

# Hybrid global space of the ILO core labour standards

by

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## Abstract

The issue of labour, in particular the core labour standards of the ILO, is on the global level governed by a panoply of regulatory initiatives. These initiatives include the Conventions of the ILO, the OECD Guidelines for MNEs, NGO initiatives, CSR policies of MNEs and international framework agreements. This panoply of initiatives also employs a panoply of regulatory mechanisms, varying from traditional forms of regulation by law to forms of regulation that are law-like, yet, different in (legal) nature and regulatory dynamics. Furthermore, these initiatives do not operate in a vacuum, yet they coexist in the same global space, namely that of the ILO's core labour standards. The aim of the contribution is to gain a better understanding of the 'hybrid global space' of the ILO core labour standards. Therefore the paper builds on the doctrine on Global Space of Cottrell and Trubek, and the doctrine on hybrid structures as developed in the context of new governance. Based on these two doctrines the regulatory mechanisms of the different initiatives will be mapped and their hybrid structures will be analysed.

## 1. Introduction

In the field of global labour law, the International Labour Organisation (ILO) is the main public international regulatory organisation. Since its constitution in 1919 the ILO has developed and maintained a system of labour standards to promote 'opportunities for women and men to obtain

decent and productive work, in conditions of freedom, equity, security and dignity'.<sup>1</sup> Part of this system is the definition and promotion of four core labour standards: 1) Freedom of association and the effective recognition of the right to collective bargaining; 2) Elimination of all forms of forced or compulsory labour; 3) Effective abolition of child labour; and 4) Elimination of discrimination in respect of employment and occupation.<sup>2</sup> Traditionally, the implementation and compliance with these rights have been promoted by the ILO via Conventions and supplementing Recommendations.<sup>3</sup> In 1998 the ILO adopted a Declaration on Fundamental Principles and Rights at work that focusses on these rights by qualifying them as 'fundamental' and 'core' labour standards.<sup>4</sup> Both instruments apply different implementation and compliance mechanisms, however, they have in common that they address the Member States as the primary actor to take care of this. This is differently with yet a third instrument of the ILO that promotes these rights: Tripartite Declaration of principles concerning multinational enterprises and social policy. The Tripartite Declaration addresses not only the Member States, it also lays down guidelines for multinational enterprises (MNEs), and employers' and workers' organizations.<sup>5</sup>

In the global arena, the ILO is not the only organisation that furthers the implementation of the core labour standards (CLS). The two organisations that are most active in this are the United Nations Global Compact (UN GC)<sup>6</sup>, the Organisation and Economic Co-operation and Development (OECD)<sup>7</sup>. UN GC is 'a strategic policy initiative for businesses that are committed to aligning their operations and strategies with ten universally accepted principles in the areas of human rights, labour, environment and anti-corruption.'<sup>8</sup> In the area of labour four principles have been identified, which are the four CLS of the ILO. The OECD promotes the implementation of the ILO's CLS by its Guidelines for Multinational Enterprise, which are 'far-reaching recommendations addressed by governments to multinational enterprises operating in or from adhering countries' and as such, they 'provide voluntary principles and standards for responsible business conduct in areas such as employment and industrial relations'.<sup>9</sup> Besides these public international organisations, there are also non-governmental organisations (NGOs) that further the promotion of the ILO CSL in cross-border situations, for instance: Fair Labor Association; Ethical Trading Initiative; Social Accountability

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<sup>1</sup> <http://www.ilo.org/global/standards/introduction-to-international-labour-standards/lang--en/index.htm>

<sup>2</sup> ILO 1998 Declaration on Fundamental Principles and Rights at work.

<sup>3</sup> These Conventions are: Convention 87 on Freedom of Association and Protection of the Right to Organise (1948); Convention 98 on Right to Organise and Collective Bargaining (1949); Convention 29 on Forced Labour (1930); Convention 105 on Abolition of Forced Labour (1957); Convention 138 on Minimum Age (1973); Convention 182 on Worst Forms of Child Labour (1999); Convention 100 on Equal Remuneration (1951); and Convention 111 on Discrimination in Employment and Occupation (1958).

<sup>4</sup> See for a discussion about what this might mean for the status of fundamental social rights as fundamental human rights: P. Alston (2004), 'Core Labour Standards' and the Transformation of the International Labour Rights Regime', *European Journal of International Law*, Vol. 15, No. 3, p.457-521; B.A. Langille (2005), 'Core Labour Rights – The True Story (Reply to Alston)', *European Journal of International Law*, Vol. 16, No. 3, p.409-437; Maupain (2005), 'Revitalization not Retreat. The Real Potential of the 1998 ILO Declaration for the Universal Protection of Workers' Rights', *European Journal of International Rights* Vol. 16, No.3, p.439-465; and P. Alston (2005), 'Facing Up the Complexities of the ILO's Core Labour Standards Agenda', *European Journal of International Law*, Vol. 16, No. 3, p. 467-480.

<sup>5</sup> Introduction to the Tripartite Declaration, available on: [http://www.ilo.org/empent/Publications/WCMS\\_094386/lang--en/index.htm](http://www.ilo.org/empent/Publications/WCMS_094386/lang--en/index.htm)

<sup>6</sup> UN Global Compact (<http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html>).

<sup>7</sup> OECD Guidelines for Multinational Enterprises, p. 37, (paragraph 48).

