

**THE ROLE OF INTERNATIONAL LAW IN ESTABLISHING  
CORPORATE ACCOUNTABILITY THROUGH CODES OF CONDUCT**

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*To Ivana, for being with me, there and back*

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*Siniša Milatović*

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## **ABSTRACT**

The thesis answers the following research question: what is the extent of the influence of international law on the construction and application of corporate codes of conduct, what factors determine this influence and through which processes does it occur?

The thesis uses a mix of methods: a content analysis study, used to measure the extent to which codes of conduct incorporate international labour standards and the degree to which they have changed over time in this respect; legal research on whether corporations can be liable for violating their codes and how this risk factors in the drafting of codes; and case studies of fifteen retailer corporations, which examine how their codes were created and how they are being applied.

The study's findings show there is an influence of international law on the construction and, to a far smaller degree, on the application of codes. The creation and application of codes is a politicised and contested process and codes are based on international law principally due to the pressure exerted by trade unions and NGOs, but also due to reputational risk, commercial pressure and mimicry by corporations. This influence has been selective, with corporations applying provisions in their codes that protect the rights carrying the biggest reputational risks.

These findings show the flaws in the current international framework for corporate accountability, which is based on self-regulation through codes and audits. They also raise issue of whether changes, such as a binding international treaty or the creation of more collaborative and inclusive programmes to oversee the application of codes, may be required in order to ensure wider respect for labour rights of workers.

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## **ABBREVIATIONS**

ASA - Advertising Standards Authority

ATCA - Alien Tort Claims Act

BIAC - Business and Industry Advisory Committee to the OECD

BPRs - Business Protection from Misleading Marketing Regulations 2008

CAP - Committee of Advertising Practice

CCPR - Covenant on Civil and Political Rights

CEACR - Committee of Experts on the Application of Conventions and Recommendations

CESCR - Covenant on Economic, Social and Cultural Rights

CFA - Committee on Freedom of Association

CLS – Core Labour Standards

CPRs - Consumer Protection from Unfair Trading Regulations 2008

CRC - Convention on the Rights of the Child

CSR - Corporate Social Responsibility

ECtHR – European Court of Human Rights

ETI - Ethical Trading Initiative

FIDIC - International Federation of Consulting Engineers

FIFA - Federation International de Football Association

GSCP - Global Social Compliance Programme

GUF - Global Union Federation

IBR – International Bill of Rights

ICANN - Internet Corporation for Assigned Names and Numbers

ICC - International Chamber of Commerce

ICEM - International Federation of Chemical, Energy, Mine and General Workers'

Unions

ICJ – International Court of Justice

IFA – International Framework Agreement

IFBWW - International Federation of Building and Wood Workers

ILC – International Labour Code

ILO – International Labour Organization

IMF - International Metalworkers Federation

IOE - International Organisation of Employers

ITS - International Trade Secretariat

MNC – Multinational Corporation

MSI-A – Multi-Stakeholder Initiative A

NAALC - North American Agreement on Labor Cooperation

NAFTA - North American Free Trade Agreement

NGO – Non-governmental Organization

NSMD - Non-state Market Driven mechanism

OECD - Organisation for Economic Development

OFT - Office of Fair Trading

SEDEX - Supplier Ethical Data Exchange

SMETA - SEDEX Members Ethical Trade Audit

SMSG - Special Representative of the Secretary General on Business and Human

Rights

UDHR - Universal Declaration of Human Rights

UNCESCR - United Nations Committee on Economic, Social and Cultural Rights

UNCHR - United Nations Commission on Human Rights

UNHRC – United Nations Human Rights Council

UNOHCHR – United Nations Office of the High Commissioner on Human Rights

WFBW - World Federation of Building and Woodworkers Unions

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**234 (art 5, 17)**

# CHAPTER 1

## INTRODUCTION

This thesis investigates the influence of international labour law and international human rights law on the content and application of corporate codes of conduct. The purpose of this chapter is to introduce key concepts as well as the aims, questions and methodology of the thesis.

The two key concepts in this thesis are ‘international law’ and ‘codes of conduct’. ‘International law’ is defined as international labour standards drawn from relevant international treaties and other instruments pertaining to workers’ rights. This is primarily the body of law of the International Labour Organization (ILO) – the conventions, recommendations and pronouncements of its committees – along with relevant labour rights provisions in international human rights law.

‘Codes of conduct’ are defined as voluntary policies adopted by corporations (either unilaterally, jointly with other corporations or with other stakeholders), which determine the nature of their relations with the workers who produce their goods. These codes pertain to the corporations’ own workers and, increasingly frequently, to the workers of other corporations in their supply chains.

Having defined the key concepts used in the thesis, my next task is to briefly introduce its subject matter, which is the regulation of corporate responsibility for workers’ labour rights through international law and codes of conduct, and to present the research question the thesis is investigating.

## **I. REGULATION OF CORPORATE RESPONSIBILITY FOR LABOUR RIGHTS**

The liberalisation of the global economy over the past four decades has not been accompanied by an improvement in working conditions in developing countries. According to the ILO, only a minority of working people today hold jobs that are well paid and where their fundamental rights are respected.<sup>1</sup> The ILO's estimates from 2012 are that nearly 21 million people are victims of forced labour globally,<sup>2</sup> a considerable increase from ILO's first estimate in 2005, when 12.3 million people were estimated to be victims of forced labour.<sup>3</sup> In addition, approximately 168 million children in the world are subject to child labour.<sup>4</sup> Other recent studies<sup>5</sup> indicate that 21% of the world's workforce earned less than 1.25 dollars per day, defined as the poverty line by the World Bank.<sup>6</sup>

As some of these vulnerable workers are employed in export-oriented industries in developing countries,<sup>7</sup> this state of affairs has brought to the fore the issue of how to regulate multinational corporations' treatment of workers in their supply chains. The local law in each jurisdiction, which regulates the activities of multinational corporations and their suppliers in developing states, can be inadequate

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<sup>1</sup> International Labour Office, *Global Employment Trends: January 2009* (ILO 2009) 14.

<sup>2</sup> International Labour Office, *ILO Global Estimate of Forced Labour: Results and Methodology* (ILO 2012) 13.

<sup>3</sup> P Belser, M de Cock and F Mehran, *ILO Minimum Estimate of Forced Labour in the World* (ILO 2005) 1.

<sup>4</sup> International Labour Office, *Marking Progress on Child Labour: Global Estimates and Trends 2000-2012* (ILO 2013) 3.

<sup>5</sup> International Labour Office, *ILO Global Employment Trends* (ILO 2010) 22.

<sup>6</sup> M Ravallion, C Shaohua and P Sangraula, 'Dollar a Day Revisited' (2009) 23(2) World Bank Economic Review 163.

<sup>7</sup> The World Bank classifies all low-income and middle-income countries (with Gross National Income per capita up to \$12,746) as developing <[data.worldbank.org/news/2015-country-classifications](http://data.worldbank.org/news/2015-country-classifications)> accessed 27 January 2015.

to effectively protect labour rights. Examples of such inadequate protection are the restrictions on trade unions in countries such as China and Vietnam.<sup>8</sup> Even where laws protect labour rights effectively, national institutions have often lacked the capacity to enforce them due, for instance, to a lack of enforcement resources.<sup>9</sup>

In addition to the lack of regulation and/or enforcement at the national level, abuses of labour rights in supply chains have not been adequately regulated at the international level. This is primarily because international law does not impose direct legal obligations on corporations with regard to human rights; rather, the dominant position in international law is that there is a ‘social norm’ that corporations have a responsibility to ‘respect’ human rights, rather than a legal one.<sup>10</sup> This is the conclusion of the Special Representative of the Secretary General on Business and Human Rights, who in his ‘Guiding Principles on Business and Human Rights’ proclaimed that only states have a legal obligation to protect human rights.

Nonetheless, the Guiding Principles have failed to quell calls for an international instrument that would legally bind corporations to respect human rights. As a result in 2014, the United Nations Human Rights Council adopted a resolution establishing a working group ‘on a legally binding instrument on transnational corporations and other business enterprises with respect to human rights’.<sup>11</sup> Although

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<sup>8</sup> R Braun and J Gearhart, ‘Who should code your conduct? Trade union and NGO differences in the Fight for Workers’ Rights’ (2004) 14(1-2) *Development in Practice* 183.

<sup>9</sup> M Robinson, ‘Foreword’ in London School of Economics and Political Science and The Corporate Responsibility (CORE) Coalition, *The Reality of Rights* (London School of Economics and Political Science 2009).

<sup>10</sup> United Nations Office of the High Commissioner for Human Rights (UNOHCHR), ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’ (2011) HR/PUB/11/04.

<sup>11</sup> United Nations Human Rights Council (UNHRC), ‘Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with respect to Human Rights’ (25 June 2014) A/HRC/26/L.22/Rev.1.

this initiative has not yet produced any concrete outputs, it testifies to the enduring attraction of an international instrument on business and human rights.

The lack of capacity at the national level and lack of regulation at the international level has been complemented by the rise of ‘various forms of private regulation’.<sup>12</sup> A key form of private regulation has been the corporate code of conduct, as defined above.<sup>13</sup> This thesis considers four main forms of codes:

- (i) ‘Stand alone’ codes – adopted by corporations on their own;<sup>14</sup>
- (ii) Joint corporate codes, most often adopted by corporations from the same industry;<sup>15</sup>
- (iii) Multi-stakeholder codes, adopted jointly by corporations with each other and sometimes with other stakeholders, such as non-governmental organisations (NGOs) and trade unions;<sup>16</sup> and
- (iv) International framework agreements (IFAs) – policies that resemble contracts signed between companies and global union federations (GUFs).<sup>17</sup>

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<sup>12</sup> K Kolben, ‘Transnational Labor Regulation and the Limits of Governance’ (2011) 12 *Theoretical Inquiries in Law* 403, 407.

<sup>13</sup> Codes of conduct may tackle many more issues, including environmental practices, anti-bribery provisions and so on. However, for the purposes of this thesis, I will discuss only those provisions that deal with labour rights.

<sup>14</sup> eg ‘Ericsson Code of Conduct’ <[www.ericsson.com/res/thecompany/docs/corporate-responsibility/2009/codeofconduct.pdf](http://www.ericsson.com/res/thecompany/docs/corporate-responsibility/2009/codeofconduct.pdf)> accessed 27 January 2015.

<sup>15</sup> eg ‘International Council of Toy Industries: Code of Business Practices’ <[www.toy-icti.org/info/codeofbusinesspractices.html](http://www.toy-icti.org/info/codeofbusinesspractices.html)> accessed on 27 January 2015.

<sup>16</sup> eg ‘SA8000 Standard’ <[www.sa-intl.org/index.cfm?fuseaction=Page.ViewPage&PageID=937](http://www.sa-intl.org/index.cfm?fuseaction=Page.ViewPage&PageID=937)> accessed on 27 January 2015>.

<sup>17</sup> eg ‘Global Framework Agreement Between Inditex S.A. and IndustriAll Global Union’ <[www.industriall-union.org/sites/default/files/uploads/documents/GFAs/signed\\_gfa\\_inditex\\_-\\_english.pdf](http://www.industriall-union.org/sites/default/files/uploads/documents/GFAs/signed_gfa_inditex_-_english.pdf)> accessed on 27 January 2015. Sometimes the various kinds of codes overlap with each other in a single company, which may have adopted a ‘stand alone’ code, signed on to a multi-stakeholder code, and signed an IFA with a GUF. Although some authors might quibble with this choice, I have included IFAs in my definition of the concept of codes of conduct to allow for comparison of how international law influences codes adopted by corporations with how it influences IFAs. This enables the thesis to examine whether there is any qualitative difference between IFAs and other codes of conduct in how they are influenced by international law.

The content of these codes varies; most frequently, however, they contain clauses proclaiming the corporation's commitment to protect internationally recognised labour rights, as well as (often vague) provisions on how to apply these commitments. For example, Chevron's Human Rights Policy, a 'stand alone' code, proclaims:

All employees of Chevron are required to comply with this policy, whose key elements are as follows.

**Employees** We treat all of our employees with respect and dignity and promote diversity in the workplace. Our company policies and procedures adhere to all applicable domestic laws and are consistent with ILO core labor principles concerning freedom of association and collective bargaining, nondiscrimination, forced labor, and underage workers in the workplace.

...

**Suppliers** We encourage our suppliers to treat their employees and to interact with communities in a manner that respects human rights and is consistent with the spirit and intent of this policy. We require that our key suppliers adhere to all applicable domestic laws and encourage them to be consistent with ILO core labor principles. We also engage with our key suppliers to reinforce awareness of potential human rights issues.<sup>18</sup>

Another form of private regulation that has emerged has been the IFA. An IFA 'is an instrument negotiated between a multinational enterprise and a GUF<sup>19</sup> in order to establish an ongoing relationship between the parties and ensure that the company respects the same standards in all the countries where it operates'.<sup>20</sup> Although the content of IFAs varies, most<sup>21</sup> include provisions protecting the four core labour standards recognised by the ILO's Declaration of Fundamental Principles and Rights

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<sup>18</sup> 'Chevron's Human Rights Policy' <[www.chevron.com/documents/pdf/AboutOurHumanRightsPolicy.pdf](http://www.chevron.com/documents/pdf/AboutOurHumanRightsPolicy.pdf)> accessed on 27 January 2015.

<sup>19</sup> A Global Union Federation is an international association of national trade unions organising in specific industry sectors or occupational groups.

<sup>20</sup> According to the ILO's Multinational Enterprises Programme <[www.ilo.org/global/about-the-ilo/newsroom/features/WCMS\\_080723/lang--en/index.htm](http://www.ilo.org/global/about-the-ilo/newsroom/features/WCMS_080723/lang--en/index.htm)> accessed on 27 January 2015.

<sup>21</sup> *ibid.*

at Work: freedom of association and the right to collective bargaining, non-discrimination, freedom from child labour and freedom from forced labour.<sup>22</sup>

A number of influential governance theories have sprung up to account for this rise of codes of conduct and other forms of transnational private labour regulation. Authors such as Ruggie, Gereffi and Mayer conceived the idea of a ‘governance deficit’,<sup>23</sup> which emerged due the aforementioned lack of national capacity to regulate corporate activity. In order to tackle this governance deficit, their argument goes, multinational corporations and even governments ended up developing forms of private regulation that included codes of conduct.<sup>24</sup>

Teubner and other scholars drawing on systems theory have similarly claimed that codes spring from the inability of national and international law to regulate transnational corporate activity.<sup>25</sup> Cata Backer has asserted that the ‘limitations and failures of perspective’ of the traditional public law regulatory framework explain the rise of codes of conduct and other forms of transnational private labour regulation, from which ‘states are substantially absent’. Instead, according to Cata Backer, the ‘centre of regulatory activity’ has now shifted to the corporation.<sup>26</sup>

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<sup>22</sup> Declaration on Fundamental Principles and Rights at Work (adopted 18 June 1998) (1998) 37 ILM 1223.

<sup>23</sup> G Gereffi and F Mayer, ‘Globalization and the Demand for Governance’ in G Gereffi, *The New Offshoring of Jobs and Global Development* (The International Institute for Labour Studies 2006); United Nations Human Rights Council, ‘Protect, Respect and Remedy: a Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie’ (7 April 2008) A/HRC/8/5, para 3.

<sup>24</sup> Kolben, ‘Transnational Labor Regulation’ (n 12).

<sup>25</sup> G Teubner, ‘The Corporate Codes of Multinationals: Company Constitutions Beyond Corporate Governance and Co-Determination’ in R Nickel (ed), *Conflict of Laws and Laws of Conflict in Europe and Beyond: Patterns of Supranational and Transnational Jurisdiction* (OUP 2009); G Teubner, ‘Self-Constitutionalizing TNCs? On the Linkage of “Private” and “Public” Corporate Codes of Conduct’ (2011) 18 *Indiana Journal of Global Legal Studies*, 617.

<sup>26</sup> L Cata Backer, ‘Multinational Corporations as Objects and Sources of Transnational Regulation’ (2008) 14 *ILSA Journal of International and Comparative Law* 499, 500.

According to these theories, the failure of states to regulate the behaviour of multinational corporations has provided those corporations with the authority and legitimacy to create norms and has left them carrying out regulatory functions formally undertaken by public bodies.<sup>27</sup> Corporations have made use of this opportunity by creating codes of conduct with various provisions regulating their relations with workers. Codes are perceived by the governance theorists referred to above as new forms of regulation that have little in common with both international and national laws and regulatory frameworks. According to Mundlak and Rosen-Zvi, advocates of private forms of regulation claim it provides an ‘alternative to traditional command-and-control regulation [and] remedies its shortcomings’.<sup>28</sup>

However, theorists such as Bartley and Cutler have put forward an alternative account that challenges the claim that codes emerged simply due to a ‘governance deficit’ or a governance failure by states at the national and international levels. Instead, Bartley and Cutler assert, the emergence of codes was shaped by a variety of private interests, social pressures from civil society and market-connected reasons such as the protection of reputation.<sup>29</sup>

Moreover, contrary to ‘much of the discourse surrounding them’, codes of conduct ‘do not simply add new rules for previously ungoverned phenomena’.<sup>30</sup> A cursory look at codes of conduct tells us that a number of them contain provisions

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<sup>27</sup> For an overview of governance theories on labour regulation, see Kolben, ‘Transnational Labor Regulation (n 12).

<sup>28</sup> G Mundlak and I Rosen-Zvi, ‘Signaling Virtue: A Comparison of Corporate Codes in the Fields of Labor and Environment’ (2011) 12 *Theoretical Inquiries in Law* 603, 604.

<sup>29</sup> AC Cutler, ‘Problematizing Corporate Social Responsibility under Conditions of Late Capitalism and Postmodernity’ in V Rittberger, M Nettesheim and C Huckel (eds), *Authority in the Global Political Economy* (Palgrave Macmillan 2008); T Bartley, ‘Institutional Emergence in an Era of Globalization: The Rise of Transnational Private Regulation of Labor and Environmental Conditions’ (2007) 113(2) *American Journal of Sociology* 297.

<sup>30</sup> T Bartley, ‘Transnational Governance as the Layering of Rules: Intersections of Private and Public Standards’ (2011) 12 *Theoretical Inquiries in Law* 517, 518.

drawn from international law (either directly or indirectly, in the form of a pledge to respect a norm of national law derived from international law).<sup>31</sup> It is submitted that the influence of international law on corporations could therefore be significant for:

- (i) its consequences on the behaviour of corporations: it may create a social expectation that corporations will adopt and apply international standards in their codes;
- (ii) Its legal consequences: it could have an impact on the legal liabilities that corporations expose themselves to when adopting codes; and
- (iii) Its impact on theoretical discourse: it may portray the relationship between traditional and new forms of regulation in a more balanced manner to the theories presented above.

Despite these criticisms, the aforementioned theories based on ‘governance deficits’ have often overlooked the influence that international law has on private forms of regulation and codes of conduct.<sup>32</sup> At the same time, scholars of international law have also customarily neglected its impact on the content and application of codes of conduct. A handful of studies by the ILO have noted the presence of ILO conventions and international human rights instruments in codes,<sup>33</sup> nevertheless, the focus in this field has been on the question of whether international

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<sup>31</sup> An example is the Primark Code of Conduct, which proclaims itself to be ‘founded on the conventions of the International Labour Organization’ and to uphold principles that reflect internationally recognised labour rights: ‘Employment is freely chosen; Freedom of association and the right to collective bargaining are respected; Working conditions are safe and hygienic; Child labour shall not be used; Living wages are paid; Working hours are not excessive; No discrimination is practised; Regular employment is provided; No harsh or inhumane treatment is allowed’.  
<[www.primark.com/en/our-ethics/workplace-rights/code-of-conduct](http://www.primark.com/en/our-ethics/workplace-rights/code-of-conduct)> accessed on 27 January 2015.

<sup>32</sup> Governance theories have also overlooked the influence of national law on codes of conduct: Bartley, ‘Transnational Governance as the Layering of Rules’ (n 30) and Kolben, ‘Transnational Labor Regulation’ (n 12). However, this issue goes beyond the scope of this thesis.

<sup>33</sup> eg J Murray, ‘Corporate Codes of Conduct and Labour Standards’  
<<http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1007&context=codes>> accessed on 27 January 2015.

law is directly binding on corporations and, if not, on the possibility of developing such an instrument.<sup>34</sup> Thus, scholars of international law writing on corporate accountability, such as Clapham and Kinley, have all but ignored the influence it indirectly exerts on workers' rights through corporate codes of conduct.<sup>35</sup>

## II. RESEARCH QUESTION

The literature on the regulation of the treatment of workers in supply chains - both by governance theorists and scholars of international law - has thus, in large measure, failed to account for the effect that international law already has on codes of conduct and international framework agreements.

This thesis aims to address this gap by answering the following research question: **what is the extent of the influence of international law on the construction and application of codes of conduct, what factors determine this influence and through which processes does this influence occur?**

The **construction** of codes is defined as the content and the process of drafting of codes. The **application** of codes signifies the measures and organisational practices (such as social audits of factories) undertaken by companies and other organisations (such as auditing consultancies) that are aimed at applying the codes of conduct. It thus covers the first layer of behavioural responses by corporations to their own codes of conduct. It does not, however, analyse the responses to these codes by

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<sup>34</sup> The most advanced attempt to develop a binding instrument was produced by the United Nations Commission on Human Rights (UNCHR) (UNCHR, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (26 August 2003) E/CN.4/Sub.2/2003/12/Rev.2). However, the idea of a binding instrument was rejected by John Ruggie, the UN Special Representative of the Secretary-General on Human Rights and Transnational Corporations and Other Business Enterprises (see UNOHCHR, 'Guiding Principles on Business and Human Rights' (n 10)).

<sup>35</sup> A Clapham, *Human Rights Obligations of Non-State Actors* (OUP 2006); D Kinley and J Tadaki, 'From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law' (2004) 44 *Virginia Journal of International Law* 931.

corporations and suppliers further down the supply chain, or measure the ultimate level of ‘compliance’ with codes of conduct for the workers affected ‘on the ground’, as this is contingent on a number of other variables beyond the scope of this thesis.

In order to comprehensively answer the research question, I will focus on its following aspects:

- What is the **extent** of the influence of international law, over time, on the construction of codes of conduct?
- How does this influence manifest itself **in practice on the application of codes of conduct**?
- **What determines** the extent of this influence? In other words, what **factors** and related **processes** shape the influence of international law on codes of conduct and on their application?

I will explain below how I approached each of these aspects of the research question in turn.

*What is the extent of the influence of international law on the construction of codes of conduct?*

In order to determine the extent of the influence of international law, I measured the degree to which companies have been incorporating international labour standards into their codes over time.<sup>36</sup> The presence of international labour standards in codes of conduct has been noted in a few studies. Islam and McPhail analysed the content of eighteen corporate codes from 2007 for core labour standards to note that all contain commitments to respect freedom from child labour, freedom from forced labour and

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<sup>36</sup> Since the focus of the study is on labour rights, and the most authoritative international labour rights are contained in ILO conventions and jurisprudence, we will use ILO standards as a benchmark throughout the study.

the elimination of discrimination, while all but one contained commitments on freedom of association and the right to collective bargaining.<sup>37</sup> This is a marked increase from the 1996 study of forty-three Canadian companies conducted by Forcese for the International Centre for Human Rights and Democratic Development, which found that only 14% of the companies responding reported having codes of conduct that refer to all core labour standards.<sup>38</sup>

This would appear to indicate an upward trend since 1996 in the incorporation of international labour standards in codes of conduct. However, this interpretation is very questionable as it is based on studies of different companies. To evaluate whether this upward trend is genuine – and thereby ascertain the extent of the influence of international law on codes - I carried out a content analysis of thirty-seven corporations' 'stand alone' codes of conduct to measure how aligned they became with international labour standards between 2003 and 2009.<sup>39</sup> In addition, I analysed sixteen companies' IFAs for their alignment with international labour rights. The content analysis was the first research method I used in the course of my thesis.

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<sup>37</sup> M Islam and K McPhail, 'Regulating for Corporate Human Rights Abuses: The Emergence of Corporate Reporting on the ILO's Human Rights Standards Within the Global Garment Manufacturing and Retail Industry' (2011) 22 *Critical Perspectives on Accounting* 790.

<sup>38</sup> C Forcese, 'Commerce with Conscience Series: Putting Conscience into Commerce: Making Human Rights Part of Business as Usual; and Commerce with Conscience? Human Rights and Corporate Codes of Conduct' (International Centre for Human Rights and Democratic Development 1997) <[www.actrav.itcilo.org/actrav-english/telearn/global/ilo/code/canadas.htm](http://www.actrav.itcilo.org/actrav-english/telearn/global/ilo/code/canadas.htm)> accessed on 27 January 2015.

<sup>39</sup> The analysis examined the versions of these corporations' codes valid in 2003 and 2009. It did not encompass any other versions that may have been promulgated by the corporations between 2003 and 2009.

*How does the influence of international law manifest itself in practice on the application of codes of conduct?*

The second aspect of the research question concerns itself with how the influence of international law on codes of conduct plays out in practice. To determine this, I used a second research method - case studies of fifteen retailer corporations<sup>40</sup> - to examine how international standards guide or otherwise influence the actions they take to apply their codes of conduct. These actions can include so-called ‘social audits’ – audits of suppliers’ factories for compliance with companies’ codes – as well as training of staff to apply their codes, and so on. The focus is on the actions of companies who have promulgated codes and on those organisations (such as auditing consultancies or multi-stakeholder organisations) that these companies contract or join in order to apply their codes.

In examining how corporations apply individual international labour standards found in their codes of conduct, I also considered whether they make any distinction between them. Some authors have claimed that corporations prioritise the protection of certain international labour rights, such as health and safety, over other - more politically charged - rights, such as freedom of association and the right to collective bargaining.<sup>41</sup> I investigated the veracity of this claim by carrying out the aforementioned case studies of corporations.

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<sup>40</sup> Retailing is ‘the resale (sale without transformation) of new and used goods mainly to the general public for personal or household consumption or utilization, by shops, department stores, stalls, mail-order houses, door-to-door sales persons, hawkers and peddlers, consumer cooperatives, auction houses etc.’, cited in United Nations Department of Economic and Social Affairs, *International Standard Industrial Classification of All Economic Activities (ISIC), Rev.4* (United Nations 2008).

<sup>41</sup> GW Seidman, *Beyond the Boycott: Labor Rights, Human Rights and Transnational Activism* (The Russell Sage Foundation 2007).

*What determines the extent of the influence of international law on the construction of codes of conduct and on their application? In other words, what **factors** and related **processes** shape the influence of international law on codes of conduct and on their application?*

In designing the thesis, it was important to discern not only the influence of international law on the construction of codes and on their application, but also what **factors** and **processes** shape this influence.

The academic literature has not addressed the question of what **factors** determine (increase or decrease) the influence of international law on codes and their application. Nonetheless, Bartley's work provides a valuable contribution to my attempt to answer this question. He studied the emergence of certain types of private regulation (certification regimes) and believes they are produced through a mix of market-connected reasons (such as protection of reputation, competition with rival companies and the provision of information to consumers) and political contestation between companies, states, NGOs and social movements.<sup>42</sup> While in Bartley's conception these factors account for the emergence of certification regimes, it is submitted that they also provide a useful starting point for examining which factors shape the emergence of codes and the influence of international law on their content and application.

To find out how these factors affect the influence of international law on codes and their application, I used the aforementioned second research method - case studies of fifteen retailer corporations. The case studies were used to determine how codes were drafted, how they came to incorporate international labour standards, how corporations applied these international standards through their codes in practice and

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<sup>42</sup> Bartley, 'Transnational Governance as the Layering of Rules' (n 30).

how market-connected reasons (such as protecting the corporation's reputation) and political disputes between the likes of corporations and NGOs affected the emergence of codes and the influence of international law on their content and application.

Moreover, I used the case studies to investigate another possible factor determining the influence of international law on codes and their application: corporate relationships with stakeholders. To this end, I analysed three groups of corporations with very different qualities of links to stakeholders: the first is comprised of corporations that have signed on to a multi-stakeholder initiative (with NGOs and unions); the second group consists of corporations that have not signed on to such initiatives but have adopted 'stand alone' codes; and the third group are corporations that have signed an IFA with a GUF.<sup>43</sup>

Finally, I examined the (lack of) legal liability of corporations for violating codes of conduct as another possible factor that could strongly affect whether corporations adopt codes and how likely they would be to contain well-defined international labour standards. Although this factor has been ignored in the literature, it appeared reasonable to assume that it would play a part in the decision-making of corporations when constructing their codes of conduct.

To determine how (the lack of) legal liability affected the influence of international law on codes and their application, I used a third research method: legal research on corporate liability for violations of codes of conduct under the law in England and the United States. I used the legal research to determine the likelihood that corporations could be liable in England and the United States for violating their codes and the impact this would have on the content of the codes; that is to say, whether they would contain international labour standards. Accordingly, I examined

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<sup>43</sup> See n 50 below for a more detailed explanation.

the statutes, case law and the practice of agencies such as the Advertising Standards Authority in England. I also covered similar ground in the United States because the sophisticated common law principles developed in American jurisprudence on corporate violations of human rights are possibly replicable in English courts, which could factor into English corporations' risk analyses for legal liabilities flowing from codes.

In order to establish the **processes** by which international standards are diffused across companies, the study consulted different theoretical frameworks. Unfortunately, there have been no theories put forward to explain the diffusion of international legal standards among corporations. I therefore had to develop a novel account of how this happens. In the course of doing so, I consulted the following two conceptual frameworks, which explain related processes; the first purports to explain the diffusion of international standards among states<sup>44</sup> and the second charts the diffusion of practices among corporations and organisations.<sup>45</sup> Namely, Goodman and Jinks describe states adopting international norms under coercion and through acculturation<sup>46</sup> and DiMaggio and Powell's influential research suggests that corporations might adopt norms through mimicry and other forms of isomorphism.<sup>47</sup>

Nonetheless, although it was useful to consult these conceptual frameworks, my research explored a hitherto unexplored process – how international law comes to influence the content and application codes of conduct. The thesis did not therefore

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<sup>44</sup> R Goodman and D Jinks, 'How to Influence States: Socialization and International Human Rights Law' (2004) 54(3) *Duke Law Journal* 621; R Goodman and D Jinks, 'Incomplete Internalization and Compliance with Human Rights Law' (2008) 19(4) *European Journal of International Law* 725.

