

Rolling Rule labor standards: Why their time has come, and why we should be glad of it

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I. Introduction

Current debates about the role of ILO labor standards – notably the acrimonious dispute regarding the utility of condensing many of the ILO's traditional and highly specialized conventions into five broad core standards – are part of a vast, often tormented reconsideration of what kind of regulatory regime will today best protect the interests of working people, in the developing countries no less than the rich ones, in the informal sector as well as in formal employment, and regardless of gender and race. Collective bargaining was viewed from the end of the 19th century to the beginning of this one as the chief instrument of defending those rights (at least those of them that comported well with the assumption of the male factory worker as the typical breadwinner in need of protection). It is everywhere under threat: from legislation mandating rules concerning pensions, on-the-job discrimination and many other domains that were, or might once have been expected to become topics of collective bargaining; from private labor standards, elaborated by NGOs and transnational corporations, governing labor conditions along global supply chains in several industries; from company participation and incentive schemes that are more appealing, especially to highly qualified workers, than traditional union arrangements; and (resulting from and contributing to all this) from the slow erosion and disorganization of domestic law in the advanced countries whose labor regimes once served as models to the world. Similarly, tripartite or neo-corporatist governance at the national level – collective bargaining writ large – is everywhere strained, has frequently come undone, and is no longer emulated by countries which once strove to do so.

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Discussion is short circuited when these manifest changes are ascribed to the disruptions of globalization and the increase in management's power associated with it. Globalization is certainly disruptive; management has gained power through continuing reorganizing occasioned by the disruption. But it is also true that globalization and reorganization have led to increased decentralization within large firms, and often from them to their suppliers at various levels in the supply chain worldwide. Surely the extremely limited ability of unions rooted in collective bargaining to use this re-distribution of power from the top down to reconstitute themselves, or at least offset some the consequences of disruption on traditional prerogatives, suggests something more: part of the labor's problem of responding to changed circumstances is the strategy of response - and so at bottom the assumptions about what constitutes an effective labor regime - rather than the changed circumstances themselves.

This paper pursues this suggestion. The core idea is simply that regulation, to be effective, must correspond or mesh with the forms of cooperation whose effects it corrects in the public interest. When, as now, the forms of cooperation change, so do the forms of effective regulation. At the ILO and elsewhere we need to discuss not how to improve the regime we have - by shifting, or not, to standards of international human rights law - but, instead, whether we have the right kind of regime at all. To consider alternative regimes in turn requires rethinking, or at least contemplating the prospect of rethinking the core concepts - such as compliance - definitive of each.

To situate the argument, therefore, Part 2 looks very briefly at three ideas of compliance, each associated with a distinct area of law, and Part 3 shows how the contractual concept of compliance, in two variants, became central to the labor regime of the last century. Part 4 looks at the breakdown of the contractualist regulatory regime at the workplace. Part 5 considers the breakdown of contractualism in its home precincts: private contracting in relations between co-operating firms. A first argument here is that the generality of the failure points to a very general cause indeed: not a shift in workplace relations, but a transformation in the conditions of cooperation out of which "contracting" or the regulation of on-going exchange arises. A second one is that, discernible amidst the ruins of the old regime are the lineaments of a new, experimentalist one. In this regime learning from (by solving problems with) partners is inextricably connected with monitoring their performance, and the requirements of compliance - the very meaning of term - are defined for the parties in that process itself. Put another way, in this regime do enter contracts with agents in which the latter are incentivized faithfully to realize the plants of the former. Rather, in the course of executing projects "principals" learn from "agents", and vice versa, blurring the distinction between the two, but in which that heighten their mutual accountability. Part 6 interrupts the development of the argument to respond to the reasonable objection that however sweeping this transformation may be, the last place it will ever reach are lower reaches the international supply chains that define the current globalization, and most especially, China. Part 7 concludes where, in my view, the coming round of debate should start: with the recogni-

tion that many global brands, such as Nike and Adidas-Salomon, private international code makers like the Fair Labor Association, some unions (at least at the regional level) in countries such as Germany and Denmark and, not least the ILO - in its Maritime Labour Convention and health and safety standard - have already reorganized this shift in the conditions of co-operation and have taken important, but partial steps to address them. One shorthand for this, recognizable to "compliance" managers working for some of the global brands, but also workers and production engineers in many sectors world wide, is "going lean" on compliance. By the time you hear that phrase again, it should be clear that there is reason to believe its time has come.

II. Three Ideas of Compliance

Take first contractual compliance, or contract, in which parties exchange promises and commit themselves to execute the terms of their agreement. Breaches of the agreement are typically sanctioned by money damages. Because contracting parties are presumed to know their situations and interests well - otherwise they would not enter agreements with each other - it is also presumed that the contracts between them will be richly detailed with respect to the particulars of their situation. Because contracting is incessant - it pulses with the market - the contexts or domains within which specific agreements are struck are likely to be familiar to courts or other specialized adjudicators, and these latter can supply default terms to fill gaps individual agreements as the parties would have filled them given sufficient time and resources to do so. Between the default rules and the parties' specialized terms, therefore, contracts are thought to come as close as any legal instrument can to specifying the parties' obligations, and thereby guiding as much as law can the determination of non-compliance or breach. Transacting parties enter contracts precisely because they can subject themselves to a law suited to their circumstances.

A second idea of compliance derives from criminal law. Call it obligatory compliance: Criminal law prohibits certain acts, and we are obligated to respect those prohibitions as a condition of participation in the society that imposes them. If we don't we lose our freedom, in jail.

A third idea of compliance imposes a duty to act reasonably or responsibly in complex situation. This is the idea of compliance associated with tort law. If we are negligent in the duty to be reasonably careful in avoiding harm to others - in the products we design, the food we process, or the medical services we provide - then we are liable in tort, not just for money damages equal to the harm caused, but for punitive fines meant both to correct the injustice we have committed, and to deter others from negligence in similar situations. Tort law thus has a regulatory as well as a corrective function.

