

**Independent monitoring of private transnational regulation of labour standards:  
A feasible proposition for a “transnational labour inspectorate” system?**

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## 1. Introduction

Since the 1980s transnational companies (TNCs) have become more aware of their corporate social responsibility (CSR) within the global society they operate.<sup>1</sup> Part of their CSR strategies is the regulation of labour issues. Initially mainly by the conclusion of unilateral codes of conducts and since the 1990s also by international framework agreements concluded by one or more representatives of the transnational company on the one hand, and one or more workers' organisations on the other hand.<sup>2</sup> In general these forms of private self-regulation are in the literature perceived as positive development, since there exists a governance-gap due to the failing efforts of various public institutions, among which the United Nations (UN), the International Labour Organisation (ILO), and the Organisation for Economic Co-operation and Development (OECD).<sup>3</sup> On the other hand it is not without critic, because as forms of voluntary self-regulation they are indicated as soft law and as such raise many regulatory challenges and questions.<sup>4</sup> At the same time it is also considered that these initiatives may not be as soft as is suggested by the notions 'voluntary' and 'soft law',<sup>5</sup> since companies are pushed for the development of CSR policies by stakeholder pressure (including workers' organisations) and consumer campaigns<sup>6</sup> and indirect as well as direct incentives by transparency obligations.<sup>7,8</sup> Moreover, it is not excluded that the CSR intentions of the TNC are sincere as they do seek to raise their credibility. One way of doing this is to involve stakeholders, in particular NGOs and workers' organisations, with the formulation of their CSR policies. By doing so,

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<sup>1</sup> See for more elaborate accounts on this development, among many others, Egels-Zandén (2009), N. 'TNC Motives for Signing International Framework Agreements: A Continuous Bargaining Model of Stakeholder Pressure', *Journal of Business Ethics*, Vol. 84: 529-547; Schönmann, I., Sobczak, A., Voss, E. and Wilke, P. (2008), 'International framework agreements: new paths to workers' participation in multinationals' governance', *Transfer: European Review of Labour and Research* Vol. 14, No. 1: 111-126; García-Muñoz Alhambra, M.A., Haar, B.P. ter and Kun, A. (2011) 'Soft on the Inside, Hard on the Outside: An Analysis of the Legal Nature of New Forms of International Labour Law', *The International Journal of Comparative Labour Law and Industrial Relations* Vol. 27, No. 4: 337-363; and Papadakis, K. (2011), 'Introduction and Overview' in K. Papadakis (ed.), *Shaping Global Industrial Relations. The impact of International Framework Agreements*, Geneva: ILO and Palgrave MacMillan: 1.

<sup>2</sup> Papadakis 2011, *op cit. note 1*, 2-7. And more elaborately on this development: Fairbrother, P. and Hammer, N. (2005), 'Global Unions: Past Efforts and Future Prospects', *Industrial Relations*, Vol. 60, No. 3: 405-431.

<sup>3</sup> Cf. among many others: Bercusson, B. and Estlund, C. (2008) 'Regulating Labour in the Wake of Globalisation: New Challenges, New Institutions', in B. Bercusson and C. Estlund (eds). *Regulating Labour in the Wake of Globalisation*. Oxford: Hart Publishing: 1-18; and Stevis, D. (2010) 'International Framework Agreements and Global Social Dialogue. Parameters and Prospects', *ILO Employment Working Paper No. 47*: 1-2.

<sup>4</sup> See for a general impression: García-Muñoz Alhambra et al, *op cit. note 1*; and Sobczak, A. (2004) 'Corporate Social Responsibility: from labour law to consumer law', *Transfer: European Review of Labour and Research*, Vol. 10, No. 3: 401-415; and within the context of the European Union specifically: Ales, E. et al (2006), *Transnational collective bargaining: Past, present and future*. Final report. Brussels: European Commission, available at [http://www.metiseurope.eu/content/pdf/n8/17\\_transnational\\_agreements.pdf](http://www.metiseurope.eu/content/pdf/n8/17_transnational_agreements.pdf) (last visited 14-01-2013).

<sup>5</sup> See García-Muñoz Alhambra et al, *op cit. note 1*.

<sup>6</sup> Cf. Kolk, A. and Tulder, R. van (2002), 'The Effectiveness of Self-Regulation: Corporate Codes of Conduct and Child Labour', *European Management Journal*, Vol. 20, No. 3: 260-271; and Fichter, M. and Sydow, J. (2002), 'Using Networks Towards Global Labour Standards? Organizing Social Responsibility in Global Production Chains', *Industrielle Beziehungen*, Vol. 9, No. 4: 358 and 361.

<sup>7</sup> Sobczak 2004 *op cit. note 4*: 408-410. Cremers, J.(2013) 'Non-financial reporting beyond the strict minimum: is the workforce a well-informed stakeholder?', *ETUI Working Paper 2013.02*; Doorey, D. J. (2005) 'Who Made That?: Influencing Foreign Labour Practices Through Reflexive Domestic Disclosure Regulation', 43 *Osgoode Hall Law Journal*: 353.

<sup>8</sup> See more generally on the explanation of the development of self-regulation by means of IFAs: Stevis 2010, *op cit. note 3*: 11-13

the management of the TNC hopes to 'raise levels of trust in labour-management relations, and boost the company's credibility vis-à-vis shareholders and other investors.'<sup>9</sup> Stakeholders, in particular workers' organisations, on their turn, are interested to participate in these forms of self-regulation since their participation can, ideally, 'lead to more democratic industrial relations, and hence to the improvement of working conditions across global value chains.'<sup>10</sup> Another way of expressing their sincerity and raising the credibility of their CSR-policy is by monitoring the CSR-practices within the company (chain).<sup>11</sup> By monitoring the company's practices in light of the CSR-initiatives, they not only show the sincerity of their corporate ethical commitment 'to shareholders and consumers, but also to those companies of the network unlikely to spontaneously respect' the CSR initiatives.<sup>12</sup>

In practice several forms of monitoring are developed, varying from poorly to well developed multi-step monitoring.<sup>13</sup> With respect to international framework agreements (IFAs), Welz<sup>14</sup> and Sobczak<sup>15</sup> also distinguish monitoring processes involving either worker representatives or external auditors (e.g. Ethical Trading Initiative and SA8000). All these forms of monitoring have in common that they are private and not entirely independent involving management and less often also workers' representatives. The fact that these initiatives are private means that all parties involved with the monitoring, including external auditors, are basically under the economic influence of the TNC.<sup>16</sup> Secondly, for as far as the monitoring is done by an external auditor, there is a twofold downside: firstly the monitoring typically focuses on the code of the external auditor itself and not the CSR-initiatives of the TNC; and secondly they often do not involve relevant workers' representatives in the monitoring process.<sup>17</sup> Although in a relatively short period of time, progress has been made towards more independent, external monitoring, involving (most of the) relevant stakeholders, in order to meet the comments and short comings, the next step in this development should be towards publicly rooted monitoring that is complementary to the national labour inspectorates.<sup>18</sup> The aim of this contribution is therefore to contemplate about and propose such a 'transnational labour inspectorate' system (further referred to as TLI-system).

The idea of a TLI-system in a broad sense is not completely novel, therefore we draw inspiration of what can be found in the practice of public international organisations (section 3). These

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<sup>9</sup> See for the involvement of workers' representatives: Papadakis 2011, *op cit note 1*: 3. See for the involvement of NGOs in general: Wells, D. (2007), 'Too Weak for the Job. Corporate Codes of Conduct, Non-Governmental Organizations and the Regulation of International Labour Standards', *Global Social Policy*, Vol. 7, No. 1: 51-73

<sup>10</sup> Papadakis 2011, *op cit note 1*: 3 and Egels-Zandén 2009, *op cit. note 1*.

<sup>11</sup> Cf. Sobczak, A. (2003) 'Codes of Conduct in Subcontracting Networks: A Labour Law Perspective', *Journal of Business Ethics* Vol. 44: 225-234 (in particular at 230-231).

<sup>12</sup> Sobczak 2003, *op cit. note 11*: 231.

<sup>13</sup> See for an example of this: UNCTAD (2012), *Corporate Social Responsibility in Global value Chains. Evaluation and monitoring challenges for small and medium sized suppliers in developing countries*. UNCTAD/DIAE/ED/2012/3.

<sup>14</sup> Welz, C. (2011) 'A Qualitative Analysis of International Framework Agreements: Implementation and Impact', in K. Papadakis (ed.) *Shaping Global Industrial Relations. The Impact of International Framework Agreements*. Geneva: ILO and Palgrave MacMillan: 38-60 (at 39).

<sup>15</sup> Sobczak, A. (2012) 'Ensuring the effective implementation of transnational company agreements', *European Journal of Industrial Relations* Vol. 18, No. 2: 139-151.

<sup>16</sup> Sobczak 2003, *op cit note 11*: 231.

<sup>17</sup> Riisgaard, L. (2005) 'International Framework Agreements: A New Model for Securing Workers Rights?', *Industrial Relations*, Vol. 44, No. 4: 709.

<sup>18</sup> Casale, G. (2012): 'The Effectiveness Of Labour Law And The Role Of Labour Inspection', *General Report, XX World Congress, International Society For Labour And Social Security Law*, Santiago De Chile, 25-28 September 2012.

developments also show the limitations of these organisations to regulate TNCs transnational activities and to a certain extent explain the reason for the development of private monitoring systems, in particular by TNCs – unilaterally as well as bilaterally with workers’ organisations – and by NGOs (section 4). Thirdly, we will discuss a selection of related ideas proposed by other scholars (section 5). However, before analysing these initiatives we will draw-out what the differences are between private, transnational monitoring systems and public, national monitoring systems (section 2). Understanding these differences is essential in understanding the difficulties and shortcomings of the transnational monitoring systems that are contemplated and – to some extent - attempted by international organisations, those that have been developed in the private initiatives and that have previously been proposed by other scholars. Secondly, it is imperative for understanding the positive features of these (private) transnational developments. Thirdly, we will use the findings of this comparison to scrutinize the existing practices and previous proposals, for their weaknesses – difficulties and shortcomings – as well as for their positive features.

In section 6 we introduce our proposal for a publicly rooted TLI-system. This proposal builds on the positive features found in the existing private transnational systems and the previous ideas proposed by other authors and international organisations. Although we strive for a proposal that is feasible, it is initial and non-comprehensive. Where foreseeable, we will indicate what the obstacles could be and which elements need further elaboration when the proposal will be further worked out in order to be applied in practice. In the conclusions (section 7) we will reflect on the feasibility of our proposal, its shortcomings, its strengths and points that need to be further elaborated before the system can be put in practice.