<sup>45</sup> P DiMaggio and W Powell, 'The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields' (1983) 48 *American Sociological Review* 147.

<sup>46</sup> Goodman and Jinks, 'How to Influence States' (n 44).

<sup>47</sup> DiMaggio and Powell, 'The Iron Cage Revisited' (n 45).

test the two above-mentioned theoretical frameworks; rather, it sought to determine how international law standards are diffused across companies and their codes, and whether there were any parallels between that process and how international law influences states (as theorised by Goodman and Jinks) or how various norms influence companies (as theorised by DiMaggio and Powell).

Having defined the key concepts used in the study and presented the research question, I will briefly turn to the aim of the thesis, which is two-fold. First, it is to ascertain the influence that international labour standards have on corporations through their codes of conduct, and how and why this influence occurs.<sup>48</sup> This will help academics and practitioners to look beyond the ongoing debate on whether international law can be utilised to hold corporations accountable for their impact on labour rights<sup>49</sup> by demonstrating the effect international law already has on corporations. This will also inform the discussion about the role of codes of conduct in the light of the suggested obligations for corporations under the ‘Protect, Respect and Remedy’ framework of the Guiding Principles on Business and Human Rights.<sup>50</sup> Second, by analysing corporate codes and actions, the thesis aims to assist practitioners and academics in evaluating the usefulness of voluntary codes as a mechanism for holding corporations accountable for violating international labour standards.

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<sup>48</sup> It should be noted that this study is not attempting to assess whether corporations and their suppliers ultimately comply with codes of conduct. That is a subject for another study.

<sup>49</sup> UNHRC, ‘Elaboration of an International Legally Binding Instrument’ (n 11).

<sup>50</sup> UNOHCHR, ‘Guiding Principles’ (n 10).

### III. METHODOLOGY

The thesis uses a mix of methods. The first method is content analysis, used to examine thirty-seven corporations' codes of conduct from 2003 and 2009 in order to measure the extent to which they incorporate international labour standards and the degree to which they have changed over time in this respect. The content analysis study also analyses sixteen corporations' IFAs in order to ascertain the degree to which these agreements incorporate international labour standards. The corporations' IFAs were analysed only at a single point in time because they have not changed sufficiently over time to be subject to a longitudinal study.

The thirty-seven corporations whose codes of conduct I analysed were randomly selected from the Global Fortune 500 list of the world's largest corporations, compiled annually by *Forbes* magazine. The reason I based my sample on the list of the world's largest corporations is that it was possible to obtain codes of conduct from 2003 only from larger corporations. The sixteen corporations whose IFAs I analysed in the content analysis study were selected randomly from the 123 IFAs signed to date.<sup>51</sup>

In order to carry out content analysis, I devised a coding system – titled the Model for Analysing and Grading Codes of Conduct (contained in Appendix 1) - specially developed to measure the extent to which companies' codes reflect international labour standards. The methodology of carrying out the content analysis study is described in more detail in chapter 3, along with the results of this study.

Another method I used was legal research. Its focus is two-fold; firstly, legal research on international labour law is utilised in chapter 3 to establish the Model for Analysing and Grading Codes of Conduct. Secondly, research on the law on

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<sup>51</sup> 'International Framework Agreements Database'  
<[www.ewcdb.eu/list\\_intl\\_framework\\_agreements.php](http://www.ewcdb.eu/list_intl_framework_agreements.php)> accessed on 27 January 2015.

corporate liability in England and the United States is used in chapter 6 to determine how strong a factor the legal liability for violating codes, or the lack of such liability, is for corporations when constructing their respective codes of conduct.

The principal method of research in the thesis, however, is the realisation of case studies of fifteen retailer corporations that fall into three groups:

(a) Eight corporations that are members of a multi-stakeholder initiative (called Multi-Stakeholder Initiative A (MSI-A)) comprised of companies, trade unions and NGOs, which requires companies to sign and adhere to a joint code of conduct, called the MSI-A Fundamental Code;<sup>52</sup>

(b) Four corporations that have adopted codes of conduct but are not a part of MSI-A; and

(c) Three corporations that have signed IFAs with GUFs.

The fifteen corporations used for case studies do not overlap with the thirty-seven corporations whose codes of conduct - or with the sixteen corporations whose IFAs were examined by the content analysis study.

My selection of corporations as research subjects among all three groups was guided by methodological considerations and practical constraints. On the methodological side, corporations that signed up to the particular multi-stakeholder initiative that I analysed, MSI-A, are principally retailers (in a number of industries, including garments, food, furniture and pharmaceuticals); thus, I chose to focus on retailers in all three groups of corporations, enabling me to compare my findings in case studies of corporations belonging to all three groups.

The challenge with focusing on retailers is that it reduces the reliability of the results as they pertain to corporations generally, as retailers are more likely to be

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<sup>52</sup> As participants in the case studies have been promised anonymity, I will not disclose the name of the multi-stakeholder initiative or of the companies studied herein.

sensitive to reputation than other corporations because of the possibility of consumer boycotts. However, I chose this course of action for two reasons: first, it strengthens the reliability of the results as they pertain to retailer corporations, who are particularly significant because their supply chains frequently extend to developing countries. Second, it allowed for comparison between corporations from each of these three groups; this meant that the study could isolate the variables of the influence of unions, NGOs and other stakeholders on the construction and application of codes of conduct.

On the practical side, where possible, I chose to carry out case studies of corporations based in the United Kingdom, due to restrictions in the time available for empirical work. Thus, I decided to use MSI-A as the multi-stakeholder initiative I would study because it is based in the UK, whereas the other major multi-stakeholder initiatives are based elsewhere. However, for corporations belonging to group (c) (signatories of IFAs), I had to make an exception and study corporations based outside of the United Kingdom, as only one of the 123 IFAs has been signed with corporations that has its headquarters in the UK.<sup>53</sup>

I will now describe in detail how I selected the fifteen corporations used for case studies. First, I chose the eight corporate members of the MSI-A that I would study after randomly selecting half of the entire membership of the MSI-A and inquiring whether these corporations would participate in the study. The eight corporations selected were the ones to respond positively to my inquiry.

Second, I selected the four corporations with ‘stand alone’ codes for case studies from the ranks of the twenty-five largest retailers in the UK.<sup>54</sup> After I

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<sup>53</sup> ‘International Framework Agreements Database’ (n 51).

<sup>54</sup> ‘Retail Week Analysis: Top 50 UK Retailers 2012/13’ <[www.retail-week.com/city-and-finance/analysis-top-50-uk-retailers-2012/13/5057111.article](http://www.retail-week.com/city-and-finance/analysis-top-50-uk-retailers-2012/13/5057111.article)> accessed on 13 February 2015.

excluded the nine retailers on the list that belong to the MSI-A, I wrote to the remaining sixteen requesting their participation in the study. The four corporations selected for case studies were those that acceded to my request.

Third, I chose the three corporations that have signed IFAs according to a different method: snowball sampling. I initially contacted the GUFs that had signed IFAs with corporations. I received positive responses from two, both of which had senior officials interviewed for the research. I then asked them to nominate corporations that they have signed IFAs with and that would participate in the case studies while fitting the criteria for inclusion in my sample, namely that they should be large retailers. The senior officials from GUFs then provided me with contacts of five corporate co-signatories of IFAs, three of which proved to be willing to participate in case studies.

The case studies were carried out through a mixture of interviews and document analysis. The interviewees were mostly corporate officials, principally in ethical trading departments, but also in senior management, labour relations and human resources departments. The first interviewee was, in all but four corporations, the ethical trading manager or her equivalent from the corporation studied. These interviewees were frequently very forthcoming with data, both during the interviews and subsequently, by sharing confidential information. Thus, I believe that I managed to obtain data of a high degree of validity, which accurately reflects the practices of the corporations studied.<sup>55</sup>

I also interviewed other individuals that play a large part in how codes of conduct have been constructed and (particularly) applied. These include employees of

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<sup>55</sup> Unfortunately, due to the sensitive nature of the topic and the secretive business culture prevalent in the corporations studied, I was unable to interview buyers with frequent commercial interactions with suppliers. This prevented me from, for example, examining the effectiveness of training programmes on ethical trading for buyers that many corporations have instituted.

consultancies specialising in auditing suppliers, NGO representatives, members of MSI-A and its secretariat, private lawyers, the leadership of global federations of unions and ILO officials. Included among these interviewees are five management staff from MSI-A, each of who was in charge of a different facet of that multi-stakeholder initiative's operations. This provided a well-rounded picture of the workings of the MSI-A and of its programmes, which was a focus of my empirical work.

The document analysis referred to above focused on codes of conduct and other company policies that regulate their relations with suppliers. In addition, relevant confidentially obtained documents, including audits of suppliers, terms and conditions included in companies' contracts with suppliers, training materials and performance indicators for staff were analysed. These documents are particularly salient as they lay out in more detail how companies apply their codes in their everyday business.

#### **IV. CHAPTER PLAN**

Chapter 2 introduces the debate on the appropriate framework to regulate the transnational activities of multinational corporations. It presents an overview of the current international law and traces the development of codes of conduct and private regulatory initiatives. Further, it presents possible theoretical frameworks to explain the influence of international law on codes of conduct and generates research questions from this literature review.

Chapter 3 examines the extent of the influence of international law on the construction of codes of conduct. It uses the aforementioned content analysis of codes of conduct from 2003 and 2009 to examine whether ILO norms have become more

pronounced in codes. Chapter 4 uses the results of the case studies to examine how the influence of international law on codes manifests itself in practice on the application of codes of conduct. In particular, it considers the functioning of methods through which corporations apply international labour standards in codes, such as social auditing and various joint programmes.

Chapters 5 and 6 investigate what determines the extent of influence of international law on codes. Chapter 5 presents the results of the case studies to determine the key factors (such as reputational risk and trade union pressure) through which international law influences codes of conduct and their application, and what the related processes (such as coercion and isomorphism) are through which international labour standards are diffused across corporations and their codes. Chapter 6 contains an analysis of whether corporations can be held accountable before domestic courts in England and in the United States in order to ascertain how (the lack of) legal liability affects the manner in which corporations construct and apply their codes.

Finally, Chapter 7 presents the conclusions and considers how the relationship between international law and transnational private labour regulation can be properly conceptualised given the findings from the previous chapters, and what the future of codes of conduct is from both legal and regulatory perspectives.

## CHAPTER 2

### INTERNATIONAL LAW AND ITS EFFECT ON CORPORATE CODES OF CONDUCT – A LEGAL AND THEORETICAL FRAMEWORK

#### OVERVIEW OF CHAPTER TWO

This chapter has two tasks. Firstly, it provides a synopsis of the international law regulating labour rights and of the obligations it imposes on corporations. This will present me with a legal framework in which I can measure the extent of the influence of international law on the construction and application of codes of conduct over time. Secondly, in this chapter I will devise a theoretical framework that I will use to analyse the extent of the influence of international law on corporate codes of conduct and how this influence occurs, allowing me to answer my research question in the subsequent chapters.

In Part I, I will present an overview of international law as it pertains to corporate relations with workers. I will examine how international law protects labour rights such as freedom of association and the right to health and safety and will establish which labour rights are binding on all member states of the ILO following their designation as core labour standards. I will also examine the respective obligations of states and corporations in international law to protect internationally recognised labour rights.

In Part II, I will develop the theoretical framework to account for the emergence of codes of conduct and the *factors* that can explain *why* international law should have an influence on the construction and application of codes despite it not being binding on corporations. I will first present the dominant ‘big-picture’ perspective, put forward by theories of global governance and legal pluralism, which

states that codes emerge due to a ‘demand’ for private governance regimes created by a lack of governance of labour rights issues. I will then offer a critique of this approach, which views the dominant perspective as incomplete because it does not take into account how other factors, such as the values, interests and relationships of particular actors (corporations, NGOs, trade unions, states and international organisations), international law and national law shape the regime of transnational private labour regulation.

In Part III, I will present three complementary conceptual frameworks that I will consult in analysing the *processes* that describe *how* international standards are diffused through corporations’ codes of conduct: the first uses the concept of legitimacy to explain why private governance regimes include international standards; the second accounts for the diffusion of international standards among states by reference to processes including coercion and acculturation; and the third is the concept of isomorphism, used to explain how organisations and their policies come to resemble each other.

## **I. INTERNATIONAL LAW**

The starting point for my inquiry is international law; more precisely, I first have to ascertain what the relevant international law on labour and human rights is, and what obligations it imposes on corporations. This issue has been a matter of great debate among scholars of international law in recent years. The focus has been on the following questions: a) what labour rights do workers have under international law? b) What are the respective obligations of states and corporations for ensuring workers

enjoy these rights?<sup>1</sup> These two questions are answered in sections I.A and I.B respectively.

## **I.A LABOUR RIGHTS OF WORKERS UNDER INTERNATIONAL LAW**

The bedrock of international human rights law is the so-called ‘International Bill of Rights’ (IBR). It includes the Universal Declaration of Human Rights (UDHR),<sup>2</sup> the Covenant on Civil and Political Rights (CCPR)<sup>3</sup> and the Covenant on Economic, Social and Cultural Rights (CESCR).<sup>4</sup> The two Covenants are binding treaties that stipulate a wide range of rights that all those in the jurisdictions of the states parties are entitled to. The UDHR, on the other hand, is an UN General Assembly resolution that has, it is widely argued, attained the status of customary international law.<sup>5</sup>

The IBR enumerates many rights, including civil and political, as well as economic, social and cultural rights. Although there is no category of ‘workers’ rights’ as such, the following labour standards are enshrined: the CCPR strictly proscribes slavery and forced labour (art. 8) and enshrines the freedom of association

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<sup>1</sup> The importance of international law is increased by the failure of national legal orders and institutions to provide an adequate framework for holding corporations accountable. This is not to say that national law is inconsequential here; merely that there has been increasing recognition among various actors that effective regulation may require a comprehensive international legal framework and that international law has, as my preliminary research has shown, a considerable influence on codes of conduct.

<sup>2</sup> Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR).

<sup>3</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (CCPR).

<sup>4</sup> International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (CESCR).

<sup>5</sup> *Advisory Opinion on the Continued Presence of South Africa in Namibia (South-West Africa)* [1971] ICJ Reports 16, 76 (Separate Opinion of Vice-President Ammoun); R Bilder, ‘An Overview of International Human Rights Law’ in H Hannum (ed), *Guide to International Human Rights Practice* (Transnational Publishers 2004); M McDougal, H Laswell and L Chen, *Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity* (Yale University Press 1980).

(art. 22);<sup>6</sup> CESCR protects the right to work (art. 6), the right to occupational safety and health (articles 6 and 7), the right to equal remuneration for equal work (art. 7), the right to reasonable working hours and to rest (art. 7), the right to form and join trade unions which are to function freely (art. 8) and the freedom from child labour (art. 10);<sup>7</sup> both Covenants prohibit discrimination on grounds including race, colour, sex, language, religion, political and other opinion, national or social origin, property, birth or other status.<sup>8</sup>

While the IBR aims to protect a broad variety of rights of all persons, the ILO's remit is narrower: it was established to seek the promotion of social justice and internationally recognised labour rights.<sup>9</sup> Accordingly, it has developed a body of treaty law – sometimes referred to as the International Labour Code (ILC)<sup>10</sup> - that sets out the rights of workers and employers in great detail.

In the 1990s the ILO singled out four rights as 'core labour standards' (hereafter 'CLS'): freedom of association and the effective recognition of the right to collective bargaining, the elimination of forced or compulsory labour, the abolition of child labour and the elimination of discrimination in respect of employment and occupation. It was the adoption of the Declaration of Fundamental Principles and Rights at Work (hereafter 'the Declaration') in 1998 that affirmed the idea of CLS.<sup>11</sup>

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<sup>6</sup> CCPR (n 3).

<sup>7</sup> CESCR (n 4).

<sup>8</sup> CCPR (n 3) and CESCR (n 4).

<sup>9</sup> Declaration Concerning the Aims and Purposes of the International Labour Organization (adopted 10 May 1944) 15 UNTS 40 (Declaration of Philadelphia).

<sup>10</sup> N Valticos and GW von Potobsky, *International Labour Law* (Kluwer 1994).

<sup>11</sup> Declaration on Fundamental Principles and Rights at Work (adopted 18 June 1998) (1998) 37 ILM 1223 (The Declaration). Although the Declaration does not use the term 'core labour standards', ILO publications sometimes use it when referring to the four rights mentioned above (eg International Labour Office, *The International Labour Organization's Fundamental Conventions* (International

These rights had previously been enshrined in seven key ILO conventions that create binding obligations on the part of the states parties to secure their fulfilment, with the eighth - Convention No. 182 (Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour) - signed subsequently in 1999. Moreover, as mentioned above, all of these rights are protected under the IBR in the CCPR and CESC, both of which have been ratified by over 160 countries.<sup>12</sup>

Following the adoption of the Declaration, the eight conventions were branded ‘core conventions’, as they protect rights that are supposedly a precondition for the realisation of all other rights. The Declaration purports to commit all ILO member states, irrespective of whether they are party to the core conventions, to respect and promote the CLS.<sup>13</sup> The Follow-up procedures to the Declaration require ILO member states that have not ratified one or more of the core conventions to report to the ILO and to describe their efforts to realise these rights. In addition, the ILO is required to provide technical assistance to member states to ratify and implement fundamental conventions and to help those states that are unable to ratify the conventions to respect, promote and realise the rights contained in the Declaration.<sup>14</sup>

The ILC also consists of a number of other conventions and recommendations that codify other important rights: these include the right to health and safety,<sup>15</sup> the

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Labour Office 2002)). Also see P Alston, ‘“Core Labour Standards” and the Transformation of the International Labour Rights Regime’ (2004) 15(3) *European Journal of International Law* 457, 462-76.

<sup>12</sup> <<http://indicators.ohchr.org/>> accessed 20 March 2015.

<sup>13</sup> Declaration (n 11).

<sup>14</sup> *ibid.*

<sup>15</sup> eg Convention Concerning Occupational Safety and Health and the Working Environment (No 155) (adopted 22 June 1981, entered into force 11 August 1983) 1331 UNTS 279 (ILO No 155); Convention Concerning Occupational Health Services (No 161) (adopted 25 June 1985, entered into force 17 February 1988) 1498 UNTS 19 (ILO No 161).

right to a maximum number of working hours<sup>16</sup> and the right to weekly rest.<sup>17</sup> The conventions enshrining these rights have been signed and ratified by numerous ILO member states, which makes them an important part of the ILC.<sup>18</sup> Further, as was outlined above, all of these rights are enshrined in the IBR, which is further evidence of their status as labour rights in international law.<sup>19</sup>

However, with the adoption of the Declaration, the ILO chose to elevate freedom of association, elimination of forced labour, abolition of child labour and non-discrimination to a level of ‘fundamental principles’. Alston claims that the adoption of the Declaration effectively created a hierarchy of rights while consigning rights ‘which did not make it into the premier league’ – such as the right to a fair wage or to a healthy and safe working environment - to ‘second-class status’.<sup>20</sup> This claim has been vigorously opposed by the likes of both Langille and Maupain, who see the core rights as key procedural rights enabling the realisation of other rights and freedoms.<sup>21</sup>

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<sup>16</sup> eg Convention Limiting the Hours of Work in Industrial Undertakings to Eight in the Day and Forty-eight in the Week (No 1) (adopted 28 November 1919, entered into force 13 June 1921) 38 UNTS 3 (ILO No 1); Convention Concerning the Regulation of Hours of Work in Commerce and Offices (No 30) (adopted 28 June 1930, entered into force 29 August 1933) 39 UNTS 85 (ILO No 30).

<sup>17</sup> Convention Concerning Weekly Rest in Commerce and Offices (No 106) (adopted 26 June 1957, entered into force 4 March 1959) 325 UNTS 279 (ILO No 106).

<sup>18</sup> eg Convention concerning the Application of the Weekly Rest in Industrial Undertakings (No 14) (adopted 17 November 1921, entered into force 19 June 1923) 38 UNTS 188 (ILO No 14) has been ratified by 119 countries.

<[http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300\\_INSTRUMENT\\_ID:312159:NO](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312159:NO)> accessed on 20 March 2015. For more on ratifications of ILO conventions see <<http://www.ilo.org/dyn/normlex/en/f?p=1000:1:0::NO::>> accessed on 20 March 2015.

<sup>19</sup> CESCR (n 4).

<sup>20</sup> Alston, “‘Core Labour Standards’” (n 11).

<sup>21</sup> B Langille, ‘Core Labour Rights – the True Story (Reply to Alston)’ (2005) 16(3) *European Journal of International Law* 409; F Maupain, ‘Revitalization Not Retreat: The Real Potential of the 1998 ILO Declaration for the Universal Protection of Workers’ Rights’ (2005) 16(3) *European Journal of International Law* 439.

Nevertheless, whatever the merits of the approach taken by the ILO, the core ILO Conventions, together with the Declaration, form a body of norms that provide workers with rights and bind all ILO Member States to carry out duties with respect to the four CLS. In other words, they along with the IBR, form a comprehensive body of international law that binds the states parties and (in the case of UDHR and the Declaration) other states to protect the CLS and a host of other human rights of their citizens.

*Key instruments promulgated by international organisations*

The CLS have also become the basis of the substantive rights protected through other international instruments regarding corporate accountability. The most important of these are the Organisation for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises, the ILO Tripartite Declaration concerning Multinational Enterprises and Social Policy, and the United Nations Global Compact and its Ten Principles. These are self-avowed voluntary instruments (so-called ‘soft law’) adopted by intergovernmental organisations but addressed to multinational corporations – thus making them distinct from the above-mentioned ILO conventions and IBR, which are addressed to states only.

Despite their voluntary nature, these instruments take their cue from the ILO conventions and the IBR: all of them proclaim the ILO-designated CLS as their key principles that corporations should adhere to.<sup>22</sup> These principles are then turned into recommendations on human and labour rights that corporations should follow.

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<sup>22</sup> OECD, *OECD Guidelines for Multinational Enterprises: 2011 Edition* (OECD 2011); International Labour Office, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Policy* (ILO 2006); United Nations, ‘United Nations Global Compact: the Ten Principles’ <[www.unglobalcompact.org/aboutthegc/thetenprinciples](http://www.unglobalcompact.org/aboutthegc/thetenprinciples)> accessed 21 February 2015.

Questions have been asked about whether these ‘soft law’ instruments create any obligations on states and particularly, on multinational corporations. Clapham believes that the fact that these instruments cite principles derived from binding IBR and ILO conventions demonstrates that states *and* multinationals consider they should respect the human rights contained in the IBR and in ILO Conventions.<sup>23</sup> A contradictory position is assumed by theorists who take the traditional view that documents such as the OECD Guidelines or the ILO Tripartite Declaration can create no legal obligation on the part of corporations.<sup>24</sup> They are of the opinion that this would create a ‘gliding bindingness’,<sup>25</sup> which weakens the objectivity and certainty of international law, while simultaneously undermining the international rule of law derived from having clear sources of law – those established by the Statute of the International Court of Justice (ICJ).<sup>26</sup>

Whatever the merit of these arguments,<sup>27</sup> the applicability of any international standards to corporations hinges on the following question: can a corporation be the subject of international law?

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<sup>23</sup> A Clapham, *Human Rights Obligations of Non-State Actors* (OUP 2006) 214.

<sup>24</sup> P Weil, ‘Towards Relative Normativity in International Law?’ (1983) 77 *American Journal of International Law* 413.

<sup>25</sup> C Ingelse, ‘Soft Law’ (1993) 20 *Polish Yearbook of International Law* 75.

<sup>26</sup> Article 38(1) of the Statute of the ICJ stipulates that there are four sources of international law: a) treaties; b) customary international law; c) general principles of law; d) the writings of eminent jurists; Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 59 Stat. 1055 (ICJ Statute) art 38(1).

<sup>27</sup> Regardless of whether the OECD Guidelines, the ILO Tripartite Declaration on Multinational Enterprises and the UN Global Compact are considered binding, they are of interest to us for at least two reasons. First, the diffusion of CLS from ILO conventions to corporate codes of conduct may occur through them. For instance, a corporate code of conduct may cite the labour rights principles found in the UN Global Compact; these principles were, however, drawn from the core ILO conventions. Thus, the diffusion of CLS to a corporate code of conduct would have occurred ‘though’ the UN Global Compact. Second, some of these instruments may influence the corporations’ understanding of ‘international law’ as a concept socially constructed by them and other actors – they may consider these instruments to be binding even though they are voluntary in character.

## **I.B WHAT ARE THE RESPECTIVE OBLIGATIONS OF STATES AND CORPORATIONS FOR ENSURING LABOUR RIGHTS?**

### *Legal personality of corporations under international law*

Historically, the activities of corporations and other non-state actors were considered by scholars of international law to be beyond its remit.<sup>28</sup> As the position of the individual became more firmly entrenched in the international order with the development of international human rights law, the efforts of activists and scholars to bring corporations into the fold of international law were invigorated. Nevertheless, calls for an analogous extension of legal personality to corporations under international law – imposing obligations on them to respect internationally recognised human rights - have been given a more muted reception.

The classicists' position is that international law is unchanged and that corporations do not possess international legal personality.<sup>29</sup> This view is strongly supported by key stakeholders in the debate, including, most prominently, corporate representatives, and was succinctly expressed by the International Organisation of Employers (IOE) and the International Chamber of Commerce (ICC), who stated that under international human rights law, 'the State – and only the State – is the duty-bearer of human rights obligations'.<sup>30</sup>

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<sup>28</sup> J Westlake, *International Law* (CUP 1910) 1 ('International law . . . is the law of the society of states or nations. '); T Lawrence, *The Principles of International Law* (4<sup>th</sup> edn, Heath & co. 1910) 1 (defining international law as 'the rules which determine the conduct of the general body of civilized states in their mutual dealings').

<sup>29</sup> eg I Brownlie, *Principles of Public International Law* (6th ed., OUP 2003) 65 (states that 'in principle, corporations of municipal law do not have international legal personality'); A Cassese, *International Law in a Divided World* (Clarendon Press 1988) 103 ('multinational corporations possess no international rights and duties' under international law).

<sup>30</sup> 'Joint initial views of the International Organisation of Employers (IOE), the International Chamber of Commerce (ICC) and the Business and Industry Advisory Committee to the OECD (BIAC) to the Eighth Session of the Human Rights Council on the Third Report of the Special Representative of the UN Secretary-General on business and Human Rights (2008)'

Some activists and scholars have taken a more expansive view of international law, claiming that corporations could be considered, in certain circumstances, to be subjects of international law with corresponding obligations. The arguments in support of this view come from a number of different perspectives. Certain scholars argue that the transnational nature of the problem demands that it is handled on the international plane, and that, accordingly, international law ‘should and can’ provide for human rights obligations directly on corporations;<sup>31</sup> such direct international legal regulation, however, *has to be created* as existing international instruments do not effectively impose human rights duties on corporations.<sup>32</sup> Other notable authors carry forward this argument of ‘necessity’ claiming that an insistence on excluding non-state actors from the reach of international law would ‘marginalize a significant part of the international human rights regime from the most vital challenges confronting global governance’.<sup>33</sup>

The above position diverges slightly from those scholars who are of the opinion that there is no conceptual barrier in *current* international law to imposing obligations on corporations and that international law does not need root-and-branch reform if such obligations are to be imposed. De Schutter claims it is understood in international law that international legal personality flows from the attribution of

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<[www.google.rs/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCMQFjAA&url=http%3A%2F%2Fwww.iccwbo.org%2FData%2FDocuments%2FCorporate-Responsibility-and-Anti-corruption%2FJoint-preliminary-views-of-the-ICC%2C-IOE-and-BIAC%2F&ei=ABLnVLPcAsK9ygOtsoGYAg&usg=AFQjCNH3DZO2JXpuLRE7zPw1ZLg-qyeyA&bvm=bv.86475890,d.bGQ](http://www.google.rs/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CCMQFjAA&url=http%3A%2F%2Fwww.iccwbo.org%2FData%2FDocuments%2FCorporate-Responsibility-and-Anti-corruption%2FJoint-preliminary-views-of-the-ICC%2C-IOE-and-BIAC%2F&ei=ABLnVLPcAsK9ygOtsoGYAg&usg=AFQjCNH3DZO2JXpuLRE7zPw1ZLg-qyeyA&bvm=bv.86475890,d.bGQ)> accessed 20 February 2015.

<sup>31</sup> S Ratner, ‘Corporations and human rights: a theory of legal responsibility’ (2001) 111 Yale Law Journal 443.

<sup>32</sup> D Kinley and J Tadaki, ‘From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law’ (2004) 44 Virginia Journal of International Law 931 (emphasis added).

<sup>33</sup> P Alston, ‘The ‘Not-a-Cat’ Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?’ in Alston (ed), *Non-State Actors and Human Rights* (OUP 2005).

rights and duties, which corporations possess in international law.<sup>34</sup> Other prominent scholars in the field, supporting their claim with extensive examples of international treaties, maintain it is arguable that international law has, in fact developed, regimes for ensuring liability of corporations', albeit in a limited context.<sup>35</sup>

The academics' claims and counter-claims on whether corporations can be subject of international treaties offer a distinct possibility that this question cannot be settled by examining international law. Instead, it is argued that the vagueness of international law on this point is an outcome of a political struggle rather than of a lack of consensus among legal scholars.<sup>36</sup> Wallerstein even claims (though perhaps overstating the importance of the issue) that the establishment of an international normative and institutional framework to hold corporations accountable with regard to human rights 'becomes therefore one of the prime political arenas of conflict in the world-system'.<sup>37</sup>

### *The UN Guiding Principles on Business and Human Rights*

The breadth of scholarly opinion reviewed above - and the ongoing political struggle described by the 'counter-hegemonistic' position voiced by the likes of Wallerstein and Rodriguez-Garavito - prompted the (now defunct) UN Commission for Human Rights to seize the issue and seek clarifications from John Ruggie, who was appointed

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<sup>34</sup> O De Schutter, 'The Accountability of Multinationals for Human Rights Violations in European Law' in Alston (ed), *Non-State Actors and Human Rights* (OUP 2005).

<sup>35</sup> Clapham, *Human Rights Obligations of Non-State Actors* (n 23) 195.