It is often said that contract law, as the law of the market, is fundamentally different from tort and criminal law as, respectively, the societal law of regulatory duties and unconditional social obligations. These distinctions are, of

course, easily confounded. Contract law is entangled in social norms, or embedded in society – contracts with (socially) “unconscionable” terms are invalid. Commercial contracts are traditionally read, under the United States Commercial Code, in the context of the norms of the industries to which they apply. Conversely, the actual application of sanctions under criminal and tort law often resembles in practice the kind of negotiation of damages associated with contract claims (pleas bargaining between prosecutors and accused in US criminal cases; creation of administrative “grids” fixing awards for various classes of harms in US mass tort cases, and so on).

More important, for present purposes, is the distinction between contract and tort liability or its obverse, compliance. The former is defined by rules: the exact content of the promises exchanged by the contracting parties. The latter is defined with reference to extremely open-ended standards: the designer of a product is only then not liable for damages caused by design defects if she was as diligent in anticipating and eliminating those defects as a designer of such products can reasonably be expected to be. To determine what reasonable expectations of diligence require in the case of a particular defect, the court determines whether the designer, beyond meeting regulatory requirements, took such precautions as her peers currently do, or as special information available to her alone would have likely prompted them to take. Put another way, to comply with the tort duty to avoid harm through negligence it is insufficient merely to abide by the current rules specifying acceptable behavior. Rather the duty is, to use language to be developed in a bit, to anticipate and mitigate risks to the extent and by the means currently possible.

III. Labor Law as Contract

Labor law was, for most of the last century, a genus of the contract law family. It came in two species. The first and perhaps most salient was of course collective bargaining. The state set terms on the parties – capital and labor – with the aim of ensuring that their bargains were public regarding. At the limit, reached in such neo-corporatist arrangements as those prevailing in, say, Austria in the 1980s (and foreseen by Carl Schmitt in the 1920s) collective bargaining and the parties to it became the state – but this was legitimated (to the extent that it was, given what came to be seen as the unacceptable exclusion of essentially everyone but the traditional bread winner and his employer from the negotiating table) by the conviction that such contracting defined the public good.

The second species was administrative or regulatory: state agencies established rules for governing workplace conditions – setting terms for compensating workers for workplace injuries, for establishing pensions systems and unemployment insurance, for reducing health and safety hazards, and proceeding to protection and racial, gender and other forms of discrimination. Such regulation of the workplace was contractual in the superficial sense that the dense web of rules that it produced had the look and feel of the rules produced by successive

revisions of collective bargaining agreements. It was contractual in the deeper sense that in practice the state, in writing regulations in consultation with the workplace actors, helped the latter overcome prisoners dilemmas and other familiar collective action problems to “impose” on themselves, through the rules, terms they would have agreed were they not hostage to limited, self-defeating calculations of self interest. If it’s a useful exaggeration to say that in collective bargaining the state sets the stage for the labor market parties to write the rules for themselves that an ideal administration would have written for them, then its an equally useful exaggeration to say that in regulation the parties make use of the administration to write the rules they would have bargained under other circumstances. The continuity between these two “contractualist” modes of setting workplace conditions is demonstrated with particular clarity by the French and other labor law regimes with labor inspectorates that can generalize collective bargaining agreements and enforce regulatory codes.

This classic form of labor regulation was, of course, rooted (or, in the language of Polanyi in which these matters are often discussed, embedded) in the social or economic conditions of particular epoch – the rise of mass production industry at the end of the 19th and beginning of the 20th century. It’s worth evoking this epochal connection briefly to provide a point of reference for the vast changes that have occurred since. Once the extraordinary economies of scale afforded by mass production by means of specialized machines and workers with correspondingly specialized skills were well established, reformers could plausibly argue that capital and labor were so manifestly dependent on each other in the large factory, and society so dependent on their cooperation, that collective bargaining was not just the right but also the obligation of the parties. Similarly, the prohibition of forms of competition and workplace organization based on low wages and the minimum possible investment in plant and equipment – sweating – was good for society and good for workers. Good for the former because it led to more efficient use of resources; good for the latter because it penalized the spread of workplace settings that invited, indeed compelled abuse of labor, in favor of settings – the large factory – where capital gained from minimal respect for labor standards (the rational for collective bargaining). The ILO was created in the aftermath and spirit of the anti-sweating campaigns of the World War One period.

IV. The Breakdown of the Labor Law Regime

I put discussion of the “contractualist” mode of labor regulation in the past tense because it is, for all practical purposes, history. It has broken down, or is rapidly crumbling, in such diverse settings – in Germany as well as the US; in automobiles as well as garments and textiles – that insofar as it continues to exist, it is a historical legacy (with all the costs that outlived bequests continue to have for the living), not the vital, institutional embodiment of the values once

— and still — associated with it. Among the countless examples of this breakdown let me select just three of particular relevance to the subsequent discussion.

