafter USCFTA]; Agreement on Labour Cooperation Between Canada and the Republic of Colombia, Can.-Colom., Nov. 21, 2008, http://www.rhdcc-hrsdc.gc.ca/eng/labour/labour_agreements/ccalc/index.shtml [hereinafter CCALC].

[23] CCALC, *supra* note 22, at art. 1; USCFTA, *supra* note 22, at art. 17.3.

[24] USCFTA, *supra* note 22, at art. 17.3.1(b).

[25] See CCALC, *supra* note 22, at pt. 3 and USCFTA, *supra* note 22, at art. 21 in comparison with NAALC, *supra* note 2, at pts. 4 and 5.

Critics argue that labor agreement enforcement at the discretion governments still leaves too much uncertainty in the application of international labor standards and argue for mechanisms that would allow complaints initiated by private parties to proceed more directly to adjudication.[26] Nonetheless the clear direction of change is towards better definition of norms and more direct routes to their application through international adjudication. By contrast, while cooperative programs have been enhanced under recent agreements, such programs remain voluntary supplements to their principal means of influence, and subject to discretionary budget allocations and priority determinations by state parties.[27] The monitoring and reporting mechanisms assigned to the NAALC Secretariat have disappeared in subsequent agreements. This has largely gone unnoticed in policy and political debate.

This trajectory of reform reflects a model of international governance embedded in the policy thinking of most key actors supporting the development of trade and labor agreements. The logic of this model runs roughly as follows: (1) states face powerful incentives to avoid complying with international core labor standards in a competitive global economy; (2) to make international governance of labor standards effective it is imperative and sufficient that those standards be set out clearly and made subject to enforcement through an impartial tribunal whose rulings will be backed by the likely threat of economic consequences for non-complying governments. The model locates the influence needed for effectiveness in the threat of trade sanctions or international fines, which provide its "teeth", and in the tribunal process itself, which provides for predictable, transparent and effective deployment of that threat. Thus the disappearance of processes for systematic monitoring, the fact that international cooperative programs remain an incidental and highly discretionary feature of the regimes, and the absence of

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[26] Ongoing advocacy and critique tends to focus on how to remove the discretion that states exert over the use of enforcement procedures, for example by establishing an independent international prosecutorial function, or enabling private parties to trigger dispute settlement procedures leading to binding orders against states. See for example Weiss, *supra* note 21, and HUMAN RIGHTS WATCH, A WAY FORWARD FOR WORKERS' RIGHTS IN US FREE TRADE ACCORDS, (2008), http://www.hrw.org.en/reports/2008/10/22/way-forward-workers-rights (last visited May 21, 2009) [hereinafter HUMAN RIGHTS WATCH, A WAY FORWARD FOR WORKERS' RIGHTS].

[27] Cooperative programs under international trade and labor agreements have also been more strategically oriented towards improvement of labor law enforcement at the national level. More recent agreements have been supported by significant international assistance programs focused on such tasks as strengthening labor inspectorates, creating cultures of safety and health at the workplace level, educating judges in national courts with respect to the requirements of international labor conventions, and so on. *See, e.g.,* CCALC, *supra* note 22, at art. 9 and Annex 1; and USCFTA, *supra* note 22, at arts. 17.5, 17.6 and Annex 17.6. Because these programs are generally funded with international assistance money, they are subject to project design requirements that require clear identification of goals and means of achieving them, a commitment of political involvement on the part of the receiving state, and a sustained focus over a period of years. This way of operating creates at least the potential for cooperative programming that can have lasting impacts on workplace practices. However, the continued funding of such programming remains discretionary and subject to larger political forces influencing national international assistance agendas in Canada and the United States.

obligations at the international level to measure or report upon the outcomes of such programs pass largely without comment.

This model of governance is heavily influenced if not entirely derived from perceptions of how international trade law works and has become one of the most effective systems of governance at the international level. Indeed its aspirations mirror the celebration of leading voices in the international trade law community of the emergence of the new legal order embodied in the WTO agreements, an order described as establishing the precedence of law over power relations in the operation of the "international trade constitution".[28] Since 2002 the labor mandate in the trade negotiating authority of the U.S. administration has been informed by the idea that trade and labor issues should receive parity of treatment with respect to dispute resolution procedures and remedies. [29] Accordingly, I will refer to this model as Adjudication and Sanctions-Based Constitutionalism (ASC).

B. Alternative Governance Models

This approach is not without critics. Some argue that labor standards should not be a priority in the international economy, continuing a debate that lies beyond the scope of this paper. Others propose alternative models based upon different understandings of the purposes of international labor law, how it can effectively respond to those purposes, or both.

(1) Sunshine and Moral Suasion

The longest standing alternative approach is based on the proposition that economic sanctions are neither necessary or desirable influencing state behavior. Rather, sunshine – publicly exposing non-compliance – and moral suasion are likely to be more effective over time.[30] The premises of behind this approach are often implicit and vary from author to author. In general terms however, it rests on propositions that: (1) governments and societies are susceptible to shaming or embarassment with respect to core labor standards violations; (2) that national level activists and non-governmental organizations can make therefore make use of credible and impartial documentation of such violations to successfully bring pressure for reform in state and employer practices. Support for this basic mechanism is therefore often combined with calls for international technical assistance to overcome lack of state capacity to enforce the law. I will refer to

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[28] *See, e.g.,* John McGinnis & Mark Movsesian, *The World Trade Constitution,* 114 HARV. L. REV. 511 (2000).

[29] Trade Act of 2002, Pub. L. No. 106-200, secs. 2(b)(11) and 2(b)(12).

[30] *See, e.g.,* Jose M. Salazar-Xirinachs, *The Trade-Labor Nexus: Developing Countries' Perspectives*, 3 J. INT'L ECON. L. 377 (2000); Posting of Michael Pollak to TWIN-SAL: Against the Social Cause, Third World Intellectuals and NGOs Statement Against Linkage, http://mailman.lbo-talk.org/2000/2000-April/008417.html (Oct. 13, 2009) [hereinafter TWIN-SAL]; Jagdish Bhagwati, *Free Trade and Labor*, NIHON KEIZAI SHIMBUN, Sept. 10, 2001.

this approach as the Sunshine and Moral Suasion (SMS) model of governance.

(2) Development Cooperation

A third, more recent line of thinking also criticizes the way that the ASC model constructs the problem facing labor standards, but unlike the SMS model treats the task of international law not as one of policing state behaviour, but rather as one of helping states to better understand their interests. This approach follows from the propositions that (1) states' best interests lie in pursuing high labor standards since these contribute to economic and social development; but (2) contemporary development ideologies and the short term pulls of domestic politics push against and obscure the force of this insight; and (3) once clearly perceived the first proposition will generally align interests the interests of states committed to growth and development in favour of respecting core standards. As a result, the central task of international labor law is not one of legally coercing states to abandon their self-interest, but rather to "lead member states to pursue their self interest through the construction of social policies which are part of the complex and mutually reinforcing aspects of human freedom which both make possible the construction of just and durable societies and which at the same time are their goal".[31] The principal means of international influence that follow from the definition of this task are research, knowledge creation including development of model laws, furnishing technical assistance and actively promoting reform. For ease of reference, I will call this the Development Cooperation (DC) model of governance.

(3) Leveraged Deliberative Cooperation

Finally, a fourth school of thought agrees with those proposing the ASC model of governance that international labor standards need to be backed by economic incentives (of which sanctions are one form) to counter incentives running against labor standards compliance, but argues deploying those incentives by relying mainly on the threat of sanctions and adjudication procedures is unlikely to work. This is because the problem of raising labor standards is sufficiently complex that it requires a level of cooperation and engagement between and within states that cannot be achieved through the threat of sanctions and adjudication alone. Writers within this fourth approach have begun to develop alternative approaches to governance making the primary focus international negotiation, deliberation and cooperation, disciplined by international monitoring and transparency with respect to labor standards reform programs, and motivated by trade incentives contingent on progress to improve compliance.[32] This model can be referred

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[31] Brian Langille, *What is International Labor Law For?* 3 LAW & ETHICS HUM. RTS. 47, 76 (2009).

[32] *See, e.g.,* Dombois et al., *supra* note 21; Kevin Kolben*, Integrative Linkage: Combining Public and Private Approaches in the Design of Trade and Labor Regimes,* 48 HARV. INT'L L.J. 203 (2007) [hereinafter Kolben, *Integrative Linkage*]; Sandra Polaski, *Combining Global and Local Forces: The Case of Labor Rights in Cambodia*, 34 WORLD DEV. 919 (2006) [hereinafter Polaski, *Combining Global and Local Forces*].

to as Leveraged Deliberative Cooperation (LDC). It is grounded in the intellectual premises of the New Governance movement, which has embarked upon a broad rethinking of regulatory governance in the face of complex conditions not well handled by traditional "command and control" models of regulation, of which the ASC model is an example.[33]

C. Issues for Inquiry

This is of course a highly stylized portrait of the current debate. Yet it faithfully reflects the priorities and general supporting reasons of competing approaches and brings into sharper focus three underlying differences in the starting points of the proposed governance models. The first lies in their understandings of the nature of the problem that international labor standards aim to solve, and in particular in the extent to which state interests, if properly understood, can be aligned in support of core labor standards without bringing other state interests into play. The second lies in understandings of how

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[33] New Governance, as an intellectual and policy movement, arose first at the domestic level in industrialized states in response to regulatory problems requiring complex solutions and the cooperative yet accountable engagement of regulated entities. It has developed models governance that set regulatory requirements and deploy regulatory incentives or sanctions adaptably, with a view to efficiently and effectively achieving policy aims in the face of complex and changing conditions. New Governance has tended to move away from "command and control" models of regulation in which standards are set in advance by public authorities and applied mainly or solely through coercive deterrence or sanctions. The adversarialism of such models of seen as inhibiting the generation of good information and analysis of what can be done to ensure optimal compliance solutions at lowest cost. Such approaches are increasingly reserved as default options in the event that less coercive relations between regulator and regulatee fail. New Governance approaches often tend to rely for their operation on iterative negotiation, with the possibility of sanctioning processes held in reserve to deal only with situations where negotiations fail. The aims of negotiations in such variants of New Governance are in general terms to establish and continuously improve or update performance benchmarks required to achieve compliance, to ensure that information on compliance with benchmarks is collected and made available to all parties with a stake in ensuring compliance, to provide opportunities for deliberate analysis of the implications of compliance data, to provide an opportunity to set where necessary new strategic directions for measures to ensure compliance. Ideally such negotiations avoid the zero sum position-taking of sanctioning procedures because they provide opportunities for outcomes that are of greater benefit to the regulator and regulatee than would be likely if the sanctioning processes were pursued to conclusion. The regulator and interested stakeholders stand to gain access to better information on and analysis of what is possible in terms of compliance with general standards, and on overall compliance performance. The regulatee gains opportunities to influence compliance benchmarks and programs of action required to bring itself into compliance. The mutuality of these gains creates potential conditions for ongoing proactive cooperative negotiation. The transparency ensured by public reporting of information on benchmarks and compliance serve to reduce the chances that low performance will be accepted as compliance, enabling interested stakeholders to bring pressure to bear on the regulation process. The risk of defaulting to an enforcement and sanctioning process reinforces these accountability dynamics. For practical and normative reasons the case for a New Governance approach to dealing with complex compliance problems of is even stronger at the international level, where the parties whose conduct is subject to legal norms and whose cooperation is required are sovereign states. For a literature review see Bradley C. Karkkainnen, *New Governance in Legal Thought and in the World: Some Splitting as an Antidote to Overzealous Lumping*, 89 MINN. L. REV. 471 (2004). For a seminal work in the New Governance movement, see IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION (1992).

international legal regimes can most effectively influence the behaviour of states to solve that problem. The third lies in differing ideas or intuitions about the extent to which political, policy and administrative complexity of core labor standards compliance has important implications for the effectiveness of international governance.

To evaluate the claims of each model, it is necessary to consider whether its understanding of the purpose of or problem facing international labor standards correct. Next we must ask whether its solution to that problem can be grounded in a coherent theory of international relations, and whether empirical evidence bears that theory out.

For the purposes of predicting their behaviour in international relations, states can be understood as organizations that pursue their interests as they understand them. Among other things, such interests can be economic, aimed at securing political power, or grounded in desires of the national polity to project or endorse values in the international arena.[34] With this in mind it is possible to treat the three underlying differences between competing governance models as raising three questions about the interests of states in international labor standards:

- First, the nature of the problem facing international labor standards can be explored by asking: What are the interests of states in such standards? Under what conditions, if any, are those interests likely to converge without forms of international co-ordination that bring other interests into play?

- Secondly, the issue of how international labor standards regimes can most effectively influence state behaviour towards compliance can be addressed by asking: how can states be influenced, through the norms and processes that constitute the governance system of such regimes, to see such compliance as being in their interests and thus to cooperate in international coordination?

- Thirdly, the issue of how international governance should respond to complexity can be addressed by asking whether such complexity has any necessary implications for sustaining the alignment of state interests over time and across complex domestic political, policy or administrative agendas.

Taken together, the answers to each question that each model implicitly relies upon constitute its logic of international influence and define the conditions that enable that logic to operate. The next three parts will take up each of these questions in turn.

III. Prevalent Problem Structures: State Interests, Globalization, and

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[34] Which of these types of interest is in general most likely to take priority is a subject of vigourous scholarly debate. However, it is not a question which this paper needs to engage. For present purposes is it sufficient to acknowledge the possibility of a state acting on a wide range of interests, and to leave to matter of which takes priority to observing the behaviour of states with respect to international labor standards.

Internationally Recognized Core Labor Standards

The four competing governance models outlined in Part 2 present two fundamentally different conceptions of the interests of states in core labor standards. The DC model is premised on the argument that, given full information and a clear understanding of the interests at stake, there are most often sufficient commonalities of interests between states to bring about a mutual commitment to implement core labor standards, without seeking to alter economic incentives through sanctions or conditional benefits. This premise explains its reliance on research, assistance and persuasion as means of governance. The SMS model relies in part on a similar understanding. Its premise that states are vulnerable to international reporting on and condemnation of core labor standards non-compliance assumes that states either have a sufficiently strong interest in behaving consistently with those norms for their own sake, or a sufficiently strong interest in being seen to comply in order to further other interests in international relations. The former assumption implies that state interests in core labor standards have strong potential to converge without other interests being brought into play. The ASC and LDC models presume the contrary, and conclude that the possibility of economic sanctions or conditional benefits is needed for effective governance.

This Part will first consider the main contemporary bases for normative, economic or other states interests in compliance with international core labor standards. Then it will ask whether this configuration of interests is likely to generate a convergence towards compliance in the absence of forms of international coordination, like sanctions or conditional economic benefits regimes, that seek to directly alter how states act on their interests in core labor standards by bringing other interests into play.

The main dividing line in state positions on trade-related labor standards lies between industrialized and developing states. The latter have almost always been demandeurs in negotiations for trade/labor linkages. Vigourous resistance to the linkage at the WTO has been led by and confined to developing country governments. The perception that industrialized country interests in trade related labor standards derive from economic protectionism informs much of this resistance to a WTO linkage. [35] Another important source of resistance is based on the argument that the international trade agenda is already titled in favour of industrialized countries so that adding labor standards to that agenda will unfairly target developing countries.[36] It is therefore natural to assume that these sources of resistance faithfully reflect the interests at stake.

However, these two arguments in fact distract from a good understanding of those interests. Labor standards are a poor option from a protectionist perspective, and those who have tried to persuade protectionist groups to support such standards in the context

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[35] *See* Kevin Kolben, *The New Politics of Linkage: India's Opposition to the Workers' Rights Clause,* 13 IND. J. GLOBAL LEGAL STUDIES 225, 244-49 (2004) [hereinafter Kolben, *New Politics of Linkage*].

[36] TWIN-SAL, *supra* note 30.

of open trade can attest.[37] Most of the labor cost advantage of developing countries is not a result of labor standards non-compliance but rather of forces of supply and demand, and therefore would not be affected by an international labor standards regime. [38] Moreover, the domestic political consensus needed to move a government to seek to impose trade sanctions under a labor standards regimes would be more difficult to achieve than it would under alternative routes to trade restrictions. Employers within industrialized countries are likely to have divided interests, some having significant investments in the state facing sanctions or in comparable states, some only equivocally supporting certain core labor standards in the first place. In practice there is no evidence that existing labor standards regimes backed by the possibility of trade sanctions have been used for protectionist purposes.[39] The unfair trade agenda argument, on the other hand, begs the question of what developing country interests would be harmed by such a standards regime. Adding a new international commitment constraining national sovereignty does not necessarily harm national interests. To the contrary, it may further them by constraining the national polity from acting on interest group claims that are inimical to long run best interests. That is after all what international trade law is intended in part to do. At best this argument provides an account of why developing countries might want to hold back agreement to implement core labor standards for strategic trade negotiation purposes. It has nothing to say about their specific interests in such standards themselves.

Thus, while the experience of industrialized country protectionism and domination of the international trade agenda may justify a general wariness on the part of developing states, it does not provide a good account of industrialized state interests in ensuring that core labor standards are observed in tandem with trade liberalization. Nor does it provide such an account of developing country interests in resisting such standards. Nonetheless, as I will argue, the main division of interests in core labor standards does track the division between developing and industrialized countries. However, it is much more nuanced and contingent than either the "free trade versus protectionism" or "unfair trade agenda" account would allow.

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[37] *See, e.g., Membership and Participation by the United States in the International Trade Organization: Hearings Before the Comm. on Foreign Affairs, House of Representatives*, 81st Cong. 269-294 (1950) (statement of Stanley Ruttenberg, Director, Department of Education and Research, Congress of Industrial Organizations) (explaining among other things that the prospect of a fair labour standards clause in the draft International Trade Organization Charter was of no comfort or value to protectionist members within his organization, and that the task of justifying his organization's support for the Charter to some of its members was therefore very difficult).

[38] See BARRY & REDDY, *supra* note 7, at 36-40; and RICHARD FREEMAN & KIMBERLY ANN ELLIOT, INTERNATIONAL INSTITUTE FOR ECONOMICS, CAN LABOR STANDARDS IMPROVE UNDER GLOBALIZATION? 14-21 (2003).

[39] Kimberly Ann Elliott, Peterson Institute for International Economics, Speech at Calvin College: Preferences for Workers? Worker Rights and the US Generalized System of Preferences (May 28-30, 1998), revised May 8, 2000, www.iie.com/publications/papers/paper.cfm?ResearchID=313, last visited August 9, 2010.

A. Prevalent Contemporary Structures of State Interests in International Core Labor Standards

There are currently three types of intellectually coherent policy arguments that define defensible state interests in international core labor standards.[40] Today these potential interests are not likely to map symmetrically onto the industrialized / developing state divide.

(1) Normative Interests

(a) International Norms

States may have an interest in ensuring respect for the fundamental moral norms of the international community. Such interests may reflect the altruism of their constituents, or more complicated interests in defending the moral legitimacy of the international economy, discussed below. In either case they lead to the position that moral decency and respect for human dignity require that certain norms be applied to conditions to work in international trade. The universality of norms is recognized in the contemporary international system through consensus on international legal obligations that embody them. Since the mid 1990's the moral fundamentals of international labor law have

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40 Historically a fourth type of argument was based on the idea that a globally integrated capitalist economic system creates its own inherent problems for economic and social stability and development, and that these problems can only be solved through international co-ordination. Stability and development were thus seen as international collective goods. This argument has evolved with changes in prevailing views about the relationships between market economies, social and economic stability, and equitable distribution in gains from economic growth. In the early twentieth century the founders of the ILO were convinced that unless corrected by internationally coordinated policies in support of social justice, the social upheavals and inequities of the unregulated international market would undermine the capacity of states to bring about a distribution of prosperity that benefited working people, and eventually undermine the chances of lasting peace within the international system. *See* Shotwell ed., *supra* note 6. In the aftermath of the Great Depression and World War II industrialized and developing countries alike shared the view, grounded in Keynesian economics, that international fair labor standards were necessary to ensuring full employment and stable demand in the international economy, by ensuring that workers in each country received a fair share of the rewards of growing prosperity in the face of short run incentives not to enact such policies at the national level. *See* Kevin Banks, *Trade and Labor, Now and Then* (forthcoming) [hereinafter Banks, *Trade and Labor*] (describing negotiating history of the Fair Labor Standards clause of the Charter of the International Trade Organization). Beginning in the 1980s however the "Washington Consensus" in support of neoclassical economic policy tended to see global economic integration as fostering economic growth and having no necessary negative effects on social or economic stability. It also tended to relegate all but the most basic of labor standards to the status of luxury goods that should be approached with caution lest they interfere with employment creation and market signals necessary to economic development. *See, e.g.,* Gary Fields, *Labor Standards, Economic Development, and International Trade*, *in* LABOR STANDARDS AND DEVELOPMENT IN THE GLOBAL ECONOMY 19-33 (S. Herzenberg & J. Perez-Lopez eds., 1990). Though it is far from uncontested, this line of thinking remains influential in many developing and industrialized states. As a result, arguments for international labor standards on economic and social stability grounds are much less resonant today than they once were.

tended to be understood in human rights terms, and find their most universally accepted expression in the ILO's Declaration on Fundamental Principles and Rights at Work, which draws upon consensus forged in large part within the field of international human rights.[41]

With the global consensus on ILO Declaration fundamental principles and rights, there is little room left for argument in general terms that respect for such norms does not reflect the express normative commitments of trading partner states. The vast majority of states are members of the ILO, and by virtue of that membership have an obligation to respect promote and realize the principles and rights recognized as fundamental in the Declaration.[42] The vast majority of members of the ILO have in addition assumed the more detailed obligations contained in the ILO Conventions underlying the Declaration.[43]

However, it is quite likely that many states' interests with respect to compliance with fundamental labor principles and rights are more complex than the simple act of membership in the ILO or ratification of its conventions convey. The ILO Declaration represents consensus at a very general level, with ample room for disagreement as to particular requirements.[44] Further, it is well known that ratification of ILO Conventions is not well correlated with compliance.[45] The reasons for this are no doubt varied. They often include lack of capacity to implement and enforce labor standards. On the other hand, experience in other human rights fields suggests that many states may be seeking to capture the benefits in international relations that ratification of conventions may confer, while at the same time pursuing economic and political interests in non-compliance.[46] The conduct of many states who have ratified ILO core conventions suggests that the normative commitment expressed by such ratification is not a matter of

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[41] Judy Fudge, *The New Discourse of Labor Rights: From Social to Fundamental Rights?* 29 COMP. LAB. L. & POL'Y J. 29 (2007).

[42] The ILO counts 183 member states. ILO, Database of International Labour Standards, http://www.ilo.org/ilolex/english/mstatese.htm (last visited May 11, 2010).

[43] The core Conventions of the ILO, which deal with the principles and rights listed in the ILO Declaration on Fundamental Principles and Right at Work, have all been ratified by at least 150 states. ILO, Ratifications of the Fundamental Human Rights Conventions by Country, http://www.ilo.org/ilolex/english/docs/declworld.htm (last visited May 11, 2010).

[44] Langille, *ILO and the New Economy*, *supra* note 4.

[45] *See* Werner Sengenberger, *International Labour Standards in a Globalized Economy: Obstacles and Opportunities for Achieving Progress*, *in* GLOBALIZATION AND THE FUTURE OF LABOUR LAW (John D.R. Craig & S. Michael Lynk eds., Cambridge University Press 2006) (noting at page 332 that ratification alone does not mean that a convention is necessarily respected or implemented, that in fact a recent study had found little evidence of a statistical link between ratification of ILO Conventions and actual working conditions, and that massive violations of ILO conventions are observed, even regarding the eight core conventions). Sengenberger is a knowledgeable and long serving former ILO staff member. *See also* Edward Weisband, *Discursive Multilateralism: Global Benchmarks, Shame, and Learning in the ILO Labor Standards Monitoring Regime*, 44 INT'L STUDIES QUARTERLY 643 (2000).

[46] For many states the act of ratifying international human rights norms, even those almost universally recognized, will not necessarily lead to any change in behaviour on the ground because the benefits of ratification can be captured without sacrificing strong interests in continued non-compliance. *See* Oona Hathaway, *Do Human Rights Treaties Make a Difference?* 111 YALE L.J. 1935 (2002).

high order priority for them.

(b) Domestic Norms

States may also have an interest in protecting and projecting into the international economy the values embedded in their legal and social code of rules regulating the fairness and legitimacy of the gains and losses that workers and employers inevitably accrue as a result of economic competition. The absence or presence of labor standards within the economy of a particular state represents an important normative choice about the type of market ordering supported within that state. When goods and services supplied from foreign states circulate within a national economy they bring to bear market pressures and create winners and losers according to a multiplicity of different labor standards regimes. This in turn leads to the potential for conflict between the values underlying rule system of the domestic economy on the one hand and the apparent moral exemption granted to foreign competitors on the other. This concern about the impacts of trade on the moral order of national economy was perhaps most pithily expressed by Franklin Delano Roosevelt in arguing for a new Fair labor Standards Act in 1937, when he stated that "Goods produced under conditions which do not meet a rudimentary standard of decency should be regarded as contraband and ought not to be allowed to pollute the channels of interstate trade".[47] While national norms about decency in the workplace may be imperfectly reflected in international standards, a state may seek international agreement to implement such standards in a trading relationship as a compromise to avoid potential conflicts between differing national conceptions of moral legitimacy.

Non-compliance with core labor standards is more prevalent in the developing world than in the industrialized world. The reasons for this are complex, as will be discussed below. As a result, the norms embedded in those standards tend not to be enacted to the same extent in day to day life, and developing country populations may be less likely to see labor standards violations as undermining the moral legitimacy of their own economy, or of the international economy.[48] In fact, in developing countries jobs in traded sectors often pay better and offer better working conditions than those available in the non-traded economy.[49] It is therefore less likely that in developing states the international economy will be seen as systematically enacting violations of fundamental social norms.

(2) Political Interests in National Policy Autonomy

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[47] Quoted in Terry Collingsworth, J.W. Goold & Pharis Harvey, *Time for a Global New Deal,* 73 FOREIGN AFFAIRS 8, 10 (1994). Roosevelt was of course referring to clashes between the labor standards of sub-national states with national norms, but the logic of his argument applies to international trade as well.