<sup>36</sup> C Rodriguez-Garavito, 'Nike's law: the anti-sweatshop movement, transnational corporations, and the struggle over international labor rights in the Americas' in Santos and Rodriguez-Garavito (eds), *Law and Globalization from Below: Towards a Cosmopolitan Legality* (CUP 2005).

<sup>37</sup> I Wallerstein, 'Opening Remarks: Legal Constraints in the Capitalist World-Economy' in Likosy (ed), *Transnational Legal Processes: Globalizations and Power Disparities* (Butterworths Press 2002).

in 2005 to be the Special Representative of the Secretary General on Business and Human Rights (SRSG).

This post was the first one created at the international level for the express purpose of setting out a normative framework for corporate accountability and, as such, was crucial in the process of settling the issue of corporate duties and corresponding human and labour rights. It is imperative therefore to closely examine the conclusions reached by Ruggie. The first two tasks in Ruggie's terms of reference sum up well some of the uncertainties in the field:

- a) [i]dentify and clarify standards of corporate responsibility and accountability for transnational corporations and other business enterprises with regard to human rights;
- b) [e]laborate on the role of States in effectively regulating and adjudicating the role of transnational corporations and other business enterprises with regard to human rights, including through international cooperation.<sup>38</sup>

The SRSG's starting point were the Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (the 'Norms' from herein). A UN organ (the Sub-Commission for Human Rights) drafted this document prior to the SRSG's appointment. It stipulates in great detail which rights corporations are obligated to protect, respect, promote and fulfil. Its drafters declared it to be a restatement of international law that would, in time, harden to become an instrument that directly binds corporations.

Ruggie accepted the Norms' widely acknowledged maxim that 'States have the primary responsibility to promote...and protect human rights recognised in international as well as national law, including ensuring that transnational

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<sup>38</sup> United Nations Commission on Human Rights (UNCHR), 'Resolution 2005/69' (20 April 2005) E/CN.4/RES/2005/69.

corporations and other business enterprises respect human rights'.<sup>39</sup> This is an area of consensus among the principal schools of thought on the issue.

However, he rejected the remaining provisions found in the Norms, instead setting out an alternative approach based on three core principles: (i) the legal duty of the State to 'protect' against human rights abuses by business; (ii) the 'social norm' that corporations have a responsibility to 'respect' human rights, and (iii) the need for more effective access to remedies.<sup>40</sup>

Ruggie eventually labeled this approach as the 'protect, respect and remedy' framework and enshrined it in the Guiding Principles on Business and Human Rights, a document endorsed by the UN Human Rights Council in June 2011. Although the Guiding Principles are not a legally binding document, according to the United Nations, they 'elaborate on the implications of existing standards and practices for States and businesses, and include points variously covered in international and domestic law'.<sup>41</sup>

The emphasis here is on States, rather than corporations; States should explore judicial, legislative and policy means at their disposal (such as domestic courts exercising extraterritorial jurisdiction for corporations violating human rights and national laws requiring disclosure of rights-related performance by corporations) to fulfil their duty to protect.

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<sup>39</sup> UNCHR, 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (26 August 2003) E/CN.4/Sub.2/2003/12/Rev.2.

<sup>40</sup> United Nations Office of the High Commissioner for Human Rights (UNOHCHR), 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (2011) HR/PUB/11/04; also see United Nations Human Rights Council (UNHRC), 'Protect, Respect and Remedy: a Framework for Business and Human Rights: Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie' (7 April 2008) A/HRC/8/5.

<sup>41</sup> UNOHCHR, 'The Corporate Responsibility to Protect Human Rights: an Interpretive Guide' (2012) HR/PUB/12/02.

According to Guiding Principle 11, the corporations' duty to 'respect' human rights 'means they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.'<sup>42</sup> The responsibility to respect human rights,

refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work.<sup>43</sup>

Thus, core labour standards – freedom of association and the right to collective bargaining, freedom from child labour, freedom from forced labour and non-discrimination – have been integrated into the Guiding Principles as rights that corporations have to respect.

Corporations have to 'act with due diligence to avoid infringing on the rights of others.'<sup>44</sup> This is justified by the claim that corporations cannot simply mirror the duties of states, as they are not democratic public interest institutions.<sup>45</sup> Further, pursuant to Guiding Principle 11, where corporations contribute to adverse human rights impacts, they have to institute processes to enable the remediation of these impacts. According to some commentators, this does not necessarily entail the

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<sup>42</sup> UNOHCHR, 'Guiding Principles' (n 40) Principle 11.

<sup>43</sup> *ibid* Guiding Principle 12.

<sup>44</sup> UNHRC, 'Business and human rights: Towards operationalizing the "protect, respect and remedy" framework: Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises' (22 April 2009) A/HRC/11/13, para 2.

<sup>45</sup> UNHRC, 'Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises: Addendum: Corporations and human rights: a survey of the scope and patterns of alleged corporate-related human rights abuse' (23 May 2008) A/HRC/8/5/Add.2.

creation of formalised grievance mechanisms, but of stakeholder consultation mechanisms.<sup>46</sup>

Unsurprisingly, many corporations have expressed their support for Ruggie's proposals.<sup>47</sup> However, the SRSG's framework is in opposition to influential scholars such as Clapham and Weissbrodt, who hold that corporations can be held directly liable for human rights violations.<sup>48</sup>

The corporate responsibility to 'respect' human rights outlined by Ruggie is significantly smaller in scope than the Draft Norms' demand that corporations promote, secure the fulfillment of, respect, ensure respect of and protect human rights. The contrast between the two approaches is disconcerting to those (such as the civil society groups who signed an open letter to the SRSG) advocating for a comprehensive set of standards governing the conduct of international business to go beyond abovementioned soft law standards.

Despite these disagreements, the UN Guiding Principles are the most authoritative restatement of international law on corporate obligations to date and their conclusions are instructive. On the *breadth* of obligations, the Guiding Principles conclude that the corporate duty to respect human rights refers to:

internationally recognised human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work.<sup>49</sup>

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<sup>46</sup> J Bonnitcha, 'The UN Guiding Principles on Business and Human Rights: the implications for enterprises and their lawyers' (2012) 1 *The Business and Human Rights Review* 14.

<sup>47</sup> Joint initial views of IOE, ICC and BIAC (n 30).

<sup>48</sup> D Weissbrodt, 'Keynote Address: International Standard-Setting on the Human Rights Responsibilities of Businesses' (2008) 26 *Berkeley Journal of International Law* 373; Clapham, *Human Rights Obligations of Non-State Actors* (n 23).

<sup>49</sup> UNOHCHR, 'Guiding Principles' (n 40) Principle 12.

Yet this progressive position is offset by Ruggie's other (somewhat unsatisfying) conclusion: that the *depth* of corporate obligation is a *social*, rather than *legal*, norm to respect human rights – in other words, to 'do no harm'. This avoidance of legal conceptions of duty and right, unsurprisingly, leaves lawyers cold and leaves Ruggie open to the charge that his efforts will ultimately contribute to the maintenance of the possibly defective status quo.

### **Conclusion**

The breadth of disagreement that followed Ruggie's conclusions once again demonstrated the fault lines on this issue among international lawyers and academics. As section I.A showed, there is widespread agreement on the content of international labour law and its effect on states: four core labour standards – freedom of association and the right to collective bargaining, freedom from child labour, freedom from forced labour and freedom from discrimination - have emerged in international law and these rights are considered binding on states simply by virtue of their membership in the ILO. Other labour rights, such as the right to a limited number of working hours, are an important part of international labour law but are binding on those states that have signed treaties that protect these rights. However, as section I.B showed, this is all that lawyers and academics can agree on; they strongly disagree on whether there is a *legal* obligation *on corporations* to respect any rights (including the four core rights) or whether corporations merely have a *social* norm to do so, as Ruggie concluded.

I do not fully endorse Ruggie's conclusions for two reasons; first, I believe Clapham and others offer a compelling argument that corporations are already subjects of international law; second, even if these arguments do not settle the issue,

Ruggie was handed a unique opportunity to fashion an international legal framework that would serve to hold corporations accountable with regard to human rights. Unfortunately, he chose to seek solutions in the classical framework, which asks states unwilling or unable to protect workers' rights to assume responsibilities and lets corporations off the hook in international law. Ruggie thereby shied away from radical changes that international law possibly requires (or a radical interpretation of international law) in order to effectively hold corporations accountable.

Nevertheless, in the absence of a treaty or of widespread agreement among eminent jurists it would be problematic to conclude that international law imposes duties on corporations with regard to human rights. Therefore, I will tentatively rely on Ruggie's conclusions as benchmarks in my research; namely: international law imposes positive obligations to protect international labour rights only on states, while it limits corporations' duties in this regard to doing no harm and to acting with due diligence to ensure the rights enshrined in IBR and in ILO instruments are respected. I will use these conclusions as benchmarks because Ruggie's work has acquired legitimacy<sup>50</sup> through qualified endorsement by the Office of the High Commissioner of Human Rights and other relevant external audiences as well as by virtue of the participatory consultative process that he has used to guide him.<sup>51</sup>

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<sup>50</sup> For more on the concept of legitimacy developed by Suchman and used here, see n 60 below.

<sup>51</sup> It should be noted that Ruggie's framework was developed in the course of my research and it therefore intersects it. Part of my research (described in chapter 3) investigates the changes in the content of corporate codes of conduct prior to the adoption of Ruggie's final report in 2011. The case studies of corporate application of codes (described in chapters 4 and 5) were conducted subsequently to the adoption of this framework. Thus, this thesis examines the influence of international law on the construction and application of codes of conduct both prior and subsequently to the adoption of Ruggie's framework. It is posited that the adoption of the 'Guiding Principles' did not significantly change the context in which the research was conducted for two reasons. First, as is mentioned above, Ruggie's conclusion that international law does not impose legal obligations on corporations to protect human rights was a confirmation of the prevailing position on this issue and a rejection of the radical view taken by the Draft Norms and by authors like Clapham. It is therefore reasonable to suppose (and it is shown in chapters 3, 4 and 5) that codes of conduct were constructed with this position already in mind and that codes invoking international law did not create further legal obligations for corporations. Second, as is shown in chapters 3, 4 and 5 the basis of the construction and application of codes are

## **II. THE EMERGENCE OF CODES OF CONDUCT AND THE FACTORS INFLUENCING THEIR CONTENT AND APPLICATION**

Having set out the relevant international law on corporate accountability, I will use the following two parts of this chapter to provide *theoretical and conceptual frameworks* that will enable me answer the following questions in the subsequent chapters:

- What accounts for the emergence of codes of conduct?
- What supports the proposition that international law could have an influence on the construction and application of codes?
- What factors and processes could account for this influence?

This part will consider a number of theories rooted in global legal pluralism and global governance that purport to explain the emergence of codes of conduct and the possible influence of international law on their construction and application.

### **II.A THE EMERGENCE OF CODES OF CONDUCT ACCORDING TO GLOBAL LEGAL PLURALISM AND GLOBAL GOVERNANCE THEORIES**

#### *Global legal pluralism*

The scope of global legal pluralism is extensive: it ranges from an examination of customary and local law and their interaction with imported legal norms in colonial and ex-colonial societies, to the numerous transnational, private and mixed authority regimes present in today's world. At its core, however is Luhmann's hypothesis that

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ILO conventions in general and CLS in particular. The case studies of the application of codes in chapter 5 demonstrate this particularly well, as they show that corporations measure their success against the standards laid down in their codes, which are, in turn, derived from ILO conventions. This was unchanged by the Guiding Principles; in fact, the Guiding Principles only served to underline the central importance of the CLS and the IBR as they call on corporations to respect the human rights contained in the Declaration (in other words, the CLS) and in the IBR.

the late twentieth century would bring with it a fragmentation of global law that would occur along social sectoral lines (rather than territorial or regional ones); its cause would be a ‘transformation from normative (politics, morality, law) to cognitive expectations (economy, science, technology)’.<sup>52</sup> Each scientific, technological and economic ‘truth-regime’ possesses the resources for explaining the whole world from its perspective, and an inbuilt tendency to maximise its proper rationality.

In the judgment of Teubner and Fisher-Lescano, the past three decades have proven Luhmann right. The fragmentation of law that he forecast is, they believe, already happening – witnessed by the increased number of international tribunals, bodies charged with, for example, regulating the internet (Internet Corporation for Assigned Names and Numbers (ICANN)), international construction (International Federation of Consulting Engineers (FIDIC) and world football (Federation International de Football Association (FIFA)), and – most importantly for our purposes - corporate codes of conduct. The root causes behind this legal fragmentation are not, however, legal:

“Transnational communities,” or autonomous fragments of society, such as, the globalized economy, science, technology, the mass media, medicine, education and transportation, are developing an enormous demand for regulating norms which cannot, however, be satisfied by national or international institutions. Instead, such autonomous societal fragments satisfy their own demands through a direct recourse to law. Increasingly global private regimes are creating their own substantive law.<sup>53</sup>

Teubner and Fischer-Lescano include codes of conduct and other non-binding instruments under this definition of ‘substantive law’. Thus, according to Teubner and Fischer-Lescano, codes of conduct emerge due to a demand for regulatory norms that

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<sup>52</sup> G Teubner and A Fischer-Lescano, ‘Regime-Collisions: the Vain Search for Unity in the Fragmentation of Global Law’ (2004) 25 Michigan Journal of International Law 999, 1000.

<sup>53</sup> *ibid* 1010.

international or national institutions cannot satisfy. Teubner proceeded to build on this idea in his subsequent work.<sup>54</sup> In it, he claims that corporate codes are autonomous and self-referential systems, whose emergence comes from unmet regulatory demand and which are normatively closed. Codes are part of a pluralized set of legal orders within society that function largely independently of the state and of the international legal order.<sup>55</sup>

### *Global governance theories*

Global governance theories identify the origins of codes as emanating from a similar source to that identified by Teubner. According to John Ruggie, it is the failure of states and intergovernmental organisations to effectively regulate corporate actions impacting labour rights that has created ‘governance gaps’ (akin to Teubner and Fischer-Lescano’s unmet ‘demand for regulating norms’). These gaps create a ‘permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation’.<sup>56</sup> According to Gereffi and Mayer, this governance gap (or ‘governance deficit’, as they term it) exists in three domains.<sup>57</sup> First, there is a home-country governance deficit, which arises because home countries of multinational corporations do not have adequate regulatory tools to address supply chains. The second governance deficit - and most important for our purposes - is caused, they claim, by the limited scope and regulatory capacity of international and intergovernmental institutions. The limited regulatory reach and

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<sup>54</sup> eg G Teubner, ‘Self-Constitutionalizing TNCs? On the Linkage of “Private” and “Public” Corporate Codes of Conduct’ (2011) 18 *Indiana Journal of Global Legal Studies* 617.

<sup>55</sup> *ibid* 632.

<sup>56</sup> UNHRC, ‘Protect, Respect and Remedy’ (n 40) para 3.

<sup>57</sup> G Gereffi and F Mayer, ‘Globalization and the Demand for Governance’ in G Gereffi, *The New Offshoring of Jobs and Global Development* (The International Institute for Labour Studies 2006) 48.

powers of the ILO are, contend Gereffi and Mayer, an illustrative example of this problem. Finally, the third deficit is due to the limited capacity of developing countries to regulate their social and economic realms that have expanded along with their economies.

These failures of systems of public governance to provide legal clarity and effective regulation have been compounded by breakdowns in the market, generating a need for other governance arrangements (Rittberger et al refer to a *demand* for governance)<sup>58</sup> to fill the lacunae created - particularly in the case of multinational corporations (hereafter 'MNCs'), whose flexibility and reach has allowed them to take advantage of lax national legal and institutional frameworks for the protection of labour rights.

The unwillingness of states to agree to an effective international treaty regime to regulate MNCs' behaviour in this respect, described above, has led to a proliferation of voluntary initiatives that purport to do so. Scholars have explained the emergence of these instruments as part of a search for alternative forms of governance involving many actors coming together on an organisational and ideological basis through agreed norms.<sup>59</sup> Some express support for 'private governance' as one of the 'building blocks' of a 'new global public domain' and regard the corporate social movement as an important source for accountability.<sup>60</sup> Others support voluntary codes

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<sup>58</sup> V Rittberger and others, 'Introduction: Changing Patterns of Authority' in V Rittberger, M Nettesheim and C Huckel (eds), *Authority in the Global Political Economy* (Palgrave Macmillan 2008).

<sup>59</sup> R Keohane and J Nye Jr., 'Governance in a Globalizing World' in R Keohane, *Power and Governance in a Partially Globalized World* (Psychology Press 2002).

<sup>60</sup> J Ruggie, 'Reconstituting the Global Public Domain: Issues, Actors and Practices' (2004) 10(4) *European Journal of International Relations* 499.

of conduct on efficiency grounds,<sup>61</sup> while the OECD has stated that the complexity of global legal frameworks creates a need for voluntary initiatives, since law and regulation are unable to elucidate good practice in sufficient detail.<sup>62</sup> Finally, in a wider context, it has been argued that private regimes – including nongovernmental regulatory instruments and market-based mechanisms - are a manifestation of more flexible and responsive regulatory mechanisms.<sup>63</sup>

## **II.C CRITIQUES OF THE GLOBAL LEGAL PLURALISM AND GOVERNANCE THEORIES AND THE FACTORS THAT INFLUENCE THE CONTENT AND APPLICATION OF CODES**

Global legal pluralism and global governance theories provide a functional theoretical starting point, according to which codes of conduct emerged as a natural response to a ‘governance deficit’ created by the failures of states and intergovernmental organisations to regulate business with respect to human rights.<sup>64</sup> Nevertheless, this ‘governance deficit’ account has been criticised by some authors for being too simplistic in its account of the emergence of codes. These critiques broadly accept that a lack of governance of MNCs with regard to labour rights left room for some form of private governance to fill the breach; nevertheless, they charge that the ‘governance deficit’ approach fails to account for why it was that codes of conduct, as opposed to other forms of regulation, emerged as a response to a deficit in governance while also failing to explain which external factors influenced the emergence and the

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<sup>61</sup> AC Cutler, ‘Problematizing Corporate Social Responsibility under Conditions of Late Capitalism and Postmodernity’ in V Rittberger, M Nettesheim and C Huckel (eds), *Authority in the Global Political Economy*.

<sup>62</sup> OECD, *Corporate Social Responsibility: Partners for Progress* (OECD 2001).

<sup>63</sup> eg I Ayres and J Braithwaite, *Responsive Regulation* (OUP 1992); J Braithwaite and P Drahos, *Global Business Regulation* (CUP 2000).

<sup>64</sup> Gereffi and Mayer, ‘Globalization and the Demand for Governance’ (n 57).

construction and application of the codes.

The first critique challenges the de-politicised character of the ‘governance deficit’ narrative. Some theorists claim it underplays the fundamentally political nature of transnational private regulation. For instance, Cutler disputes the idea that any particular corporate social responsibility (CSR) initiatives, including codes of conduct, are an instance of widely agreed-upon forms of global governance. This is a question of purpose; while CSR may contribute to the provision of public goods (such as human rights and a healthy environment) it also facilitates the pursuit of private interests.<sup>65</sup>

Bartley also challenges the idea that it was codes of conduct that had to emerge as a natural response to governance deficits or to a demand for regulatory norms. His account (bolstered by empirical research) draws on strands of institutional research in sociology that instead treat institutions as settlements of conflict among actors with differential power and competing frames. According to this critique, codes emerge and are shaped by a mixture of factors, including the above-mentioned ones, such as political contestation between companies, unions and NGOs and protection of reputation.

The second critique of the account of legal pluralism and governance theories is that they ignore the influence that international law has on private forms of regulation. Indeed, brief reviews of codes show that a number of them contain provisions taken from international law and, more particularly, from ILO conventions, as well as obligations to respect national law (which are frequently

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<sup>65</sup> AC Cutler, ‘Problematizing Corporate Social Responsibility’ (n 61).

derived from international law).<sup>66</sup> Scholars such as Bartley, Kolben and others<sup>67</sup> argue that,

The growing literature on social and environmental standards, codes of conduct and certification systems routinely ignores this layering of rules, instead portraying private standards as filling a "regulatory void" or a "governance gap" created by the inability or unwillingness of states or international bodies to regulate a world of mobile capital and global supply chains.<sup>68</sup>

Instead, as Bartley points out, in order to understand the operation of transnational private regulation it is necessary to pay attention to the layering of multiple rules between these transnational private regimes and other sources of rules, such as international law.<sup>69</sup> This is because the rules contained in transnational private regimes (a category that includes codes of conduct) are likely to originate from other sources of law and therefore to have already been imbued with meaning through interpretation, argument and re-interpretation in institutions including international organisations and national institutions such as courts and the executive branch. In other words, the rules promulgated in codes are not a *tabula rasa* and those applying codes are likely to be influenced by the manner in which these rules have been interpreted to date in other institutions and other fora.

## **Conclusion**

By claiming that transnational private regimes emerge due to a global 'governance

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<sup>66</sup> M Islam and K McPhail, 'Regulating for Corporate Human Rights Abuses: The Emergence of Corporate Reporting on the ILO's Human Rights Standards Within the Global Garment Manufacturing and Retail Industry' (2011) 22 *Critical Perspectives on Accounting* 790, 798.

<sup>67</sup> For more, see volume 12 of the *Theoretical Inquiries in Law* journal (2011).

<sup>68</sup> T Bartley, 'Transnational Governance as the Layering of Rules: Intersections of Private and Public Standards' (2011) 12 *Theoretical Inquiries in Law* 517.

<sup>69</sup> *ibid.*

deficit', global legal pluralism and global governance theories provide a springboard for the examination of the emergence of codes of conduct. However, this approach also has deficiencies, as pointed out by sceptical governance theorists such as Bartley, Kolben and Cutler. Namely, the 'governance deficit' approach to the emergence of transnational private regimes fails to take into account two key considerations: the first is whether these regimes emerged fully-formed simply as a result of a governance deficit or whether they were created as a compromise solution through a contest of political interests and ideas by corporations, NGOs, unions, international organisations and states; the second is how the content and application of transnational private regimes are affected by rules from other sources, such as national and international law.

I will consult these critiques of sceptical governance theorists to analyse the emergence, construction and application of codes and their interplay with international law. This will allow me to focus on micro-processes and examine whether, as Bartley and others argue, a governance regime is made and then continuously remade through a series of small-scale struggles over the same regulatory turf by actors who may act as partners one day and as adversaries the next.

Moreover, my research will address some of the questions left unanswered by sceptical governance theorists. Importantly, while Bartley has shown that the emergence of certification regimes has a politicised character, this thesis will examine whether this pattern is repeated when it comes to the creation of a broader number of categories of private regimes, including multi-stakeholder codes of conduct and single-corporation codes of conduct. This thesis will also investigate whether there is a political struggle during the 'use' and application of codes of conduct by corporations and other actors, as well as on the occasions when these codes are

revised and international standards mooted for inclusion. Finally, this thesis will examine how the content and application of labour standards protected in codes of conduct is shaped by the international labour standards they invoke as well as by further layers of laws and rules.

### **III. THE PROCESSES OF THE DIFFUSION OF INTERNATIONAL NORMS**

In Part III, I will shift my focus from why codes emerge and the factors that influence their construction and application to considering the *processes* that can describe *how* international standards are diffused through codes. As no theorists have addressed this exact issue, I will consult the works of authors researching the diffusion of international standards in other contexts to conceptualise the processes through which diffusion of international law in codes of conduct occurs.

#### **III.A LEGITIMACY CONFERRED BY INTERNATIONAL LAW**

The first theory I consulted is based on Cashore and Bernstein's research of forms of transnational private regulation (which they term 'non-state Market driven' mechanisms (NSMDs)). The principal claim of Cashore and Bernstein (for the purposes of this thesis) is that a key to the process of the proliferation of NSMDs is the means by which they acquire legitimacy.<sup>70</sup>

Their starting point is to draw on Suchman's understanding of legitimacy (of organisations and organisational activity) as 'a generalized perception or assumption' - by an external audience - 'that the actions of an entity are desirable, proper, or appropriate within some socially constructed system of norms, values, beliefs and

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<sup>70</sup> S Bernstein and B Cashore, 'Can non-state global governance be legitimate? An analytical framework' (2007) 1 Regulation & Governance 347.

definitions.’<sup>71</sup> Cashore and Bernstein use this conception from organisational sociology to argue that transnational private governance regimes have to create rules that fit with existing norms and institutions of global governance in order to obtain legitimacy from relevant external audiences at the global level (including corporations who are potential signatories, NGOs, trade unions, key states and other actors). A clash of NSMD rules with established international law would, they maintain, ‘militate against the legitimacy of any emerging governance scheme.’<sup>72</sup>

### **III.B ACCULTURATION AND OTHER MECHANISMS OF SOCIAL INFLUENCE**

Goodman and Jinks have outlined a different approach to the influence of international law on states, which nevertheless leads to a similar conclusion.<sup>73</sup> Their work has woven together strands of scholarship in law, sociology, economics and other disciplines to describe the ways in which international law influences state behaviour. They contend it does so through three specific mechanisms of social influence: material inducement, persuasion, and acculturation.

The first two are well known and easily understood. According to Goodman and Jinks, however, acculturation has been largely overlooked in legal scholarship. They define it as ‘the general process by which actors adopt the beliefs and behavioral patterns of the surrounding culture’.<sup>74</sup> The ‘touchstone’ of this mechanism

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<sup>71</sup> M Suchman, ‘Managing Legitimacy: Strategic and Institutional Approaches’ (1995) 20 *Academy of Management Review* 571, 574.

<sup>72</sup> S Bernstein and B Cashore, ‘Nonstate Global Governance: Is Forest Certification a Legitimate Alternative to a Global Forest Convention?’ in J Kirton and M Trebilcock (eds), *Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment and Social Governance* (Ashgate 2004).

<sup>73</sup> R Goodman and D Jinks, ‘How to influence states: socialization and international human rights law’ (2004) 54(3) *Duke Law Journal* 621; R Goodman and D Jinks, ‘Incomplete Internalization and Compliance with International Human Rights Law’ (2008) 19(4) *European Journal of International Law* 725.

<sup>74</sup> Goodman and Jinks, ‘How to influence states’ (n 73).

is the aforementioned notion from New Institutionalism and organisational sociology that ‘identification with a reference group generates varying degrees of cognitive and social pressures - real or imagined – to conform.’<sup>75</sup>

Under the first process (material inducement), international law provides material inducements (such as sanctions) to states to change human rights practices; under the second (persuasion), it persuades states to do so because of the validity of international law; under the third, however, it is not inducements or the content of international law that matter. States will change human rights practices in order to preserve or improve their relationship with a particular reference group (of other states, for example) or with the wider cultural environment. When acculturation occurs, actors do not normatively assess the content of the norms, nor do they calculate the material costs and benefits of (not) complying with them. Instead, it is cognitive pressures (such as the urge to minimise dissonance as a form of ‘cognitive discomfort’) and social pressures that propel acculturation.<sup>76</sup>

### **III.C APPLICATION TO CORPORATE CODES OF CONDUCT AND ‘ISOMORPHISM’**

The analysis of Goodman and Jinks pertains only to the adoption of international conventions by states; my empirical research will attempt to fill this gap in the theoretical framework by investigating whether their conception of acculturation, and

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<sup>75</sup> *ibid.*

<sup>76</sup> It should be noted that Goodman and Jinks have built upon the work of theorists who had similar insights but who did not identify acculturation as a separate process. A good example is Finnemore and Sikkink’s three-stage process of norm influence in politics. The first stage is ‘norm emergence’, the second involves broad acceptance, which is termed a ‘norm cascade’ by Cass Sunstein, and the third involves internalisation. The characteristic mechanism of norm emergence is persuasion by ‘norm entrepreneurs’ (defined as agents having ‘strong notions about appropriate or desirable behavior in their community’). The second stage of a norm cascade, however, is typified by a ‘dynamic of imitation’ motivated by pressure for conformity and a desire for international legitimization – in other words, what Goodman and Jinks would term ‘acculturation’ (see M Finnemore and K Sikkink, ‘International Norm Dynamics and Political Change’ (1998) 52(4) *International Organization* 887).

Cashore and Bernstein's concept of legitimacy, can be consulted to develop a conceptual framework for the diffusion of international law in both the *construction* and *application* of *corporate* codes of conduct.

Further, my research will cast a detailed look at whether the adoption of a code of conduct based on international standards by one corporation has a bearing on another corporation. In order to do so, and in addition to the above-mentioned concepts, I will also draw on the concept of isomorphism, which forms the basis of Goodman and Jinks's typology of influence of international law and of the idea of acculturation. Briefly, isomorphic processes force 'one unit in a population to resemble other units that face the same set of environmental conditions'.<sup>77</sup>

DiMaggio and Powell developed isomorphism into a key concept in organisational sociology that compellingly explains why organisations come to look alike. They established that two kinds of isomorphism exist: competitive and institutional, with the latter containing three mechanisms through which it occurs - coercive (resulting from outside pressures), mimetic (resulting from uncertainty that causes organisations to model themselves on other organisations), and normative (stems primarily from professionalisation). Though mimetic institutional isomorphism has subsequently received a disproportionate amount of attention,<sup>78</sup> I will also draw on competitive isomorphism and coercive institutional isomorphism to analyse the diffusion of international norms in corporate codes of conduct.

The limitations of isomorphism are that it does not explain why some firms would acquiesce to external pressures and others would not. Oliver has outlined a

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<sup>77</sup> P DiMaggio and W Powell, 'The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields' (1983) 48 *American Sociological Review* 147, 149.

<sup>78</sup> M Mizuchi and L Fein, 'The Social Construction of Organizational Knowledge: A study of the Uses of Coercive, Mimetic, and Normative Isomorphism' (1999) 44 *Administrative Science Quarterly* 653.

range of other possible responses by corporations – they might compromise, avoid, defy or manipulate (including co-opt), depending on the type and nature of external pressures.<sup>79</sup> This model, though critiqued for some of its shortcomings,<sup>80</sup> will be helpful for conceptualising the full range of responses by some corporations to other corporations including international standards in their codes of conduct.

## **Conclusion**

In this section I presented three different theoretical frameworks that touch upon the diffusion of norms. The first concludes that international standards are diffused among NSMDs because they confer legitimacy. The second explains the diffusion of international law among states by reference to the processes of material inducement, persuasion and acculturation. The third presents the concept of isomorphism as a means of accounting for the process of the diffusion of practices among organisations and why they come to resemble each other.

