

INDEPENDENT MONITORING OF PRIVATE TRANSNATIONAL REGULATION OF LABOUR
STANDARDS:
A PROPOSAL FOR A “TRANSNATIONAL LABOUR INSPECTORATE” SYSTEM

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1. Introduction

Since the 1980s transnational companies (TNCs) have become increasingly aware of their corporate social responsibility (CSR) within the global society in which they operate.¹ CSR strategies include 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 with one or more workers' organisations.² In general these forms of private self-regulation are perceived in the literature as positive developments, since there is a governance-gap due to the failing efforts of various public institutions, including the United Nations (UN), the International Labour Organisation (ILO), and the Organisation for Economic Co-

¹ See for more in-depth accounts of this development, among many others, Egels-Zandén (2009); Schönmann, Sobzack, Voss, Wilke (2008); García-Muñoz Alhambra, Haar, Kun (2011); Papadakis (2011).

² Papadakis (2011, 1- 7). And more elaborately on this development: Fairbrother, Hammer (2005).

operation and Development (OECD).³ However, private regulation is not without its critics, because these forms of voluntary self-regulation are soft law and as such raises many regulatory challenges and questions.⁴ At the same time it is argued that these initiatives may not be as soft as suggested by the notions ‘voluntary’ and ‘soft law’ (García-Muñoz Alhambra, Haar, Kun, 2011), since companies come under pressure to develop CSR policies from stakeholders (including workers’ organisations) and consumer campaigns (*cf.*, Kolk, Tulder, 2002; Fichter, Sydow, 2002) as well as direct and indirect incentives relating to transparency obligations (Sobczak, 2004, 408 - 410; Cremers, 2013; Doorey, 2005).⁵ Moreover, it may be that the CSR intentions on the part of TNCs are sincere as they seek to enhance their credibility. One way of achieving this is to involve stakeholders, in particular NGOs and workers’ organisations, in the formulation of CSR policies. By doing so, the management of TNCs hope to “raise levels of trust in labour-management relations, and boost the company’s credibility vis-à-vis shareholders and other investors.”⁶ Stakeholders, in particular workers’ organisations, for their part, are interested in taking part 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” (Papadakis, 2011; Egels-Zandén, 2009). Another way company management can express their sincerity and raise the credibility of their CSR-policy is by monitoring CSR-practices within the company supply chain (*cf.*, Sobczak, 2003, in particular at 230-231). By monitoring company practices in light of the CSR-initiatives, management 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” CSR initiatives (Sobczak, 2003).

In practice several forms of monitoring are adopted, varying from poorly to well developed multi-step monitoring.⁷ With respect to international framework agreements (IFAs), Welz (Welz, 2011) and Sobczak (Sobczak, 2012) also distinguish between monitoring processes involving either worker representatives or external auditors (*e.g.* the Ethical Trading Initiative and SA8000). What all these forms of monitoring have in common is that they are private and not entirely independent, involving management and less often workers’ representatives. The fact that these initiatives are private implies that all parties involved with the monitoring, including external auditors, are basically under the economic influence of the TNC (Sobczak, 2003). In addition, as far as the monitoring is carried out by an external auditor, there are two negative aspects: first, the monitoring typically focuses on the code of the external auditor and not the CSR-initiatives of the TNC; and second they often do not involve the relevant workers’ representatives in the monitoring (Riisgaard, 2005). Although in a relatively short period of time, progress has been made towards more independent, external monitoring, involving the relevant stakeholders (or most of them), in order to deal with any shortcomings, the next step in this development should be towards publicly based monitoring that is complementary to national labour inspectorates (Casale, 2012). The aim of this contribution is therefore to investigate and propose such a ‘transnational labour inspectorate’ system (hereafter: a TLI-system).

³ *Cf.* among many others: Bercusson, Estlund (2008); Stevis (2010).

⁴ See for a general impression: García-Muñoz Alhambra et alii (2011); Sobczak (2004); Ales et alii (2006).

⁵ See more generally on the explanation of the development of self-regulation by means of IFAs: Stevis, 2010, 11-13.

⁶ See for the involvement of workers’ representatives: Papadakis (2011, 3). See for the involvement of NGOs in general: Wells (2007).

⁷ See for an example of this: UNCTAD (2012).

The idea of a TLI-system in a broad sense is not completely novel, and as a result we draw inspiration from the practice of public international organisations (section 3). These developments also cast light on the limitations of these organisations to regulate 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). We then discuss some related ideas proposed by other scholars (section 5). However, before analysing these initiatives, we examine the differences between private transnational monitoring systems on the one hand and public national monitoring systems on the other (section 2). Understanding these differences is essential in appreciating 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 by private initiatives and that have previously been proposed by other scholars. This is imperative for understanding the positive features of these (private) transnational developments. Subsequently, we will use the findings of this comparison to scrutinise existing practices and proposals, considering their weaknesses, difficulties and shortcomings, as well as for their positive features.

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

2. Public Monitoring vs. Private Monitoring

When it comes to the monitoring of compliance with labour standards, the traditional and most well-known instrument is labour inspection, that is part of most national labour law systems. Since these forms of monitoring are considered the norm, all other forms of monitoring are, directly or indirectly, assessed and commented on in comparison with these forms. As a result, we start with a brief general examination of transnational, private labour monitoring systems in comparison with the traditional system of labour inspection in its most basic and general form. This comparison serves several purposes. First, it makes visible the ways private forms of monitoring differ from the traditional form of labour inspection. Second, it provides a context in relation to which the difficulties and shortcomings can be recognised, enabling 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. Third, it enables us to indicate how our proposal for a TLI-system can be complementary to national labour inspection.

In their basic form, traditional systems of labour inspection are self-evidently state-based and therefore limited to the national setting within each country, and are branch/sector- or factory-centred. In addition, their organisational structure is hierarchical and their monitoring is backed-up by public sanctions. Transnational, private labour monitoring systems are self-evidently transnational by nature. Arguably, they are the only

existing monitoring systems of any kind to build on.⁸ These forms of monitoring focus on brands and are increasingly 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 non-governmental human rights organisations. The monitoring is supported by market-based sanctions, and sometimes by incentives, for instance technical support for the lead-company to improve working conditions, with continuation of the supply contract as a reward for improvement, and with the threat of termination of the contract in case of insufficient improvement or none at all.⁹ Table 1 summarizes the two systems on the basis of their main characteristics.