[48] *See, e.g.,* M. Neil Browne, Alex Frondorf, Ronda Harrison Spoerl & Sumangali Krishnan, *Universal Moral Principles and the Law: The Failure of One-Size-Fits-All Child Labor Laws*, 27 HOUS. J. INT'L L. 1 (2004).

[49] Deborah Spar, *Foreign Investment and Human Rights,* 42 CHALLENGE 1 (1999).

States may have an interest in compliance with international core labor standards to protect their self-determination in labor affairs against the effects of the competitive pressures of an international economy. Arguments for this concern have a long history. The founders of the International labor Organization saw their task largely as that of preventing destructive forms of international competition between national jurisdictions. They were convinced that international competitive pressures had held states back from developing national laws and programs for the benefit of workers, and would continue to do so, out of fear that such measures would undermine the international competitiveness of their producers and drive investment abroad.[50] The basic theory behind this concern is that high labor standards can raise unit labor costs (some core labor standards raise labor costs, even once any immediate productivity gains accruing to firms are taken into account), that capital owners will therefore seek to avoid such standards, and thus relocate to avoid them or seek to to ensure that governments do not raise standards by threatening to leave their jurisdiction if they do so.[51] The theory is sound as far as it goes. However empirical research has shown an open international economy does not necessarily produce such pressures.[52] Many of the states most successful in international trade and in attracting international investment have implemented high labor standards. Their competitive advantage depends not on low labor costs but on advantages such as good infrastructure, the rule of law, a highly trained workforce, or large domestic markets enabling economies of scale. As a result, the logic of competitive pressures based on labor standards simply does not operate at the level of the national economy of such countries. On the other hand, there is no reason in principle to think that states which do not enjoy such advantages and rely heavily on low labor costs for competitiveness will be immune from competitive pressures on their capacity to set national labor policy.[53] The extent of a state's interest in preserving policy autonomy can therefore be expected to depend upon the sources of its competitive advantage and disadvantage in the international economy.

This interest maybe shared between industrialized and developing states. Indeed the latter are more likely to have strong reasons to address potential short term core labor standards-related competitive disadvantages in international markets for labor intensive products. Developing countries tend to be much more dependent upon such markets for economic success. Their economies are often composed mainly of firms whose business models are very labor cost sensitive. Moreover, much of production located in such economies by international firms is often highly mobile and with little attachment to domestic markets, being the result of short term, price sensitive contracts to supply foreign markets, or export-oriented investment. This amplifies the potential for competitive market pressures on labor costs to translate into pressures on national labor

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50 Shotwell ed., *supra* note 6.

51 *See* Kevin Banks, *The Impact of Globalization on Labour Standards – A Second Look at the Evidence*, *in* Craig & Lynk eds., *supra* note 45, at 79-83 [hereinafter Banks, *Impact of Globalization*] (reviewing theories).

52 *Id.* at 83-87 (reviewing empirical literature).

53 *Id.* at 87-94.

policy making. Evidence from the developing world suggests that this is often the case.[54] On the other hand, most industrialized countries on the other hand could not possibly lower their labor costs enough by lowering labor standards (or by any other means) to compete that way with low unit labor cost producers in the developing world. Moreover governments in those countries tend to be constrained by the fact that most of their economy is not traded, so that lowering standards in search of international economic competitiveness would negatively affect the entire workforce (and thus most of the electorate) for the benefit of a limited set of employers within the overall economy. [55] Nevertheless, industrialized states may nonetheless be legitimately concerned that international competitive pressures will undermine the effectiveness of their national labor laws and policies in key sectors of their economy.[56]

However the extent to which this interest will be recognized as important or legitimate by national governments and within the international community will depend upon the normative weight attached to labor standards themselves. The international trading system recognizes the legitimacy of and indeed encourages competition on the basis of cost differences, including cost differences inherent in differences in the national regulatory regimes.[57] What distinguishes acceptable forms of such competition from those that may not be acceptable is that the latter violate normative commitments that take priority over allowing unrestricted international trade. Similarly, states participating in the international trading system can be assumed to have accepted the effects of international competition on national regulatory systems except to the extent that it trenches upon such priority norms.[58] In this sense, the interest in addressing the effects of international competition on national regulatory regimes is derivative of the normative interests described above.

(3) Economic Interests

(a) Offsetting Competitive Disadvantage

Promoting core labor standards compliance internationally stands to reduce the risk that

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[54] *Id.*

[55] *Id.* at 92-93.

[56] For example, there is evidence that the NAFTA has enhanced the capacity of employers to credibly threaten to relocate in response to workers' exercise of their legal rights to join a union and bargain collectively. Such threats diminish the likelihood that workers will exercise their rights freely, thus undermining a pillar of labour relations policy embedded in labour relations legislation in many jurisdictions. *See* KATE BRONFENBRENNER, NORTH AMERICAN COMMISSION FOR LABOR COOPERATION, THE EFFECTS OF PLANT CLOSING OR THREAT OF PLANT CLOSING ON THE RIGHT OF WORKERS TO ORGANIZE (1997), http://digitalcommons.ilr.cornell.edu/intl/1.

[57] Robert Howse & Michael Trebilcock, *The Free Trade – Fair Trade Debate: Trade, Labor and the Environment, in* ECONOMIC DIMENSIONS IN INTERNATIONAL LAW: COMPARATIVE AND EMPIRICAL PERSPECTIVES (J. Bhandari & A. Sykes eds., 1995).

[58] For a discussion, see Steve Charnovitz, *The Moral Exception in Trade Policy,* 38 VA. J. INT'L L. 689 (1998).

compliance with core standards by domestic producers will itself become a competitive disadvantage. While such a disadvantage may be relatively small in relation to other competitive advantages or disadvantages based on labor costs or in other factors, it may matter at the margin in highly competitive markets for products in which labor costs are a major component of overall production costs. Making such compliance part of the grounds rules of international competition may counter any economic or political incentives to lower labor standards to gain competitive advantage in this way. However, as with political interests in national labor policy autonomy, economic interests in offsetting competitive disadvantage are best understood as derivative of higher order normative commitments to labor standards. Whether any competitive advantage conferred by low labor standards matters to a state's policy priorities depends on whether labor standards norms themselves matter in that scheme of priorities.

(b) Maintaining Political Support for an Open International Trading System

States may have an economic interest in maintaining public support for an open international economy by ensuring its moral legitimacy. The impacts real and perceived of international economic integration on labor standards may undermine public support for the international trading system if they are understood to be morally illegitimate. This in turn may increase support for protectionist political coalitions. States seeking to maintain public support for international trade have often in fact been in part motivated to respond to public pressures for international labor standards for these reasons. This is however an instrumental interest in labor standards, and can be served at lowest cost by measures that are perceived as strong action by the general public while committing as little as possible in the way of expenditures. There is no reason a priori to think that this approach will lead to effective international coordination. Morover, given the potential differences in national norms noted above, developing states may often see their interest in maintaining support for an international trade agreement not so much as a matter of responding to domestic political pressure, but rather as an instrumental response to the risk posed to the trading system by pressures in the industrialized world. Finally, to the extent that putting in place an international labor standards regime may expose problems that would not otherwise have been drawn to the public's attention, parties may see it as creating risks to public support for the trade regime that might not otherwise have to be managed. This concern may be amplified for developing countries by previous experience with industrialized country protectionism.

(c) Durable Economic and Social Development

States may also have interest in core labor standards compliance to the extent that they perceive it to further economic development or poverty reduction. Consistent with the premises of the DC model, there is significant evidence today that states with high labor standards attract the vast majority of foreign direct investment, and are among the most

successful in international trade.[59] There is also growing evidence that fundamental labor standards may in fact be integral to the kind of social, political and regulatory environment that tends to attract significant foreign direct investment, because they promote social and political stability and growth in the domestic market.[60] It also appears that some labor standards can increase growth and efficiency by encouraging innovation, higher productivity and transition from low skill / high turnover methods of production (often referred to as sweatshop methods) towards competitive strategies that rely upon the skills and committed effort of workers.[61] The most successful industrial economies long ago enacted modern labor policies that at least partially embody the vision of social justice held by the founders of the ILO. These policies were arguably not only key to securing their social stability, but also to developing highly productive leading industries by securing cooperative an innovative work relations on the shop floor.[62]

The potential interest of developing countries in labor standards as a path to durable economic and social development is likely to coincide with the normative interests of industrialized states, and may well coincide with their international development policies as well. However, a number of contingencies affect this convergence of interests.

First, while there is good reason to think that implementing core labor standards supports durable economic and social development, this conclusion remains contested by neoclassical economic thinking that remains influential with many governments. From this perspective gains to some workers realized by raising labor standards are likely to come at the cost of reduced employment and economic growth that will negatively impact others.[63] Uncertainty over the effects of raising labor standards may give developing country policy makers pause. If proponents of the Development Co-operation model are right, uncertainty could in principle be overcome through better research and information. However it is unlikely that the evidence will show that implementing core labor standards is the only way to achieve these goals, at least in the short to medium term. To the contrary, the experience of China suggests that it is likely not a necessary condition for stable and sustained economic growth at least in initial decades of

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[59] See Banks, *Impact of Globalization*, *supra* note 51, at 83-87 for a review, and ROBERT FLANAGAN, GLOBALIZATION AND WORKING CONDITIONS – NORKING CONDITIONS AND WORKER RIGHTS IN THE GLOBAL ECONOMY (Oxford University Press 2006).

[60] David Kucera, *The Effects of Core Workers' Rights on Labour Costs and Foreign Direct Investment: Evaluating the Conventional Wisdom* (International Institute for Labour Studies, Decent Work Research Program, Discussion Paper No. 131/2001, 2001).

[61] Joseph Stiglitz, *Democratic Development as the Fruits of Labor*, *in* THE REBEL WITHIN 279-315 (Ha-Joon Chang ed., Wimbledon Publishing Company 2001); Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 COLUM. L. REV. 3 (1994); WILLIAM LAZONICK, COMPETITIVE ADVANTAGE ON THE SHOP FLOOR (1990); WOLFGANG STREECK, SOCIAL INSTITUTIONS AND ECONOMIC PERFORMANCE: INDUSTRIAL RELATIONS IN ADVANCED CAPITALIST ECONOMIES (1992).

[62] Lazonick, *supra* note 61; STREECK, *supra* note 61.

[63] *See, e.g.,* FLANAGAN, *supra* note 59, at ch. 7; MARTIN WOLF, WHY GLOBALIZATION WORKS 170-171, 186-187 (Yale University Press 2004).

industrialization.[64] As a result, the choice to implement core labor standards will likely continue to depend upon more than a commitment to durable economic growth. It will probably require in addition a policy choice to foster the kinds of freedom that core labor standards enable, and a commitment to the way life that these freedoms entail.

As I have argued more fully elsewhere, there is a more problematic potential source of contingency as well.[65] In the current configuration of the international economy competitive pressures are likely to create significant incentive problems even for developing states wishing to implement a core labor standards agenda. As discussed above, many developing countries are likely to face intense competitive pressures based on labor costs. They may lose market share and as a result they may lose employment in response to even relatively modest labor costs increases. In fact, in today's economic environment many face pressures to reduce labor costs as a result of competition with China. China is not only the low unit labor costs producer in many industries, it has several advantages such as a large internal market, relatively good infrastructure, and political stability which other developing countries often do not have to the same extent.[66] Given the mobility of the production that many developing countries depend upon for international market share, these competitive pressures are likely to be felt in the short run.

By contrast, the gains to competitiveness from increased social stability, and changes in methods of production to increase the skill demanded of workers and the capital investment to support them are likely to take longer to accrue. History suggests that developing modern competitive advantages to attract high quality investment and reduce reliance on lost cost labor is likely to take longer than most election cycles.[67] Political decision makers may therefore not reap the gains from policies supporting high labor standards. They will tend to weigh risks and benefits within the time horizon that governs political decision making in their political system, and to discount those lying outside that time frame. As a result, there will be tensions at the political level between short term pain and long term gain.

These tensions will also play out in the private sector and in turn feed back into politics. The longer run benefits of an economy respecting core labor standards may or may not accrue to any particular firm, depending upon its ability to adapt and compete in the new higher labor standards environment. For many firms reaping this gains means basic changes to their business model. Employers making use of low skilled production

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[64] Gordon Betcherman, Notes for a Presentation to Human Resources and Skills Development Canada: Globalization and Employment – The New Players and What They Mean to Labour Markets Everywhere (March 24, 2006) (on file with author).

[65] Banks, *Impact of Globalization*, *supra* note 51, at 87-94.

[66] Betcherman, *supra* note 64.

[67] For examples of episodes of rapid development supported by government policies to ensure distribution of gains from growth to the working population, see JOSE E. CAMPOS & HILTON ROOT, THE KEY TO THE EAST ASIAN MIRACLE: MAKING SHARED GROWTH CREDIBLE (1994); ALICE AMSDEN, ASIA'S NEXT GIANT (1989).

strategies where worker turnover is high will see few short term returns on investing in skill and worker well-being. There is thus little incentive or opportunity in such workplaces to seek the productivity rewards of workers commitment and skill that can come with higher wages and better labor standards.

Finally, in many developing states a number of factors amplify the stakes of any new policy that could lower competitiveness in the short run. Demographics often create enormous pressures for job creation as an expanding population comes of age. [68] Developing countries may also be highly dependent in the short run on foreign exchange earnings generated by international trade to service national debt.[69]

For all of these reasons many developing country governments may perceive it to be in their immediate interests to avoid any labor standards commitment that could increase costs of production in the short run regardless of foregone and potentially greater longer term benefits in terms of increased productivity, stability and competitiveness. The result is likely to be lower standards in developing countries than could otherwise be achieved, at least in the medium term, and perhaps in the long run as well.[70]

(4) Conclusions: The Prevalence of Competing Tendencies within State Interests

The legitimate interests of developing and industrialized states with respect to core labor

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68 GLOBAL COMMISSION ON INTERNATIONAL MIGRATION, MIGRATION IN AN INTERCONNECTED WORLD: NEW DIRECTIONS FOR ACTION 11-14 (2005).

69 DAVID MALIN ROODMAN, WORLDWATCH INSTITUTE, STILL WAITING FOR THE JUBILEE: PRAGMATIC SOLUTIONS FOR THE THIRD WORLD DEBT CRISIS (Worldwatch Paper #155, 2001).

70 Some have argued that in the longer run such dynamics will be corrected by market forces, as economic growth raises employment and contracts the excess supply of labor in developing countries, forcing them to compete on productivity more than on the lowest possible labor costs: Fields, *supra* note 40. There is in fact significant evidence that globalization has brought with it increases in national income in many developing countries, and that this in turn has led to improved working conditions: Flanagan, *supra* note 59. However, the gains made in many developing countries through economic growth still leave them a long way from providing the basic rights and occupational safety and health levels found industrialized countries, and it is far from clear that the transition to more adequate rights and protections will happen automatically as a result of market forces. If the history of industrialized countries provides any guidance, such a transition tends to involve political struggle and legislated compromise that takes years to resolve, and yields gains for workers that would not otherwise have been obtained. *See e.g.,* LAZONICK, *supra* note 61; DEBORAH J. MILLY, POVERTY, EQUALITY AND GROWTH: THE POLITICS OF NEED IN POSTWAR JAPAN (1989); Dani Rodrik, *Democracies Pay Higher Wages*, 64 QUARTERLY JOURNAL OF ECONOMICS 3 (1999). It is also worth noting that most of the advanced industrialized economies completed their transition to a modern labor standards regime in a period of relatively low levels of international economic integration, and thus little potential for international competitive pressure on their policies. Thus if effective international cooperation on labor standards issues is possible, it stands at least to accelerate transitions to higher labor standards by enabling a greater number of developing countries to implement such standards without fear of eroding their existing industrial base. This may in turn help to spur a move to higher productivity strategies of production. On the other hand, the absence of international cooperation is likely to result at a minimum in significant delays in such transitions.

standards will very often not align well. While there is an important international consensus recognizing core labor standards as fundamental human rights, many states do not reflect in their conduct a prioritization of this normative commitment. Such commitments are more likely to influence state behaviour in the industrialized world, both directly and through derivative concerns about national policy autonomy and fair terms of international economic competition. It is also more likely that industrialized states will face pressures from their populations that pose risks to an open international trading system, and seek to address those risks through trade-related labor standards. On the other hand developing economy states will often face short run concerns about economic competitiveness for investment and employment. These pressures compete directly with interests in potential gains from durable economic and social development that can be achieved through core labor standards compliance. Developing economy states are likely to yield to such pressures in the absence of unusual political or economic conditions that allow political decision makers to operate within a longer time frame, so that the payoffs of improved core labor standards compliance could be recognized and rewarded politically.

As a final caveat, it should also be recognized that some states may in fact oppose implementing core labor standards for reasons related to the power structures of their societies or political beliefs of ruling parties. For example, a state may be tightly controlled by elites that have a strong preference for ensuring that the working population remains disempowered, because elite members derive wealth and political power from the economic subjugation of the majority. If political resistance runs deep enough, there is probably little that can be done by international law to change it in the short to medium term. [71]

C. The Need for Payoff Adjustment

In the absence of such political resistance, this kind of problem can be elegantly captured, as Alan Hyde first suggested, in the game theory model of the Stag Hunt.[72] In that model, all players are best off if they successfully hunt a stag (a large payoff), but they cannot do so unless all participate in the hunt. Individual players can at any time however successfully hunt a hare, for a much smaller payoff. States (developing states in particular) similarly face a strategic choice to either maintain a low standards regime (with the low but certain payoff of maximizing the investment and employment generated by minimizing labor costs as much as possible), raise labor standards on their

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[71] Economic sanctions have for the most part had little influence in matters of high politics such as territorial disputes or human rights violations that ensure the subjugation of national populations. See R.A. Pape, *Why Economic Sanctions Do Not Work*, 22 INT'L SECURITY 2 (1997); George A. Lopez & David Cortwright, *Economic Sanctions and Human Rights: Part of the Problem or Part of the Solution?* 1 INT'L J.H.R. 1 (1997).

[72] Alan Hyde, *A Game Theory Account and Defence of International Labour Standards – A Preliminary Look at the Problem*, *in* Craig & Lynk eds., *supra* note 45, at 143.

own (with the probability of a high payoff in the form of durable economic and social dependent on the probability that others will act the same way), or to seek to coordinate their actions (with the probability of a high payoff dependent on the probability of successful coordination). Game theory predicts and experimental literature reviewed by Hyde confirms that players will not spontaneously "hunt a stag" unless they are provided with some reliable assurance that all others will also do so.[73] Hyde's analysis suggests therefore a need for active international coordination to raise labor standards, and outlines two possible approaches to addressing this need which I will develop further.

First, states can seek by international arrangements to foster an environment in which assurance is obtained through trust. This may entail building international agreements at least initially only among relatively small numbers of like-minded states, as "stag hunt" game experiments suggest that co-operation among larger groups (above six players) tends to fail.[74] Group size might later be extended by taking advantage of "peer effects" in which small groups of neighbours converge on optimal solutions, and then bargain with other neighbours to draw them into that solution, making its justice norms "contagious".[75] Such an approach might be supplemented by using mutually acceptable international rules as co-ordination points which provide clear information about expected conduct and clear signals of commitment to abide by understandings to collectively pursue higher labor standards.[76] Alternatively, an international regime could seek to provide assurance by altering the payoffs of defection through a regime of economic sanctions or positive incentives such as conditional trade or other benefits.

The analysis thus far depends upon the assumption that relevant competitors of developing countries are parties to the international co-ordinating agreement. However, in today's international economy the major developing country players have yet to show willingness to lead or participate actively in such an assurance regime. China, for example, is in many global markets important to developing countries the low unit labor cost producer.[77] If China is not party to the international assurance regime, the regime will not provide the necessary coordination among developing states unless it can offset through an exchange of mutual advantages that is both conditional upon core labor compliance and sufficient to offset potential short run losses in competition with China. As will be discussed in Part IV below, such advantages can take many forms. They could be economic advantages such as enhanced market access. They could be cooperation in other policy domains, such as the international movement of persons. They could be reputational advantages which enable states to pursue their interests more successfully in future dealings with each other. To the extent that economic advantages are relied upon however, it should be noted that in the absence of a grouping of developing countries of sufficient size and economic importance, the international agreement would likely have

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[73] Hyde, *supra* note 72, at 152.
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] Betcherman, *supra* note 64.

to involve industrialized states who can, for example, provide significant enhancements in access to major markets.

D. Implications for International Governance

Solving these incentive problems likely requires altering payoffs through conditional advantages. The only clear alternative is to transform state interests by raising the value attached by states to compliance, specifically by influencing states through their domestic politics to renounce low labor standards on normative grounds such as human rights commitments. This would have the effect of a making the core labor standards-compliant approach to seeking durable economic and social development the politically necessary one.

On its own, the DC governance model is not likely to do either of these things. This is because its construction of the problem to be solved implies that neither is required. Rather, insight and information on the role of core labor standards in durable development should be sufficient to lead to action. The DC model does not address the potential for short term economic incentives to effectively displace longer term development interests. Not surprisingly then, it has no tools to deal with this problem. In the near term, it is unlikely that international analysis, persuasion and assistance will very often be sufficient to overcome the timing problem at the root of this displacement, given the complexity of the changes required. The potential for harmonious and simultaneous pursuit of human freedoms and economic prosperity is intellectually and morally compelling. However, if the pace of the advance of human rights on the ground provides any measure,[78] the political, policy and intellectual sea changes required to make this powerful set of ideas a reality are likely to take many decades to reach the workplace. In the mean time, the DC model, left to its own devices, depends upon the existence of relatively scarce enabling conditions such as domestic developing country political leadership ideologically committed to implementing core labor labor standards as a matter of high priority, or willing to take significant risks in pursuit of longer term development benefits, or both.

This analysis also implies that the SMS model is unlikely to be effective to the extent that it relies on existing levels of state normative commitment to international core labor standards. Rather, if sunshine and moral suasion are to be effective, it will be because international governance processes are either capable of reconstructing how states understand the importance of such commitments, or of affecting other interests to which states are likely to assign higher priority. The next Part addresses whether this model is likely to accomplish either, or whether in the alternative a labor standards regime needs to deploy economic leverage to be effective.

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[78] Hathaway, *supra* note 46.

IV. Effective Governance in the Face of Short-Run Incentives for Non-Compliance

Arguments for the SMS, AC and LDC models rely on claims, explicit or implicit, that the means of influence deployed by each are both capable of influencing either the content of state interests or how states act on their interests sufficiently to be effective in ensuring their compliance with core labor standards. In addition, each makes the explicit or implicit claim that its chosen means is more effective than the alternatives, either because it is more directly influential, or because the alternatives are likely to have counter-productive consequences. This Part will assess these claims first by providing plausible theoretical underpinnings to each model's means of influence and then by testing the empirical propositions that flow from those underpinnings against the available evidence. In order to do this, it is first necessary to provide some background on how international legal regimes can influence sovereign states.

A. Background: Three Theories of the Influence of International Legal Regimes and Three General Approaches to Governance

It is now a commonplace among international relations and international legal scholars that international law can influence the way that states behave.[79] Nonetheless, different schools of thought persist with respect to how such influence tends to operate.[80] Broadly speaking, the main currents of international legal and international relations theory move in two streams: rationalist instrumentalism and constructivism.[81] Both schools start from the proposition that in a system of sovereign state actors, states will act in accordance with their interests as they perceive them. The key difference between these schools is the extent to which they believe that the processes and content of international law itself can redefine the interests of states. The logic of these theories in turn yields differing views on the likely influence of economic leverage in support of compliance with international law.

(1) Rational Instrumentalism

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[79] Brett Frischman, *A Dynamic Institutional Theory of International Law*, 51 BUFF. L. REV. 679, 680 (2003) (arguing that international relations and international law scholars have moved beyond the question of whether international law matters and have turned their attention to questions of why and how international law leads to international co-operation).

[80] Surveys which inform this discussion include Harold Hongju Koh, *Why Do Nations Obey International Law?* 106 YALE L.J. 2599 (1997); Anne-Marie Slaughter, Andrew S. Tulumello & Stepan Wood, *International Law and International Relations Theory: A New Generation of Inter-Disciplinary Scholarship,* 92 AM. J. INT'L L. 367 (1998); Anthony Clark Arend, *Do Legal Rules Matter? International Law and International Politics,* 38 VA. J. INT'L L. 107 (1998).

[81] Peter Katzenstein, Robert Keohane & Stephen Krasner, *International Organization and the Study of World Politics,* 52 INT'L ORG. 645, 683 (1998) (predicting that the debate between rational choice and constructivism would shape the field of international relations for the years to come).

Rational instrumentalism tends to start from the view that state interests are mostly or completely formed exogenously, that is, outside of the direct influence of international law.[82] States enter international relations, in this view, with a relatively complete set of preferences based upon a rational assessment of how well international policy options serve national interests. International law exerts influence not by changing interests, but rather by serving as an instrument that better enables states to pursue them, enabling them to choose policies and course of action that reflect their own best interests. International law can do this by helping to solve international coordination and collaboration problems, thus reducing the risks and increasing the benefits that flow from such choices. Doing this may be as simple as establishing a recognized international coodination point, such as international air traffic control rules, so that all states can reliably act on their mutual interests in promoting air travel for example. However, faced with conflicting short and long term interests, and a configuration of state interests that makes assurance based on information and trust building unworkable, rational instrumentalism will look for ways in which international law can implement new incentive structures. States will be assumed to have rationally assessed the risks and benefits associated with short term interests in labor standards non-compliance and to have decided that they outweigh those associated with longer term interests in compliance. Risks and benefits therefore need to be adjusted. This might be done through one or more of two channels of influence and related governance strategies.

First, the regime might deploy economic sanctions for non-compliance, or economic benefits for labor standards compliance[83], thus reducing the value of short-term gains through non-compliance. This incentive altering approach may be enhanced where an international regime has the effect of mobilizing domestic actors within states in support of international commitments, increasing the likelihood that partner states will impose sanctions or other consequences for non-compliance, or the likelihood that a national government will lose power or influence as a result of domestic disapproval.[84] This in turn suggests that sanctions or incentives should be designed so as to directly align private sector interests and well as public sector interests with compliance.

Secondly, the regime may draw upon states' interests in their reputations for compliance by documenting and publishing state records of compliance and non-compliance.[85]

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[82] Barbara Koremenos, Charles Lipson & Duncan Snidal, *The Rational Design of International Institutions*, 55 INT'L ORG. 761, 762 (2001); Niels Petersen, *How Rational is International Law?* 20 E.J.I.L. 1247 (2009); and Robert Keohane, *International Relations and International Law: Two Optics*, 38 HARV. INT'L L.J. 487, 490 (1997) (each considering analytical frameworks of rationalist schools of international legal and international relations scholarship).

