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Sarosh C. Kuruvilla
Cornell University, sck4@cornell.edu

Anil Verma
University of Toronto

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Abstract
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Keywords
ILR, Cornell University, collective bargaining, regulation, international labor standard, trade, government, labor, jobs, human resource

Disciplines
Labor and Employment Law

Comments
Suggested Citation
Kuruvilla, S., & Verma, A. (2006). *International labor standards, soft regulation, and national government roles.*Retrieved [insert date], from Cornell University, School of Industrial and Labor Relations site: http://digitalcommons.ilr.cornell.edu/articles/37

Required Publisher Statement
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INTERNATIONAL LABOR STANDARDS, SOFT REGULATION, AND NATIONAL GOVERNMENT ROLES.

SAROSH KURUVILLA* AND ANIL VERMA**

In this article, we briefly describe the different approaches to the regulation of international labor standards, and then argue for a new role for national governments based on soft rather than hard regulation approaches. We argue that this new role shows potential for significantly enhancing progress in international labor standards, since it enables governments to articulate a position without having to deal with the enforcement issues that hard regulation mandates. We justify this new role for governments based on the increasing use of soft regulation in the international arena. Of course, this approach is not without its own problems, but given that existing approaches have all provided imperfect solutions to the problem of improving labor standards globally, re-visiting the role of national governments is in our view, highly important.

* Professor, School of Labor and Industrial Relations, Cornell University, Ithaca, NY 14851-0952, USA, Email: sck4@cornell.edu. ** Professor, Rotman School of Management and Centre for Industrial Relations, University of Toronto, E-mail: verma@rotman.utoronto.ca.

INTRODUCTION

The debate around international labor standards has gained increasing attention in the wake of rapid growth in global trade. Along the way, there have been some frustrations. The failure of the last WTO round and the lack of consensus on social dimensions of the proposed Free Trade of the Americas Agreement (FTAA) are good examples of the lack of progress in improving labor standards internationally. Although a variety of approaches exist for improving labor standards, none of them provide a satisfactory and viable way forward. And many of the voluntary approaches such as corporate codes of conduct or certification and reporting systems, are not integrated with prior approaches nor do they engage national governments, who can play a big role in supporting and extending or obfuscating these voluntary approaches.

In our view, a consideration of the role of national governments is important. We realize of course that it is the failure of national governments to adequately enforce their own legislation that has created the problem that the current approaches are trying to solve. But we feel that national governments should not be seen only as the source of the problem but should be included as part of the solution. This is because national governments offer substantial advantages in improving labor standards. More than any private sector system, NGOs or international agencies, it is national governments (and by extension regional, sub-regional and local governments) who have more resources and better access to reach all types of workers and workplaces in different industrial sectors. Thus, national governments can take a more comprehensive approach. Besides, focusing on the national government also forces consideration of an important issue, i.e. that of

sovereignty. Many developing country governments have been hesitant to support the linkages between labor standards and free trade partly because this linkage is articulated and seen as being imposed by the advanced ("North") countries. This is a critical reason why national governments must be seen as part of the solution, despite their current ineffectiveness.

In this article, we first examine the various current approaches to improving labor standards globally. Many of these approaches can be classified as "soft regulatory methods" rather than "hard" regulation which is most commonly manifested in legislation. Taking into account the development of soft regulatory mechanisms, particularly in the cross-national arena, we propose a new role for national governments in improving labor standards. Our proposal takes into account the North-South divide on labor standards (the sovereignty issue) but also addresses the issue of comprehensiveness, since we are envisaging a more activist, rather than just regulatory, role for national governments. In the next section, we examine the various approaches to the improvement of labour standards internationally.

THE REGULATION OF INTERNATIONAL LABOUR STANDARDS

Basically, the current international pressure to improve labor standards stems from the fundamental failure of national governments to enforce their own labor laws. Most labor laws in developing countries are quite comprehensive and cover the core labor standards (freedom of association and collective bargaining, freedom from discrimination, abolition of child labor and abolition of forced labor). Yet, national governments in developing countries have exhibited remarkable failures in enforcement,

leading to the generation of international pressures to improve labor standards. A variety of approaches, exist for this purpose, each with their advantages and problems. We discuss each of these approaches below, focusing on why they are only partial (and imperfect) solutions.

The Linkage of Labor Standards with Trade.