## **2. Public monitoring versus private monitoring**

When it comes to the monitoring of compliance with labour standards, the traditional and most well-known manner is by labour inspection that is part of many national labour law systems. Since these forms are considered the norm, all other forms of monitoring are, either directly or indirectly, assessed and commented against these forms. Therefore, we start our contribution with a brief and very general comparison of transnational, private labour monitoring systems with the traditional system of labour inspection in its most basic and general form. This comparison serves several purposes. Firstly, it makes visible in which general aspects private forms of monitoring differ from the traditional form by labour inspection. Secondly, it provides us a context against which the difficulties and shortcomings can be recognised and it enables us to distinguish its positive features. The positive features will be used as input for our proposal, while at the same time we will try to (partially) overcome the most pressing difficulties and shortcomings. Thirdly, it enables us to indicate in general how our proposal for a TLI-system in very general terms can be complementary to national labour inspection.

In its very basic and general form, traditional systems of labour inspection are self-evidently state-based and therefore limited to the national setting and within the country, and are branch/sector- or factory-centred. Furthermore, their organisational structure is hierarchical and their monitoring is backed-up by public sanctions that are mainly negative of nature. Transnational, private labour monitoring systems are self-evidently transnational by nature. Moreover, on this level,

they are in fact the only real existing monitoring systems of any kind to build on.<sup>19</sup> These forms of monitoring focus on brands and they are increasingly also extended to supply-chains. The governance structure of these private forms of monitoring is non-hierarchical, they have a networked and multi-stakeholder approach, usually including the management of the lead-company, representatives of workers and nongovernmental human rights organisations. The monitoring is backed-up by market-based, sometimes also positive sanctions, for instance technical support of the lead-company to improve a certain situation, with as reward for sufficient improvement continuation of the supply contract, however, under the threat of termination of the contract in case of none or insufficient improvement.<sup>20</sup>

Table 1 summarizes the two systems by their main characteristics.

**Table 1.** Differences between national labour inspections and transnational private monitoring

	<b>National labour inspections</b>	<b>Transnational private monitoring</b>
1.	Self-evidently state based	Transnational
2.	Factory-centred	Focus on companies (brands) and their supply chains
3.	Hierarchical	Networked, multi-stakeholder attitude
4.	Use of public and (mainly negative) sanctions	Use of market-based sanctions, often indicated as positive sanctions

The most important difficulties and shortcomings of transnational, private labour monitoring systems can be briefly summarized as follows:

- The activities of these private (outsourced) systems are mimicking and challenging functions (i.e. labour inspection in a wide sense) that were before the exclusive purview of public bodies. Thus, they are solicitous in terms of legitimacy, credibility, accountability and independency.<sup>21</sup>
- Sometimes they are described as corrupt attempts to mislead consumers (with PR-ploys) and also to free industry from the last vestiges of state regulation and trade union organisation.<sup>22</sup>
- The uncontrolled proliferation of such heterogeneous systems has created a kind of uncoordinated ‘industry’ of transnational, private labour monitoring. The multiplicity of codes and monitoring schemes can cause confusion and contradictions in practice.<sup>23</sup>
- Empirical case-studies about the actual effects of transnational, private labour monitoring systems are limited in number and for as far as they have been conducted, they are unsystematic. To a great extent this can be explained by the confidentiality and sensitivity of

<sup>19</sup> On the other hand, the deficit of transnational public regulation and enforcement seems to be long-lasting, since there is no world-state and “nobody wants a world-state”. Cf. Mückenberger, U (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: Kluwer: 99-116 (at 109).

<sup>20</sup> Although it is still not a mainstream technique (and it also has some negative effects by hurting workers and causing unemployment), some big multinationals also cancel contracts on the basis of poor social performance of subcontractors.

<sup>21</sup> Cf. *Monitoring International Labour Standards: Techniques and Sources of information*. Committee on Monitoring International Labour standards: Standards, National Research Council. Washington: National Academies Press (2004).

<sup>22</sup> Justice, D. (2001), *The new codes of conduct and the social partners. International confederation of free trade unions*. Available: <http://www.cleanclothes.org/resources/cc/corporate-accountability/code-implementation-a-verification/426> [06 Feb. 2013.].

<sup>23</sup> Cf. Jenkins, R., Pearson, R. and Seyfang, G (eds.; 2002), *Corporate responsibility and ethical trade: Codes of conduct in the global economy*. London: Earthscan.

such corporate information. On the other hand, a large part of the existing research on the actual performance of such systems is highly critical and sceptical. Mostly because of their perceived corporate bias and manipulation and presumed low level of rigour.<sup>24</sup> Evidence about systematic positive impact of MNCs' private inspection regimes are rather exceptional.<sup>25</sup>

In addition it is important to note that some of the major problems of transnational, private labour monitoring systems are identical to the 'evergreen' problems of national traditional labour inspection systems. This includes for instance: the limitation of resources, scope, frequency and coverage;<sup>26</sup> the superficial and occasional nature of inspection; the lack of appropriate training; the risks of corruption; the complexity of the monitoring itself as well as the issues to be monitored; and the mismatch between norms and enforcement.<sup>27</sup>

### 3. Initiatives for monitoring systems by international organisations

In this section we provide a description of a selection of the most important public initiatives involved with labour aspects of the private initiatives of multinationals. Although public organisations, like the ILO, the UN and the OECD, have no competence to regulate the labour practices of TNCs directly, they all have issued either guidelines (ILO<sup>28</sup> and OECD<sup>29</sup>) or principles (UN GC<sup>30</sup> and the so-called Ruggie Framework<sup>31</sup>) on how TNCs should best deal with labour issues in their practices. Hence, these documents are the only alternatives for any form of regulation of TNCs' labour practices by public institutions on the international level. Besides these initiatives we also discuss ILO Convention 81 on Labour Inspection, which plays a central role in maintaining and

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<sup>24</sup> O'Rourke, D. (2002), 'Monitoring the monitors: A critique of corporate third-party labor monitoring', in R. Jenkins, R. Pearson, and G. Seyfang (Eds.), *Corporate responsibility and ethical trade: Codes of conduct in the global economy*. London: Earthscan; Sabel, Ch. F. (2007), 'Rolling Rules Labour Standards: Why Their Time has Come and Why We Should Be Glad of it', in Politakis, G.P. (ed.) *Protecting Labour Rights as Human Rights: Present and Future of International Supervision*, Geneva: ILO: 257-273.

<sup>25</sup> Based on a case study of labour inspection and code of conduct implementation in the Dominican Republic, Amengual argues that the comparative advantages of state and private actors can drive complementary state-private regulation. These findings suggest that private-voluntary initiatives can reinforce, rather than displace, state regulation. Amengual, M. (2010), 'Complementary Labor Regulation: The Uncoordinated Combination of State and Private Regulators in the Dominican Republic', *World Development* Vol. 38, no. 3: 405-414. Harry Arthurs also cites some related empirical evidences. Arthurs, H. (2010), 'Extraterritoriality by other means', *Stanford Law & Policy Review* 21: 527-554, at 549.

<sup>26</sup> One example for comparison: private monitoring firms conducted more than 10,000 audits of garment shops in Los Angeles alone in 1998, which is about 10 times the number carried out by state and federal authorities. Cited by *Monitoring International Labor Standards: Techniques and Sources of Information* 2004, *op cit.* note 21: 93.

<sup>27</sup> See in general on these issues also: the case-studies in Papadakis 2011, *op cit.* note 1.

<sup>28</sup> ILO (2006) *Tripartite declaration of principles concerning multinational Enterprises and social policy (MNE Declaration)*. Geneva: International Labour Office (4<sup>th</sup> edition). Available on: [www.ilo.org](http://www.ilo.org).

<sup>29</sup> OECD (2011), *OECD Guidelines for Multinational Enterprises*. OECD Publishing, <http://dx.doi.org/10.1787/9789264115415-en>.

<sup>30</sup> UN/ILO (2008) *The Labour Principles of the United Nations Global Compact. A Guide for Business*. Geneva: International Labour Office. Available on: [www.unglobalcompact.org](http://www.unglobalcompact.org).

<sup>31</sup> <http://www.business-humanrights.org/SpecialRepPortal/Home/Protect-Respect-Remedy-Framework/GuidingPrinciples>

promoting decent conditions of work through an efficient and effective labour inspection system.<sup>32</sup> Despite the fact that the Convention stipulates rules for national systems of labour inspection,<sup>33</sup> indirectly they are also intended to serve as inspiration for the transnational level<sup>34</sup> and therefore interesting for us to draw inspiration from.

### 3.1 Initiatives of public organizations

#### 3.1.1 ILO: *Tripartite declaration of principles concerning multinational Enterprises and social policy*

The aim of this declaration is to use the guidelines in order to enhance 'the positive social and labour effects of the operations of MNEs.'<sup>35</sup> The weakness in this declaration is that it underlines the fact that compliance with the declaration is on a voluntary basis, and therefore left up to the MNEs themselves (Guideline 7). While the declaration sets out in its guidelines which labour issues are to be taken into account by the MNEs, including subjects as employment promotion, equality of opportunity and treatment, security of employment, training, conditions of work and life, and industrial relations, it remains silent on any form of monitoring by labour inspection systems, not even in reference to the national systems. At the most a reference is found to comply with existing national procedures, preferably based on the ILO Conventions and Recommendations, with respect to grievances and the settlement of industrial disputes. Compliance with the Declaration itself is also not monitored. At best, parties involved with the implementation of the Declaration can ask for an interpretation of the Declaration when a dispute arises concerning its implementation.<sup>36</sup> However, these requests for interpretations can be asked by a) the government of a Member State; b) a national organization of employers or workers and c) by an international organization of employers or workers.<sup>37</sup> Although it is positive that employers and workers organisations, on national as well as international level, have access to the Committee on MNEs, it is remarkable that MNEs themselves have not. Here, the limitations of a public (international) organization is shown again.