[83] The distinction between these concepts is a slippery one. Benefits or positive incentives can only continue as such for so long before they come to be seen as acquired rights or privileges, the removal of which will then be seen as a sanction. For a discussion of the role of contingent sanctions for defection in mixed motive coordination problems see George Downs, *Enforcement and the Evolution of Cooperation,* 19 MICH. J. INT'L L. 319 (1998).

[84] *See generally* Robert Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games,* 42 INT'L ORG. 427 (1988).

[85] George Downs & Michael Jones, *Reputation, Compliance and International Law,* 31 J. LEGAL

States may see value in developing and maintaining a reputation for compliance, given that such in complex ongoing international relationships such a reputation may make it easier and less costly to secure the cooperation of other states over time and over the many issues that may arise between states. In addition, a developing reputation for non-compliance may undermine the trust underpinning an international assurance regime upon which a state depends to pursue its longer term best interests.

There is no inherent conflict between these two strategies, and thus no reason why they could not be both deployed at once. There is also however no necessary reason within rational instrumentalist thinking why a state should have such a interest in maintaining a reputation for compliance in any given field of international relations, given that states often have better compliance records in some fields than others and therefore may not form a global impression of a state's reliability based on its conduct in a single field such as labor standards compliance.[86] In that case, economic incentives may be the only viable option.

(2) Constructivism

Constructivists argue on the other hand that the preferences and interests of states are themselves significantly influenced, and indeed constructed at least in part by international legal processes and norms. International legal norms can alter how states formulate their interests because state preference sets are inherently provisional and open to revision, because states can be receptive to non-coercive international influence, and because states acquire identities, which are the basis of interests, in part through participation in international relations.[87] In general terms, this type of influence can operate through at least three channels.

First, an international legal regime can generate a process of persuasion and learning between states, a process which may of course include any autonomous international organization established under the regime. [88] The persuasive or informative influence of international law may lie in the moral force and legitimacy of its norms.[89] International engagement with respect to normative commitments may directly persuade or inform policy makers, spurring argument and deliberation and thus generating a process of learning within the state apparatus and the public. An international regime may thus deploy the legitimacy of law to reframe issues, or it may repeatedly cue people to think harder about policy positions. Alternatively, it may deploy technical and policy expertise

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STUD. 95 (2002).

86 *Id.*

87 Arend, *supra* note 80, at 126-129.

88 ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY ch. 1 (1995); Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621, 635-638 (2004) (describing micro-processes of persuasion).

89 Thomas Franck, *Legitimacy in the International System*, 82 AM. J. INT'L L. 705 (1988); Phillip Trimble, *International Law, World Order and Critical Legal Studies*, 42 STAN. L. REV. 811, 833 (1990).

to enable state decision makers to recognize and thus prioritize new ways in which developing and complying with international norms can serve their state's better interests. New internationally shared ideas thus transform state interests.

Secondly, international legal regimes may influence states indirectly through a process of acculturation or socialization to the expectations and cultural identity of members of the international community.[90] Such processes may operate as an attractive international identity or community membership becomes strongly associated with international normative commitments, or certain policy solutions to common problems. States desiring to modernize their social policies and programs, for example, may come to identify with the norms and solutions offered by the International Labor Organization, or the World Bank, for example.[91] Alternatively or in addition, an international or a transnational legal process of repeated interaction between states, non-governmental actors, and international organizations, and structured around international commitments and norms may reshape state practices of explanation and justification in policy making, thus changing habits of analysis and notions of acceptable practice.[92]

Finally, international law may reshape state interests by mobilizing domestic political constituencies to bring national policy into line with international norms, directly exerting political pressure that changes how states construct and understand their interests. International regimes may for example increase the salience and legitimacy of international norms with national politics, increase awareness of non-compliance, and enhance the voice and standing in national politics of national and transnational actors aiming to shift policy priorities and mobilize the wider public in support of those norms.[93]

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[90] *See* Goodman & Jinks, *supra* note 88, at 638-656 (describing a range of acculturation processes); George Downs, Kyle W. Danish & Peter N. Barsoom, *The Transformational Model or International Regime Design: Triumph of Hope or Experience?* 38 COLUM. J. TRANSNAT'L L. 465, 469-476 (2000), and sources cited therein (describing theories of processes by which combination of membership in a regime, diffusion of information, and iterations of collective deliberation may transform state interests).

[91] Stephen J. Kay, *Recent Changes in Latin American Welfare States: Is There Social Dumping?* 10 JOURNAL OF EUROPEAN SOCIAL POLICY 2 (2000) (influence of endorsement and technical support for reforms by international development banks); David Strang & Patricia Mei Yin Chang, *The International Labor Organization and the Welfare State: Institutional Effects on National Welfare Spending, 1960-1980*, 47 INT'L ORG. 235 (1993) (influence of social policy models developed by ILO on national policy making).

[92] Koh, *supra* note 80, at 2646 (arguing that each instance of interaction and norm interpretation generates a legal rule which will guide future transnational interactions between the parties; future transactions will further internalize those norms; and eventually repeated participation in the process will help to reconstitute the interests and even the identities of the participants in the process). Alexander Wendt, *Collective Identity formation and the International State*, 88 AM. POL. SCI REV. 384 (1994) (arguing that actors adopt identities by learning through interactions to see themselves as others see them, and that by engaging in cooperation a state projects something about itself that redefines the inter-subjective environment from which its self-conception is derived – as the other state absorbs this self-presentation it projects it back and resocializes the cooperative state to a new conception of itself).

[93] Putnam, *supra* note 84; MARGARET E. KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS (1998).

This line of thinking supports a range of approaches to international governance designed to increase international persuasion, moral suasion, normative community building, and opportunities to mobilize domestic actors in support of international commitments. [94] Research and analysis by international organizations and peer groups of states into policy alternatives may prove persuasive to states and provide information and arguments which can be used by domestic actors to transform national political debate. Systematic monitoring, analysis and public reporting of compliance levels may provide information to focus deliberation at the international and national levels on remedying problems areas by addressing underlying causes of non-compliance, and may mobilize domestic actors to participate in such deliberation and seek to influence national policy makers. Intellectual leadership by international organizations may influence peer states to adopt common outlooks and positions. Opening channels for international engagement across state structures, including all relevant ministries and departments, may foster persuasion, learning and acculturation dynamics. Ensuring regular deliberation within national decision making bodies on compliance with international norms may also deepen such dynamics, and provide opportunities for national actors to seek to mobilize decision maker and public support for compliance with international norms. Fair, accurate, impartial and public determinations of non-compliance in particular cases may enhance peer acculturation dynamics between states by providing a credible basis upon which to shun or condemn non-complying states. It may provide compelling information to domestic actors to mobilize political support, and may contribute to understanding compliance problems and learning about how to effectively address them. International assistance to strengthen capacity to comply with labor standards may complement each of the above strategies to the extent that lack of capacity is a causal factor and can be remedied in this way.

(3) Enforcement versus Managerial Governance

These competing theories of the influence of international law thus yield different predictions about which forms of governance are likely to be effective, and not surprisingly underpin the main division between general schools of thought on international governance. This division can be roughly captured as "enforcement" versus "management".[95] The enforcement school prioritizes the deployment of sanctions or incentives and is largely oriented by rational instrumentalist thinking. Managerialism by contrast tends to prioritize means of governance derived from constructivist premises. Of course, governance strategies do not require foundations purely derived from one theoretical approach or the other. Where forms of instrumentalist or constructivist influence complement each other, they are often combined. Managerialists tend also to rely upon "naming and shaming" mechanisms based on reputation-based

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[94] *See, e.g.,* CHAYES & CHAYES, *supra* note 88; Goodman & Jinks, *supra* note 88, at 656-702.

[95] *See* Jonas Tallberg, *Paths to Compliance: Enforcement, Management and the European Union*, 56 INT'L ORG. 609, 609 (2002) (characterizing competing enforcement and management models of governance as framing contemporary debate on regime effectiveness).

instrumentalism.[96] Enforcement approaches may draw upon the capacity of potential sanctions or adjudication and enforcement mechanisms to signal the strength of support for international norms, of to mobilize domestic constituencies to transform state interests.

However, views on the effectiveness of using or threatening to use sanctions or economic incentives divide the enforcement and management schools. Most analysts taking a constructivist perspective have tended to be skeptical about the value of economic leverage. Threats of economic pressure are often seen as undermining the trust required for persuasion and genuine learning, and the process of identification through a reference group. Instead, in the constructivist and mangerialist vewis, they tend to lead to confrontation, a hardening of positions, grudging and minimal compliance at best, and a closing off of possibilities for reshaping interests.[97]

(4) A Hybrid Theory of Influence and Model of Governance

Scepticism about the value of leverage does not follow inevitably from constructivist premises however. Some have argued for example that economic sanctions and inducements can serve as a powerful means of conveying international approval or disapproval, and thus spur constructivist acculturation and learning dynamics.[98] Some argue that sanctions or economic incentives may in fact constitute an important form of constructivist influence by directly shifting the interests and relative influence of subnational political actors, who will in turn seek to alter the international agenda of the state within which they reside. Depending on how it is deployed, the possibility of sanctions or economic benefits might open the door to international negotiation and learning rather than breeding distrust and conflict.[99]

As Richard Parker points out, if this is true, rational instrumentalist and constructivist channels of influence may often be mutually supportive, opening the possibility of hybrid theories of influence and approaches to governance.[100] In this line of thinking, international regimes might in fact make use of economic incentives not mainly to deter non-compliance, but rather to open states to a wider range of possible policy choices that could serve or reshape their interests. The constructivist belief that states do not

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[96] See for example CHAYES & CHAYES, *supra* note 88, at 273, and other examples cited in Downs & Jones, *supra* note 85, at 99-100.

[97] *See* George W. Downs, David M. Rocke & Peter N. Barsoom, *Is the Good News About Compliance Good News About Cooperation?* 50 INT'L ORG. 379, 380-381 (1996) (surveying managerial perspectives on enforcement and sanctions based approaches to international governance).

[98] Sarah H. Cleveland, *Norm Internalization and U.S. Economic Sanctions,* 26 YALE J. INT'L L. 1 (2001).

[99] Richard Parker, *The Use and Abuse of Trade Leverage to Protect the Global Commons: What We Can Learn from the Tuna-Dolphin Conflict,* 12 GEO. INT'L ENVTL L. REV. 1, 98, 121 (1999); Tallberg, *supra* note 95.

[100] Parker, *supra* note 99.

necessarily have a fixed preference sets determined rationally and outside of international relations may be true at the same time as the rational instrumentalist belief that states are unlikely to be persuaded to change their behaviour and beliefs about their interests simply by international level analysis, exhortation, modelling, acculturation or condemnation. Further, it may both be true that incentives matter to states, and that sanctions alone are unlikely to change behaviour in lasting or extensive ways because states remain unpersuaded and hold untransformed preferences in the face of them.

In this view, states' interests will often result from a combination of rational analysis and inability to explore options owing to domestic political constraints. International influence may operate to lift such constraints by changing the incentive structures facing powerful domestic political actors. This may enable a new national level debate to occur in which international norms, persuasive argument and peer influence might play a stronger role. Moreover, this debate may lead to extensive and durable compliance with international norms because it may lead to a domestically formulated political settlement re-ordering national preferences in international relations. In short, economic incentives might activate rather than impair constructivist channels of influence, and such channels might be a more effective way for economic incentives to exert influence.

From this hybrid perspective, the most effective means of addressing labor standards compliance may be to use the possibility of international sanctions or benefits to foster dynamics that build institutional and policy commitments from the ground up rather than from the top down. Effective influence would operate neither by pure deterrence nor by mere persuasion or acculturation. It would operate by exchanging the coercive potential of sanctions or withdrawal of benefits for openings to negotiation, deliberation and political decision making. In concrete terms, such an approach leads to a governance model in which international activity would take place mainly in the types of engagement, deliberation, information gathering and analysis processes outlined in the managerial approach outlined above. However, the mode of international engagement would be more more heavily weighted towards negotiation of plans of action, supporting cooperative programs, and associated timetables and indicators of success. The possibility of sanctions or extending benefits would be the motivating factor for such negotiations.

B. Implicit Premises of the Competing Governance Models

It is now possible to identify the particular theory of influence upon which each model still under consideration must rely.

(1) Sunshine and Moral Suasion

The SMS governance approach is managerialist. On its strongest theoretical footing it

combines rational instrumentalism to influence states, by increasing the risk of damage to reputation, with constructivism using repeated patterns diplomatic engagement around such monitoring and reporting. This engagement seeks to reinforce the legitimacy of international norms, and to gradually reconstruct national interests by acculturating state actors to international consensus on that legitimacy, reinforcing identification with peer states that have strong records of compliance, and by mobilizing and empowering domestic constituencies that support compliance. To the extent that the SMS model does not presume that states already have a strong interest complying with international labor standards for their own sake, it presumes the truth of at least one of the following two propositions: (1) that sunshine and moral suasion processes can eventually construct such interests through the persuasive force of international legal legitimacy, by (a) socializing states into compliance through repeated international and transnational legal processes, or (b) by mobilizing domestic constituencies to reshape the national political agenda in support of compliance; or (2) that states have a strong interest in protecting their reputations for compliance with international law in order to maintain international credibility and influence to pursue other interests, and that this interest will be affected by their international labor standards compliance track record.

(2) Adjudication and Sanctions-Based Constitutionalism

ASC model relies first on the risk of sanctions or loss of benefits to alter the economic interest calculus of key domestic political actors, who in turn will influence how the state in question acts on its interests. Adjudication serves as a means of clearly signalling the possible deployment of sanctions or positive incentives, and legitimating their imposition when necessary. If the signal is clear it will operate to deter non-compliance, to trigger actions required to bring states into compliance and to provide motivation for any international negotiations directed at agreement to pursue that end. It in this respect joins the enforcement school of governance, relying on rational instrumentalist premises. The ASC model might also rely upon the constructivist influence of adjudication processes themselves. Adjudication processes might reinforce the legitimacy of international norms, mobilizing and empowering domestic constituencies supportive of those norms, cueing government administrations to rethink their interests. This might in turn increase the risk that failing to comply with norms articulated in judgments will harm the reputation of the state in question in international relations.

(3) Leveraged Deliberative Cooperation

The LDC model relies conditional benefits or potential sanctions to create opportunities for negotiation and political or policy deliberation with respect to achieving or maintaining core labor standards compliance. Unlike the ASC model, it puts in place negotiation and deliberation processes proactively on the premise that these open up the opportunity created by economic incentives, enabling national level actors to

constructively debate the possibilities for labor reform. Participation by civil society actors such such processes accelerates the potential for transforming national policy discourse, and thus for transforming state interests.

C. Points of Empirical Inquiry

The the inherent contradictions between the theoretical foundations of each model raise four sets of empirical questions.

The first is whether the enabling conditions for the effectiveness of the SMS model are present in the contemporary international political economy. Specifically, is there sufficient identification with core labor standards by peers in international community? Is public exposure sufficient to motivate civil society actors to transform national configuration of state interests in response to domestic politics? Does the risk of developing a reputation for core labor standards non-compliance create sufficient risks for pursuit of state interests to deter non-compliance?

The second is whether and how economic leverage in the form of sanctions or conditional benefits is likely to diminish (as the constructivist logic of the SMS model would suggest) or enhance (as the instrumentalist logic of the AC model presumes) the influence of a trade-related labor standards regime?

Third, if economic leverage does stand to enhance core labor standards regime influence, how will it do so? Will it act more through coercive deterrence of state non-compliance, as the rational instrumentalist premises of the AC model would suggest, or by creating opportunities for international negotiation and reconfiguration of domestic political interests, as the LDC model presumes?

Fourth, is adjudication itself likely make a significant independent contribution to the influence of an international core labor standards regime? In particular, does it deploy economic sanctions or incentives in a way that enhances their influence? Is it likely in this context to increase the reputational stakes of compliance or to mobilize and empower domestic constituents supporting core labor standards compliance?

The remainder of this part takes up the first two of these sets of questions. Part 5 takes up the last two.

D. A Review of Available Evidence

Below I develop a first cut at a response. I draw upon the empirical literature with respect to the effectiveness of international legal regimes seeking to promote compliance with core labor standards in today's international economy.

Given that I am examining the influence of international law on political regimes, it is reasonable to expect a lag period with respect to that influence. I have therefore not relied upon evidence with respect to international legal processes initiated within the last five years in arriving at any conclusion that such a process has been ineffective. On the other hand, I have not included indirect effects such as enhancement of transnational advocacy group cooperation or the validation or increased political salience of labor standards issues as evidence of effectiveness per se. While such outcomes may be of interest for other reasons, if they have not in turn yielded concrete changes in labor standards compliance within five years of an international action, it is difficult to describe that action as directly or indirectly effective at improving such compliance.

(1) The Limited Influence of Sunshine and Moral Suasion

As noted in Part 3, non-compliance with ratified ILO labor standards conventions is high among most developing countries. These problems extend even to core conventions. Many developed states also have such compliance problems, though they tend to be less severe. The shallowness of contemporary international consensus commitment to core labor standards implies that sunshine and moral suasion models of governance are unlikely to be effective. There is probably insufficient depth of commitment to core labor standards in the wider international community to generate an international cultural pull towards compliance. The peer states with which developing countries (and some developed states) identify will often have poor compliance records. The extent of non-compliance with core labor standards also suggests that states will face little risk that a reputation for non-compliance with those standards will hamper their ability to pursue their interests in international relations, since counterparts are likely to reserve condemnation of non-compliance for matters to which they attach higher priority and are more likely to comply themselves. To the extent that sunshine and moral suasion strategies are effective most often it is likely the result of having aroused sympathetic members of domestic political constituencies to pressure the state in question to comply, or because they have increased the risk of adverse economic consequences for employers as a result of boycotts, often initiated abroad. The former constituencies will often be politically weak.

A review of available evidence tends to confirm these inferences. Below I will consider experience under the review procedures of the International Labor Organization, and under the North American Agreement on Labor Cooperation. Both rely in practice heavily upon case-by-case review processes, which are very often complaint-driven. Both issue public reports following their reviews which identify labor standards compliance problems, call upon member states to address them, and establish diplomatic procedures for follow up. For different reasons, the possibility of sanctions under each regime is in the vast majority of cases too remote to pose a significant risk to non-

compliant member states.[101] There is sufficient experience under both regimes to justify drawing strong conclusions.

(a) The Review Procedures of the International Labor Organization

While studies have shown that the ILO has on many occasions had significant formative influence of the labor law regimes of member states, such cases have tended to involve states prepared to implement reforms and seeking credible models for such reforms by drawing upon international consensus and expertise.[102] Where state interests are not already so favourably disposed, the evidence suggests that the ILO is generally not able to exert effective influence. Weisband, in the most through study of its kind, reports that over the period of 1964 to 1995 only 12% of negative observations of the Committee of Experts on the Application of Conventions and Recommendations (CEACR) with respect to state compliance with obligations under freedom of association, forced labor or non-discrimination conventions were followed by state action to correct the problem identified.[103] He also finds during that period a global average of 4.3 CEACR observations of non-compliance per ratification of the ILO Conventions on these three human rights matters, a number which increased substantially over that time period.[104] This is consistent with observations that ratification of ILO Conventions is not significantly associated with observance of the relevant labor standards in practice,[105]

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[101] In the case of the ILO, review processes occur within the Organization's well developed, relatively depoliticized and professional Committee structure, and in response to regular reports that member states must file, or various forms of complaint that can be filed by trade unions, employers, or member states. Non-compliant states must report on steps taken to address compliance problems, and can be engaged more directly through technical assistance missions or Commissions of Inquiry. *See* Hector Bartolomei de la Cruz, *History and Structures of the* ILO, *in* THE INTERNATIONAL LABOUR ORGANIZATION: THE INTERNATIONAL STANDARDS SYSTEM AND BASIC HUMAN RIGHTS 1-15 (Hector Bartolomei de la Cruz, Geraldo von Potobsky & Lee Swepston eds., 1996). The ILO has at its disposal the capacity under Article 33 of the ILO Constitution to call upon members states to take actions that may include imposing economic sanctions in order to secure compliance with Conventions. However, the ILO has used Article 33 only once, in 2000, in response to the gross and well-documented violations of forced labour conventions by the state of Myanmar (formerly Burma). This move did not lead to any new pressures against the military regime in Myanmar; the United States and the European Union had already applied economic sanctions, and Myanmar's Asian trading partners, including China and Japan, generally oppose any such sanctions. *See* JAMES ATLESON ET AL., INTERNATIONAL LABOUR LAW, CASES AND MATERIALS ON WORKER RIGHTS IN THE GLOBAL ECONOMY 92-93 (Thomson West 2008). In the case of the NAALC, all reviews have been carried out by National Administrative Offices located within the public service of member states, in response to public communications filed by civil society organizations such as trade unions or human rights advocacy groups. While such review processes can be politicized, they have in most cases not been and instead the Canadian and United States National Administrative Offices have tended to carry out balanced and public fact finding and to publish reports that frankly identify issues of potential non-compliance. In practice the follow up to such reports has taken place through diplomatic channels and tended to result international technical cooperation and rights awareness raising, though most often at a relatively shallow level. *See* JONATHAN GRAUBART, LEGALIZING TRANSNATIONAL ACTIVITISM ch. 3 (2008).

[102] Strang & Chang, *supra* note 91.

[103] Weisband, *supra* note 45, at 659.

[104] *Id.* at 656.

[105] Sengenberger, *supra* note 45.

despite the most extensive reporting and review systems available in international human rights law at the global level.[106]

To be sure, Weisband's figures need to be read with some caution. First, his data do not distinguish technical forms of non-compliance from more substantive Convention violations.[107] It could be argued that much non-compliance and non-responsiveness of states to ILO processes simply reflects the unimportance of the issues at stake. Secondly, Weisband's data, because they are global, do not allow us to directly focus on cases where economic reasons for non-compliance are not overshadowed by deeply entrenched political opposition, since he had no way to sort member states according to their interests in non-compliance. Finally, the ILO's review mechanisms rely on the mobilization of international shame, but do so using very diplomatic language and forms of engagement. It could be argued that a more forceful shaming strategy would be more effective.

However, each of these objections is inherently limited in its impact. In the case of technical forms of non-compliance, one could just as easily argue that correcting these would be an easy matter for states, since their political stakes are low, if they saw compliance as a priority. Even if the failure to exclude states with entrenched opposition skews Weisband's data, the effect is likely quite small. In Europe, where entrenched opposition to implementing labor conventions is much less likely, he finds that responsiveness to observations with respect to non-compliance with the human rights conventions in question was still only 17% over the relevant time period, a figure that changed little with the collapse of Communism in 1989.[108] A more forceful shaming strategy might increase the effectiveness of ILO review processes, but one is left wondering how much forceful it would need to be in order to raise responsiveness rates roughly five or sixfold so that a clear majority of states took action to correct the problems identified in observations. The scale of the problem identified in Weisband's findings suggests that the forms of influence presently available to the ILO are unlikely to

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[106] For a comparative analysis of multilateral human rights regime supervision systems, *see* Virginia Leary, *Lessons from the Experience of the International Labour Organization, in* UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL (Philip Alston, ed., Clarendon Press 1992). One earlier study, covering 31 years of ILO operations ending in 1964, found that about 32% of ILO committee observations were met with action to bring states into full compliance, and a further 29% were met with action achieving partial compliance. The responsiveness of states with respect to freedom of association, non-discrimination and forced labor was however much lower, though still higher than found in Weissband's study. *See* E.A. LANDY, THE EFFECTIVENESS OF INTERNATIONAL SUPERVISION chs. 2 & 3 (Oceana Publications 1966). The non-responsiveness of states to observations on freedom of association was subsequently confirmed in ERNST HAAS, HUMAN RIGHTS AND INTERNATIONAL ACTION – THE CASE OF FREEDOM OF ASSOCIATION (Stanford University Press 1970). The difference between Landy's findings and those of Weissband are nonetheless large enough that they suggest that the global political and economic environment in which the ILO operates today poses greater challenges to effectiveness than it did in the early years of the ILO's operations.

[107] This is perhaps because CEACR does not itself distinguish between serious and technical forms of non-compliance in determining whether to make an observation.

[108] Weisband, *supra* note 45, at 659,

achieve this.

(b) The Public Communication Processes of the North American Agreement on Labor Cooperation

Experience under the North American Agreement on labor Cooperation points in the same direction. The review and follow up on submissions filed by civil society organizations – known as public communications in the Agreement's terminology - constitutes the international action under the Agreement with the greatest potential to improve labor standards compliance outcomes.[109] Despite the fact that NAALC public communications have probably attracted greater public and political attention than ILO reviews in North American owing to their high profile political linkage to the NAFTA [110] there is little evidence that the public communications process has been effective except in limited circumstances.

Some 36 public communications (complaints) have been filed by various civil society groups under the provisions of the NAALC. Of these, 29 were filed at least five years ago as of this writing, meaning that more than enough time has elapsed for NAALC procedures to produce results. Of those 29, 20 clearly or almost certainly had merit under the terms of NAALC obligations, having either been accepted and upon review led to recommendations for follow up action by the government that was the subject of the communication, or otherwise led to action by that government prior to any formal report or recommendation. (The rest were either rejected for review, accepted for review but did not lead to any actual or recommended action, or withdrawn without action.) The set of 20 complaints leading to recommendations or action included 14 public communications dealing with freedom of association, the right to organize, and/or the right to strike, 5 dealing with freedom from discrimination, 12 with occupational safety and health, 9 with minimum employment standards, and 6 with the equal treatment of migrant workers. Many submissions deal with several issues at once.[111]

The NAALC has been the subject of a number of studies by scholars and advocacy groups attempting to measure its impact on working conditions.[112] Researchers have

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[109] While there have been numerous cooperative activities under the Agreement, in recent years the majority were in follow up to public communications. Other cooperative activities have almost universally taken the form of information exchange and awareness raising rather than strategic plans of action designed to change established patterns of practice. The NAALC Secretariat has thus far only undertaken descriptive studies with few direct policy implications.

[110] Lance Compa, *NAFTA's Labour Side Agreement and International Labour Solidarity*, 33 ANTIPODE: A RADICAL JOURNAL OF GEOGRAPHY 451 (2001).