Table 1. Differences between national labour inspectorates and transnational private monitoring

	National labour inspectorates	Transnational private monitoring
1.	State-based	Transnational
2.	Factory-centred	Focus on companies (brands) and their supply chains
3.	Hierarchical	Networked, multi-stakeholder attitude
4.	Use of public sanctions (mainly negative)	Use of market-based sanctions (incentives /positive sanctions)

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

- The activities of these private (outsourced) systems tend to mimic and challenge functions (i.e. labour inspection in a broad sense) that were once the exclusive purview of public bodies. Thus, they present problems in terms of legitimacy, credibility, accountability and independence.¹⁰
- They are sometimes 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 (Justice, 2001).
- The uncontrolled proliferation of such heterogeneous systems has created a kind of uncoordinated ‘industry’ of transnational, private labour monitoring bodies. The multiplicity of codes and monitoring schemes can cause confusion and contradictions in practice (*cf.* Jenkins, Pearson, Seyfang, 2002).
- Empirical case-studies about the effects of transnational, private labour monitoring systems are limited in number and they tend to be unsystematic. To a great extent this can be explained by the confidential and sensitive nature of much corporate information. On the other hand, a good deal of the existing research on the performance of such systems is highly critical and sceptical, mostly because of their perceived corporate bias and manipulation and presumed low level of rigour (O’Rourke, 2002; Sabel, 2007). Evidence of any systematic positive impact of MNC

⁸ 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 (2011).

⁹ Although it is 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.

¹⁰ *Cf. Monitoring International Labour Standards: Techniques and Sources of Information*, 2004, Committee on Monitoring International Labour Standards. Washington: National Research Council, National Academies Press.

private inspection regimes is exceptional.¹¹

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 traditional national labour inspection systems. This includes, for instance, the limitation of resources, scope, frequency and coverage;¹² the superficial and occasional nature of inspection; the lack of appropriate training; the risks of corruption; the complexity of the monitoring as well as the issues to be monitored; and the mismatch between norms and enforcement.¹³

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 the labour aspects of 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, all of them have issued guidelines (ILO¹⁴ and OECD¹⁵) or principles (UN GC¹⁶ and the Ruggie Framework¹⁷) on how TNCs should best deal with labour issues in practice. Hence, these documents are the only alternatives for any form of regulation of TNC labour practices by public institutions at the international level. In addition to these initiatives, we discuss ILO Convention 81 on Labour Inspection, which plays a central role in maintaining and promoting decent conditions of work through an efficient and effective labour inspection system (Pérez, Vega, 2010). Although the Convention stipulates rules for national systems of labour inspection (Pérez, Vega, 2010, 9 - 10), indirectly they are also intended to serve as an inspiration for the transnational level¹⁸ and are therefore of interest in the present context.

3.1. *Initiatives by Public Organisations*

3.1.1. *ILO: Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*

The aim of this Declaration is to use the guidelines to enhance “the positive social and

¹¹ 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 point to the need for complementary state–private regulation. These findings suggest that private-voluntary initiatives can reinforce, rather than displace, state regulation (Amengual, 2010). Harry Arthurs also cites some related empirical evidence (Arthurs, 2010).

¹² One example by way of 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 10, 93.

¹³ See in general on these issues the case-studies in Papadakis (2011).

¹⁴ ILO, 2006, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (MNE Declaration)*, Geneva, International Labour Office, 4th edition, Available at: www.ilo.org.

¹⁵ OECD, 2011, *OECD Guidelines for Multinational Enterprises*, OECD Publishing, <http://dx.doi.org/10.1787/9789264115415-en>.

¹⁶ 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.

¹⁷ <http://www.business-humanrights.org/SpecialRepPortal/Home/Protect-Respect-Remedy-Framework/GuidingPrinciples>.

¹⁸ We draw this conclusion 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.

labour effects of the operations of MNEs.”¹⁹ The weakness of this Declaration is that it underlines the fact that compliance is voluntary, and therefore left up to the MNEs (Guideline 7). While the Declaration sets out guidelines for labour issues to be taken into account by MNEs, including issues such 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 with reference to national systems. At most a reference is made to complying with existing national procedures, preferably based on 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, the parties involved with the implementation of the Declaration can ask for an interpretation of the Declaration when a dispute arises concerning its implementation.²⁰ However, these requests for interpretations can be made by a) the government of a Member State; b) a national organization of employers or workers and c) an international organisation of employers or workers.²¹ Although it is positive that employers’ and workers’ organizations that are a member of the ILO, have access to the Committee on MNEs, it is remarkable that MNEs do not. This, once again highlights the limitations of a public (international) organisation.

3.1.2. OECD: *Guidelines for Multinational Enterprises*

The OECD Guidelines differ from the ILO Declaration in some respects: they do not deal exclusively with labour issues, but they provide stronger guidelines on how MNEs should safeguard and monitor these rights. However, as an organisation with an economic perspective, the means promoted by the OECD to monitor compliance are based on 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 enterprise risk management systems, to identify, prevent and mitigate actual and potential adverse impacts’.²² The positive aspect of this interpretation of due diligence is that it encourages MNEs to make CSR part of their ordinary business strategies and activities.²³ The disadvantage is that it is initially conceived in a unilateral setting, whereas labour issues are best negotiated 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 will also be done when it comes to the monitoring of labour standards or other issues that are of interest to employees. Also in the section on Employment and Industrial Relations, no further rules on ensuring or monitoring compliance are laid down, hence a reference is made to the guidelines on due diligence of the section on General Policies.²⁴

Another positive element of the OECD Guidelines, when compared to the Tripartite

¹⁹ ILO, 2006, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (MNE Declaration)*, Geneva, International Labour Office, 4th edition, Introduction, p. v, and in other words repeated in guidelines 1 and 2.

²⁰ Addendum to the original Declaration adopted by the Governing Body of the International Labour Office at its 232nd Session, Geneva, March 1986.

²¹ 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.

²² General Policy guideline 10 of the OECD Guidelines for Multinational Enterprises.

²³ See also point 14 of the commentary on the General Policies.

²⁴ Point 50 of the commentary on Employment and Industrial Relations.