Although the efforts to formally link labor standards with trade was not successful in the WTO negotiation rounds, such a linkage continues to be advocated by many observers and some countries (e.g., the US) as the best method to improve labor standards. There have been several arguments brought forward to justify this linkage. First, proponents argue that core labor standards ought to be seen as fundamental human rights. This altruistic concern for workers in poor countries tends to rise with increases in per capita income however, since this concern is evident mostly in very wealthy countries of North America and Western Europe. Second, proponents argue that such a linkage will prevent an "international race to the bottom". The argument here is that low labor standards will increase third world competitiveness, leading to a loss of jobs and de-industrialization in the developed countries, and in this form to a competitive devaluation of labor standards through out the world. Third, proponents argue that the legitimacy of the international trading system (which is seen as a cause of widening inequality and competitive devaluation of standards) is at stake here and enhancing the legitimacy of free trade requires a connected commitment and mechanism to increase labor standards. Fourth, proponents argue that following a core set of labor standards will increase living standards all over the world. Fifth, some argue that forcing all countries to follow core labor standards could be efficiency enhancing in the long run. For example, abolishing

child labor or extremely “cheap” labor (via no labor standards) could yield to increased substitution of capital for labor (thus increasing efficiency) but also leads to better longer term investment in human resources (as those “child” workers receive better education), thus increasing long term efficiency as well. Sixth, some argue that linking labor standards to trade would defuse the protectionist stance that is taken in some countries.

The evidence to sustain all of these arguments is not very strong however. For example, export prices of hand made carpets are significantly lower in countries with extensive use of child labor. There is no connection between trade flows and ratification of ILO conventions, although there is a connection between low labor standards (or costs) and inward FDI .However, one must note that not all countries with low labor costs attract similar levels of FDI. For instance, more than 60% of the FDI going to developing countries flows into just one, China, where labor costs do happen to be low.

On the other hand, there are a number of arguments brought forward to oppose any linkage between trade and labor standards. This is one issue that clearly divided countries of the “North” and countries of the “South”, since these opposing arguments are advocated mostly by third world governments as well as third world employers. First, they argue that linking trade with labor standards is designed to protect industries in the “North” that would otherwise move to the “South”. Their position is supported by some empirical research that does not find a relationship between lower labor standards and competitive advantage in the marketplace (Raynauld and Vidal 1998; Gunderson 1998; Campbell and Sengenberger 1994).

Second, the fact that this linkage is most clearly advocated by the United States, a country that has very limited commitment to improving labor standards within its own

borders, re-inforces the perception that this is a protectionist device. Fourth, "southern" governments argue that worker welfare is a national consumption decision (another sovereignty argument). Finally, those opposing such a link note that trade sanctions are most likely to cause harm to workers in the short run, particularly in those factories who lose orders as a result of the sanctions.

Despite the lack of agreement at the WTO however, the US has embarked on a bilateral approach that links labor standards with trade. This can be seen most recently in the latest US-Jordan and US-Singapore agreements, followed by the current initiative for a similar agreement with Morocco. And these agreements follow a history of similar agreements, such as the Caribbean Basin Recovery Act and the Andean Trade Preference Act. More recently, the US Trade Representative, by law, must have data on the labor standards records of all of its trading partners, an data-collection effort that is currently underway by the National Academies in the US. Thus, the failure to reach an agreement at the WTO has not settled the issue of a linkage between trade and labor standards, although, as noted, the wisdom of such a linkage is still heavily contested terrain.

Multilateral Model: the ILO

The ILO seeks to promote core labor standards by advocating that its member nations adopt a series of conventions, with the belief that adopting a convention will result in the enactment of national legislation and its enforcement in member countries. In this way, the ILO has set a process in motion that could, by degrees, lead to better labor standards globally. The implementation of these conventions is left up to each national government. Failure to implement can result in a complaint to the ILO. However, the ILO does not have any punitive power and must rely on moral suasion.

History is replete with examples of countries adopting ILO conventions and not implementing or enforcing labor laws. Further, at the global level, the ILO does not have the resources to monitor and enforce standards.

There are a total of 181 conventions on a range of issues. Out of a total of 175 members, only 146 have ratified the forced labor convention, 130 have ratified the convention on discrimination, while 138 have ratified the convention on freedom of association. The US, a big proponent of improving core labor rights has only ratified 12 conventions, and has not ratified the freedom of association and collective bargaining conventions. Of bigger concern is the fact that there are widespread violations of labor standards even in the countries that have ratified the conventions.

The key issue for the ILO is in terms of enforcement. Many have criticized the ILO procedures asd not having enough "teeth". Yet it is important to understand that the ILO works in nuanced ways. The ultimate step, that of expelling a country from the ILO must not be taken because that would negate any influence the ILO has over that country in the future. Hence it works in different ways, as we discuss below.