#### 3.1.2 OECD: *Guidelines for Multinational Enterprises*

The OECD Guidelines differ from the ILO Declaration in some points: on the one hand it deals not only and specifically with labour issues, but on the other hand provides stronger guidelines on how MNEs should ensure and monitor these rights. However, being an organization with a background in economics, the means promoted to monitor compliance are based in corporate governance and due diligence rather than labour law institutions, such as national labour inspection systems. Instead MNEs are encouraged to carry out 'risk-based due diligence, for instance by incorporating it into their

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<sup>32</sup> Pérez, H., Vega M.L., (coord. 2010) *Labour Inspection: what it is and what it does*. Geneva:ILO: 7. Available at: [http://www.ilo.org/wcmsp5/groups/public/ed\\_dialogue/lab\\_admin/documents/instructionalmaterial/wcms\\_141400.pdf](http://www.ilo.org/wcmsp5/groups/public/ed_dialogue/lab_admin/documents/instructionalmaterial/wcms_141400.pdf) (last visited February 2013)

<sup>33</sup> *Idem*, 9-10

<sup>34</sup> We conclude to this based on the fact that Convention 81 has been included in ILO Declaration on Social Justice for a fair Globalization, 2008. Available at: [www.ilo.org/wcmsp5/groups/public/dgreports/cabinet/documents/publication/wcms\\_099766.pdf](http://www.ilo.org/wcmsp5/groups/public/dgreports/cabinet/documents/publication/wcms_099766.pdf)

<sup>35</sup> ILO (2006) *Tripartite declaration of principles concerning multinational Enterprises and social policy (MNE Declaration)*. Geneva: International Labour Office (4<sup>th</sup> edition), Introduction, p. v, and in other words repeated in guidelines 1 and 2.

<sup>36</sup> Addendum to the original Declaration adopted by the Governing Body of the International Labour Office at its 232<sup>nd</sup> Session (Geneva, March 1986).

<sup>37</sup> Point 5 on the procedure for the examination of disputed concerning the application of the tripartite declaration, as annexed to the latest version of the Declaration (2006).

enterprise risk management systems, to identify, prevent and mitigate actual and potential adverse impacts'.<sup>38</sup> The positive point in this interpretation of due diligence is that it encourages MNEs to make CSR part of their ordinary business strategies and activities.<sup>39</sup> The downside to this is that it is initially conceptualized to a unilateral setting, whereas labour issues are best served in at least a bilateral setting, including representatives of the workers. Even though guideline B2 of the General Policies, encourages enterprises 'to engage or support, where appropriate, private or multi-stakeholder initiatives and social dialogue on responsible supply chain management', there is no guarantee that this is also done when it comes to the monitoring of the labour standards or other issues that are of interest of the employees. Also in the particular section on 'Employment and Industrial Relations', further rules on ensuring or monitoring compliance are not indicated, hence a reference is made to the guidelines on due diligence of the section on General Policies.<sup>40</sup>

Another positive element of the OECD Guidelines, when compared to the Tripartite Declaration of the ILO, is that it provides a supportive system to raise awareness about the existence of the Guidelines and the implementation thereof by the use of 'National Contact Points'. These NCPs are usually hosted by a national ministry, but can also be an interagency group comprised by experts, representatives of employers and employees, and non-governmental organisations.<sup>41</sup> The main focus of the activities of the NCPs though, is on the implementation of the guidelines, rather than monitoring compliant behavior once a MNE has expressed its consent to apply the guidelines. For as far as they have a monitoring role, this is re-active rather than pro-active, like a labour inspector can be, since it is concerned with the interpretation of the guidelines when a dispute is raised about this (by means of '*good office*'), rather than compliance therewith.<sup>42</sup> The NCP on its turn is obliged to report about its activities to the Investment Committee, which includes their activities on offering *good offices* in case of disputes on interpretations or specific implementation issues regarding the guidelines. Nonetheless, the role of the Investment Committee is limited to observing proper functioning of the NCPs and to ensure uniform interpretation of the guidelines by advising the NCPs when they are asked for interpretations. As such, it is far from coming close to a monitoring system resembling that of a labour inspection. All in all, the OECD complaint mechanism offers a mediation process between complainants and corporations without any systematic monitoring and sanctions.

### **3.1.3 UN: Global Compact and the Ruggie Framework**

In short UN Global Compact "asks companies to embrace universal principles and to partner with the United Nations. It has grown to become a critical platform for the UN to engage effectively with enlightened global business."<sup>43</sup> At the time of writing this article UN Global Compact has over 10.000 corporate participants and other stakeholders and is as such the largest voluntary C(S)R initiative in the world.<sup>44</sup> Its goal is to mainstream ten principles, among the four core labour standards of the ILO,<sup>45</sup> in business activities around the world. The governance system is a delicate one that is

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<sup>38</sup> General Policy guideline 10 of the OECD Guidelines for Multinational Enterprises.

<sup>39</sup> See on this also point 14 of the commentary on the General Policies.

<sup>40</sup> Point 50 of the commentary on the Employment and Industrial relations.

<sup>41</sup> OECD Guidelines for Multinational Enterprises, part II Implementation Procedures, I.A.2 Institutional Arrangements.

<sup>42</sup> Points 28-37 and 40-42 of the commentary on the Implementation Procedures.

<sup>43</sup> Quote of UN Secretary-General Ban Ki-moon on the website of UN GC: <http://www.unglobalcompact.org/index.html>.

<sup>44</sup> <http://www.unglobalcompact.org/AboutTheGC/index.html>

<sup>45</sup> <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html>



network-based involving seven entities that have different functions within a multi-centric framework. Again it is stressed that it is voluntary.<sup>46</sup> Being a network-based governance framework, the emphasis lies not with monitoring compliance with the principles, rather it lies with structures providing positive incentives and support to implement the principles throughout the business. Much emphasis is paid to sharing and disseminating information and good practices; mutual learning processes. Hence, on the website it is clearly stated that ‘the initiative is not designed, nor does it have the mandate or resources, to monitor or measure participants’ performance’, moreover it is stated that ‘it is not now and does not aspire to become a compliance based initiative’.<sup>47</sup> Nevertheless, some rules have been adopted to ensure the integrity with the programme.<sup>48</sup> These rules focus on misuse of association with the programme; failure to communicate progress in implementing the ten principles; and allegations of systematic or egregious abuses. For the latter issues a reporting procedure is developed, meaning that upon written allegations, the Global Compact Office will investigate the reported matter and may take actions to remedy the situation. What this remediation entails is not specified. In general, the UN Global compact programme is to be considered as a supportive in implementing, in our case the four core labour standards, complementary to other public as well as private initiatives.<sup>49</sup>

On 15 July 2003 John Ruggie was appointed as Special Advisor to Secretary-General Kofi Annan on the Global Compact. In 2005 this appointment was a sort of prolonged, yet from then on as ‘Special Representative of the UN Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises’.<sup>50</sup> In this function Ruggie has developed a framework ‘to protect, respect and remedy’ human rights, including social rights, in business, which is also of relevance for the UN Global Compact, therefore we discuss this in the same section.<sup>51</sup> In a period of six years and via three stages of research and development, Ruggie presented in 2011 his final report, with probably the most well-developed framework in this field.<sup>52</sup> The framework rests on three pillars:

1. the State duty to protect against human rights abuses by third parties, including enterprises, through appropriate policies, regulation and adjudication;
2. the corporate responsibility to respect human rights, which means that business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved; and
3. the need for greater access by victims to effective remedy, both judicial and non-judicial.<sup>53</sup>

Similar to the OECD, the Ruggie framework addresses the issue of human rights due diligence. Unlike the OECD Guidelines, the Ruggie framework goes one step further since it not only requires enterprises to identify its potential adverse human rights impacts,<sup>54</sup> but also involve meaningful

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<sup>46</sup> [http://www.unglobalcompact.org/AboutTheGC/stages\\_of\\_development.html](http://www.unglobalcompact.org/AboutTheGC/stages_of_development.html)

<sup>47</sup> <http://www.unglobalcompact.org/AboutTheGC/IntegrityMeasures/index.html>

<sup>48</sup> *Ibid.* Referred to as ‘Integrity Measures’.

<sup>49</sup> *E.g.* as noted on the website with regard to the SA8000 standard: [http://www.unglobalcompact.org/docs/issues\\_doc/labour/tools\\_guidance\\_materials/Principles\\_to\\_Practice.pdf](http://www.unglobalcompact.org/docs/issues_doc/labour/tools_guidance_materials/Principles_to_Practice.pdf)

<sup>50</sup> [http://www.unglobalcompact.org/Issues/human\\_rights/The\\_UN\\_SRSG\\_and\\_the\\_UN\\_Global\\_Compact.html](http://www.unglobalcompact.org/Issues/human_rights/The_UN_SRSG_and_the_UN_Global_Compact.html)

<sup>51</sup> *Ibid.*

<sup>52</sup> [http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31\\_AEV.pdf](http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf)

<sup>53</sup> Paragraph 6 of the Introduction to the Guiding Principles (the framework).

<sup>54</sup> Principles 17 and 18 of the Ruggie Framework.

consultation with potentially affected groups and other relevant stakeholders (principle 18), impact assessments (principle 19) and qualitative and quantitative indicators to verify whether adverse human rights impacts are being addressed, including feedback from internal and external sources, among which affected stakeholders (principle 20). This resembles highly a monitoring process that is aimed at a prevention of adverse effects on human rights, as is similar with the role of a labour inspectorate system. In particular the last principle, which includes more precisely performance contracts, reviews, surveys, audits and operational-level grievance mechanisms. What is lacking is the explicit involvement of workers organizations and representatives. Given the background against which this framework has been developed, that of human rights firstly and implicitly also including labour rights, this is not surprising. Secondly, like the procedure on due diligence with the OECD Guidelines, the monitoring procedure is a mostly internal affair executed by the enterprise with optional involvement of affected stakeholders, which could be trade unions (but is not explicitly mentioned though) and external advisors/experts. This leaves some doubts about the reliability of the monitoring since it lacks independence and a publicly rooted third party aspect. What is positive though, is that like we noticed with the IFAs, the OECD and UN initiatives seem to foster participative structures that are open to deliberation, which in itself is potentially able to strengthen the credibility of the monitoring.

### **3.2 ILO Convention 81 Labour Inspection**

As mentioned in the introduction to this section, ILO Convention 81<sup>55</sup> plays a central role in maintaining and promoting decent conditions of work through an efficient and effective labour inspection system.<sup>56</sup> Although the Convention is created as model for national systems of labour inspection,<sup>57</sup> they hold some principles<sup>58</sup> that should be taken into account when thinking about a monitoring system in general. These principles are: public service; accountability; efficiency and effectiveness; universality; transparency; consistency and coherence; proportionality; equality; cooperation and collaboration.

Several of these principles are reflected in Article 6 of Convention 81 that stipulates that inspectors 'must be public officials assured of the stability of employment and independent of changes of government and improper external influences'. Moreover, this article stresses the importance to secure a real independence of the inspector in order to have an independent monitoring system. Such as opposed to the current transnational, private forms of monitoring where there exists a high (economic) dependence of those executing the monitoring on the transnational company. With respect to the principles of efficiency and effectiveness, relevant aspects can be found in Articles 7, 11, 12 and 13 of Convention 81. Article 7 stipulates that inspectors 'must be recruited with the sole regard to their qualifications and they must be adequately trained for the performance of their duties', Furthermore, they must be properly equipped and legally empowered (Articles 11 and 13) for the development of their duties. In order to enable the inspector to execute its duties, the inspector should have some prerogatives (Article 12), which includes the free entrance in the workplaces as often and as thoroughly as necessary. With respect to the qualifications of the labour inspector, the ILO provides additionally the Labour Administration and Inspection Programme

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<sup>55</sup> Together with Convention 129 on labour inspection in the agriculture.

