

# **"Private Labor Regulation and the Global Supply Chain: A Bridge to the State?"**

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First of all I would like to thank Professor Ravi Anupindi for inviting me to participate in today's event. I've had the chance to work with Ravi in recent months on some issues surrounding the committee, and I've been amazed and inspired by his commitment to its work and mission. It's also such a thrill to be back in Ann Arbor after so many years and to still be involved in these issues and the committee's work. It's also an honor to be sandwiched between my first employer after law school, Michael Posner, and Rick Locke, whose work I've learned so much from.

Today I would like to take the opportunity to discuss the regulatory and political context of private labor regulation in the global supply chain. In particular I want to suggest that universities and university committees need to refocus their attention a) on the state which seems to often be forgotten in these conversations, and b) on the broader ends of public and privately enforced labor law, which I think should include democracy, human flourishing, and development broadly construed.

*But first*, since I in fact was once a member of Michigan's advisory committee in its beginning years, from 2000 – 2002, I'd like to talk a little about the context of its creation and what the issues were. In 2000 I was a student in the law school and at Rackham's School of Graduate Studies. When I joined I had recently spent summers in Cambodia, where a new bilateral textile free trade agreement had been signed with the US that established what is now Better Factories Cambodia, and in India where I had worked on bonded child labor issues. The committee was created because the President of the university at the time, Lee Bollinger, had a problem on his hands. Starting in the mid-90s, students at Michigan began to actively protest against companies, such as NIKE, that had licensing and supply contracts with the university, but had been the subject of scathing exposés of the conduct of their suppliers in Indonesia and elsewhere. Students marched and held teach-ins, imploring other students and the university to boycott the company. Incidentally, according to at least one informant, namely my sister who was an undergrad here at the time and active in the protests, Nike had hired student counter-protestors to support Nike.

Out of these initial protests, an activist group at Michigan formed called SOLE, which staged sit-ins in the office of President Bollinger, to demand that Michigan adopt a code of conduct and require its licensees to make transparent the list of their suppliers. To be able to get back into his office, Bollinger decided that an advisory committee was to be formed made up of faculty, staff, and students to study and make recommendations around several issues: they included creating and monitoring

compliance with a university code of conduct; creating full public disclosure by licensees; protecting women's rights; identifying appropriate wage level(s) consistent with human rights and dignity; and ensuring and monitoring compliance by licensees with our code of conduct.

The debates on the committee and between the committee members were a microcosm of the larger debates, many of which persist to this day. What is the proper role and scope of freedom of association? Should Michigan and other universities even be permitting production in China and Vietnam, where independent unions are illegal? What is the proper role of universities and other stakeholders in prescribing wage levels, particularly as related to the so called "living wage?" Which labor rights NGOs were best suited to promoting labor rights, and which might just be corporate shills? And what is the most effective way to engage with licensees and suppliers – carry a big stick and be confrontational, or work closely and assume good intentions of the other party?

The arguments, particularly among the faculty were sometimes intense and personal, which gave me a good preview of academic life. At least one faculty member seem inclined to think the whole committee a colossal waste of time that would only serve to ineffectively and illegitimately interfere with the market's ability to improve wages and remedy other abuses over time; while others strongly advocated for a more interventionist and what one might call a *legalistic* approach, whereby our code of conduct would serve as a strongly enforced set of rules and conditions that licensees

would be contractually bound to enforce upon their suppliers. In other words, sanctions would lead to compliance.

Many of the discussions and arguments that we had on the committee helped shape the work that I would do after graduating from Michigan. First as a senior associate at the Lawyers Committee for Human Rights working on these issues, and then as an academic on the faculty of Rutgers University. These debates, somewhat simplified here, of course, continue to this day. Yet we have seen a remarkable growth in knowledge about what works and what doesn't.

Since my charge here is to discuss the regulatory context of the Committee's mission and that more generally of labor in global supply chains, I'd like to briefly contextualize the rise of privately driven, non-state initiatives like that of Michigan's to enforce labor standards in their supply chains in light of the limitations of private governance.

As the sociologist Gary Gereffi and others have observed, the growth of trade and capital flows has *not* been paired with a commensurate growth of appropriate regulatory institutions. What has emerged is what he terms a governance deficit, and in particular a deficit in traditional legal institutions.

The first deficit is that the home countries of MNCs are very limited in their capacity to regulate the conduct of their companies abroad; and even more limited in regulating the conduct of their companies suppliers. This is particularly so in labor relations, which has traditionally been considered to be a matter of local or domestic

sovereignty. In the US there have been some attempts to create forms of liability in US courts, through for example the Alien Tort Statute, or attempts to create a third party beneficiary claim under contract law. But these efforts have been largely unsuccessful.