Any party recognized in the ILO tri-partite structure (government, labor, and business) may make representations to the ILO concerning violations, which are then examined by a Committee and reported in ILO publications, and to the Conference. Complaints may result in a Commission of Inquiry, and further action can be taken through the use of Article 33 of the ILO Constitution, which empowers it to take broad remedial action against persistent violators (Institute for International Economics, 2004). Article 33 states,

> "In the event of any Member failing to carry out within the time specified the recommendations, if any, contained in the report of the Commission of Inquiry, or in the decision of the International Court of Justice, as the case may be, the Governing Body may recommend to the Conference such action as it may deem wise and expedient to secure compliance therewith" (Americasnet, http://www.americasnet.net/Commentators/Bruce_Jay/jay_15.pdf).

Thus, it is true that in the extreme case, the ILO does have an enforcement mechanism through Article 33. However, until 2000, Article 33 had never been invoked, making it the first and only time in the ILO's 85 year history. This occurred in 2000 against Burma for continuous use of forced labor. The ILO thus requested that all multilateral agencies of the United Nations and the Breton Woods institutions refrain from program assistance to Burma. In effect, it promoted a worldwide official boycott of the country. Furthermore, by using reports of the use of forced labor in building the country's tourism infrastructure and gas pipeline to Thailand, the ILO exerted pressure on foreign investors and tourism companies to refrain from doing business in Burma (Institute for International Economics, 2004).

However, the case of Burma is an extreme exception to the ILOs normal handling of labor violations. Until 2000, the ILO had only encouraged compliance through the supervisory and technical assistance systems. However, since the birth of the linkage debate the ILO has taken many more proactive steps at curbing labor violations. Along with the country reports, the ILO produces director general global reports which are more succinct and easy to read. These reports summarize key problems in CLS implementation and identify specific nations with CLS violations. One way to judge the potential power of these reports is the fact that several countries attempted to stop the director general from "naming names" or specifically listing nations with labor violations

in the director general global reports (Institute for International Economics, 2004). During the June 2000 International Labor Conference which discussed the first global report, many nations criticized the Director General for pointing to specific nations for their violations of freedom of association. In response, the Director General rejected the criticism and stated that it is the ILO's duty to carry out transparent credible reporting. Furthermore, the report's naming helped shift the policies of some Middle Eastern nations. For example, Saudi Arabia announced in 2001 that it would permit the formation of working committees, and Bahrain decided to allow trade unions. More significantly, these nations along with Oman, Qatar, and the United Arab Emirates asked the ILO for technical assistance in these endeavors (Institute for International Economics, 2004). This series of ILO actions shows that, even with its limited resources, through transparent reporting, it has been able to elicit changes in the face of repressive governments.

The ILO, however, has shied away from clearly prioritizing violations or categorizing countries by degree of violation in order to avoid conflict with its members. However, the very act of publishing reliable data has allowed other organizations to do this. In 1996 and in 2000 the OECD used ILO data and other documents to categorize 70 countries into groups based upon their respect for the right to freedom of association. Similarly, a committee appointed by the US National Research Council has been studying ways to use ILO and other data to develop indicators of how countries are faring with labor standards (Institute for International Economics, 2004). Both are examples of how the ILO's reporting of the status of labor violations in the world has been used by other organizations to further publicize the issues at hand. Through the

country reports and more importantly, the global reports, the ILO, as well as other organizations, have highlighted labor violations and therefore significant changes have been made in certain nations. Thus, it is shown that the ILO's tools, although not "teeth" per say, are effective, to a certain degree, at curbing CLS violations. Hence the ILO's methods must be viewed as a soft regulatory method rather than as hard legislation, and we realize that evaluation of effectiveness here is a difficult process.

Regional Trade Agreements and Labor Standards.

The most developed regionalization initiatives, i.e., the EU and NAFTA also have agreements on labor conditions. The European union follows the principle of upward harmonization of all relevant labor legislation, (except the case of freedom of association, collective bargaining and the right to strike). The Directives proposed by the European commission and adopted by the Council of Ministers are converted into national legislation. Thus, EU w-de standards prevail. Further, it is possible that agreements reached by labor and management representatives in different sectors may also result in directive. Thus, sectoral and cross industry agreements have the potential to raise labor standards throughout the community. The European case is interesting because labor standards are based on Europe-wide legislation in countries that have had historically high labor standards, a strong tradition of collective bargaining with high levels of union density and bargaining coverage. None of these conditions are replicated elsewhere in the world, and hence the possibility of the EU model being replicated in other parts of the world is slim at best.