The first is the endless search for a reconciliation between German workplace collective bargaining (*Mitbestimmung*) and the forms of continuous workplace re-organization associated with the Toyota production system and all the innovations inspired by it. Very crudely, the tension is that *Mitbestimmung*, like all forms of collective bargaining, assumes that the workers' representative will periodically bargain away a (now) unworkable rule, in return for a substitute that respects workers' interests. In the continuous reorganization of the new production systems, the workers (typically in collaboration with managers and technicians) are themselves involved in devising new procedures, and changes occur so rapidly and fluidly that it is impossible to bargain them through one revision at a time. We will return below to the distinction between systems that aim to conserve as much of the existing rule structure as possible in solving problems (such as collective bargaining) and those that treat (almost all) rules and provisions, and re-write them as equitable problem solving requires. Here the key point is just the viscosity of traditional collective bargaining in the face of a significant and persistent change in environment: The German Metalworkers Union and auto industry, particularly VW, has been trying to reconcile flexibility with contractual control through collective bargaining for 25 years. Since they have done on much recent evidence far better at this than many of their competitors, the continuing struggle is surely a sign that there is a deep tension between the demands of productive efficiency under current conditions and traditional forms of protecting labor standards.¹

A second indicator of the crisis of the contractualist labor regulation is the success of the currently much admired Danish flexicurity model. The core of the model — and you will look in vain in Denmark or elsewhere for accounts that go much beyond the assertion of this core — is that workers allow employers a nearly free hand in creating, abolishing, and re-organizing jobs in return for access to (and financial support for pursuing) continuing training programs of such quality that workers who complete them have their pick of engaging, well paid jobs. Employers, correspondingly, have to upgrade their jobs they offer in order to retain current workers and attract capable replacements. The result is what everyone wants, i.e. a high skill, low-unemployment economy that is highly resilient to market changes because it is highly flexible, quickly abolishing jobs that are no longer needed and creating (quickly filled) ones that are. For present purposes the interest of this success story is in what it does not contain; although unions play an important role in the Danish labor market, especially with regard to continuing education, they do not bargain over the job definitions, or (certain formalities aside) over the creation or destruction of jobs at the workplace in the

¹ The question mark in the subtitle of an excellent recent book on progress towards this goal says as much; see Michael Schumann, Martin Kuhlmann, Frauke Sanders, Hans Joachim Spierling (eds.), *Auto 5000: Ein neues Produktionskonzept — Die deutsche Antwort auf den Toyota-Weg?*, Hamburg, 2006.

manner of "contractualist" unions. Though the comparison is by itself hardly conclusive, the Danes' success in regulating the labor market without the usual devices of collective bargaining and the associated regulation of employment protection together with the Germans' persistent difficulties in making collective bargaining work under current conditions re-enforce our strong suspicion that the "contractualist" model of labor regulation is out of joint with the times.

The third example of the breakdown of the contractualist regime in labor concerns the failures of international codes of conduct regulating labor conditions in multinational firms, particularly, the garment and sport shoe industries. A reasonable response to the difficulties of traditional labor law in the domestic settings of the US or other OECD countries was to argue that the problem lay not in the nature of the regulatory regime, but rather in the newfound ability of multinational corporations to escape its reach — first and foremost through the globalization of production to suppliers in distant, unregulated jurisdictions. But this response is unconvincing in light of the recent experience of corporations such as Nike. Largely out of concern that the sometimes scandalous behavior of its suppliers could devastate its reputation, Nike, like many other prominent brands in fashion-sensitive industries, imposed on itself and its suppliers a strict code of conduct regarding labor standards, and organized an internal inspectorate to assure compliance with its terms. Whatever its shortcomings, there is no doubt that as regards regulation of the work week, payment of and limitation on overtime, insistence on respectful, non-discriminatory treatment of the workforce and the like, the code mirrors provisions common in developed countries. Nor is there any doubt that the inspectorate makes a determined and good faith effort to enforce its terms, visiting factories subject to it more frequently, and examining them more thoroughly, than the (now understaffed and underpaid) labor inspectorates in advanced countries would typically survey like facilities within their own jurisdictions.² A review of Nike's own reports on suppliers' response to periodic review shows the inspections to be, at best, ineffective: findings of non-compliance in one period do not lead to improvements in labor conditions in subsequent ones. The inspectorate system is costly; its very existence constitutes an acknowledgement by Nike of responsibility (shading into liability) for labor conditions in the suppliers. It is hard, therefore, to view the system as a fig leaf, and easy to understand Nike's apparent frustration at its failure. The corporation is doing, after all, just what its critics demanded of it — applying the "contractualist" tradition of labor regulation and rule-based compliance. Surely this is as fair a test of the viability of that tradition under conditions of globalization as reasonably be expected; and the result strengthens, from a transnational viewpoint, the concerns nourished by diverse, domestic experience.

² Efforts to enforce labor codes in the advanced countries are typically dismissed with remarks such as the following: "The system of monitoring and enforcing compliance with federal and state labor and employment laws in the US is broken"; see Janice Fine, *Worker Centers: Organizing Communities at the Edge of the Dream*, 2006 (ILR/Cornell University Press: Ithaca, NY), p. 264.

V. The Breakdown of Contractualism in General

The examples so far are consistent with idea – often implicit in discussions of labor standards – that the problems of traditional or contractualist regulation are specific to, or particularly acute in the workplace: the result of changes in the organization of heavy industry, or the shift to services or high-tech, or of all of these combining with globalization to shift power in favor of capital or otherwise undermine existing arrangements. But a glance at the vast literature on administrative changes in other domains – food safety, reporting in financial markets, air and maritime safety, operation of energy and telecommunications networks, and many more – compels the conclusion that the crisis of labor regulation is part – an especially acute part – of a broader crisis of the contractualist model of regulation. I'll limit the survey of a broad discussion to four salient aspects:

First, command and control regulation – in which a hierarchical superior (usually a state authority) writes detailed, stable rules to govern action within a particular domain – is today unworkable in almost all domains. The regulated activity changes too rapidly for the regulator to write rules governing it. More precisely, change is so rapid in relation to rule writing capacity that the rules on the books quickly become simply irrelevant to the primary actors, or are easily gamed by them to simulate compliance.