[111] These figures were compiled by the author on the basis of his own review of information collated by the Commission for Labor Cooperation. *See* Commission for Labor Cooperation, Public Communications, http://www.naalc.org/public_communications.htm (last visited May 11, 2010).

[112] *See* GRAUBART, *supra* note 101; Dombois et al., *supra* note 21; ROBERT H. FINBOW, THE LIMITS OF REGIONALISM: NAFTA'S LABOUR ACCORD (Ashgate 2006); GARRETT D. BROWN, MAQUILADORA

compiled a body of case studies that cover most of the international action taking place under the Agreement. Some of these have sought to determine whether processes under the Agreement have led to changes at a systemic level in the way that governments administer and enforce labor legislation, or the way in which major employers or groups of employers behave with respect to labor standards issues raised in NAALC processes.[113] This permits a close analysis of whether and how that international action influences state practices and workplace outcomes.

Taken together, these studies show that there have been 4 distinct cases in which NAALC review processes and surrounding diplomatic engagement have led to policy reform initiatives, administrative changes or changes in employer conduct within a small number of years following the relevant process. While not insignificant, in each case the changes could not be described as major reform on part of governments. Only one involved legislative change, and those changes did not squarely address the problems identified in the public communication.[114] The remaining four involved relatively discrete issues affecting a relatively small segment of the working population at any given time.[115]

HEALTH AND SAFETY SUPPORT NETWORK, NAFTA'S 10 YEAR FAILURE TO PROTECT MEXICAN WORKERS' HEALTH AND SAFETY (2004); LINDA DELP, MARISOL ARRIAGA, GUADALUPE PALMA, HAYDEE URITA & ABEL VALENZUELA, UCLA CENTER FOR LABOR RESEARCH AND EDUCATION, NAFTA'S LABOR SIDE AGREEMENT: FADING INTO OBLIVION? AN ASSESSMENT OF WORKPLACE HEALTH & SAFETY CASES (2004); HUMAN RIGHTS WATCH, TRADING AWAY RIGHTS: THE UNFULFILLED PROMISE OF NAFTA'S LABOR SIDE AGREEMENT (2001); Ruth Buchanan & Rusby Chaparro, *International Institutions And Transnational Advocacy: The Case Of The North American Agreement On Labour Cooperation* (CLPE, Research Paper No. 22/2008 Vol. 04 No. 05, 2008); Monica Schurtman, *Los Jonkeados and the NAALC: the Autotrim/Custom Trim Case and Its Implications for Submissions in the NAFTA Labor Side Agreement*, 22 ARIZ. J. INT'L & COMP. L. 291 (2005); John Knox, *Separated at Birth: The North American Agreements on Labor and the Environment*, 26 LOY. L.A. INT'L & COMP. L. REV. 359 (2004).

[113] See in particular GRAUBART, *supra* note 101; FINBOW, *supra* note 112; DELP ET AL., *supra* note 112; BROWN, *supra* note 112.

[114] In response to the filing of Public Communiciation U.S. NAO 9803 concerning alleged failure to protect employees against anti-union plant closures, the government of Quebec, Canada agreed to consider reforms to its labor code. Eventually, the government enacted reforms expediting the union certification process. Stakeholders accepted this as a response to the problem identified in the public communication. However, as recent litigation demonstrates, plant closures in response to unionization remain a significant problem in the view of Quebec's labor movement. *See Desbiens v. Wal-Mart Canada Corp*., 2009 SCC 55, [2009] 3 S.C.R. 540.

[115] In case US 9701 advocates raised the issue of discrimination against pregnant women in the Mexican maquila sector. Several major U.S. multinationals with production facilities in Mexico announced that they would eliminate pregnancy testing as a condition for hiring. Mexican authorities proved willing in this context to change their interpretation and administration of the Mexican Federal Labor Code. GRAUBART, *supra* note 101, at 77. Public Communications Canadian NAO 98-2 and Mexican NAO 9804 raised the issue of administrative procedures that led migrant workers in the United States to fear deportation if they were to file complaints with the U.S. Department of Labor under the U.S. Fair Labor Standards Act. The Clinton administration changed this practice shortly after the filing of the Communications. FINBOW, *supra* note 112, at 156. Public Communication Mexican NAO 9802 raised the issue of the access of migrant workers in Washington state's apple industry to a range of labor rights and protections. The state of Washington increased the number of full time staff enforcing health and safety regulations of migrant workers. *See* GRAUBART, *supra* note 101, at 77.

By contrast, numerous issues were taken up repeatedly in the 20 NAALC cases in question without any detectable resulting change in government practice or in working conditions. Ten such cases have dealt with administrative processes impairing or failing to protect the the capacity of Mexican workers to choose or replace a collective bargaining representative.[116] Seven pointed to problems with the protection of occupational safety and health in Mexico, three to such problems in the United States, and 3 to problems with the enforcement of minimum employment standards in Mexico.

It could be argued that freedom of association and collective bargaining issues in Mexico are linked to fundamental political structures in the Mexican state - the corporatist system of trade union representation linking established unions to the political party in power[117] – and thus that it is unfair to expect that international processes would yield prompt significant influence. However, the same cannot be said about minimum employment standards and occupational safety and health issues, with respect to which there is little evidence of the effectiveness of NAALC procedures despite such issues having been repeatedly raised in public communications.

A closer look at the case study evidence provides some insight into how NAALC influence has operated where it has proven somewhat effective. Validation of the allegations contained in public communications by published National Administrative Office reports has proven to be a necessary but not a sufficient condition.[118] In each instance there was in addition a well co-ordinated campaign of advocacy aimed at governments and employers, and that campaign raised public awareness of issues with respect to which governments and employers faced political or economic vulnerability.[119]

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[116] Issues have included public voting procedures (as opposed to secret ballots), hyper-technicality authorities handling of union registration proceedings leading to inordinate delays in beginning lawful union operations, and the lack of a public database of collective agreements enabling unions to enter into collective agreements without the knowledge of the workers that they purport to represent. See report of Can NAO on CAN 2003-01, which reviewed the findings of previous reports on public communications: Human Resources and Skills Development Canada, Review Report of Public Communication CAN 2003-1, http://www.hrsdc.gc.ca/eng/lp/spila/ialc/pcnaalc/06table_of_contents.shtml (last visited May 12, 2010).

[117] KEVIN J. MIDDLEBROOK, THE PARADOX OF REVOLUTION: LABOR, THE STATE AND AUTHORITARIANISM IN MEXICO (1995).

[118] GRAUBART, *supra* note 101, at 92-94.

[119] In case US 9701 advocates raised the issue of discrimination against pregnant women in the Mexican maquila sector. In the United States this was readily identifiable as a human rights issue. The Clinton administration's Labor Secretary, Alexis Herman, was receptive and responsive to such claims. The three public communications that successfully advanced labor standards of migrant workers in the United States (CAN 98-2, MX 9802, and MX 9804) took place in a context in which both major political parties in the U.S. were actively courting the Mexican immigrant voting population, in which the government of Mexico increasingly recognized the important contribution to its economy of remittances by migrants in the United States, in which many Mexicans in the United States and Mexico could identify with the situation of migrant agricultural workers, and in which agricultural products had proven vulnerable to consumer boycott. In relation to MX 9802 Washington state apple industry representatives noted that some 20 per cent of their production was exported to Mexico.

This pattern of events suggests that the most important channel of NAALC influence is the opportunity that the Agreement's mechanisms provide to raise public awareness and mobilize constituencies within domestic politics in support of meeting NAALC obligations.[120] The NAALC has in limited circumstances enabled domestic actors to transform the way that states see and act on their interests, largely by raising the political and economic risks associated with non-compliance.

There is little evidence however of influence based on state concerns about how their reputations for compliance might affect their ability to pursue their interests in future dealings with each other. If such influence were a significant factor one would expect a more consistent response to public reports by NAOs validating allegations of non-compliance contained in public communications. Similarly, if acculturation were operating within international relations one would not expect the observed pattern of progress within a limited subset of cases among a series of cases that are in many ways closely analogous. The dynamics of acculturation would be more consistent with states adjusting their practices across the board in response to newly internalized norms. In fact, studies including in-depth interviews with government officials and detailed analysis of case outcomes have tended to conclude that negotiation to resolve NAALC complaints has generally reflected a zero-sum logic in which parties concede as little as possible in the way of change in state practices.[121]

(c) Conclusions

Before concluding that the SMS model is likely to be effective, one would hope to see evidence of states acting in accordance with (1) strong interests in preventing damage to reputation by exposure of record of non-compliance with core labor standards, or (2) patterns of identification with or acculturation to norms through interactions of peer states or intensive engagement with review and justification processes of international regimes; and (3) national interests transformed by domestic actors who have been empowered by international processes to exert enhanced influence in domestic politics. Despite extensive experience with ILO and NAALC complaints review procedures, there is little evidence that either exerts today a significant influence on states to improve compliance with international labor standards. Nor is there much evidence of the enabling conditions that would enable the channels of influence upon which sunshine and moral suasion rely to operate. Many states do not appear to be strongly concerned about developing a reputation for non-compliance. They do not appear to risk exclusion from peer networks in which they have a strong interest. At least in the case of the NAALC, their positions, which presumably reflect their interests, appear to have remained untransformed in the face of repeated iterations of international legal processes over many years.

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[120] DELP ET AL., *supra* note 112, arrives at a similar conclusion.

[121] Dombois et al., *supra* note 21, at 435-440.

(2) Effectiveness of Conditional Trade Benefits

This section will examine the labor rights conditionality under the United States' Generalized System of Preferences (GSP). The US GSP system provides the only extensive experience with the application of economic leverage in international relations in the service of compliance with a set of standards that include internationally recognized core labor standards.

Under its Generalized System of Preferences the United States conditions access to preferential tariff reductions upon compliance with a series of broadly worded labor standards defined by U.S legislators.[122] These standards overlap with but differ in some respects from the internationally defined principles and rights set out in the ILO Declaration.[123] Failures of US trading partners to meet labor standards conditions can be brought to the attention of the US administration via a petition procedure. Submissions are investigated by the office of the United States Trade Representative. If the allegations are found to be substantiated, the preferential trade benefits of the state subject to review may be extended subject to ongoing review or may be revoked by the U.S. administration.

There have been over 100 petitions for GSP review.[124] In many cases geopolitics have trumped labor rights considerations, leading US administrations to decline to review GSP benefit eligibility.[125] In what appears to be the only comprehensive study of petitions, Kimberly Ann Elliot analyzed the results of each petition accepted for review between the inception of the program and 1998.[126] After excluding cases in which the US administration made no demands for change, and those in which improvement followed regime change or other major political opening that could not be attributed to GSP incentives, the total number of cases stood at 32. She found that those cases were almost evenly divided between success (15) and failure (17), with success being defined as taking verifiable steps towards improved respect for labor standards.[127] This rate of effectiveness was comparable to that achieved by US trade sanctions with respect to unfair trade practices under section 301 of the Trade Act, and is much higher than that achieved under the ILO or the NAALC.

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[122] 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 (2001) for a description of the process.

[123] The standards are:

1. the right of association;
2. the right to organize and bargain collectively;
3. a prohibition on the use of any form of forced or compulsory labor;
4. a minimum age for the employment of children; and,
5. acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.

See Compa & Vogt, *supra* note 122, at 202.

[124] Compa & Vogt, *supra* note 122, at 208-209.

[125] Compa & Vogt, *supra* note 122, at 235.

[126] Elliot, *supra* note 39.

[127] *Id.* at 7.

Given that main difference in practice between governance models of the three systems is that the GSP uses conditional incentives, it is unlikely that this did not play a significant role in the GSP's greater effectiveness. This inference is supported by Elliot's observation that the success rate of GSP reviews appears to vary positively and significantly with with importance of tariff preferences to the state subject to review.[128] The effectiveness of reviews also appears to vary significantly with political openness of that state.[129] This suggests that responsiveness to GSP review not merely a matter of rational assessment of economic incentives, but also of the receptivity of domestic politics to improving labor standards.

Elliot's aggregated data do not provide any detail on how GSP incentives translate into influence on the ground. Moreover, they do not provide much insight into the extent of improvements in labor standards brought about by GSP reviews. These gaps can be remedied to a certain extent by examining case studies of petitions accepted for review in which the US sought to influence labor standards in trading partner states. This relatively small literature provides sufficient detail for purposes of analysis with respect to the outcomes of petitions involving six Latin American countries, mainly in Central America.[130] The case studies show that GSP reviews have prompted significant legislative and administrative changes sometimes under very difficult conditions, including in states with histories of violent repression of trade union activists. In five of the six cases GSP review led directly to major labor law reform, and three to significant administrative reforms.[131] These changes appear to have made a difference on the ground, reducing levels of anti-union violence, and in some countries leading to an increase in workers' exercise of their rights to organize.[132] This strengthening is notable

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[128] *Id.* at 8.

[129] *Id.*

[130] *See* HENRY FRUNDT, TRADE CONDITIONS AND LABOR RIGHTS (1998), Compa & Vogt, *supra* note 122. The states in question are El Salvador, Guatemala, Honduras, the Dominican Republic, Costa Rica, and Paraguay. While these sources also analyze outcomes in other countries, I was not able to conclude with sufficient certainty on review of those case studies that changes in labor standards resulted from GSP processes as opposed to other possible influences.

[131] Significant legislative reforms were passed in Paraguay, El Salvador, Guatemala, the Dominican Republic and Costa Rica in direct response to the risk of withdrawal of preferences. See FRUNDT, *supra* note 130, at 98, 112-117, 150, 216 and 232-237 respectively. GSP reviews also led to the strengthening of administrative and enforcement capacity in Guatemala: *Id.* at 159, 164-172; in Honduras a GSP petition led directly to new expedited union registration procedures aimed at reducing the potential for intimidation of workers, and the application of more effective methods of enforcement including increased fines and the suspension of export licenses for eggregious violators: *Id.* at 204-206; in the Dominican Republic USTR review led to the establishment of new labor courts with streamlined procedures, to the labor Ministry aggressively investigating complaints and fining violators, to the establishment of a tripartite oversight commission established to mediate collective bargaining disputes, and to the agreement of every major union federation to use the commission for that purpose: *Id.* at 220-224.

[132] Frundt notes a limited reduction in anti-union violence in El Salvador and Guatemala (*id.* at 275), a increase in the number of unions registered in Guatemala (*id.* at 166), an increase in union action in Honduras following administrative reforms (*id.* at 206); and an increase in union organizing and bona contracts between unions and employers in the Dominican Republic following reforms there (*id.* at 277).

in that it runs counter to trends in the rest of Latin America during this time.[133] All of this suggests that the depth of influence achieved by GSP reviews is more significant than that achieved under the NAALC.

The case studies also demonstrate the direct role that conditioning trade benefits played in GSP regime influence. That influence operated by changing the cost benefit calculus of economic elites, opening them and their governments to the possibility of reform. However, it generally did not operate through blunt coercion independent of national politics. GSP influence was managed by USTR officials to ensure that the threat of benefits withdrawal did not provoke a backlash within national politics on the one hand, or appear too remote on the other.[134] US officials actively sought to broker political dialogue on reforms within Central American states. Analysts have noted that the extent of GSP review influence also depended significantly on a number of factors that enhanced opportunities for deliberation and negotiated compromise on reform packages, including: (1) the normative legitimacy of human rights groups as petitioners;[135] (2) the extent to which domestic unions and human rights groups in affected states were organized, directly involved in international campaigns and empowered by international resources;[136] (3) the extent of opportunities for those actors to participate in political deliberation over proposed reforms.[137] These factors converged in most cases to produce significant legislative reform.

On the other hand, there appear to be significant limits to this influence in the face of strong political resistance. In El Salvador and Guatemala violations of workers' legal rights remained widespread and continued to enjoy impunity even following GSP-induced reforms.[138] Reforms in Chile waited 7 years following the suspension of GSP benefits,[139] and the causal connection in that case is less clear. In some cases progress halted as soon as GSP reviews were lifted following legislative reforms, leaving those reforms largely unimplemented.[140] It is possible that had the United States been more

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133 Maria Lorena Cook, Paper prepared for the meetings of the American Political Science Association, Washington, D.C.: International Labor Standards And Domestic Labor Advocates: The Politics Of Labor Rights In Latin America, 16 (Sept. 1-4, 2005).

134 Compa & Vogt, *supra* note 122, note in particular the importance of this in Guatemala, where GSP reviews prompted death threats against Guatemalan union leaders who supported them.

135 Elliot, *supra* note 39, at 7.

136 Cook, *supra* note 133, at 6.

137 This can been seen in the contrast shown in Frundt's case studies between the superficial consultation and relatively limited reforms in El Salvador with the deeper engagement of unions in the Dominican republic. *See* FRUNDT, *supra* note 130, chs. 6 and 10.

138 FRUNDT, *supra* note 130, at 276-7.

139 *Id.* at 95.

140 Progress halted when reviews were lifted on El Salvador, where lack of enforcement capacity nullified the effect of legislative reform on the ground: *Id.* at 127; in Guatemala where one year following administrative and legal reforms courts remained backlogged and legal enforcement elusive: *Id.* at 177; and in Costa Rica where two years after legal reforms there was little improvement in private sector unionization rates and major cuts were made to the budget of labor ministry: *Id.* at 235-237.

willing to maintain the pressure of GSP reviews following legal reforms things might have been different in some of those cases. However, it is also possible that in the more difficult cases even this influence may not have proven sufficient to the task. Studies of international sanctions show that, not surprisingly, they tend not to be effective in the face of political interests that outweigh the economic interests put at risk by the sanctions regime.[141] Some Central American states were at the time of the available US GSP case studies (and remain) highly unequal and often subject to highly polarized labor politics, for reasons lying mainly in their own political histories and lying entirely outside of GSP reviews.[142] In such states human rights reforms generally, including protection for trade union rights, may have threatened the very foundations of the existing authoritarian political order by opening avenues for previously repressed dissent and political contestation. Further, the weakness of union movements and labor ministries in Central America, and the transitoriness of tripartite policy advisory bodies, accentuated the difficulty of building political consensus for and implementing reforms.

(3) Conclusions

The contrast between the relative success of the US GSP in comparison with ILO and NAALC review procedures strongly suggests that the availability in practice of economic incentives in the form of conditional trade benefits can significantly enhance the effectiveness of an international labor standards agreement. Such incentives directly changed the interest calculus of powerful domestic political actors, and thus the interests of states in international relations. Changing those interest structures appears to be necessary, and other means of doing so do not appear to be available in most international relationships, for reasons discussed above.

This observation is consistent with the conclusions of studies of the effectiveness of international regimes addressing aspects of international trade law and international environmental law facing similar problem structures.[143] Unlike international labor law,

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[141] Yaraslau Kryvoi, *Why European Union Trade Sanctions Do Not Work*, 17 MINN. J. INT'L L. 209 (2008).

[142] This is evident in Frundt's case studies of Guatemala, El Salvador in particular. FRUNDT, *supra* note 130, at chs. 6 and 10.

[143] The Stag Hunt problem structure is one that is familiar to international trade law and international environmental law. The theory underpinning the international trading system predicts that all states will be better off economically if they keep their markets predictably open by committing to do so in law. This will allow for economic specialization, a more efficient allocation of resources, from which, according to the theory of comparative advantage, all stand to gain in some significant measure. However, for an open international trading system to work states must also forego the short term gains that can be had by reducing access to one’s own market (such as avoiding potential economic losses due to business failures or reductions in profits that would have accrued domestically), as this will predictably lead others to withdraw from a stance of trade openness, leaving all worse off. Similarly, international environmental law is confronted with a series of problems in which environmental conservation goals benefiting those who use the resource in question (such as fish stocks) are regularly put at risk by short term economic incentives to damage those goods, combined with the risk that first movers towards conservation will be left worse off by the lack of cooperation of other states.

international environmental law has been the subject of a significant number of systematic studies of regime effectiveness. These studies have tended to conclude that, in the limited number of situations in which it is available, economic leverage has significantly contributed to the effectiveness of regimes in dealing with assurance problems similar to those facing international core labor standards.[144] Similarly, as will be discussed below, most analysts have concluded that the capacity to authorize economic sanctions under the General Agreement on Tariffs and Trade[145] has been a key contributor to its success.[146]

More tentatively, the experience of the US GSP system also confirms the prediction that deep political resistance rooted in authoritarian power structures may imposes outer limits on the viability of international influence. Finally, it also tentatively suggests that where such resistance does not present a binding constraint, the deployment of economic leverage so as to induce domestic political deliberation on rather than to coerce labor standards reforms enhances international influence. The next Part provides an account at a general level for this observation.

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144 See for example David Victor*, The Operation and Effectiveness of the Montreal Protocol's Non-Compliance Procedure*, *in* THE IMPLEMENTATION OF EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL COMMITMENTS: THEORY AND PRACTICE (David Victor, Kal Raustiala & Eugene Skolnikoff eds., MIT Press 1998), concluding that provisions under the Protocol providing for the withholding of technical assistance funding in the event of non-compliance significantly enhanced its effectiveness by improving incentive structures facing states; DUNCAN BRACK, INTERNATIONAL TRADE AND THE MONTREAL PROTOCOL xvii (Chatham House 1996), concluding that the "trade provisions of the Protocol ... were a vital component in (a) building the wide international coverage that the treaty has achieved and (b) preventing industrial migration to non parties to escape the controls"; Parker, *supra* note 99, at 53-58 showing that the threat of trade restrictions by the United States has underpinned the effectiveness of the Inter-American Tropical Tuna Commission's Dolphin Conservation Initiative; Steve Charnovitz, *Recent Developments: Environmental Trade Sanctions and the GATT: An Analysis of the Pelly Amendment to on Foreign Environmental Practices,* 9 AMERICAN UNIVERSITY JOURNAL OF INT'L LAW AND POLICY 751, (1994) concluding on the basis of an examination of 14 cases that U.S. threats of unilateral sanctions against states undermining international conservation agreements had proven effective; Ronald B. Mitchell, *Regime Design Matters: Intentional Oil Pollution and Treaty Compliance,* 43 INT'L ORG. 425 (1994), finding that powers of states to detain non-compliant ships were a significant factor in the success of the requirements for segregated ballast tanks contained in the International Convention for the Prevention of Pollution from Ships; and more generally EDWARD MILES ET AL., ENVIRONMENTAL REGIME EFFECTIVENESS: CONFRONTING THEORY WITH EVIDENCE 460 (MIT Press 2001), finding strong support, on the basis of in-depth case studies of 14 regimes, for the proposition that in cases of truly difficult international coordination problems regimes will achieve high effectiveness only if they contain one or more of the following: (1) selective incentives for cooperative behaviour; (2) linkages to more benign (and preferably more important) issues; and (3) a system with a high problem solving capacity. Contrast these findings with the ineffectiveness of most high seas management regimes without leverage: M. J. Peterson, *International Fisheries Management*, *in* INSTITUTIONS FOR THE EARTH: SOURCES OF EFFECTIVE INTERNATIONAL ENVIRONMENTAL PROTECTION (Peter Haas, Robert Keohane & Larc Levy eds., MIT Press 1993).

145 General Agreement on Tariffs and Trade, Oct. 30, 1947, T.I.A.S. No. 1700, 55 U.N.T.S. 187.

146 *See id.* at sec. V(B)(2)(b)(iii).

V. Effective Governance in the Face of Administrative, Policy and Political Complexity

The availability of sanctions, positive economic incentives or some other conditional benefit will thus often be a necessary condition for an effective international labor standards regime today. Ensuring that any sanctions or incentives are fairly and transparently applied in turn may require adjudicative or quasi-adjudicative review procedures to determine whether there is a factual basis for doing so, whether legal standards have been met, and whether other international legal obligations such as those in international trade agreements are being respected. But would this be sufficient to ensure an effective regime?

Arguments for proposals within the ASC model imply that it is, though often subject to stipulations designed to enhance the accessibility and independence of adjudication: that private parties be empowered to initiate supranational legal proceedings before an permanent tribunal, for example.[147] Critics of this approach have argued that the complexity of labor standards issues distinguishes them from the kinds of problems that can be effectively addressed through international adjudication, even where economic leverage is available.[148] The common thread running through such critiques is the political, policy and administrative complexity of labor standards compliance problems requires engagement with national and subnational level actors in a process of negotiation and dialogue, rather than discipline from a distance through legal mechanisms. [149] As Kolben puts it, creating tariff-based incentives or sanctions to compel state enforcement is not enough "in a regulatory context in which, lack of will to enforce is combined with resistance from business owners and managers to implementing regulations, weak civil society and unions that cannot put adequate pressure on governments to enforce and strengthen domestic law, and deep rooted failures in regulatory capacity that include lack of funds, and high rates of corruption."[150]

This is a plausible intuition, and one to which arguments for the ASC model of governance have not attended. Yet it is also fair to say that the literature presenting this critique has not developed a robust theory or empirical analysis to underpin it. Without such an account it is not clear why it might correct. Why for example might the deterrent and incentive effects of an adjudication and sanctions-based model not succeed in generating meaningful labor standards reforms? Could such a regime not prompt all

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[147] Daniel Ehrenberg, *From Intention to Action: An ILO/GATT/WTO Enforcement Regime for International Labor Rights*, *in* HUMAN RIGHTS, LABOR RIGHTS AND INTERNATIONAL TRADE (Lance Compa & Stephen Diamond eds.,1996); HUMAN RIGHTS WATCH, A WAY FORWARD FOR WORKERS' RIGHTS, *supra* note 26.

[148] Bhagwati, *supra* note 30; Kolben, *Integrative Linkage*, *supra* note 32; Dombois et al., *supra* note 21.

[149] *See* Bhagwati, *supra* note 30, at 5 (arguing that complex problems such as child labor cannot be solved through sanctions, and that "They need heavy lifting: working with local NGOs, supportive governments, with parents, with schools.")

[150] Kolben, *Integrative Linkage*, *supra* note 32, at 224.

the negotiation that is required by extending the "shadow of the law" so that parties can clearly foresee and respond to the consequences of non-compliance in advance? Why would a regime on the LDC model succeed where an ASC model regime would not?

This Part will develop a theory of the implications of complexity for effective international governance. It will then examine the the fit of the LDC and ASC models governance with those implications. Finally it will test this fit analysis against studies of relevant experience under a range of different legal regimes.