NAFTA's approach is to condition each member country to respect each other's

labor laws, and to force countries (through a complicated complaint process) to enforce their own labor laws. While the EU's approach clearly has the capacity to create uniform labor conditions in the region, NAFTA"s approach does not. Rather, the NAFTA model is a process that encourages countries to implement their current labor laws while simultaneously increasing understanding of the differences in labor laws and conditions across countries. Complaints about violations of labor law in one of the three countries must be made in either of the other two countries. The complaint may be investigated by the National Administrative office in, and the NAO has wide latitude to deal with these complaints. In cases where it has been established that there has been a failure to implement national law, the complaint may be referred to an expert committee (this has not yet been formed). In cases where there are complaints regarding failure to implement law for core labor standards, the complaint may be referred to an arbitration panel. Failure to follow panel recommendations can result in a loss of tariff preferences or fines. (For a detailed investigation into NAFTA's labor side agreement, please see Compa, 1999). Critics of NAFTA point to its narrow scope and limited powers to argue that this approach, while useful in educating the parties and publicizing the violations, is unlikely to make an appreciable impact on a large scale (EPI 2001; Compa 1999). Other recently emerging regionalization initiatives, such as MERCOSUR and ASEAN have not yet developed detailed agreements on the labor issue, although MERCOSUR has made a start and appears to be following the EC model. ASEAN has not discussed labor side issues as yet. Thus, the potential of regionalization trade models to be the vehicle by which core labor standards are protected seems quite restricted at present.

Corporate Codes of Conduct

Given the problems with existing methods, several "voluntary" models have also grown. Most common amongst these are corporate codes of conduct that draws their inspiration from the Sullivan principles used during the fight against apartheid. A plethora of codes abound, for example, corporate codes, Trade Association Codes, Union sponsored codes, Multi-stakeholder codes, Inter-government codes, and University Codes. Generally, the scope of codes are quite similar, focusing on the core labor standards but including safety, health, working hours and working conditions. (For an example of a typical corporate code, see www.nikebiz.com).

Corporate Codes have made some progress within the niche of internationally-traded consumer goods. Codes were first established in consumer goods sectors such as toys, clothing, shoes and rugs. The success of corporate codes is premised on a robust consumer preference in high-income countries for "ethically-made" goods. They will succeed as long as consumers are willing to pay a premium to ensure that goods they buy are not made in sweatshops (Blank & Freeman 1994; Freeman 1994, 1998), or if they are unwilling to buy brands that do not follow basic labor standards. Thus, the impact of corporate codes may be ascribed at least in part to the presence of two factors: consumer goods and consumer preference. In the absence of these constraints, there would be little or no pressure to improve labor standards. It is this pressure that can be argued to form the basis for most corporate code movements such as the FLA, the CCC and the ETI.

It is important to understand that the attitudes of various different stakeholders to codes of conduct can be quite different. For many large corporations, codes of conduct are a matter of managing public their public image, and arise out of a pre-emptive strategy. In other cases, they are often introduced after critical incidents, and to satisfy

their own employees that company is doing something about labor conditions in contractor factories. However, it is also true that in the garments and athletic shoe sectors, many corporations have taken the implementation of their codes seriously. NGOs' in the "North", see codes of conduct as element in the regulation of international business (see for example, e.g., Oxfam, Save the Children, Amnesty, Greenpeace etc). For unions, codes represent an inferior means of securing labor rights, and unions are quite skeptical of codes without independent monitoring or agreements. Only a small percentage of consumers in advanced nations are willing to pay extra dollars for goods produced under standards imposed by does of conduct. However, these consumer groups aligned with other civil society groups are key actors in maintaining the pressure on corporations to implement their codes. Southern exporters see codes that serve to increase their costs of production mostly, and imposed on them by their Northern customers upon whom they depend for orders. Workers in the "South" often support codes, but it is also fair to say that on some occasions their concerns are different from what the codes focus on. For example young women workers may be more interested in a code provision that guarantees them maternity benefit rather than a code provision that limits their ability to earn overtime wages. Southern governments do not oppose codes of conduct, largely because they are voluntary efforts by corporations.

Although codes of conduct are becoming more popular, research has unveiled a number of problems with them. First, workers who are covered by the code often don't know the contents of the code of conduct, even though they are to be displayed in the workplace. Second, there has been a lot of dissatisfaction with monitoring of the code. Not all corporations monitor to see whether the code is being implemented. Of those who

do, 60% do the monitoring themselves. Only 15% of corporations with codes have agreed to some form of independent monitoring. And the quality of monitoring is also suspect i.e., there are relatively few neutral monitors who have the sufficient skills and resources to monitor effectively. Third, there is a very limited focus on consumer industries. Fourth, unions raise the issue of whether a code is beneficial absent the right to organize and bargain collectively. Fifth, often failure to follow the codes does not attract any penalties.

In general, corporate codes of conduct have made some progress in improving labor standards but their reach is limited and it is unclear if they can make a significant impact without the help of national governments. These efforts are likely to benefit only a small segment of the target workforce (OECD 2000a, 2000b; Scherrer and Greven 2001). It is not clear what will happen if consumer preference diminishes or disappears over time. What we do know is that corporate codes have diffused much more slowly in industry sectors whose goods are not sold directly to the consuming public. Thus, the ability of voluntary models like corporate codes of conduct to significantly improve labor standards for the majority of workers in developing countries is also limited.