Second, in response to the breakdown of command and control or traditional regulation, administration is becoming “networked” or “multi-level.” Differences of nomenclature aside, the common feature of these alternative regulatory systems is to blur precisely the distinction between rule conception (or definition) and rule execution (or application) that command and control emphasizes. This they do by an institutional architecture or decision making process that focuses on the definition and subsequent elaboration of framework goals. A notionally super-ordinate (“Federal”) authority, frequently in “networked” consultation with notionally subordinate entities (the “States,” “Provinces” or “Regions”) sets an open-ended goal (e.g. clean water, safe food, schools providing an adequate education, reasonable accommodation for persons with handicaps) and provisional definitions of minimally acceptable performance levels and measures for gauging progress towards the goal. The subordinates report regularly on their performance, and, together with federal authorities, periodically revise goals, minimal acceptable performance levels, and performance metrics in the light of their pooled experience. Such experimentalist or rolling-rule regulation is pervasive in the European Union, although it is naturally more fully developed in some domains than others. But administration on these lines is also evident in the US, for example, in education and child-protective services. Through recursive revision this kind of regulation plainly blurs the distinction between rule-based and standard-based compliance associated historically with contract and tort: in each period the standard is in effect applied in different rules in different, “inferior” jurisdictions, and then reinterpreted to incorporate generalizations that emerge from joint evaluation of the varying

applications. The standard reshapes the rules and the rules reshape the standard. Another variant of this kind of regime, spreading in human service administrations in areas such as child welfare and mental health in the US, is the quality service review, or QSR. In QSRs, the regulatory “center” regularly reviews a randomly drawn sample of cases in the “lower level” jurisdictions. The case record is supplemented by interviews with a wide range of stakeholders – the client and her family, the therapists, the case worker, the school counselor – to determine whether the diagnosis and the resulting individual service plan were reliable, whether the services indicated where actually provided and of high quality, and whether the service plan was revised if necessary. Like the first variant, this kind of quality review helps detect and correct misjudgments by individuals, flaws in administrative practice and ambiguities or omissions in the high level specification of agency goals.

As the reference to the EU was intended to suggest, the emergence of the new, experimentalist forms of regulation is not limited to domestic or municipal law. On the contrary, transnational settings, such as the EU and the WTO, seem if anything especially propitious to the emergence of the new regulatory model. One reason for this is that no incumbent sovereign, accustomed to the prerogatives of Westphalian sovereignty – the *foens et origo* of command and control – to oppose the fragile pretensions of the new forms of governance. A corollary to this is the need, in transnational space, to harmonize many different bodies of domestic law. Agreement on high-level principal and continuous adjustment in the light of experience whose import is unpredictable – and is therefore unlikely to systematically favor one national solution over others – proves in practice to be a practical and politically effective means of reaching this end. A leading example of the spread of what has been called “anomalous” administrative law – where the anomaly is precisely the deviation from the command and control assumptions underpinning the traditional law of the administrative state – is the Codex Alimentarius, which through the SPS agreement incorporated into the WTO plays a key role in setting standards for food safety in world trade.

Third, and more controversially, as the reference to reasonable accommodation was intended to suggest, the new methods of regulations are not limited to apparently technical matters such as food or aviation safety. They can be, and are being, applied to the articulation and vindication of rights as well. Here too leading examples are from the EU, especially with regard to rights against discrimination at the workplace, or on the basis of gender, age, or ethnicity. But the application of experimentalist or rolling rule methods to rights is only incipient. It is much less developed than in other domains and remains, partly for that very reason controversial. Indeed many rights advocates believe that any attempt to build a rolling rule regime in the domain of rights is self-defeating, as rights, in their view, must be articulated as stable, sharp-edged rules if they are to be effective at all.

The most comprehensive and fundamental indication of the crisis of the contractualist model, and the emergence of an alternative, is, finally, a transformation in the character of contractual relations among firms themselves, and

more specifically a deep change in the nature of long-term or relational contracts. The canonical relational contract was an agreement between a coal-fired electric power station optimized for coal of certain composition, and a nearby mine producing coal of just that type. As the power station was dependent on the mine and vice versa, neither party would invest without an assurance from the other that the relation would continue – despite variations in the cost of labor or of transport – at least as long as necessary for both parties to amortize their investment. The relational contract provided that assurance, binding the parties to buy and sell to each other for the necessary term of years, and establishing formulas for sharing the burdens caused by fluctuations in the price of their respective inputs. Such agreements still exist. But agreements between customers and suppliers are today much more likely to be open-ended in the sense of anticipating the co-development by both parties of the next generation of product, and establishing a governance committee (with equal representation from both parties) to determine which of the potential projects that emerge from collaboration should actually be pursued. In the canonical case, decisions are by consensus. In case of disagreement, the dispute is reviewed by (a committee of) the hierarchical superiors of the deadlocked governance committee. Presumably, no one on either side of the governance committee wants to jeopardize his/her career by raising an objection that is overruled at the next level; and in any case the members of the governance committee, who presumably believe deeply in the project, will always be inclined to think that more time and money will solve current problems. This creates powerful incentives to minimize obstacles. But the consensus rule means that any participant, by raising a strong objection can place the evidentiary burden on the others to demonstrate the feasibility of the project. So the incentive to proceed is balanced by a device that makes it easy to question the advisability of doing so, allowing doubters to express concerns in a form that leads to deliberate investigation, not horse trading.

The upshot is that where the traditional relational contract established rules to govern the relation, the new relational contract establishes framework goals and a governance mechanism for periodically evaluating emergent, alternative interpretations of it. Where the old regime contractualized regulation, the emergent one apparently regulates contract by experimentalist or rolling rule means. Another way to think about the new relational contract is as a formalization – flexible and corrigible – of the traditional tort obligation to act reasonably or responsibly in complex situation. But here is not the place to explore that limb of the argument.