A. Implications of Political, Policy and Administrative Complexity

The root causes of violations of core labor standards often lie in complex and interconnected patterns of culture and social and economic organization. Changing those patterns generally requires complex policy and administrative interventions carried out or at least supported by the state, and that such interventions be sustained over long periods of time. As discussed in Part III of this paper, economically and politically motivated resistance to reforms to improve core labor standards compliance is not uncommon, particularly in the developing world. That potential resistance can interact with the complexity of reform in important ways, multiplying opportunities for mistake, avoidance or obstruction. I will develop this point and its implications by first presenting an example.

(1) Example: The Progressive Elimination of Child Labor

Consider the question of how to eliminate child labor. The International Labour Organization estimates that 218 million children are child laborers, of whom 126 million are involved in hazardous work.[151] The underlying causes of child labor are now well studied, and a number of relatively well funded national and international initiatives have been put in place to being to remove these children from the workforce.[152] This analysis and experience tells us the following. First, the root causes of child labor are often deeply embedded in economic and social structures, and as a result likely to resist simple prohibition and enforcement efforts, or worse, to produce negative unintended consequences when such an approach is applied. The supply of child labor is often fuelled by the poverty of the parents, which in turn may reflect low earnings in relation to

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[151] FRANK HAGEMANN, YACOUBA DIALLO, ALEX ETIENNE & FARHAD MEHRAN, ILO, GLOBAL CHILD LABOR TRENDS 2000-2004 2 (2006). These statistics are based on age group: 5-17. ILO survey methodology classifies children aged 5-11 as involved in child labor, while children aged 12-14 are not considered to be involved in child labor if they work fewer than 14 hours per week unless their work is considered hazardous.

[152] For surveys informing this discussion, see Kaushik Basu, *Child Labor: Cause, Consequence and Cure, with Remarks on International Labor Standards,* 37 JOURNAL OF ECONOMIC LITERATURE 1083 (1999); THE POLICY ANALYSIS OF CHILD LABOR: A COMPARATIVE STUDY (Christiaan Grootaert & Harry Anthony Patrinos eds., 1999); M. Neil Browne, Alex Frondorf, Ronda Harrison Spoerl & Sumangali Krishnan, *Universal Moral Principles and the Law: The Failure of One-Size-Fits-All Child Labor Laws*, 27 HOUS. J. INT'L L. 1 (2004).

subsistence needs, or the effects of a family crisis that cut earnings significantly.[153] Other factors may be at play on the supply side as well. The lack of accessible or affordable schools may leave little in the way of alternatives to parents seeking a supervised environment for their children. Adult illiteracy often contributes as well since the benefits of an education may be less apparent to the parents. On the demand side, the availability of child labor responds to and reinforces methods of production that often rely little on skill, and very labor intensive, operate on thin profit margins and make little use of technology.[154] Culturally embedded notions of who should do what work, and what opportunities should be available to whom may reinforce conditions on both the supply and demand side of the equation.

This thumbnail sketch of root causes suggests a range of possible policy interventions, each with its own benefits and risks. The poverty of parents might be addressed by gradually raising the minimum wage. However, this would have to be carefully done to avoid putting people out of work rather than raising their incomes. Family income crises might be avoided by establishing basic income security programs and pensions. However these may prove complex to administer; the poor may have little of their own income to contribute; the better-off may resist being taxed to fund the program. New schools can be built, new teachers hired and public education can be made available at little or no cost. But this requires an ongoing commitment of public funds, and thus a new source of tax revenue or a reallocation of government resources. Addressing adult illiteracy faces similar challenges, and in addition the challenge of outreach and availability to fit adult education into the busy lives of parents. Policy makers might also seek to change demand side conditions by ensuring greater access to credit to invest in productive technology. This may involve developing new banking institutions, and new forms of public-private sector partnership. In addition, policy makers might seek to hold buyers in supply chains with sufficient market power accountable for the use of child labor in those supply chains. This would involve developing new monitoring systems, new forms of legal responsibility, and in any event would not reach many of the small producers who directly meet the needs of the poor rather than be linked to larger networks of wholesalers or producers. Culturally embedded justifications for child labor can be challenged through education and outreach; but there are risks of offending and

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[153] ALEC FYFE, ILO, THE WORLDWIDE MOVEMENT AGAINST CHILD LABOUR; PROGRESS AND FUTURE DIRECTIONS 70 & 83 (2007):

> "Households send children to work to augment household income, but also to better manage income risk or shocks due to adult job loss or harvest failure. Child labour plays a significant role in the self-insurance strategy of poor households."
>
> …
>
> "There is also a general consensus that child labour is both a result and a cause of poverty. Household poverty pushes children into the labour market to support family income or, in extreme cases, even to survive during crises caused by economic shocks…Increasingly, however, it is being recognized that the various aspects of poverty need examination, together with other causes of child labour, and efforts made to understand how these interact with one another in given situations."

[154] *Id.* at 70.

alienating community leaders and members whose support may be needed.

Despite the attendant complexity, it appears that some progress is being made in eliminating child labor around the world.[155] Appropriate social policy and programs, including labor laws, policies and programs appear to be making a contribution.[156] This contribution has required engagement with complex policy making and administration over long periods of time. It has required enlisting the co-operation of governments, parents and employers, and it has required that solutions be tailored to the cultural, industrial and other characteristics of the places in which change was brought about.[157] To the extent that international actors have contributed to making progress, they have had to exert their influence steadily over time to adapt their measures with subtlety attuned to context. They have arguably done this not simply by choice and out institutional predisposition, but also out of necessity given the task at hand.

(2) The Prevalence and Characteristics of Polycentric Problems

Space constraints do not permit further examples, but it is safe to say that this sort of analysis would yield the same conclusions about significantly increasing respect for other fundamental labor standards in states where this is problematic today.[158] It is thus quite

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[155] HAGEMANN ET AL., *supra* note 151, at 2. From 2000 to 2004 the number of the number of child laborers declined by 11.3% (from 246 million to 218 million), and the number of children in hazardous work declined by 25.9% (from 171 million to 126 million)

[156] ILO, REPORT I (B), ILC, 95TH SESS., THE END OF CHILD LABOUR: WITHIN REACH, REPORT OF THE DIRECTOR-GENERAL 15 (2006):

> "Child labour elimination and poverty reduction through economic development go hand in hand. The relationship is not automatic, however. Policy choices matter, and they must be coherent. The pace of child labour elimination accelerates when strategies open up 'gateways of opportunity' for poor people. For example, where development efforts focus on the reduction of rural poverty, when the length of compulsory education is progressively extended and when government agencies, employers, trade unions and others combine forces to enforce minimum age for employment laws and create opportunities for children to avoid the trap of premature work, especially under hazardous conditions, then progress is made in fighting child labour".

[157] Christiaan Grootaert & Harry Anthony Patrinos, *Policies to Reduce Child Labor, in* Grootaert & Patrinos eds., *supra* note 152, at 156-162 (arguing for a gradual approach, beginning with reductions in hours except in the case of hazardous work, and focusing on increased access to education, improving the economic security of poor households and the productivity of household enterprises).

[158] For example, ensuring respect for freedom of association and the right to bargain collectively requires at a minimum adequate legal and administrative frameworks that need to be in place. Governments must provide a legislative framework (1) that protects and enforces freedom of association and the right to collective bargaining and permits the enforcement of collective agreements, and 2) establishes relevant institutions that facilitate and administer these rights. In some cases where rights are not well established public awareness campaigns also play an important role by creating demand for these rights and for continued progress. Training in industrial relations and collective bargaining for both workers' and employers' organizations may be needed may also prove valuable in ensure effective collective bargaining, and dispute resolution. ILO, REPORT I (B), ILC, 97TH SESS., FREEDOM OF ASSOCIATION IN PRACTICE: LESSONS LEARNED, REPORT OF THE DIRECTOR-GENERAL (2008). On the important role of states in eradicating slavery, see KEVIN BALES, ENDING SLAVERY: HOW WE FREE TODAY'S SLAVES ch. 5 (University of California Press 2007).

typical of the challenge of raising even the most fundamental labor standards that it requires changes in notions of acceptable behaviour among workers and employers, changes in the way that the state applies and enforces the law which may include the development of new administrative and adjudicative capacity, and changes in private sector incentives that bring about changes in methods of production. It may also require changes in institutional support systems available to workers and their families. In some cases it may even call for changes in economic infrastructure to help employers change their methods of production. Given the extent and complexity of reform that is often required, for practical purposes the aim of significant continuous improvement must often replace that of immediate full compliance. Complex reforms must be carried out over long periods of time. Raising labor standards is thus very often a classic polycentric problem,[159] that is, one which requires the simultaneous solution of multiple interconnected problems, many of which do not have a single right answer, involve numerous affected parties, and therefore entail complex policy choices on their own and must be revisited and adapted over time and to changing conditions. These decisions may arise at the point of interpreting international norms if those norms take into account factors such as the level of development of states, or impose graduated obligations on states. Even if international norms are framed in unconditional terms policy judgment will be required at the stage of devising remedies for non-compliance.

(3) Implications for International Governance

This complexity makes important demands on international governance. First, developing a sustained and adaptable response to complex policy problems requires good information on underlying causes, on the practical likelihood of success interventions, including, when it is available, on what solutions have and have not worked in similar situations, and on changing conditions. It also requires basic capacity to analyze the benefits and risks of potential options. It requires capacity for sustained strategic direction, since there is a significant risk that action will be directed at problems which are not the most significant ones in terms of the objectives of the international labor standards in question. Information and analysis can only support this kind of direction through systematic deliberation focused on what in means in practice to move as fully as possible towards compliance with core labor standards. Resource commitments need to follow such decision making. Results need to be assessed, plans of action updated, provided with renewed resources, and so on. International influence thus needs to flow into capillary channels of national priority setting, policy making and program design. In effect what is required is a targeted and limited legalization of labor politics and policy, through which international norms begin to regularly inform deliberation and decision making at the national and sub-national level. Taken together, I will refer to these exigencies as the requirement for sustained, informed and and strategically focused deliberation.

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[159] On the challenges that such problems pose for adjudication, see Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394-404 (1978).

This requirement in turn points to two significant risks to effective international governance. First, the complexity of reform and the number of times and places in which it requires deliberate action provide ample room for resistance or indifference to impede progress, by avoiding acknowledgement of problems, by delaying decisions, by failing to commit resources, or by selecting ineffective policy or program options. Secondly it poses risks to the legitimacy of international governance, which if realized will likely provoke or create room for further resistance. Initiatives to improve labor standards compliance may fail simply because of mistakes, perhaps due to problems which may only become apparent in the light of experience, given the frequent complexity of underlying causes of non-compliance. If international actors make too many mistakes in their advice, negotiating positions or decisions in the face of polycentric problems requiring local knowledge for effective solutions, the result could be a loss of political legitimacy of international norms and institutions.[160] This in turn may feed back by increasing political resistance to the efforts of international actors to influence national politics and policy making. Legitimacy is also put at risk by the potential demands of ensuring compliance in the face of resistance. Reaching too far or too coercively into national politics and policy making may provoke challenges to legitimacy, not only from the state but also from organized interests and the wider public, if it is perceived as intruding unduly into national policy self-determination.[161] On the other hand, simply deferring to national political processes will entail no meaningful accountability, and may produce no meaningful results.

These considerations suggest a second general requirement: that an effective international labor standards regime must rest on a foundation of proactive international cooperation. The need for this can be seen by trying to imagine how the risks identified above could be successfully managed under the opposite circumstances – those of a zero-sum logic in which cooperation in a given matter does not advance a state's interests. This might be the case, for example, where for a given state short term incentives for non-compliance prevail over longer term interests in compliance (as will often be the case if the analysis in Part III is correct), and a finding of non-compliance will lead directly to the imposition of the withdrawal of benefits that would otherwise continue.

Under such circumstances the interests of the state in question will favour using the many possible avenues of avoidance and resistance in order to avoid the imposition of sanctions. Proving non-compliance in the face of such resistance may be difficult, time consuming and costly. It will often be the case that information needed to assess whether a state is in compliance or is making reasonable progress towards compliance

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[160] For a discussion of forms and challenges to legitimacy in international governance see Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?* 93 AM. J. INT'L L. 596 (1999) (identifying several forms of legitimacy relevant to international governance, including expert legitimacy, and participatory legitimacy).

[161] *Id.* As the extent of international governance increases so does pressure on participatory legitimacy. The traditional state consent model of participation in international affairs becomes more problematic from the perspective of democratic legitimacy as the extent of delegated authority vested in international regimes increases.

lies either in the hands of the regulated state, or is accessible only with its consent. For example, determining how best to improve the application and enforcement of the law, or to change the incentive structures that lead to violations of fundamental principles and rights at work may require a great deal of information that can realistically only be gathered by national and subnational level actors. Obtaining information on such matters as the performance of labor inspectorates, will likely require the cooperation of the inspectorate itself. Constructing proxies for such information will be difficult.

More importantly, even if non-compliance can be proven and sanctions imposed, the rational response will be superficial compliance masking continued avoidance. The same problems of proof will therefore resurface in the supervision of remedial measures and the determination of whether to lift sanctions. Further, to counter avoidance, remedial direction may of necessity become increasingly intrusive and directive, in turn raising risks of mistake, loss of legitimacy, and political backlash. Alternatively, at some point international decision makers may simply defer to the measures that a non-complying state has implemented. These will by definition be the least effective measures that can be conceded given the opportunities for continued resistance.

In general terms, breaking this pattern requires a foundation agreement which escapes this zero-sum logic by exchanging something of value to a potentially non-compliant state for a determinate set of measures that themselves constitute ongoing pro-active cooperation by that state in addressing the causes of non-compliance. The thing of value could take many forms: additional tariff concessions, concessions on other policy issues such as international migration of workers, or simply assurance of the continuing stability of existing tariff concessions in the face the risk posed by potential complaints that could lead to sanctions. The important point is that the exchange must remain a contingent one in the sense that continued delivery of the thing of value would understood by both parties to cease more or less automatically if and when proactive cooperation ceases. Otherwise the incentive posed by renewed opportunities for avoidance will cause this foundation bargain to collapse back into the zero-sum dynamics described above.

The obvious problem facing this type of solution is that of ensuring that both parties understand what constitutes proactive cooperation with sufficient precision so that any withdrawal of the concession in question can actually happen automatically and without extensive disputation. The complexity of the challenges of raising labor standards will make it impossible to specify at the outset of the agreement a single set of measures constituting proactive cooperation for the purposes of the duration of the agreement. Rather it will be necessary to approach this problem pragmatically, defining what constitutes proactive cooperation through a process of iterative definition and redefinition of provisional understandings.[162] These understandings must address what needs to be done to make significant and continuous progress on strategic priorities for international

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[162] For a discussion of this form of pragmatic governance and its suitability to polycentric rights compliance problems, see Charles Sabel & William Simon, *Destabilization Rights – How Public Law Litigation Succeeds,* 117 HARV. L. REV. 1015 (2004), especially at 1067-1073.

standards implementation in the particular context of the state in question, for a particular limited time period.

The most direct way to generate this iterative redefinition is to establish a process of repeated informed and strategic deliberation between the parties resulting in the negotiation of particular time-bound understandings. This iteratively redefined agreement for proactive cooperation would effectively become the understanding of what constitutes compliance with the international labor standards commitments at any point in time. The bargained arrangement could also provide for proactive monitoring of progress, thus eliminating the need for ad hoc and contentious gathering of evidence after a dispute has arisen. This approach essentially fuses the inquiry into compliance with the development of a remedy by, in effect, stipulating by agreement and in advance the remedial measures required to move towards compliance significantly and continuously. It stands to give both parties something of value by, on the one hand, eliminating most of the potential uncertainty over whether conditional benefits will continue and giving the parties direct control over the concrete requirements of the agreements, and on the other hand, by sharply reducing opportunities for compliance avoidance and thus in turn lowering the stakes required to deter non-compliance. It transforms the dynamics of international regime incentive application from challenge and defence of acquired gains to the relatively less contentious implementation of an agreed upon set of measures constituting a mutually beneficial bargain.

Alternatively, an international regime might seek to induce states, by deterrence, to unilaterally and accurately anticipate what is required by their international commitments at any point in time and to proactively implement such measures. Note however that a regime relying on deterrence to bring about this kind of cooperation will need to raise the stakes of non-compliance considerably in comparison to what would be required where agreement compliance is less complex and frought with opportunities for avoidance. Deterrence depends upon a calculation that the anticipated costs outweigh the anticipated benefits. The anticipated costs are essentially the costs times the risk that they will be imposed. The complexity of compliance determinations introduces greater uncertainty into the likelihood that sanctions will be imposed and successfully pursued to the point of ensuring compliance, for reasons outlined above. Accordingly, the size of the sanction would need to be increased in order to achieve sufficient deterrence, since the international regime can offer no benefit in return for forsaking the use of avoidance strategies.

In any event, whatever means are chosen to put into operation an appropriate contingent bargain, the effectiveness of an international labor standards regime would be enhanced if it can bring about a gradual transformation of states' understandings of their own interests so that any short term incentives not to comply are reduced over time. As discussed in Part IV, this kind of transformation might be effected through by persuading government officials to attach greater normative priority to core labor standards, or by persuading them to see core labor standards as making an achievable contribution to durable

economic and social development. Alternatively or in addition, it could be effected by empowering and mobilizing domestic actors supporting core labor standards to successfully seek changes in priorities within their own government.

B. The Fit of Leveraged Deliberative Cooperation to the Task of Increasing Core Labor Standards Compliance

This analysis of requirements for effective international governance provides a plausible account of why LDC models of governance may prove effective in raising core labor standards. First, such models consciously use trade incentives or other forms of leverage to put in place the contingent bargain required. They explicitly provide for iterative redefinition of proactive compliance, and make continued benefits contingent on it. Secondly, their core processes (monitoring, deliberation and negotiation) expressly provide for the informed strategic deliberation required to make such bargains effective, rather than anticipating that they will arise as an ad hoc by-product of other forms of international relations. Finally, their core processes provide opportunities for the gradual transformation of state interests by directly promoting dialogue on how to achieve core labor standards and economic competitiveness at the same time. In some cases they also empower domestic actors to inform co-operative plans for reform. This empowerment may in turn shift dynamics within national labor politics and policy making.

Experience under the United States-Cambodia Textiles Agreement[163] provides an important example of these dynamics. In January of 1999 the United States and Cambodia entered into an agreement which among other things provided Cambodia with enhanced access to the United States market in the form of a quota bonus in the textile and apparel sectors, on condition that working conditions in those sectors substantially comply with internationally recognized core labor standards.[164] Given then prevailing conditions in that sector, meeting this condition entailed significantly improving compliance. The Agreement operated until 2005, at which time the phasing out of the Multi-Fibre Agreement[165] and Cambodia's recent accession to the WTO made the quota scheme of the Agreement obsolete.[166]

The Agreement contained little detail with respect to its implementation. Cambodia agreed to "support the implementation of a program to improve working conditions in the textile and apparel sector, including internationally recognized core labor standards,

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[163] U.S.-Cambodia Bilateral Textile Trade Agreement, U.S.-Cambodia, Jan. 20, 1999, http://cambodia.usembassy.gov/uploads/images/M9rzdrzMKGi6Ajf0SIuJRA/uskh_texttile.pdf [hereinafter UCTA].

[164] *Id.* at art. 10.

[165] Agreement Regarding International Trade in Textiles (Multifibre Agreement), Dec. 20, 1973, 25 U.S.T. 1001 (entered into force on Apr. 1, 1974).

[166] Cambodia became a WTO member on October 13, 2004. Office of the United States Trade Representative, WTO Accessions, http://www.ustr.gov/trade-agreements/wto-multilateral-affairs/wto-accessions (last visited May 13, 2010).

through the application of Cambodian labor law".[167] Both parties agreed to hold not less than two consultations per year "to discuss labor standards, specific benchmarks and the implementation of this program".[168] Based on those consultations and other information regarding the implementation of the program and its results, the United States would make a determination by December 1 each year as to whether the conditions for annual quota increase had been met. These conditional increases would remain in effect if and only if reviews in subsequent years were positive, and could be withdrawn if the US determined at any point that Cambodia had taken or failed to take major action resulting in a significant deterioration in working conditions. This meant in effect that if conditions were met in previous years the stakes of meeting them again in subsequent years would gradually ratchet up.[169] Cambodia agreed to seek international financing for its program, and the US agreed to support those efforts.[170]

The Agreement was implemented through programs administered by the ILO, and developed in consultation between the ILO, the U.S. and the Garment Manufacturer Association of Cambodia.[171] Under a program originally known as the ILO Garment Sector Project, and then as Better Factories Cambodia, the ILO provided direct monitoring of textile and apparel factories. The findings of the ILO in turn provided a basis upon which the US would determine whether quota bonuses would be granted or withdrawn.[172] Providing a credible information base for these determinations was an important issue as both the U.S. and Cambodian governments recognized that the capacity of the Cambodian government for monitoring private corporations was weak, and any information gathered solely by the government would therefore be unreliable.[173] Cambodian factories were not compelled to join the monitoring program. However, in order to avoid the potential free rider problems inherent in passing on the benefits of quota bonuses to employers who did not participate in the program, the Cambodian government mandated that only ILO monitored factories would be granted export permits enabling them to access the quota increase. This ensured that 100% of Cambodian garment factories participated.[174] Based on its inspections, the ILO published a synthesis report on the results of compliance monitoring in aggregate form, without the mentioning of specific factories.[175] However, after the ILO had inspected a firm and noted its non-compliance with labor standards, a second inspection would occur. If compliance did not increase, then the factory would be named specifically in the next ILO report.[176]

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[167] UCTA, *supra* note 163, at art. 10B.
[168] *Id.* at art. 10C.
[169] *Id.* at art. 10D.
[170] *Id.* at art. 10E.
[171] Kolben, *New Politics of Linkage*, *supra* note 35, at 91.
[172] Sandra Polaski, *Cambodia Blazes a New Path to Economic Growth and Job Creation,* at 7 (Carnegie Endowment for International Peace, Carnegie Paper No. 51, 2004).
[173] Polaski, *Combining Global and Local Forces, supra* note 32, at 920.
[174] *Id.* at 923.
[175] *Id.*
[176] Kolben, *Integrative Linkage, supra* note 32, at 241.

A second part of the ILO program provided for capacity building of Cambodian labor law enforcement and dispute resolution capacity. Several steps were taken to increase the capacity of the Cambodian government to monitor and enforce labor laws. First, the ILO monitors would be Cambodians trained by the ILO.[177] Second, the ILO pledged support in helping draft Cambodian labor laws and regulations.[178] Finally, the Cambodian government filled a gap in its own labor code by creating a Labor Arbitration Council that would resolve enforcement disputes.[179]

The UTCA appears to have prompted significant improvements in working conditions in Cambodian factories. Most analysts have concurred with the ILO's assessment that significant progress was made in improving conditions during the life of the Agreement.[180] Further, the monitoring program helped induce a change in the competitive strategy of the industry that ensured that improvements would continue. Private businesses placing a significant value on sourcing products from labor standards compliant factories valued the credible information about the state of labor standards in Cambodian markets.[181] Eventually, major brands such as the Gap began to require factory reports as a condition of doing business.[182] Private buyers also began making sourcing decisions in Cambodia due to increases in labor standards compliance. This revealed to the Cambodian government that it now had a trade advantage in labor standards, one that it would seek to maintain.[183] Cambodia's economic growth, spurred by the textile and garment industry, was robust even through the costs for Cambodian exports were 25% higher than China's.[184] The Cambodian government decided as a result to ensure that the ILO program continued following the term of the UTCA.

The Better Factories Program continues today, with similar numbers of factories voluntarily participating as did during the term of the UTCA. Synthesis reports from the

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[177] Kevin Kolben, *Trade, Monitoring and the ILO: Working to Improve Conditions in Cambodia's Garment Factories*, 7 YALE HUM. RTS. & DEV. L.J. 79, 101 (2004).

[178] *Id.*

[179] Polaski, *Combining Global and Local Forces, supra* note 32, at 927.

[180] *See* Kolben, *Integrative Linkage, supra* note 32, Polaski, *Combining Global and Local Forces*, *supra* note 32, and Don Wells, *Best Practice in the Regulation of International Labour Standards: Lessons of the U.S. Cambodia Textile Agreement*, 27 COMP. LAB. L. & POL'Y J. 357 (2006). Wells created a longitudinal analysis of firms and their implementation record based on ILO synthesis reports. He notes that by the tenth report, 43% of the recommendations made to firms previously visited were implemented: *Id.* at 372. According to Wells' calculations 95% of the monitored plants had implemented some or all of the recommendations with respect to wages and health and safety; 76% had implemented some or all measures to correct violations of freedom of association; but only 41% of firms were in full compliance with hours of work and overtime requirements: *Id.*

[181] Polaski, *Combining Global and Local Forces*, *supra* note 32, at 924.

[182] Kolben, *Integrative Linkage*, *supra* note 32, at 239.

[183] As a result, the government extended monitoring program voluntarily beyond the end of Agreement. Kolben, *Integrative Linkage*, *supra* note 32, at 240.

[184] Kolben, *Integrative Linkage, supra* note 32, at 240, citing James Brooke, *A Year of Worry for Cambodia's Garment Workers*, N.Y. TIMES, Jan. 24, 2004, at C1.

Better Factories Cambodia program show relatively high levels of compliance with key labor standards.[185] For example, the most recent report dated December 2009 found that of factories monitored: in only 3% had the employer interfered with freedom of association; in only 1% had the employer engaged in anti-union discrimination; in only 1% were there children working; in 10% the employer had engaged in discrimination; in 100% the employer complied with the minimum wage for regular employees; in 94% the employer complied with the minimum wage for piece rate employees; in 90% overtime was voluntary.[186] These overall results are consistent with the findings of regular reports published by the program in recent years.[187]

Some problem areas remain. Compliance with important occupational safety and health measures remains in the 60% range.[188] The report also notes that Better Factories Cambodia is aware of allegations of corruption of some unions by factory representations and that this problem is difficult to detect.[189] Others have argued that this remains a persistent problem.[190] In addition, reform of state capacity to effectively administer labor laws lags behind. On one hand, the Labor Arbitration Council has been moderately successful, with parties implementing its awards in about 68% of cases despite the fact that the vast majority of those awards are non-binding.[191] The Labor Arbitration Council is seen in Cambodia as an exception to the weak and corrupt judicial system in place in Cambodia, and as "a model for judicial reform".[192] Kolben notes however that the initial goal of increasing the technical capacity of the Cambodian government to enforce labor rights has been a secondary part of the overall project.[193] Because of this Kolben has stated that it is "unclear…how much Cambodia's regulatory capacity has grown."[194] At least one commentator notes that progress on implementation of labor standards at the factory level is hindered by "the authoritarian nature of the government, widespread corruption, and the lack of institutions such as a strong

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[185] The synthesis reports for the Better Factories Initiative are available at: Better Factories Cambodia, Publications and Reports, http://www.betterfactories.org/ILO/resources.aspx?z=7&c=1 (last visited May 1, 2010).