<sup>8</sup> <http://www.unglobalcompact.org/AboutTheGC/index.html>

<sup>9</sup> <http://www.oecd.org/daf/inv/mne/>

International (or SA8000); and Fair Wear Foundation.<sup>10</sup> The main addressees of these NGOs are MNEs (and their full global chain), however, with the implementation and monitoring of compliance are also other actors involved, often including workers' representatives. Lastly, on the global level, ILO CLS are also promoted by MNEs themselves. This is either done by unilaterally adopted codes of conduct that are part of the MNE's corporate social responsibility strategies (CSR) or via bilateral international framework agreements that have been concluded between the management of a MNE on the one side and on the other side workers organisations, among which Global Union Federations, World Works Councils and European Works Councils.<sup>11</sup>

As the above paragraphs illustrate, labour issues on the global level are regulated by a panoply of regulatory initiatives. Research on each of these regulatory forms is extensive and thorough and provides interesting insights,<sup>12</sup> however, hardly any of these studies discusses these regulatory initiatives in relation to each other.<sup>13</sup> Quite remarkable though, when this is considered in the context of the doctrine on hybrid structures between hard law and soft law,<sup>14</sup> and more broader in

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<sup>10</sup> <http://www.fairlabor.org/our-work/labor-standards>; <http://www.ethicaltrade.org/resources/key-eti-resources/eti-base-code>; <http://www.sa-intl.org/index.cfm?fuseaction=Page.ViewPage&pageId=1458>; <http://www.fairwear.org/488/labour-standards/1.-employment-is-freely-chosen/>. This is just a small selection among many others.

<sup>11</sup> See about this in general: I. Schömann, A. Sobczak, E. Voss and P. Wilke (2008), *Codes of conduct and international framework agreements: New forms of governance at company level*. Eurofound.

<sup>12</sup> Just a selection among many: on the ILO Conventions: J-M Servais (2011), *International Employment and Labour Law*. Geneva: ILO; and L. Betten (1993), *International Labour Law. Selected Issues*. Deventer: Kluwer. See on the initiatives of other international organisations: Y. Kryvoi (2007), 'Enforcing Labor Rights against Multinational Corporate Groups in Europe', *Industrial Relations* Vol. 46, No. 2; and J. G. Ruggie (2001), 'global\_governance.net: The Global Compact as Learning Network', *Global Governance* Vol. 7, p. 371-378. See on the initiatives of non-governmental organisations: I. Daugareilh (2010), 'La norme ISO 26000 sur la responsabilité sociétale des organisations : observations sur une expérience d'inter-normativité', in M. Capron, F. Quairel-Lanoizelée, M.F.Turcotte (eds.), *ISO 26000 : une Norme 'hors norme?*, Paris: Economica, p. 147-163; S. Barrientos and S. Smith (2007), 'Do workers benefit from ethical trade? Assessing codes of labour practice in global production systems', *Third World Quarterly*, Vol. 28, No.4, p. 713-729; and F. Cafaggi (2011), 'New Foundations of Transnational Private Regulation', *Journal of Law and Society*, Vol. 38, No. 1, p. 20-49. See on CSR Codes of Conduct: R. Jenkins, R. Pearson and G. Seyfan (2002; eds.), *Corporate Responsibility and Labour Rights. Codes of Conduct in the Global Economy*, London: Earthscan; and Pennings, F.J.L., Konijn, Y. & Veldman, A.G. (2008). Social responsibility in labour relations – European and Comparative perspectives. Alphen aan den Rijn: Kluwer Law International. See on IFAs: K. Papadakis (2006; eds.), *Cross-border Social Dialogue and Agreements: An emerging global industrial relations framework?* Geneva: ILO; and N. Hammer (2005), 'International Framework Agreements: global industrial relations between rights and bargaining', *Transfer: European Review of Labour and Research*, Vol. 11, No. 4, p. 511-530.

<sup>13</sup> There are some scholars that do address more than one initiative, however, mostly descriptive as also existent, without making a connection between the initiatives, e.g. M-A Moreau (2006), *Normes sociales, droit du travail et mondialisation. Confrontations et mutations*, Paris: Dalloz; R. Jenkins, R. Pearson and G. Seyfan (2002; eds.), *Corporate Responsibility and Labour Rights. Codes of Conduct in the Global Economy*, London: Earthscan; B. Hepple (2005), *Labour Laws and Global Trade*. London: Hart Publishers; and B. Bercusson and C. Estlund (2008; eds.), *Regulating Labour in the Wake of Globalization: New Challenges, New Institutions*. London: Hart Publishing. Also, some of them are limited in their scope of initiatives, since they only address public initiatives or private initiatives. An example of the former is L. Betten (1993), *International Labour Law. Selected Issues*. Deventer: Kluwer, who not only deals with the Conventions of the ILO, but also with initiatives of regional organisations, like the European Union. An example of the latter is the 2008 Eurofound report: I. Schömann, A. Sobczak, E. Voss and P. Wilke (2008), *Codes of conduct and international framework agreements: New forms of governance at company level*. Eurofound.