In the shift from relatively rigid, rule-based exchange to fluid co-development we have, at last, a plausible candidate for the efficient or proximate cause of widespread distress of contractual regulation and the emergence of networked or experimentalist alternatives (the causes behind this cause are of course a different question entirely). Beyond that, the close connection between changes in the form of contract and changes in the form of regulation suggest that we have in this nexus a starting point for rethinking labor regulation: the diffusions of new forms of collaborating within and among firms. But before turning to that

task we have to address the obvious and reasonable objection that, even if the breakdown of contractualist regulation is not limited to the world of work, and even if changes in contracting among firms are somehow implicated in it, the actual organization of production on a global scale not only does not encourage collaboration in general and co-development between customers and suppliers in particular but rather maintains developing economies – and thus in effect the industrial workforce of tomorrow if not already today – as the subordinate instruments of advanced country design.

VI. Transformation of Global Supply Chains

The current globalization of production is often said to perpetuate, perhaps in a new form, the long standing division between a rich, advanced center which innovates technologically and controls access to markets, and a backward, poor periphery which performs routine, simple tasks. The multi- or transnational corporation organizes and administers this division of labor, headquartering its knowledge intensive activities in the world center, and then locating its production facilities (formerly internal subsidiaries, now at least nominally independent suppliers) in the country currently paying the lowest wages – and relocating them should a new entrant offer better terms. The early versions of the literature on global supply chains presented this view in some empirical detail. Thus this literature distinguished between “producer-driven” supply chains, as in autos, where the a manufacturing firm in the advanced countries directly organizes the decentralization of production to developing countries, and “consumer- or retailer-driven” supply chains, as in garments or shoes, where an advanced country “brand” designs and markets products, but contracts with independent suppliers to produce them. Though based on long-range exchange and sophisticated communications and logistics, globalization in this account amounts to a modern version of sweating. Factories in the developing world at the limit have only variable, and no fixed costs, and therefore can be costlessly closed when demand for their output drops, and moved when lower variable costs are available elsewhere. Though this picture may have captured a key tendency in globalization circa the early 1990s, and though it is still all too easy to find examples of corporate behavior that correspond to it, four considerations strongly suggest that globalization today fosters, or at least creates many opportunities for new forms of collaboration.

The first piece of evidence in this direction is the absence of races to the bottom in labor regulation worldwide. If the sweating model were correct, there would be powerful, indeed nearly irresistible, pressures on developing economies to increase their attractiveness to transnational investors by adopting permissive labor standards, or none at all. Study after study has shown no connection between inward investment and such deregulation.³ There is, on the con-

³ See Robert J. Flanagan, “Labor Standards and International Competitive Advantage” in Flanagan and Gould (eds.), *International Labor Standards*, Stanford, 2003.

trary, some evidence of a race to the top in competition among corporate codes of conduct the garment and footwear industries. Consistent with the Nike findings reported earlier, the improvement referred to here is in code terms, not actual firm conduct. Nonetheless, it seems that corporations would have to be extremely cynical or shortsighted – or both – to impose higher and higher standards of conduct on themselves in global settings while pressing for more and more abusive conditions in host countries.

A second piece of evidence goes directly to the emergence of new forms of collaboration rather than the implausibility of the sweating model. It is the well documented spread of lean production from the auto industry to the garment industry, and from the advanced countries to the developing ones. Lean production is to manufacturing what co-design is to development: a method for treating current solutions as provisional and searching collaboratively, beyond the boundaries of current routine, for ways to improve it. In lean production, this is typically done by forming teams representing different production departments and specialties to trace disruptions, such as machine breakdowns, manufacturing defects, back to their (typically distant and counter-intuitive) root cause. This system requires close coordination and very often co-location of suppliers and assemblers – assembly problems often originate in defective parts, or erratic deliveries of supplies – as well as collaboration between customer and supplier to increase manufacturing efficiency shades into co-design of next generation parts and products. Lean production was pioneered by Japanese automobiles firms but variants of it have been introduced by all their competitors, frequently beginning with the co-location of new assembly and supplier facilities – unencumbered by tradition – in developing countries or transition economies such as Brazil, Mexico or the Czech Republic. Crucially, for present purposes, lean production has been embraced in recent years by just the firms that traditionally rely on production by semi-skilled seamstresses, and thus, on the sweating account, would be the last to do so – leading producers of garments and sportswear such as Nike and Adidas-Salomon. These firms and other are excluding suppliers who show no promise of adopting these methods and are cooperating more intensively in solving design and production problems with those who do (though not otherwise sharing the substantial costs of adjustment). Leading industry consultants routinely provide detailed cost accounting of the advantages to cut-and-sew producers – who simply assembled garments from textiles supplied by their customers – of themselves organizing low inventory systems able to shift quickly from one product to another as fashion demands: what the industry calls “full package production”. And whole regions, Central America in particular, which only recently built up garment industries to mass produce t-shirts and the like, are frantically discussing how to attract textile mills and trim makers able to produce short production runs at competitive prices and otherwise facilitate a shift towards lean production and co-development. The garment industry is of course a dominant – in the case of countries such as Bangladesh or El Salvador overwhelmingly dominant – component of developing economies, and often their principal connection to the world economy.

A transformation in the organization of the garment industry in direction of more cooperation within and among producers in that industry is therefore a sign of deep change in the nature of development: a blurring of the distinction between center and periphery at the core of the sweating model.