Certification Approaches

Another voluntary approach, certification approaches refer to an external body certifying that the factories producing certain commodities are adhering to labor standards, or more directly certifying that certain products are produced in accordance with labor standards. A number of different examples exist, such as ISO14001, Rugmark, SA8000, AA1000, etc. SA8000, for example, was launched by a coalition of

rights activists, governments, MNCs (Avon, Dole, Toys-R-Us among others). SA8000 sets standards and appoints inspectors. By 2002, SA8000 had certified 58 factories worldwide. However, violations have been observed even in factories certified by SA 8000 in China.

Among the better known certification arrangements are those by the FLA (Fair Labor Association). Established by President Clinton's Apparel Industry Partnership, it is an industry wide agreement on a code of conduct and monitoring system. The code of conduct focuses on a number of issues (Forced labor, child labor, harassment/abuse, non discrimination, health and safety, freedom of association and collective bargaining, wages and benefits (minimum wage) and hours of work). The FLA certifies monitors (drawn from the private sector) and emphasizes both internal and external monitoring. Its members are Adidas_salomon, GEAR, Jostens, Joy Athletic, Levi Strauss, Liz Claiborne, Nike, Patagonia, Reebok, Eddie Bauer, Phillips Van Heusen, Polo Ralph Lauren. The FLA publishes the results of monitoring at their website. The results are quite encouraging in many ways as factories that subcontract to FLA members are very clearly making efforts to follow core-labor standards. The one area in which progress has not been made concerns freedom of association and collective bargaining. However, note that the FLA only monitors those factories that serve as subcontractors to its members, and thus has a very limited reach.

Reporting Initiatives

Another multilateral initiative to improve international labor standards can be seen in the proliferation of "reporting" systems. The essential element of a reporting

system is that it requires those corporations who agree to participate in the system to report on the enforcement of such standards in their own firms. The best examples of these are the GRI (Global Reporting Initiative) and the UN Global Compact.

The GRI (Global Reporting Initiative) commenced in 1997 and was convened by the Coalition for Environmentally Responsible Economies, and the United Nations Environment Program. Currently there are participants from over 51 countries. GRI has a membership of over 68 NGOs and Research Institutes, over 106 global corporations, over 12 Business Associations, over 26 Financial Institutions, and many Consulting firms, Foundations, and universities.

GRI ‘s basic mission is the development of globally applicable guidelines for reporting on economic, social, environmental performance for businesses, governments and NGOs. Called the “triple bottom line” since it focused on environmental, social as well as financial reporting, the idea is to elevate sustainability reporting to the same level as financial reporting. Through a pilot program involving 21 test companies in 1999-2000 resulted in the creation of the Sustainability Reporting Guidelines 2000.

The Global Compact is similar in that it requires members to report on a number of dimensions. It was started by the UN Secretary General in 1999, who asked World Business organizations to: Support and respect protection of international human rights, make sure their corporations are not complicit in human rights abuse, uphold freedom of assoc. and collective bargaining, uphold elimination of forced labor, uphold the elimination of child labor, uphold the elimination of discrimination, support a precautionary approach to environmental challenges, undertake to promote greater environmental responsibility, encourage development and diffusion of environmentally

friendly technologies. Participating organizations must sign a letter of intention to participate and then report on their performance on the above nine principles in their annual report. As of 2003, there were 90 global corporations, 11 international business associations, 7 inter-sectoral business associations, 9 international labor unions federations, 11 civil society organizations, and various others participating.

The key problems with this approach are as follows: First, it is a voluntary approach and not all multinational corporations participate. Second, there is no monitoring, i.e. no one is going to inspect to see if corporations are following the standards. The hope is that the transparency inherent in participation in reporting systems (and the danger that someone might actually check if the corporation is following core labor standards) will be sufficient to ensure that labor rights are expected all over the world. The limited participation negates this principle though.

In sum, there are many different approaches to improving labor standards globally. They are diverse, not connected or integrated with each other, and each approach has significant limitations. In many ways, these constitute a scattergun approach, where some initiatives work in some cases for certain time periods, but we are not closer to a general solution to the problem of labor standards. Thus, it is good to have so many multi-lateral and voluntary tools for the job. On the other hand, the collective effectiveness of these tools need improvement. In the next section we examine the potential of new regulatory approaches in international industrial relations to contribute to the international labor standards problem.