<sup>56</sup> Pérez and Vega 2010, *op cit* note 32.

<sup>57</sup> *Ibid*, 9-10

<sup>58</sup> *Ibid*, 20.

(LAB/ADMIN)<sup>59</sup>, which, among other things, offers technical assistance and training of labour inspectors, in order to support the development of national inspection systems.

Another interesting point is that Convention 81 emphasizes that the labour inspector should perform, not only a function of control and punishment, but also a more “proactive” function. This proactive function aims to achieve compliance to labour standards by positive support of the labour inspector. In this function, the labour inspector provides employers and workers of information and gives them advice on how to reach compliance with the labour standards (Article 3.1 b Convention 81).<sup>60</sup> An element of monitoring that we also find in the private initiatives described in the next section.

#### **4. Monitoring systems as they are found in private initiatives applied in practice**

In general we distinguish three different private initiatives that potentially also include monitoring systems. The first are CSR policies and strategies of TNCs that often are unilaterally adopted by a code of conduct. The second are international framework agreements, that sometimes are also part of a TNC’s CSR policy, but can also be the result of the pressure of the society or workers’ organisation(s). Thirdly we find initiatives of non-governmental organisations, some in general dealing with human rights, labour rights and environment (all as part of sustainability), some specifically on labour rights, either in general or for a specific sector. Although all three are private and aim to address labour rights in transnational companies, they are very different in their execution. They are not only different compared to each other, they are also very different within their own ‘categories’, therefore it is hardly possible to give an impression of these three initiatives in general.<sup>61</sup> Nonetheless, there are some very general elements these initiatives have basically in common and why they are grouped as a specific category that we will address in this section. These descriptions are limited though to the compliance mechanisms that they (are presumed to) create.

##### **4.1. CSR codes of conduct**

Codes of conduct go by many names, among which business codes, corporate governance codes, code of business ethics, etc..<sup>62</sup> What they have in common is that they are typically unilaterally adopted by the management of a TNC. If such a code already includes a form of monitoring,<sup>63</sup> this unilateral aspect is also reflected in that monitoring process, since this is often limited to internal audits based on questionnaires and surveys on management level. Consequently, input from the work floor is weak or lacking, since the workers’ representatives are mostly not involved and it is not

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<sup>59</sup> See about this programme: <http://www.ilo.org/labadmin/lang--en/index.htm> (last visited 25 february 2013).

<sup>60</sup> See also: *Report III (part 1B) of the Committee of Experts on the Application of Conventions and Recommendations of the ILO*. Geneva: International Labour Conference 2006, 95<sup>th</sup> Session: 29-32.

<sup>61</sup> García-Muñoz Alhambra et al 2011, *op cit.note 1*.

<sup>62</sup> L. Compa (2004), *Trade Unions, NGOs, and Corporate Codes of Conduct*, 14 DEV. PRAC: 210, 211; Arthurs, H. (2001), ‘Private Ordering and Workers’ Rights in the Global Economy: Corporate Codes of Conduct as a Regime of Labour Market Regulation’, in J. Conaghan, K. Klare and R.M. Fischl (eds.), *Labour Law in an Era of Globalization: Transformative practices and possibilities*, 471, 473); and M. Posner and J. Nolan (2003), ‘Can Codes of Conduct Play a Role in Promoting Workers’ Rights?’, in R.J. Flanagan and W.B. Gould IV (eds.), *International Labor Standards: Globalization, Trade and Public Policy*, 207

<sup>63</sup> Research indicates that codes of conduct are “policy-heavy” with little attention to monitoring and sanction efforts. See about this: Hoejmoose, S.U. and Adrien-Kirby A. J. (2012), ‘Socially and environmentally responsible procurement: A literature review and future research agenda of a managerial issue in the 21st century’, *Journal of Purchasing & Supply Management*, Vol. 18: 232–242.

likely that workers will complain about the infringement of their rights to their managers. For as far as the monitoring is placed with an external party, this is often either a commercial auditing company or a non-governmental organisation. In both situations, again often representatives of workers are not part of the monitoring processes. Secondly, in both situations the ties with the TNC are very close, since the management of the TNC is paying for the monitoring. This puts the independence, objectivity and reliability of the monitoring under pressure: which TNC is willing to pay (and extent the contract) for a harsh report listing severe infringements of labour rights and with that sketching a negative image of that TNC?<sup>64</sup>

#### 4.2 International framework agreements

Compared to CSR codes of conduct, international framework agreements (IFAs) have one initial positive advantage, namely the involvement of workers' representatives. IFAs are namely agreements between the management of a TNC on the one hand and on the other hand workers' representatives or organisations, among which Global Union Federations (GUFs), national and regional trade union, and world or European works councils.<sup>65</sup> Nonetheless, when it comes to independent monitoring with these instruments, scepticism remains too. Since these initiatives have been indicated as the only serious alternative for the (public) regulatory gap on transnational level,<sup>66</sup> they are an important development that needs to be examined more closely. Therefore, we have based our analysis on a sample of 21, randomly picked, IFAs<sup>67</sup> and on second hand information as found in the literature. The latter includes in particular empirical case studies, since it is a known fact that the inclusion of monitoring systems in IFAs is limited, rather they are worked out in secondary documents to the IFA.

Before analysing the monitoring mechanisms included in IFAs, we need to stress that with respect to these initiatives it is necessary to keep in mind that the reason for workers' organisations to negotiate an IFA is in the first place to encourage and develop social dialogue with the aim to gradually improve working and employment conditions. Monitoring compliance, in particular in the sense of bringing each violation of the IFA to the attention of the general public or before a court, is therefore not one of the main goals.<sup>68</sup> This may be a clarification for the fact that forms of external monitoring, like audits, or third-party involvement (for instance an NGO), are relatively rarely found in IFAs.<sup>69</sup> On the other hand, when it comes to thoughts and ideas on increasing the effectiveness of

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<sup>64</sup> Cf. Robinson, P. (2011), 'International Framework Agreements: Do Workers Benefit in a Global Banana Supply Chain?', in K. Papadakis (ed.) *Shaping Global Industrial Relations. The Impact of International Framework Agreements*. Geneva: ILO/Palgrave: 164-178 (at 167).

<sup>65</sup> Justice, D. (2008), Report of the French EU Presidency conference "Transnational company agreements. Dialogue, rights, anticipating corporate restructuring, actors: a new perspective". Lyon: 20. See also: Papadakis 2011, *op cit.* note 1: 2; and García-Muñoz Alhambra et al 2011, *op cit.* note 1.

<sup>66</sup> Cf. Thomas, M.P. (2011), 'Global Industrial Relations? Framework agreements and the Regulation of International labor Standards', *Labor Studies Journal* Vol. 36, No. 2: 269-287.

<sup>67</sup> These are the IFAs of: Accor; AngloGold; BallastNedam; Carrefour; Chiquita; DaimlerChrysler; Danone; Endesa; ENI; Faber-Castell; Fonterra; Freudenburg; Hochtief; IKEA; Merloni; Norske Skog; OTE; Skanska; Statoil; Telefónica; Volkswagen.

<sup>68</sup> Schömann, I., Sobczak, A., Voss, E., Wilke, P. (2008), *Codes of conduct and international framework agreements: new forms of governance at company level*. EUROFOUND: 63

<sup>69</sup> *Ibid.* See also: Torres, L., Gunnes, S. (2004), *Global Framework agreements: a new tool for international labour*. FAFO: 18.

CSR initiatives, among which IFAs, in practice, growing attention is paid to means of implementation and monitoring of that implementation.<sup>70</sup>

Opinions about private monitoring initiatives, even with the involvement of workers' organisations, remain sceptical.<sup>71</sup> One of the reasons for this, is that these organisations, like trade unions, lack structures and resources that are necessary for a comprehensive independent monitoring, especially due to the increasing number of instruments they have to deal with.<sup>72</sup> The alternative is to ensure that they are at least involved in determining the monitoring rules and procedures and that they are informed and consulted.<sup>73</sup> In our analysis of IFAs and review of the literature we find the following developments on monitoring that also involve trade unions:

(1) joint committees involving representatives of the workers and the management where frequently also EWCs are involved.<sup>74</sup> Usually an annual meeting of the joint committee is established, but agreements where two annual meetings<sup>75</sup> are foreseen can also be found. The task of these monitoring groups is "that of exchanging and developing views on the management system and defined standards, and on their compliance or noncompliance with the agreement"<sup>76</sup>;

(2) At least in two of the IFAs that we have selected<sup>77</sup> an external audit procedure is included, involving NGOs and expert consultants whose mission is to conduct inspection of the company and its subcontractors' workplaces and submit a report to the joint committee.<sup>78</sup> Representatives of the workers are allowed to be present with this inspection. As such, this is a nice example of a networked form of multi-stakeholder monitoring involving the management of the TNC, workers' organisations and NGOs;<sup>79</sup>

(3) Additionally, in the course of time GUFs are developing their own monitoring capacities<sup>80</sup> consisting in global trade union networks within TNCs that aim to create a formal channel along which the information gathered at local level is effectively conveyed at the central level. Some

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<sup>70</sup> Stevis, D. (2011), 'The Impacts of International Framework agreements: Lessons from the Daimler Case', in K. Papadakis (ed.), *Shaping Global Industrial Relations. The impact of International Framework Agreements*, Geneva: ILO/Palgrave: 116-142.

<sup>71</sup> Telljohann, V., Da Costa, I., Müller, T., Rehfeldt, U., Zimmer, R. (2009a), *European and international framework agreements: practical experiences and strategic approaches*. EIRO: 55. See also Telljohann et al (2009b), 'The impact of European and International Framework Agreements on the internationalization of industrial relations', *TRANSFER*: 7.

<sup>72</sup> Hellmann, M. (2007), 'Social Partnership at the Global Level: Building and Wood Workers' international experiences with International Framework Agreements', in V. Schmidt (ed.), *Trade Union Responses to Globalisation: A review by the Global Union Research Network*, Geneva: ILO: 28; Telljohann et al 2009b, *op cit note 70*: 7; and Müller, T., Platzer, H-W., Rüb, S. (2008), *International Framework Agreements- Opportunities and limitations of a New Tool of Global Trade Union Policy*. Friedrich Ebert Stiftung. Briefing papers n° 8: 3.