<sup>14</sup> A doctrine that has been introduced in the debate on 'new governance' and is most elaborate developed by Trubek and Trubek: D.M. Trubek and G.L. Trubek (2007), 'New Governance and Legal Regulation: Complementarity, Rivalry or Transformation', *Columbian Journal of European Law* Vol. 13 No. 3, p. 539 – 564.

the arena of transnational governance that is also referred to as 'global space',<sup>15</sup> or more specifically in the context of 'hybrid global labour law'.<sup>16</sup> Basic to both doctrines – global space and hybrid structure – is the recognition that traditional forms of regulation by law coexist with other forms of regulation that are law-like, yet, different in (legal) nature and regulatory dynamics. With traditional forms of regulation is understood the law of public organisations that stress enforcement and compliance with fixed norms.<sup>17</sup> With law-like forms of regulation is understood regulatory initiatives of (multi-stakeholder) private organisations, among which NGOs, MNEs and trade unions, that put emphasis on collective problem solving in complex situations with rather open-ended standards.<sup>18</sup> In general these two regulatory forms are associated with two roles in global space: rule orientation and problem solving respectively.<sup>19</sup> Furthermore, these two broad forms of regulation do not just coexist, on the contrary, they serve different roles in the 'global space' and interact in a wide variety of configurations.<sup>20</sup> The sort of configuration between the regulatory forms determines how the roles fit together, *i.e.* whether they down play each other or that they play to each others strengths. The doctrine on hybrid structures distinguishes three main configurations: rivalry – when the different initiatives fight for dominance; complementary – when the different initiatives coexist peacefully, either by unplanned design or by well elaborated design; transformative – when the different initiatives merge and each constituent part is needed to achieve the goal.<sup>21</sup> What these doctrines together implicate is that in order to grasp the full extent of what is happening on the global space a wider approach needs to be taken to law, focussing on all regulatory (law-like) forms and their distinguished roles. Furthermore, these regulatory forms need to be studied in relation to each other, since their configuration determines to what extent these regulatory forms are able to play their distinguished roles.<sup>22</sup>

The aim of this contribution is to gain a better understanding of the hybrid global space by which the core labour standards of the ILO are promoted, in particular in the cross-border situation of labour, *i.e.* the activities of MNEs. Therefore, we give in section two more elaborate descriptions of the doctrine on global space, in particular with regard to the two roles and the governance mechanisms that are associated with those roles, and the doctrine on hybrid structures. When these two doctrines are taken together, it gives an impression of how the hybrid global space is shaped. The initiatives identified in this introduction will be analysed against the background of these two doctrines, thus for their role in the global space and the governance mechanism deployed by the respective initiatives (section 3) and their possible configurations in this global space (section 4). In section 5, we will bring the findings of those two sections together in order to conclude on the hybrid global space that is created in order to further the promotion of the ILO CLS in the practices of MNEs.

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<sup>15</sup> See about this: M.P. Cottrell and D.M. Trubek (2012), 'Law as Problem Solving: Standards, Networks, Experimentation, and Deliberation in Global Space', *Transnational Law & Contemporary Problems* Vol. 21, p. 359-393.

<sup>16</sup> U. Mückenberger (2011), 'Hybrid Global Labour Law', in R. Blanpain and F. Hendrickx (eds.), *Labour Law between Change and Tradition*, Liber Amicorum Antoine Jacobs. Alphen aan de Rijn: Wolters Kluwer, p. 99-116.

<sup>17</sup> Cottrell and Trubek (2012), *op cit.* note 15, p. 359.

<sup>18</sup> *Idem.* See about this in the context of 'new governance' also: G. De Búrca and J. Scott (2006), 'Introduction', in De Búrca, G. and Scott, J. (eds.), *Law and New Governance in the EU and the US*. Portland: Hart Publishing, p. 6.

<sup>19</sup> Cottrell and Trubek (2012), *op cit.* note 15, p. 361, where they draw on the work of trade law scholar Robert .E. Hudec.

<sup>20</sup> Cottrell and Trubek (2012), *op cit.* note 15; and Trubek and Trubek (2007), *op cit.* note 14.

<sup>21</sup> Trubek and Trubek (2007), *op cit.* note 14.

<sup>22</sup> See for a similar conclusion in the context of transnational private regulation: Cafaggi (2011), *op cit.* note 11.

## 2. The doctrine on global space and the doctrine on hybrid structure

In the introduction it is outlined that the ILO CLS are, on the global level, not only promoted by the Conventions of the ILO itself, but by a panoply of regulatory forms, varying from traditional laws to law-like forms. On a very nuanced and detailed level, the variety of regulatory forms is probably infinitely, therefore the identification of regulatory forms in this contribution is confined to the most prominent forms. These are: the ILO Conventions; law-like instruments of public organisations (the 1998 declaration of the ILO; the tripartite declaration of the ILO; the guidelines of the OECD and the UN programme Global Compact); law-like initiatives of non-governmental organisations (*e.g.* Fair Labor Association; Fair Wear Foundation; Ethical Trade Initiative; and SA8000); and the self-regulatory initiatives of MNEs – unilateral initiatives (CSR codes of conduct) and bi/multilateral initiatives (international framework agreements (IFAs)). Together these regulatory initiatives comprise what is referred to as the ‘global space’. In order to grasp the full extent of these regulatory initiatives with respect to the ILO CLS, it is firstly necessary to identify their distinguished regulatory roles and governance mechanisms and, secondly, since they coexist in the same space, on their configurations. The doctrine on global space offers insights to identify the role and governance mechanisms, while the doctrine on hybrid structures maps three basic configurations. Both doctrines together give an impression of the regulatory ‘hybrid global space’ of the ILO CLS.