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HARD AND SOFT REGULATION

Of late, there has been increasing interest in “soft law” and “soft regulation” particularly in industrial relations, particularly in the international arena. We first distinguish between hard and soft regulation, then examine some examples of emerging soft regulation in one international context, the European Union and discuss how soft regulation seems to be dominant in the various approaches to international labor standards, drawing heavily from Sisson and Marginson (2001). We also discuss the implications of “ratcheting labor standards” a proposal based on soft regulation that holds some potential for long term solution to the labor standards issue and raises implications for national government roles.

Emergence of Soft Regulation in the International Arena.

While there is no systematic definition of soft regulation, we best understand the nature of soft regulation when we distinguish it from hard regulation. The best example of hard regulation or hard law is an existing piece of legislation in any country. The legislation is characterized by a clear definition, specifies some standards, and articulates penalties for failure to comply with the legislation. Thus, hard regulation is always “compulsory” and binding on the populations covered by it.

Soft regulation, on the other hand, is more diverse. Often soft regulation deals with a set of minimum standards or provisions, when it does tend to deal with rights and obligations. Much of soft regulation is permissive, and not compulsory. Often soft regulation takes the form of recommendations, or opinions, or statements. Soft regulation often provides for multiple interpretations of processes, whereas hard regulation tends to assume that the process is finished. Sisson and Marginson (2001)

suggest that an important distinction between is that hard regulation might be described as “parfait” or complete while soft regulation is generally imparfait or incomplete.

A key distinction between soft and hard regulation is in terms of enforcement. In hard regulation, enforcement is only via sanctions or other forms of “punishment”. In soft regulation there is a huge variation of enforcement approaches. For example moral suasion, monitoring and feedback, transparency, peer group audits, bench-marking, joint studies, joint papers etc are a variety of methods relied on by soft regulation.

A final point is that soft regulation tends to appear more commonly in areas that have cross-border implications. In the area of employment relations for example, most countries have “hard” regulation, whether it is in the form of laws or collective bargaining agreements. Sisson and Marginson suggest that in the EU, soft regulation tends to dominate in many ways. They suggest that there are four main ways in which employment relations issues are dealt with in the EU. First, hard regulation has been used to deal with health and safety. Second, a mixture of hard and soft legislation has been used in the case of working time and European works councils, since the social partners required flexibility in implementing these through collective agreements. Third, there are soft regulations through framework agreements and joint recommendations that are used to “encourage” negotiation and consideration at other lower levels, but are not binding on them. Finally, there is another soft dimension to EU regulation in terms of employment policy (the open coordination method), where the approach has been to specify targets but let each country achieve them in its own way. Kerstin Jacobsson (2004) in talking about the EU employment policy calls it a “discursive regulatory” method, a subtle method that includes mechanisms related to language-use, knowledge

making and meaning-making.

The point of the above discussion is to show that soft regulation is increasingly used in the "international" arena. In fact, there are many more examples of "soft" regulation in respect of international environmental issues rather than labor issues. The key question of interest is why this is the case. Two explanations exist. The first concerns complexity. Sisson and Marginson (2001) essentially argue that this is due to the difficulty of adopting hard regulatory methods when faced with increasing complexity i.e. "a growing social and economic complexity stemming from the twin processes of differentiation and inter-dependency" in the EU. Given the variety of different employment relations patterns and structures in the EU, a one-size fits all approach cannot be adopted. Hence, the prevalence of soft regulation in the employment relations arena within the EU, or within other international arenas such as environmental regulation and treaties.

A second explanation concerns the argument that the increased use of soft regulation in governing transnational relations may be due to the increasing strength and maturity of the international system----not all relations need to be governed by law, but some can be left to "etiquette, social discourse and informal commitments (Shelton, 2000: 12) and Jacobsson (2004:356). While this may certainly be true in the European community case, where a shared understanding exists on a number of issues, we don't see this as being the primary explanatory variable in terms of the emerging soft regulation arrangements that deal with international labor standards in the third world.

Third, from an international perspective, there are many practical issues which soft regulation helps to overcome. Keller (2000) suggests that soft regulation is just easier

to achieve because conflicts of interests may be easier settled in a flexible format that allows the parties considerable leeway. Clearly this explanation has relevance in the highly contested terrain of international labor standards.

If one considers the development of regulation in the international labor standards arena, they can be all classified as "soft". Codes of conduct, the OECD guideline for multinational companies, the ILO's tripartite declaration on social policy, the UN Global Compact, certification approaches all fall quite clearly under the rubric of "soft" regulation.