Declaration of the ILO, is that they provide a support system to raise awareness about the existence of the Guidelines and their implementation by means of National Contact Points (NCPs). These NCPs are usually hosted by a national ministry, but they can also be an interagency group consisting of experts, employers' and employees' representatives, and non-governmental organisations.²⁵ The main focus of the activities of NCPs is on the implementation of the Guidelines, rather than monitoring compliance once an MNE has agreed to apply the guidelines. To the extent that they have a monitoring role, this function is re-active rather than pro-active, as a labour inspector can be, since it is concerned with the interpretation of the guidelines when a dispute is raised (by means of "good offices"), rather than compliance.²⁶ The NCP is obliged to report to the Investment Committee, that also offers "good offices" in case of disputes on interpretations or specific implementation issues regarding the Guidelines. However, the role of the Investment Committee is limited to observing the proper functioning of the NCPs and to ensuring uniform interpretation of the Guidelines by advising the NCPs when they are asked for an interpretation. As such, it does not come close to being a monitoring system resembling labour inspection. All in all, the OECD complaints 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*

The 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."²⁷ At the time of writing the UN Global Compact has over 10,000 corporate participants and other stakeholders and is the largest voluntary CSR initiative in the world.²⁸ Its aim is to mainstream ten principles, including the four core labour standards of the ILO,²⁹ in business activities around the world. The governance system is a delicate one that is network-based, involving seven bodies that have different functions within a multi-centred framework. Again it is stressed that it is voluntary.³⁰ As a network-based governance framework, the emphasis lies not on monitoring compliance with the principles, but rather with structures providing positive incentives and support for implementing the principles throughout the business. Much emphasis is placed on sharing and disseminating information and good practices by means of mutual learning. 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".³¹ Nevertheless, some rules have been adopted to ensure the integrity with the programme.³² These rules focus on the misuse of association with the programme; failure to communicate progress in implementing the ten principles; and allegations of systematic or egregious abuses. For such abuses a reporting procedure is provided, meaning that upon the submission of written allegations, the Global Compact

²⁵ OECD Guidelines for Multinational Enterprises, part II-Implementation Procedures, I.A.2 Institutional Arrangements.

²⁶ Points 28-37 and 40-42 of the commentary on the Implementation Procedures.

²⁷ Quote of UN Secretary-General Ban Ki-moon on the website of UN GC: <http://www.unglobalcompact.org/index.html>.

²⁸ <http://www.unglobalcompact.org/AboutTheGC/index.html>.

²⁹ <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html>.

³⁰ http://www.unglobalcompact.org/AboutTheGC/stages_of_development.html.

³¹ <http://www.unglobalcompact.org/AboutTheGC/IntegrityMeasures/index.html>.

³² *Ibid.* Referred to as 'Integrity Measures'.

Office will investigate the reported matter and may take action to remedy the situation. What this remediation entails is not specified. In general, the UN Global Compact 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.³³

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 in a sense prolonged, but from then on he became the Special Representative of the UN Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises.³⁴ In this function Ruggie helped develop a framework “to protect, respect and remedy” human rights, including social rights, in business, and this is also of relevance for the UN Global Compact, so we discuss this in the same section.³⁵ At the end of a six-year period and three stages of research and development, Ruggie presented his final report in 2011, with probably the most well-developed framework in this field.³⁶ The framework rests on three pillars:

1. the duty of the State to protect against human rights abuses by third parties, including enterprises, through appropriate policies, regulation and adjudication;
2. corporate responsibility to respect human rights, which means that enterprises should act with due diligence to avoid infringing the rights of others, and 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.³⁷

Similar to the OECD, the Ruggie Framework addresses the issue of human rights by means of due diligence. Unlike the OECD Guidelines, the Ruggie Framework goes one step further, since it not only requires enterprises to identify potential adverse human rights impacts,³⁸ but also to ensure meaningful consultation with potentially affected groups and other relevant stakeholders (principle 18), to carry out impact assessments (principle 19) and to adopt qualitative and quantitative indicators to verify whether adverse human rights impacts are being addressed, including feedback from internal and external sources, including affected stakeholders (principle 20). This resembles a monitoring process that is aimed at the prevention of adverse effects on human rights, as it is similar to the role of a labour inspectorate. This is particularly the case with the last principle, which includes performance contracts, reviews, surveys, audits and operational-level grievance mechanisms. What is lacking is the explicit involvement of workers’ organisations and representatives. Given the background against which this framework has been developed, that of human rights above all and implicitly also labour rights, this is not surprising. Moreover, like the procedure on due diligence within the OECD Guidelines, the monitoring procedure is mostly an internal affair executed by the enterprise with optional involvement of the stakeholders, who could be trade unions (not explicitly mentioned) and external advisors/experts. This leaves some doubt about the reliability of the monitoring since it lacks independence and a publicly rooted third-party presence. What is positive, however, is that as noticed with IFAs, the OECD and UN initiatives seem to foster participatory structures that are open to deliberation, which in itself is potentially able to

³³ 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.

³⁴ http://www.unglobalcompact.org/Issues/human_rights/The_UN_SRSG_and_the_UN_Global_Compact.html.

³⁵ *Ibid.*

³⁶ http://www.ohchr.org/Documents/Issues/Business/A-HRC-17-31_AEV.pdf.

³⁷ Paragraph 6 of the Introduction to the Guiding Principles (the framework).

³⁸ Principles 17 and 18 of the Ruggie Framework.

strengthen the credibility of the monitoring.

3.2. ILO Convention 81 Labour Inspection

As mentioned in the introduction to this section, ILO Convention 81³⁹ plays a central role in maintaining and promoting decent conditions of work through an efficient and effective labour inspection system. (Pérez, Vega, 2010). Although the Convention is created as a model for national systems of labour inspection (Pérez, Vega, 2010, 9 - 10), it upholds some principles (Pérez, Vega, 2010, 20) that should be taken into account when examining monitoring systems. These principles are: public service; accountability; efficiency and effectiveness; universality; transparency; consistency and coherence; proportionality; equality; cooperation and collaboration.

Several of these principles are embodied in Article 6 of Convention 81 that stipulates that inspectors “must be public officials assured of stability of employment and independent of changes of government and improper external influences”. Moreover, this article stresses the importance of ensuring real independence for labour inspectors in order to have an independent monitoring system. This is in contrast with the current transnational, private forms of monitoring, characterised by a high level of (economic) dependence of those executing the monitoring of the transnational company. With regard 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 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 carrying out their duties. In order to enable labour inspectors to execute their duties, they should enjoy certain prerogatives (Article 12), including free access to 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 (LAB/ADMIN)⁴⁰, which 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 with the use of sanctions, but also a more “pro-active” function. This pro-active function aims to achieve compliance with labour standards by positive support for labour inspectors. In this function, the labour inspector provides employers and workers of information and gives them advice on how to achieve compliance with labour standards (Article 3.1 b Convention 81).⁴¹ This element of monitoring is to be found also in the private initiatives outlined in the next section.

4. Monitoring Systems as Found in Private Initiatives Applied in Practice

In general we distinguish between three different private initiatives that potentially include monitoring systems. First, mention should be made of CSR policies and strategies of TNCs that are often unilaterally adopted by a code of conduct. Second, reference should

³⁹ Together with Convention 129 on labour inspection in agriculture.

⁴⁰ See about this programme: <http://www.ilo.org/labadmin/lang-en/index.htm>, last visited 25 February 2013.