<sup>73</sup> Kearney, N, and Justice, D. (2003), 'The New Codes of Conducts – Some questions and answers for Trade Unions', in I. Wick (ed.), *Workers' tool or PR ploy? A guide to codes of international labour practice*: 109.

<sup>74</sup> See, among others Béthoux, E. (2008), *Transnational Agreements and texts negotiated or adopted at company level: European developments and perspectives*: 12; Bourque, R. (2008), "International Framework Agreements and the future of collective bargaining in Multinational Companies", *Just Labour: a Canadian Journal of Work and society*, Vol. 12: 36-37; and Rüb, S. (2006), *Guidelines for Implementing and Monitoring an International Framework Agreement*, Frankfurt, IG Metall: 18.

<sup>75</sup> Chiquita-IUF IFA.

<sup>76</sup> Hellmann 2007, *op cit note 71*: 28.

<sup>77</sup> IKEA-IFBWW IFA and Chiquita-IUF IFA.

<sup>78</sup> Bourque 2008, *op cit. note 73*: 37. Telljohann 2009a, *op cit. note 70*: 6.

<sup>79</sup> Which is one of the strategies for monitoring IFAs indicated in the literature. See Telljohann et al 2009b, *op cit. note 70*: 7.

<sup>80</sup> Rüb 2006, *op cit. note 73*: 20-22.

authors refer to this development as “the subsidiarity model”.<sup>81</sup> These networks are highly dependent on the involvement of local and group level social partners, which have limits in those countries where workers are not organised and where, therefore, bargaining and regular monitoring become difficult.<sup>82</sup>

A shortcoming that is general for all IFAs is the fact that they lack indicators to monitor the process of implementation and compliance.<sup>83</sup> However, with respect to our proposal it is more interesting to highlight the following. The involvement of GUFs and national or local workers organisations, like trade unions and works councils, in the monitoring seems to contribute to the establishment of a joint monitoring body that exchanges views and is in a continuous dialogue. This makes these instruments participative and open to deliberation, which strengthens the seriousness of the monitoring and consequently, the credibility of the monitoring, in particular towards stakeholders, shareholders and civil society in general. Furthermore, interesting for our proposal is that these networked and multi-stakeholder monitoring mechanisms seem to be more formalized and institutionalized than those submissive to singular auditing systems as found in unilateral codes of conducts. Of course there are also some problems specific to such monitoring systems, especially in relation with the limitations of GUFs: their scarce resources, the problems for the organized labour structures in some countries, etc., but those are a variety on the already commented ‘evergreen’ problems of the inspection systems as named in section 2.

#### 4.3 Monitoring initiatives of NGOs

In general NGOs have one big disadvantage, namely that they are normally not about the monitoring of the CSR initiatives of the TNC itself, rather they are about monitoring of the rights/issues they focus on. Secondly, we have to make a distinction between general human rights NGOs that also address some labour rights<sup>84</sup> and NGOs that specifically address labour rights.<sup>85</sup> The latter are more likely to address at least all the core labour standards of the ILO and more and to involve workers’ organisations in their monitoring system. In this group 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>86</sup> whereas some others target a specific sector.<sup>87</sup>

What these NGOs have in common is that in general they offer a sort of ‘certificate’, meaning that if the TNC is affiliated with the NGO this means that the TNC (tries to) behave as a social responsible enterprise that respects the labour rights that are promoted by the NGO. For some NGOs this intention seems to be sufficient enough to be affiliated. To what extent the labour rights are also respected in practice is not extensively monitored, or at best by internal audits of the TNC itself.<sup>88</sup>

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<sup>81</sup> Schömann et al 2008, *op cit.* note 67: 65-66.

<sup>82</sup> Torres and Gunnes 2004, *op cit.* note 68: 19.

<sup>83</sup> European Commission (2008), *Mapping of transnational texts negotiated at corporate level*. EMPL F2 EP/bp 2008 (D) 14511: 24.

<sup>84</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>85</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>86</sup> *Ibid.*

<sup>87</sup> <http://www.fairwear.org/10/home/>.

<sup>88</sup> This is for instance the case with the ETI Base Code. *Cf* Robinson 2011, *op cit.* note 63: 167.

The shortcomings in such a system are evident: no independence or objectivity and lack of involvement of workers' organisations. Other NGOs offer more sophisticated monitoring systems. SA8000 for instance requires the TNC to appoint a management representative and to recognise a SA8000 workers' representative who are both to be involved with the review of the policy of the TNC with regard to the requirements of the SA8000 standards.<sup>89</sup> A more recent global CSR initiative that is worth noticing is ISO 26000.<sup>90</sup> ISO 26000 provides guidance rather than requirements, so it cannot be certified (complied, verified etc.), unlike some other well-known ISO standards. As such, despite of its relatively well-elaborated content, it can advance our idea about transnational monitoring / inspection. The approach of the Fair Wear Foundation (FWF) is also that of multi-stakeholders (including trade unions), however, the emphasis is not so much on monitoring compliance, rather, like that with IFAs, on implementation mechanisms that foster participation and deliberation.<sup>91</sup> Hence, their multi-stakeholders approach recognises the vulnerability of labour rights in respect of economic pressures and that serious implementation thereof is not a matter of one party mainly, for instance the TNC, the supplier or the (local) trade unions, rather, it needs a joint effort of many stakeholders, including the workers themselves via a system of whistle-blowing, not to the management of the TNC, but to the FWF.<sup>92</sup> The Fair Labor Association (FLA) has also a multi-stakeholder approach as it brings together universities, society organisations and companies, however, from a labour law point of view, it has a weakness since it does not include trade unions. A positive aspect of the monitoring system of FLA is that their monitoring system consists of three elements: assessments; investigations of alleged violations of workers' rights; and unannounced factory visits by independent external assessors.<sup>93</sup> In particular the latter is very interesting element. It resembles closely one of the tasks that are of the exclusive competence of national labour inspectors. Furthermore, these unannounced visits by external assessors renders the overall monitoring less dependant on the reports and audits of the TNC itself.<sup>94</sup>

### **3.4 Concluding remarks on these transnational private monitoring systems**

Despite the difficulties and shortcomings highlighted in the above three sections, these transnational private monitoring systems are the only real existing transnational labour monitoring systems of any kind to build on. Besides, they also have some positive features which might serve as catalyst and model for any perceived new idea of a TLI-system as we intent to propose in section 6. For instance, these private monitoring systems fill gaps in traditional governmental and inter-governmental labour regulation by innovatively transforming the character of existing monitoring systems and

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<sup>89</sup> [http://www.sa-intl.org/\\_data/n\\_0001/resources/live/2008StdEnglishFinal.pdf](http://www.sa-intl.org/_data/n_0001/resources/live/2008StdEnglishFinal.pdf), paragraphs 9.2-9.4.

<sup>90</sup> ISO is a specific voluntary (non-governmental) organization whose members are recognized authorities on standards, each one representing one country. See for more details: <http://www.iso.org/iso/home/standards/iso26000.htm>.

<sup>91</sup> See above section 4.2. In the literature these forms of regulation have also been indicated as 'new governance'. See for instance: 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: 358-393.

<sup>92</sup> On their website they show a very nice video in which they explain their method: <http://www.fairwear.org/10/home/>.

<sup>93</sup> <http://www.fairlabor.org/transparency>.

<sup>94</sup> <http://www.fairlabor.org/transparency/tracking-charts>. Even though FLA is able to visit approximately 5% of the facilities that supply affiliated companies per year, the 'threat' of a possible visit has a spill-over effect on more compliant behaviour.

supplementing public, national systems. Secondly, they react to real and increased pressure from consumers, human rights NGOs and labour movements. Thirdly, these systems entail new, flexible forms of collaboration and coalition and create seemingly democratic opportunities for participation and empowerment of all (multiple) interested stakeholders. Research shows that the involvement of stakeholders, third-parties is accompanied by higher scores of compliance.<sup>95</sup> Fourthly, these systems apply multiple and diverse practices, methods and procedures. These include for example internal/in-house and external/third-party monitoring, unannounced visits by external assessors, auditing, consultancy, verification, benchmarking, disclosure of factory locations, rating/scoring of subcontractors, labelling, reporting/disclosure, whistle blowing, complaint-procedures. Lastly, they increase the amount of information available about the activities of MNCs and their compliance with labour standards. This information is useful for a range of stakeholders, among which competitors, regulators, consumers, investors, NGOs and trade unions. Needless to say, the quality of this information can always be debated.

## 5. Discussion of previous proposals of other scholars (selection)

Many academic opinions are recognising the increasing, dynamic convergence and synergies of official and unofficial, public and private, national and transnational systems of monitoring.<sup>96</sup> Furthermore, there are compelling arguments in favour of the enhanced credibility, effectiveness, consistency and legitimacy of transnational private, nongovernmental labour monitoring systems.<sup>97</sup> Some authors are also exposing the more concrete question: can the public element and the "... ILO be brought more fully into nongovernmental monitoring?"<sup>98</sup> Others take an alternative integrative approach by which efforts are made to re-center the public (and the state) as an important actor in transnational labour governance, while recognizing the important function that private initiatives play.<sup>99</sup> Barenberg, for instance, stresses that "policies can be designed so that the rise of private regulation will more likely result in the strengthening of social protection than in the undermining of what little regulation currently exists." He makes a distinction between managerialist (mostly private) and democratic models of monitoring.<sup>100</sup> Kolben adds to this that, since power imbalances and conflicts are always present at workplaces, purely private, technocratic regulatory and monitoring regimes "that rely completely on deliberation and benchmarking at the expense of rights and citizenship, are unsatisfying".<sup>101</sup>

Mückenberger pleads for third-party involvement into the implementation of transnational standards. Third-party in his view not only refers to NGOs and experts, but can also refer to state/government actors. He also stresses the importance of a "new mode of public supervision of global enterprise

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<sup>95</sup> R. van Tulder, J. van Wijk, and A. Kolk (2009), 'From Chain Liability to Chain Responsibility', *Journal of Business Ethics* 85:399-412. While IFAs scored lower on specificity, they performed better in terms of compliance than unilateral COCs; Cf. B. Hepple (2005): *Labour Laws and Global Trade*, London: Hart Publishers.

<sup>96</sup> Among others: M. Weiss (2011), 'Re-Inventing Labour Law?', in G. Davidov and B. Langille (eds.), *The Idea of Labour Law*, Oxford: Oxford University Press, p. 43-56.

<sup>97</sup> Cf. Mückenberger 2011, *op cit* note 19: 109.

<sup>98</sup> *Monitoring International Labor Standards: Techniques and Sources of Information* 2004, *op cit.* note 21: 97.