[186] BETTER FACTORIES CAMBODIA, TWENTY THIRD SYNTHESIS REPORT ON WORKING CONDITIONS IN CAMBODIA'S GARMENT SECTOR 7-9 (2009) [hereinafter BETTER FACTORIES CAMBODIA].

[187] Comparison by author of reported compliance figures in 15th through 23rd Synthesis Reports.

[188] BETTER FACTORIES CAMBODIA, *supra* note 186.

[189] *Id.*

[190] For this reason Arnold argues that the UCTA agreement did not do much to help the establishment of unions and collective bargaining. According to him improving this situations will require employees to work from the bottom up to establish proper unions and weed out "yellow" unions: Dennis Arnold, Paper presented at "Workshop on Multinational Production and Labor Rights" at the University Center for International Studies: The Cambodia Experiment in Ethical Production: Dynamics of a 'GMO Approach' to Promoting Labor Rights and Investment 18 (Sept. 22-24, 2006) (on file with author).

[191] Posting of Duong Sokha to Khmer Nz News Media, Labour courts: The Wishes of Employers and Unionists Soon to be Granted? http://khmernz.blogspot.com/2009/05/labour-courts-wishes-of-employers-and.html (May 7, 2009) (quoting the Executive Director of the Arbitration Council).

[192] Lejo Sibbel & Petra Borrmann, *Linking Trade with Labor Rights: the ILO Better Factories Cambodia Project,* 24 ARIZ. J. INT'L & COMP. L. 235, 246 (2007).

[193] Kolben, *Integrative Linkage*, *supra* note 32, at 236.

[194] *Id.* at 242.

judiciary".[195]

Analysts have traced the relative success of the Agreement first and foremost to the capacity of its incentive and monitoring systems to align public and private sector incentives in Cambodia in favour of core labor standards compliance.[196] The Cambodian government had incentives to ensure that the program worked, and to ensure that employers improved or maintained working conditions. It responded by ensuring that employer incentives operated consistently with these goals. Interestingly, this alignment occurred not simply as a result of the distribution of access to the quota bonus. Perhaps more importantly, the transparency of ILO monitoring had the effect of bringing pressures from factory clients to bear as well. As Kevin Kolben explains, the monitoring program effectively integrated public and private sector forms of regulation in a manner that was particularly apt in the Cambodian context.[197] This integration yielded significant improvements in working conditions within a much shorter timeframe than would have been possible if all factory level labor standards compliance verification had been left to the public authorities, whose inefficient and corruptible labor administration will likely take years more to reform.[198]

Yet it is equally important to look further back in the causal chain to see how this innovative new form of regulatory regime came about. As Kolben points out, it would not have been possible to get the Agreement of the Cambodian government to implement it without the willingness of the US government to provide the conditional benefit of the quota bonus.[199] That influence was carefully deployed so as to make the development of innovative reform measures possible.

The approach to governance in the UCTA reduced the potential for zero sum deadlock over compliance. The Agreement made benefits available on condition that compliance targets were met, creating an incentive to put in place an effective regime, rather than to defend the status quo. At the outset the quota bonus represented a clear potential net gain for Cambodia and its textile an apparel producers.[200] It thus provided an opportunity

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[195] AMA MARSTON, REALIZING RIGHTS, LABOR MONITORING IN CAMBODIA'S GARMENT INDUSTRY: LESSONS FOR AFRICA 9 (2007) www.realizingrights.org/.../Labor_Monitoring_in_the_Garment_Industry_May2007_A_Marston.pdf (last visited May 13, 2010).

[196] Kolben, *Integrative Linkage, supra* note 32, at 241.

[197] *Id.* at 238-242.

[198] With respect to corruption in the Cambodian judiciary, see Arnold M. Zack, Paper prepared for ABA-LELS-International Committee Meeting, Beijing, China: Cambodia Moves Toward Industrialization (April 16, 2008), citing BOOZ ALLEN HAMILTON, UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT, USAID SOUTHEAST ASIA COMMERCIAL LAW AND INSTITUTIONAL REFORM AND TRADE DIAGNOSTICS – AAMBODIA 5 (2007).

[199] Kolben, *Integrative Linkage*, *supra* note 32, at 255.

[200] The quota bonus provided Cambodian producers with relief against an otherwise inevitable loss of market access. Because Cambodia was not a party to the WTO, it was not covered by the Multi-Fibre Agreement, which allowed for a system of quotas to be placed on textiles entering the U.S. and Europe. When foreign investors began to take advantage of this lack of quota restrictions in the mid-1990s, the U.S.

for mutually beneficial outcomes not only for the two governments but also for worker and employer interests in Cambodia. Cambodia was not defending acquired gains but rather seeking agreement on new advantages.

Under the Agreement the parties devised and a new and potentially more effective regulatory model to be implemented at the national level. They agreed upon a system for collection and publication of data on compliance which reduced opportunities for defensive evasion of commitments. The non-accusatory approach to monitoring and review did not require the initiation of conflict to maintain regulatory influence and provide accountability for results. The structures of the Agreement ensured that its objectives remained the subject of sustained deliberation by political decision makers as regular consultations mandated by the Agreement focused on progress towards compliance with national and international labor standards.

The monitoring system and automatic review procedures removed opportunities and incentives that Cambodia and the employers may have had to comply as minimally as possible. Further, the economic advantages of meeting consumer demand for labor standards compliance products eventually strengthened the alignment of private sector interests with compliance, and transformed the competitive strategy of many employers. The incentives provided by the regime thus gradually transformed the positions of key stakeholders and in turn the interests of the Cambodian state. This is evident in the willingness of Cambodia and many Cambodian companies to continue to participate in the ILO's Better Factories Initiative once the UCTA has ceased to operate.

In short, the UTCA deployed trade incentives to prompt an agreement on concrete measures to improve compliance by factories with core (and other) labor standards, and to continuously monitor and review compliance by Cambodia with its commitment. The Agreement elicited proactive cooperation from Cambodia and from its key domestic stakeholders. Because of the incentives generated by the innovative domestic regulatory model put in place to implement the UTCA, the interests of Cambodian employers and the Cambodian state were transformed as they came to perceive a competitive advantage in verifiably labor standards-compliant production. This kind of competitive advantage may serve as an important bridge to more general advantages of durable economic and social development accompanying core labor standards compliance. The experience under the UTCA provides evidence of the effectiveness of using economic leverage to underpin contingent, verifiable, actively monitored and mutually acceptable agreements on best efforts towards improved compliance.

Studies of experience under international environmental law offer suggestive corroboration for this conclusion. Case studies have illustrated how deployment of economic leverage to prompt agreement on verifiable commitments to specific environmental protection measures has resulted in some of the most effective of

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moved to close this loophole. The UCTA served to place a quota upon Cambodian textile exports. *See id.* at 204.

international environmental regimes. Parker finds for example that the use of trade leverage by the United States to promote use by foreign fishers of dolphin-safe tuna fishing techniques played a vital role in establishing and maintaining the successful Dolphin Conservation Initiative of the Inter-American Tropical Tuna Commission. It did this through what he describes as oblique influence, by: (1) securing producer and foreign state participation in a search for cost-effective alternative fishing techniques to avoid a trade embargo; (2) triggering national and transnational discourse on environmental risk avoidance strategies, while empowering and legitimating the voices of conservation in that discourse; and (3) thus catalyzing the formation of an international control regime and getting unwilling countries to accept monitors funded by an international secretariat who played an vital role in ensuring ongoing regime compliance. The regime appears to have dramatically reduced dolphin by-catch in the tuna fishery.[201] Similarly, Mitchell concludes that the success of International Convention for the Prevention of Pollution from Ships[202] in dramatically reducing the discharge of oil into ocean waters by oil tankers followed the adoption of tanker technology requirements in the face of a unilateral requirement to be imposed on all tankers entering its waters. The threat of U.S. action prompted development of cost effective technologies which in turn facilitated the negotiation and adoption of an international agreement precisely stipulating compliance requirements. Compliance with the technological requirements of the agreement is easily monitored and backed by the power of states to detain non-complying ships, which provides assurance to states and ship operators that non-compliant operators will not gain a competitive advantage.[203] Likewise, Raustiala argues that conditioning funds for the incremental costs of compliance with the Montreal Protocol on Substances that Deplete the Ozone Layer[204] on approval of signatory states' compliance plans, combined with systematic review of implementation of those plans, was critical to the success of the Protocol, widely regarded as one of the most successful examples of multilateral cooperation.[205] He observes that this case suggests that "while international lawyers have long looked to courts and tribunals as the preferred mode of peaceful adjudication in the international system, non-judicial and largely administrative structures... may be more effective in a second-best world of sovereign states unwilling to... abide international legal judgments." [206]

C. Inherent Limits of Adjudication and Sanctions-Based Constitutionalism in the Face of Political, Policy and Administrative Complexity

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201 Parker, *supra* note 99, at 49-57, 98-109.

202 International Convention for the Prevention of Pollution from Ships, Nov. 2, 1973, 1340 UNTS 184, 12 ILM 1319; modified by Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, Feb. 17, 1978, 1340 UNTS 61, 17 ILM 546.

203 Mitchell, *supra* note 144, at 435-453.

204 Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1541.

205 Kal Raustiala, *Compliance and Effectiveness in International Regulatory Cooperation*, 32 CASE W. RES. J. INT'L L. 387, 416-420 (2000).

206 *Id.* at 420.

By contrast, there are good reasons to think that relying primarily on adjudication to deploy the risk of sanctions will not enable an international legal regime to meet either the requirement for strategic and informed deliberation or the requirement for proactive cooperation. This is because the ASC model of governance provides no built-in capacity to set strategic priorities or to generate information needed for sound reform. It provides little inherent institutional capacity to generate and analyze policy options. While some of these deficiencies can be corrected, as I will explain, the corrections come only at expense of making adjudication a preliminary process leading to an LDC approach, or by deepening tendency of adjudication to intensify an uncooperative zero-sum logic. As a result, the ASC model must rely heavily on either strong deterrence to prompt deliberation and proactive implementation, or on efforts transform state interests, or both. Both of these avenues of influence, I will argue, are quite problematic in theory and on the available evidence.

(1) Lack of Capacity for Sustained, Informed and Strategically Focused Deliberation

The lack of capacity of adjudicative bodies for sustained, informed and strategically focused deliberation or legal, policy or administrative reform is inherent in obvious and general features of their operation. Adjudication processes are inherently ad hoc and as a result their focus depends upon interests the party initiating and pursuing the proceedings. Generally speaking, proceedings in international labor law are most often initiated by private parties.[207] The issues raised tend to reflect the particular concerns of and information and resources available to those parties. There is no reason a priori why the complaint filings of private parties should raise general issues that would take priority if they had been chosen in a process of strategic deliberation on which issues represent the greatest core labor standards compliance problems at the national level. Moreover, if the party that with carriage of the complaint at the point of binding dispute resolution is a state party, as is the case under current trade and labor agreements, the decision to pursue that matter may be subject to a range of political considerations. Any eventual remedies likely to focus on the particular actions or failures to act with respect to which the complaining party is able to provide evidence.

Adjudication tribunals are likely also to lack the information and institutional analytical capacity to arrive at effective solutions to non-compliance problems, or to monitor progress in remedying non-compliance. They are reliant upon party litigants to bring forth information. Because the process is international, much of the necessary information on underlying causes of non-compliance will lie in the hands of the defending state party and may not be subject to compelled production. Further, tribunals

[207] The ILO Committee on Freedom of Association has generated by far the largest share of ILO jurisprudence, almost entirely in response to complaints filed by worker organizations. All complaint-driven reviews under the North American Agreement on Labor Cooperation have taken place as a result of Public Communications filed by private parties.

generally lack basic bureaucratic capacity for policy analysis, including the interpretation of complex social science data. Finally, because they aim to produce a single determination with respect to whether or not legal norms have been violated, they are generally not set up to engage in iterative experimentation with solutions to complex problems.

As a result, adjudicative institutions faced with complex problems calling for positive interventions to bring about social and economic change will generally face the legitimacy dilemma described above: either risk specifying a single determinate remedy on the basis of incomplete information, or issue a general direction to the non-compliant party leaving it with ample discretion. The latter course runs risks inherent in leaving the supervision of compliance to further litigious proceedings. The complaining party may lose interest, or it may return to the tribunal with evidence sufficient to establish non-compliance but without information or analysis sufficient to specify a determinate remedy. The former course of action risks mistakes, over-instrusiveness and thus loss of legitimacy.[208]

Arguably, each of these problems could be addressed by modifying or supplementing adjudicative processes. The ad hoc character of complaints-driven processes subject to diplomatic intermediation could be overcome by creating an international prosecutorial body charged with proactively investigating allegations brought forward by non-government actors and with initiating complaints at the international level, prioritizing cases based on their overall importance to achieving core labor standards compliance improvements.[209] Institutions that proactively monitor compliance levels and research good policy and administrative practice could provide much of the information necessary to set such priorities, to devise appropriate remedies, and to monitor their implementation. A permanent international tribunal could be established to create a consistent jurisprudence to coherently address recurring issues.[210] The remedial dilemma facing adjudicators of choosing between deferring to national government plans of action or risking loss of legitimacy could be circumvented by empowering tribunals to directly supervise and require transparency in the development and implementation of such plans of action.[211] Incentives to make such a remedial process work could also be provided by

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[208] Sabel & Simon, *supra* note 162, at 1017-1018 and sources cited therein.

[209] For an argument along these lines, see Weiss, *supra* note 21, at 752-754. *See also* Daniel Ehrenberg, *From Intention to Action: An ILO-GATT/WTO Enforcement Regime for International Labor Rights*, *in* Compa & Diamond, eds., *supra* note 147, at 163-180 (proposing a tribunal which would accept complaints from private parties, subject to an admissibility screening process. Both of these proposals are designed to remove the diplomatic brake on dispute resolution, but could be adapted to provide some prioritization of issues addressed as well).

[210] Weiss, *supra* note 21, at 752.

[211] This experimentalist approach has emerged in the United States to resolve similar dilemmas in public law litigation aiming to reform the operation of government agencies and institutions such as schools or prisons in accordance with civil rights norms. *See* Sabel & Simon, *supra* note 162. Where plaintiffs in such law suits have been successful, courts have begun to make orders in which remedies are devised in ongoing negotiations involving interested parties. Remedial solutions are provisional and subject to revision in the light of experience. Transparency is mandatory: both good and bad results of remedial

deferring the application of sanctions subject to the success of the remedial plan of action. The international labor standards regime might thus build up the capacity of complaint driven adjudication to a set coherent and strategic core labor standards agenda, prompt negotiation in the shadow of the law, and thus bring about the legalization politics which would be required to pursue that agenda.

These modifications of the basic adjudication model would come at a price however. First, they would have the effect of making adjudication a costly preliminary processes to LDC governance. With these changes, adjudication now serves to prompt the negotiation that lies at the heart of the LDC approach and which now does most of the heavy lifting. If such dynamics can be brought about without passing through the lengthy gateway of complaint, adjudication and remedial order, one must question whether relying on the such processes to initiate the work that is needed to bring about compliance represents a wise investment of financial and diplomatic resources. If it is possible to do so, why not move directly to deliberative cooperation, and reserve adjudication for problems with implementing a program agreed upon in that way?

Secondly, and more importantly, moving to an independent prosecutor and tribunal system acting on privately initiated complaints stands to proliferate conflict and exacerbate the zero-sum logic inherent in litigious processes. As Dombois et al have noted in their study of the NAALC, the centrality of complaints procedures to the operation of that Agreement tended to generate a zero sum logic in its international relations.[212] Where such a finding of legal violation may lead to economic sanctions one would expect litigious processes to accentuate this zero sum logic. In any given case, if the complaint can be successfully defended, then the status quo is restored. The economic benefits placed at risk will remain secure unless and until the complainant once again musters the political will, resources and evidence to launch a new complaint. Each complaint is thus a single challenge to be fended off. The defendant has incentives to concede as little as possible at every stage. Conversely, nothing in this governance model provides the complainant with a future process of negotiation to look forward to in which it may have something to gain through forbearance in the present proceedings. To the contrary, adjudicative processes have inherent potential to accentuate divisions between party litigants and are thus unlikely to lead to proactive cooperative engagement in problem solving. Establishing that one party has failed to comply with its obligations requires the other to explicitly present allegations and evidence of wrong doing or inaction resulting in a failure to honour commitments. The further parties move into the argument of their positions the more likely they are to commit themselves to them. Making adjudication the central means of governance places such conflict at the centre of the regime.

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programs must be disclosed. Successes are benchmarked and become default solutions in the absence of a more promising local solution. Negotiations are based upon disciplined comparisons between jurisdictions. Pressure to make progress is maintained in part by the publicity generated by stakeholder empowerment and the transparency of outcomes.

[212] Dombois et al., *supra* note 21, at 435-440.

(2) Limited Capacity to Induce Proactive Cooperation

Given its inherently adversarial processes, there is little that can be done to change the zero-sum logic of complaint-driven adjudication itself. If ASC governance is to overcome the divisive effects of this logic, it must do so either upstream or downstream of litigation, either by deterring non-compliance or by influencing the politics subsequent to it and thus helping to bring about a new construction of state interests consistent with labor standards compliance. The literature proposing ASC governance models provides no account of how international adjudication processes could have either of these effects. Accordingly, I will turn once again to international relations theory to construct one.

Deterrence operates through a weighing of risks and benefits in the light of existing preferences. The rational instrumentalist perspective is therefore appropriate to analyzing it. The strongest argument for the deterrent capacity of the ASC model is that judicialization of dispute resolution would increase both the risk of its detection and accurate labelling as such, and increase the likelihood and severity of consequences flowing from that detection and labelling.[213] It is well known that judicial procedures accessible by private parties are more likely to be used than state to state procedures.[214] State parties may also be drawn to use judicial dispute settlement procedures to vindicate their interests because fair and independent fact finding and legal interpretation processes leading to a favourable decision will protect countermeasures such as sanctions from charges of international unlawfulness.[215] Adjudication may also enhance the influence at the disposal of states to secure compliance with international rules that favour their interests.

First, the credibility of a judicial determination in against a defendant state may increase the risk that that state will face reputational consequences for non-compliance, since it removes most doubt about the state of non-compliance. A non-compliant state is thus more likely to find it more difficult to pursue its own interests in future negotiations with states that may not trust its capacity to honour its commitments. Secondly, a credible judicial finding of non-compliance also raises the stakes of continuing non-compliance since it may cause others to doubt the assurance that the legal regime provides, and thus put at risk the longer term value of the regime to all states party to it. As a result, it is likely to lead to international community pressure towards compliance. Thirdly, the legitimacy of a judicial finding of non-compliance may create embarassment and stigma for a government within the domestic politics, and may mobilize domestic opposition to its non-compliant policies. Finally, the legitimacy of a judicial finding of non-

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[213] Lawrence Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals, A Response to Professors Posner and Yoo,* 93 CAL. L. REV. 899, 904 (2005).

[214] Lawrence Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273, 284 (1997) [hereinafter Helfer & Slaughter, *Toward a Theory of Effective Supranational Adjudication*].

[215] Bernhard Zangl, *Judicialization Matters! A Comparison of Dispute Settlement Under GATT and the WTO*, 52 INTERNATIONAL STUDIES QUARTERLY 825, 829 (2008).

compliance and may increase pressure within a complainant state to impose sanctions in order to secure compliance, and thus strengthen the hand of the government in the face of domestic opposition to the imposition of sanctions.

Constructivist theory supplies arguments about how judicialization might transform state interests by influencing the politics of compliance.[216] For the defendant state, a clear and legitimate identification of illegality through judicial proceedings may conflict with a national self-conception as a law-abiding state and thus cue a government to rethink its interests and to comply. In addition, or in the alternative such a finding may lend legitimacy to and thus empower and motivate domestic actors supporting compliance in national political debate. It might also help to transform the terms upon which national political debate takes place in a way that valorizes labor standards compliance, increase the political salience of core labor standards within that debate, and correspondingly reduce the political availability of avoidance of compliance problems.[217]

Note however that these theories do not map completely onto international labor affairs in today's international political economy. As discussed above in Part IV, many states appear to be able to separate non-compliance with international labor law from reputational effects in other spheres of international relations. While this state of affairs may change, such changes may well be a long time in coming. As a result, it is likely that any potential strengthened reputation effects resulting from judicialization would be associated mainly with the violation, inherent in not complying with a judgment, of rule of law norms that require respect for international tribunal decisions. For similar reasons, judicialization of international labor law may not in itself significantly raise the stakes for an assurance regime important to a non-compliant state and others likely to pressure it, even if labor standards are embedded in an international trade regime. States will preserve the capacity to distinguish different forms of non-compliance within a complex international trade agreement. They will be most concerned with whether non-compliance is likely to undermine the assurance of compliance with particular obligations strongly serving their economic interests. They will be looking for signals from other states that they continue to perceive their long term interests as being served by complying with those particular obligations. Non-compliance with international labor obligations may say nothing in particular about that question. Further, if states have chosen to pursue short run gains obtainable through low labor standards rather than long run gains obtainable by observing them, they will be less concerned about undermining assurance of labor standards compliance (even though this choice may be in part due to the unavailability of such assurance).

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[216] Because rational instrumentalism sees state interests as formed endogenously, it tends to see adjudication as serving mainly to provide information - a procedurally fair determination of what international law requires in a given context – but not as influencing state conceptions of their own interests. Adjudication may ascertain the facts of non-compliance, but would not influence what states decide to do on the basis of those facts. *See, e.g.,* Eric Posner & John Yoo, *Judicial Independence and International Tribunals*, 93 CAL. L. REV. 1, 7-25 (2005).

[217] Robert O. Keohane, Andrew Moravcsik & Anne-Marie Slaughter, *Legalized Dispute Resolution: Inter-state and Transnational,* 54 INT'L ORG. 457, 476-479 (2000).

As a result, the potential deterrent capacity of the ASC model in international labor law will depend upon its capacity to mobilize economic the withdrawal of economic benefits, and upon any additional influence that rule of law norms associated with judicial processes can exerts upon the reputation interests of non-compliant states. The interest transforming capacity of the ASC model likewise depends heavily upon the additional influence that such rule of law norms might provide to judicial processes within domestic politics of non-compliant states.

In what follows I argue that neither source of influence is likely to overcome the problems created by the uncooperative zero sum international relations inherent in relying primarily on complaints adjudication to deal with complex problems of labor standards implementation.

(a) The Constrained Influence of Rule of Law Normativity

As noted above, states may comply with decisions with which they disagree because they see themselves as law-abiding, because domestic actors will be mobilized to pressure the government by or in response to a decision to pressure the government to comply, or out of a desire to preserve an international reputation as a state that respects the rule of law. There is however no reason to conclude *a priori* that adjudication will necessarily exert significant influence in any of these ways. [218] From an external perspective courts and tribunals can be considered political actors engaged in a system of governance.[219] Within that system, as Lisa Conant puts it, "no political institution graciously cedes authority to another". [220] Government actors are constrained from defying court decisions by the risk of negative consequences, notably the loss of legitimacy that may result from doing so. The strength of those constraints depends on the political support for norms that support compliance such as the legitimacy of courts as interpreters of the law, the illegitimacy of political acts not in accordance with the law, support for particular legal norms, and so on. The greater the political change entailed by a court decision, the greater the risk that political actors will tilt towards avoidance or even open defiance. [221] As courts must rely upon executive branches to enforce their decisions, such responses inevitably undermine

[218] Even theories arguing for such influence have tended to emphasize the importance of an already receptive domestic political environmental and legal institutions to enabling it. *See, e.g.,* Helfer & Slaughter, *Toward a Theory of Effective Supranational Adjudication, supra* note 214, at 389 (arguing that a transnational community of law is both a cause and a consequence of effective supranational adjudication.)

[219] Richard Fallon, *Constitutional Constraints*, 97 CAL. L. REV. 975, 1015-1021 (2009).

[220] LISA CONANT, JUSTICE CONTAINED: LAW, POLITICS AND THE EUROPEAN UNION 213 (Cornell University Press 2002).

[221] As actors within such a political system, domestic courts are constrained not only by the legal norms that they have to apply but also by the risk of being inefficacious, that is, of having their decisions avoided or ignored if they become politically unrealistic. Awareness of this risk leads to judicial prudence. Fallon, supra. The same is likely to be true at the international level, where the political position of tribunals may be more delicate.

their effectiveness.

Secondly, the characteristics that make international tribunals legitimate as actors in a political setting, and those that define them as legal institutions - their neutrality, their adherence to the technical requirements of legal analysis, their prudent, incremental and technically framed conclusions[222] - may tend to make them unlikely to be sources of political influence. These characteristics may attract the support and adherence of national level courts and tribunals. But there is no reason a priori to conclude that such legal procedures will necessarily mobilize a wider constituency. In fact, the incremental and technical quality of legal decision making often may not provide for the kind of compelling narrative upon which political activists have tended to base their campaigns.[223]

Below I consider the implications of recent studies of the experience with international adjudication in international human rights law a field in which regional international adjudication is well developed. I will argue that experience has tended to bear out expectations that adjudication processes have very limited independent capacity either to deter non-compliance through potential reputation sanctions or to exert transformative influence on national politics. I will corroborate these observations with a brief discussion of the literature on compliance with U.S. court decisions requiring implementation of politically controversial social policy or program changes to vindicate human rights.

(i) International Human Rights Adjudication

It is often difficult to disentangle the effects of rule of law normativity from other factors that may influence the effectiveness of an international adjudication system in ensuring compliance with the law that it is called upon to enforce. To date, the empirical literature on international adjudication does not provide sufficient direct measures of the influence of rule of law normativity to enable conclusions about its potential influence in the operation of the new trade and labor regimes.[224] It is possible however to draw

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[222] Helfer & Slaughter, *Toward a Theory of Effective Supranational Adjudication, supra* note 214, at 298-328.