All of these frameworks provide accounts of the diffusion of norms that may have a relevance to my research: some touch upon the diffusion of norms among corporations and others explain the diffusion of international law and its particular legitimacy (albeit among states). Yet, these frameworks do not directly address the topic of my research; namely, the processes through which international law is incorporated and diffused in the construction and application of corporate codes of conduct. Accordingly, I will draw on the ideas of legitimacy, acculturation and isomorphism as starting points in my research, but will expand on these ideas to

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<sup>79</sup> C Oliver, 'Strategic responses to institutional processes' (1991) 16(1) *Academy of Management Review* 145.

<sup>80</sup> B Cashore and I Vertinsky, 'Policy networks and firm behaviours; Governance systems and firm responses to external demands for sustainable forest management' (2000) 33 *Policy Sciences* 1.

conceptualise the processes through which the diffusion of international law occurs in codes of conduct. This will contribute both to the research on the diffusion of international law (by expanding it to conceive of how international norms are diffused among corporations and not just among states, and how international norms are applied and not just adopted) and on the evolution of codes of conduct.

#### **IV. CONCLUSION**

International labour law has developed exponentially under the aegis of the ILO. Its conventions and jurisprudence have codified workers' rights to a great level of detail. In particular, the adoption of the Declaration of Fundamental Principles and Rights at Work established a set of core labour standards that all member states of the ILO are bound by: freedom of association and the effective recognition of the right to collective bargaining, the elimination of forced or compulsory labour, the abolition of child labour and the elimination of discrimination in respect of employment and occupation. In addition, the ILO has set out a number of other important rights that bind signatories to its conventions, such as the right to health and safety, the right to limited working hours and the right to weekly rest.

This body of international law would appear to provide an excellent legal foundation for workers of multinational corporations to enjoy their rights. However, its capacity to do so is constrained by its limited reach; namely, as currently authoritatively interpreted by the Guiding Principles on Business and Human Rights, international law creates a social norm, rather than a legal obligation, under which corporations should 'respect' all rights enshrined in the IBR and in the Declaration on Fundamental Principles and Rights at Work. In other words, while states have a legal

obligation to protect labour rights as defined by the ILO, corporations are merely expected to do no harm in this regard.

This raises the first problem that my study grapples with: given this legal framework, which appears to limit the impact of international labour law on corporations, is there another, less direct, means for international labour law to influence corporations – namely, through their codes of conduct and their application? Having shown where international law presently stands, I will use this position as a benchmark to measure the extent of the influence of international law on the construction of codes of conduct (in chapter 3) and the manner in which this influence manifests itself in practice on the application of codes of conduct (in chapter 4).

I will then turn my attention to further aspects of the research question, which consider the following: to the extent that international law influences corporate codes of conduct and their application, what accounts for this influence and how does it occur? As has been shown in parts II and III of this chapter, these questions cannot be answered through a single theoretical framework. This is not only due to the heterogeneity of the issues covered, but also due to the number of academic fields that these issues cut across. Thus, governance scholars have mostly concentrated on the significance of codes as governance regimes, but not on their content. In the field of international law, scholarship has historically ‘tended to ignore the multifaceted ways in which legal norms are disseminated, received, resisted and imbibed “on the ground” in daily life’.<sup>81</sup> Among lawyers, the debate over the manner in which international law should hold corporations accountable for labour rights has focused

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<sup>81</sup> P Schiff Berman, ‘From International Law to Law and Globalization’ (2005) 43 *Columbia Journal of Transnational Law* 485, 492.

almost exclusively on the possibility of creating a binding international treaty or on the direct application of existing legal instruments.

The as-yet-uncharted indirect effect of international law on corporate policy and behaviour through its incorporation into corporate codes of conduct can therefore be understood only by drawing on the findings and concepts from a variety of other disciplines presented in parts II and III of this chapter.

The research done by what I termed ‘sceptical governance’ theorists such as Bartley and Kolben about private transnational regimes can offer some guidance. It raises questions over how private transnational regimes emerge, urging researchers to look beyond the existence of a deficit of governance in a particular area (in this case, in corporate accountability for labour rights violations), and to examine the political contest that gives rise to that particular regime.

I will draw on this idea to examine why codes of conduct were the form of governance that surfaced once it became apparent that corporations’ obligations towards workers in supply chains were not sufficiently regulated. Were they a widely accepted solution or were they a compromise between those seeking ‘more’ and different forms of governance (such as NGOs) and those seeking ‘less’ governance (such as the corporations themselves)?

The research of sceptical governance theorists raises another important question: what role do other rules play in the shaping of the content of transnational private regimes? I will attempt to provide an answer to this question by looking at the influence of one particular set of rules (international labour rights) on a form of transnational private regimes (codes of conduct).

Finally, the thesis aims to discover the processes through which international law comes to influence codes of conduct. As discussed in part III, the narrow focus of

international lawyers and governance theorists means there are no theories or concepts that address this particular issue. As a result, I will draw on associated concepts that purport to explain how international law influences states (through material inducement, persuasion and acculturation) and how organisations come to look alike through isomorphism. These concepts provide a springboard for further research into how corporations come to include international labour standards in their codes of conduct: does this occur due to pressure from outside sources, due to corporations being persuaded of the authority of international law, due to their tendency to mimic other corporations and thereby seek legitimacy from their peers and the community at large, due to a combination of these factors or due to some, as yet, unidentified process? Having presented these various concepts and frameworks, I will draw and expand on them in chapter 5 to consider what factors and processes determine the influence of international law on the construction and application of codes of conduct.

## **CHAPTER 3**

### **THE INFLUENCE OF INTERNATIONAL LAW ON THE CONSTRUCTION OF CODES OF CONDUCT**

#### **OVERVIEW OF CHAPTER THREE**

This chapter presents the results of the study of the content of codes of conduct carried out for this thesis. In doing so, it will provide an answer to one of the three key aspects of the research question, namely: what is the **extent** of the influence of international law on the construction of codes of conduct? This is what the research presented in this chapter purports to measure through a longitudinal content analysis of thirty-seven companies' codes of conduct and a study of sixteen companies' international framework agreements (IFAs).<sup>1</sup>

Part I of this chapter will set out the scope of the study and the methodology used to conduct it. It will present my sample of corporate codes of conduct studied. It also presents the coding system I developed to measure the extent to which companies' codes changed between 2003 and 2009 to reflect international labour standards, and the extent to which the IFAs signed by corporations reflect international labour standards.

Part II will present the results of the study. They show a clear longitudinal increase in the presence of international labour standards in codes between 2003 and 2009. Part III will examine the implications of these results for the influence of international labour standards on corporate codes.

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<sup>1</sup> The study of the international framework agreements is not longitudinal because the overwhelming majority of companies have only signed one such agreement. It is therefore impossible to gauge their evolution over time.

## **I. THE SCOPE AND METHODOLOGY OF THE CONTENT ANALYSIS STUDY**

The study presented in this chapter principally attempts to ascertain the extent to which international labour standards have been incorporated into corporate codes of conduct over a period of time – between 2003 and 2009.

There are numerous internationally recognised labour rights. The first decision I had to make in conducting this study was to determine which rights should be examined in codes of conduct. In a process (outlined in chapter 2) that culminated with the adoption of the Declaration of Fundamental Principles and Rights at Work (hereafter ‘the Declaration’), the ILO designated four of these rights (freedom of association and the right to collective bargaining, freedom from child labour, freedom from forced labour, and non-discrimination) as ‘fundamental’ core labour standards (CLS), requiring each member state of the ILO to adhere to them, irrespective of whether it is a signatory of the treaties that originally enshrined these rights in international law.<sup>2</sup>

Controversially, however, long-established labour rights were not included in the Declaration. Various authors have held forth on what the ‘ideal’ content of the Declaration should have been. Authors such as Alston,<sup>3</sup> Summers<sup>4</sup> and DiMatteo<sup>5</sup> have all stated that the following rights should have also been included: the right to

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<sup>2</sup> Declaration on Fundamental Principles and Rights at Work (adopted 18 June 1998) (1998) 37 ILM 1223. While the Declaration does not use the term ‘core labour standards’, ILO publications sometimes use it when referring to the four fundamental rights (text to n 11 in ch 2).

<sup>3</sup> P Alston, “‘Core Labour Standards’ and the Transformation of the International Labour Rights Regime” (2004) 15(3) *European Journal of International Law* 457.

<sup>4</sup> C Summers, ‘The Battle in Seattle: Free Trade, Labor Rights and Societal Values’ (2001) 22(1) *University of Pennsylvania Journal of International Economic Law* 61.

<sup>5</sup> L DiMatteo and others, ‘The Doha Declaration and Beyond: Giving a Voice to Non-Trade Concerns Within the WTO Trade Regime’ (2003) 36 *Vanderbilt Journal of Transnational Law* 95.

occupational safety and health; the right to limited working hours; the right to reasonable weekly rest; and freedom from workplace abuse.

Other authors point to labour rights protected by relevant regional/international instruments (aside from ILO conventions) as sources of further rights that might merit inclusion into the category of CLS. Compa highlights the eleven labour rights set forth as fundamental labour principles by North American Agreement on Labor Cooperation ((NAALC), the labour agreement that is a part of the North American Free Trade Agreement (NAFTA)) as well as the rights protected under the Charter of Fundamental Rights of the European Union.<sup>6</sup>

Of the four additional rights identified by Alston, DiMatteo and Summers, the right to occupational health and safety is most prominently represented in these two documents, while the right to limited hours and the right to weekly rest are also mentioned (as part of the right to minimum employment standards in the NAALC). The freedom from workplace abuse, however, is not protected by these documents.

I have therefore decided to concentrate, in the study presented here, on the four core rights (freedom of association and the right to collective bargaining, freedom from child labour, freedom from forced labour, and non-discrimination),<sup>7</sup> as well as the three rights that various authors have identified as ‘core-plus’ rights that are also protected in regional instruments (right to occupational safety and health,<sup>8</sup>

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<sup>6</sup> North American Agreement on Labor Cooperation (Canada-Mexico-United States) (adopted 8 September 1993, entered into force 1 January 1994) 32 I.L.M. 1499; Charter of Fundamental Rights of the European Union [2000] OJ C 364/01.

<sup>7</sup> Declaration on Fundamental Principles and Rights at Work (n 2).

<sup>8</sup> Convention Concerning Occupational Safety and Health and the Working Environment Convention (No 155) (adopted 22 June 1981, entered into force 11 August 1983) 1331 UNTS 279 (ILO No 155); Convention Concerning Occupational Health Services (No 161) (adopted 25 June 1985, entered into force 17 February 1988) 1498 UNTS 19 (ILO No 161).

right to reasonable working hours,<sup>9</sup> and the right to weekly rest<sup>10</sup>).<sup>11</sup> Focusing on these seven rights will enable me to more broadly measure the influence of international human rights law and international labour law on the construction of corporate codes of conduct.

## **I.A A REVIEW OF LONGITUDINAL STUDIES OF CODES OF CONDUCT<sup>12</sup>**

The upswing in interest in corporate codes of conduct in academic and policymaking circles over the past two decades has been followed, with a slight lag, with the production of a number of studies on the proliferation of corporate codes of conduct.

A significant number of studies concentrate on the prevalence of codes of conduct in certain countries' corporations;<sup>13</sup> others examine the content of corporate codes, focusing on the degree to which they refer to issues such as bribery, environmental protection and human rights.<sup>14</sup> The most notable, including those carried out by Islam and McPhail and by the ILO, measure the inclusion of

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<sup>9</sup> Convention Limiting the Hours of Work in Industrial Undertakings to Eight in the Day and Forty-eight in the Week (No 1) (adopted 28 November 1919, entered into force 13 June 1921) 38 UNTS 3 (ILO No 1); Convention Concerning the Regulation of Hours of Work in Commerce and Offices (No 30) (adopted 28 June 1930, entered into force 29 August 1933) 39 UNTS 85 (ILO No 30).

<sup>10</sup> Convention Concerning Weekly Rest in Commerce and Offices (No 106) (adopted 26 June 1957, entered into force 4 March 1959) 325 UNTS 279 (ILO No 106).

<sup>11</sup> NAALC and Charter of Fundamental Rights (n 6). The decision to focus on these rights has, inevitably, meant that the study did not consider many international labour standards (such as those on social security stipulated by the Convention Concerning Minimum Standards of Social Security (No 102) (adopted 28 June 1952, entered into force 27 April 1955) 210 UNTS 131 (ILO No 102), as well as many of the issues discussed by various codes of conduct (such as bribery, ethics and so on).

<sup>12</sup> The review of the theoretical literature on the development of codes of conduct is presented in Chapter 2; here, I am reviewing only previous longitudinal studies of codes, their methodologies and results.

<sup>13</sup> eg GR Weaver, LK Trevino and PL Cochran, 'Corporate Ethics Practices in the Mid-1990s: An Empirical Study of Fortune 1000' (1999) 18 *Journal of Business Ethics* 283.

<sup>14</sup> K Gordon and M Miyake, 'Business Approaches to Combating Bribery: A Study of Codes of Conduct' (2001) 34 *Journal of Business Ethics* 161; B Farrell and D Cobbin, 'Mainstreaming Ethics in Australian Enterprises' (1996) 15(1) *Journal of Management Development* 37.

international labour standards in corporate codes.<sup>15</sup> These studies are, however, only a snapshot of the inclusion of international labour standards in a set of codes at a certain point – they do not chart the evolution of their presence over time.

There is only one English-language longitudinal study (unearthed in my research) that charts the changes in the content of codes over a defined period of time.

This study, conducted by Murphy, examines the content of codes at three points in time – in 1992, 1997 and 2003.<sup>16</sup> The sample in Murphy's study was drawn from three sources: companies in the *Forbes* 500 at the three different points in time, *Forbes'* list of the largest private companies in the United States, and the *Financial Times'* list of the top fifty largest multinational corporations.<sup>17</sup> All of these companies were contacted and asked, by letter, to fill in a written questionnaire. The final sample was composed of the companies that answered this (the response rate varied between 21% and 30% for companies surveyed in 1992, 1997 and 2003).<sup>18</sup> However, as is clear from the above-mentioned, the study looks at three different sets of companies in the three years in which surveys were performed. No indication is given in the article that any effort was made to ensure that the same companies be surveyed

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<sup>15</sup> M Islam and K McPhail, 'Regulating for Corporate Human Rights Abuses: The Emergence of Corporate Reporting on the ILO's Human Rights Standards Within the Global Garment Manufacturing and Retail Industry' (2011) 22 *Critical Perspectives on Accounting* 790; J Murray, 'Corporate Codes of Conduct and Labor Standards' <<http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1007&context=codes>> accessed on 21 February 2015.

<sup>16</sup> P Murphy, 'Developing, Communicating and Promoting Corporate Ethics Statements: A Longitudinal Analysis' (2005) 62 *Journal of Business Ethics* 183.

<sup>17</sup> There is another study, carried out jointly by Dutch employer association VNO-NCW, KPMG and Ethicon, which scrutinises various corporations' codes on several issues. It examines the codes of 21, 38 and 54 different companies, respectively, at three points in time (1991, 1999 and 2003). It is cited in M Kaptein, 'Business Codes of Multinational Firms: What Do They Say?' (2004) 50 *Journal of Business Ethics* 13; unfortunately, linguistic obstacles (the study is in Dutch, which I do not speak) prevented me from garnering further insight into its contents.

<sup>18</sup> Murphy 'Developing, Communicating and Promoting Corporate Ethics Statements' (n 16), 185.

(instead, the final sample was a reflection of the random responses received to the questionnaire being sent).

Murphy's study looks at both the form and the content of corporate codes. With regard to the former, he measures whether the codes could be categorised as codes of ethics, corporate credos, values statements, Internet privacy policies or all of the above (these are not mutually exclusive categories). Content-wise, he analyses 'areas of specific guidance' in the codes; these include categories such as: 'gift giving/receiving', 'bribery', 'workforce diversity', 'selling practices', 'working conditions/safety', 'human rights', and 'international issues'. Murphy charts the percentage of codes that cover these areas in 1997 and 2003 (he excludes 1992 for unexplained reasons), and finds that not much has changed in the two years surveyed and that 'the similarity of specific guidance covered by codes of ethics also seems to mean that much of the material in codes is "boilerplate"'.

There is no further depth of analysis here; the inclusion of 'human rights' in the code can mean both a throwaway line that mentions that the company in question will 'seek to respect human rights' or something similarly formulated, or it can mean that the code contains very detailed and firm commitments as to which rights are to be respected and what they mean for the company and its employees/stakeholders/the community. More importantly, both studies have a common considerable methodological shortcoming; namely, the object of research changes from study to study. In other words, both studies use different samples at the three points in time, thus making the validity of the comparison of the results questionable.

Thus, to date, no research has been carried out to examine the changes to the content of codes of the same corporations over a period of time.

## **I.B METHODOLOGY OF THE LONGITUDINAL CONTENT ANALYSIS**

This study focuses on the codes of conduct of thirty-seven of the largest corporations in the world from 2003 and 2009 and on the IFAs signed by sixteen other companies by 2009. It uses the method known as *content analysis* to evaluate the changes in the content of codes and thereby measure the extent to which they are influenced by international labour standards.

I chose to use content analysis as a method because, as a 'research technique for making replicable and valid inferences from texts',<sup>19</sup> it would enable me to analyse changes to codes of conduct and IFAs. The key components of content analysis include unitising, sampling and coding.<sup>20</sup> Below I describe how I unitised, sampled and coded relevant data for this study.

### *The unitisation and operationalisation of codes of conduct*

Unitising involves defining relevant units of analysis; for the purposes of this thesis, the unit of analysis is the code of conduct. Although no single definition of a code of conduct has become widespread, common elements can be discerned: a code is a 'guide to both present and future behaviour',<sup>21</sup> which lays out 'corporate ethical values and the responsibilities of employees to one another and to organizational stakeholders.'<sup>22</sup> Furthermore, a corporate code of conduct clarifies the objectives of the company, as well as 'what it can be held accountable for.'<sup>23</sup>

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<sup>19</sup> K Krippendorff, *Content Analysis: An Introduction to its Methodology* (3<sup>rd</sup> ed, Sage 2013) 24.

<sup>20</sup> *ibid* 84.

<sup>21</sup> M Kaptein and M Schwartz, 'The Effectiveness of Business Codes; A Critical Examination of Existing Studies and the Development of an Integrated Research Model' (2008) 77 *Journal of Business Ethics* 111.

<sup>22</sup> *ibid*.

<sup>23</sup> Kaptein, 'Business Codes of Multinational Firms: What Do They Say?' (n 17).

The breadth and relative lack of precision of these definitions is unavoidable, given that corporations have adopted a wide range of names for documents that include some, or all, of these features. Some have adopted Standards of Business Conduct, others Codes of Ethics, while others have opted for various ‘guidelines’, ‘policies’ or ‘statements’. More importantly, it is not uncommon for a corporation to have more than one document that pertains to the issue of its, and its employees’, behaviour (frequently, corporations have a ‘Human Rights Statement’ alongside a ‘Diversity Statement’ or a ‘Human Resources Policy’). Companies can adopt ‘stand alone’ codes – policies that they adopt on their own, or ‘multi-stakeholder’ codes, which they adopt jointly with other companies and, sometimes, other stakeholders such as civil society groups.

It is, however, important to clarify that a ‘code of conduct’ pertains to forms of (varying degrees of) self-regulation only. In that, it differs from other policies or other forms of regulation that pertain to relationships between corporations and its employees, like laws. Nevertheless, I have also included, for the purposes of this thesis, IFAs in the definition of the concept of codes of conduct. IFAs are an emerging form of regulation in which employees’ representatives (global union federations) play a more prominent role and negotiate the texts of the agreements with large MNCs. The results should provide an interesting comparison with the content of codes of conduct and insight into the influence of employees in shaping corporate policy.

For the purposes of this study, I have also sought to be as inclusive as possible and to look beyond what a corporation has termed its ‘Code of Conduct’ or ‘Code of Ethics’ to all of the documents that examine the relationship of the corporation with

its employees. Moreover, as this is a longitudinal study, the names (and obviously the content) of these documents have, on occasion, changed from 2003 to 2009.

### *Sample of codes of conduct*

Sampling ‘allows the analyst to economize on research efforts by limiting observations to a manageable subset of units that is statistically or conceptually representative of the set of all possible units.’<sup>24</sup> I selected the sample of corporations whose codes of conduct were studied from the Global Fortune 500, a list of companies compiled annually by *Fortune* magazine.<sup>25</sup> Only those corporations that appear five times or more on the list between 1999 (the earliest available list) and 2009 were initially taken into consideration. A study of the lists of the Global Fortune 500 showed that there were three hundred and twenty two such corporations. I assigned each of these corporations a number from 1 to 322, and then winnowed them down (for a more manageable sample) to fifty corporations by random selection through a random number generator.<sup>26</sup>

The websites of thirteen of these fifty corporations offered no information on their codes in English (these were primarily corporations headquartered in China); I was thus left with a sample of thirty-seven corporations. As the study examines the changes in corporations’ codes for the extent to which they incorporate international labour standards, I decided to analyse these thirty-seven corporations’ codes at two points in time: 2003 and 2009.<sup>27</sup> My initial intent was to examine the change in the

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<sup>24</sup> Krippendorff, *Content Analysis: An Introduction to its Methodology* (n 19) 84.

<sup>25</sup> <<http://money.cnn.com/magazines/fortune/global500>> accessed 1 February 2015.

<sup>26</sup> <<http://www.random.org/integers>> accessed 1 February 2015.

<sup>27</sup> Codes valid at the end of each of these years, or as close as could be obtained to the end of the year, were used in the study.

codes between 1997 and 2009, with 2003 as the mid-point. The principal reason for selecting 1997 as the starting year for the study is that it immediately precedes the adoption of the Declaration on Fundamental Principles and Rights at Work, which is assumed to be an important benchmark in the standardisation of the four above-mentioned fundamental labour rights as relevant standards for corporations. However, I was unable to obtain sufficient access to codes from 1997 and was thus forced to examine the changes in companies' codes at two points - from 2003 to 2009.<sup>28</sup>

Corporate codes of conduct were collected through the websites of the corporations in the sample. The thirty-seven corporations in the sample had forty-two valid codes on human and labour rights in 2009.<sup>29</sup> Only twenty-four of these corporations, however, had codes on human and labour rights that were valid in December 2003 and that could be collected via the 'Wayback Machine' (web.archive.org).<sup>30</sup> The other thirteen corporations' websites from 2003 (accessed via the 'Wayback Machine') did not allow access to their codes and could not supply them to me; this leaves us with twenty-four corporations whose codes I procured both from 2003 and 2009, and thirteen corporations whose codes from 2009 I was able to procure, but whose codes from 2003 I could not access. In the rest of the study I have indicated where I have used figures for just the narrower sample (fifty-six codes of twenty-four corporations, one each from 2003 and 2009, respectively) and where I have used figures from the broader sample that includes the fourteen additional codes from 2009 (forty-two codes of thirty-seven corporations from 2009, together with twenty-eight codes of twenty-four corporations from 2003).

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<sup>28</sup> I examined only the codes that were valid at those two points – in 2003 and 2009. I did not examine versions of codes that may have been valid between these two years.

<sup>29</sup> There were more codes than corporations in the sample in 2009 because five corporations had two codes that dealt with different aspects of human and labour rights.

<sup>30</sup> The 'Wayback Machine' allows access to websites at various points in time going back to 1996.

The composition of the sample for studying codes of conduct was a thorny methodological issue to resolve. Amid the vast number of multinational corporations (MNCs) worldwide the question of how to select them was crucial. My sample is drawn from the largest MNCs globally. The principal reason for this is that, from a practical point of view, it is easier to obtain data on larger corporations than it is on smaller ones.<sup>31</sup> In this case, that proved to be particularly true, because smaller corporations did not have as well-developed websites (the principal method of obtaining codes) in 2003 as did the larger corporations examined. Therefore any longitudinal research - such as this one - not relying on previously collected data is obliged to create its sample from larger corporations. As the quantitative research does not have a country- or region-specific focus, it was decided that the *Fortune Global 500* provided an obvious and authoritative source of the world's largest corporations.

The IFAs examined were chosen in a more straightforward fashion. Of the one hundred and twenty-three such agreements signed in total to date<sup>32</sup> sixteen have been signed with Global Fortune 500 companies from the broad sample of 322 companies. All sixteen of these IFAs were analysed and graded as part of this study. The recent emergence of IFAs means companies have overwhelmingly signed only one IFA, which they have not had the opportunity or need to revise; in other words, unlike with codes of conduct, it is pointless to make comparisons between 2003 and 2009 versions of IFAs as they are unchanged.

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<sup>31</sup> I would also echo the arguments made by Fligstein, who stresses that studying large corporations is 'defensible' because: 1) their size affords them relatively high importance vis-à-vis other corporations; and 2) the organisational practices of these firms provide examples for appropriate firm behaviour and organisation: N Fligstein, 'The Spread of the Multidivisional Form Among Large Firms, 1919-1979' (1985) 50(3) *American Sociological Review* 377.

<sup>32</sup> <[http://www.ewcdb.eu/list\\_intl\\_framework\\_agreements.php](http://www.ewcdb.eu/list_intl_framework_agreements.php)> accessed 14 February 2015.

### *Developing a coding system*

Coding is designed to simplify the analysis of texts; it ‘bridges the gap between texts and someone’s reading them.’<sup>33</sup> In this study, I use a subset of coding called magnitude coding, which adds numeric values to a datum to indicate intensity, frequency, direction, presence or evaluative content.<sup>34</sup> In order to numerically code the codes of conduct and IFAs of the corporations mentioned above, I developed the Model for Analysing and Grading Codes of Conduct (hereafter referred to as the ‘Model for Analysing Codes’, contained in Appendix 1). It grades codes and IFAs for the following,

1. The extent to which they incorporated the following rights as defined by international legal standards:

- a) Freedom of association and the right to organise;
- b) The right to collective bargaining;
- c) Freedom from forced labour;
- d) Freedom from child labour;
- e) Non-discrimination;
- f) The right to occupational safety and health;
- g) The right to limited hours of work;
- h) The right to weekly rest.

Codes of conduct are graded separately in categories for each of these eight rights.

2. The scope and depth of the obligation according to the language in the code:

- a) Is the language undertaking the obligation aspirational, prospective or more of a statement of fact?

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<sup>33</sup> Krippendorff, *Content Analysis: An Introduction to its Methodology* (n 19) 85.

<sup>34</sup> J Saldana, *The Coding Manual for Qualitative Researchers* (1<sup>st</sup> ed, Sage 2009) 58.

b) What is the nature of the company's obligation (respect, promote, promote, fulfil or other)?

Codes of conduct are graded in each of these two categories.

As I sought to express the intensity and presence of international legal standards in numerical values, I constructed the Model for Analysing Codes in accordance with the approach to the quantification of legal rules termed 'leximetrics'. This approach, elaborated in recent years by researchers including Simon Deakin, 'refers to quantitative measurements of law'.<sup>35</sup> Its two key features are that it is functional and interpretive. Leximetrics is 'functional in the sense that the coding process depends on identifying, for any given area of legal rules, a set of indicators whose content is determined by the function performed by those rules.'<sup>36</sup> Thus, in the Model for Analysing Codes, the indicators for grading the provisions of codes are defined in terms of how far those provisions reflect ILO standards and thereby perform the function of worker protection.

For instance, the Model for Analysing Codes<sup>37</sup> judges the extent to which codes protect freedom of association by grading them for the following elements of that right: the right to form a union of one's own choosing; the right to join trade unions of one's own choosing; the right to draw up the constitutions and rules of trade unions; the right to strike; and non-discrimination of workers' representatives. These elements of the right of freedom of association are all reflective of ILO conventions and/or jurisprudence and all perform the function of worker protection.

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<sup>35</sup> M Siems, 'Shareholder Protection Around the World ("Leximetric II")' (2008) 33 Delaware Journal of Corporate Law 114.

<sup>36</sup> S Deakin and P Sarkar, 'Indian Labour Law and its Impact on Unemployment, 1970-2006: A Leximetric Study' (2011) Working Paper 428 CBR Working Paper Series, 10.

<sup>37</sup> See Appendix 1, point 1.1.

As for its second feature, leximetrics is interpretive in that ‘the focus is on the rule as a norm, that is to say on its normative content, not on its social or economic effects.’<sup>38</sup> This approach is ‘purely a measure of formal regulations, that is, the *de jure* content of rules. A given leximetric coding makes no assumption about whether a given rule is observed in practice.’<sup>39</sup> The Model for Analysing Codes adheres to this guideline and focuses purely on the content of the rules contained in the codes of conduct and IFAs graded for this study.

I will now provide an explanation of how I developed the Model for Analysing Codes. I will also use examples to illustrate the challenges I faced during this process; in doing so, I will refer to the contents of the Model for Analysing Codes, which can be found in Appendix 1.

In cases where a given code of conduct makes no mention of human rights in general, or a labour right in particular, the Model awarded that code a **‘0’ grade** in the category of that right (see point 1 of Appendix 1).

Where the code made a general reference to the corporation protecting human rights, or civil liberties or it used other similar generic formulations without further detail, the code was awarded at least a **‘1’ rating** for each labour right category (see point 1 of Appendix 1). For example, Fujitsu’s code of conduct from 2009 proclaims that the company ‘respects each individual’s human rights’; it was accordingly awarded a ‘1’ rating across for all labour rights not explicitly mentioned.<sup>40</sup>

A **‘2’ rating** was awarded through the Model for Analysing Codes in cases where international standards were referenced which protected the right in question,

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<sup>38</sup> Deakin and Sarkar ‘Indian Labour Law and its Impact on Unemployment, 1970-2006’ (n 36) 11.

<sup>39</sup> *ibid.*

<sup>40</sup> eg ‘Fujitsu 2009 Code of Conduct’ <<http://www.fujitsu.com/global/about/philosophy/codeofconduct/>> accessed 10 December 2009.

without that right itself being mentioned in the code of conduct (see point 1 of Appendix 1). The most common examples of this were references made to the Universal Declaration of Human Rights (UDHR). These instances also presented me with serious challenges in coding. One such example is the ConocoPhillips 2009 code of conduct (in this example, the ‘code of conduct’ was made up of four documents – ConocoPhillips’ Code of Ethics Policy, Code of Ethics Booklet, Human Rights Statement and Health and Safety Policy), which states that the company will conduct its business ‘consistent with the human rights philosophy expressed in’<sup>41</sup> the UDHR. The code of conduct then vows to protect the employees’ right to collective bargaining, but does not explicitly stipulate that employees will be required to work only a (reasonable and) limited amount of hours and that they are entitled to weekly rest – the last two of the rights analysed in this study.