⁴¹ 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, 95th Session, 29-32.

be made to international framework agreements, that are sometimes part of the CSR policy of a TNC, but can also be the result of pressure from society or workers' organisations. Third, we find initiatives by non-governmental organisations, some dealing with human rights, labour rights and the 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 implementation. They are not only different compared to each other, they are also very different within their own 'categories', and as a result it is difficult to give an impression of these three initiatives in general (García-Muñoz Alhambra et alii, 2011). However, there are some general elements that these initiatives have in common and hence they are grouped as a specific category that we address in this section. These descriptions are limited to the compliance mechanisms that they (are presumed to) create.

4.1. *CSR Codes of Conduct*

Codes of conduct go by many names, including business codes, corporate governance codes, and codes of business ethics (Compa, 2004; Posner, Nolan, 2003). What they have in common is that they are typically unilaterally adopted by the management of a TNC. If such a code includes a form of monitoring,⁴² this unilateral aspect is also reflected in the monitoring process, since this is often limited to internal audits based on questionnaires and surveys at management level. As a result, input from the workplace is weak or lacking, since the workers' representatives are mostly not involved and it is unlikely that workers will complain about the infringement of their rights to their managers.⁴³ As far as the monitoring is entrusted to an external party, this is often either a commercial audit company or a non-governmental organisation. In both cases, workers' representatives are once again often not part of the monitoring processes. Second, in both situations the links with the TNC are close, since the management of the TNC is paying for the monitoring. This puts the independence, objectivity and reliability of the monitoring under strain: it is hard to imagine a TNC willing to pay (and extend the contract) for a harsh report listing severe infringements of labour rights, projecting a negative image of the TNC (*cf.*, Robinson, 2011).

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 agreements between the management of a TNC and workers' representatives or organisations, including Global Union Federations (GUFs), national and regional trade union, and World or European Works Councils (Justice, 2008; Papadakis 2011; García-Muñoz Alhambra et alii, 2011). However, when it comes to independent monitoring with these instruments, there is reason for scepticism. Since these initiatives have been indicated as the only serious way to fill the (public) regulatory gap at a transnational level (*cf.* Thomas, 2011), they are an important development that needs to be examined more closely. As a

⁴² Research indicates that codes of conduct are "policy-heavy" with little attention to monitoring and sanction efforts. See about this: Hoejmoose, Adrien-Kirby (2012).

⁴³ See on this also Hossain, elsewhere in this book.

result, we base our analysis on a sample of 21 IFAs selected at random,⁴⁴ and on secondary information in the literature. The secondary sources include in particular empirical case studies, since it is well known that the inclusion of monitoring systems in IFAs is limited, though they can be identified from the secondary documents linked to IFAs.

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 of gradually improving working and employment conditions. Monitoring compliance, particularly in the sense of bringing each violation of the IFA to the attention of the public or before a court, is therefore not one of the main goals (Schömann, Sobczak, Voss, Wilke, 2008). This may help to clarify the fact that forms of external monitoring, like audits, or third-party involvement (for instance, that of an NGO), are rarely found in IFAs (Schömann, Sobczak, Voss, Wilke, 2008).⁴⁵ On the other hand, when it comes to ideas on increasing the effectiveness of CSR initiatives, including IFAs, in practice, growing attention is paid to implementation and the monitoring of that implementation (Stavis, 2011).

Opinions about private monitoring initiatives, even with the involvement of workers' organisations, remain sceptical (Telljohann et alii, 2009a,b). One of the reasons for this, is that these organisations, like trade unions, lack structures and resources that are necessary for comprehensive independent monitoring, especially due to the increasing number of instruments they have to deal with (Hellmann, 2007; Telljohann et alii, 2009b; Müller, Platzer, Rüb, 2008). 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 (Kearney, Justice, 2003). In our analysis of IFAs and in the review of the literature, we find the following developments on monitoring involving trade unions:

(1) joint committees involving representatives of the workers and the management in which EWCs are frequently also involved.⁴⁶ Usually an annual meeting of the joint committee is held, but agreements in which two annual meetings⁴⁷ are held 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" (Hellmann, 2007);

(2) at least in two of the IFAs selected,⁴⁸ 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 to submit a report to the joint committee (Bourque, 2008; Telljohann 2009a). Workers' representatives are allowed to be present at 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;⁴⁹

(3) additionally, in the course of time GUFs are developing their own monitoring capacities (Rüb, 2006) consisting of global trade union networks within TNCs that aim to create a formal channel by which the information gathered at local level is effectively conveyed to the central level. Some authors refer to this development as "the subsidiarity

⁴⁴ 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.

⁴⁵ See also: Torres, Gunnes (2004).

⁴⁶ See, among others Béthoux (2008); Bourque (2008), Rüb (2006).

⁴⁷ Chiquita-IUF IFA.

⁴⁸ IKEA-IFBWW IFA and Chiquita-IUF IFA.

⁴⁹ Which is one of the strategies for monitoring IFAs indicated in the literature. See Telljohann et alii (2009b).

model” (Schömann et alii, 2008). 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 bargaining and monitoring are difficult (Torres, Gunnes, 2004).

One shortcoming in all IFAs is that they lack indicators for monitoring implementation and compliance.⁵⁰ However, with respect to our proposal, it is interesting to highlight the following. The involvement of GUFs and national or local workers’ organisations, like trade unions and works councils, in monitoring seems to contribute to the establishment of a joint monitoring body that exchanges views in a continuous dialogue. This makes these instruments participatory and open to deliberation, reinforcing the credibility of the monitoring, in particular towards stakeholders, shareholders and civil society in general. Furthermore, what is interesting for our proposal is that these networked and multi-stakeholder monitoring mechanisms seem to be more formalized and institutionalized than those relating to single auditing systems as found in unilateral codes of conducts. Clearly there are also some problems specific to such monitoring systems, especially in relation to the limitations of GUFs: their scarce resources, and the problems for organised labour in certain countries, but these are a variation on ‘evergreen’ problems of inspection systems as mentioned in section 2.

4.3. *Monitoring Initiatives by NGOs*

In general NGOs have one major disadvantage, namely that they are normally not about the monitoring of the CSR initiatives of the TNC itself, but rather they are about monitoring of the rights/issues they focus on. In addition, we have to make a distinction between general human-rights NGOs that also address labour rights⁵¹ and NGOs that specifically address labour rights.⁵² These more specific NGOs are more likely to address at least the core labour standards of the ILO and to involve workers’ organisations in the monitoring system. In this group a further distinction can be made between NGOs that aim to further the implementation of labour rights regardless of the sector the company is active in,⁵³ and others that target a specific sector.⁵⁴

What these NGOs have in common is that 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 socially responsible enterprise that respects the labour rights promoted by the NGO. For some NGOs, this intention seems to be sufficient for affiliation. The extent to which the labour rights are also respected in practice is not extensively monitored, at best by internal audits of the TNC itself.⁵⁵ The shortcomings of such a system are evident: the lack of independence or objectivity, and the lack of involvement on the part of workers’ organisations. Other NGOs offer more sophisticated monitoring systems.