### 2.1 Doctrine on global space

Cottrell and Trubek use the term ‘global space’ to refer to ‘an evolving regulatory environment created by both globalization and the increasing role international norms play in domestic settings.’<sup>23</sup> Based on a literature review, they come to at least four defining features of this space: firstly, global space is increasingly diverse and complex since law has to bring some degree of uniformity between a great variation of social systems and legal orders; secondly, the regulatory arena is plural in terms of legal orders (horizontal and vertical) and in terms of participating actors (public and private); thirdly, it is recognised that international systems of coercion are relatively weak and limited in means; and fourthly, by a knowledge deficit that is the result of a high degree of uncertainty concerning the optimal solutions to problems.<sup>24</sup> These features have resulted in a development of the global space, comprised by two main roles: the conventional rule-setting role of international law that stresses the enforcement and compliance with fixed rules and a problem-solving role that emphasizes the operation of multi-level networks, the role of experimentation and deliberation in order to internalise open-ended standards.<sup>25</sup>

What these two distinctive roles (rule-setting and problem-solving) characterises is drawn from the literature on legalization<sup>26</sup> and new governance.<sup>27</sup> The concept of legalization reflects traditional,

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<sup>23</sup> Cottrell and Trubek (2012), *op cit.* note 15, p. 362.

<sup>24</sup> *Idem*, p. 362-363.

<sup>25</sup> *Idem*, p. 362. Mückenberger comes in his search of hybrid global labour law to a more or less similar conclusion when he says: “Public legal regulations are either non-existent in the global sphere or their enforcement power is more or less totally missing. [...] Any expectation for a global labour law can therefore not rely on that public angle. As against that, private ordering exist on a global level and its power seems substantial” (Mückenberger 2011, *op cit.* note 16, p.109).

<sup>26</sup> K.W. Abbott, R.O. Keohane, A. Moravcsik, A-M Slaughter and D. Snidal (2000), ‘The concept of legalization’, *International Organization*, Vol. 54, No. 3, p.401-419. See for a further developed concept: B.P. ter Haar (2012),

legalist ideas on international public law: law as a system of precise rules that are adopted according a procedure and that are interpret and enforced by third-party decisions makers.<sup>28</sup> Furthermore, it makes the implicit assumption that greater degrees of lawfulness, substance, and structure<sup>29</sup> 'will lead to more compliance and hence greater cooperative gains'.<sup>30</sup> Although this may not always be the case,<sup>31</sup> it represents the core governance mechanisms of the first role – rule-setting – of law-like processes that comprise the global space.

The second role of law-like processes that comprise the global space – problem solving – involves 'a common understanding that a problem exists, consensus that it ought to be solved, and the mobilization of appropriate expertise and resources to do so.'<sup>32</sup> In order to achieve this, some governance mechanisms must be created. Firstly, mechanisms are to be deployed that 'seek to promote experimentation and knowledge dissemination'.<sup>33</sup> Secondly, it must create participation, not only because stakeholders have the knowledge (and resources) to solve the problems, but also because their involvement generate procedural and substantive legitimacy. Thirdly, the mechanism created should have the ability to translate knowledge into norms.<sup>34</sup> Related to these three governance mechanisms, Cottrell and Trubek identify five features characterising the role of problem solving. The first feature is 'the emphasis on broad and open-ended standards whose full meaning and impact must be worked out through multi-level, deliberative and probably consensual means.'<sup>35</sup> The second feature is that of experimentation. Because of the complexities and uncertainties the governance mechanism creates an iterative process that promotes the exchange of best practices and renders standards revisable.<sup>36</sup> The latter – revisable standards – implies the third feature, namely that the law-like process needs to accommodate deliberation and negotiation. The fourth characteristic feature is the fact that there is not one source of law (law-maker), hence there are multiple actors that cooperate and coordinate their actions vertically and horizontally in a multi-level governance setting, involving public officials, private actors and epistemic communities.<sup>37</sup> The fifth characteristic Cottrell and Trubek have identified of this expanded vision of the law of global space is

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*Open Method of Coordination. An analysis of its meaning for the development of a social Europe*, Dissertation University of Leiden, MI 271, p. 53-57.

<sup>27</sup> D.M. Trubek and L.G. Trubek (2005), 'Hard and Soft Law in the Construction of Social Europe: the Role of the Open Method of Coordination', *European Law Journal*, Vol. 11, No. 3, p. 343-364; and more generally: G. de Búrca and J. Scott (2006; eds.), *Law and Governance in the EU and the US*. Oxford: Hart Publishing.

<sup>28</sup> Cottrell and Trubek 2012, *op cit. note 15*, p. 364; Abbott et al, *op cit. note 26*.

<sup>29</sup> Ter Haar 2012, *op cit. note 26*, p. 54.

<sup>30</sup> Cottrell and Trubek 2012, *op cit. note 15*, p. 364; and M. Kahler (2000), 'The Causes and Consequences of Legalization', *International Organization*, Vol. 54, No. 3, p. 661-683.

<sup>31</sup> Cottrell and Trubek 2012, *op cit. note 15*, p. 365.

<sup>32</sup> *Idem*, p. 367.

<sup>33</sup> *Idem*.

<sup>34</sup> *Idem*.

<sup>35</sup> *Idem*, p. 368.

<sup>36</sup> *Idem*, p. 368-369. See also: J. Zeitlin (2011), 'Pragmatic Transnationalism: Governance Across Borders in the Global Economy', *Socio-Economic Review* Vol. 9, p. 187-206.