It was thus a challenge to grade the ConocoPhillips 2009 code of conduct in the categories of ‘working hours’ and ‘weekly rest’, as I had to determine whether the reference to UDHR in the code carries any significance here. In other words, does article 24 of UDHR (‘Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay’) protect the rights to limited working hours and the right to weekly rest? With regard to the right to limited working hours, it is obvious from the wording of the article that it does. Determining whether the article protects the right to weekly rest is not as straightforward. In trying to settle on a conclusive interpretation of UDHR, I sought guidance from ‘conventions which elaborate work-related rights’, as suggested by Craven.<sup>42</sup>

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<sup>41</sup> eg ConocoPhillips ‘Human Rights Position’ <<http://www.conocophillips.com/EN/susdev/policies/humanrightsposition/Pages/index.aspx>> accessed 15 December 2009.

<sup>42</sup> M Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Clarendon Press 1998) 7.

Among the most prominent of such conventions is the International Covenant on Economic, Social and Cultural Rights (ICESCR). Along with the International Covenant on Civil and Political Rights, it ‘expand[s] and define[s] its [the UDHR’s] terms and establish[es] legal obligations to which States may bind themselves’.<sup>43</sup> Its provisions, and their reading by the Committee on Economic, Social and Cultural Rights, the body established by the ICESCR to oversee its implementation, are therefore a useful source of interpretation of UDHR.

This is particularly true of article 7 of ICESCR, which repeats, almost verbatim, article 24 of UDHR (‘The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular: ... (d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays’).

In interpreting this article, the Committee on Economic, Social and Cultural Rights has relied on ILO standards in the field, including the Weekly Rest (Industry) Convention of 1921 (No. 14), and the Weekly Rest (Commerce and Offices) Convention of 1957 (no. 106).<sup>44</sup> By referring to these conventions, the Committee ‘seems to imply that...employees, whether in public or private undertakings, shall enjoy a period of rest of at least twenty-four consecutive hours in every seven days.’<sup>45</sup> Therefore, we can surmise that the right to weekly rest is also a constituent part of article 24 of the UDHR.

Referring back to my original example, ConocoPhillips’ code of conduct was accordingly given a ‘2’ rating in the categories of weekly rest and working hours, as

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<sup>43</sup> G Alfredsson and A Eide, *The Universal Declaration of Human Rights: a common standard of achievement* (Martinus Nijhoff 1999) 502.

<sup>44</sup> United Nations Committee on Economic, Social and Cultural Rights (UNCESCR) ‘Reporting Guidelines Supp. (No. 4), Annex IV’ (1990) E/C.12/1990/8, 90 cited in Craven (n 42), 244.

<sup>45</sup> *ibid* 245.

the code references UDHR, which protects the right to weekly rest and the right to work limited hours, while not explicitly protecting these two rights for employees.

Another example comes from Aviva's code of conduct. Its Corporate Social Responsibility policy claims Aviva is 'guided in the conduct of its business'<sup>46</sup> by the UDHR. Nevertheless, this presented me with another conundrum in coding, as it is not immediately clear whether UDHR prohibits child labour. Again, it is secondary sources that provide a more definitive answer; the UN General Assembly has in several resolutions, including resolution 50/153 of 21 December 1995, referred to 'extreme forms of child labour, such as forced labour [and] bonded labour' as forms of slavery,<sup>47</sup> which is proscribed by article 4 of the UDHR.<sup>48</sup> Thus, Aviva's code of conduct was awarded a '2' rating in the category of child labour.

A code received a '**3**' rating with regard to a particular labour rights category if: it specifically protected a right without elaborating on it or without referencing international source documents; or, if it explicitly protected a right (without elaborating on it) and referenced international law but qualified the statement by invoking national, local or other law (see point 1 of Appendix 1). It was felt that a reference to a specific right protected in international law merits a higher grade than a reference to an international source document without particular reference to a right. An example comes from Ericsson's 2009 code of conduct. It proclaims that employees are 'free to join or not to join trade unions or similar external

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<sup>46</sup> 'Aviva Corporate Social Responsibility Policy'  
<[http://www.aviva.com/library/pdfs/cr/csr\\_policy.pdf](http://www.aviva.com/library/pdfs/cr/csr_policy.pdf)> accessed 20 December 2009.

<sup>47</sup> UN General Assembly Res 50/153 (21 December 1995) A/RES/50/153.

<sup>48</sup> Alfredsson and Eide (n 43) 109.

representative organizations’, but only ‘as far as any relevant laws allow’.<sup>49</sup> In accordance with the coding system, this code was awarded a ‘3’+ rating in the category of freedom of association.

A **‘4’ rating** was awarded if a code specifically mentioned a right (but without more substantive detail) while invoking or referencing international source documents without qualification by national, local or other law (see point 1 of Appendix 1). Total’s 2003 code of conduct provides us with an illustration. It provides that Total ‘adheres to the principles of the Universal Declaration of Human Rights, the principles of the International Labour Organization and, in particular, to those concerning the use of child labour’.<sup>50</sup> Thus, Total’s code of conduct received a ‘4’ rating regarding freedom from child labour.

It should be noted that the grade given to each right in each code reflects the degree of influence (or incorporation) of international law. It does *not* pass normative judgment on the degree to which a right is substantively developed, even if it is in line with international law. An example may prove to be illustrative: codes which directly cited international documents as sources of a particular right were given a ‘4’ rating, even though the right was not substantively developed; codes which developed the right in detail, citing specific aspects of it, but did not cite international documents, were given a ‘3’+ rating. These rankings (from ‘0’ – ‘4’) are along an ordinal scale.

Finally, and importantly, any detailed provisions that pertain to a right can cause the grade to be adjusted and decimal points to be earned, up to a **maximum ‘5’ rating** in a category (a category can similarly be ‘upgraded’ from a ‘3’ rating to a ‘4’

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<sup>49</sup> ‘Ericsson Code of Conduct’

<[http://www.ericsson.com/ericsson/corporate\\_responsibility/doc/codeofconduct.pdf](http://www.ericsson.com/ericsson/corporate_responsibility/doc/codeofconduct.pdf)> accessed 10 December 2009.

<sup>50</sup> ‘Total Code of Conduct’ <[www.total.com](http://www.total.com)> via <[web.archive.org](http://web.archive.org)> accessed 24 December 2009.

rating). Here, the codes have been graded continuously. Namely, the rights in question have been broken down into components. Decimal points are awarded for each component included in a code.<sup>51</sup>

The content of these rights and the manner in which they were coded are fleshed out in more detail in the next section, with reference to the Model for Analysing Codes. I will elaborate on this grading system, and the elements of a ‘5’ grade rather than a ‘4’ grade, by detailed reference to one of the rights examined and graded – the freedom of association. I will hereby also illustrate some of the challenges that were inherent in measuring the influence of international labour standards by coding the codes of conduct and IFAs.

*Freedom of association, the right to organise and the right to collective bargaining*

The scope of freedom of association, as formulated by international treaty law and the jurisprudence of supervisory bodies, is very large. Its development in international law can be traced back to its inclusion in the ILO’s Constitution, which proclaims it to be ‘of special and urgent importance’. Subsequently, documents produced by key ILO supervisory bodies, including comments by the Committee of Experts on the Application of Conventions and Recommendations (CEACR), the General Surveys produced on an annual basis by CEACR, as well as the ‘Digest of decisions’ of the Committee on Freedom of Association (CFA), have provided direction on the scope

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<sup>51</sup> I decided the amount of decimal points to be awarded for each component by analysing its perceived importance in ILO jurisprudence on the exercise of the right in question. For instance, when grading codes on freedom from child labour, I identified two of its components as meriting additional points for their inclusion in codes. Thus, 0.5 additional points were awarded to a code that included a minimum age of employment and a further 0.5 additional points were awarded to a code that included provisions stipulating that children under 18 shall not perform hazardous work. In that instance, I determined that these two components of freedom from child labour have equal importance. Nonetheless, it should be noted that the amounts to be awarded are an approximation intended to reflect the importance of each component to the exercise of a right. For a detailed breakdown of how the components of each right were graded, please see Appendix 1.

and content of the right. Distilling the ‘essence’ of the right – those of its components that we should use to grade codes of conduct in the Model for Analysing Codes– was a challenging and complex task.<sup>52</sup> In doing so, I tried to place a particular emphasis on those aspects of the right that would pertain to a corporation (or, conversely, whose protection does not depend overwhelmingly on the state). For each of these essential components, I awarded an additional 0.2 points to the grade between 3 and 4, or between 4 and 5.

The two most basic components of the right to freedom of association are the right to form and the right to join trade unions (see points 1.1.a and 1.1.b of Appendix 1).<sup>53</sup> The supervisory bodies of the ILO, including CFA and CEACR, have ‘vigorously defended’<sup>54</sup> these two components of the right. They have stated, for example, that a requirement for a minimum number of workers for the creation of a trade union may be incompatible with the Convention Concerning Freedom of Association and Protection of the Right to Organise (Convention no. 87).<sup>55</sup> These two components were therefore included in the Model for Analysing Codes.

Another component of the right included in the Model for Analysing Codes falls under the heading of *administration and activities of organisations* (see point 1.1.c of Appendix 1).<sup>56</sup> Trade unions have the right to draw up their own rules and to

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<sup>52</sup> The principal guidance in this task was provided by N Rubin, *The International Labour Code: Law, Practice and Jurisprudence* (CUP 2005), which comprehensively presents the canon of international labour law.

<sup>53</sup> Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) art 23(4).

<sup>54</sup> L Swepston, ‘Human Rights Law and Freedom of Association: Development through ILO Supervision’ (1998) 137(2) *International Labour Review* 169.

<sup>55</sup> ILO, *Freedom of Association and Collective Bargaining: General Survey of the Reports on the Freedom of Association and the Right to Organise Convention (No. 87), 1948 and the Right to Organise and Collective Bargaining Convention (No. 98), 1949, International Labour Conference, 81<sup>st</sup> Session, 1994* (ILO 1994).

<sup>56</sup> Rubin, *The International Labour Code* (n 52) 189-202.

be independent of employer interference, while their leaders should have access to the workplace as well as the right to be politically active outside it.<sup>57</sup>

A more controversial aspect of the right to freedom of association is the *right to strike* (see point 1.1.d of Appendix 1). Nevertheless, despite the absence of ‘express provisions on the right to strike in the basic texts’,<sup>58</sup> along with the CFA, the CEACR has reaffirmed ‘its basic position that the right to strike is an intrinsic corollary of the right to organise protected by Convention no. 87’.<sup>59</sup> I therefore decided to incorporate the right to strike in the Model for Analysing Codes.

The final element included in the Model for Analysing Codes is an aspect of the right to organise, which straddles Conventions no. 87 and no. 98. This is *adequate protection of workers against anti-union discrimination* (see point 1.1.e of Appendix 1), which ‘constitutes an essential aspect of freedom of association’.<sup>60</sup>

Some of the aspects of freedom of association not explicitly incorporated in the Model for Analysing Codes include: the right to personal security of trade unionists (under the model, this is covered by the right to non-discrimination (of trade union officials)); the question of persons covered by freedom of association (whether public employees should have the right to establish occupational organisations) and the issue of exercising this right in special situations during states of emergency. These were excluded both because they were thought (in practice) to create

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<sup>57</sup> *Chile (Case No 1194)* (12 April 1983) Report of the Committee on Freedom of Association No 230 (Vol LXVI 1983 Series B No 3), para 291.

<sup>58</sup> ILO *General Survey* (n 55) para 145.

<sup>59</sup> ILO *General Survey* (n 55) para 151.

<sup>60</sup> ILO *General Survey* (n 55) para 202; see also Convention Concerning the Application of the Principles of the Right to Organise and to Bargain Collectively (No 98) (adopted 1 July 1949, entered into force 18 July 1951) 96 UNTS 257 (ILO No 98), art 1. While the particular aspect of it included in Appendix 1 (the Model for Analysing Codes) – the adequate protection of workers against anti-union discrimination – is protected in Convention No 98, it was considered under the freedom of association category due to the desire to examine the extent of the proliferation of the right to collective bargaining separately.

obligations for the state rather than for the corporations, and because of the desire to have the Model for Analysing Codes be a manageable and practical tool for evaluating corporate codes of conduct.

Let us re-examine an example: if a code refers to the right to freedom of association and to a relevant international document or to international law, it will get a '4' rating. Where, however, the code referenced an international instrument and provided a more detailed definition of the right – such as ExxonMobil's 2009 code of conduct which 'recognizes and respects its employees' right to join associations',<sup>61</sup> its rating for that category was increased by two decimal points to 4.2 (the more detailed aspects of the right correspond to international standards - the right to join trade unions is a key provision in ILO Convention no. 87 Concerning the Freedom of Association and the Right to Organise (1948)).

The right to collective bargaining, as defined by the practice of the ILO supervisory bodies, contains three crucial aspects (see point 1.2 of Appendix 1). The first is that collective bargaining should be *voluntary* without recourse to 'measures of compulsion' which would 'alter the voluntary nature of such bargaining'.<sup>62</sup> The second is that employees can choose *representative organisations* for the purpose of engaging in collective bargaining, which the employers have to recognise. The third is the obligation of public authorities to *promote* collective bargaining. However, the latter does not create significant obligations for employers; therefore, only the former two elements of the right of collective bargaining – its voluntariness and the

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<sup>61</sup> 'ExxonMobil Statement on Labor and the Workplace'  
<[http://hoe.exxonmobil.com/Corporate/community\\_rights\\_labor.aspx](http://hoe.exxonmobil.com/Corporate/community_rights_labor.aspx)> accessed 22 December 2009.

<sup>62</sup> ILO, *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* (Fifth (revised) ed, ILO 2006), para 926.

obligation to recognize representative organisations – were included in the Model for Analysing Codes.

Following the demonstration of how freedom of association and the right to collective bargaining were graded through the Model for Analysing Codes, I will very briefly present how the Model was designed to grade some of the other rights.

#### *Freedom from child labour and forced labour*

Freedom from child labour was defined through two key ILO Conventions (no. 138 and no. 182)<sup>63</sup> and subsequent jurisprudence of ILO bodies. Generally, ‘ILO instruments in this field cover work which is unacceptable for young people below a certain age’.<sup>64</sup> The first crucial component of the freedom from child labour is *the age at which any economic activity is inappropriate* (see point 1.4.a of Appendix 1). ILO standards have set this minimum age between 12 (for some kinds of non-permanent work) and 15 (which is what Convention no. 138 specifies). The second is the *age at which children can undertake the ‘worst forms’ of labour* (see point 1.4.b of Appendix 1). This distinction between regular and dangerous or potentially exploitative work recognises that the nature of the activity determines, to a certain extent, the age at which it might be appropriate to carry that activity out. ILO Convention no. 182 has defined the lower limit for this type of labour as 18.

Freedom from forced labour consists of two principal components. The first is that labour will be considered to be forced if it is not performed *voluntarily* (see point

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<sup>63</sup> Convention Concerning Minimum Age for Admission to Employment (No 138) (adopted 26 June 1973, entered into force 19 June 1976) 1015 UNTS 297 (ILO No 138); Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (No 182) (adopted 17 June 1999, entered into force 19 November 2000) 2133 UNTS 161 (ILO No 182).

<sup>64</sup> ILO, *General Survey of the Reports Relating to Convention No. 138 and Recommendation No. 146 Concerning Minimum Age*, International Labour Conference, 67<sup>th</sup> Session, 1981 (ILO 1981).

1.3.a of Appendix 1).<sup>65</sup> Aside from forced, bonded or compulsory labour, for the purposes of this study, the proscription of prison labour is also a relevant standard here. While prison labour is not necessarily considered involuntary, ‘the persons concerned should not be placed at the disposal of private individuals, companies or associations’.<sup>66</sup> The second component is that forced labour has to be extracted under the *menace of a penalty* (see point 1.3.b of Appendix 1). The two criteria overlap in situations where workers are required to hand over ‘deposits’, valuables of their identification papers with their employer, and are therefore included in the Model for Analysing Codes.<sup>67</sup>

#### *Non-discrimination*

The next right examined is the freedom from discrimination. The right protected, by ILO Conventions 100 and 111 can be broken down into the following elements:

- (i) *The grounds on which the difference in treatment is based*; as well as
- (ii) *An objective result of this difference in treatment*, in particular through the reference to the ‘effect’ of a distinction, exclusion or preference (see point 1.5. of Appendix 1).<sup>68</sup>

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<sup>65</sup> Convention Concerning Forced or Compulsory Labour (No 29) (adopted 28 June 1930, entered into force 1 May 1932) 39 UNTS 55 (ILO No 29), art 2.

<sup>66</sup> ILO, *General Survey of the Reports Relating to the Forced Labour Convention, 1930 (No. 29), and the Abolition of Forced Labour Convention, 1957 (No. 105) International Labour Conference, 65<sup>th</sup> Session, 1979* (ILO 1979), para 35.

<sup>67</sup> ILO, *General Survey of the Reports Relating to the Forced Labour Convention, 1930 (No. 29), and the Abolition of Forced Labour Convention, 1957 (No. 105) International Labour Conference, 96<sup>th</sup> Session, 2007* (ILO 2007), para 37-39; ILO, *Combating Forced Labour: A Handbook for Employers and Business* (ILO 2008), 9.

<sup>68</sup> ILO, *Equality in Employment and Occupation: General Survey of the Committee of Experts on the Application of Conventions and Recommendations International Labour Conference, 75<sup>th</sup> Session, 1988* (ILO 1988), para 26-28; also see ILO, *Equality in Employment and Occupation: Special Survey on Equality in Employment and Occupation in respect of Convention No. 111 International Labour Conference, 83rd Session, 1996* (ILO 1996).

The grounds according to which discrimination is prohibited in ILO conventions are fairly restrictive; UN standards, UN monitoring mechanisms such as the Human Rights Committee and even ILO supervisory mechanisms<sup>69</sup> are more expansive and consider grounds such as sexual orientation and age. This broader definition of discrimination reflected more appropriately the character of the right under international law, which is why I used it in the Model for Analysing Codes to hold corporate codes of conduct to that standard.

### *Occupational health and safety*

Although the right to occupational health and safety was not included in ILO's list of fundamental rights and principles, it is very well developed right in international law. Where the content of most rights has been developed through the jurisprudence of monitoring bodies, including the Human Rights Committee, or courts such as the European Court of Human Rights, health and safety has been defined to a very high degree of detail through numerous ILO conventions.

A difficulty presented here is that the great majority of the obligations created by this 'sea' of norms are imposed on treaty signatories and ILO member states, rather than on employers. With this in mind, it was difficult to select the most important principles of the right for inclusion in the Model for Analysing Codes, while filtering out the less pertinent ones. I decided to focus on instruments that pertain to the widest possible number of workers, while excluding instruments that apply to specific categories of workers, such as workers exposed to radiation (ILO Convention no. 115), because of the diverse nature of companies examined in the study.

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<sup>69</sup> *Special Survey 1996* (n 68) para 277.

Using this criterion, I broke the right down into five clusters of norms derived from ILO conventions, recommendations and jurisprudence. The first lays out a basic requirement that employers should ensure that *workplaces, machinery, equipment and processes under their control are safe and without risk to health*. Further employer obligations (that substances are not risky; adequate clothing and equipment is provided; and so on) are presented in Appendix 1. An application of these basic elements of health and safety to commercial offices - that premises must be kept clean, have good ventilation, lighting, temperature, etc. – is also included in the first element of this right (see point 1.6.a.(ii) of Appendix 1).

The second cluster of employer obligations relates to the *organisation of work and the physical and mental health of workers* (see point 1.6.b of Appendix 1). Employers should: ensure work is organised with respect to work hours; take all practicable measures with a view to eliminating excessive fatigue; keep abreast of scientific knowledge on health and safety; appoint workers' safety delegates and health committees. The third focuses around *Occupational Health Services* (see point 1.6.c of Appendix 1). Employers should cooperate in the implementation of measures relating to occupational health services, while the occupational health services of a national corporation or a MNC with more than one establishment should provide the highest standard of services.

Fourth, employers have a duty *to make their health and safety policies known to workers and to verify their implementation* through monitoring, audits and other methods (see point 1.6.d of Appendix 1). Finally, the fifth responsibility of employers is to *consult with workers' safety delegates and committees on health and safety measures*, which means allowing them access to all parts of workplace and giving workers and their delegates protection from dismissal if they complain of a breach of

statutory requirements or an inadequacy in the measures taken by the employers in respect of health and safety (see point 1.6.e of Appendix 1).

### *Working hours*

Employers' responsibilities with regard to the right to limited and reasonable working hours were divided into four parts. The first was the *maximum number of hours* a worker can work during a day and during the week (see point 1.7.a of Appendix 1). This was defined with regard to most industries, such as transport, mining and so on, by the very first ILO convention (Convention no. 1 on Hours of Work (Industry)) as being no more than eight hours a day and forty-eight hours a week. This definition was later expanded (by Convention no. 30) to cover employees working in commerce and offices. While there are exceptions when this limitation can be exceeded – in cases of accidents, for example – this standard is the internationally accepted one. An attempt to lower the weekly limit to forty hours a week stalled since the relevant convention (Convention no. 47) has been ratified by only 14 countries.

The second principal set of employers' responsibilities is to *notify employees of the hours at which work begins and ends*, and of the rest intervals (see point 1.7.b of Appendix 1). The third element of this right included in the Model for Analysing Codes is that employers have to *maintain wages when reducing hours* (see point 1.7.c of Appendix 1). Finally, the fourth employer obligation is to deem all *work excess of normal hours as overtime*, which should be paid more than regular work (see point 1.7.d of Appendix 1).

### *Weekly rest*

The right to weekly rest encapsulates three key duties on the parts of employers. The first is to grant employees to an uninterrupted *weekly rest period of not less than 24 hours over a week* (see point 1.8.a of Appendix 1). The second is that there *should be no reduction in wages if these measures on weekly rest are implemented* (see point 1.8.b of Appendix 1). Finally, the employer *must make known the hours of weekly rest* where such rest is given to staff collectively, or the system of workers' rest where the rest period is not granted to the whole of the staff collectively (see point 1.8.c of Appendix 1).

Having used part I to present the scope and methodology used, in part II I will present the results of the content analysis of codes.

## **II. RESULTS OF THE STUDY**

### **II.A OVERALL RESULTS – CODES OF CONDUCT**

Comparison of the corporate codes of conduct between 2003 and 2009 demonstrates clearly that there is *a general upward trend of the presence of international human rights and international labour law norms in the codes*. The value of the mean of the eight fundamental rights graded has grown significantly between 2003 and 2009 (from 1.54 to 2.75). In other words, *codes of the companies analysed changed from 2003 to 2009 by including significantly stronger commitments to labour rights and the international instruments that recognise them*.

This result reflects the significant changes that occurred in the codes of corporations. An example is the change in the codes of conduct of ConocoPhillips, an American corporation that operates in the energy industry. Whereas the company's *Code of Ethics Policy* and *Code of Ethics Booklet* from 2003 do not reference any

international standards but merely claim that the company ‘respects human rights’, the 2009 codes (including a newly crafted *Human Rights Position*) state that ConocoPhillips will conduct its business ‘consistent with the human rights philosophy expressed in’<sup>70</sup> the Universal Declaration on Human Rights and the Declaration.

Consistently with the Model for Analysing Codes, rights such as freedom from forced labour and the right to limited and reasonable working hours – not explicitly mentioned in ConocoPhillips’ *Human Rights Position* – were accordingly graded with a ‘2’ rating in 2009, rather than the lower ratings they received in 2003. At the same time, freedom from discrimination, accorded a ‘3’ rating in 2003 (when ConocoPhillips code of conduct proclaimed that ‘we are firmly committed to providing equal opportunity in all aspects of employment’)<sup>71</sup> was upgraded to a ‘4’ rating when this commitment was supplemented by the pledge to conduct its business consistently with the UDHR and the Declaration.

Another corporation that changed its code of conduct to incorporate international standards is Citigroup. Whereas its 2003 *Code of Conduct* makes no reference to international standards and does not provide for the protection of any core rights but for the prohibition of discrimination, the 2009 *Code of Conduct* claims that the company is ‘guided by principles such as those in the ILO Core Conventions regarding child labor and forced labor, freedom of association for our employees and the right to organize and bargain collectively, and equal pay and nondiscrimination in our workforce.’<sup>72</sup> Here, again, the grades of categories such as freedom of

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<sup>70</sup> ‘ConocoPhillips Human Rights Position’ <[www.conocophillips.com](http://www.conocophillips.com)> accessed 23 December 2009.

<sup>71</sup> ‘ConocoPhillips Code of Business Conduct and Ethics’ <[www.conocophillips.com](http://www.conocophillips.com)> accessed 23 December 2009.

<sup>72</sup> ‘Citigroup, Code of Conduct’ <[www.citigroup.com](http://www.citigroup.com)> accessed 20 December 2009.

association, child labour and others were upgraded from ‘0’ (these rights were not protected at all under the 2003 *Code of Conduct*) to ‘4’.

I will now analyse the results for each particular category (the results are presented in abbreviated form in Table 1 below and in detail in Appendix 4).

**TABLE 1**

<b>Year and type of instrument</b>	<b>2003 Codes (28 Codes)</b>	<b>2009 Codes (28 Codes)</b>	<b>Change from 2003 to 2009</b>	<b>IFAs</b>
<b>Category</b>				
Overall score	1.54	2.75	+1.21	3.18
Non-discrimination	2.51	3.93	+1.42	3.84
Freedom from forced labour	1.70	3.34	+1.64	3.65
Freedom from child labour	1.91	3.48	+1.57	3.67
Freedom of Association	1.53	2.66	+1.13	4.16
Right to collective bargaining	1.18	2.47	+1.29	3.78
Right to health and safety	2.15	3.13	+0.98	2.85
Right to limited working hours	0.75	1.80	+1.05	2.19
Right to weekly rest	0.57	1.44	+0.87	1.34

*Non-discrimination*

Despite having the highest initial mean among the 28 codes analysed in 2003 (2.51), the *value of the mean for this category rose significantly between 2003 and 2009* (by

1.42 to 3.93 among the same 28 codes in 2009 and by slightly less (1.32) – to 3.83 - among the full 42 codes in 2009).<sup>73</sup>

A comparison of Ericsson's *Code of Conduct* from 2003 and 2009 provides a good illustration of a change in the way that corporations treat discrimination. In the earlier version it was stated,

No worker should be discriminated against because of age, race, gender, religion, sexual orientation, marital or maternity status, political opinion or ethnic background. We recommend that all workers with the same experience and qualifications receive equal pay for equal work.<sup>74</sup>

The code was given a '3.5' rating; the basic '3', in accordance to the *Coding system* above, is because discrimination is proscribed explicitly (without reference to international standards); an additional decimal point was given for each ground included beyond the international standard used as a benchmark (ILO Convention no. 111), which defined discrimination as 'any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin'.<sup>75</sup> Therefore, a decimal point each was awarded for proscribing discrimination on the grounds of age, sexual orientation, marital or maternity status, ethnic background, and a further additional decimal point was awarded for the provision in the code that recommends that all workers with the same experience and qualifications receive equal pay for equal work (this is in line with the provisions of Convention no. 100 that oblige employers to provided equal remuneration for equal work by men and women). The final grade of '3.5' was achieved when a decimal point was deducted for not including 'social origin' in the list of grounds on which

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<sup>73</sup> For a full account of the 42 codes analysed from 2009 please see above (n 29).

<sup>74</sup> 'Ericsson Code of Conduct' (n 49).

<sup>75</sup> Convention Concerning Discrimination in Respect of Employment and Occupation (No 111) (adopted 25 June 1958, entered into force 15 June 1960) 362 UNTS 31 (ILO No 111), art 1(a).

discrimination is prohibited.

The latter version of Ericsson's Code (from 2009) explicitly notes that it is based on the Universal Declaration on Human Rights and the ILO Declaration and expands the provision from 2003 to also prohibit discrimination on the grounds of 'nationality...disability...social origin, social status...union membership, and any other characteristic'.<sup>76</sup> Thus, the Ericsson 2009 *Code of Conduct* was granted a rating of 5 in the category of non-discrimination.

This example is atypical in one small respect. Both versions of Ericsson's Code prohibit discrimination on the grounds of 'political opinion', in line with ILO Convention no. 111. The inclusion of this ground is exceedingly unusual; in fact, it is the only code of those analysed where this ground is included. The same is true of discrimination on the grounds of 'social origin', which is commonly not included in the codes that comprise the sample.

#### *Child labour and forced labour*

The presence of provisions protecting freedom from forced labour and freedom from child labour was increased between 2003 and 2009 in codes by (almost) the same extent as non-discrimination. The value of the mean for forced labour rose by 1.64 (from 1.70 to 3.34 among the 28 matching codes from 2003 and 2009; a similar increase (from 1.70 to 3.32) is noted if we look at all 42 codes from 2009).

During the same period the value of the mean for child labour increased by 1.57 (from 1.91 to 3.48 among the 28 matching codes from 2003 and 2009; a slightly smaller increase (from 1.91 to 3.39) occurs if we analyse all 42 codes from 2009). Thus, *companies' codes in 2009 included a significantly higher degree of protection*

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<sup>76</sup> 'Ericsson Code of Conduct' (n 49).

*of the freedom from forced labour and the freedom from child labour than same companies' codes in 2003.*

A sizeable proportion of corporations have adopted the ILO standards for child labour (discussed above). Motorola's *Human Rights Policy* introduced an explicit reference to ILO standards by 2009:

Our hiring practices conform with the International Labor Organization conventions for minimum age (C138) and child labor (C182). Employees under the age of 18 should not perform hazardous work and should be restricted from night work if it interferes with educational needs.<sup>77</sup>

This code was given a '4.5' rating. The basic '4' rating was because the provision proscribes child labour and references international standards. A further half a point (.5) was awarded because the provision provides a minimum age (18) under which no one should be employed to do hazardous work and which corresponds with international law (Convention no. 182).