For example, SA8000 requires the TNC to appoint a management representative and to

⁵⁰ European Commission, 2008, *Mapping of transnational texts negotiated at corporate level*. EMPL F2 EP/bp 2008 (D) 14511: 24.

⁵¹ See about this, among others: Winston (2002). Examples of general human rights organisations also dealing with fundamental social rights are: Amnesty International and Human Rights Watch.

⁵² 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/>.

⁵³ *Ibid.*

⁵⁴ <http://www.fairwear.org/10/home/>.

⁵⁵ This is for instance the case with the ETI Base Code (*cf.*, Robinson, 2011, 167).

recognise a SA8000 workers' representative who are both involved in the review of the policy of the TNC with regard to the requirements of SA8000 standards.⁵⁶ A more recent global CSR initiative that is worth mentioning is ISO 26000,⁵⁷ which provides guidance rather than requirements, so it cannot be certified or verified, unlike some other well-known ISO standards. As such, despite its relatively elaborate 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, but rather, as with IFAs, on implementation mechanisms fostering participation and deliberation.⁵⁸ Hence, their multi-stakeholder approach recognises the vulnerability of labour rights in respect of economic pressures. Serious implementation is not a matter of one party mainly, for instance the TNC, the supplier or the (local) trade unions: rather, it requires a joint effort on the part of many stakeholders, including the workers via a system of whistle-blowing, not to the management of the TNC, but to the FWF.⁵⁹ The Fair Labor Association (FLA) also has a multi-stakeholder approach bringing together universities, civil 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 FLA monitoring system is that it consists of three elements: assessments; investigations of alleged violations of workers' rights; and unannounced factory visits by independent external assessors.⁶⁰ In particular, unannounced visits are an interesting feature, closely resembling one of the tasks performed by national labour inspectors. Furthermore, unannounced visits by external assessors render the overall monitoring less dependent on the reports and audits of the TNC itself.⁶¹

4.4. *Concluding Remarks on Transnational Private Monitoring Systems*

Despite the shortcomings highlighted in the above three sections, these transnational private monitoring systems are the only existing transnational labour monitoring systems to build on. Moreover, they have some positive features that might serve as a model for the new idea for a TLI-system that we propose in section 6. First, these private monitoring systems fill gaps in traditional governmental and inter-governmental labour regulation by transforming the character of existing monitoring systems and supplementing public, national systems. Second, they react to real and increased pressure from consumers, human rights NGOs and labour movements. Third, these systems entail new, flexible forms of collaboration and coalition and create democratic opportunities for participation and empowerment for multiple interested stakeholders. Research shows that the involvement of third-party stakeholders is accompanied by higher levels of compliance.⁶² Fourth, these

⁵⁶ http://www.sa-intl.org/_data/n_0001/resources/live/2008StdEnglishFinal.pdf, paragraphs 9.2-9.4.

⁵⁷ ISO is a specific voluntary (non-governmental) organization whose members are recognized authorities on standards, each representing one country. See for more details: <http://www.iso.org/iso/home/standards/iso26000.htm>.

⁵⁸ See above section 4.2. In the literature these forms of regulation have also been indicated as 'new governance'. See for instance: Cottrell, Trubek, (2012).

⁵⁹ On their website they show a video in which they explain their method: <http://www.fairwear.org/10/home/>.

⁶⁰ <http://www.fairlabor.org/transparency>.

⁶¹ <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.

⁶² Tulder et alii, 2009. While IFAs scored lower on specificity, they performed better in terms of compliance than unilateral COCs (*cf.* Hepple, 2005).

systems adopt multiple and diverse practices, methods and procedures, including 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, and complaints procedures. Finally, 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, including competitors, regulators, consumers, investors, NGOs and trade unions. Clearly, the quality of this information requires critical scrutiny.

5. *Discussion of Previous Proposals by Other Scholars (Selection)*

Many scholars recognise the convergence and synergy between official and unofficial, public and private, national and transnational systems of monitoring.⁶³ Furthermore, there are compelling arguments in favour of the enhanced credibility, effectiveness, consistency and legitimacy of transnational private, non-governmental labour monitoring systems (*cf.*, Mückenberger, 2011, 109). Some authors discuss the question of whether public actors and the ILO can “be brought more fully into non-governmental monitoring.”⁶⁴ Others take an alternative approach in which efforts are made to cast the public (and the state) as the central actor in transnational labour governance, while recognizing the important function that private initiatives play (Kolben, 2011). Barenberg 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 (Barenberg, 2008). Kolben argues that since power imbalances and conflicts are always present in the workplace, purely private, technocratic regulatory and monitoring regimes “that rely completely on deliberation and benchmarking at the expense of rights and citizenship, are unsatisfying” (Kolben, 2011).

Mückenberger advocates third-party involvement in the implementation of transnational standards. Third-party in his view not only refers to NGOs and experts, but also to state/government actors. He stresses the importance of a “new mode of public supervision of global enterprise behaviour” (Mückenberger, 2011). This is in line with the argument that transnational monitoring regimes cannot be blamed for facing the same challenges state systems have faced for a long time, in terms of capacity, resources, reach and scope. (Arthurs, 2010). All of these intrinsic problems of any inspection are multiplied at transnational level.

Another source of inspiration for our proposal is to be found in the ideas of the European Coalition for Corporate Justice (hereafter: ECCJ), 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 of care would mean that the MNC would have an obligation to ensure that proper management systems are in place to investigate human rights abuses and to take reasonable steps to prevent or mitigate such abuses.⁶⁵ In our opinion, a monitoring system, preferably with an enhanced public element, could form an integral and important part of such management systems.

⁶³ Among others: Weiss (2011).

⁶⁴ *Monitoring International Labor Standards: Techniques and Sources of Information*, 2004, *op cit.* note 10, 97.

⁶⁵ Contribution to the EU2020 consultation, ECCJ, ID number (EC Registration), 48872621093-60.

