

Trade, Labour and International Governance

MNCs, Global Value Chains and Social Regulation
HEC Montreal, June 6-8 2011

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Four Models of Governance

- 1. Adjudication and Sanctions-based Constitutionalism
- 2. Sunshine and Moral Suasion (ILO and NAALC review processes)
- 3. Development Cooperation (IPEC)
- 4. Leveraged Deliberative Cooperation (US-Cambodia Textiles Agreement)

Three Key Questions

- Are state interests in international labour standards likely to converge or diverge?
- How can international law effectively influence those interests to bring about and maintain alignment and thus ensure cooperation?
- What effects if any do policy and political complexity have on the capacity of international law to exert the influence required to ensure international cooperation?

Why leverage is likely to be necessary

- Longer term interests in durable development often at odds with short term interests in maximizing cost competitiveness.
- Non-participation of China takes assurance-based solutions off the table for other developing economy states.
- Therefore either payoffs need to change, or interests need to be transformed.
- States behave as though there are no reputational consequences to non-compliance.
- States appear not to be socialized, persuaded, or to otherwise have their interests transformed (eg. by mobilization of political constituencies) as a result of independent international review processes. Naming and shaming has not worked.

General Requirements for Effectiveness in the Face of Complexity

- Implications of complexity: international governance needs
 - (1) capacity to generate sustained, informed and strategically focussed deliberation
- This creates risks of:
 - resistance (avoidance, delay, failure to commit)
 - loss of legitimacy (mistakes, reaching to far or too coercively, or deferring too much and foregoing accountability)
- These risks imply a second requirement:
 - (2) capacity to induce proactive cooperation.

General Forms of Potential Solution

- 1. Exchange something of value for a determinate set of measures constituting ongoing pro-active cooperation.
- 2. Increase risks of non-compliance to heighten deterrence and lead to anticipatory compliance.
- 3. Heighten the interest-transforming effects of international law.

Characteristic Challenges Associated with Each Form of Solution

- 1. Ensuring sufficient precision of understanding and automaticity of withdrawal of benefits.
- 2. Raising the stakes enough.
- 3. Deepening the reach of international law reach into national politics.

Fit of Leveraged Deliberative Cooperation

- 1. Leveraged Deliberative Cooperation
 - uses incentives to seek the contingent bargain directly
 - monitoring, deliberation and negotiation are part of the plan
 - actively engages domestic constituencies in the formulation and monitoring of the bargain
- Example: US-Cambodia Textiles Agreement

Fit of Adjudication and Sanctions-Based Constitutionalism

- 2. Adjudication and Sanctions-Based Constitutionalism
- Capacity for deliberation, strategic and sustained focus could perhaps be added on:
 - prosecutorial body (strategic focus)
 - monitoring capacity (information)
 - permanent tribunal (predictable jurisprudence and thus predictable signals)
 - supervised negotiation at remedial stage (deliberation)

Fit of Adjudication and Sanctions-Based Constitutionalism

- 2. Adjudication and Sanctions-Based Constitutionalism
- But getting proactive cooperation indirectly through deterrence or interest transformation will be more of a problem:
 - problem: aggravates zero sum logic
 - need a theory of how can do these things upstream or downstream of actual adjudication – by lengthening the shadow of the law.

Fit of Adjudication and Sanctions-Based Constitutionalism

- 2. Adjudication and Sanctions-Based Constitutionalism

- Theory of effectiveness in the face of complexity:

- (1) Deterrence:

- mobilize and increase likelihood of withdrawal of economic benefits

- enhance reputational sanctions (rule of law normativity)

- (2) Transformation of interests

- influence of rule of law normativity within domestic political processes.

Fit of Adjudication and Sanctions-Based Constitutionalism

- 2. Adjudication and Sanctions Based Constitutionalism
- Challenges to theory, borne out in evidence:
 - Reluctant executive branches will avoid full compliance rather than ceding power.
 - Characteristics that give adjudication legitimacy reduce its capacity to mobilize domestic political constituencies.
 - This leaves sanctions or incentives overloaded. In international trade law they are not asked to do this much.

Core Features of a More Effective Model

- 1) A mandatory process through which the parties deliberate upon and identify a program of measures constituting reasonable best efforts to improve core labor standards compliance over a determinate period of time, and iteratively redefine such best efforts.
- 2) Economic or other incentives sufficient to offset short run incentives for non-compliance that in practice remain contingent upon such agreement and upon ongoing best efforts, and will only be removed in the event that best efforts cease.
- 3) Systematic monitoring by a reliable and neutral third party of whether best efforts are being carried out, and of whether they are achieving their goals.

Core Features of a More Effective Model

- 4) Transparent reporting of monitoring results in order to ensure state accountability for those results, and that subsequent negotiations respond to findings with respect to whether best efforts have achieved core labor standards compliance improvements.
- 5) Regular opportunities for stakeholder consultation and input with respect to the design of the program in order to ensure that those with an interest in its implementation accept its broad contours and attempt to hold governments accountable for its implementation.
- 6) Independent tribunal review of state decisions to impose sanctions or withdraw benefits failure to participate in or carry out the agreed upon core labour standards compliance improvement programs. Review processes would seek to ensure that there is a sufficient factual basis for the withdrawal in light of the undertakings stipulated in the program.

Role of Complaints-Driven Adjudication

- Role of complaints-driven review mechanisms open to private parties:
 - ad hoc means to ensure accountability for implementation of the agreement
 - de-politicized as much as possible so that decisions to review complaints, and decisions on the merits of complaints are not perceived as antagonistic acts of governments
 - no obligation to impose sanctions or even to exercise a discretion to impose sanctions flowing from the findings of such a review mechanism
 - obligation to consider and address findings in the context of ongoing review of and negotiations with respect to the required program of action.