A distinction can be made between the provision in Motorola's code of conduct and the one found in Pepsi's *Human Rights Code*. The latter proclaims 'We do not use child labor', which is defined as: 'no person under the age of 15 years old shall be employed for any purpose, either full time or part time, including paid or unpaid work.'<sup>78</sup> In this case, the code was given a '3.5' rating for the category of child labour. The category received a basic '3' rating because it explicitly proscribed child labour. Additionally, a further half a point (.5) was granted because the minimum age in the provision corresponds to the minimum age established by international standards (notably ILO Convention no. 138).

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<sup>77</sup> 'Motorola Human Rights Policy' <[www.motorola.com](http://www.motorola.com)> accessed 18 December 2009.

<sup>78</sup> 'Pepsi Human Rights Code' <[www.pepsi.com](http://www.pepsi.com)> accessed 19 December 2009.

The inclusion of international standards for forced labour is not, however, accompanied by the same level of precision as that found in provisions proscribing child labour. UBS's 2009 *Responsible Supply Chain Standard* proclaims, 'Suppliers shall not use any form of forced, imprisoned, indentured, bonded or involuntary labor.'<sup>79</sup> This code was awarded a '4.5' rating in the category of forced labour. A basic '4' rating was granted because the *Responsible Supply Chain Standard* references the UDHR and the ILO Declaration. A further half point (.5) was added because the code proscribes not merely forced, but also prison, indentured, bonded or involuntary labour, in line with international law (ILO Conventions no. 29 and no. 105).

Nevertheless, the rise in the value of the mean between 2003 and 2009 reflects the increase in the number of corporations who have pledged not to use forced labour.

#### *Freedom of association and the right to collective bargaining*

The value of the mean for freedom of association rose by 1.13 (from 1.53 to 2.66 among the matching codes form 2003 and 2009; a slightly bigger increase (from 1.53 to 2.74) is noted if we analyse all 42 codes from 2009). In the same period the value of the mean for the right to collective bargaining rose by 1.29 (from 1.18 to 2.47 among the matching codes form 2003 and 2009; a slightly smaller increase (from 1.18 to 2.27) is noted if we analyse all 42 codes from 2009). *Thus, freedom of association and the right to collective bargaining are among the least incorporated labour rights in the codes examined.*

The freedom of association was qualified, in many instances, by national law. A good example comes from UBS's *Responsible Supply Chain Standard*, which

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<sup>79</sup> 'UBS Responsible Supply Chain Standard' <[www.ubs.com](http://www.ubs.com)> accessed 14 December 2009.

demands that suppliers ‘recognize and respect the right of their employees to freely associate and collectively bargain within the boundaries of the applicable law’.<sup>80</sup> Therefore, in this instance, UBS’s code of conduct was given a ‘3’ rating in the category of freedom of association.

Skanska’s *Code of Conduct* is another case in point, which proclaims: ‘as far as any relevant laws allow, all employees are free to form and to join or not to join trade unions or similar external representative organizations and to bargain collectively.’<sup>81</sup> Skanska’s approach of treating the right to bargain collectively as a component of the freedom of association is commonplace in the codes analysed. Otherwise, the right was most commonly ignored.

The lack of prominence of these two rights cannot be explained by reference to these results alone. Nevertheless, the results open up an important issue for further inquiry via qualitative research. The central status that freedom of association and the right to collective bargaining play among the core labour standards is evidenced by the amount of attention dedicated to it within the body of international labour law (witness Volume I of the ‘Code of International Labour Law’, over half of which is dedicated to these two rights).<sup>82</sup> The Declaration of Philadelphia reaffirms that the freedom of association is ‘essential to sustained progress’ and that it is one of the fundamental principles upon which the ILO is based. Some international union leaders have argued: ‘if you had a real freedom of association in practice, other things would be taken care of as there would be no child labour, discrimination.’<sup>83</sup>

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<sup>80</sup> *ibid.*

<sup>81</sup> ‘Skanska, Code of Conduct’ <group.skanska.com> accessed 20 December 2009.

<sup>82</sup> Rubin, *The International Labour Code* (n 52).

<sup>83</sup> Interview with head of international trade union federation that is signatory to international framework agreements, and one of the founders of MSI-A (Brussels, 10 May 2013).

The importance of the freedom of association, then, is not matched by the prominence afforded to it in corporate codes of conduct. The fear of union activity, present in corporate and legal cultures of some of the corporations examined as well as their home countries and host countries is possibly the driving force behind the omission of freedom of association from many of the codes, such as Japan Tobacco's and McDonald's codes of conduct from 2009. Further evidence for this may be inferred from the tendency to omit 'political opinion' as a ground for discrimination. This possibility will be tested in the course of the case studies presented in the following chapters.

#### *Health and safety*

The most developed right in the canon of labour rights examined in this study is incorporated in almost every code of conduct examined. The *value of the mean for health and safety rose by less than a point* (from 2.15 to 3.13 among the 28 matching codes from 2003 and 2009; an almost identical increase (from 2.15 to 3.15) is noted if we compare the 28 codes from 2003 to all 42 codes from 2009).

*Despite having a value of the mean of 3.13 in 2009, the influence of international law on codes of conduct in the sphere of health and safety is fairly small.* Indeed, while ten codes scored '4' or higher on freedom of association (meaning they not only protected it explicitly, but also referenced international instruments where this right is protected), only five codes scored '4' or higher on health and safety. Moreover, *none of these codes* referenced any international instruments (such as ILO Conventions no. 155 or no. 148 on noise, pollution and vibration) as international standards that would guide the company in the implementation of the law. Rather, where codes scored '4' or more, it was because

they referenced instruments such as the OECD Guidelines, which oblige employers to follow health and safety rules and regulations.

A good example is L’Oreal’s code of conduct (including its *Health and Safety Policy*), which was awarded a score of ‘3.2’. The basic score was a ‘3’ because the code explicitly proclaimed the right to occupational health and safety, stating that all employees ‘have a right to a healthy, safe and secure working environment.’<sup>84</sup> A further two decimal points were added because the policy requires L’Oreal to perform ‘internal and external SH&E audits’<sup>85</sup>, in line with ILO Recommendation no. 164.

#### *Working hours and weekly rest*

The presence of the right to limited working hours and the right to weekly rest was increased between 2003 and 2009. The *value of the mean for working hours rose by 1.05* (from 0.75 to 1.80 among the 28 matching codes from 2003 and 2009; a slightly bigger increase of 1.16 (from 0.75 to 1.91) is noted if we look at all 42 codes from 2009).

During the same period the *value of the mean for weekly rest increased by 0.87* (from 0.57 to 1.44 among the 28 matching codes from 2003 and 2009; a slightly smaller increase of 0.82 (from 0.57 to 1.39) occurs if we compare the 28 codes from 2003 to all 42 codes from 2009).

There were even fewer instances of either of these rights scoring ‘4’ or more than with the right to occupational health and safety (three in total, for both rights, among all seventy codes analysed). Where the two rights did not score ‘0’, the great

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<sup>84</sup> ‘L’Oreal, Health and Safety Policy’ <[www.loreal.com](http://www.loreal.com)> accessed 18 December 2009.

<sup>85</sup> *ibid.*

majority of scores were a '2', because of the interpretation of the Universal Declaration of Human Rights as inclusive of these two rights.

As with the right to health and safety, *none of the codes* examined referenced any international instruments (such as ILO Conventions no. 1 or no. 106 on weekly rest) as international standards that would guide the company in the implementation of the law.

The fact that no codes among the seventy examined contain any reference to international instruments that protect the right to occupational health and safety, the right to limited working hours and the right to weekly rest would seem to indicate these rights are different from the four 'core' rights examined above (freedom from child labour, freedom from forced labour, non-discrimination, freedom of association and the right to collective bargaining). More specifically, it would indicate that international law (whether through the process of acculturation or persuasion, or otherwise) played little part in establishing the norms of health and safety, working hours or weekly rest in codes of conduct. One possible explanation that would account for the difference in the inclusion of the four 'core' rights and the rights to occupational health and safety, limited working hours and weekly rest in codes is that the designation of these four rights as 'core' by the ILO Declaration has given them a different status reflected in corporate attitudes towards them. My qualitative research will aim to account for the difference in the scores and between these three rights and the four 'core' rights protected by the ILO Declaration.

#### *Language undertaking the obligation*

In addition to grading the codes for the way they reflect international labour standards, I also graded them for the language undertaking the obligation, which is

very important in understanding what sort of obligation the corporation considers it has adopted.

On the whole, the results show a definite trend, both in the scope and depth of the obligation according to the language in the code. Namely, the mean value of the language undertaking the obligation in the code went up by more than a full point between 2003 and 2009, from 1.38 to 2.52. This *signifies that companies are using less aspirational language and adopting firmer obligations*. A similar (though smaller) upward trend was noticed in the language signifying the nature of the company's obligation (e.g. to respect, promote, fulfil, human rights).

Ericsson's Code of Conduct provides a good example of the sort of change that a corporation can undertake. While its *Code of Conduct* from 2003 proclaims: 'We recommend that all workers with the same experience and qualifications receive equal pay for equal work', the latter version from 2009 makes what can be read as a statement of fact: 'Employees with the same qualifications, experience and performance receive equal pay for equal work.'

In other words, while the version of the Code from 2003 does nothing more than express a preference for a certain non-discriminatory action, the 2009 version proclaims that Ericsson is behaving in a certain manner. Nevertheless, there are still very few companies who express their commitments in the 'statement of fact' manner that Ericsson's 2009 Code of Conduct does.

#### *Different standards of conduct for corporations and their suppliers*

A notable feature of the sample was that some corporations had one set of codes of conduct that regulated their behaviour and another that governed the expected behaviour of their suppliers. Somewhat awkwardly, the standards adopted by the

corporations to govern their behaviour are, at times, less demanding than those imposed on their suppliers. For example, while McDonald's 2009 *Code of Conduct for Suppliers* includes a minimum age (15) below which all labour is prohibited, its *Standards of Business Conduct* does not include a similar provision.<sup>86</sup> The same is true of UBS and its *Responsible Supply Chain Standard*, which proclaims that 'suppliers shall not employ children under the age as defined by the International Labor Organization conventions', a standard not replicated in its *Human Rights Statement* and *Code of Business Conduct and Ethics* from 2009.<sup>87</sup> Other corporations' codes mostly create obligations for them alone, or for both the corporations and their suppliers.

#### *Corporations based on their country of origin*

The difference in the results based on the corporations' country of origin was negligible. The general upward trend of the presence of international human rights and international labour law norms in the codes is on a similar scale irrespective of whether the corporations originate from the United States or from Europe. The value of the mean of each of the ten variables graded (the eight fundamental rights, the nature of the obligation and language in which the obligation is undertaken) for U.S. companies grew by 1.16 between 2003 and 2009; the value of the mean for each of the ten variables graded grew by 1.01 for European companies over the same period – a very similar increase.

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<sup>86</sup> 'McDonald's Code of Conduct for Suppliers and Standards of Business Conduct' <[www.mcdonalds.com](http://www.mcdonalds.com)> accessed 9 December 2009.

<sup>87</sup> 'UBS Responsible Supply Chain Standard' (n 79); 'UBS Human Rights Statement' and 'UBS Code of Business Conduct and Ethics' <[www.ubs.com](http://www.ubs.com)> accessed 14 December 2009.

I did not measure the differences in the results between the industries that companies belong to, as the number of companies in our sample was too small to draw any conclusions (the sample included companies from a wide range of industries, including extractives, insurance, retail, food and beverage, telecommunications, tobacco, finance, infrastructure, and so on).

### *Monitoring systems*

Unlike the codes' incorporation of international labour standards, the monitoring systems specified were only given descriptive grades. However, a pattern of weak monitoring systems emerged. Namely, the great majority of codes have nothing more than superficial monitoring 'mechanisms' on paper, overseen only by a corporate compliance department or an equivalent body. According to their codes, very rarely do corporations involve other parties, including Business Support Groups, NGOs and other stakeholders, in verifying compliance with the provisions of the codes. This issue will be investigated in more detail in the succeeding chapters.

## **II.B OVERALL RESULTS - INTERNATIONAL FRAMEWORK AGREEMENTS**

The sixteen IFAs examined were signed between companies and international trade union federations. Unitising and operationalising the concept of an IFA is somewhat easier than with regard to a code of conduct. Following the adoption of a Code of Labour Practices by the International Confederation of Free Trade Unions and the International Trade Secretariats (ITSs), which stated that companies and their subcontractors must undertake to respect the core labour rights as defined by the Declaration, ITSs (which eventually transformed into Global Union Federations (GUFs)) used this Code as a reference for negotiating IFAs. By 2002, 'the term

International Framework Agreement had been adopted as a means of clearly distinguishing the negotiated agreements<sup>88</sup> from corporate codes of conduct; one of the key characteristics of an IFA is that it is negotiated between a MNC and a GUF, with respect for labour rights and workers' welfare as the principal subject (as opposed to codes of practice which are mostly unilateral and deal with a great variety of subjects).

In the course of the study, I examined all 16 codes signed by companies in the broad sample of 322 companies. This represents 13% of all (123) IFAs signed globally;<sup>89</sup> thus, the results described below can be considered to be fairly representative of the entire body of IFAs. As was mentioned above, companies have signed only one IFA and it is thus pointless to make comparisons between 2003 and 2009 versions of IFAs, as they are unchanged. In addition, the sample (sixteen IFAs) is too small to perform correlation analysis. Therefore, I have carried out simple calculations of the mean of all the categories described in the *coding system* above as a way of demonstrating the differences in the content between IFAs and codes of conduct.

#### *Freedom of association and collective bargaining*

The value of the mean for freedom of association among IFAs is 4.16, higher than the value of the mean of codes of conduct from 2009 (2.66) by a sizeable 1.50. The great majority of IFAs examined directly cite international instruments, as shown in this example from the IFA signed by EADS and the International Metalworkers

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<sup>88</sup> For more on the history of IFAs, <<http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/internationalframeworkagreement.htm>> accessed 14 March 2013.

<sup>89</sup> As of 14 February 2015, <<http://www.global-unions.org/spip.php?rubrique70>> accessed 14 February 2015.

Federation (a global union federation): ‘In accordance with ILO Conventions Nos. 87 and 98, EADS recognises the principles of freedom of association’.<sup>90</sup>

The *value of the mean for collective bargaining among IFAs is 3.78, higher than the value of the mean of codes of conduct from 2009 (2.47) by 1.31*. The IFA signed between Bosch and the International Metalworkers Federation (IMF) demonstrates the extent of the commitment to international standards: ‘Within the framework of respective legal regulations – insofar as these are in harmony with the ILO Convention no. 98 – we respect the right to collective bargaining.’<sup>91</sup> Unlike any of the codes of conduct analysed in the study, in this provision it is national law that has to be in harmony with an international standard, rather than the vice-versa.

#### *Forced labour and child labour*

The value of the mean for forced labour among IFAs is 3.67, higher than the value of the mean for codes of conduct from 2009 (3.34) by only 0.33. For child labour, the difference between IFAs (value of the mean: 3.65) and codes of conduct (value of the mean from 2009: 3.48) is also small (0.17).

The IFA signed between Lafarge and the International Federation of Building and Wood Workers (IFBWW), the International Federation of Chemical, Energy, Mine and General Workers’ Unions (ICEM) and the World Federation of Building and Woodworkers Unions (WFBW) is in harmony with the international standards laid out by the coding system:

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<sup>90</sup> ‘International Framework Agreement between the European Aeronautic Defence and Space Company (EADS) and the European Works Council of EADS’ <[www.industrialunion.org/sites/default/files/uploads/documents/GFAs/EADS/eads-gfa-english.pdf](http://www.industrialunion.org/sites/default/files/uploads/documents/GFAs/EADS/eads-gfa-english.pdf)> accessed 21 February 2015.

<sup>91</sup> ‘Basic Principles of Social Responsibility at Bosch’ <[www.industrialunion.org/sites/default/files/uploads/documents/GFAs/Bosch/bosch-gfa-english.pdf](http://www.industrialunion.org/sites/default/files/uploads/documents/GFAs/Bosch/bosch-gfa-english.pdf)> accessed 21 February 2015.

It is prohibited to use child labour in any form whatsoever: only workers above the age of 15 years, or over the compulsory school-leaving age if higher, shall be employed (ILO Convention 138). In view of their age, children under the age of 18 shall not perform work, which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children (ILO Convention 182).<sup>92</sup>

### *Non-discrimination*

The value of the mean for non-discrimination among IFAs is 3.84, almost identical to the value of the mean for codes of conduct from 2009 (3.93). Interestingly, while only one of sixteen IFAs features a provision that proscribes discrimination against women on the grounds of their maternity status, it invokes an ILO convention not mentioned in any of the seventy codes of conduct examined as part of the study:

LUKOIL respects family values and will practically implement provisions of the ILO Convention 156 (workers with family responsibilities), paying special attention to defending rights of the working women, expectant mothers, nursing mothers and women with large families.<sup>93</sup>

### *Health and safety*

Unlike the four above-mentioned core labour rights, which tend to score higher in IFAs than in codes of conduct, the three 'non-core' labour rights score comparatively in both types of instrument. The value of the mean for health and safety among IFAs is 2.85, lower than the value of the mean for codes of conduct from 2009 (3.13) by 0.28. For the right to reasonable working hours, the difference between the value of the mean in the IFAs (2.19) and the value of the mean in codes of conduct (1.80) is

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<sup>92</sup> Lafarge-IBWW/ICEM/WFBW International Framework Agreement <<http://www.global-unions.org/framework-agreements.html?lang=en>> accessed 14 February 2015.

<sup>93</sup> 'Agreement between Industriall Global Union, Russian Professional Oil, Gas and Construction Workers' Union, International Association of Trade Union Organizations of Open Joint Stock Company 'Lukoil' and Open Stock Joint Company "Lukoil"' <[www.industriall-union.org/sites/default/files/uploads/documents/GFAs/Lukoil/gfa-lukoil-en\\_web.pdf](http://www.industriall-union.org/sites/default/files/uploads/documents/GFAs/Lukoil/gfa-lukoil-en_web.pdf)> accessed 21 February 2015.

also small (+0.39). Finally, for the right to weekly rest, the value of the mean in the IFAs (1.34) is almost identical to the value of the mean in codes of conduct from 2009 (1.44).

Results show that *most of the labour rights categories in IFAs have a mean that is higher than comparative figures in the sample of codes of conduct from 2009 (and, of course, from 2003). However, interestingly, the only two rights that have a significantly higher mean in the IFAs than in codes from 2009 are freedom of association and the right to collective bargaining.* This appears to be a good indicator that unions hold to freedom of association and the right to collective bargaining to be key to the effective enjoyment of labour rights by employees of MNCs and their suppliers (thirteen of the IFAs state the principles in the IFAs apply to suppliers; examples include Carrefour's IFA, which states that it 'intends to ensure that the principles established by the ILO are respected by its suppliers'<sup>94</sup>, and Renault's IFA which proclaims that 'suppliers and service providers must comply with this policy in order to work with Renault'<sup>95</sup>). This emphasis on protecting the freedom of association in IFAs is evidenced by provisions stipulating the protection of worker representatives from discrimination (example: 'StatoilHydro will refrain from dismissing or otherwise discriminating against union delegates'), an exceedingly rare feature of codes of conduct. However, further qualitative research will be required to determine this disparity between the content of IFAs and codes of conduct.

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<sup>94</sup> 'Carrefour-UNI Global Framework Agreement' <[http://place.uniglobalunion.org/LotusQuickr/pub/PageLibraryC1257824003A7C09.nsf/0/7D79BD715B168933C12578AA0050519D/\\$file/UNI-Carrefour-en.pdf](http://place.uniglobalunion.org/LotusQuickr/pub/PageLibraryC1257824003A7C09.nsf/0/7D79BD715B168933C12578AA0050519D/$file/UNI-Carrefour-en.pdf)> accessed 21 February 2015.

<sup>95</sup> 'Global framework agreement on social, societal and environmental responsibility between the Renault Group, the Renault Group Works' Council and Industrial Global Union' <[www.industrialunion.org/industrial-signs-gfa-with-the-renault-group](http://www.industrialunion.org/industrial-signs-gfa-with-the-renault-group)> accessed 21 February 2015.

### **III. CONCLUSION**

The results of this study show that the commitment of corporations to international labour standards in codes of conduct and IFAs substantially increased between 2003 and 2009. When broken down to individual labour rights, the results demonstrate that the biggest upward trend is noticed with regard to CLS (non-discrimination, freedom from forced labour, freedom from child labour, freedom of association and the right to collective bargaining) all of which are protected to a significantly higher degree in codes from 2009 than in codes from 2003. Rights that were not designated as CLS by the ILO in the Declaration (health and safety, right to limited working hours and right to weekly rest) registered a smaller increase in codes over the period studied.

A further important distinction was chronicled among CLS in codes of conduct: freedom of association and the right to collective bargaining were incorporated at a slower rate, and qualified by national law far more often, than other CLS. Finally, the results show that this pattern is reversed if we analyse international framework agreements; while IFAs incorporate most of the internationally recognised labour rights at a similar, if slightly higher, rate than in codes of conduct, they incorporate freedom of association at a much higher rate than codes and afford it the greatest prominence among all labour rights.

If we take these results as an indicator of the influence of international law on the construction of codes, then the content analysis study has shown that this influence has increased in recent times; corporations are now more likely to include provisions stipulating the protection of international labour standards, with an explicit acknowledgment of the relevant ILO conventions and other instruments as a source, than they were previously.

The results also refute Teubner's influential account of the relationship between codes of conduct and international and national law. As noted in chapter 2, Teubner has argued that codes have no overlap with the international legal order and that they function independently of it as 'normatively closed' systems.<sup>96</sup> However, these results show there are close links between international law and codes of conduct that are characterised by the normative primacy of international law over codes. Codes of conduct do not exist in a vacuum; they increasingly take their cue from ILO standards and, as the results show, major companies have slowly ratcheted up standards in their codes and in IFAs.

While some commentators have branded this 'a peculiar competition to defy the accusation that corporate responsibility statements are often nothing more than lip service at best and post facto damage control at worst'<sup>97</sup>, it is possible that more complex processes and factors are the cause of this trend. The results still reflect a trend that merits closer examination and that could possibly have a significant impact on establishing enforceable standards of corporate accountability for labour rights violations.

It has been claimed that for self-regulation to work well it requires two elements: a justiciable standard and sanctions for non-adherence.<sup>98</sup> Besmer claims that establishing a justiciable standard has been impossible because of the high fragmentation of CSR measures - a problem that has been branded a 'catch-22': it is impossible to assess the intent of an economic actor absent an objective standard, yet a practicable CSR standard must logically be an aggregation of private practices. In

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<sup>96</sup> G Teubner, 'Self-Constitutionalizing TNCs? On the Linkage of "Private" and "Public" Corporate Codes of Conduct' (2011) 18 *Indiana Journal of Global Legal Studies* 617.

<sup>97</sup> V Besmer, 'The Legal Character of Private Codes of Conduct: More than just a Pseudo-Formal Gloss on Corporate Social Responsibility' (2006) 2 *Hastings Business Law Journal* 279.

<sup>98</sup> *ibid.*

this analysis, this ‘lowest common denominator’ may be too low to increase the quality of corporate governance.<sup>99</sup>

However, it is submitted that the results presented in this chapter indicate that corporate standards are already emerging in the field of labour rights and that these standards are increasingly a reflection of international law rather than solely of autonomously created private practices. Some commentators have argued that there is a similarity between the development of international standards and corporate standards in that, ‘just like the declaratory tradition in international law before it, the corporate declaratory tradition is likely to evolve and develop in the coming years’.<sup>100</sup> Others, however, have claimed that these efforts are misguided and that they will have no true effect on establishing corporate accountability.<sup>101</sup>

The ILO itself has expressed concern, having found that issues that excite public opinion and sympathy, such as the use of child labour, are often addressed in private corporate codes, whereas other rights, such as the freedom of association and the right to collective bargaining, may be left out of codes because they attract little public attention.<sup>102</sup> This study generates findings that would support that view: as we have seen, the freedom of association and the right to collective bargaining – perhaps the two most central labour rights – have not seen nearly as high a ‘jump’ in corporate codes of conduct as have the other core labour rights. Moreover, the disparity between the non-core rights examined here and core rights is even greater. The ILO

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<sup>99</sup> *ibid.*

<sup>100</sup> JG Frynas and S Pegg (eds), *Transnational Corporations and Human Rights* (Palgrave Macmillan 2003) 24-25.

<sup>101</sup> D Henderson, *Misguided Virtue: False Notions of Corporate Social Responsibility* (Institute of Economic Affairs 2001).

<sup>102</sup> K Hagen, ‘Issues Involving Codes of Conduct from an ILO Perspective’ (1998) 92 *American Society of International Law Proceedings* 267.

claims that this has ‘led to the perception that private codes are arbitrary, focus on standards with emotional appeal, and undermine the universality of the ILO standards’.<sup>103</sup> Nevertheless, it must be said that, despite the disparity to be found between the rights, the results do show a general upward trend in using ILO standards as the ‘lowest common denominator’. This study has measured the extent to which international labour standards have been included in codes over time, thereby telling us about the extent of the influence of international law on the *construction* of codes. Further qualitative research will show what accounts for this trend and for the disparities between individual rights noted in the results. For instance, why is there a difference in the scores of the four core ILO rights and the non-core labour rights? What accounts for the difference noted between the inclusion of the right to collective bargaining and freedom of association and other core rights? The case studies presented in the succeeding chapters will provide answers to these questions.

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<sup>103</sup> *ibid.*

**CHAPTER 4**  
**THE INFLUENCE OF INTERNATIONAL LAW ON**  
**THE APPLICATION OF CODES OF CONDUCT**

**OVERVIEW OF CHAPTER FOUR**

In Chapter 3, I found that international law has a significant influence on the construction of codes of conduct. This chapter will examine how this influence manifests itself in practice, on the application of codes of conduct.

Part I will focus on the most widely used mechanism for applying codes of conduct: the social auditing of factories and other production sites. I will examine how auditors and corporations apply international labour standards found in codes and what distinction, if any, they make between these standards.

Part II sets out the other mechanisms used by corporations for applying codes. These include joint initiatives of corporations aimed at improving the welfare of workers in a particular production facility as well as programmes, carried out under the aegis of multi-stakeholder initiatives, that are aimed at tackling rights violations in certain supply chains. Part III will briefly examine the application of international framework agreements (IFAs) signed between corporations and global union federations (GUFs). I will also investigate the differences between the new mechanisms used by corporations to give effect to their codes, portrayed in Part II, the IFAs described in Part III, and auditing. In particular, I will examine whether international law has a different degree of influence on the application of these new mechanisms, IFAs and codes.

Finally, Part IV will conclude by noting that corporations very selectively apply their codes of conduct and that the impact of international law on the

application of codes is muted in terms of its scope and is inconsistent from one labour right to another.

## **I. SOCIAL AUDITING**

The primary mechanism used by corporations to give effect to their codes of conduct is social auditing. The practice of social auditing became widespread once corporations began to adopt codes of conduct containing labour rights guarantees for their and their suppliers' workers. Social audits were seen as a means of ensuring that suppliers were upholding the standards set by corporations in their codes.<sup>1</sup>

Typically, the first time that the possibility of conducting a social audit arises is when a corporation finds a new supplier that it wishes to source from. As one of its initial steps, the corporation may either require the prospective supplier to fill a self-assessment questionnaire (SAQ) or it may already decide to carry out an initial audit, usually conducted by a third party.<sup>2</sup> In the former case, the corporation will use the SAQ to 'weed out the bad' suppliers; the SAQs are commonly 'pass or fail on key rights - child labour, health and safety, wages.'<sup>3</sup> If the responses to the SAQ are satisfactory, the supplier 'can get through the door and then have an audit.'<sup>4</sup>

Once they have decided to proceed, the majority of corporations contract third party consultancies to conduct social audits, while some have large in-house auditing

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<sup>1</sup> C Sabel, D O'Rourke, A Fung, 'Ratcheting Labor Standards: Regulation for Continuous Improvement in the Global Workplace' (2000) KSG Working Paper No. 00-010; Columbia Law and Economic Working Paper No. 185; Columbia Law School, Public Law Research Paper No. 01-21.

<sup>2</sup> This option is less frequently exercised, as corporations are usually hesitant to commit the necessary resources to conduct an audit prior to determining if the supplier can deliver on the specifications of its order.

<sup>3</sup> Interview with two managers at corporate member of MSI-A (London, 1 February 2013). The full list of interviewees is provided in Appendix 2.

<sup>4</sup> *ibid.*

teams that perform this service for them.<sup>5</sup> In either scenario, the auditor (whether third party or in-house) first consults the corporation's own code of conduct (or any other set of standards that it is auditing against, such as a multi-stakeholder code of conduct that the corporation has signed up to or local law) and its audit protocol (the questionnaire and/or set of guidelines that auditors should follow in the course of an audit).<sup>6</sup> Following this preparatory phase, the auditors 'obtain information from the facilities about the make up of the workforce, work patterns', and allocate person(s) proficient in the local language to carry out the audit.<sup>7</sup> The auditors normally announce to the suppliers the exact time and date when they will audit their facilities; it is rare that they carry out a 'semi-announced' audit, where the supplier is told an auditor will be arriving, but not on which date,<sup>8</sup> and exceedingly rare that an auditor conducts an unannounced audit.

Finally, the auditors carry out social audits, which normally last one working day. The auditor usually has an opening meeting with the supplier's management to explain the scope of the audit.<sup>9</sup> Subsequently, the auditor will tour the facilities with a member of management to 'ensure there are no 'no go' areas, to identify people to talk to, perhaps people that look young, pregnant or otherwise vulnerable and that carry out jobs that might bring them into contact with chemicals or otherwise endanger their health and safety.'<sup>10</sup> The auditors will then usually examine the

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<sup>5</sup> Interview with manager at corporate member of MSI-A (London, 3 October 2013).

<sup>6</sup> Interview with senior manager at auditing company (Munich, 31 January 2014).

<sup>7</sup> Interview with senior manager at auditing company (London, 30 January 2014).

<sup>8</sup> For instance, semi-announced audits are sometimes carried out by auditors contracted by corporation A1, when they are following up non-compliances from a previous audit (Interview with manager at corporate member of MSI-A (London, 15 January 2013)).

<sup>9</sup> Interview with senior manager at auditing company (Munich, 31 January 2014).