We come to the same conclusion by looking, third, at particular developing economies rather than key industries. Argentina is a good example of the profusion of product “upgrading” in mid-income developing countries, and the access to export markets it affords. At the beginning of the 20th century Argentine agriculture was frontier of efficiency. By the 1960s, its soils were depleted, its technology backward. From the late 1980s on Argentina again became a leader – this time in no-till soy cultivation, based on genetically modified seeds and precision seeders (capable of inserting one seed at a time at a depth and with the amount of fertilizer that will maximize yield in the particular plot under cultivation). The precision seeders are fabricated domestically. Close collaboration between the capital goods makers and the users of the equipment allows such rapid innovation in all the appliances that slit open, tamp down and otherwise touch the ground that foreign competitors can not keep pace. A similar story of close collaboration between different specialist firms (and between them and the national agricultural extension service) explains the transformation of the traditional wine industry in Mendoza province into a high-quality producer with a rapidly share of demanding worldwide markets. The same goes for the emergence of new firms developed worldwide markets for “tv-formats”: analytic descriptions (more detailed than a high concept, but much more open than a finished episode or pilot) of a soap opera, reality tv or crime show that allows for customization in other countries. Indeed, influenced by the work of Hausmann and Rodrik on process of “self discovery” by which entrepreneurs in developing countries explore export possibilities, there is now a substantial case study literature suggesting that a key barrier to entry to world markets is not the closure of supply chains, but rather the limits to the search capacities and production capabilities of developing country economies.

Consider as a final and crucial entry on the list of counter-examples to the new sweating view concern the experience of China. With its low wages and vast pool of workers, authoritarian (but development-oriented government), and explicit prohibitions on labor organizing, China often stands as the knock down example – or rather, given its weight in the world economy, as proof – of the new sweating interpretation. But detailed recent reports suggest that China too is beginning to move, and rapidly, in the direction of the Toyota-style, co-design production methods. A striking indication of this is the emergence of what are called “supply chain” cities. This label is applied to two different phenomena. One is the emergence of huge factories – each large enough to constitute a small city in itself – constructed by foreign or domestic firms to integrate design and manufacturing. The other is profusion of industrial clusters: constellations of small and medium sized firms in complementary specialties which collaborate in constantly varying configurations to produce a changing mixture of highly specialized goods. The common feature is that both variants premise the local

integration of conception and execution. In other words, to the extent that the notion of "supply chain" cities captures an emergent reality, China, the last frontier of globalization, turns out to provide evidence for the spread of new forms of cooperation. These revisions in the picture of the global supply chain are all the more compelling in that they derive from the recent work of Gary Gereffi, whose earlier research presented the most thoughtful version of the new sweating view.⁴

VII. Traces of a New Labor Law Regime

Suppose then that labor law both in the form of regulation and as collective bargaining was contractualist. That contractualism – including of course contractualism in labor law regimes – is in crisis because new forms of co-operation and co-development require continuing governance of deep uncertainty rather than periodic adjustment of an enduring body of rules, in global supply chains and developing countries no less than in the advanced economies. Suppose finally that a successor labor regime will have to mesh with the new forms of co-operation if it is to alter, for public benefit, the high-order effects or externalities of that co-operation. What can we say about the basic features of such a regime?

What, if anything, can we say about its progress and prospects in the world?

The rudiments of an answer to the first question follow from the discussion of new regulatory and relational contracting regimes. These suggest that we think of the labor regime on at least two levels. The first, plant or firm based, is directed at problem solving. Shop floor employees are increasingly being included in the teams responsible for continuous process improvement in just-in-time plants, and in the related problem solving teams that aim to get to the root of, and correct problems that cut across departments or products. Similarly, workers at various levels are being drawn into the process of continuous re-organization of plants that go hand in hand with continuous product upgrading and changes from one model generation to another. As issues concerning work organization, pay systems, and working conditions are inevitably intertwined – think of the shift, characteristic of the move to Toyota-style production, from pay systems that incentivize rapid repetition of known tasks to pay systems that incentive active participation in switching from one product set-up to another – problem solving inevitably shades into activities that impinge on working conditions. But this problem solving only becomes the foundation of a new labor regime when firms and workers deliberately decide to apply the problem solving techniques to the issues concern labor: Why are there spells of debilitating overtime? How can the pay system assure a fair distribution of the gains from joint problem solving? How can the "housekeeping" needed to reduce inventories in just-in-time systems make the workplace more accommodating?

⁴ See Gary Gereffi, *The New Offshoring of Jobs and Global Development*, ILP Social Policy Lecturers, Jamaica, December 2005.

Still the formation of these first-level problem solving groups or teams is not by itself a labor regime. On the contrary, taken alone it obviously exposes workers to new risks – competition among problem solving groups, expropriation of their best solutions, or simply of a fair share of the productivity gains to which they contribute, and so on. To create a protective labor regime rather than a new threat to well-being, these first-level institutions must be complemented by a second level that pools the information generated locally in several ways. One is comparison of the results of problem solving across plants, firms and industries in order to establish benchmarks for rates of improvement and (periodically revisable) standards of minimally acceptable performance. Information on what comparable firms are – or are not – doing allows workers and their representatives to turn differences in performance into arguments for (more rapid) local improvement.

A second and complementary form of information pooling would be based on the model of the QSRs. The second-level institution would in effect do selected diagnostic reviews of the plant or firm level institutions doing root-cause analysis of labor problems. The results of these reviews would naturally inform the setting of benchmarks and standards, but its primary purpose would be to help identify and overcome systemic problems in applying the new problem solving techniques to labor issues.

What, then, of the prospects of actually realizing this two-tier structure in the world? The short answer – the only kind the facts allow – is that there is not one robust, fully developed example of a regime of this type, at least as far as I know. But there are surprisingly many institutions, including the ILO, that are moving in the direction of creating one. While you are considering which fact should weigh more, here is a short list of what might prove the beginnings of a new regime:

- As noted above, Nike and other brands have encountered the limits of check-list compliance in their efforts to improve the labor conditions of their suppliers, and they are obligating their suppliers to shift to just-in-time, Toyota-style production methods. If nothing else, the simultaneity of the two developments has prompted many compliance officials in the firms to see the second – root-cause problem solving – as an answer to the first – the limits of rule-based (contractualist) compliance systems. Hence the call, ever more insistent, to "go lean on compliance" in the way described above. It is, however, difficult to know how seriously to take this call, given that the same firms call on their suppliers to go lean, but typically do little to help them get there. For that reason, it is relevant to note that the call to go lean on compliance from within the brands is seconded by calls from the FLA to move in this direction as well.
- The FLA's own experience with compliance checking dovetails with that of the brands. Moreover, the FLA sees the brands shift to lean suppliers. So far the organization has no fully developed response to these twin developments, but it is well positioned to act as a second-tier information pooler

in both senses. On the one hand, it already implies comparative information on performance with regard to labor standards, and on the other it is actively pursuing pilot projects that could produce QSR type review instruments.