<sup>37</sup> *Idem*, p. 369. See also D. Drezner (2009), *All Politics is Global: Explaining international Regulatory Regimes*, New Jersey: Princeton University Press. See in general about multi-level governance: D. Messner (2002), 'The Concept of the "World Economic Triangle": Global Governance Patterns and Options for Regions.' *IDS Working Paper* 173; G. Marks and L. Hooghe (2004), 'Contrasting visions of multi-level governance', in I. Bache and M. Flinders (eds.) *Multi-Level Governance*. Oxford: Oxford University Press, p. 15-30; and with respect to transnational industrial relations: M. Keune and P. Margison (2012), 'Transnational Industrial Relations as Multi-Level Governance: Interdependencies in European Social Dialogue', *British Journal of Industrial Relations*, 25 pp.

the fact that both roles – rule-setting and problem-solving – are often yoked together in hybrid constellations.<sup>38</sup> What these constellations can be, will be further described in the next section on the doctrine of hybrid structures.

## 2.2 Doctrine on hybrid structures

While the concept of global space recognises that ‘all legal sources in the world have their particular means and procedures of implementation and enforcement’, the theory of hybrid structures takes this one step further and argues that sources that operate at the same time and contributing to a common goal, act ‘in a multi-fold interplay of public and private actors in the processes of norm-building and norm-implementing’.<sup>39</sup> With this it is recognised that a significant development has taken place, the doctrine of hybrid structures aims to help understand this process. Therefore it maps several basic configurations between law and law-like processes; between traditional command and control processes and forms of new governance; between hard law and soft law. Essentially, three varieties of hybrid configurations are distinguished:

“When each [system] is operating at the same time and contributing to a common objective but they have not merged, we describe them as *complementary*. When the newer forms of governance are designed to perform the same tasks as legal regulation and are thought to do it better, or otherwise there seems to be a necessary choice between systems, we speak of *rivalry* between the co-existing processes.”<sup>40</sup>

The third variety, *transformation*, is used to

“describe configurations in which governance and traditional law are not only complementary; they are integrated into a single system and the functioning of each element is necessary for the successful operation of the other.”<sup>41</sup>

Whereas complementarity speaks for itself, the other two varieties need further explanation. The variety *rivalry* knows three configurations. The first configuration of rivalry is when traditional regulation and governance are alternative routes of equal value. They show no interaction with each other since the choice is either the one or the other. The potential threat lies in the fact that one of the processes can become more popular than the other and consequently suppress the other.<sup>42</sup> When this occurs consciously this form of rivalry formed by the implication that one form of regulation, in particular governance, is superior over the other and therefore to be preferred.<sup>43</sup> Thirdly, rivalry can exist when the traditional form of regulation creates unacceptable standards that can be avoided by a governance process. Particularly this refers to the situation in which traditional law is unable to frame workable solutions as a result of which stakeholders are forced to seek ways out of the regulatory vise.<sup>44</sup>

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<sup>38</sup> Cottrell and Trubek 2012, *op cit.* note 15, p. 371.

<sup>39</sup> Mückenberger 2011, *op cit.* note 16, p.113.

<sup>40</sup> Trubek and Trubek (2007), p. 6

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*, p. 10-11.

<sup>43</sup> *Ibid.*, p. 11-12.

<sup>44</sup> *Ibid.*, p. 12. See also: Ch. Sabel and J. Zeitlin (2006), *Learning from Difference: The New Architecture of Experimentalist Governance* (published on: <http://www2.law.columbia.edu/sabel/papers/EU%20governance%20paper%20060406.pdf>).

The variety *transformation* too is divided into three sub-varieties. In the first law creates new governance procedures and mandates basic parameters. This is also indicated as a shift to “proceduralism” in legal regulation: law structures procedures for problem solving while the norms are entrenched in the reflexive practice of governance.<sup>45</sup> The second variety of transformation is formed when ‘new governance solves the problems and law provides a safety net’.<sup>46</sup> Law, for instance, might create minimal standards while governance is available for those who exceed the standards. This variety is also indicated as default hybridity.<sup>47</sup> The law thus allows stakeholders “to ‘opt out’ of the legal regime on condition that they use new governance processes such as self-regulation and self-monitoring to exceed minimum standards.”<sup>48</sup> Thirdly, transformation comes in the variety where traditional regulation (hard law) provides general norms while governance is used to make them more concrete.<sup>49</sup>

Furthermore, Trubek and Trubek note that hybrid structures can be designed consciously in order to get the best of all regulatory forms involved. Hybrid structures can also gradually grow into a complementary structure or merge in a new constellation. Sometimes this is done intentionally to displace older forms of regulation, however, it can also occur unintentionally because the newer form makes it hard to deploy traditional modes that then wither away. In such a constellation the newer and older form coexist as rivals.<sup>50</sup>