When taking a broader view on the monitoring of labour issues in private regulatory forms, the ideas of Hepple are also an inspirational input. Hepple stresses the need to set up “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.” (Hepple, 2005). Furthermore he argues for the enlargement and updating of the core conventions of the ILO by including labour inspection. He is in favour of an independent monitoring scheme and a “complaints-based enforcement mechanism” of the ILO (Hepple, 2005). Hepple’s suggestions and proposals are inspirational for our concept of a publicly based TLI-system, since they strive to institutionalise and locate public elements in transnational labour regulatory initiatives and they intend to fill the transnational regulatory gap. The ultimate goal is to re-invent transnational labour regulation in order to ensure that TNCs comply with labour standards.

More recently a study on Responsible Supply Chain Management has put forward a more ambitious idea, with the establishment of a specific non-judicial monitoring authority at EU-level. This authority could provide more efficient and effective access as a remedy for victims of alleged abuses in supply chains by companies active in Europe. It would be granted a mandate to investigate, sanction and provide remedies for abuses (Opijnen, Oldenziel, 2011).

Traditional labour inspection is often perceived as a burden on firms and their productivity and competitiveness. However, Roberto Pires offers a forceful and pioneering explanation about the beneficial impact of labour inspection on social and economic development. According to his analysis, the intervention of labour inspectors can promote positive changes also in business practices through legal, managerial and technological advancement (Pires, 2011). Pires also notes that the historical emergence of state labour inspection services arose from a “social push” towards state regulation of economic forces (Pires, 2011). Currently a similar “social push” is emerging at the transnational level, due to the increasing activity of labour rights NGOs, trade unions, and conscious consumers. In line 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 impossible *per se*. Good labour inspectors have always had the ability and the need to “overcome the deficiencies and anachronism of the written law” (Pires, 2011). Without doubt, this kind of broad understanding of labour inspection is essential at transnational level.

When describing the role of labour inspection, Casale notes that labour inspection systems have the potential to play an even greater role in the age of globalisation than they had hitherto, also in assisting and strengthening the international supervisory system (Arrigo, Casale, Fasani, 2011). Arrigo, Casale and Fasani also underline the fact 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” (Arrigo, Casale, Fasani, 2011). It is clear that such public domination and authority would currently be virtually impossible at the transnational level. Nonetheless, it is imperative - and we suppose that it is also possible - to involve at least certain public actors in transnational labour monitoring. In relation to the acknowledged role of public-private partnership initiatives in monitoring working conditions, a further proposal is the setting up a competency network and the development of international guidelines on supply chain management and monitoring (Arrigo, Casale, Fasani, 2011). Furthermore, it is evident that “if employers’ power is transnational, workers’ rights should also be recognised at a transnational level” (Moreau, 2008). 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 introduce our proposal. For this purpose we draw inspiration from the above mentioned developments, academic ideas, and initiatives from public, international organisations. We also address some obstacles or shortcomings and where possible anticipate how they might be dealt with in the near future. Our aim is not to design a fully worked out publicly rooted TLI-system. Rather, we aim to draw a preliminary outline of such a system that we think might be feasible in practice, despite the lack of an adequate legal framework.

(a). Independence via a public root

The TLI-system we envisage is based on the voluntary participation 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 could also make monitoring compliance obligatory. As indicated in the introduction, there are several reasons why a transnational company would volunteer to have its initiatives monitored for compliant behaviour, among which pressure from workers' organisations⁶⁶ and consumer organisations⁶⁷ and demands for transparency by civil society as a whole and by investors. The more independent this monitoring is, the more credible the monitoring itself is and by implication also the company in respecting its own labour standards. As a result, the independence of the monitoring system is of the utmost importance for any proposal on (transnational) monitoring.

The best way to secure the independence of any monitoring system is to provide it with a public root. As indicated in section 2, this will not overcome the 'evergreen' problems inherent to monitoring in the field of labour, though it makes the monitoring significantly less dependent on TNCs. At transnational level this implies that the monitoring system should be provided (or at least controlled, supervised and/or coordinated) by a public, international organisation.⁶⁸ 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, hence there is still a governance gap. This does not mean that an international organisation cannot promote a monitoring system for which transnational companies can voluntarily apply, for instance, by means of institutional arrangements, protocols, procedural back-ups, orientation, or accreditation. In our opinion there is one organisation *par excellence* that could play this role: the ILO.

(b). TLI-system: the inspectors' list

More concretely we propose that the ILO should facilitate the TLI-system, in particular, by providing a list of transnational labour inspectors who have been trained and accredited by the ILO. These inspectors can be either independent or affiliated to an NGO or organisation that is active in monitoring labour standards, like the Fair Labour Association,

⁶⁶ The Telefonica and Endesa IFAs are examples of this: see Niforou, (2012).

⁶⁷ A good example is the monitoring of working conditions in the Foxconn factories by the Fair Labour Association (FLA), after this became an issue with the products of Apple at the cost of the lives of a number of workers. See also: <http://www.apple.com/supplierresponsibility/accountability.html>.

⁶⁸ When it comes to creating international law, this can still only be done by states or by international organisations to the extent that they have the power to do so. See, among many others: Ku, Diehel (2009).

Worldwide Responsible Apparel Production, SA8000, or the Ethical Trading Initiative. The training of these inspectors would also be facilitated by the ILO. There are several reasons why the ILO appears to be the best organisation to facilitate this training.⁶⁹ First, 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 means of its Labour Administration and Inspection Programme (LAB/ADMIN).⁷⁰ Second, the inspectors need to be trained to monitor transnational norms on labour issues, and not national norms. Third, training by the ILO would enhance the independence of the inspectors 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 monitoring. Only inspectors who have been trained by the ILO could be accredited by the ILO as transnational labour inspectors. The inspectors that are listed by the ILO can be put forward by the ILO as the TLI that is in charge of the monitoring of the CSR initiatives of the TNC that applies voluntarily for the TLI-system.

A particularly sensitive issue is the selection of the persons to be trained and accredited. Who might be suitable are for instance national labour inspectors, those involved with the monitoring via an NGO, or those 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 appointment of these representatives might give rise to a compatibility issue when a TNC applies for the TLI-system. However, this could be dealt with by compatibility requirements in the protocol.

(c). TLI-system: the protocol

To ensure the independence and quality of the monitoring, a protocol should be drawn up by the ILO that stipulates the basic rules and requirements for monitoring. Although companies would apply for the system on a voluntary basis, after the application has been submitted, the rules of the monitoring as stipulated in the protocol would be binding in all respects.⁷¹ This means that, in principle, there would be no option to adjust the protocol to the specific circumstances of the TNC or to opt-out of 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 inspectors.