A second governance deficit is the weakness of international institutions. The pre-eminent UN organization responsible for labor is of course the ILO. But the ILO is highly limited in its ability to impact the conduct of states, and even more so private companies. It is and remains primarily a standard setting organization with limited ability to sanction or remedy, beyond shaming.

Given the limitations of the ILO's reach, some activists and policymakers in the 1990s argued that the World Trade Organization, with its stronger ability to incentivize compliance through trade sanctions might be the answer. If, they argued, there were a labor rights provision in the body of the trade agreements, there would be improved state compliance with international labor standards. But the WTO is a democratic and consensus driven organization with more developing country members than developed ones, and these efforts failed because they smelled to many members as being protectionist and even paternalistic. "Go to the ILO," these WTO members argued, which is where labor standards belong.

The opposition voices won the day, and what emerged at the ILO as a partial result of this failure was the Declaration on Fundamental Principles and Rights at Work, which outlined four broad categories of rights that all ILO members have an

obligation to realize whether or not they have ratified the relevant conventions. These include, as most of us know, conventions on freedom of association, child labor, discrimination, and forced labor. These standards have become benchmarks for most codes of conduct.

A third governance deficit, and I think a very important one, relates to the limited ability of many developing countries to sufficiently regulate their economies and their labor markets. Many of the tragedies that we either know of first hand because we work in this field, or have read about in the media, are the result of a failure of domestic law and specifically, enforcement of the law. The problem by and large is not the law on the books, but rather weak institutions of enforcement. Why these institutions are weak is of course a complicated question. The reasons are related both to technical capacity, and to political will depending on the country and the context. But as I will suggest in a little bit, it is critically important that we not simply work around this deficit, but rather seek to remedy it using various tools at our disposal.

While there have been various responses to these deficits, such as the inclusion of labor rights provisions in bilateral trade agreements, the most remarkable and far reaching implication has been the rise of private regimes of labor governance. As we can see just from who is participating in this event today, almost every major

company with global supply chains now has a code of conduct and systems of enforcement.

Why is this the case? Because companies fear damage to their brands when bad things happen to workers in their supply chains. Consumers react, albeit unpredictably and I would argue sub-consciously. Companies know that reputations and brand allegiances can be fickle. Media and new technologies of communication and Transnational Activist Networks can quickly mobilize to bring intense pressure on corporations to remedy abuses in their supply chains. And they are effective.

What has resulted has been a range of private mechanisms that exclude the state: companies have implemented their own private systems of governance; they participate in multi-stakeholder initiatives; the ILO has departed from its traditional focus on state capacity building and has developed its own largely private auditing and advisory program called Better Work, transnational activist networks continue to thrive and generate pressure; a slew of competing certifications have emerged; and we have even seen the advent of a new form of corporate structure in the US called the B-corporation, that allows managers to put social and environmental priorities ahead of shareholder value.

But is the shift to private regimes of labor and social regulation all good? I'd say not necessarily. A central reason for this claim is because private regulation is by its own terms limited. In other words, private regulation suffers from its own kinds of governance deficits.

First, the effectiveness of private regulation has been seriously questioned. As we might hear very soon from Professor Locke, despite a number of years of trying, compliance based models of private supply chain regulation have not proven to be very effective, especially when there is lack of collaboration between buyers and suppliers. On the other hand, where public institutions are strong, or where there was better worker participation in management decisions, labor standards in the suppliers factories are better.<sup>1</sup>

A second limitation of private regulation is what I'll call *sustainability*. Private regulatory regimes are primarily driven by the desire, or perceived desire, of consumers and other stakeholders such as civil society organizations and transnational activist networks (TANs), to ensure that working conditions in global supply chains meet their expectations.<sup>2</sup> But this is a relatively weak driver for regulation in comparison to a public regulatory regime in a well-functioning and responsive democratic state. There, the primary drivers of labor regulation are 1) to ensure that workers do not mobilize to vote out the current regime if their demands are not met, and 2) the fear of economic and political instability through industrial action. Whereas global consumers and TANs might be mobilized and care about a set of issues at one

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<sup>1</sup> Locke did find, however, that in certain conditions private regulatory regimes work better. First, the degree to which collaborative and cooperative relationships exist between the buyer and the producer are important. The more collaborative and more engaged private inspectors were with supplier factory managers, even at the level of playing golf with them, the better the performance of factories in labor standards compliance. Locke, *supra* note 57, at 123. In particular, Locke notes in a study of two factories in Mexico producing for Nike, Locke describes "dramatically different labor conditions" between the two factories. In the factory with better labor conditions, particularly higher wages and no forced overtime, there were more collaborative relationships with Nike inspectors; more worker participation including by its union in management decisions; and more flexible work organization. See, generally, Locke, *supra* note 57, chapter 5. Long term, strategic relationships and frequent interactions, Locke argues, promotes



moment, their attention can quickly turn elsewhere – I did say consumers’ tastes were fickle, which decreases pressure on corporations and other non-state actors to regulate the supply chain.