These configurations seem simple, however, the identification thereof is not, in particular when more than two regulatory forms are involved. Moreover, for a full analysis of the configurations, in depth qualitative research is needed, including empirical research, such as interviews.<sup>51</sup> In this paper the analysis is limited to what is found in the regulatory initiatives. More specifically, the analysis is conducted as follows. One of the aims of the paper is to map the hybrid global structure of regulatory forms that co-exist in the field of the core labour standards of the ILO. Therefore, configurations are sought with the ILO as the primary organisation to regulate labour rights on the global level. In this context three initiatives of the ILO are of interest: the eight Conventions dealing with the core labour rights; the 1998 Declaration; and the Tripartite Declaration on MNEs. To establish what kind of configuration is made with one or more of these initiatives, the other initiatives have been analysed on several aspects. First, they have been analysed on their content, *i.e.* which CLS they address. Secondly, they have been analysed on whether the initiatives provide for their own definition of those CLS, or that they refer to another initiative. Thirdly, when the latter is

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<sup>45</sup> *Ibid*, p. 12-13. Where they draw on the work of Gunter Teubner: G. Teubner (1983), ‘Substantive and Reflexive elements in Modern Law’, *17 Law & Society Review*, p. 286; and G. Teubner (1997), ‘The King’s Many Bodies: The Self-Deconstruction of Law’s Hierarchy’, *31 Law & Society Review*, p. 788. They derive this variety also from the case-study of J. Scott and J. Holder (2006), ‘Law and New Environmental Governance in the European Union’, in G. De Búrca and J. Scott (eds.), *Law and New Governance in the EU and the US*, Oxford: Hart Publishing, p. 211-242.

<sup>46</sup> *Ibid*, p. 13.

<sup>47</sup> De Búrca and Scott (2006), p. 9.

<sup>48</sup> Trubek and Trubek (2007), p. 13.

<sup>49</sup> *Ibid*, p. 13

<sup>50</sup> Trubek and Trubek 2007, *op cit.* note 14, p.

<sup>51</sup> Research on IFAs has for instance shown that not all regulatory mechanisms are included in the IFA itself. Therefore, an analysis based on only the texts of these initiatives is limited as it doesn’t take into account the practice around the initiative. Cf. Welz, C. (2011), ‘a Qualitative Analysis of International Framework Agreements: Implementation and Impact’, and Stevis, D. (2011), ‘The Impacts of International Framework Agreements: Lessons from the Daimler case’, both in K. Papadakis (ed.), *Shaping Global Industrial Relations. The Impact of International Framework Agreements*, Geneva: ILO/Palgrave, p. 38-60 and 116-142 respectively.



the case, it is further analysed which initiative the reference is made too. It is likely that this will be one of the initiatives of the ILO, however, it is not unimaginable that reference is made to for instance the standards of the OECD, UN Global Compact or NGO, which on their turn might refer to an initiative of the ILO. Consequently, the hybrid configuration can exist of several shackles.

### 2.3 Selection of initiatives

The initiatives of public international organisations are limited in number which makes it possible to focus on those that are in general considered as the most important: ILO Conventions, ILO Declaration of 1998, ILO Tripartite Declaration, OECD Guidelines and UN Global Compact, including the Ruggie framework. This is different with the private initiatives, in particular that of NGOs and those that are part of an MNE's CSR policies – the number of initiatives of the former is unknown, whereas regarding the latter their number runs in over 7000 initiatives.<sup>52</sup> There exists a good impression about the number of international framework agreements (IFAs), however, this number is growing.<sup>53</sup> As for the analysis in this paper the numerical seize of these initiatives has implications. Firstly, a selection need to be made that is representative enough to gain an impression of what could be found in terms of implementation and compliance mechanisms and hybrid structures. Secondly, the findings in these selected instruments will be complemented with results already found in studies on these initiatives.<sup>54</sup> Since it is expected to find a wide variety of mechanisms and hybrid structures, lastly, the analysis will focus on tendencies that the majority of the selected initiatives and literature shows.

Regarding the selections that are made, the following considerations are taken into account and selections have been made. When searching the internet for NGOs dealing with labour rights, several things stand out, of which some are helpful to make a representative selection. Firstly, there are NGOs that address human rights in general, of which (some) labour rights are also part,<sup>55</sup> whereas there are also NGOs that specifically address labour rights.<sup>56</sup> Regarding the latter, a further distinction can be made between NGOs that aim to further the implementation of labour rights no matter what kind of business the company is active in,<sup>57</sup> and NGOs that target a specific sector.<sup>58</sup> Another selection criteria that can be distinguished is that between NGOs that have a national focus and those that focus on MNEs and their supply chain. The interest of this paper lies with the latter, yet not with any of the other distinctions, therefore a random sample is taken from each of these

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<sup>52</sup> [www.csrhub.com](http://www.csrhub.com) for instance rates over 7.000 CSR policies and strategies.

<sup>53</sup> In 1988 the first IFA was signed, another 23 have been signed between 1988 and 2002 and in the following four years another 33, by mid-2010 there were in total about 80 IFAs. This is the number of IFAs involving a GUF, however, when a wider definition is taken, the approximately 160 initiatives exist. See about this: Papadakis, K. (2011), 'Introduction and Overview', in K. Papadakis (ed.), *Shaping Global Industrial Relations. The Impact of International Framework Agreements*, Geneva: ILO/Palgrave, p. 1-18 (in particular at 5).

<sup>54</sup> *Op cit* notes 12 and 13.

<sup>55</sup> See about this, among others: M. Winston (2002), 'NGO Strategies for Promoting Corporate Social Responsibility', *Ethics and International Affairs* Vol. 16, no 2: 71-87. Examples of general human rights organisations also dealing with fundamental social rights are: Amnesty International and Human Rights Watch.