<sup>99</sup> K. Kolben (2011): *Transnational Labor Regulation and the Limits of Governance*, *Theoretical Inquiries in Law*, Vol. 12, No. 2.

<sup>100</sup> M. Barenberg (2008): *Towards a Democratic Model of Labor Monitoring*, in C. Estlund and B. Bercusson (eds) *Regulating Labour in the Wake of Globalisation: New Challenges, New Institutions*: 37, 41.

<sup>101</sup> Kolben 2011, *op cit.* note 98: 434.



behaviour”.<sup>102</sup> This is with the remark that transnational monitoring regimes can not be blamed for having almost the same challenges state systems have had for a long time, in terms of inadequate capacity, resources, reach, scope etc..<sup>103</sup> All of these intrinsic problems of any inspection are multiplied on a transnational level.

Another source of inspiration for our proposal we find in the ideas of the European Coalition for Corporate Justice (further: ECCJ), which is the largest civil society network devoted to corporate accountability within the EU. The ECCJ proposes to enhance the duty of care of MNCs in order to influence the operations of other companies that are not formally part of the company group but remain economically dependent on the group, such as suppliers. This duty to care would mean that the MNC would have an obligation to ensure the right management systems are in place in order to investigate the risks of human rights abuses and to take all reasonable steps to prevent or mitigate the abuses.<sup>104</sup> In our opinion, a monitoring system, preferably with an enhanced public element, could form an integral and important part of such management systems.

When taking a somewhat broader view on monitoring of compliance of private regulatory forms of labour issues, the ideas of Hepple are also interesting to be taken as inspirational input. Hepple stresses the need for a creation of “an international conciliation and arbitration service to resolve disputes between governments, TNCs and workers involving the alleged violation of rights under ILO conventions, bilateral treaties, corporate codes and international collective agreements.”<sup>105</sup> Furthermore he argues for the enlargement and updating of the core conventions of the ILO by including the topic of labour inspection. He is in favour of an independent monitoring scheme and a “complaints-based enforcement mechanism” of the ILO.<sup>106</sup> The suggestions and proposals of Hepple are inspirational for our idea of a publicly rooted TLI-system, since they strive to institutionalise and to locate public elements into transnational labour regulatory initiatives and they intent to fill up this transnational regulatory void. The ultimate goal is to “re-invent” transnational labour regulation in order to ensure that TNCs observe labour standards.

More recently a study on Responsible Supply Chain Management has put forward a more ambitious idea, comprehending the establishment of a specific non-judicial monitoring authority at EU-level. This monitoring authority could provide for more efficient and effective access to remedy for victims of alleged abuses in supply chains by companies active in Europe. It would get a mandate to investigate, sanction and provide remedies for abuses.<sup>107</sup>

Traditional labour inspection is often depicted and perceived as a burden on firms and their productivity and competitiveness. However, Roberto Pires offers a forceful and pioneering explanation about the beneficial impacts of labour inspection on social and economic development. According to this analysis, interventions of labour inspectors can promote positive changes also in business practices through the induction of legal, managerial and technological advancement.<sup>108</sup> Pires also notes that the historical emergence of state labour inspection services arose from a “social

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<sup>102</sup> Mückenberger 2011, *op cit.* note 19: 105-107.

<sup>103</sup> Arthurs 2010, *op cit.* note 25: 549.

<sup>104</sup> Contribution to the EU2020 consultation, ECCJ, ID number (EC Registration): 48872621093-60.

<sup>105</sup> Hepple 2005, *op cit.* note 94: 273-274

<sup>106</sup> *Ibid.*

<sup>107</sup> Opijnen, M. van and Oldenziel, J. (2011), ‘Responsible Supply Chain Management, Potential success factors and challenges for addressing prevailing human rights and other CSR issues in supply chains of EU-based companies’, European Union: 93-94.

<sup>108</sup> Pires, R. (2011), *Labour inspection and development: some reflections*, Geneva: ILO (LAB/ADMIN Working Document No. 9.)

push” towards state regulation of economic forces.<sup>109</sup> Currently a similar “social push” is emerging on the transnational level, which is imposed, for instance, by the increasing activity of labour rights NGOs, trade unions, and conscious consumers. In sequence with the analysis of Pires we note that the ‘inspection’ of “soft laws” (i.e. corporate voluntary labour policies) by the TLI-system we envisage is not an impossibility per se. Good labour inspectors always have had the ability and the need to “...overcome the deficiencies and anachronism of the written law...”.<sup>110</sup> Without doubt, this kind of broad understanding of labour inspection is inevitable on the transnational level.

When describing the role of labour inspection in general, Casale notes that labour inspection systems have the potential to play an even greater role in the age of globalization than they had hitherto, also in assisting and strengthening the international supervisory system.<sup>111</sup> Arrigo, Casale and Fassani also underline that the public component is of the utmost importance in labour inspection, since “the great strength of labour inspection lies in those thousands of sworn public servants”.<sup>112</sup> It is clear that such public domination and authority would be currently virtually impossible on the transnational level. Nonetheless, it is imperative – and we suppose that it is also possible – to involve at least certain public factors into transnational labour monitoring. In relation to the acknowledged role of public-private partnership initiatives in monitoring working conditions, the same authors mention the possibilities of, for example, setting up of a competency network and the development of international guidelines on supply chain management and monitoring.<sup>113</sup> Furthermore, it is obvious that “if employer’s power is transnational, workers’ rights should also be recognised at a transnational level”.<sup>114</sup> A well-designed TLI-system could be a building block in this evolving transnational regulatory arena and mode of control.

## **6. Transnational Labour inspection - our proposal and idea**

In this section we will introduce our proposal. For our proposal we draw inspiration from the above described developments, academic ideas, and initiatives from public, international organisations. We will also address some obstacles or shortcomings and where possible anticipate on how they might be faced or could be developed in the near future. Our aim is not to draw a fully worked out publicly rooted TLI-system, however, we aim to draw a first sketch of such a system which we think might be feasible in practice, despite the fact of the lack of a legal framework.

### *Independence via a public root*

The TLI-system we envisage is based on voluntariness of the transnational company. This is a consequence of the lack of a legal framework that could not only give legally-binding effect to self-regulatory tools such as codes of conducts and IFAs, but also could make monitoring compliance obligatory. However, as indicated in the introduction, there are several reasons why a transnational company would voluntarily have its initiatives monitored for compliant behaviour, among which

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<sup>109</sup> *Ibid*, 2.

<sup>110</sup> *Ibid*, 8.

<sup>111</sup> Arrigo, G, Casale, G, Fasani, M. (2011) *A guide to selected labour inspection systems (with special reference to OSH)*, Geneva: ILO (LAB/ADMIN Working Document No. 10), Preface.

<sup>112</sup> *Ibid*, 3.

<sup>113</sup> *Ibid*, 7.

<sup>114</sup> Moreau, M-A. (2008), ‘The Originality of Transnational Social Norms as a Response to Globalisation’, in C. Estlund and B. Bercusson (eds.) *Regulating Labour in the Wake of Globalisation: New Challenges, New Institutions*: 256.

pressure from workers' organisations<sup>115</sup> and consumer organisations<sup>116</sup> and demands of transparency by society as a whole and by investors. The more independent this monitoring is, the more credible the monitoring itself is and as spin of also the company in respecting its own labour standards. Consequently, the independence of the monitoring system is of the utmost essence of every proposal on (transnational) monitoring.

The best way to secure the independence of any monitoring system is by providing it a public root. As indicated in section 2, this will not overcome some of the 'evergreen' problems inherent to monitoring in the field of labour, however, it makes the monitoring significantly less dependant on the TNC. On the transnational level this implies that the monitoring system should be provided (or at least controlled, supervised and/or coordinated) by a public, international organisation.<sup>117</sup> International organisations are aware of their role in this, as illustrated by the description of the initiatives in section 5, however, the basic problem is that they can only bind their member states at best and not transnational companies; the governance gap. Nonetheless, this does not mean that an international organisation cannot facilitate a monitoring system that transnational companies can voluntarily opt for. For instance, by means of institutional arrangements, protocols, procedural back-ups, orientation, or accreditation. In our opinion there is one organisation par excellence to provide such facilitation: the ILO.

#### *TLI-system: the inspectors' list*

More concretely we propose that the ILO should facilitate the TLI-system by, for example, providing a list of transnational labour inspectors that have been trained and accredited by the ILO. These inspectors can either be an independent, individual person or a person that is affiliated with an NGO or organisation that is already active in monitoring labour standards, like the Fair Labour Association, Worldwide Responsible Apparel Production, SA8000, or the Ethical Trading Initiative etc. The training of these inspectors is also facilitated by the ILO. There are several reasons why we think the ILO is the best organisation to facilitate the training. Firstly, the ILO already has experience in (supporting) the training and education of labour inspectors since the ILO offers technical assistance and training of labour inspectors by its Labour Administration and Inspection Programme (LAB/ADMIN).<sup>118</sup> Secondly, the inspectors need to be trained to monitor transnational norms on labour issues, and not national norms. Thirdly, training by the ILO enhances the independence of the inspector as it is independent of any company and/or country, which consequently strengthens the inspector's commitment to the transnationality of the monitoring and in particular to the protocol that determines the rules for the monitoring process. Only inspectors that have been trained by the ILO could be accredited by the ILO as transnational labour inspector. The inspectors that are listed by the ILO, can be put forward by ILO

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<sup>115</sup> The IFAs from Telefonica and Endesa are examples of this, see: Niforou, C. (2012), 'International Framework Agreements and Industrial Relations Governance: Global Rhetoric versus Local Realities', *British Journal of Industrial Relations* Vol. 50, No. 2: 359-360.

<sup>116</sup> Of which the monitoring of working conditions in the Foxconn factories by the Fair Labour Association (FLA) is a good example, after this became an issue with the products of Apple at the cost of lives of some workers. See about this on: <http://www.apple.com/supplierresponsibility/accountability.html>.

<sup>117</sup> When it comes to creating international law, this can still only be done by states or by international organisations for as far as they have been contributed with the power to do so. See on this, among many others: Ku, C and Diehel, P.F. (2009), *International Law. Classic and Contemporary Readings*. Boulder Colorado: Lynne Rienner Publishers (3rd ed.).

<sup>118</sup> See about this programme: <http://www.ilo.org/labadmin/lang--en/index.htm> (last visited 25 february 2013).

as the TLI that is in charge of the monitoring of the CSR initiatives of the TNC that applies, voluntary, for the TLI-system.