- Groups of shop stewards in Denmark and Germany, together with some local or regional officials, have become actively engaged in linking shop-floor problem solving to labor issues in their plants and firms, and creating supra-plant fora (periodic meetings, conferences, etc.) for comparing results. In both cases, the national level of the unions has limited developments, apparently out of fear of creating counterpowers within the organization. But in both cases the regional successes have attracted broader attention.
- With regard to the ILO, I am instructed by those in a position to know, two developments signal a determination seriously to explore framework or recursive rule alternatives to the traditional contractualist labor regime. The first is the Maritime Labor Convention, adopted in 2006. The new convention, like traditional instruments, sets minimum requirements for work and employment conditions of seafarers, hours of work and rest, accommodation, recreational facilities, food and catering, health protection, medical care, welfare and social security protection. Its novel features include rapid amendment procedures, akin to the problem solving mechanisms used to establish detailed provisions to international regimes such as the law of the sea, and a system of certification under which shipowners' make plans for assuring respect for the relevant law of the flag nation shipmasters are responsible for carrying out the plans documenting that they have done so, the flag state reviews the plans and certifies that they are being implemented. The system could easily develop into a version of the two-tier pooling mechanism describe above, or into a flexible form of traditional compliance checking.
- The second ILO example is the Framework for Occupational Safety and Health Convention, also from 2006. This instrument is plainly inspired by the EU framework directives discussed above: national governments, in consultation with key partners (labor, capital) are to formulate plans for improving the ensemble of the occupational health and safety policies, and periodic review of these plans is to lead to improvement in plans and practice. The affinity with the new forms of co-operation could not be more explicit: the objective of the convention, stated in Article 2 is that "each Member which ratifies this Convention shall promote continuous improvement of occupational safety and health to prevent occupational injuries, diseases and deaths, by the development, in consultation with the most representative organizations of employers and workers, of a national policy, national system and national programme." But again developments are too fresh, and too open, to even begin assessing the probability that this innovation will work, and become a model for others.

So there we are – a labor regime in crisis, some stirring of a new age, some quietly bold proposals by normally cautious, and always well informed participants about the possibility of using novel forms of organization to safeguard traditional values in a changed epoch. This is hardly the blueprint (or the CAD equivalent) for a new labor regime. But it is of such gossamer stuff that new regimes take shape.

Discussion

*Steven Oates** – I would like to draw attention to a key aspect of the ILO's system which I think has not been discussed during this conference so far, namely tripartism. The social partners are a core element of the ILO system which is present both in the standard setting and in the supervisory side. I wonder how much importance the speakers would actually attribute to tripartism and to voluntary collective bargaining which is, or can be, an important part of both the standard setting and, at the national level, of the implementation of ratified Conventions and other international labour standards. I wonder whether the panelists think that the ILO system of involving non-governmental organizations is in any way a model for non-governmental organization participation in other international standard setting and supervisory bodies and processes. There have been several references to the fact that ILO Conventions and standards are addressed to States. In the ILO, we have a representation of States which is different from other organizations; again, it is tripartite. If employers' and workers' organizations participate in the formulation and adoption of international labour standards and can also participate in the implementation of them in terms of the supervisory processes, do they have a responsibility? This would be addressed particularly perhaps to representatives of enterprises. Don't they also bear some sort of responsibility in terms of implementation?

*Hedva Sarfaty*** – I am dealing with issues of labour market reform and welfare reforms, mainly in Europe but also elsewhere. I just wanted to say how grateful I am to the three speakers for having shown the pitfalls and the risks of the changes that we are undergoing now but also for having pointed at possible positive answers to the challenges of globalization and eventually a race to the top. This, in turn, might guide possible future ILO action so that the Organization increases its visibility and becomes an influential actor at the global level.

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*Catherine Brakenhielm Hansell** – The subject of occupational safety and health has been brought up on several occasions and, in this context, I would like to bring to your attention that a new occupational safety and health Convention was adopted in June 2006. The new instrument actually relates in several ways to what has been brought up by the three speakers. It has a total different content from previous instruments. In a nutshell, it introduces a management systems approach to occupational safety and health and proposes to governments to undertake to progressively improve their situation as regards occupational safety and health by adopting national policies, national action plans and so forth. My proposition is that having such instrument as an international labour standard may contribute to this possibility of moving to the top rather than the bottom, although it is true that the specific details in the area of occupational safety and health are mostly laid down at the national level.

*Michael Halton Cheadle*** – Charles Sabel gave the example of the coal mine and the power station, and he suggested a movement from a relational contract into a framework agreement in which there was a co-development and governance committee. Such a framework agreement was not rule-based, but essentially some kind of governance model for regulating the relationship between the power station and the coal mine, each needing each other. But earlier on in his presentation, he contrasted the German co-determination model, which is in a sense a co-determination governance model at the level of the workplace. I do not think it is right to say collective bargaining takes place at the workplace in Germany, but certainly there is the works council and that, as I understood it, is, in a sense, a governance model to regulate relations, for workplaces to be able to adapt to changes. It just seemed to me that both governance models were meant to be directed towards adaptation and I wondered if you could comment.