Third, and related to the first two claims, private regulation, and particularly regimes that are designed and run by corporations, are *limited in scope*. Private regulatory regimes tend to be better at, and more focused on, improving technical standards such as health and safety and ensuring that wages are paid properly. But they are not necessarily very good, or often interested, in addressing or promoting freedom of association and collective bargaining rights, discrimination, workplace democracy, or what might be termed “process rights.”<sup>3</sup> This conclusion is not surprising. First, process rights are more difficult to assess and enforce because they often require greater degrees of discretion and subjectivity to evaluate. But second, private regimes that are corporate run or "managerialist," according to the moniker of one scholar,<sup>4</sup> will also reflect the ideologies and interests of the entities that control them. Unions, workers rights, and workplace democratic governance tend not to be prioritized in American corporate culture, for example. And Europeans are

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significant advances in labor standards. Locke, *supra* note 57, at 122-125. CHECK. Second, in factories where there was a strong union presence labor standards were better. *Id.* at 97.

<sup>2</sup> See Gay Seidman, Beyond the Boycott: Labor Rights, Human Rights, and Transnational Activism 143 (2007)

<sup>3</sup> Stephanie Barrientos & Sally Smith, *Do workers benefit from ethical trade? Assessing codes of labour practice in global production systems*, 28 Third World Quarterly 713 (2007); see Matthew Amengual, *Complementary Labor Regulation: The Uncoordinated Combination Of State And Private Regulators In The Dominican Republic* 38 World Development 405, 408 (2010).

<sup>4</sup> Mark Barenberg, *Towards a Democratic Model of Labour Monitoring*, in Brian Bercusson & Cynthia Estlund, *Regulating Labor in the Wake of Globalization* (1998)

unaccustomed to the gloves-off conflict often found in the U.S system and in many developing countries, and are used to more integrated industrial relations systems.

But it is not only corporations that de-prioritize freedom of association. Arguably, associational rights are also not as prioritized by *global consumers* as, say, child labor or egregious health and safety issues.<sup>5</sup> Although it is true that *some* private regimes that have more involvement of civil society and trade unions are more focused on workplace democracy, through freedom of association rights<sup>6</sup> as well as political democracy building at the national and local levels.<sup>7</sup> And to add a little more fuel to the fire, I might also add that associational rights and workplace democracy are also not particularly prioritized by many traditional human rights organizations. The reasons for this I believe are both structural and cultural, and, as I have argued elsewhere, might be intrinsic to human rights as a theoretical framework.

Finally, and importantly, private regimes suffer from a deficit of *democratic legitimacy*. Private regulatory regimes are primarily responsive and accountable to their own stakeholders, which do not necessarily include the workers or factories that are

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<sup>5</sup> Add Citation

<sup>6</sup> See Barenberg, *supra* note 70 (describing the work of the Workers Rights Consortium); Barrientos, at 725-6. It is important to recall and emphasize, however, that private regimes are not only corporate led. Various multi-stakeholder initiatives (MSI) have been developed that also engage in various forms of supply chain monitoring, inspections, and regulation. These MSIs have various governance structures that include various combinations of corporate actors, governments, global unions, consumers groups, and various other civil society groups. The governance structures, of course, affect the particular emphasis of a particular MSI and its regulatory regime. Abbott & Snidal, *supra* note 20, at \_\_. For example, the Fair Labor Association does not include unions in its governance structure, and has been criticized for being a corporate dominated organization that does not hold corporations' feet to the fire. On the other hand, the Workers Rights Consortium is an MSI that is dominated by universities, labor friendly independent members, and the activist group, University Students against Sweatshops. It has no corporate representation on its board.