An issue that might complicate this is in particular the selection of the persons to be trained and accredited. Not anyone could be suitable to become a TLI. Persons that might be suitable are for instance national labour inspectors, persons involved with the monitoring via a NGO or a person who is involved with the implementation and/or monitoring of CSR initiatives of a TNC itself, either as representative of the management or as representative of the workers. The latter might cause compatibility issue when a TNC applies for this TLI-system. However, this could be captured by compatibility requirements in the protocol.

#### *TLI-system: the protocol*

To ensure the independency and the quality of the monitoring a protocol is drawn by the ILO that stipulates the basic rules and requirements for the monitoring. Although companies apply for the system on a voluntary basis, once applied for it, the rules of the monitoring as stipulated in the protocol are binding in all their aspects.<sup>119</sup> This means that in principle, there is no option to adjust the protocol to the specific circumstances of the TNC or to opt-out on certain provisions of the protocol.

This protocol should include at least the following rules and requirements.

#### 1. Rules on the selection of the transnational labour inspector.

How we envisage the TLI-system, the TLI takes a central position, hence, the TLI is leading in the whole process. This puts a strong pressure on the independence and quality on the TLI. It also requires a lot of trust from the TNC in the TLI. Therefore the protocol should provide at least the following rules and requirements on the selection of the TLI:

- the TLI must be a person that is trained and accredited by the ILO;
- detailed list of incompatibility-criteria on the TLI and the company;
- rules on the selection of the actual TLI: preferably the ILO puts forward two or three TLIs they have listed, taking into account the incompatibility-criteria and the sector the TNC is active in, then it is up to the TNC to choose one of them in order to accommodate the issue of trust.

#### 2. Rules and requirements concerning the competence (the power) of the TLI.

In order to ensure the independence and quality of the monitoring the TLI is in charge of the whole monitoring process. This also means that the TLI should have the accompanying power to actually be in charge. The competences of the TLI should therefore at least include the following aspects:

- The TLI is the chair of the monitoring committee;
- The TLI has a veto vote on the work of the monitoring committee;
- The TLI has a final say in the selection of the members of the monitoring committee's staff. In particular taking into account the needed level and specifics of knowledge to do the monitoring of the specific MNE;
- The TLI supervises and coordinates the monitoring work of the committee;
- The TLI verifies and approves the final report of the monitoring.

#### 3. Rules on the composition and the size of the monitoring committee.

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<sup>119</sup> That is, binding by way of a 'contract' (*pacta sunt servanda*) and not because of public authority of the ILO.

In our view, the monitoring committee should be comprised as follows.

- Obligatory and as a minimum:
    - The TLI, who is also the chair/leader of the committee (see on this also above);
    - Representative(s) of the management of the TNC;
    - Representative(s) of the workers covered by the CSR initiatives.
  - Optional, but strongly recommended:
    - National labour inspector(s) of either the home-country of the TNC or any other country the TNC operates in. The involvement of national labour inspectors strengthens more the public element in the monitoring. Furthermore it offers the opportunity to involve local expertise and to converge transnational and national inspection, in particular through the process of mutual learning.
    - NGOs. The inclusion of an NGO would add expertise and mechanisms of good governance they often already represent. Although here listed as optional, this should be obligatory when the TNC that applies for the TLI-system has or had already externalised the monitoring to an NGO. Furthermore, we think it should also be obligatory when an NGO fulfils an important role in setting good governance rules in the specific sector the TNC is active in. This is for instance the case in the garment industry.
  - Rules on the size of the monitoring body. What the size of the monitoring committee ought to be, depends first of all on the size of the company and the scope of its CSR initiatives, *i.e.* whether those initiatives are extended to the subsidiaries, suppliers and subcontractors of the TNC. It is up to the TLI to check this, yet, only by what is indicated by the scope of the CSR initiatives that are to be monitored. Secondly, the size of the monitoring committee depends on the geographical spread of the company. The intention is after all to establish a committee that is representative for all countries, sectors, trade unions, persons, etc., covered by the CSR initiatives.
  - Rules on appointment of the representatives of the management of the TNC and the workers. It is up to the TNC and the workers' organisations to appoint their representatives. Guiding in this are the rules on representation that are generally known and accepted in the field of collective bargaining. In order to ensure compliance with those rules, the TLI will check this briefly, for instance that the workers' representative is from an organisation that is active in the sector of the TNC and that it represents a substantial number of the workers. More detailed rules need to be worked out.
4. Rules on the procedures of the monitoring and on what is to be monitored.
- Rules on the procedures of the monitoring. This is a point that we only mention here, but needs to be further worked out. It is self-evident though that such rules are needed in order to enhance the good governance of the monitoring and the transparency of the monitoring. These are therefore mainly formal and procedural rules. Which these rules exactly should be needs to be further worked-out. However, it is clear that one of these rules is about one of the first tasks of the monitoring committee, namely drawing up a work-plan or plan of action.
  - Rules on what is to be monitored. Ideally the monitoring is not limited to one initiative of the TNC that deals with labour issues, instead all initiatives and documents of the TNC (e.g. CoCs, IFAs, policies) are to be monitored in relation with each other. However, we realise that this

might be an obstacle and that TNCs might be reluctant to have all its labour policies scrutinised by the monitoring. Also, TNCs cannot be forced to submit themselves to monitoring beyond what they want to be bound too; submitting to this TLI-system is voluntary. Furthermore, it is still a minority of TNCs that has been willing to externalise the monitoring of their CSR initiatives, therefore, the idea of external monitoring is relatively new and needs to be promoted and stimulated. In order to attract as many TNCs as possible, what is to be monitored is initially to be decided by the TNC itself. However, the TLI has the right to make recommendations on this aspect, for as far as policies are known to the TLI. The TLI could for instance be informed on other policies by workers and or their representatives. However, in the course of time, when this form of monitoring is well-settled and accepted, it could become more compulsory in the sense of when submitting to the TLI-system means an assessment of all initiatives and documents dealing with labour issues. Another point that needs to be addressed in this perspective, since it may also be an obstacle, is the material content of the CSR initiatives that are to be monitored. It is well known from several case-studies that the normative quality of the substance of the CSR initiatives, *i.e.* the rights and obligations, are rather vague and unconditional. This complicates the monitoring since it leaves a large margin of interpretation. In general though, this is not uncommon for labour standards and as such one of the 'evergreen' problems of monitoring of labour standards, which never stood in the way of national labour inspections. Nonetheless, we also realise that this may be a more serious obstacle on the transnational level than on the national level, where more laws might exist further interpreting the rights and obligations. Although this needs to be worked out in much further detail than we can do here, we imagine that the following suggestion could be one way to overcome this problem partly. In our opinion, the monitoring committee could take a broad/reflective approach to these initiatives by monitoring what principles are in these documents and how those are reflected in the practices at the workplaces of the TNC ('principles versus reality' test). Such an approach could be one of the issues the TLI is in particular trained for by the ILO. Input of the practices and customs of the company could be provided by the members of the committee, since it is comprised by representatives of the management of the TNC (including its subsidiaries, suppliers and subcontractors when the initiatives are extended to them) and representatives of the workers. In this perspective, the involvement of an NGO could also extend the information to the public opinion on how the company is doing.

##### 5. Rules on access to all parts of the TNC.

Essential to the monitoring of compliance with labour standards is safe and guaranteed access to all workplaces of the TNC. This includes those of the subsidiaries, suppliers and subcontractors when they are also covered by the CSR initiatives that are to be monitored. We realise that this may lead to practical obstacles, for instance the number of suppliers can easily reach hundreds of main suppliers and in the apparel industry easily thousands. However, this has not withheld the development of private monitoring by external bodies. Secondly, in the literature suggestions has been made to deal with these obstacles. For instance by making a critical selection of subcontractors that really have a

relation with the TNC,<sup>120</sup> or by prioritising monitoring issues and with that the workplaces to be monitored in first instance in order to deal with the most pressing issues first. Such an approach would fit within the idea of transnational monitoring, when taking into account that the sanctions are mostly market-based (positive) sanctions that aim to support plants to improve the implementation of the CSR initiatives rather than punish non-compliance.<sup>121</sup> How to determine what would be the best approach is initially up to the monitoring committee. Therefore, it is important that one of the first tasks of the monitoring committee is to draw up a work plan.

#### 6. Rules on the final report of the monitoring (the result of the monitoring).

The results of the monitoring is to be reported in a written report that is signed by all the members of the monitoring committee. The report should give a critical assessment of the CSR initiatives as well as recommendations and guidelines on action to improve the implementation of the CSR initiatives or to turn non-compliance into compliance. Furthermore, the executive summary of the report will be published. Ideally in a unified, searchable, public database, for instance at the website of the ILO. The TNC is not obliged to publish the full report, however, when it uses the monitoring to enhance its credibility this would be recommendable. The full report will be sent to the management of the TNC that applied for the TLI-system and signed the contract with the ILO. It is therefore up to the TNC to decide what to do with the report in terms of publication, for instance on the website or the intranet of the TNC.<sup>122</sup>

#### *Some additional aspects*

In this part we address some additional aspects that either could be part of the protocol or separate contracts between the TNC and the ILO/TLI. They have in common that they are aspects that need to be arranged in order to ensure and secure a proper functioning of the TLI-system we envisage.

#### 1. Exclusion of liability of the ILO and the TLI.

The aim of this TLI-system is to improve the monitoring of transnational CSR initiatives by enhancing its independence and the quality. However, there is no guarantee that the CSR initiatives are implemented and complied with. Also the monitoring is no guarantee that no unlawful actions or – for instance - accidents will happen etc.. The TNC remains responsible and liable for what happens in its work places and those affiliated through its global value chain, thus its subsidiaries, suppliers and subcontractors. In other words, the monitoring cannot serve as a “shield” against lawsuits, fines and boycotts. How and where this is best arranged needs to be seen. The protocol is one option which is also open for third-parties. A contract between the ILO/TLI and the TNC applying for the TLI-system is another option.

#### 2. Model contracts.

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<sup>120</sup> Fichter, M. and Sydow, J. (2002), ‘Using Networks Towards Global Labor Standards? Organizing Social Responsibility in Global Production Chains’, *Industrielle Beziehungen* Vol. 9, issue 4: 357-380.

<sup>121</sup> See on this also section 2 above.

<sup>122</sup> A substantial number of TNCs is already used to publish reports about their practices with respect to their CSR policies, since they are obliged to do so by national authorities in order to create greater transparency. Examples of this can be found in the US and France. See on this: Sobczak 2004, *op cit.* note 4: 209-210.

- Between the ILO and the TNC for providing the service, the expertise and to ensure independence and credibility, but also to organise and ensure commitment to the protocol (interestingly enough, the ILO would act in this model in an 'agency-like' role)
- Between the ILO and the TLI (ad hoc engagement agreement / service contract).
- Between the TLI and the TNC on practical issues related to the execution of the monitoring and the protocol and on the other hand to set rules to protect the interests of the TNC (data-protection).