Clearly the degree of "softness" varies dramatically in these approaches. The existing international approaches also vary to the extent that soft regulation can be turned into hard regulation, (although we are not sure whether this should be a goal of soft regulation). For example, codes of conduct are classical examples of soft regulation. However, more and more companies are using independent monitoring and eliminating those contractors who fail to meet the standards laid down in the code of conduct. This is one example of how soft regulation often becomes "harder" over time as sanctions are increasingly tied to them. More recently, the FLA board in New York was considering the suspension of one of its members Gildan Activewear for not following conditions laid down for being a participating FLA company. Not all of the current approaches show promise of being concerted from soft to hard. For example, the only way in which the ILO approach can be converted from its "soft" moral suasion to a hard approach would be to expel the country from the ILO. But this would leave the ILO with no leverage at all.

Although Sisson and Marginson (2001) state that soft regulation must be

converted to hard regulation at some point so that it remains more than a statement of intent. They cite Wedderburn (1997:11) who argues that fundamental labor rights have to be built on the "hard rock" of constitutional principle or legislative provision. We are in agreement, to be sure, but recall also that it is the failure of hard regulation, i.e labor law in developing countries that gave rise to the international pressure for labor standards. Thus, we argue that soft regulation approaches in the area of international labor standards could be developed further, but the fundamental character of "softness" must be maintained in order to be successful. Below, we describe one possible approach that would constitute development, refinement or improvement of these soft approaches. This particular approach is discussed here since it helps us develop our proposal regarding new government roles in the following section.

Ratcheting Labor Standards

The basic purpose of the Ratcheting Labor Standards approach (developed by Sabel, O'Rourke and Fung, 2000) is to establish a systematic competition between firms based on their treatment of workers. The idea is to use monitoring and public disclosure of working conditions to create official, social, and financial incentives for firms to monitor and improve labor standards through out the supply chain. Thus, Sabel, O'rourke and Fung (2000) argue that this transparency would enable firms to document their accomplishments in such ways that will compel emulation by "laggards". Essentially, the process would work as follows: First, firms in a particular industry would be required to adopt some existing certified provisions (codes of conduct or SA8000 for example) for monitoring their labor standards performance. The key here is to ensure that all firms in that particular sector participate. Currently only some do. Second, monitoring agents

would be required to make their inspections and suggestions for remediation public and independently verifiable. This would mean uploading their inspection results into a publicly accessible data base. The FLA already follows this procedure, and there are examples in other areas such as the Toxics Release Inventory. Participating firms must also be open to external verification should it become necessary. Monitors would rank the performance of firms under their purview, and provide information about the methods used for rankings to an RLS governing council (the CHIEF UMPIRE) who would ensure comparability standards and dissemination.

There are several outcomes associated with this process if it is followed. Firms will essentially compete to capture the right customers by improving their labor standards, since it is public. The monitors would also compete to improve the scope and reliability of their monitoring effects. Gradually, the knowledge base would grow and facilitate other things. For example, as it develops firms may be motivated to do more and "ratchet" their labor standards upwards. From the perspective of lower cost countries, information generated via this would lead to public debate in each country and across countries. For e.g. footwear conditions of work in Indonesia would be compared to those in country at similar levels of development. So the standards used would be broadly appropriate for different stages of development. As the knowledge base increases, RLS could be the basis for the development of common minimum standards by the government or international bodies that were appropriate for different industries and developmental contexts. It also stimulates more agents such as regulatory agencies and unions to participate as monitors. The key aspect is that the transparency that is central to this approach would bring about increased regulatory pressures on firms. For a more

detailed exposition of RLS, please see Sabel et al. (2000). RLS raises several implications for soft law approaches and national government roles which we explore in the next section.

PROPOSAL: NEW ROLES FOR NATIONAL GOVERNMENTS

The basic element of the proposal in this paper is that we should revisit the role of national governments in improving labor standards, despite their prior failure to implement their own legislation. Our rationale for going back to the role of the national government rests on several propositions. First, we argue that national governments must be brought back to play an key role so that it eliminates the "north-south" divide that exists currently. New regulations need to be seen as being friendly to the interests of both developing and industrialized countries. To accomplish this, the movement for better labor standards will have to shed its profile as an initiative originating in high-wage countries and being exported to low-wage countries. As long as new regulations are seen as 'external' initiatives, there will be resistance within developing countries to adopting them. What is needed is a process that will bring the issue of better labor standards into the internal debates within each country and at the same time overcome the sovereignty issues. In order for that to happen national governments need to be engaged and their engagement needs to go beyond their traditional regulatory roles.

Second, we argue that national governments must be brought back in because they often have better reach than other players. It is possible for national governments to help extend the movement towards better labor standards to pother sectors, industries and regions as long as there is sufficient motivation for governments to participate.