<sup>7</sup> Seidman, *supra* note 68 (describing the work of the NGO, COVERCO in Guatemala).

subject to that regulation.<sup>8</sup> *Public* regimes, on the other hand, are grounded in and bounded by legal authority that, in principle, is accountable to a public, and in particular to the workers who are the subjects of that regulation. The source of norms and the power of their enforcement reside in *private* actors i.e. buyers who are based outside of the legal jurisdiction of the "regulated" actors. What results are governance regimes of that are not necessarily responsive or accountable to the needs and wishes of the regulated parties, particularly workers.<sup>9</sup>

What this means, I would suggest, is that we need to ensure that the state and public regulatory institutions are strong and effective. Not necessarily as command and control institutions, but as democratically responsive institutions that can protect workers' rights. This is not to say that private regulation is a dead end and the state is a panacea that will address these private governance deficits that I have described above. Rather, in the rush to fill the domestic governance deficits that I described earlier, we seem to often forgot that in fact in every country in which the value chain

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<sup>8</sup> Black, at 143 ("despite their variety, transnational, non-state regulators in general pose the difficulty that the usual panoply of constitutional mechanisms of accountability which characterize liberal democratic constitutional systems is not necessarily available.")

<sup>9</sup> Scholars of governance in law and other fields have tried to address the legitimacy deficit by moving away from political accounts towards sociological ones. Black, at 144. The test for legitimacy becomes not whether or not the institution meets some transcendental institutional ideal, but rather on whether or not the regulated actor *believes* or *perceives* the regulatory power of the regulatory to be legitimate. Id at 145 ("Legitimacy thus lies as much in the values, interests, expectations, and cognitive frames of those who are perceiving or accepting the regime as they do in the regime itself"); James N. Rosenau, & Ernst Otto Czempiel, *Governance, Order, and Change in World Politics*, in *Governance Without Government : Order and Change in World Politics* 4 (James N. Rosenau, & Ernst Otto Czempiel eds., 1992)(Governance is thus a system of rule that is as dependent on intersubjective meanings as on formally sanctioned constitutions and charters). For an argument that many supragovernmental environmental and labor certification organizations (i.e. transnational non-state organizations) have evolved to satisfy democratic criteria see Meidinger, *supra* note 30. But if our perspective is from the perspective of workers in global supply chains, supply chain regulatory regimes will arguably still lack political legitimacy, for few workers would even know how if at all their workplace is being governed by private regimes.

operates, there are in fact public regulatory institutions functioning at various levels of effectiveness.

What's more, labor regulation has traditionally been a subject of domestic governance, and for good reason. Labor law is grounded in local institutions of industrial relations and governance. How a country governs its workplaces is tightly woven with, and a reflection of, its political system as well as its economic and political institutions. Democratic and participatory institutions in the workplace tend to reflect democratic structures in society. Trade unions and member-driven labor organizations can serve as training grounds for political activism and leadership. Envisioning more equality in the workplace can lead to demands for equality more broadly in society. Having a wage sufficient to live on, and being healthy in the workplace enables workers to have the time and energy to be involved citizens outside of the workplace. What this means, is that labor democracy and higher labor standards in the workplace are closely linked to many aspects of Development, broadly construed.

So what does this mean for the advisory committee and for university committees more generally? My point here is not to be a party pooper about private regulation, which I believe serves an important albeit limited function, but rather to suggest that universities and university committees are uniquely situated to act outside of the structural constraints of state, corporations, trade unions, transnational activist

networks, and MSIs to ask how can private regulation be part of a broader strategy to promote and realize to the ultimate goals of development, democracy, and human flourishing in ways that other organizations cannot.

They need to think hard about how we conceptualize and actualize the relationship between public and private regulation, and to re-focus attention onto state capacity building. They need to ask how public and private regulation can be deployed in what scholars such as Matthew Amengual have termed, complementary ways.

For example, universities and their committees are uniquely situated to identify and promote research on where public and private regulation have comparative advantages. Perhaps they could require that the MSIs of which they are members purposively engage with states to identify points of collaboration, foster technical capacity building, and engage in knowledge transfer. They could make direct contacts, perhaps, with ministries of labor and ministries of commerce to collaborate on capacity building and regulatory regime design.

My point here is that private regimes such as those that universities have become part of can and should be seen not as substitutes but as complements and catalysts, both by their implementers and by the state ministries whose governance deficits those regimes are meant to remedy. They should be seen as bridges, not final destinations.

As I recall, when I was on the committee, questions about public law and the broader aims of development that I have mentioned were rarely if at all part of the conversation. We were too busy developing our own code of conduct, writing admonishing letters to licensees, and debating whether or not to join the WRC and/or FLA. Recently the debate turned to whether to join the Accord or the Alliance, whether to drop Adidas (or the FLA), etc. Sounds a little like the same record.

Thank you for your time and I am looking forward to the conversation today.