[223] GERALD ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 422 (2d ed., University of Chicago Press 2008) [hereinafter ROSENBERG, THE HOLLOW HOPE].

[224] It may be possible to separate sources of influence using regression analysis, but I am not aware of any studies of international adjudication that do so at a sufficiently fined grained level. Bown finds reports that a finding of GATT violation by a GATT or WTO adjudicative body in itself proved significant in explaining the level of trade concesssions following the ruling on for relatively small state defendants, a finding of significance that was not robust to alternative model specifications. Chad P. Bown, *On the Economic Success of GATT/WTO Dispute Settlement*, 86 THE REVIEW OF ECONOMICS AND STATISTICS 811 (2004). However, Bown's measurement could reflect the force of GATT / WTO substantive norms independently of adjudication, the influence of adjudication, concern about reputational effects, concerns about damaging the WTO system, or perhaps most likely, a combination of all of these things. Detailed case studies may eventually provide evidence upon which to draw inferences. However, case study design often does not sufficiently distinguish between sources of influence to convincingly assess the independent

inferences from the significant limitations of the influence of international courts in dealing with problems similar to those often faced by international labor law in terms of their complexity, political contentiousness and extended time period required to remedy legal non-compliance. If well developed international court systems with characteristics that should enhance their effectiveness face such limitations despite drawing upon a full range of sources of influence (including reputation interests, the compliance pull of substantive regime norms and the compliance pull of rule of law norms), then it is fair to infer that the rule of law normativity of such regimes will generally not have significant influence on outcomes in trade and labor regimes.

The influential work of Slaughter and Helfer identifies a set of characteristics that can be reasonably predicted to enhance the effectiveness of a international tribunal.[225] Tribunals with capacity to accept petitions directly from private parties and issue judgments legally binding on states should tend not only to have greater capacity to address a wide range of issues free from the political filter that states may impose, but also greater possibilities for direct relationships with domestic courts, administrative agencies or legislative committees that may apply or be influenced by their judgments. These channels of influence stand to be enhanced by a series of international tribunal characteristics that lend credibility and force to court decisions, including: composition of the court including senior national and international jurists, independent fact finding capacity, the formal binding nature of decisions, the neutrality and demonstrated autonomy of the court, and the quality of its legal reasoning. On the other hand, international court influence is likely to encounter greater resistance in the face of serious and extensive legal violations, and the absence of autonomous national institutions which can respond to international judgments.

The relevant empirical literature remains small, in part because there are so few fully developed courts and tribunals at the international level, and in part because those which do have such characteristics have seldom been charged with adjudicating claims of analogous complexity and contentiousness. GATT and WTO adjudicative bodies have generally not been called upon to address such issues and in fact appear to have been consciously constrained by states from assuming authority that would allow them to seek to do so.[226] The Inter-American Court of Human Rights provides a notable exception to

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normative influence of adjudication. Zangl, *supra* note 215, for example, ascribes influence to the normative commitments of GATT and WTO parties, but without identifying the particular sources of such influence.

[225] Helfer & Slaughter, *Toward a Theory of Effective Supranational Adjudication, supra* note 214, at 298-336.

[226] GATT adjudication followed rather than led the influence of GATT norms in national politics. In the early years of the GATT, dispute resolution processes were informal, diplomatic, and allowed wide latitude for political settlement without reference to legal norms. *See* Joost Pauwellin, *The Transformation of World Trade*, 104 MICH. L. REV. 1 (2005). Adjudication processes were only gradually formalized over several decades. They provided what Robert Hudec has characterized as a "diplomat's jurisprudence" - intentionally vague and with little precedential value – in order to permit parties ample opportunity to negotiate solutions outside of the limelight of legal condemnation. ROBERT HUDEC, ENFORCING INTERNATIONAL TRADE LAW: THE EVOLUTION OF THE MODERN GATT LEGAL SYSTEM 11-12 (1993). At

this rule. The IACHR has a mandate to adjudicate claims filed by individuals of violations of an international charter of human rights.[227] It is comprised of independent judges with legally protected tenure. It has the power to order remedies requiring state action in the form of compensation or changes to administrative practice or legislation. It has issued an extensive jurisprudence often dealing with systematic human rights abuses by public authorities. It has ordered governments to investigate abuses and prosecute rights violators in order to remedy the abuses and eliminate the climate of impunity which permits them to survive. The experience of the IACHR stands to provide valuable insights.

A recent review of compliance with orders of the IACHR by Cavallaro and Brewer

> ... reveals a clear (though not universal) pattern in states' reactions to its judgments. The pattern that emerges demonstrates that states generally pay some or all of the monetary damages awarded by the Court. In addition, states may comply with symbolic reparations, including those concerning public ceremonies. However, when it comes to more far-reaching measures to reduce impunity and advance human rights (such as prosecuting past violations or changing laws and practices), compliance is considerably less likely. Most salient, virtually no compliance decision records that a state has effectively investigated and punished the perpetrators of a human rights violation forming the basis of a Court decision. Even when states report taking some steps toward a full investigation of the case or having prosecuted some of the alleged perpetrators, they often do not progress to investigating fully or prosecuting all the parties involved, weakening the impact of

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one point in the 1960s when new and difficult issues combined with an expanded and much more diverse membership placed the normative structure of the GATT under major strain, dispute resolution ceased entirely. *Id.* at 12-13. Only after 47 years of the regime's operation did the WTO agreements significantly strengthen and formalized dispute resolution processes applicable to GATT commitments. Since that time WTO panels and the Appellate Body have begun to develop a rigorous jurisprudence with precedential force. Yet it has in the main been a cautious and technical jurisprudence, hewing closely to treaty text. As Richard Steinberg puts it, the WTO Appelate body operates within a "strategic space" that is "bounded by three nested factors: WTO legal discourse, which could be constrained by constitutional rules, both of which are constrained by politics." According to Steinberg, it is the political constraints that impose the most significant restrictions on expansive judicial lawmaking by the Appellate Body. Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AM. J. INT'L L. 247, 249 (2004). When panels did in fact seek to advance what panel members understood to be the norms of the multilateral trading system in rulings into politically contentious fields, such as the interaction between international trade law and national environmental protection laws, their rulings served mainly to galvanize opposition to the expansion of the world trading system rather than to promote acceptance of their interpretations of its norms. *See* Jose E. Alvarez & Robert Howse, *From Politics to Technocracy, and Back Again; the Fate of the Multilateral Trading Regime*, 96 AM. J. INT'L L. 94 (2002).

[227] The Inter-American Court of Human Rights accepts complaints from individuals, on referral from an independent commission, once domestic avenues of relief have been exhausted. ORGANIZATION OF AMERICAN STATES [OAS], RULES OF PROCEDURE OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS arts. 23 & 31 (Oct. 28-Nov. 13, 2009), *reprinted in* OAS, *Basic Documents Pertaining to Human Rights in the Inter-American System*, OAS/Ser.L/V/I.4 rev.12 (2007), http://www.cidh.oas.org/Basicos/English/Basic18.RulesOfProcedureIACHR.htm.

> those legal processes in combating impunity. States also frequently fail even to provide the Court with the data necessary to determine whether the state is complying with a judgment or not. ....As of 2007, the Court reported full compliance in only 11.57 percent of resolved cases. [228]

In their review of cases where states fully complied, Cavallaro and Brewer find that rather than stemming directly from Court orders advances in the human rights practices have depended on the ability of social movements and human rights advocates on the ground to exert pressure on authorities to implement change. This in turn has required coordinated, long-term advocacy strategies involving grassroots organization and mobilization.[229] In most instances the movements in question had already gained strong political support for or at least neutralized much of the opposition to the remedies that they were seeking. [230] Cavallaro and Brewer conclude that:

> in states where respect for human rights is not entrenched, supranational tribunals are unlikely to enjoy the automatic implementation of their decisions, particularly when these decisions call for a significant political or financial commitment or implicate endemic human rights problems. As a result, supranational courts will often lack the power to trigger lasting improvements in the protection of human rights simply by directing governments to change their practices.[231]

The experience of the IACHR contrasts with that of the European Court of Human Rights (ECHR). At least in its early years, the ECHR enjoyed high rates of compliance with its judgments.[232] Cavallaro and Brewer suggest, consistent with other comparative

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[228] James L. Cavallaro & Stephanie Erin Brewer, *Reevaluating Regional Human Rights Litigation in the Twenty First Centurey: The Case of the Inter-American Court*, 102 AM. J. INT'L L. 768, 785-786 (2008). The finding that states generally comply fully or partially with damage orders needs to be understood in context as well. As Caravallo and Brewer note, the Court only adjudicates a tiny fraction of the petitions that could potentially be referred to it:

> "From the Court's inception through the end of 2007, it had issued 174 determinations in ninety-five contentious cases. From 2004 to 2007 (following... systemic reforms discussed above), the Court resolved approximately fourteen cases annually, including a total of seventeen in 2006. Yet these numbers still represent an average of less than one case per year for each country that has recognized its contentious jurisdiction. Recalling that the Inter-American Commission receives more than thirteen hundred complaints each year--which already represent only a fraction of total victims of rights abuses--it is clear that the fourteen or so cases resolved by the Court each year make up a tiny percentage of the potential cases that would progress through the system if every victim of human rights violations had his or her proverbial day in court.

Id. at 781-2. As a result, the damages awarded often represent a very small gesture in the face of large systemic problems.

[229] *Id.* at 788.

[230] *Id.* at 790-702.

[231] *Id.* at 770.

[232] As of 1999 the Court had adjudicated more than 670 cases, making 460 findings of violation. According to Posner and Yoo, the Court claims that damages consistently paid and reports 294 cases in which states have changed domestic laws to comply with its decision. *See* Posner & Yoo, *supra* note 216, at 65.

observers of the experience of the ECHR and IACHR, that the difference in rates of compliance can be accounted for by two factors. First, the cases facing each court have tended to be quite different. Until recently at least, most violations faced by the ECHR were minor and technical in nature, and the majority of petitions concerned matters of a non-violent and administrative character. [233] Resolving the underlying problems giving rise to these complaints did not require large scale policy overhauls by defending states. Thus the ECHR had dealt with a very different case load from that faced by the IACHR (and likely to be faced in many parts of the developing world by any tribunal charged with adjudicating allegations of non-compliance with core labor standards). Secondly, the ECHR benefited from an already receptive political, policy and institutional environment in most European states, in contrast with the environment in much of Latin America.[234]

The contrast between the experience of the ECHR and IACHR suggests that the influence of international human rights court judgments is likely to be highly dependent on already receptive domestic political conditions. In the absence of such conditions states will tend to engage in superficial compliance or avoidance of judgments. Moreover, international human rights court judgments have tended to do little to catalyze or mobilize domestic political support that had not already otherwise developed.

These observations are consistent with those of other comparative studies of human rights tribunals,[235] and with the findings of an in-depth study of the influence of four judgments of the European Court of Justice mandating significant policy and administrative change on the part of European Union member states.[236] Experience with even relatively strong

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[233] Helfer & Slaughter, *Toward a Theory of Effective Supranational Adjudication, supra* note 214, at 329. Caravallo and Brewer point out that things are changing for the ECHR. They note that the entry of roughly twenty new members into the Council of Europe beginning in the early 1990s--many of which are former Soviet bloc states typified by grave violations and more limited experience of the rule of law than Western Europe--has presented the ECHR with a significantly different political climate, and both challenges to its authority and an increased number of cases involving systematic, violent human rights violations and that the majority of ECHR judgments awaiting compliance supervision by the committee now involve Eastern European member states and Turkey. Caravallo & Brewer, *supra* note 228, at 773.

[234] Similarly, Posner and Yoo argue that the ECHR operated in a context of significant political and normative unity. The political unity arguably leads to greater acceptance of regional institutions. The normative unity results from prior sociological and political convergence towards human rights norms. As a result, the Court's judgments have may have tended to fill gaps in the realization of pre-existing political commitments, through processes seen as politically legitimate, rather seeking to transform political commitments and processes in more profound ways. Posner & Yoo, *supra* note 216, at 66-67.

[235] See Helfer & Slaugher, *Toward a Theory of Effective Supranational Adjudication, supra* note 214 for a review. *Id.* at 329 that:

> A sad paradox results. At least in the human rights arena, international human rights regimes an the supranational tribunals that enforce them have been most effective in states that arguably need them the least: those whose officials commit relatively few, minor and discrete human rights violations.

[236] CONANT, *supra* note 220, concludes at page 214 that "...national officials typically obey an individual ECJ decision as it concerns the parties to the case, and ignore the broader policy implications of the ruling... The book's four case studies illustrate how broader societal and institutional responses were necessary to break cycles of contained compliance." Of particular relevance, she notes at page 215 that where legal challenges sought access to social benefits for migrant workers, "the specter of ongoing, but

supranational international tribunals thus suggests that faced with compliance problems calling for complex and contentious changes in state practice, neither the direct influence of tribunal judgments on states' reputation interests nor their indirect influence on national political discourse is likely to contribute significantly to overcoming resistance to those changes. The main contribution of international tribunal judgements to bringing about such changes has been to validate the claims of social movements that have already achieved considerable political purchase, and to provide a justification or cover that allows political authorities to make concessions in the face of already mounting pressure.

The literature and experience upon which these conclusions are based remains thin. However such conclusions are consistent with the findings of a deeper literature on the conditions under which domestic courts in the United States have succeeded in mandating complex and program change in response to human rights claims, to which I will now turn.

(ii) Civil Rights Litigation in the United States

Strategic litigants have repeatedly called upon Federal courts in the United States to remedy violations of human rights in ways calling for significant institutional reform. Those courts tend to be much better placed than international courts and tribunals in terms of the effectiveness characteristics discussed above, most importantly because as domestic political institutions embedded in a society with strong rule of law norms, US courts have a greater store of political legitimacy and popular support than international tribunals are likely to enjoy.[237] The experience of US Federal courts ordering remedies for rights violations requiring extensive state action is therefore not only instructive, it provides something of a rough litmus test of potential outer limits of the capacity of international tribunals to successfully order the kinds of changes required by compliance with core labor standards.

The literature on the capacity of U.S. courts to bring about significant social reform has tended to divide into two branches starting from a common point of origin.[238] That point

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uncoordinated legal challenges regarding access to social benefits, which concentrate significant costs on member states, resulted in continuing evasion, legislative overrule, and strategies of pre-emption".

[237] See the comparison in CONANT, *supra* note 220, of US courts to the ECJ at 218.

[238] Works within this vast literature which inform my discussion include the following: David A. Bernstein & Ilya Somin, *Judicial Power and Civil Rights Reconsidered*, 114 YALE L.J. 591 (2004); Scott L. Cummings & Deborah L. Rhode, *Public Interest Litigation: Insights from Theory and Practice,* 36 FORDHAM URB. L.J. 603 (2009); GOVERNING THROUGH COURTS (Richard A. L. Gambitta, Marlynn L. May & James C. Foster eds., Sage Publications 1981); JOEL HANDLER, SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE (Academic Press 1978); MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (Oxford University Press 2004); Jules Lobel, *Courts as Forums for Protest*, 52 UCLA L. REV. 477 (2004); MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION (University of Chicago Press 1994) [hereinafter MCCANN, RIGHTS AT WORK]; Michael W. McCann, *Reform Litigation on Trial*, 17 LAW & SOC, INQUIRY 715 (1992) [hereinafter McCann, *Reform Litigation on Trial*]; Michael McCann, *Causal versus Constitutive Explanations (or, On the Difficulty of*

of origin is the recognition that because courts do not have power to implement their own decisions, they act only by issuing judgments and must depend upon other actors to implement them. As a result the direct influence of courts in such cases is determined by the capacity of legal judgments to affect the interests of governments and government agencies, interests which include staying in power and accomplishing a political or policy agenda. If court rulings coincide with such agendas the state will of course cooperate in implementing them. If the government is indifferent or not strongly opposed, and a ruling can be implemented through market forces or other civil society actors, it will likely acquiesce. Otherwise political actors will have incentives to seek to avoid or even defy court decisions. They may on the other hand be constrained from doing do by the risk of negative consequences such as the loss of legitimacy or even being voted out of office.[239] The influence of court rulings thus lies mainly in the direct risk that defiance by a government of a court decision poses to its political legitimacy, or in the indirect risk that a judgment will mobilize or empower political opposition or transform the terms upon which national political debate takes place so as to damage the government's capacity to pursue its agenda.

The main divergence within the literature lies in the extent to which authors have tended to see these indirect effects of adjudication as likely and potent. One school of thought sees relatively little potential for this kind of mobilization or transformation. In this view courts are also likely to be in a poor position to exert indirect influence since relatively few people know what they do on important issues, and fewer still are likely to combine that knowledge with a belief in the legitimacy of the Court as a political actor.[240] Further, the complex and technical nature of litigation makes it a difficult motor for mobilization of political movements beyond expert constituencies.[241] A second school of thought sees the legal interpretations that courts provide and practices of legal argument in and

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Being so Positive...), 21 LAW AND SOC. INQUIRY 457 (1996) [hereinafter McCann, *Causal versus Constitutive Explanations*]; SUSAN GLUCK MEZEY, PITIFUL PLAINTIFFS: CHILD WELFARE LITIGATION AND THE FEDERAL COURTS (University of Pittsburgh Press 2000); Laura Beth Nielson, *Social Movements, Social Process: a Response to Gerald Rosenberg*, 42 J. MARSHALL L. REV. 671 (2009); JAMES T. PATTERSON, BROWN V. BOARD OF EDUCATION: A CIVIL RIGHTS MILESTONE AND ITS TROUBLED LEGACY (Oxford University Press 2001); ROSENBERG, THE HOLLOW HOPE, *supra* note 223; Gerald Rosenberg, *Positivism, Interpretivism, and the Study of Law,* 21 LAW & SOC. INQUIRY 435 (1996); Gerald Rosenberg, *Hollow Hopes and Other Aspirications: A Reply to Feeley and McCann*, 17 LAW & SOC. INQUIRY 761 (1992); Gerald Rosenberg, *Saul Alinsky and the Campaign to Win the Right to Same Sex Marriage*, 42 J. MARSHALL L. REV. 643 (2009); STUART SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE (Yale University Press 1974); LEVERAGING THE LAW: USING COURTS TO ACHIEVE SOCIAL CHANGE (David A. Schultz ed., Peter Lang 1998); Vincent James Strickler, *Green-Lighting Brown: A Cumulative Process Conception of Judicial Impact*, 43 GA. L. REV. 785 (2009); Mark Tushnet, *Some Legacies of Brown v. Board of Education*, 90 VA. L. REV. 1693 (2004).

[239] Fallon, *supra* note 219, at 1015-1021. The strength of such constraints will depend upon the strength of political support for norms supporting compliance including the legitimacy of courts as final interpreters of law, the illegitimacy of political action not in accordance with law, and the extent of political support for particular constitutional norms. The greater the political change entailed by a Court decision, the greater the risk that political actors will tilt towards avoidance or even open defiance.

[240] ROSENBERG, THE HOLLOW HOPE, *supra* note 223, at 424.

[241] *Id.*

around litigation as woven into the fabric of political life, and thus as a potent wellspring of change.[242] In my view the accumulated evidence with respect to judicial review of government action is more supportive of the former position than of the latter.

The focal point of the literature on the capacity of US courts to bring about significant state policy and administrative reform remains Gerald Rosenberg's *The Hollow Hope*.[243] Rosenberg presents detailed case studies of the effects on the ground of court orders for reform in a wide range of fields including school desegregation, access to abortion, women's equality rights, electoral district re-apportionment, prison administration, rights of juvenile defendants, exclusion of evidence obtained in violation of constitutional rights from criminal trials, access to legal representation in criminal trials, and rights to same sex marriage. His case studies look for direct impacts of court decisions in the form of changes in state practice effective in vindicating the interests that the litigation was meant to serve. They also examine the historical record for indirect effects, looking for increased salience of issues within the national political agenda, changes in public opinion, or encouragement of advocacy groups. Rosenberg finds that court orders in cases requiring extensive changes in state practice in the face of significant political resistance were generally ineffective at the direct level, attracting at best superficial compliance that left the substantive aims of the order unrealized. This was the case, according to Rosenberg: in school desegregation litigation as the United States Supreme Court's decision in *Brown v. Board of Education*[244] remained largely unimplemented until the passage of the Civil Rights Act by the United States Congress some ten years later;[245] in women's rights litigation where despite important court rulings aimed at ending systemic discrimination in labor markets little progress in eliminating wage discrimination an occupational segregation took place in the absence of collective bargaining or government action to implement it;[246] in prison reform litigation where implementation of major legal victories remained blocked or severely limited except where public or political acceptance of reform was strong or prison administrators already saw the benefits of reform prior to litigation;[247] criminal justice reform where exclusion of unconstitutionally obtained evidence had little deterrent effect on unlawful search and seizure in the absence of willingness on the part of police administrators to give exclusion for such reasons career consequences;[248] in rights to counsel in criminal

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[242] For different perspectives within this school of thought, see McCann, *Reform Litigation on Trial*, *supra* note 238; MCCANN, RIGHTS AT WORK, *supra* note 238; McCann, *Causal versus Constitutive Explanations*, *supra* note 238; Bradley C. Cannon, *The Supreme Court and Policy Reform: The Hollow Hope Revisited*, *in* Schultz, ed., *supra* note 238; Lobel, *supra* note 238; Michael J. Paris & Kevin J. McMahon, *The Politics of Rights Revisited: Rosenberg, McCann and the New Institutionalism*, *in* Schultz ed., *supra* note 238; and David Schultz & Stephen Gottlieb, *Legal Functionalism and Social Change: A Reassessment of Rosenberg's The Hollow Hope*, *in* Schultz ed., *supra* note 238.

[243] ROSENBERG, THE HOLLOW HOPE, *supra* note 223.

[244] 347 U.S. 483 (1954).

[245] ROSENBERG, THE HOLLOW HOPE, *supra* note 223, at chs. 2 and 3.

[246] *Id.* at ch. 7.

[247] *Id.* at ch. 11.

[248] *Id.*

justice which most often failed to provide robust representation because governments failed to commit sufficient resources to public defenders offices;[249] and in same sex marriage litigation where a handful of victories extending often limited marriage rights to same sex couples created a backlash resulting in measures in forty five states to prevent the recognition of same sex marriages and twenty seven amendments to state constitutions limiting marriage to heterosexuals.[250] Where court decisions did produce extensive direct effects, Rosenberg found that that ordinary constraints on the effectiveness of court decisions had been lifted by social and political change occurring independently of the court decision. This happened for example: when the U.S. Supreme Court's decisions in *Roe v. Wade*[251] and *Doe v. Bolton*[252] reflected growing social and political acceptance of a woman's right to choose to terminate a pregnancy (evident in the increasing trend line in abortions which predated those decisions are remained unaffected by them) and could be implemented by private markets for abortion services;[253] and when re-apportionment litigation received broad support within the U.S. public and political elites without threatening major policy directions and interests of powerful incumbents (who could often avoid such consequences by gerrymandering new district boundaries).[254]

Nor do court judgments supportive of reform appear to have had sufficient indirect influence to bring about reforms. Rosenberg reviews the history of the civil rights movement, of the abortion rights movement, of the women's rights movement and of the movement for same sex marriage. He finds no evidence that *Brown v. Board of Education* gave desegregation increased political salience, pressed political elites to act, legitimated the claims of desegregation proponents in public discourse, or strongly motivated civil rights activists. He finds on the contrary that *Brown* did have the effect galvanizing opposition to reform in the southern states.[255] He finds no increase in the political salience, media coverage, the growth of the women's movement or public support following the Supreme Court's *Roe* and *Doe* decisions. Government officials actually tended to be more hostile to abortion rights after the decision than before it. Again, opponents of abortion rights were able to use the decision to successfully mobilize opposition.[256] Similarly, victories for same sex marriage rights in state courts did more to mobilize opposition than to generate public support and to broaden the movement in favour of such rights. He concludes that courts will generally not be able to bring about significant social reform unless their decisions (1) already enjoy support for the change within the legislature and executive and there is either support from some citizens or at least low levels of opposition from all citizens, and (2) either positive incentives are

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249 *Id.*

250 *Id.* at ch. 13.

251 410 U.S. 113 (1973).

252 410 U.S. 179 (1973).

253 ROSENBERG, THE HOLLOW HOPE, *supra* note 223, at ch. 7.

254 *Id.* at ch. 10.

255 *Id.* at ch. 4.

256 *Id.* at ch. 8.

offered to induce compliance, or costs are imposed to induce compliance, or court decisions allow for market implementation, or administrators or officials crucial to implementing it already have reason to support it because it may provide additional resources or provide cover for acting on it in the face of resistance.[257]

Critics have argued that Rosenberg's methods are insufficiently attentive to potential indirect effects of court decisions and to the potential of those effects to lead to social change. Their critiques have focused almost exclusively on Rosenberg's analysis of the impacts of *Brown v. Board of Education*. They have argued that Rosenberg understates how *Brown*: raised the hopes of African Americans that change might come by showing that the racist power structure was vulnerable;[258] made criticism of segregation acceptable and legitimate;[259] transformed the way that activists and members of the public thought about civil rights by making values actionable as claims of legal right;[260] and inspired movement participants.[261] There is room for debate on the historical facts about whether this is the case.[262] Critics have also argued that litigation is particularly effective at gaining publicity for causes that the public might otherwise overlook.[263] Yet even if all of these points are conceded to the critics, they are simply evidence of changes within the understandings and strategies of the activist movement, and in public perceptions and awareness of social problems. Such changes may contribute to bringing about significant reforms. However, in the absence of evidence of concrete consequences flowing from these indirect effects, it is simply conjecture to conclude that they will necessarily overcome the resistance that faces them.

With one possible exception, there is little evidence in the critical literature of any clear causal pathway from those indirect effects to changes in the practices that litigants set out to transform. A number of observers have pointed out that *Brown* set public debate on segregation in motion.[264] It mandated action on an issue of great importance to white racists, sparking massive resistance to desegregation.[265] Bernstein argues that this may have been a necessary step in dismantling desegregation because it led southern jurisdictions to absorb costs that in the end were unsustainable.[266] Klarman points out that the costs of this massive resistance were raised only once President Eisenhowever showed a willingness to use federal troops to break blockades of schools, with the result that the only way to avoid integration was to close schools. Eisenhower's decision was

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[257] *Id.* at 420-423.