As we envisage the TLI-system, the TLI takes a central position, hence, the TLI takes a lead in the whole process. This puts strong pressure on the independence and quality of the TLI. It also requires a high degree of trust on the part of the TNC in the TLI. As a result, the protocol should lay down at least the following rules and requirements on the selection of the TLI:

- a requirement for the TLI to be a person trained and accredited by the ILO;
- clearly stated incompatibility-criteria for the TLI and the company;
- rules on the selection of the actual TLI: preferably the ILO should put forward two or three officially listed TLIs, 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 powers of the TLI.

⁶⁹ Support for this argument can also be found in the recently adopted CSR initiatives concerning the fire and building safety in Bangladesh, in particular the Accord on Fire and Building Safety in Bangladesh (<http://www.industrial-union.org/action-on-bangladesh>).

⁷⁰ See: <http://www.ilo.org/labadmin/lang-en/index.htm>, last visited 25 February 2013.

⁷¹ That is, binding by way of a 'contract' "*pacta sunt servanda*" and not because of public authority of the ILO.

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

- the TLI should be the chair of the monitoring committee;
 - the TLI should have a right to veto the work of the monitoring committee;
 - the TLI should have the final say in the selection of the members of the monitoring committee members, in particular, taking into account the necessary level and of knowledge for the monitoring of the specific MNE;
 - the TLI should supervise and coordinate the monitoring by the committee;
 - the TLI should verify and approve the final monitoring report.
3. Rules on the composition and the size of the monitoring committee.

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

- obligatory and as a minimum:
 - the TLI, who is also the chair of the committee (see 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 the home-country of the TNC or any other country the TNC operates in. The involvement of national labour inspectors strengthens the public element in the monitoring. It also offers the opportunity to involve local expertise and bring together transnational and national inspection, in particular through a process of mutual learning;
 - NGOs. The inclusion of an NGO would add expertise and elements of good governance that they already represent. Although listed here as optional, this should be obligatory when the TNC that signs up for the TLI-system has outsourced the monitoring to an NGO. In addition, 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. The optimal size of the monitoring committee 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, reflecting on the scope of the CSR initiatives that are to be monitored. In addition, the size of the monitoring committee depends on the geographical reach of the company. The intention is after all to establish a committee that is representative for all countries, sectors, trade unions and persons 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. Guidance in this connection can be provided by the rules on representation that are generally known and accepted in collective bargaining. In order to ensure compliance with those rules, the TLI should check this briefly, for instance to ensure that the workers' representative is from an organisation that is active in the sector of the TNC representing a substantial number of the workers. More detailed rules need to be worked out.
4. Rules on the procedures of the monitoring and matters to be monitored.
- Rules on the procedures of the monitoring. This is a point that is only touched on

here, but needs to be further worked out. It is self-evident that such rules are needed in order to enhance the good governance and the transparency of the monitoring. These are therefore mainly formal and procedural rules. The exact nature of these rules should be further worked out. However, it is clear that one of these rules concerns the first task of the monitoring committee: drawing up a work-plan or plan of action.

- Rules on matters to be monitored. Ideally the monitoring should not be 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) should be monitored in relation to each other. However, we realise that this might be an obstacle and that a TNC might be reluctant to have all its labour policies subject to monitoring. Also, TNCs cannot be forced to submit to monitoring beyond what they intend to be bound by; signing up for this TLI-system is voluntary. Furthermore, it is still a minority of TNCs that are willing to outsource the monitoring of their CSR initiatives. As a result, the idea of external monitoring is relatively new and needs to be promoted. In order to attract as many TNCs as possible, the matters to be monitored should initially be decided by the TNC. However, the TLI has the right to make recommendations in this respect, as far as policies are known to the TLI. The TLI could, for instance, be informed about other policies by workers and or their representatives. In the course of time, when this form of monitoring is well-established and accepted, it could become compulsory in the sense that signing up for the TLI-system would mean an assessment of all initiatives and documents dealing with labour issues.

Another point that needs to be addressed in this connection, since it may turn out to be an obstacle, is the content of the CSR initiatives to be monitored. It is well known from several case-studies that the normative quality of the substance of CSR initiatives, *i.e.* of the rights and obligations, is vague and unconditional. This complicates monitoring as it leaves a wide margin of interpretation. In general, though, this is usually the case for labour standards and as such one of the ‘evergreen’ problems of monitoring of labour standards, that never stood in the way of national labour inspection. However, we also realise that this may be a more serious obstacle at transnational than at national level, where more laws might apply, further interpreting the rights and obligations. Although this needs to be worked out in greater detail than we can do here, we imagine that the following suggestion could be one way to partly overcome this problem. In our opinion, the monitoring committee could take a broad/reflective approach to these initiatives by monitoring the principles in these documents and how they are reflected in practice at the workplaces of the TNC (‘principles versus reality’ test). Such an approach could be one of the issues the TLI is trained for by the ILO. Input about the practices and culture 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 workers’ representatives. In this perspective, the NGO could convey information to the wider public 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 TNC workplaces. This includes those of the subsidiaries, suppliers and subcontractors when they are covered by the CSR initiatives 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 held up the development of private monitoring by external bodies. In the

literature suggestions have been made to deal with these obstacles, for instance, by making a critical selection of subcontractors who have a relationship with the TNC (Fichter, Sydow, 2002), or by prioritising monitoring issues and hence the workplaces to be monitored in the 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 sanction non-compliance.⁷² Determining what would be the best approach would initially be up to the monitoring committee. As a result, 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 should be specified in a written report signed by all the members of the monitoring committee. The report should provide 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 should be published, ideally in a unified, searchable, public database, for instance on the ILO website. The TNC is not obliged to publish the full report: however, when it uses 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.⁷³

(d). Some additional aspects

In this part we address some additional aspects that could either be part of the protocol or of 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 would be implemented and complied with. Also the monitoring is no guarantee that no unlawful actions or – for instance - accidents will occur. The TNC remains responsible and liable for what happens in its workplaces and those affiliated through its global value chain, 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 achieved needs to be verified. The protocol is one option that is open for third-parties. A contract between the ILO/TLI and the TNC applying for the TLI-system is another option.

2. Model contracts.

- between the ILO and the TNC for the service and the expertise, as well as to ensure independence and credibility, but also to organise and ensure commitment to the protocol (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 relating to the execution of the

⁷² See on this also section 2 above.

⁷³ A substantial number of TNCs already 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, 209-210).

monitoring and the protocol and to draft rules to protect the interests of the TNC (data-protection).