<sup>56</sup> Among many others: SA 8000 (<http://www.sa-intl.org/index.cfm?fuseaction=Page.ViewPage&PageID=1458>); ISO 26.000 (<http://www.iso.org/iso/home/standards/iso26000.htm>); the Ethical Trading Initiative (ETI) (<http://www.ethicaltrade.org/>); and Fair labor Association (<http://www.fairlabor.org/>).

<sup>57</sup> *Ibid.*

<sup>58</sup> <http://www.fairwear.org/10/home/>.

three categories.<sup>59</sup> More specifically, the initiatives of Human Rights Watch, Ethical Trading Initiative, SA8000 and Fair Wear Foundation will be analysed.

With respect to CSR codes of conduct the number, running over 7000, is by far too much for the qualitative document analysis that is aimed for in this paper. Instead the analysis relies on secondary sources (literature) and a sample is taken of about 20 CSR policies that are rated at [csrhub.com](http://csrhub.com). The selection of this sample is based on two criteria: sectoral and geographical spread. These criteria are based on firstly comments that these kind of initiatives are a 'hobby of the West' and secondly empirical findings that in some sectors CSR policies are further developed than in others. *This has resulted in the selection of the following initiatives: ... (selection is in progress).*

For the selection of IFAs, the same criteria apply as those used for the selection of CSR initiatives. However, unlike the initiatives of NGOs and CSR policies, there is a good idea about the number of IFAs and there exists quantitative data, that includes for instance an analysis of the substantive provisions, including reference to ILO Conventions<sup>60</sup> and other regulatory forms, among which the ILO Declaration of 1998, the ILO Tripartite Declaration, the OECD Guidelines, UN Global Compact, and SA8000.<sup>61</sup> Secondly, there are some interesting case studies on implementation and compliance mechanisms applied in IFAs.<sup>62</sup> Since this information enables a more balanced analysis, the analysis is limited to the eighty IFAs that are defined by Papadakis and those that have been analysed by Welz (Bosch, Chiquita, Leoni, PSA Peugeot Citroën, Telefónica, and Securitas) and Stevis (Daimler).<sup>63</sup>

### 3. Identification of roles and governance mechanisms of the global regulatory initiatives

#### *Role and governance mechanisms IFAs*

Bi- or multilateral agreements come in several varieties,<sup>64</sup> however, in this paper the agreements are limited to those that are negotiated between management and labour with a transnational coverage. Secondly, it is limited to the agreements that involve the participation of global unions in their adoption and implementation. Although this excludes many other agreements,<sup>65</sup> it offers a pragmatic advantage of empirical case studies about implementation and compliance mechanisms and quantitative data thereof, as well as quantitative data on references to some other global initiatives, among which the ILO initiatives, the OECD Guidelines, UN Global Compact and SA8000.

Being instruments that are negotiated between the management of one MNE and a GUF, the content varies per MNE, including the mechanisms for implementation and compliance. Some IFAs stress that

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<sup>59</sup> See for another categorisation of NGOs: Jenkins, R. (2002), 'The political economy of codes of conduct', in R. Jenkins, R. Pearson and G. Seyfan (eds.), *Corporate Responsibility and Labour Rights. Codes of Conduct in the Global Economy*, London: Earthscan, p.13-42 (at 14-15).

<sup>60</sup> K. Papadakis (2011; ed.), *Shaping Global Industrial Relations. The Impact of International Framework Agreements*, Geneva: ILO/Palgrave, *Appendix: Provisions in IFAs, Table 2* (p. 249-256).

<sup>61</sup> *Ibid*, *Table 3* (p. 257-258).

<sup>62</sup> Eg. Welz 2011, *op cit. note ...*; and Stevis 2011, *op cit. note ...*

<sup>63</sup> Papadakis 2011, *op cit. note ...*; Welz 2011, *op cit. note ...*; and Stevis 2011, *op cit. note ...*

<sup>64</sup> Cf. Papadakis, K. (2011), 'Introduction and Overview', in K. Papadakis (ed.), *Shaping Global Industrial Relations. The Impact of International Framework Agreements*, Geneva: ILO/Palgrave, p.1-18 (at 1-2).

<sup>65</sup> For instance transnational collective agreements that are adopted by management and a European trade union and/or a European Works Council. See about this for instance: I. Schönmann, R. Jagodzinski, G. Boni, S. Clauwaert, V. Glassner and T. Japsers (2012), *Transnational collective bargaining at company level. A new component of European industrial relations?* Brussels: ETUI.

it is the responsibility of the company, in exceptional cases only employees are made responsible for it, while most IFAs require both sides of the industry to ensure proper implementation.<sup>66</sup> A review of the literature on implementation mechanisms of IFAs learns, that it is not a singular act, but an ongoing process, even though this has not been worked out in the majority of the IFAs.<sup>67</sup> Generally, the implementation starts with the communication of the text of the IFA to the employees.

#### 4. Hybridit global space of ILO CLS

##### *Hybridity IFAs*

Based on tables two and three annexed to the book edited by Papadakis,<sup>68</sup> the following data is gathered concerning references in 80 IFAs to other global initiatives.