Third, national governments have the capacity of significantly strengthening existing soft regulation methods or to even, in time turn soft regulation into harder regulation. The RLS for example offers, through the transparent development of a knowledge database, the basis for governments to act to extend standards from one sector to another, or to create new common minima for their countries. At the same time, national governments can also play a role to ensure that the standards are appropriate for their own stage of development. The transparency and knowledge base inherent in RLS provides all the stakeholders to debate the standards that are or should be applicable at any point in time, and national governments can be important arbiters in this process, engaging employers, unions and community groups in a dialogue over labor standards. While such a "soft law" approach has not always attracted support from all advocates of labor standards, we view this role of national governments as the missing link between the current private initiatives on the one hand and the future "hard law" regimes that are expected to take shape globally, on the other hand (Verma 2003).

Thus, we are essentially arguing that soft regulation approaches create opportunities for national governments to get back into the center of the labor standards debate, and play a role that is quite different from the regulatory one in which they have failed. The key question is how they will do this. We think that several of the current soft law examples serve as useful models. For example, we have argued that to bridge the North-South divide, it is vitally important to internalize the labor standards debate at the national level within each country. In many ways, the UN's *Global Compact* is a similar idea at the international level. This process begun at the global level could cut across all industry sectors. The hope behind *Global Compact* is that the largest corporations'

voluntary compliance would lead to a snowball effect in which other companies, including suppliers, would follow. This expectation is not entirely unrealistic if the largest 500 firms were to comply. These firms would become eager, in turn, to see that the others comply with similar standards. It would be in their self-interest as well others' to see the standards extended as far and wide as possible.

At the national level, each government would initiate a process similar to *Global Compact* at the national level. The process could be initiated by at a meeting of business, labor and government leaders at the national level. The parties would be charged with developing a set of standards for firms for both their domestic and international operations. These standards would establish a "floor" below which the signatories would undertake not to operate. Given that most of the participating firms may already be above the "floor", it would not be costly for them to agree to a minimum standard below. If the experience of other industry groups is indicative, it would be possible to arrive at a set of standards to which that the largest 500 firms in that country could agree.

The national pattern can be replicated in within various industry sectors. Initially, we see the process involving the largest businesses because they would have the resources to commit to this process. However, over time it can be gradually extended in stages to their own suppliers and other smaller firms that did not participate at the initial stages. Further, through the example of the transparency requirements of the RLS, this entire issue could be publicly debated in the country.

An alternative "soft regulation" approach for national governments would be to establish a competition, rather like the Baldridge awards for quality, in the realm of labor standards. Here too, principles of transparency a la RLS could be used to effectively

diffuse the adoption of good labor practices. In another variation of the soft regulation approach, the government could encourage a standard for the particular industry, perhaps through a code of conduct or through a certification system based on RLS principles. The national or local government could also generate appropriate incentives for firms to participate in the process.

Essentially, we are suggesting that national governments can adopt a soft regulation approach encourage improvements in labor standards. In order to do so, national governments must learn from current international efforts, since these are all based on soft regulation approaches. And there is a wide variety of them, as discussed in this paper.

The approach suggested here is not without its problems. A few key issues need to be addressed. First, what is necessary to prod national governments (which have not been too effective at implementing protective labor legislation) to take on this new activist role? Second, what mechanism or incentives can the national government use (beyond moral suasion) to encourage large employers to adopt the kinds of standards and practices that we are suggesting? Third, what mechanisms will be there to ensure that large employers who agree to adopt these standards are actually practicing them? Finally, this paper is essentially suggesting a trickle down effect from large employers to smaller and medium size employers. There are obvious obstacles to such trickle down processes. Is there a way for governments to encourage smaller employers as well to adopt these practices?

One option, for a government wanting to be seen as more “activist”, is perhaps to provide a tax incentive, say, a percentage reduction of business or corporate taxes for

those firms who adopt and comply with such practices. This is likely to increase adoption, as the cost of adopting core labor standards may not be as high as the reduction in taxes.

CONCLUSION

In sum, in this paper, we argue for a new conceptualization of the role of national governments in the international labor standards debate. In conceptualizing this new role, we are particularly sensitive to the new international soft regulation approaches, and the unique advantages that accrue from involving national governments in promoting labor standards through soft regulation. Our argument recognizes that we are coming around full circle to the original starting point, i.e., to the national government. Yet, it is also clear that as globalization proceeds apace, soft regulation approaches have increased in importance and show greater promise than the traditional hard regulation route. We hope our proposal in this paper will stimulate debate on ways in which the national government can be seen as part of the solution, rather than as part of the problem.

ACKNOWLEDGEMENTS
Earlier versions of this paper were presented to the Industrial Relations Research Association 56th Annual Meeting, January 2-5, 2004, San Diego, CA, USA; and to the International Industrial Relations Association 5th Asian Regional Congress, June 23-26, 2004, Seoul, Korea. The authors are grateful to participants from both conferences for their feedback.

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