[258] McCann, *Causal versus Constitutive Explanations, supra* note 238; Schultz & Gottlieb, *supra* note 242.

[259] Schultz & Gottlieb, *supra* note 242.

[260] McCann, *Reform Litigation on Trial*, *supra* note 238.

[261] CANONT, *supra* note 220, at 224 – 232; Tushnet, *supra* note 238.

[262] See KLARMAN, *supra* note 238, at 368-381 for an argument that Brown did have symbolic importance for movement participants because it showed that success was feasible and made desegregation a front page issue.

[263] Lobel, *supra* note 238.

[264] *Id.*

[265] S*ee, e.g.,* Bernstein & Somin, *supra* note 238.

[266] *Id.*

in turn a response to mob coercion and violence orchestrated by white community leaders in response to efforts of African Americans, often with the support of the National Association for the Advancement of Colored People (NAACP) to access segregated schools. This high stakes conflict radicalized racial politics in many Southern states, pushing moderate reformers and their initiatives to the sidelines of political life. Orchestrated racist violence and resistance to the authority of the courts pushed federal legislators to end school segregration under the 1964 Civil Rights Act[267], probably earlier than would otherwise have been the case.[268]

Even if one concedes that this was the case however, the available evidence still suggests that the changes in state practice (ending segregation) required by courts were a long time in coming, depended on the mobilization of the civil rights movement and the cooperation of the legislative and executive branches of government, and arrived via a very indirect route crossing the risky terrain of high stakes conflict.[269]

(iii) Conclusion

There is little reason to believe that international adjudication, where confronted with contentious matters raising significant and complex social policy problems, is likely to exert sufficient independent influence to reshape national interests or to proactively deter non-compliance with core labor standards. It most cases it is probably more likely to impede than to foster proactive cooperation, given the zero sum logic of litigated dispute resolution.

(b) Overloading Sanctions

As a result, the ASC model of governance must lean heavily on the threat of withdrawing economic benefits to coercively deter non-compliance with core labor standards. There is virtually no relevant experience in international labor law of putting such a sanctions-based approach to the test. The ILO has called upon member states to take such measures but once, in a case where intense political resistance to reform on the part of the government put its interests deeps and unambiguously at odds with the will of the international community, and key states declined to act.[270] As discussed above, the application of the US GSP sought to avoid direct coercion of compliance by managing the deployment of economic leverage so as to provide room for domestic political

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[267] Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964).

[268] KLARMAN, *supra* note 238, at 417-442.

[269] See also Strickler, *supra* note 238, arguing that the strongest effects of *Brown* took place in the late 1960s when federal courts drew upon the line of jurisprudence following *Brown* to order strong desegregation measures based on constitutional protections, which had the effect of complementing desegregation initiatives of the federal government under the Civil Rights Act.

[270] *See* ATLESON ET AL., *supra* note 101.

deliberation.[271]

Arguments for the ASC model have tended to appeal instead to the experience of international trade law.[272] This analogy is appealing because, like the application of core labor standards, the problem structure of state interests in the multilateral trading system can also be aptly characterized as a "stag hunt".[273] Moreover, it is widely acknowledged that the GATT has been very effective by the standards of international regimes,[274] and recent research has shown that increased judicialization[275] under the WTO agreements has been associated with significant improvements in the effectiveness of international trade law.[276] Finally, the availability of trade retaliation has almost certainly played an

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[271] *See supra* Section IV(D)(2).

[272] *See supra* Section II(A).

[273] *See supra* Section IV(D)(3).

[274] The GATT is widely hailed as one of the most successful international legal regimes in operation today. Indeed, as noted in Part 2 of this paper, its relative success has served as inspiration and a model for reform of international labor law, and the emergence of the new generation of trade and labor agreements. In absence of more systematic compliance data, the success of the GATT has tended to be measured by the rate of state compliance with tribunal decisions addressing international trade disputes. This in some respects is a good measure of regime effectiveness since it shows the capacity of the regime to influence state interests where they diverge. Hudec's seminal study shows very high rates of success for dispute settlement procedure, though it notes very high rates of withdrawal before rulings were made, especially by weaker countries. *See* HUDEC, *supra* note 226. Busch and Reinhardt re-interpret the same data as showing only 42% of rulings for the complainant resulting in full compliance and 31% producing no compliance at all. *See* Marc L. Busch & Eric Reinhardt, *Testing International Trade Law: Empirical Studies of GATT/WTO Dispute Settlement*, *in* THE POLITICAL ECONOMY OF INTERNATIONAL TRADE LAW: ESSAYS IN HONOR OF ROBERT HUDEC 471 (Daniel M. Kennedy & James D. Southwick eds., Cambridge University Press 2002). This remains in any event a high level of effectiveness by the standards of international legal regimes, and it certainly much higher than the success rates of the review processes of international labor law to which not risk of sanctions attaches. Bown's study examining growth of imports from plaintiff to defendant in disputed sector before and after disputes found that adjudication was more likely to be successful when the complainant had a large share of the defendant's exports. This finding was unchanged pre and post-WTO, suggesting that retaliatory capacity is a primary driver of compliance. *See* Bown, *supra* note 224.

[275] The WTO Agreements greatly increased the automaticity with which tribunal decisions would be adopted by the international community. Specifically, the Dispute Settlement Understanding provided that decisions of panels or decisions of the WTO Appellate Body would become binding in the absence of a consensus decision of the Dispute Settlement Body not to adopt them, whereas under the GATT decisions required consensus of GATT contracting parties (including a state found to have violated its obligations) in order to be adopted. They backed this adoption process with procedurally automatic authorization to suspend trade concessions in order to seek to secure compliance. (If a party found to be in violation fails to implement measures to bring itself into compliance within an agreed upon time frame the Dispute Settlement Body will grant authorization to suspend concessions. The Agreements created an Appellate Body to review panel decisions in the interests of developing and applying a legally coherent jurisprudence. The move from the GATT to the WTO system thus provides something of a natural experiment permitting examination of the influence of increased legalization by strengthening adjudication. For details see ERNST-ULRICH PETERSMANN, THE GATT/WTO DISPUTE SETTLEMENT SYSTEM: INTERNATIONAL LAW, INTERNATIONAL ORGANIZATIONS AND DISPUTE SETTLEMENT 177-191 (1997).

[276] The most unbiased way available to assess the effects of the reforms is to look at rates of full or partial concessions by defendants to complainant's demands in trade disputes initiated under the GATT and WTO regimes. This method avoids the potential bias introduced by examining only rates of compliance

important role in the relatively high rates of full or partial compliance with GATT norms following disputes between states.[277]

However, despite a structural similarity between them, the problems facing international labor law are arguably quite different at the level of resolution from most of those facing international trade law. In trade law, compliance most often simply requires governments to refrain from acting (by imposing tariffs or quotas or discriminatory regulations or by providing subsidies, for example). At the dispute resolution stage, international trade law thus does not often require influence extending into decisions sustaining positive initiatives over long periods of time. Thus trade law does not present the same opportunities for and risks of avoidance and shallow cooperation as does international labor law.

International trade law's adjudication system also has advantage of drawing, I will argue, upon important incentives in addition to potential sanctions, incentives that are today much less available to international labor law. In particular, it draws upon (1) individual state concerns and international community pressure to respect rule of law within the trade law system so as to maintain a low cost means of assurance that enables states to pursue their interests; and (2) concerns about maintaining state reputations for compliance.

Retaliatory trade measures were very seldom used under the GATT, and were in fact legally authorized only once. As a result, a ruling from a GATT panel could aptly be

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with tribunal decisions. This bias likely on rational instrumentalist theories because the cases in which settlement talks fail and a hearing is held are those in which it is more likely that the defendant is not susceptible to pressures based on normative condemnation, and in which the complainant is likely less able to impose sanctions. In other words, a ruling is most likely when it is least likely to affect the defendant's behaviour. *See* Marc L. Busch & Eric Reinhardt, *The Evolution of GATT/WTO Dispute Settlement*, *in* TRADE POLICY RESEARCH 143, 147 (John M. Curtis & Dan Ciuriak eds., Minister of Public Works and Government Services Canada 2003) [hereinafter Busch & Reinhardt, *Evolution of GATT/WTO Dispute Settlement*]. This approach also provides a relatively complete picture of the influence of dispute settlement processes over bargaining in the shadow of the law, since most cases settle before a ruling of any kind is issued. It likely reliably reflects compliance with international legal obligations since in the vast majority of cases dispute panels have found in favour of the complainant. Under the GATT, for example, between 1980 and 1994 83% of dispute panel rulings went in favour of the complainant: *Id.* at 154. Data on rates of concessions before and after the WTO reforms has been compiled by Busch and Reinhardt, extending earlier work by Hudec. They find that between the mature GATT period of 1980 to 1994 and the early WTO period of 1995-2000 the overall rate of concessions offered by defendants, including concessions offered before or after dispute settlement rulings, rose from 62% to 79%. Posner & Yoo, *supra* note 216, at 49, citing Marc L. Busch & Eric Reinhardt, *Developing Countries and the General Agreement on Tariffs and Trade/WTO Dispute Settlement*, 37 J. World Trade 719, 725 (2003). When the rate of full concessions only is considered, the improvement is more significant – an increase from 38% to 66%.

[277] Bown's research, for example, shows a significant correlation between the percentage of a defandant country's imports received by a complainant state and the extent of market opening granted by the defendant following resolution of a dispute (measured as a percentage increase in trade following that resolution).

characterized as a "punch that will not hit anyone". [278] Similarly, following the WTO agreements in 1994, sanctions have seldom been used to enforce GATT 1947 obligations. Given this low rate of usage, it would be rational to discount the risk that sanctions would be imposed. Yet the GATT regime achieved relatively high levels of compliance despite this. Robert Hudec, in his seminal study of the operations of the GATT regime, argued that the influence of the GATT could be largely attributed to international community pressure based on the shared values, interests and expectations of GATT contracting parties. [279] In the early years of the GATT, the 23 contracting parties could aptly be characterized as a club based on a shared commitment to "embedded" liberalized international trade, that is, an open international trading system between states committed to a progressive interventionist welfare state.[280] The contracting parties constituted a relatively homogeneous group in the early years of the Agreement, with a shared commitment to making an open multilateral trading system work. These countries established a powerful set of international norms and policy frameworks which in turn influenced trade policy making at the national level. As the membership of the GATT became more diverse and the issues that it confronted became more contentious the character of shared norms gradually evolved into a more neoliberal conception of open trade.[281] While the boundaries of this conception became increasingly contentious, the core commitment to an open international trading system remained in place despite the vast expansion of states party to the system under the WTO agreements.[282] These normative commitments came to inform the ways in which trade policy officials and insiders around the world understand policy priorities and trade politics.[283] Those actors have continued to influence national policies in accordance with free trade values as they understand them. The broad acceptance of trade policy norms within state structures, and its reflection in an increasingly elaborated system of international rules, strengthened pro free trade political constituencies within GATT contracting parties (and later WTO member states) and reshaped national politics in ways that often freed national governments to sidestep calls for protectionism.

This gradual transformation of values and norms within states surely accounts for much of the proactive compliance of states with international trade law. States often see compliance as being relatively unambiguously in their interests. Yet there are clearly many cases in which state interests are more ambivalent. The practice of international trade law and diplomacy is after all concerned with countless instances of overt and disguised protectionism, reflecting a persistent tension within states between political pressures to protect domestic industry or to seek international advantage through unreciprocated market access. It might be argued that it is here that the threat of

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[278] Robert E. Hudec, *"Transcending the Ostensible": Some Reflections on the Nature of Litigation Between Governments,* 72 MINN L.REV. 211, 219 (1987).

[279] *Id.*

[280] Alvarez & Howse, *supra* note 226, at 97.

[281] *Id.*

[282] *Id.*

[283] *Id. See also* Sebastien Princen, *EC Compliance with WTO Law: The Interplay of Law and Politics*, 15 E.J.I.L. 555 (2004).

sanctions does the heavy lifting. This is no doubt in part true. Yet even here observers have noted that reasons for state compliance before and after WTO complaints include reputational concerns and concerns about damaging the trade regime. Zangl, for example, finds that judicialization has made a difference to the propensity of the U.S. and the E.U. to comply with WTO law in disputes with each other, not only because adjudication in these cases made threats of sanctions more convincing, but also because it generated concerns on the part of states that a reputation for non-compliance could hamper their ability to pursue future trade interests, and because it increased the concern on the part of the parties that non-compliance could damage the credibility of the WTO itself.[284] Similarly, in their study of compliance under the GATT and WTO regimes Busch and Reinhardt postulate that defendants will weigh not only the potential economic damage of retaliation, but also the desire to avoid normative condemnation for overtly breaking the rules and possible strategic concerns about setting a precedent with could in turn spark a wave of future non-compliance by others.[285]

Game theory provides a plausible account of these concerns. The shared norms of the international trade law community are derived from a widely shared understanding of shared interests. This understanding has been carefully cultivated over many years and tested by experience. The widespread acceptance of these norms arguably creates a basis for trust between states that makes much easier the task of providing assurance that states will not defect from trade obligations. This trust thus helps to solve the stag hunt problem posed by short term pressures to engage in protectionism or mercantilism despite long term interests in open trade, enabling states to pursue those long run interests without undertaking much more expensive monitoring and sanctioning processes. Trust based on shared values and experience is thus arguably itself one of the most important assets of international trade law. In a system in which states generally see the benefits of a working multilateral trade system they therefore will understand their interests to generally coincide with preserving the effectiveness of that system. States may seek to avoid being perceived as non-compliant in order to avoid triggering a wave of non-compliance which could undermine the capacity of the regime to provide this low cost assurance. Moreover, in this context, where international trade law thus provides a forum in which long term interests in open trade can be successfully pursued, states' reputations for compliance are likely to matter to them because other states may be willing to make significant commitments of mutual benefit if they are confident that trust-based assurance will help to support the effectiveness of that bargain.

(iii) Conclusions

The ASC model leaves governance of international labor law with less supporting incentives and a bigger task than it has in international trade law. There are good reasons to doubt that simply harnessing the influence of sanctions or conditional economic benefits to a judicialized dispute resolution processes will be sufficient on its

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[284] Zangl, *supra* note 215.

[285] Busch & Reinhardt, *Evolution of GATT/WTO Dispute Settlement, supra* note 276, at 146.

own to offset incentives inherent in its zero sum logic and to deter avoidance of deeper reform requirements of compliance with core labor standards.

VI. Conclusions

This paper has examined the potential effectiveness of international labor law in realizing one of its highest stated priorities for improving working conditions around the world, that of ensuring respect for core labor standards in the international economy. Developing states aiming for durable economic and social development or committed to human rights in the workplace have rational interests in implementing core labor standards. However, those interests are likely often to be in tension with short run incentives to avoid any measure, including improvement in respect for core labor standards, that is likely to raise unit labor costs and thus create a short run disadvantage in attracting investment or gaining market share. These incentives are likely to create political pressures that operate regardless of potential long run gains in economic productivity and social stability associated with doing raising core labour standards compliance. International labor law is therefore confronted with a basic tension between long run and short run interests in much of the developing world. International governance must respond to it in order to be effective.

As a result, international labor law needs some capacity to change the short run payoffs for states to core labor standards compliance. To change payoffs an international labor law regime needs either to provide states with some effective assurance that competitors will not undercut them or to directly alter payoffs by providing an offsetting advantage contingent on core labor standards compliance. Relying on trust-building between competing states through monitoring and transparency will of course not work where, as is the case in most bilateral or regional agreements, major developing country competitors are not party to the agreement. This kind of trust-based assurance appears unlikely to work at the multilateral level because large numbers of highly diverse states are unlikely to develop sufficient confidence between them to coordinate their actions, and because in today's international political economy major developing country players like China are not likely to participate. Sunshine and moral suasion have not worked to alter payoffs in most cases because a reputation for non-compliance with core labor standards does not adversely affect the capacity of states to pursue their interests in other fields, and thus leaves states free to respond to short run incentives to continue non-compliance. Accordingly, in today's international political economy, international labor law must to be effective seek to alter the economic payoffs to labor standards compliance.

This implies that critics of linking labor standards to bilateral and regional trade agreements are wrong to the extent that they argue that the linkage is counter-productive and that core labor standards compliance is better pursued by other means. To the contrary, such agreements provide one of the few contexts in which economic incentives

can be provided internationally, and in which the small number of state parties permits the negotiation of such arrangements. The development of trade-related labor standards clauses and agreements thus represents a significant potential step forward for international labor law's pursuit of greater compliance with core labor standards.

However, the adjudication and sanctions-based model of governance embedded in most of those agreements is a distant second best solution to key challenges to effectiveness facing those agreements. The implementation of core labor standards presents politically challenging and complex polycentric policy problems. To effectively address such problems international governance requires both capacity for the sustained, informed and strategically focused deliberation on policy and program development, and capacity to establish a foundation of proactive international cooperation. The complaint-driven adjudication mechanisms upon which current trade and labor agreements rely for their influence have no capacity for such deliberation, and tend to exacerbate the zero-sum logic of dispute resolution. While those mechanisms could be strengthened to relieve the former problem to a certain extent, it is very unlikely that any adjudication-based model of governance will induce the required proactive cooperation. Experience at the international and domestic levels confirms theoretical predictions that adjudication does not deter non-compliance in such cases. It does not cause states to reassess their interests, nor it is likely to have the effect of mobilizing domestic political pressure so as to change those interests. States have remained free to pursue multiple opportunities for contained compliance with international and constitutional court decisions, avoiding the deeper measures required to effectively address conditions giving rise to persistent non-compliance. They are likely to do so in the face of the zero-sum logic of international dispute resolution. Relying upon the threat of sanctions to deter this sort of behaviour will probably overload it. International trade law has never leaned so heavily on sanctioning powers.

International relations theory and emerging empirical evidence point to a more promising alternative model of governance, which I refer to as Leveraged Deliberative Cooperation, exemplified by the United-States Cambodia Textiles Agreement. That model seeks to ensure proactive international cooperation in raising core labor standards compliance by exchanging something of value (e.g. tariff concessions or concessions on other policy issues of importance such as international migration) for agreement upon a determinate set of measures that themselves constitute reasonable best efforts to improve core labor standards compliance, and thus constitute compliance with the international agreement for the time period during which they are to be implemented. Delivery of the thing of value would potentially cease automatically in the event that best efforts to implement those measures ceased. Implementing such a contingent bargain over time would require systematic review of implementation so that the state of overall compliance could be determined at any point in time. It would require procedures through which best efforts measures could be iteratively redefined. It would require transparency and opportunities for engagement of labor and business stakeholders to ensure accountability of negotiations to redefine commitments. The bargain must remain stable and protected

from challenge so long as its terms are being met. In concrete terms, the logic of this model implies that an international trade and labor agreement should contain the following core elements:

1) A mandatory process through which the parties deliberate upon and identify a program of measures constituting reasonable best efforts to improve core labor standards compliance over a determinate period of time, and iteratively redefine such best efforts.

2) Economic or other incentives sufficient to offset short run incentives for non-compliance[286] that in practice remain contingent upon such agreement and upon ongoing best efforts, and will only be removed in the event that best efforts cease. In particular the withdrawal of benefits should not follow failure to carry out any particular measure. Nor should it follow a failure to comply with a conception of core labor standards compliance requiring anything other than the set of measures agreed upon as a program to be implemented within any given time period.

3) Systematic monitoring by a reliable and neutral third party of whether best efforts are being carried out, and of whether they are achieving their goals.

4) Transparent reporting of monitoring results in order to ensure state accountability for those results, and that subsequent negotiations respond to findings with respect to whether best efforts have achieved core labor standards compliance improvements.

5) Regular opportunities for stakeholder consultation and input with respect to the design of the program in order to ensure that those with an interest in its implementation accept its broad contours and attempt to hold governments accountable for its implementation.

The agreement should also provide, as current agreements do, for complaints-driven review mechanisms open to private parties, as an additional ad hoc means to ensure accountability for implementation of the agreement. However, in order to ensure that

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[286] This raises the question of whether a bilateral or regional trade and labor agreement can make payoff adjustments big enough to offset the incentives inherent in international economic integration that may operate against its effectiveness. Assuming that major developing country competitors like China or India are not party to such an agreement, can the benefits of such an agreement, even if made conditional on labor standards compliance, offset the pressures to compete with those countries in global markets on the basis of low standards? The benefits from the total increase in trade flows resulting from a free trade agreement with a smaller industrialized country partner like Canada may be smaller than the potential losses at stake in the larger global market. Thus it is quite possible that for many developing countries only trade and labor agreements with larger economic powers like the United States and the European Union provide sufficient benefits to directly change the economic incentive structure around labor standards issues. On the other hand, once made, public findings of non-compliance under an agreement with a country like Canada are bound to raise the likelihood that similar findings would be made under an agreement with the United States. Such agreements may thus exert sufficient influence indirectly.

such review or adjudication does not undermine pro-active cooperation between states such review should have two characteristics. First, it should be de-politicized as much as possible so that decisions to review complaints, and decisions on the merits of complaints are not perceived as antagonistic acts of governments. This could be achieved by ensuring that review of complaints was placed in the hands of a neutral third party. Secondly, there should be no obligation to impose sanctions or even to exercise a discretion to impose sanctions flowing the findings of such a review mechanism. Rather, the only obligation upon states that should flow from such findings would be to consider and address those findings in the context of ongoing review of and negotiations with respect to the program of action required under the agreement.

The agreement should also provide for independent tribunal review of state decisions to impose sanctions or withdraw benefits failure to participate in or carry out the agreed upon core labour standards compliance improvement programs. Review processes would seek to ensure that there is a sufficient factual basis for the withdrawal in light of the undertakings stipulated in the program. This would provide insurance against the possibility that such sanctions or benefit withdrawals might be motivated by protectionist or other irrelevant aims.

Trade and labor agreements might also be productively supported by international cooperation in the form of technical assistance, for example to to modernize the administration of labor inspectorate, or impart good regulatory or program practices, develop innovative regulatory models such as the integrative linkage model deployed under the U.S. Cambodia Textiles Agreement, or to conduct research into policies aiming to maximize durable economic and social development consistently with core labor standards.

It remains possible that in some states the combined effect of short run economic incentives and deeply rooted political resistance seeking to preserve the power of elites over their working populations will foreclose the possibility of effective international influence in support of core labor standards. Seeking to negotiate an international labor agreement which requires proactive cooperation and closes off many channels of reform avoidance might in fact provide a good test of whether a prospective international trading partner is in a position to support such reforms.

If the analysis presented in this paper is correct, it implies that the evolution of trade and labor agreements to which Canada and the United States have been party has gone off track in at least two important respects. First, it reflects an over-investment of political capital in adjudication-based dispute resolution, and a corresponding under-investment in cooperative governance backed by economic leverage. Secondly, it has abandoned institutional innovations that were potentially quite useful. As originally conceived, the Secretariat of the Commission for labor Coooepration established under the North American Agreement on Labor Cooperation was mandated to periodically report on a range of labor standards related issues, including the state of labor law administration and

enforcement in each of the three NAFTA member states.[287] By allowing the Secretariat to atrophy and fail to exercise this function the parties, and stakeholder groups in each of the three states, have missed an opportunity to establish and develop experience with a key element of a more effective model of international governance: the systematic and transparent review of labor standards compliance that could inform public and policy debate over how to meet international norms.

Finally, the analysis in this paper has a series of implications for multilateral governance of international labor law through the International Labor Organization. It is clear that the ILO is not likely to exert sufficient economic or other leverage over its members to bring about compliance with core labor standards in the great majority of cases of deliberate non-compliance. Experience has shown that the ILO has only been able to muster economic leverage in the most extreme case of gross violations by deliberate and fundamental state policy, a situation in which it is relatively unlikely to be effective in any event. Nonetheless, sources of direct and effective influence remain open to it. First, the ILO may continue to have significant influence, as it evidently has in the past, by providing technical assistance to states at political transition points where governments are actively seeking models for legal, program and administrative reform. Secondly, it might also, as some have suggested[288] focus on promoting labor standards, such as many occupational safety and health standards, which provide net economic advantages to employers in the relatively short term, and thus face only minor short run disincentives to implementation.

Regional and bilateral trade-related labor clauses and agreements stand to open up important channels of indirect influence to the ILO as well. The ILO can continue to inform the content of such agreements by articulating an internationally legitimate set of priority norms, standards and legal rules. It might serve, as it did in under the U.S. Cambodia Textile Agreement as an accepted neutral third party monitoring body capable of assembling the required expertise for that task. It might also provide technical assistance to support the implementation of those agreements. The ILO is well placed to conduct or sponsor high quality research and publish findings on policy models that combine compliance with core labor standards with durable economic and social development so as to inform national policy debate, and reduce potential sources of resistance to such models based on arguments that they are not achievable. It can also seek to inform the agendas of other multilateral organizations such as the World Bank with the results of such work.

The findings of this paper are initial and surely will not constitute the last word on the questions they address. The evidence upon which they rely constitutes an incomplete mosaic. But it is a mosaic embedded in a theoretical framework which accounts well for the pattern of compliance and non-compliance observed in international labor law today.

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[287] NAALC, *supra* note 2, at arts. 10.1.8 and 14.1.2.

[288] Alan Hyde, *The International Labor Organization in the Stag Hunt for Global Labor Rights*, 3 LAW & ETHICS HUM. RTS. 153 (2009).

That pattern is dependent upon the ways in which states see their interests in core labor standards in today's international political economy. Those ways of seeing may change. States in the past have seen their interests in international labor standards differently and more enthusiastically. In the immediate post World-War II period developing and industrialized states negotiating a Charter the proposed International Trade Organization readily agreed that the Charter should contain a Fair Labor Standards Clause. Moreover, they agreed that this clause should be backed by the dispute resolution procedures and remedies available to ensure compliance with the rest of the trade agreement. Consensus on this issue rested largely on a Keynesian argument that a stable international economy required that workers be able to earn a fair share of the fruits of the productive capacity of what they hoped would be a growing integrated international economy. [289] It is possible that a similar international consensus will someday come together again.[290] In the mean time however, the picture of today's possibilities for effective international governance in the service of core labor standards is clear enough that it should begin to inform contemporary policy debate.

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[289] Banks, *Trade and Labor*, *supra* note 40.

[290] Posting of John Mckennirey to Doorey's Workplace Law Blog, http://www.yorku.ca/ddoorey/lawblog/?p=1480 (Nov. 20, 2009).