<sup>10</sup> *ibid.*

supplier's documentation, including health and safety records, its policies and its payroll. Aside from the documentation, the auditors will also carry out a combination of group and individual interviews with management, workers and the worker representative, if one exists at the production facility. The most sensitive topics, such as 'discrimination, harassment and so on' will usually be discussed in one-on-one interviews.<sup>11</sup> Subsequently, having collected information from the documentation and the interviews, the auditors will have closing meetings with the supplier's management to discuss instances of non-compliance with the code of conduct or with the standard being audited against and corrective actions that the supplier should take. Eventually, the auditor will complete the report and submit it to the corporation that paid for the audit.

I will now examine in more detail the contents of audit protocols and the influence of international law on them.

### **I.A Auditing protocols**

As was stated above, each social audit is conducted in accordance with an audit protocol, a document that contains a set of questions and/or guidelines for persons conducting the audit. Audit protocols are developed by corporations themselves or by specialised auditing consultancies. They feature a set of questions about each right in a particular code of conduct that should be answered by the auditor in the course of a social audit. These questions are intended to help the auditor determine if a supplier is violating a right protected under the applicable code of conduct. The two sub-sections below examine the content of the auditing protocols developed by the Supplier Ethical Data Exchange (SEDEX) and Global Social Compliance Programme (GSCP).

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<sup>11</sup> *ibid.*

These are two auditing protocols widely used by corporations to audit against their compliance with certain multi-stakeholder codes of conduct.

### *SEDEX audit protocol*

The most commonly used audit protocol is that developed by SEDEX, a not-for-profit organisation whose aim is to ensure that its corporate members can avoid the duplication of audits. Its SEDEX Members Ethical Trade Audit (SMETA) Report is a template for all those corporations wishing to audit suppliers against a code. The code used as a reference point is the Base Code of the Ethical Trading Initiative (ETI), a multi-stakeholder partnership of corporations, non-governmental organisations and trade unions. The SMETA Report is complemented by the SMETA Best Practice Guidance, a document that provides auditors with a detailed breakdown of how to conduct an audit and what to investigate in order to determine whether there has been a violation of the rights in the ETI Base Code.

The SMETA Report and SMETA Best Practice Guidance break audits down to each individual labour standard of the ETI Base Code. For instance, for auditing clause 1 of the ETI Base Code, which proscribes ‘forced, bonded or involuntary prison labour’,<sup>12</sup> the SMETA Best Practice Guidance directs auditors to look for whether:

- (i) Workers have a contract detailing their rights and obligations, as well as notice and grievance procedures;
- (ii) Workers can leave their employment after reasonable notice;

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<sup>12</sup> Clause 1 of the ETI Base Code additionally states that ‘workers are not required to lodge “deposits” or their identity papers with their employer and are free to leave their employer after reasonable notice’ <<http://www.ethicaltrade.org/eti-base-code>> accessed on 14 February 2015.

- (iii) Employers keep only copies of workers' identification documents and 'right to work checks', and whether originals are returned to workers;
- (iv) There are any clauses in contracts that would restrict workers leaving;
- (v) Any loans to workers are covered by a signed agreement from both parties that detail repayments, terms and conditions;
- (vi) There is a process for preventing worker debt from recruitment fees; and
- (viii) Other indicators exist of whether the employer is subjecting workers to forced labour.

Another example concerns clause 2 of the ETI Base Code, which guarantees each worker's freedom of association and right to collective bargaining, with a set of provisions providing more detail on what these rights entail.<sup>13</sup> The SMETA Report and the SMETA Best Practice Guidance then list a few more detailed questions to help the auditor determine whether there has been a violation of clause 2. These include questions on a number of issues, including:

- (i) Whether a union or an alternative worker organisation exists;
- (ii) Whether management recognises any of the unions present;
- (iii) 'Where unions are allowed by law', whether workers are free to join the union they wish;
- (iv) Whether union officials are freely elected;
- (v) Whether worker representatives are independent of management and represent workers effectively;

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<sup>13</sup> Clause 2 of the Ethical Trading Initiative Base Code guarantees workers' the right to 'join or form' unions of their choosing; prohibits employers from discriminating workers' representatives; ensures workers' representatives access to the workplace; and requires employers to 'facilitate' the development of 'parallel means for independent and free association and bargaining.' For more detail, see <<http://www.ethicaltrade.org/eti-base-code>> accessed on 14 February 2015.

- (vi) Whether, and what percentage of, workers are covered by a collective bargaining agreement;
- (vii) Whether the collective bargaining agreement includes rates of pay;
- (viii) Evidence of discrimination against union leaders;
- (ix) Whether facilities are provided for union leadership; and so on.<sup>14</sup>

The questions posed by the SMETA Report and Best Practice Guidance go a long way in fleshing out the two above-mentioned labour standards. In doing so, they place the auditors' focus on various aspects of freedom of association, the right to collective bargaining and the freedom from forced labour. The great majority of the aspects of these rights highlighted by the audit protocols correspond to the manner in which these rights are defined in international law, as interpreted in ILO jurisprudence.<sup>15</sup>

However, the drafters of these guidelines (auditing consultancies, corporations and suppliers gathered by SEDEX in an advisory working group) did not consult international law when drafting them. Indeed, none of those responsible for drafting these guidelines were familiar with any aspect of the international legal system apart from a vague knowledge of ILO conventions and the Universal Declaration of Human Rights.<sup>16</sup> This is unsurprising, as auditors are rarely, if ever, recruited from a legal background. Instead, the drafters created the audit protocols on the basis of 'best practice' that would be a 'very practical tool to use on the ground'.<sup>17</sup> This reflects the

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<sup>14</sup> 'SMETA Report' <[www.sedexglobal.com/ethical-audits/smeta/](http://www.sedexglobal.com/ethical-audits/smeta/)> accessed 22 February 2015, 17.

<sup>15</sup> For more, see ILO, *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* (Fifth (revised) ed, ILO 2006).

<sup>16</sup> eg Interview with communications manager at auditing company (London, 27 January 2014), Interview with senior manager at auditing company (Munich, 31 January 2014), Interview with senior manager at auditing company (Munich, 31 January 2014) and Interview with senior manager at auditing company (London, 3 February 2014).

<sup>17</sup> Interview with manager at audit and compliance facilitation organisation (London, 3 October 2013).

auditors' mindset, which is typically about having the most practical and efficient way to measure compliance. The Best Practice Guidance document 'comes out of audit companies' experience, and how they audit against the ETI Base Code.'<sup>18</sup>

### *GSCP audit protocol*

A similar picture emerges with regard to another frequently referenced audit protocol - the Audit Process and Methodology developed by the GSCP.<sup>19</sup> The Audit Process and Methodology, created in 2009, audits against the GSCP Reference Code - a code of conduct developed by the GSCP and intended for widespread use as a reference for suppliers' obligations. The GSCP Reference Code requires suppliers to comply with 'fundamental international labour standards as defined by the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up'<sup>20</sup> and with 'other applicable international labour standards' including ILO conventions on hours of work (no. 1), weekly rest (no. 14), and health and safety (155 and 161).

As with the SEDEX audit protocols, the GSCP Audit Process and Methodology provides auditors with a set of questions and indicators they can use during a social audit to determine whether individual labour standards proclaimed by the GSCP Reference Code are being violated by a supplier. On the first clause of the GSCP Reference Code, which proscribes forced, bonded, indentured and prison labour, the Audit Process and Methodology guides auditors to check:

(i) Whether there is a process in place for workers to give notice if they wish to leave employment;

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<sup>18</sup> *ibid.*

<sup>19</sup> The GSCP is a programme funded by corporations that aims to develop standard reference tools in the implementation of labour standards.

<sup>20</sup> 'GSCP Reference Code, Version 2, April 2010' <<http://www.gscpnet.com/working-plan/step-1-reference-code/109.html>> accessed 2 February 2015.

- (ii) Whether workers are fined and lose their residency if they leave their employer;
- (iii) Whether the job descriptions of security guards mention restrictions on worker movements;
- (iv) Whether management retain copies only of workers' identification documents and right to work documentation, and whether management returns all copies of these documents to workers within a reasonable time; and so on.

In another example, regarding the second clause of the GSCP Reference Code, which proscribes child labour, the GSCP Audit Process and Methodology asks auditors to check:

- (i) Whether there are any workers on site 'under the age of 15 or under the legal minimum working age, whichever is higher. If however, local minimum age law is set at 14 years of age in accordance with developing country exceptions under ILO Convention 138, this lower age may apply';
- (i) Whether personnel records specify the birth date of each worker;
- (iii) Whether young workers (those under 18 years of age, but older than the legal minimum working age) have the 'consent of their parent or guardian' where required by law or where possible;
- (iv) Whether young workers' contracts or job descriptions state the limitations on the nature of work permitted; and
- (v) Other detailed indicators on whether the supplier is employing children or engaging young workers in improper work.

As can be seen from the above-mentioned examples, the GSCP Audit Process and Methodology reflects the substance of international labour standards as interpreted by ILO committees. Despite this, as was the case with the SMETA Best Practice Guidance, the GSCP Audit Process and Methodology was also drafted by

audit practitioners with almost no familiarity with ILO jurisprudence; consequently, ILO jurisprudence and international law was never consulted in the production of the Audit Process and Methodology. Instead, the drafters used ‘best practice’ as defined by auditors and corporations involved in the GSCP. In this sense, as with the SMETA Best Practice Guidance, the GSCP Audit Process also reflects the inclination of auditors to develop the most practical and efficient way to measure compliance (rather than any need to seek compliance with ILO standards).

### *Individual corporate audit protocols*

A number of corporations studied have chosen to develop audit protocols and conduct audits by themselves. These corporations perceive audit consultancies as corrupt<sup>21</sup> and as complicit with suppliers in a mutually advantageous relationships aimed at ‘putting on a good show for the auditor’ while circumventing the purpose of audits - namely, to ensure compliance with various codes of conduct.<sup>22</sup>

Corporation A5<sup>23</sup> has developed a comprehensive ‘audit rating’ system, which classifies all audit findings into six categories.<sup>24</sup> Those suppliers that receive a category 6 grade from auditors with regard to any single labour right are struck off corporation A5’s supplier list, and buyers are instructed not to place any further orders from them.<sup>25</sup> Those suppliers receiving a category 5 grade are requested by corporation A5 to improve their practices; if a follow up audit, always held six months later, discovers that a category 5 violation has not been remedied, the audit

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<sup>21</sup> Interview with manager at corporate member of MSI-A (London, 3 October 2013).

<sup>22</sup> Interview with manager at corporate member of MSI-A (London, 27 March 2013).

<sup>23</sup> The full list of corporations studied for this thesis is contained in Appendix 3.

<sup>24</sup> Corporation A5’s audit rating table (made available to the author).

<sup>25</sup> Interview with manager at corporate member of MSI-A (London, 6 February 2013).

protocols mandate that these suppliers should also be struck off the supplier list and that no further business should be conducted with them until these breaches of labour rights have been rectified. Other categories encompass progressively smaller violations of labour rights accompanied by follow up periods for audits, which are set at increasing intervals. Thus, a supplier that has no non-compliances in the course of an audit is classified as category 1 by corporation A5's auditors, who will conduct a follow up audit only after 24 months.

The audit rating table of corporation A5 details the kinds of indicators that its auditors should use in determining whether a right has been violated, along with an example of how to categorise each violation. Thus, regarding the prohibition of forced labour, enshrined in the first clause of corporation A5's code of conduct, the audit rating table states that any 'unreasonable restriction of resignation' by workers, 'evidence of workers being trafficked' or 'prison labour if unable to verify voluntary status' are critical violations of its code of conduct classified as category 6. Where auditors uncover that suppliers have retained workers' identity documents, or where suppliers restrict rest breaks, these violations are classified as category 5. Any evidence of 'delaying payments due to workers when they leave', 'missing documentation' or 'holding original documents' leads to a finding of a minor violation, classified under categories 2 through to 4.

The audit rating table of corporation A5 also distinguishes between different kinds of violations for all of the other labour rights protected in its code of conduct. Thus, for freedom of association, any 'deliberate dismissal of union members or representatives', 'anti union clauses in employment contracts', or 'evidence of a critical communication breakdown between workers and employers which may lead to serious conflict or abuse' are considered as category 6 violations. Lesser violations,

graded as category 5, include ‘evidence of discrimination against union members or representatives’, ‘interference by factory management in the decision making or election process of workers committee representatives’ and ‘union or worker representatives are not permitted any facilities/sufficient time to carry out their duties, within reason’. Finally, minor violations include ‘no documented notes of meetings between management and representatives of issues raised and actions taken’, ‘elections for worker representatives not held regularly’, or ‘no policy and/or communication to workforce of their right to freedom of association and bargain collectively’.

As with the SMETA and GSCP audit protocols, the indicators used in the audit rating table of corporation A5 predominantly reflect international law as interpreted by ILO jurisprudence.<sup>26</sup> Nevertheless, much like the cases of SMETA and GSCP, the drafters of corporation A5’s audit protocols were unfamiliar with ILO jurisprudence and did not consult it when creating the audit protocols. Instead, they relied on their auditors’ previous experiences to help draft the audit protocols.<sup>27</sup> Again, this reflects the approach of corporation A5 and its auditors, which is concentrated on having the most practical and replicable way to comprehensively measure compliance with its code of conduct. This approach is conditioned by the reality that there are significantly more suppliers than auditors can cover, thus

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<sup>26</sup> For instance, the audit rating table of corporation A5 (made available to the author) states that ‘evidence of a critical communication breakdown between workers and employers which may lead to serious conflict or abuse’ is a major violation of the freedom of association by the supplier. ILO jurisprudence also places an onus on management to communicate with workers: in a case where the management of an enterprise refused to establish communications with union representatives, the Committee on Freedom of Association pointed out that ‘workers’ representatives should be granted without undue delay access to the management of the undertaking and to management representatives empowered to take decisions, as may be necessary for the proper exercise of their functions (*United Kingdom (Case No 1852)* (3 October 1995) Report of the Committee on Freedom of Association No 304 (Vol LXXIX 1996 Series B No 2), para 493.

<sup>27</sup> Interview with manager at corporate member of MSI-A (London, 6 February 2013); Interview with manager at corporate member of MSI-A (London, 3 October 2013).

necessitating an efficient mechanism for auditing, which does not require auditors to make in depth judgments about legal standards they are unfamiliar with.

### **I.B The execution of audits**

As shown above, audit protocols reflect international law to a certain degree, though there appears to be little direct influence of international law on their drafting. In this section, I will examine what influence international law has on the manner in which audits are carried out.

#### *Child labour and forced labour*

All of the corporations studied for this thesis expressed the view that freedom from child labour and freedom from forced labour are ‘absolutely non-negotiable’<sup>28</sup> rights that must be upheld through audits. The corporate managers interviewed stressed in the strongest terms that their supply chains should be free of child labour and forced labour, and that any violations of these rights would be considered as ‘critical’.<sup>29</sup> The CEO of corporation A6 stated that ‘we will never, never, never be involved in child labour. We wouldn’t countenance it.’<sup>30</sup> Similarly, a manager in corporation A5 was adamant that ‘morally and legally, child labour and forced labour are a no go, you can’t do that as a business.’<sup>31</sup> For their part, auditors perceive corporations as having a ‘zero tolerance’ policy towards child labour.<sup>32</sup> Non-governmental organisations are also of the opinion that child labour and forced labour ‘are taken incredibly seriously

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<sup>28</sup> Interview with senior manager at auditing company (London, 30 January 2014).

<sup>29</sup> Interview with manager at corporate member of MSI-A (London, 29 January 2013).

<sup>30</sup> Interview with head of corporate member of MSI-A (London, 17 January 2013).

<sup>31</sup> Interview with manager at corporate member of MSI-A (London, 6 February 2013).

<sup>32</sup> Interview with senior manager at auditing company (London, 30 January 2014).

by corporations when found in the supply chain.<sup>33</sup> There is a combination of reasons for this: corporations are scared of the reputational risk they face if their supply chains are found to feature child labour or forced labour, they come under tremendous pressure from NGOs and unions not to have any involvement in this activity and their staff has internalised an opposition towards these practices that has become ingrained (these reasons are explored in detail in the next chapter).

Perhaps because of this, there is a low incidence of child labour and forced labour found during audits.<sup>34</sup> Suppliers know of corporate attitudes towards these two rights and are aware that corporations would be likely to stop placing orders in case they were found to employ children or to engage in forced labour.<sup>35</sup>

In addition, the nature of audits limits opportunities for uncovering violations of child labour and forced labour. As the majority of audits are either announced or semi-announced, some corporate managers claim that suppliers take the opportunity to remove all children and workers subjected to forced labour from their facilities ahead of the arrival of the auditors. It is only during unannounced audits, where auditors have an opportunity to look at the entire workforce, that child labour or forced labour are likely to be found. The ethical trading manager of corporation A1 claimed that auditors who turned up unannounced to a supplier's production facilities saw children leave the factory in question via another entrance.<sup>36</sup> Similar incidents

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<sup>33</sup> Interview with official at non-governmental organisation active in monitoring corporate violations of human rights (Oxford, 4 March 2013).

<sup>34</sup> Interview with senior manager at auditing company (London, 30 January 2014).

<sup>35</sup> Interview with manager at corporate member of MSI-A (London, 6 February 2013).

<sup>36</sup> Interview with manager at corporate Multi-Stakeholder Initiative-A (MSI-A) member (Reading, 7 February 2013).

were noted by other corporate officials, who cast doubt on the possibility of uncovering child labour or forced labour during audits.<sup>37</sup>

Despite these constraints, auditors do occasionally report violations of child labour and forced labour. When determining whether suppliers are engaging in child labour or forced labour, auditors and corporations usually consider the corporation's code of conduct and national law, and use as their 'default' benchmark the standard that 'gives the higher degree of protection'.<sup>38</sup> As an example, corporation A5 considers 'a child labourer who is 15 years and one month old in China, where minimum legal age is 16' to be a critical violation of child labour requiring immediate cessation of business with that supplier (despite 15 being the child labour benchmark age both in its code of conduct and in ILO Convention 138).

On the rare occasions that auditors and corporations do consider ILO standards (along with the standards contained in the corporation's code of conduct and national law), they are often uncertain on how to interpret them. For instance, in applying the ILO standard which states that young workers (under the age of 18) shall not be employed in hazardous conditions, corporations are in two minds as to whether working in a garment factory can be considered hazardous for these purposes.<sup>39</sup> (ILO Recommendation 190 provides some guidance on this matter. It states that 'work with dangerous machinery, equipment and tools', as well as work 'which may expose children to hazardous substances, agents or processes, or to temperatures, noise levels

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<sup>37</sup> Interview with manager at corporate member of MSI-A (London, 3 October 2013).

<sup>38</sup> Interview with senior manager at auditing company (London, 3 February 2014).

<sup>39</sup> Interview with official at non-governmental organisation active in monitoring corporate violations of human rights (Oxford, 4 March 2013).

or vibrations damaging to their health’ should be considered hazardous.<sup>40</sup> Still, as the corporations studied are unfamiliar with secondary ILO standards, Recommendation 190 was not mentioned by any of the interviewees as a reference for determining what constitutes hazardous work for children).

Once auditors and corporations determine that there is a violation of freedom from child labour, they have tended to focus on promptly tackling the issue because they are apprehensive about the possible fall-out in the media and among trade unions and NGOs. Auditors make sure to communicate the finding to their client as quickly as possible, and within twenty-four hours at the latest.<sup>41</sup> Corporations will then either ‘walk away from business with the supplier, especially if it is new’ or ‘require immediate remediation in order to work with the supplier.’<sup>42</sup> For corporation A1, which has the ILO standard on child labour enshrined in its code, a 14-year-old child working in China is not a clear violation of this standard but a ‘tricky’ situation that does not cause it to stop ordering from the said supplier. Instead, this corporation, along with the majority studied, engages in so-called remediation programmes, whereby the supplier is typically pressured to fund that child’s schooling until school-leaving age, while also guaranteeing her a job upon her return to work. In the meantime, the supplier is requested to ‘give the same job to someone else in the family so there is no loss of income.’<sup>43</sup> Finally, as part of this scheme, corporations will often engage a local NGO to follow the child’s progress in school.<sup>44</sup>

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<sup>40</sup> Recommendation Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (No 190) (International Labour Conference, 87th Session, Geneva 17 June 1999).

<sup>41</sup> Interview with senior manager at auditing company (Munich, 31 January 2014).

<sup>42</sup> Interview with senior manager at auditing company (London, 30 January 2014).

<sup>43</sup> Interview with manager at corporate member of MSI-A (London, 3 October 2013).

<sup>44</sup> Interview with senior official at MSI-A (London, 29 January 2013).

Forced labour presents its own challenges as well. On occasion, auditors, corporations and even NGOs active in this field will be unable to agree on what constitutes forced labour - for instance, whether migrant workers 'have been trafficked or have migrated by choice.'<sup>45</sup> They will not refer to ILO standards in the course of these debates because, again, they are frequently unfamiliar with their detailed content.

More commonly, the debates inside these organisations have focused on what course of action to take upon uncovering examples of forced labour. Some corporations have instituted remediation programmes for victims of forced labour akin to those of victims of child labour, while other corporations go no further than halting business relationships with factories engaged in the practice.

The decisions of corporations to undertake remediation, rather than simply break off relations with suppliers, reflect the importance companies assign to findings of child labour and forced labour, along with a worry that a strict application of standards contained in a code of conduct could lead to a child or an involuntary worker losing their job and being forced into more dangerous work, such as prostitution.<sup>46</sup>

### *Health and safety*

Suppliers that violate health and safety rules place the lives of their workers at considerable risk. This is underscored by fatal tragedies in the last two years that occurred in Bangladesh. The collapse of the Rana Plaza building in Dhaka, the capital of Bangladesh, on 24 April 2013 led to the deaths of 260 workers who were

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<sup>45</sup> Interview with official at non-governmental organisation active in monitoring corporate violations of human rights (Oxford, 4 March 2013).

<sup>46</sup> Interview with manager at corporation that is not a member of MSI-A (London, 5 February 2013).

employed in garment factories occupying Rana Plaza's eight floors. A number of well-known retailers sourced from suppliers occupying Rana Plaza, including Mango, Primark, Benetton and others.<sup>47</sup> Another major risk are deadly fires, caused by violations of fire safety provisions. The most prominent recent example was the fire in November 2012, which destroyed the Tazreen factory on the outskirts of Dhaka, killing 112 workers and injuring more than 200.<sup>48</sup>

It is therefore understandable why corporations should regard health and safety as a key issue. For some corporations, 'the single biggest issue is health and safety, it causes us the biggest concern.'<sup>49</sup> It is of 'paramount' importance, and the accidents in Bangladesh 'have put the icing on the cake for a lot of retailers.'<sup>50</sup> Corporations are therefore afraid of health and safety violations both due to the inherent dangers to the lives of workers and due to the risks to their own reputations and profits.

From the perspective of NGOs, corporations are aware that 'factories that burn down could be easily one of theirs; it's just chance or luck.'<sup>51</sup> Indeed, while corporations A4 and B1 had placed orders from suppliers at the Tazreen factory prior

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<sup>47</sup> S Greenhouse, 'As Firms Line Up on Factories, Wal-Mart Plans Solo Effort', New York Times <[http://www.nytimes.com/2013/05/15/business/six-retailers-join-bangladesh-factory-pact.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/05/15/business/six-retailers-join-bangladesh-factory-pact.html?pagewanted=all&_r=0)> accessed 14 February 2015.

<sup>48</sup> Business and Human Rights Resource Centre, 'Tazreen Fashions Lawsuit' <<http://business-humanrights.org/en/tazreen-fashions-lawsuit-re-factory-fire-in-bangladesh>> accessed 14 February 2015.

<sup>49</sup> Interview with manager at corporation that is not a member of MSI-A (London, 5 February 2013).

<sup>50</sup> Interview with manager at corporation that is not a member of MSI-A (London, 10 April 2013).

<sup>51</sup> Interview with official at non-governmental organisation active in monitoring corporate violations of human rights (Oxford, 4 March 2013).

to the fire there,<sup>52</sup> officials from other corporations studied believe that the factories they source from are ‘just as likely to have a fire as Tazreen’.<sup>53</sup>

Health and safety violations are the most commonly cited non-compliance found by audits and, practitioners suggest, the workers’ biggest concern.<sup>54</sup> Confidential figures produced by one corporation suggest that 57% of all non-compliances refer to violations of health and safety provisions.<sup>55</sup> Auditors also suggest that health and safety is the most commonly brought up issue in their audits.<sup>56</sup> This is often ascribed to health and safety violations being most easily identifiable of all of the labour rights standards. As a practitioner states, health and safety violations ‘get brought up because you can see them’.<sup>57</sup>

Despite the high number of non-compliances reported, audits would actually appear to have a mixed record in uncovering violations of health and safety provisions. Practitioners point to audits that fail to spot obvious examples of unsafe facilities, which are uncovered later by corporate officials or NGO representatives during visits, often following deadly accidents. The most prominent example of this was that the Tazreen factory was audited by Underwriters Limited, an audit consultancy, nearly a year before the deadly fire there. The audit report (which was later salvaged from the fire) found a number of violations of health and safety provisions, including blocked fire exits, missing fire extinguishers and unlabeled

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<sup>52</sup> Interview with manager at corporate member of MSI-A (London, 14 October 2013); Interview with manager at corporation that is not a member of MSI-A (London, 10 April 2013).

<sup>53</sup> eg corporation A5, Interview with manager at corporate member of MSI-A (London, 3 October 2013).

<sup>54</sup> Interview with senior official at MSI-A (London, 29 January 2013).

<sup>55</sup> Interview with manager at corporate member of MSI-A (London, 15 January 2013).

<sup>56</sup> Interview with senior manager at auditing company (Munich, 31 January 2014); Interview with senior manager at auditing company (London, 3 February 2014).

<sup>57</sup> Interview with senior official at MSI-A (London, 29 January 2013).

hazardous materials.<sup>58</sup> Nevertheless, the auditors did not recommend closing the factory, which allowed it to go on producing until the fire, nearly a year later. Auditors also failed to recommend the closure of the Ali Enterprise factory in Pakistan less than a year before a fire there killed 260 people. An advocacy group called the Clean Clothes Campaign identified a number of violations in a subsequent report; auditors ignored these violations in their report. They included the number of workers at the facility being undercounted by ‘hundreds of workers’; the factory having an ‘elevated wooden mezzanine used for temporary workers, leading to unsafe conditions’; the fire exit doors being locked; and false documentation attesting to factory fire inspections.<sup>59</sup>

These examples are bolstered by data from SEDEX. It shows that the overall number of health and safety violations has remained constant over the past ten years.<sup>60</sup> A series of audits can lead to improvements in an individual factory, although even there the suppliers ‘will respond specifically to points you raise and no more.’<sup>61</sup> On a wider scale, however, auditors believe that ‘a random sample of first hit factories’ would indicate no improvement in health and safety conditions.<sup>62</sup>

In the course of carrying out audits, auditors are not influenced by ILO standards on health and safety (which is in keeping with the findings in Chapter 3 showing that codes of conduct do not refer to ILO standards on health and safety).

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<sup>58</sup> ‘STR audit report’ <<http://www.documentcloud.org/documents/695056-tazreen-factory-fire-audit.html>> accessed on 4 February 2015.

<sup>59</sup> Social Accountability International (SAI), ‘Report Addendum: Fire Safety in Pakistan and Worldwide’ <[http://www.sai-intl.org/\\_data/n\\_0001/resources/live/SAIReportAddendum\\_FireSafetyinPakistanandWorldwide.pdf](http://www.sai-intl.org/_data/n_0001/resources/live/SAIReportAddendum_FireSafetyinPakistanandWorldwide.pdf)> accessed 4 February 2015, 15.

<sup>60</sup> Interview with official at audit and compliance organisation (London, 6 March 2013).

<sup>61</sup> *ibid.*

<sup>62</sup> Interview with official at audit and compliance organisation (London, 6 March 2013); Interview with senior manager at auditing company (Munich, 31 January 2014).

Instead, they use health and safety provisions from local law as benchmarks, as they tend to be well defined and usually provide the highest degree of protection for workers.<sup>63</sup> Where local laws are insufficiently well developed for the corporations' standards, the corporations' own codes of conduct are used as benchmarks. For instance, in countries with unclear legislative provisions on the signposting required on fire exits, 'most UK retailers will ask the factories to change that and make additional improvements.'<sup>64</sup>

ILO standards are largely irrelevant to corporations and auditors auditing for health and safety violations for three reasons: first, as mentioned above and in Chapter 3, they are not referred to in the codes themselves. Second, they are frequently not as well developed as local law. Third, they are sectoral; in other words, the most detailed ILO standards are enshrined in conventions for certain groups of workers.<sup>65</sup> This 'complicates things' for auditors and NGOs monitoring conditions in factories. Therefore, ILO standards are almost never cited by auditors, corporations and others applying codes of conduct.

### *Freedom of association and the right to collective bargaining*

Freedom of association and the right to collective bargaining are the most polarising labour rights among the various stakeholders involved in auditing codes of conduct.<sup>66</sup>

Trade unions consider freedom of association as an 'enabling' right, whose realisation

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<sup>63</sup> Interview with senior manager at auditing company (London, 30 January 2014); Interview with official at audit and compliance organisation (London, 6 March 2013); Interview with senior manager at auditing company (Munich, 31 January 2014).

<sup>64</sup> Interview with senior manager at auditing company (London, 30 January 2014).

<sup>65</sup> eg Convention Concerning Safety and Health in Construction (No 167) (adopted 20 June 1988, entered into force 11 January 1991) 1592 UNTS 33 (ILO No 167).