**Table ...** Overview of references in IFAs to other global initiatives

Initiative	N <sup>o</sup> of references (n = 80)	IFAs
ILO Conventions	69	Adecco; Brunel; Danske Bank; France Telecom; Freudenberg; Group 4 Securicor; Inditex; Kelly Services; Manpower; Nampak; Olympia Flexgroup; Randstad Holding; Renault; Shoprite Checkers; Statoil; Takashima; USG People; Wilkhahn; AnglGold Ashanti; ArcelorMittal; BMW; Club Med; Daimler; Endesa; Evonik Industries; H&M; Hochtief; Indesit Company; ISS; Leoni; National Australia Group; Prym; Rheinmetall; Röchling; SCA; Schwan-Stabilo; Securitas; Volkswagen; World Color Press; Aker Solutions; Ballast Nedam; Chiquita; EADS; EDF; Elanders; ENI; Euradius; Faber-Castell; Fonterra; GEA; IKEA; Impreglio; Italcementi; Lafarge; Lukoil; Norske Skog; OTE; Portugal Telecom; PSA Peugeot; Rhodia; Royal BAM; Skanska; Staedtler; Telefónica; TEL-Telecomunicações; Umicore; Vallourec; Veidekke; Volker-Wessels.
ILO 1998 Declaration	45	Accor; Citroën; Danone; Adecco; Brunel; Danske Bank; Freudenberg; Inditex; Kelly Services; Manpower; Nampak; Olympia Flexgroup; Randstad Holding; USG People; Wilkhahn; Aker Solutions; Ballast Nedam; Chiquita; EADS; EDF; Elanders; ENI; Euradius; Faber-Castell; Fonterra; GEA; IKEA; Impreglio; Italcementi; Lafarge; Lukoil; Norske Skog; OTE; Portugal Telecom; PSA Peugeot; Rhodia; Royal BAM; Skanska; Staedtler; Telefónica; TEL-Telecomunicações; Umicore; Vallourec; Veidekke; Volker-Wessels
ILO Tripartite Declaration	5	Impreglio; Lafarge; Royal BAM; Staedtler; Volker-Wessels
OECD Guidelines	11	Aker Solutions; Ballast Nedam; EADS; GEA; H&M; Impreglio; Inditex; ISS; Italcementi; Lafarge; WAZ
UN Global Compact	13	AnglGold Ashanti; BMW; Daimler; Danske Bank; EADS; EDF; France Telecom; H&M; Lafarge; Lukoil; PSA Peugeot; Renault; WAZ

<sup>66</sup> Welz 2011, *op cit. note ...*, p. 39.

<sup>67</sup> Among others: Schönmann, I. (2011), 'The Impact of Transnational Company Agreements on Social Dialogue and Industrial Relations', in K. Papadakis (ed.), *Shaping Global Industrial Relations. The Impact of International Framework Agreements*, Geneva: ILO/Palgrave, p. 21-37; Welz 2011, *op cit. note ...*; and Stevis 2011, *op cit. note ...*

<sup>68</sup> Papadakis 2011, *op cit. note ...*, p. 249-258.

SA8000	1	Carrefour
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**Source:** tables 2 and 3 annexed in K. Papadakis (2011), *Shaping Global Industrial Relations*. Geneva: ILO/Palgrave

Table ... shows that out of 80 IFAs, 69 refer to the ILO core Conventions. More segregated data shows that about thirty IFAs cover even more than the core rights with direct reference to the ILO Conventions, in particular Conventions 135<sup>69</sup> and 155<sup>70</sup>. Oppositely, eleven IFAs make no reference to the ILO core Conventions. However, of these eleven IFAs, three IFAs (Accor; Citroën; and Danone) make a reference to the ILO 1998 Declaration, one IFA (WAZ) refers to two other initiatives, namely the OECD Guidelines and UN Global Compact, and one IFA (Carrefour) refers to SA8000. Of the remaining six IFAs, three (Antara, Bosch and SKF) refer to a few CLS, which leaves only three IFAs (Falck; Metro and UPU) that seemingly operate in global solitary. This is actually only true for the IFA of UPU, which aims to establish cooperation to promote social dialogue. The IFA of Metro is slightly more specific allowing, with a bit of good will, to read in it an indirect reference to two core conventions, namely on the right of association and the right on collective bargaining. The IFA of Falk aims not for the implementation of CLS, yet, for the establishment of a world works council, which could be the first step towards bi/multilateral agreement that aims for the implementation of CLS. Some IFAs are well embedded in the global space, since they refer to several other initiatives. Thirteen IFAs refer to three different initiatives, of which the most common configuration is that of the ILO core Conventions, the ILO 1998 Declaration and either the OECD Guidelines (five) or UN Global Compact (4).<sup>71</sup> Two IFAs refer to four different initiatives<sup>72</sup> and the IFA of Lafarge refers to five, except SA8000.

## 5. Conclusions

<sup>69</sup> 42 references. ILO Convention 135 is concerned with the Protection and Facilities to be Afforded to Workers' Representatives in the Undertaking.

<sup>70</sup> 20 references. ILO Convention 155 is concerned with the Occupational Safety and Health and the Working Environment.

<sup>71</sup> These are: Aker Solutions; Ballast Nedam; Danske Bank; EDF; GEA; H&M; Inditex; Italcementi; Lukoil; PSA Peugeot; Royal BAM; Staedtler; Volker-Wessels.

<sup>72</sup> IFA EADS refers to the ILO core Conventions (and more); ILO 1998 Declaration; OECD Guidelines and UN Global Compact. IFA Impreglio refers to the ILO core Conventions (and more), ILO 1998 Declaration; ILO Tripartite Declaration; and OECD Guidelines.