3. Costs of the TLI-system

The TLI-system would give rise to costs. There are costs involved with the training and accreditation of the TLIs and with the monitoring itself: translation costs, travel expenses for the meetings and so on. Since the biggest beneficiary of the TLI-system is the TNC, because it enhances its credibility, serves its reputation with consumers and investors, and might reduce the costs arising from work-related accidents, we consider it to be fair that the TNC should bear the cost of this system. In fact this is not much different from the current practice of TNCs hiring external auditing bodies or NGOs. Secondly, support for the feasibility of this can be found with the recently adopted CSR initiatives on the fire and building safety in the RMG-Industry in Bangladesh, since part of those initiatives is contribution schemes for the signatory TNCs to finance the inspections. The fee the TNC needs to pay the ILO for the service therefore includes costs for overheads relating to the administration and the training and education of the TLI.

In addition to the costs involved with the monitoring by the committee, the TLI, who will probably be occupied full-time, also gives rise to costs. Since the TLI is typically a freelance expert or someone affiliated with an NGO / university / consultancy, at least not an employee of the ILO, we propose that the TNC should pay the TLI according to a schedule of fees 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 inspection work at the TNC.

4. Regularity of the monitoring.

A basic feature of monitoring is that it should not be done as and when it suits the TNC, but rather should take place on a periodic basis. The time-frame for such monitoring depends on, among other things, the size of the company, which is also decisive for the amount of time needed for the monitoring, and for a) the problems of non-compliance and b) the credibility of the TNC in its submission to external and independent monitoring. In order to ensure repeat monitoring, we find it recommendable to finalise 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 recommendations should also be mentioned in the executive summary in order to make this transparent and enable third parties, such as workers' organisations and NGOs, to hold the TNC accountable for this.

7. *Conclusions*

The aim of this contribution is to delineate and propose a kind of “transnational labour inspectorate system” (TLI-system), that embodies the next (but still cautious) step towards a more independent, external monitoring of transnational private labour norms, involving the relevant stakeholders or most of them. 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 promoted by the ILO, OECD and UN, to further the implementation of and compliance with labour rights in the policies of TNCs, confirmed the existence of the well-known regulatory and enforcement gap. Furthermore, it also showed that these organisations increasingly try to adopt a multi-stakeholder approach to the implementation

of labour rights, involving – among others – governments of the member states, employers’ and workers’ organisations and the management of TNCs. The same is found with the private, self-regulatory initiatives, albeit in most unilateral CSR codes of conduct, this is limited, and at best includes a form of external auditing by an NGO or a private social auditor. Although most IFAs involve workers’ organisations, their interest lies predominantly with some kind of social dialogue to implement labour standards, rather than scrutinising every infringement of rights. Nonetheless, examples may be cited showing that these implementation mechanisms actually have a wider effect, since they foster participation and deliberation as part of an ongoing dialogue. Similar mechanisms can be found in the initiatives of some NGO and/or multi-stakeholder schemes. In the initiatives of NGOs we also found scarce but promising examples of unannounced visits by external assessors, giving the NGO uncensored information about the true situation of the labour standards in the company under examination. Many proposals in the literature stress the need for multi-stakeholder approaches and more dynamic mechanisms furthering the implementation of labour rights in practice. Many of them not only promote multi-stakeholder approaches, but also advocate a system that provides a strong role for national governments or international organisations, in particular the ILO. A similar idea has been put forward by Arrigo, Casale and Fasani, 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 appointed to the job that is needed, but also to ensure independence of the monitoring and the positive changes 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 anachronisms of the law.

The system we have outlined in section 6 addresses many of these aspects. In short, by having the ILO work 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 basis can be provided. Moreover, this public basis is the very heart of our proposal, since the TLI would have a leading role in monitoring. Furthermore, our proposal accommodates the participation of representatives of the management of the TNC and of the workers covered by CSR initiatives, and (highly 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 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 frequency 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 proposal for a TLI-system. It has many elements that need to be clarified and worked out in collaboration with experts and the representatives of all the 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, and so on. For many of these aspects we have indicated the matters that we consider need to be addressed as a minimum: however, the issues raised are by no means exhaustive. In some respects we have limited knowledge, particularly with regard to the possible costs involved with a system like this, although we think that compared to comparable systems, this is a relatively cost-effective option. Also

we are not 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 that we mentioned in section 2, including the limitation of resources, scope, frequency and coverage; the superficial and occasional nature of some inspections; the risk of corruption; and the mismatch between the norms and enforcement. At the transnational level these problems might even be more difficult to deal with than at the national level.

Although we are convinced that we have proposed a feasible TLI-system, it has some weaknesses that need further attention, if they can be overcome. One weakness that we consider inherent to the transnational level is the impossibility to force TNCs to apply for this system, leaving it to the discretion of TNCs to opt for it. The fact that the TLI-system would be 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 is reported to be sympathetic to 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 ILO-standards.

Another rather obvious weakness is the potential legitimacy deficit of the TLI, since the public basis by means of accreditation by the ILO and the provision of a protocol and contracts is not substantial. We are aware of the danger that the weak, symbolic – or more critically, cosmetic – nature of the public embeddedness of the system might also result in a possible basis for misuse. However, this is a limitation inherent in any kind of regulatory experiment in relation to TNCs, because of the regulatory gap. What is important is the fact that the TLI should be an independent, well-trained, publicly appointed expert not tied to the TNC. At the same time the contracts between the ILO and the TNC should 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 (at an 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 by contracts. The extent to which this could be the case needs to be further explored in the emerging sphere of ‘global hybrid labour law’ (Mückenberger, 2011).

Another weakness is the lack of sanctions, such as penalties, fines or in extreme cases the power to order the factory to be closed down, that are usually provided in classical inspection. On the other hand, our review of the public and private initiatives shows tendencies towards greater focus on monitoring in order to promote effective implementation. In this sense, the monitoring carried out by the TLI-system could follow this tendency by using mechanisms that promote participation, deliberation and alternative sanctions. In 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 inspection ‘multiplier effect’ (influencing the working conditions in more companies by action within a few) (*cf.* James et alii, 2007).

This might also be the point at which the TLI-system could be complementary to 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 is the option for 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 argue that this could be an element to be further developed when the 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, that enhances the credibility of the monitoring of private initiatives that TNCs undertake in the context of the CSR, and that can be complementary to national labour inspection systems. It is challenging in several ways, not least because of the complexity of the monitoring itself, but also because of the hybrid structures it engenders. One thing is clear: due to the contemporary complexity and disintegration of modern transnational corporate structures and the large extent of supply-chains, the ability of firms to move globally and optimize production, monitoring of compliance is challenged to the maximum. There is no system of national or transnational, public or private, monitoring that can be all-encompassing, fully systematic and perfect. Such illusions - if any - must be left behind (Pearson, Seyfang, 2002). That is why we argue that any new attempt which might strengthen - even to a small extent - the monitoring of global labour issues is worth examining and striving for.

8. References

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