*Janice Bellace**** – This is directed more towards Brian Langille's point about identifying what is in a nation's self-interest as a way of looking at ILO standard setting or regulation. One of the things that interests me most in tripartism, and particularly in the present time, is when something is not in the interest of the employers – or at least the workers representatives do not see it in their interest – but it might be in the interest of the nation. One example here that strikes me, at least in the most advanced economies, has to do with keeping older workers in the labour force. Most of our standards approaches and the conventional wisdom has been that when workers reach their late fifties basically they are physical wrecks and they would appreciate being put out to pasture for a

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while. But that is something that gets back to Charles Sabel's point. It is an early twentieth century model thinking about the standard, rather than what are we trying to achieve which is having labour force participation ages that match the productive capacity of workers and their educational needs.

I think that you are pointing out that, if we turn around and think about what is in a given country's self-interest in light of its stage of economic development, we would perhaps have some more flexible approaches towards the application of certain standards. This also reminds me of night work where the Committee of Experts had quite a discussion about what we were trying to achieve, if it is non-discrimination between men and women. The question is, whether by prohibiting night work of women, we are protecting women, we are favouring them, or we are disfavoured them. We had a very lively discussion, getting back to the point about what are we trying to achieve in light of the fundamental principles of the Organization.

Simon Deakin – Charles Sabel, as I understand it, is arguing that there is a transformation in forms of production and, more widely, in supply chains, a shift towards a governance model which would involve the emergence of framework contracts as a new paradigm of economic organization. I think that is extremely interesting and that it may well be the case. I can think of similar examples actually within the field of industrial relations where one observes governance-type mechanisms of this sort. If the point Charles Sabel is making is that globalization's competitive pressures really require firms to think up innovative ways of maintaining their competitive position and there is not necessarily a race to the bottom and a return to sweating, then I agree with that and I think that we should not assume that globalization always has negative implications. I would just like to pose a question. I am not sure whether a transformation of that sort necessarily involves abandoning either collective bargaining or the contract of employment or employment relationship as the founding notions of labour law. I would like to keep an open mind about that because I think that the basic concepts we use, and possibly also our model of international labour standard setting, these basic ideas are actually very flexible and may well also be capable of some adaptation.

Brian Langille – Let me pick up the example of the new health and safety standard. Here is a way of putting the point I am trying to make: what is the Committee of Experts going to do under that law? Is it benchmarking, noting progress and learning? Are we going to have the same kind of Committee of Experts 80 years from now if our Conventions are going to look more and more like that? That is the question I am trying to get at. If things are changing, could you get a certain model of what the Committee is for, a certain model of law and a certain set of purposes without rethinking about the institution?

Concerning Ms. Bellace's question about what happens when employers and trade unions have one view and it may not be in the interest of the State. Just to be provocative again, I think it is one of the mysteries why governments in the

ILO with 50 per cent of the votes do not run the show a bit more. Why don't those 50 per cent of the votes speak with more authority than they traditionally have and I think the reason for that is because we have been wedded to this whole race-to-the-bottom divided set of interests. There is no coherent story that all States could tell each other about why they are in this scheme, no clear and positive story. But if there is a coherent, positive story that all States can see then there is much more possible unity among the governments, much less potential for divide and conquer by the other members of the tripartite delegations, to put it bluntly. I therefore think that getting this story right has a lot to do with maintaining the kind of political coalitions you need. On the old theory, it is really easy to divide and conquer the governments; on the new theory, it should be much more possible to have sustainable coalitions over a broader range of issues.

Charles Sabel — Let me say a word about tripartism and then come to this question of new forms of cooperation in relation to the older ones. My presentation was also a non-Canadian presentation, but a non-Canadian presentation by a non-Canadian is even worse than a non-Canadian by a Canadian. So, in that same spirit, let me just say that tripartism is bad for you. It is bad for you because you have three weak partners who need each other because this is one of their last places of self-legitimation. So, they are willing to make deals with each other to preserve the status quo to have an excuse for their continuing futility elsewhere and that is a disaster for the ILO because it means that you have a little bit of freedom but you have to keep secret everything you really want to do. This is like all these other things you well know. Things that an outsider can learn in two days in an institution, or things that are, by definition, common knowledge in that institution.

On the question of the relation between the power station example and the co-development example, this raises, of course, a fundamental issue and it goes to a key point that Simon Deakin is making as well. The part that was alighted, and perhaps too compressive is the following: I did not mean to say that in the current setting the power station and coal mine went to this new kind of agreement. If one looks at these agreements, they look pretty much like they always looked. The thing that has changed is that is no longer the canonical agreement. The canonical agreement looks much more like an agreement between a biotech company and a bio-informatics company developing new tools, or between a carmaker and a supplier, or even between Adidas and one of its shoe-producing factories. Those contracts, different as they are, have the features that I mentioned. The question that has been raised is what is the difference between that and *Mitbestimmung*, and you can trust me, I do know how that actually works. The agonizing problem is that if you look at the two in the abstract on paper twenty years ago, they look equally flexible and the tragedy is that people thought that countries that had institutionalized that kind of cooperation already had a flexible adjustment instrument. It turns out that when you bargain continuously over rules, this is very different from setting a framework agreement, setting benchmarks and meeting periodically to re-adjust the whole system in the

light of that result. You would not know that unless you ran the two experiments and that is the difference between the German production model and the extension of the Japanese production model. They are both, theoretically, flexible and they just turn out to be flexible under different domain conditions and that is the answer and it is an empirical answer.

On Simon Deakin's rhetorical question whether we should ditch all the old things just because there is this difference, I think he is absolutely right. Crazy as I am in insisting on there being a big new thing, I do not think one knows any more the limits of the adaptability of the old things for the same reason you did not know exactly what the results would be of the comparison I made a moment ago. I think one has to keep an open mind on both sides. For the people who have been doing the old thing you need to recognize the emergence of a new thing, for people who believe there is a new thing you must not pretend that there cannot be some profound hybridization and I accept the latter proposition as much as I insist on the former.