### 3. Costs of the TLI-system

The TLI-system does not come for free. There are costs involved with the training and accreditation of the TLIs and with the monitoring itself: translation costs, travel expenses for the meetings etc.. Since the biggest beneficiary of the TLI-system is the TNC, because it enhances its credibility, serves its public appreciation by consumers and investors, and might reduce costs on work related accidents, we consider it only to be fair that the TNC bares the costs of this system. The fee the TNC needs to pay the ILO for the service, therefore includes costs for overhead involved with the administration and the training and education of the TLI.

Besides the costs involved with the monitoring activities of the committee, the TLI, who will probably be full-time occupied by it, also needs to be paid. Since the TLI is typically a freelance expert or someone affiliated with a NGO / university / consultancy, at least not under labour contract with the ILO, we propose that the TNC pays the TLI according to a transparent fee-scheme determined by the ILO. Contractually, this could be arranged in a service contract, meaning that the TLI is a self-employed person. This contract would only be effective as from the moment the TLI is selected by the TNC and starts its inspection work at the TNC.

### 4. Regularity of the monitoring.

Basic to monitoring is that it is not done incidentally when it suites the TNC, rather that it takes place every once in a while. In which time-frame such monitoring needs to take place depends on, among other things, the size of the company, which is also determinant for the period the monitoring needs, and the seriousness of a) the problems on non-compliance and b) the credibility of the TNC in its submission to external and independent monitoring. In order to ensure repetitiveness of the monitoring, we find it recommendable to make this part of the contract between the TNC and the ILO when the TNC applies for the TLI-system. When this is not feasible, but also when it is agreed in the contract, it should be part of the recommendations and the action plan that are part of the final report of the monitoring committee. Such recommendation should also be mentioned in the executive summary in order to make this transparent and enable third-parties, like workers' organisations and involved NGOs to hold the TNC accountable for this.

## 7. Conclusions

The aim of this contribution is to contemplate about and propose a kind of 'transnational labour inspectorate system' (TLI-system), that embodies the next reformer (but still cautious) step towards a more independent, external monitoring of transnational private labour norms, involving (most of the) relevant stakeholders. One of our prerogatives for such a system is that it has to be publicly rooted, which is also the biggest challenge to meet. Our analysis of the public initiatives introduced by the ILO, OECD and UN, to further the implementation of and compliance with labour rights in the



business policies of TNCs, confirmed the existence of the well-known regulatory and enforcement gap. Furthermore, it also showed that these organisations increasingly try to accommodate a multi-stakeholder approach to the implementation of labour rights, involving – among others - governments of their member states, employers and workers organisations and the management of TNCs. The same is found with the private, self-regulatory initiatives, albeit in case of most of the unilateral CSR codes of conducts this is limited, and at best includes a form of external auditing by, for example, a NGO or a private social auditor. Most of the IFAs though do involve workers organisations, however, their interest lies predominantly with mechanisms of some kind of social dialogue to implement labour standards, rather than scrutinizing every infringement of a right. Nonetheless, examples are known that these implementation mechanisms have actually a wider effect, since they foster participation and deliberation in an ongoing dialogue. Similar mechanisms can be found in the initiatives of some NGOs and/or multi-stakeholder schemes. In the initiatives of NGOs we also found scarce, but promising examples of unannounced visits of external assessors giving the NGO uncensored information about the true situation of the labour standards in the assessed company. Many previous proposals as found in the literature also stress the need for multi-stakeholder approaches and more dynamic mechanisms furthering the implementation of labour rights in practice. Moreover, many of them not just plea for multi-stakeholder approaches, hence they plea for a system that provides a strong role for either national governments or an international organisation, in particular the ILO. Similar idea has been put strongly forward by the words of Arrigo, Casale and Fassani, when they argue that the public component is of the utmost importance for labour inspection in general. This is not only true because of the large number of inspectors sworn to the job that is needed, but also to ensure independence of the monitoring and the positive change they can promote, for workers' rights as well as the business itself. In line with Pires we are also convinced that well-trained inspectors can live up to the enormous challenge of the 'inspection of soft laws' (*i.e.* private, voluntary labour policies of TNCs), as good inspectors have always had the ability to overcome the deficiencies and anachronism of law.

The imaginary system we have introduced in section six addresses many of these aspects. In short, by having the ILO working out a uniform protocol for transnational 'inspection' and facilitating the training of transnational labour inspectors (TLIs), having those inspectors accredited and listed, some kind of public root can be provided. Moreover, this public root is the very heart of our proposal, since the TLI would have a leading role in the monitoring process. Furthermore, our proposal accommodates the participation of representatives of the management of the TNC and of the workers covered by the CSR initiatives, and additionally (and strongly recommended) the involvement of national labour inspectors and relevant NGOs. The proposal also comprises the unannounced, full and safe access of the TLI-led monitoring committee to the premises that are covered by the CSR policies of the TNC, including its subcontractors and suppliers (to the extent indicated by the given TNC-policy). Another important element is the regularity of the monitoring. As the developments in the private initiatives show, regularity fosters participation and deliberation and consequently a higher level of compliance with the labour rights.

Our proposal is just an initial model trying to deal with the most essential elements to start the development of and a debate about a much needed and plead for TLI-system. It has many elements that need to be precisely clarified and worked out in collaboration with experts and the representatives of all related stakeholders (most of all, the ILO, and other international organisations like the OECD and the UN), representatives of TNCs and business associations, workers organisations, NGOs, etc.. For many of these aspects we have indicated what we consider important to be

addressed at least, however, the raised issues are not at all exhaustive. On some aspects we have limited knowledge, like the possible costs involved with a system like this, although we think that compared to other possible comparable systems, this is a relatively cheap and reasonable option. Also we are no labour inspectors ourselves, which makes it hard for us to clarify how and what should be monitored exactly. The same applies to some of the 'evergreen' problems inherent to labour inspection systems that we mentioned in section two, among which the limitation of resources, scope, frequency and coverage; the eventually superficial and occasional nature of the inspection; the risk of corruption; and the mismatch between the norms and enforcement. On the transnational level these problems might even be more stubborn to deal with than on the national level.

Although we are convinced that we have proposed a feasible TLI-system, it has also some weaknesses that need further elaboration, if they can be overcome at all. One weakness, we consider inherent to the transnational level, is the impossibility to force TNCs to apply for this system, rendering it to the voluntary will of TNCs to opt for it. Having the TLI-system rooted in the public sphere (more specifically, in the ILO) may pose an obstacle for TNCs to apply for the system, since in general the ILO has a name to be very sympathetic for workers. To tackle this, it would be interesting to examine the options for closer cooperation between international organisations, in particular the OECD and the UN, since both already have programmes (as described in section 3) that refer to the ILO-standards.

Another, rather obvious weakness is the potential legitimacy- (and acceptance-) deficit of the TLI, since the public root by means of accreditation by the ILO and the provision of a protocol and contracts is meagre. We are aware of the danger that this weak, symbolic – or more critically, cosmetic – nature of the public embeddedness of the system might also give a possible basis for misuse. However, this is a limitation inherent to any kind of regulatory experiments in relation to TNCs, because of that regulatory gap. What is important is the fact that the TLI is an independent, well-trained, publicly assigned expert not tied to the TNC, while at the same time the contracts between the ILO and the TNC ensure the consent of the TNC to be bound by the protocol of the inspection system. In a way it adds an extra dimension to the hybridity between public and private (on organisational level: ILO – TNC), hard and soft, substantive and procedural regulatory aspects: public / 'semi-hard' root in the ILO – enhanced by a privately implemented, but publicly assigned and overseen mechanism (the protocol) to be bound on the basis of contracts. To what extent this could be the case needs to be further explored, likely in the emerging sphere of 'global hybrid labour law'.<sup>123</sup>

Another weakness is the lack of sanctions, among which penalties, fines or in extreme cases the power to order the factory to be closed down are usually existent in classical inspection. On the other hand, our review of the public and private initiatives show tendencies towards more focus on implementation mechanisms and monitoring in order to further the real implementation. In this sense, the monitoring carried out via the TLI-system could follow this tendency by using mechanisms that promote participation, deliberation and alternative sanctions. On this way, the TLI-scheme could also strengthen the reputational effects of monitoring. As a result, it could potentially have a 'spill over' effect by contributing to the so-called inspection 'multiplier effect' (influencing the working conditions in more companies by action within a few).<sup>124</sup>

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<sup>123</sup> Mückenberger 2011, *op cit.* note 19.

<sup>124</sup> Cf. James, Ph., Johnstone, R., Quinlan, M., and Walters, D. (2007), 'Regulating Supply Chains to Improve Health and Safety', *Industrial Law Journal*, Vol. 36, No. 2: 176

This might also be a point where the TLI-system could be complementary to the national labour inspection systems: TLI-monitoring fosters learning and deliberation in a proactive approach to support implementation, while national inspection systems can apply repressive measures, including sanctions. Again this would imply an innovative move towards hybridity between two systems, this time national and transnational, and needs further exploration.

Another related crucial element that is lacking from our proposal as it is now and definitely needs further elaboration is the option of workers to report alleged infringements of labour rights directly to the TLI-led monitoring body. Many private initiatives provide for a form of 'whistle blowing'. Since this could make the application of the TLI-system less attractive for TNCs, we considered that this could be an element to be further developed when the so-called prototype of the TLI-system is already in place, or offered as an optional extra.

As stressed repeatedly, this is a proposal for a first step towards a publicly rooted TLI-system that involves the main stakeholders, enhances the credibility of the monitoring of private initiatives that TNCs undertake in the context of the CSR, and can be complementary to national labour inspection systems. It is more than challenging in several ways, not in the least place because of the complexity of the monitoring itself, but also because of the hybrid structures it is to be entangled. One thing is clear though: owing to the contemporary complexity and disintegration of modern transnational corporate structures and the large extent of supply-chains, the ability of firms to globally move and optimize production, monitoring of compliance is challenged to the maximum. Neither any kind of national or transnational, public or private, monitoring system can be all-encompassing, fully systematic and perfect. Such illusions – if any – must be left behind.<sup>125</sup> That is why we think that any new attempt which might strengthen – even to a small extent – the monitoring of global labour issues is worth thinking about and striving for.

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<sup>125</sup> Pearson, R., and Seyfang, G. (2002), 'Codes of conduct as enclave social policy', in R. Jenkins, R. Pearson, and G. Seyfang (Eds.), *Corporate responsibility and ethical trade: Codes of conduct in the global economy*. London: Earthscan.