<sup>66</sup> Freedom of association and the right to collective bargaining are often considered to be one right by practitioners. I will therefore use 'freedom of association' as shorthand for both in this section, except where the right to collective bargaining is explicitly differentiated from it.

is a pre-condition for the enjoyment of all other rights.<sup>67</sup> They believe that the ‘inability of workers to come together and bargain collectively, due to restrictions in national law and attitudes of employers’ is the ‘overriding issue’ facing workers in supply chains.<sup>68</sup>

The belief that respect for freedom of association is crucial for the exercise of other rights is mostly shared by NGOs and practitioners, even those who are critical of the manner in which unions function. Although she says ‘unions are no angels’, a prominent NGO activist states that ‘my main yardstick of judging corporations is how they treat freedom of association. It has to be a fundamental thing in the company - to be to doing something about it, to the level they can in terms of their responsibilities.’<sup>69</sup> Other practitioners and NGO activists are also critical of the manner in which trade unions function - they are perceived as too dogmatic, male-dominated and inflexible to respond to globalised production processes - but underscore the importance of freedom of association for curbing abuses in supply chains.<sup>70</sup> The director of Multi-Stakeholder Initiative A (MSI-A) states, ‘if you have genuinely democratic, well organised unions who are a partner to management, they will tackle other issues, such as discrimination, child labour and so on.’<sup>71</sup>

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<sup>67</sup> Interview with head of international trade union federation that is signatory to international framework agreements, and one of the founders of MSI-A (Brussels, 10 May 2013).

<sup>68</sup> *ibid.*

<sup>69</sup> Interview with representative of non-governmental organisations to MSI-A (London, 13 February 2013).

<sup>70</sup> Interview with official at non-governmental organisation that is a member of MSI-A and active in monitoring corporate violations of human rights (Oxford, 20 March 2013); Interview with consultant on corporate accountability and advisor to MSI-A (London, 8 February 2013); Interview with consultant on corporate accountability and former senior official at MSI-A (Oxford, 4 March 2013); Interview with consultant on corporate accountability (Brighton, 10 February 2014).

<sup>71</sup> Interview with head of MSI-A (London, 2 April 2013).

Corporations and auditors, who mostly place far less emphasis on freedom of association than trade unions and NGOs, do not share these views. As seen in the previous chapter, corporate codes of conduct usually contain provisions guaranteeing freedom of association to workers. Despite this, many of the corporations studied appear to have ambivalent attitudes towards the application of this right. They frequently see freedom of association as a potentially disruptive force in the running of their businesses. These corporations are apprehensive about allowing trade unions to disrupt the balance of power vis-à-vis the workers in their supply chains. This balance is currently tilted in their favour, and strengthening the union movement would potentially endanger the business model on which they have built their successes.

However, as their codes require some form of freedom of association, some corporations are willing to consider worker management committees set up by management or comment boxes as adequate means of enjoyment of freedom of association.<sup>72</sup> For instance, many of the corporations importing bananas and other produce from Costa Rica have continued to do so in spite of suppliers' controversial practices. Namely, in the face of strong unions in Costa Rica in the banana industry, suppliers in the 1980s began to establish permanent workers' committees (called 'Solidarismo Associations') of three people to represent workers. Although these associations were designed for small workplaces of less than ten people, they were introduced in large plantations of up to 200 people. The Solidarismo Associations signed a series of agreements on piece rates and working conditions with management, which were not as demanding as the collective bargaining agreements

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<sup>72</sup> Interview with official at non-governmental organisation active in monitoring corporate violations of human rights (Oxford, 4 March 2013).

they replaced.<sup>73</sup> These associations would also frequently have members of the employers' management in their leadership, while employers would offer them preferential conditions over trade unions. Provisions in Costa Rican law meant that employers could conclude direct agreements with Solidarismo Associations and non-unionised workers generally, even in workplaces where trade unions exist. NGO activists claim this 'sophisticated parallel system' was designed in such a way as to 'convince outsiders it respects ILO conventions', but to subvert freedom of association in reality.<sup>74</sup> The ILO Committee on the Freedom of Association found that this system, based on promoting worker committees and on anti-union practices, raises a number of obstacles to the effective enjoyment of freedom of association.<sup>75</sup>

Nevertheless, a number of corporations studied as part of this thesis, including corporation A1, found that such practices do meet the requirements of the right to free association, and continued to work with suppliers in Costa Rica. Corporations such as A1 are unfamiliar with the ILO system and are thus unaware of bodies' findings. Moreover, they are unlikely to be swayed by ILO decisions, which they see as non-binding, unless campaigners from the ranks of trade unions, NGOs or the media subsequently harness these decisions to put pressure on them.

Those corporations that do evince more of a concern that suppliers' workers should be enjoying freedom of association are often hindered by their lack of commercial leverage. Corporation A5, which conducts its own audits, inspected a supplier factory in which workers advocating for the formation of a union were either

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<sup>73</sup> International Trade Union Confederation, *2010 Annual Survey of violations of trade union rights - Costa Rica* (ITUC 2010).

<sup>74</sup> Interview with official at non-governmental organisation that is a member of MSI-A and active in monitoring corporate violations of human rights (Norwich, 2 May 2013).

<sup>75</sup> eg *Costa Rica (Case No 1483)* (21 December 1988) Report of the Committee on Freedom of Association No 278 (Vol LXXIV 1991 Series B No 2), para 188-191.

transferred to other facilities or dismissed. Its auditors suspected that the factory's management undertook these actions because the campaigners were close to gathering signatures of thirty percent of the workforce, which would have enabled them to form a trade union. The ethical trading manager at corporation A5 resolved to protect workers from the actions of factory management; however, he felt that its relatively small purchasing orders with the supplier did not provide it enough leverage to do so: 'How do I stop workers from being fired? I haven't got the tools, I haven't got the pressure or the business to give me the power and ability to do that'.<sup>76</sup>

Taking their cue from corporations, auditors have all but ignored freedom of association in their reports. A manager in a large auditing consultancy considers freedom of association to be 'the elephant in the room';<sup>77</sup> for another auditor, freedom of association is the 'most contested right',<sup>78</sup> repeatedly violated by suppliers but rarely acknowledged by corporations and auditors. There are three principal reasons for this. First, auditors mirror some corporations' attitudes to freedom of association and pay little mind to it. They are aware that corporations' 'deeply held political objection'<sup>79</sup> to freedom of association means they are unlikely to be taken to task by their clients if they fail to register violations of freedom of association. Auditors view corporations as having a lack of commitment to freedom of association and believe them to be 'powerless to be able to really make changes' in an audited factory because 'saying to a factory you have to have freely elected worker representatives is

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<sup>76</sup> Interview with manager at corporate member of MSI-A (London, 3 October 2013).

<sup>77</sup> Interview with senior manager at auditing company (London, 30 January 2014).

<sup>78</sup> Interview with consultant on corporate accountability (Madrid, 9 January 2014).

<sup>79</sup> Interview with official at non-governmental organisation active in monitoring corporate violations of human rights (Oxford, 4 March 2013).

a very long term thing.’<sup>80</sup> Aside from cases of egregious violations of freedom of association, such as layoffs of union leadership, there are rarely, if ever, follow up questions from corporations to auditors about a supplier’s policy or practice on freedom of association.<sup>81</sup> Bearing all this in mind, auditors rarely place a focus on freedom of association in the course of their audits.

Second, auditors have a ‘fundamental lack of understanding’ of freedom of association.<sup>82</sup> Auditors have been trained to look for signs of non-compliance with rights enshrined in codes of conduct. For rights such as freedom from child labour or the right to health and safety, the benchmark they use is ‘binary’<sup>83</sup> - a worker has to be of a certain age, a production facility has to have a certain number of fire extinguishers - and where those standards are not fulfilled auditors can record a non-compliance. Freedom of association is as much of a ‘process’ right as it is a ‘substantive’ right; management has to provide conditions to enable workers to enjoy this right, while showing a constructive attitude to workers’ organisations as a partner in dialogue. Auditors understand this aspect of freedom of association poorly. An official from a leading consultancy stated that auditors focus on ‘whether workers are happy’ in assessing freedom of association.<sup>84</sup> None of the auditors interviewed stated that they investigate the ‘process’ aspects of freedom of association.

Third, the nature of audits means they are not well suited to uncovering the dynamics of worker-management relations. Auditors ‘do not like’ investigating

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<sup>80</sup> Interview with senior manager at auditing company (London, 30 January 2014).

<sup>81</sup> Interview with senior manager at auditing company (Munich, 31 January 2014).

<sup>82</sup> Interview with official at non-governmental organisation that is a member of MSI-A and active in monitoring corporate violations of human rights (Oxford, 20 March 2013).

<sup>83</sup> Interview with consultant on corporate accountability and advisor to MSI-A (London, 8 February 2013).

<sup>84</sup> Interview with senior manager at auditing company (Munich, 31 January 2014).

respect for freedom of association because of the limitations inherent in an audit format.<sup>85</sup> They usually conduct very few one-on-one interviews with workers in the course of a typical one-day audit and are likely to talk to only one worker representative, who may be ‘coached or scared’ by management.<sup>86</sup> Audits are regarded as ‘a one-day snapshot’, during which ‘you have to be lucky or work really hard’ to get to identify violations of freedom of association.<sup>87</sup>

In considering whether a supplier is contravening the freedom of association, auditors typically do not consider ILO standards. Rather, ‘the benchmarks are provisions from local law’.<sup>88</sup> This means that in countries with restrictive legislation, such as China, auditors almost never report that freedom of association is being suppressed, while in countries with more a more permissive legislative framework for union activity, auditors sometimes do report violations of freedom of association. This approach leads to a paradox, whereby ‘if there isn’t a union in the factory there is no violation of freedom of association’.<sup>89</sup>

This approach is, auditors and corporations believe, based on the reality on the ground. ‘In theory’, an auditor states, ‘we should raise a non-compliance on freedom of association during every audit’.<sup>90</sup> Instead, auditors and corporations have a shared understanding that freedom of association should be interpreted according to local law and that ILO standards are not to be invoked in audits.

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<sup>85</sup> Interview with manager at audit and compliance facilitation organisation (London, 3 October 2013).

<sup>86</sup> Interview with manager at corporate member of MSI-A (London, 3 October 2013).

<sup>87</sup> *ibid.*

<sup>88</sup> Interview with senior manager at auditing company (London, 3 February 2014).

<sup>89</sup> Interview with official at non-governmental organisation active in monitoring corporate violations of human rights (Oxford, 4 March 2013).

<sup>90</sup> Interview with senior manager at auditing company (London, 3 February 2014).

### *Working hours and the right to weekly rest*<sup>91</sup>

The right to work limited hours is viewed warily by the corporations studied for this thesis. Namely, most of the companies studied have codes that limit workers to a forty-eight hour working week and twelve hours of overtime per week. This standard is believed by corporations to come from ILO conventions and jurisprudence (in reality it only partly reflects ILO standards).<sup>92</sup> Further, codes stipulate that where national law provides for a shorter working week it should be applied.

However, corporations have come to believe that the limits stipulated by ILO standards, their codes of conduct and national law, are unrealistic and unclear and therefore impossible to apply. In particular, they argue that it prevents workers wishing to work more than sixty total hours from doing so. A common scenario would see seasonal workers, such as those employed in agriculture and farming, wishing to work more than forty-eight hours in a single week being limited by the wording of the MSI-A Fundamental Code.<sup>93</sup> Some corporate officials argue that these limits are unrealistic because they run counter to deeply ingrained cultural norms: ‘All the Chinese people want to work the hours they work. It doesn't matter how much you pay them - you could pay them three times as much money - they still want to work those hours. I think laws on working hours have to be sensitive to the cultural situation in a country.’<sup>94</sup> Moreover, companies wanting to pay a premium for

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<sup>91</sup> The right to work limited hours and the right to weekly rest are two separate rights in international labour law and in corporations' codes of conduct. They were treated as such in the quantitative study of the influence of international law on codes of conduct, the results of which are examined in chapter 3. However, in the course of interpreting their codes, corporations subsume both rights under the right to work limited hours. As a result, this sub-section will use ‘the right to work limited hours’ to designate both rights.

<sup>92</sup> Interview with manager at corporate Multi-Stakeholder Initiative-A (MSI-A) member (Reading, 7 February 2013); Interview with consultant on corporate accountability and advisor to MSI-A (London, 8 February 2013).

<sup>93</sup> Interview with manager at MSI-A (London, 29 January 2013).

<sup>94</sup> Interview with manager at corporate member of MSI-A (London, 18 January 2013).

overtime work were unclear on how much a premium rate should be in relation to the regular hourly rate.<sup>95</sup>

Trade unions, NGOs and practitioners agree that provisions on working hours frequently lead to difficulties in the application of codes.<sup>96</sup> They agree that a limit on working hours during a week (such as that of forty-eight hours plus twelve hours' overtime) can be inimical to the interests of workers wishing to work and earn more. However, they argue that this should lead corporations to 'look at reasons why workers turn up and work long hours: because they're in such a poor situation they don't have a better alternative'.<sup>97</sup> They have also voiced their displeasure at the lack of clarity of this standard provision regarding overtime rates. Namely, practitioners point to examples where part-time workers, contracted to work twenty-four hours per week, who wish to earn additionally over Christmas by working additional hours have been told that they would have to work over forty-eight hours per week before they would be paid an overtime premium.<sup>98</sup>

This has left auditors in a difficult position. The 'grey areas' created by provisions on working hours create problems for auditors: 'in the compliance world, you have to know if it's okay or not. There is no middle ground'.<sup>99</sup> In practice, auditors have not established uniform practice in how to respond when they encounter the above-mentioned situations where workers routinely work more than allowed by the code of conduct, or where employers pay little or no overtime premium.

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<sup>95</sup> Interview with manager at corporate Multi-Stakeholder Initiative-A (MSI-A) member (Reading, 7 February 2013).

<sup>96</sup> Interview with official at audit and compliance organisation (London, 6 March 2013).

<sup>97</sup> Interview with senior official at MSI-A (London, 29 January 2013).

<sup>98</sup> *ibid.*

<sup>99</sup> Interview with official at audit and compliance organisation (London, 6 March 2013).

As a result of this and of corporate attitudes, auditors have interpreted limits on working hours loosely. According to one auditor,

We have seen a relaxation on forty-eight hours plus twelve hours' overtime as a standard, so some say we allow sixty hours per week in our supply chains. A lot of brands realise that this drove falsification of records inside factories, but they didn't want to tell their customers the truth because they would be penalised. So now brands are more relaxed - we will still audit you against sixty hours, but you can go over. It's the reality. They realised it was unachievable. In China the average hours are sixty-seven.<sup>100</sup>

This shift has meant that auditors do not strictly apply any of the benchmarks - ILO standards, code of conduct provisions or national law - that usually guide their work. Instead, the (perceived) ILO standard of a working week consisting of forty-eight hours plus a maximum of twelve hours' overtime is now effectively 'negotiable' on an ongoing basis between corporations and their suppliers, states another auditor.<sup>101</sup>

### *Non-discrimination*

Corporations studied for this thesis largely disregard freedom from discrimination while applying their codes.<sup>102</sup> The typical corporate attitude is that of the ethical trading manager of corporation A1, who views discrimination as a 'touchy feely' right, which is 'not tangible.'<sup>103</sup> Discriminatory behaviour in supply chains may even be thought of in a favourable context; according to this view, factory managers and owners 'simply use short hand ways of thinking about things - there is a lot of latent sense of what people from different groups are like. They don't think it's

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<sup>100</sup> Interview with senior manager at auditing company (London, 3 February 2014).

<sup>101</sup> Interview with senior manager at auditing company (London, 30 January 2014).

<sup>102</sup> Interview with manager at corporate Multi-Stakeholder Initiative-A (MSI-A) member (Reading, 7 February 2013); Interview with manager at corporate member of MSI-A (London, 6 February 2013); Interview with two managers at corporate member of MSI-A (London, 1 February 2013); Interview with manager at corporation that is not a member of MSI-A (London, 10 April 2013).

<sup>103</sup> Interview with two managers at corporate member of MSI-A (London, 1 February 2013).

discrimination, they think it's common sense.<sup>104</sup> For their part, despite acknowledging the plight of discriminated workers, NGOs and trade unions also place little emphasis on freedom from discrimination in the workplace.

The principal reason for this lack of attention to discrimination from all stakeholders appears to be that it is difficult to prove, for auditors and NGOs alike.

Practitioners know that,

Even if you find discrimination in a factory, how are you going to prove that? You might have to ask half a dozen workers or a hundred workers to have one tell you about it. And then one tells you about it, and if one has told you about it, you can't corroborate that with somebody else's account, then you probably can't record it.<sup>105</sup>

An auditor from a consultancy states that for discrimination to be reported there would have to be 'clear evidence, e.g. pregnancy testing of women, and the like; otherwise discrimination is generally hard to prove'.<sup>106</sup> An auditor from corporation A4 confirms this, stating that discrimination is 'difficult to pick up in audits'.<sup>107</sup>

As a result, although corporate officials 'know from going around factories that there is discrimination',<sup>108</sup> they (for instance, corporations A1, A2, B1 and B3, among others) have typically 'never come across an audit report on discrimination'.<sup>109</sup> As there are so few cases of reported discrimination, it is unclear which - if any - benchmarks from international law, national law or codes of conduct are being applied by corporations or auditors in cases of discrimination.

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<sup>104</sup> Interview with official at International Labour Organization (Geneva, 1 March 2013).

<sup>105</sup> Interview with senior official at MSI-A (London, 29 January 2013).

<sup>106</sup> Interview with senior manager at auditing company (London, 30 January 2014).

<sup>107</sup> Interview with manager at corporate member of MSI-A (London, 6 February 2013).

<sup>108</sup> Interview with two managers at corporate member of MSI-A (London, 1 February 2013).

<sup>109</sup> Interview with two managers at corporate member of MSI-A (London, 1 February 2013); Interview with manager at corporation that is not a member of MSI-A (London, 10 April 2013).

Consequently, there appears to be effectively no influence of ILO standards on the interpretation of non-discrimination provisions in codes of conduct by either corporations and auditors or NGOs and trade unions.

## **Conclusion**

As this section has shown, audit protocols closely mirror international labour law by focusing on aspects of labour rights already highlighted in ILO jurisprudence. Nevertheless, it is also clear that this is not by design, as audit protocols were developed by reference to auditors' experiences, rather than ILO jurisprudence, with which their drafters are unfamiliar.

The influence of international law on execution of audits is smaller, as auditors are unfamiliar with, and consequently hardly refer to, ILO standards when they carry out audits. In addition, when they are asked to apply ILO standards included in codes of conduct, corporations and auditors are very inconsistent in their application of ILO standards during audits.

Thus, while audit protocols provide a basis for the application of ILO standards (because they mirror how labour rights are interpreted in ILO jurisprudence), audits themselves fail to uphold international labour law standards consistently across all labour rights. Namely, as is shown in this section, although auditors strongly focus on uncovering abuses of rights such as freedom from child labour and freedom from forced labour, they exhibit a much smaller concern for violations of assorted other rights, including freedom of association and the right to collective bargaining.

It can therefore be said that while there is some indirect influence of international law on the drafting of auditing protocols, there is little or no influence

(direct or indirect) on the application of auditing protocols and the way audits are carried out.

## **II. OTHER MECHANISMS FOR APPLYING CODES OF CONDUCT**

Although auditing is the principal mechanism for ensuring codes of conduct are respected in supply chains, corporations also utilise other means for this purpose. This section will briefly describe two such programmes, recently developed by corporations and their partners.

### **II.A The realisation of programmes aimed at strengthening freedom of association**

In recent years, some corporations have concluded that audits are ‘but a snapshot of a factory’<sup>110</sup> that do not lead to sufficient change in the working conditions of suppliers’ employees.<sup>111</sup> In the words of the ethical trading manager of corporation A5, ‘not only have factories been audited to death but the workers have also become disillusioned, because they know when the auditor comes, what’s going to change?’<sup>112</sup>

As a result, a number of corporations have commenced working with suppliers on two-pronged initiatives to increase suppliers’ productivity and improve their management systems. The thinking behind such so-called ‘beyond auditing’ initiatives is that improvements in these areas will lead to an increase in workers’

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<sup>110</sup> Interview with manager at corporation that is not a member of MSI-A (London, 10 April 2013).

<sup>111</sup> Interview with manager at corporate member of MSI-A and a signatory to an international framework agreement (London, 7 February 2013).

<sup>112</sup> Interview with manager at corporate member of MSI-A (London, 3 October 2013).

wages, to reduced turnover among staff and eventually to improvements in working conditions.<sup>113</sup>

Although this thesis cannot pronounce upon the successes of such initiatives, three of the corporations studied (A3, A5 and B1) believe that, even though ‘beyond auditing’ initiatives represent a step forward from auditing, they do not go far enough because ‘they haven’t got a union presence’.<sup>114</sup> In their view, corporations need to partner with unions in order to succeed in effectively applying their codes; without active unions to report on labour rights violations throughout the year, the thinking goes, annual audits are unable to capture the true state of affairs regarding labour rights observance in a particular factory. Consequently, these three corporations are instituting a joint pilot programme that would augment typical ‘beyond auditing’ initiatives with a third prong: the strengthening of trade unions and improvement of industrial relations in factories which all three corporations use as suppliers.<sup>115</sup> Working together, these corporations believe, will increase their leverage with suppliers and thereby also their programme’s chance of success.<sup>116</sup>

Thus, the joint programme of corporations A3, A5 and B1 assists suppliers in three respects. First, the corporations hire experts to improve the suppliers’ human resources management policies (‘employee handbook, company rules, grievance policy and discrimination policy’<sup>117</sup>) and practices. Second, the corporations teach the suppliers how to improve their productivity through technical assistance. The aim of

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<sup>113</sup> *ibid.*

<sup>114</sup> *ibid.*

<sup>115</sup> Interview with manager at corporate member of MSI-A and a signatory to an international framework agreement (London, 7 February 2013).

<sup>116</sup> Interview with manager at corporate member of MSI-A (London, 3 October 2013).

<sup>117</sup> Interview with manager at corporation that is not a member of MSI-A (London, 10 April 2013).

these two forms of support is to reduce staff turnover and increase suppliers' income. It also 'opens the door' for these corporations to 'get suppliers to understand the business benefits of allowing freedom of association and having workers active as partners'.<sup>118</sup>

Once suppliers acquiesce to this, corporations can begin working on the third prong - to strengthen freedom of association among suppliers' workers. The corporations engage global union federations (GUFs) to carry out a baseline assessment on 'what freedom of association looks like in these factories'.<sup>119</sup> Following this baseline assessment, the corporations and GUFs put together a joint training plan on industrial relations and worker-management dialogue for suppliers' management and workers which, the corporations hope, will ensure that trade unions or other forms of worker representation emerge in factories. The corporations believe that strong unions will be powerful advocates with management for the enjoyment of the labour rights contained in these corporations' codes of conduct. Moreover, strong unions would regularly report to the corporations, thereby providing a far more comprehensive picture of the degree to which workers enjoy their rights than audits. Eventually, these corporations aspire to have their pilot programmes adopted by all of their suppliers while also obviating the need for audits.<sup>120</sup>

This programme is in its incipient phase and it is thus impossible to determine how it will develop. It can, however, be said with certainty that its underlying premise is different from that of auditing; namely, while auditing attempts to gauge suppliers'

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<sup>118</sup> *ibid.*

<sup>119</sup> *ibid.*

<sup>120</sup> Interview with manager at corporate member of MSI-A and a signatory to an international framework agreement (London, 7 February 2013); Interview with manager at corporation that is not a member of MSI-A (London, 10 April 2013); Interview with manager at corporate member of MSI-A (London, 3 October 2013).

level of compliance with codes of conduct, international and national law, this programme sees freedom of association as the pivotal right, whose fulfilment is the precondition for workers to enjoy other labour rights. In this respect, the programme reflects the central place that freedom of association occupies in the body of international labour law. Nonetheless, as these corporations have very recently commenced to implement this initiative, it is impossible for this thesis to ascertain what level of influence international law will have on it.

## **II.B The realisation of programmes through multi-stakeholder initiatives**

MSI-A is an organisation formed by trade unions, NGOs and corporations to improve workers' conditions in its corporate members' supply chains. Its focus is on ensuring that its corporate members and their suppliers comply with its code of conduct (the MSI-A Fundamental Code). In order to ensure this, corporate members are required to adopt strategies and set annual targets, in agreement with the MSI-A secretariat, on how to put into effect the MSI-A Fundamental Code. The corporations are required to report against these strategies and targets regularly to the MSI-A secretariat, which awards grades that determine the stage (first through to fourth) that each corporation is at in the MSI-A (the goal being to advance to the fourth stage). If corporations fail to meet the criteria set, the MSI-A secretariat has 'a clear procedure if a company is not meeting its obligations and the steps to take to work with them'.<sup>121</sup> Corporations that do not meet their obligations are 'ultimately told they don't belong' and asked to leave MSI-A.<sup>122</sup> This, corporate officials, MSI-A staff and NGO representatives all

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<sup>121</sup> Interview with head of MSI-A (London, 2 April 2013).

<sup>122</sup> Interview with head of MSI-A (London, 2 April 2013); MSI-A internal documents (made available to the author).

agree, would likely cause serious harm to a corporation's reputation and thereby to its bottom line.

Those corporations that have adopted strategies on how to apply the MSI-A Fundamental Code have also explored how to put them in place. Some corporations, such as A1 or A4, have discussed setting so-called 'key performance indicators' (KPI) on ethical trading for their staff.<sup>123</sup> According to this idea, commercial buyers from these corporations who place orders with suppliers would have their performance measured not only by the profit margins of their orders but also by the level of enjoyment of labour rights of their suppliers' workers. The ethical trading managers of corporations A1 and A4, among others, have been exploring how to put into practice this idea. Despite such novel ideas, corporate members of the MSI-A are still mostly focused on auditing as a means of implementing the Fundamental Code.

However, in 2012 the MSI-A leadership decided to change the emphasis of its activities by addressing distinctive, high priority issues in its corporate members' supply chains through collective action.<sup>124</sup> These issues are chosen according to 'where we have leverage', the 'vulnerability of workers, but also commercial importance'.<sup>125</sup> For instance, MSI-A is currently running a programme aimed at tackling abuses of young girls working in cotton mills in southern India. This practice, also known as Sumangali, involved girls being hired by cotton mills on three year 'apprenticeships' that are supposed to pay them a lump sum at the end that they can use for dowry. According to the NGOs that uncovered this scheme, at the end of

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<sup>123</sup> Interview with manager at corporate member of MSI-A (London, 14 October 2013); Interview with manager at corporate Multi-Stakeholder Initiative-A (MSI-A) member (Reading, 7 February 2013).

<sup>124</sup> Interview with head of MSI-A (London, 2 April 2013).

<sup>125</sup> Interview with manager at MSI-A (London, 8 April 2013).

the three-year period, however, these girls commonly go unpaid.<sup>126</sup> Sumangali thus amounts to a practice that combines elements of child labour and forced labour.

As the cotton mills engaging in Sumangali are sub-contractors of corporate suppliers, MSI-A realised that audits, which are usually conducted for first-level suppliers only, would be ineffectual in uncovering further abuses. MSI-A instituted a programme aimed at eradicating this practice from cotton mills in its corporate members supply chains. As ‘Sumangali is ingrained and no one can eradicate it on its own’, the MSI-A programme is collaborative, with the participation of its corporate members, unions, NGOs ‘and the Indian government to change the law and practice on the ground’.<sup>127</sup> It focuses on providing a viable alternative for cotton mill owners and for the girls who are victims.

MSI-A runs a number of additional programmes aimed at addressing other abuses: in the Thai shrimp fishing industry, among Moroccan strawberry growers, and so on. At the core of these programmes is the need to promote dialogue between workers and suppliers and to strengthen workers’ freedom of association by linking them to trade unions and NGOs active on the ground.<sup>128</sup>

The implementation of the MSI-A programmes has thus far been uneven; corporate officials complain of having spent ‘a lot of money’ for little impact due to poor coordination on the ground and a lack of organisation by the MSI-A

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<sup>126</sup> Interview with official at non-governmental organisation active in monitoring corporate violations of human rights (Oxford, 4 March 2013); Interview with two managers at corporate member of MSI-A (London, 1 February 2013); Interview with manager at MSI-A (London, 8 April 2013).

<sup>127</sup> Interview with two managers at corporate member of MSI-A (London, 1 February 2013).

<sup>128</sup> Interview with head of MSI-A (London, 2 April 2013).

secretariat.<sup>129</sup> Nevertheless, the members of the MSI-A agree that these are ‘growing pains’,<sup>130</sup> and these programmes should be developed further.

As a whole, the programmes run under the aegis of MSI-A indicate that a new trend may be emerging. These programmes have emerged from a belief that auditing is limited in its ability to improve workers’ conditions. The MSI-A and its members devised a new approach, which uses the collective leverage of corporations to improve workers’ rights and, in particular, their enjoyment of freedom of association. In this respect, the MSI-A programme echoes some approaches to international labour law<sup>131</sup> in that it sees freedom of association as an ‘enabling’ right whose realisation will allow workers to enjoy other labour rights. However, the MSI-A programmes on Sumangali and other issues in supply chains are in their embryonic phase; it is therefore difficult, at the time of writing, to pronounce how international law will influence them.

## **Conclusion**

In their efforts to apply codes of conduct, some corporations are beginning to depart from the compliance-based model typified by audits to mechanisms reliant on partnerships between stakeholders. The corporations implementing these programmes have concluded that audits are unlikely by themselves to improve the level of observance of labour rights for workers in their supply chains.

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<sup>129</sup> Interview with two managers at corporate member of MSI-A (London, 1 February 2013).

<sup>130</sup> Interview with manager at corporate member of MSI-A (London, 3 October 2013).

<sup>131</sup> Interview with head of international trade union federation that is signatory to international framework agreements, and one of the founders of MSI-A (Brussels, 10 May 2013); Interview with senior official at international trade union federation and one of the founders of the MSI-A (Brussels, 15 October 2013).

Instead, they believe that such improvements can only be achieved if they team up with their suppliers' management and workers' representatives. Such partnerships will, they believe, create an environment where workers' representatives will be emboldened to raise concerns with management about labour rights violations and where management, in turn, will recognise that productivity can be increased if workers enjoy their rights. These programmes hold out the promise that they will lead to a greater degree of enjoyment of international labour standards than audits. Nevertheless, there is insufficient data to determine how influenced they will be by international law and ILO standards.

### **III. THE APPLICATION OF INTERNATIONAL FRAMEWORK AGREEMENTS**

While audits are the dominant mechanism of implementing corporate codes of conduct, the application arrangements of IFAs are not as standardised. This reflects the attitude of the global union federations (co-signatories of IFAs) that 'while rights are non-negotiable, the way companies allow access to them is negotiable.'<sup>132</sup>

In most instances, the arrangements for the application of IFAs are only defined once a GUF and a corporation have signed them. Some of the corporations studied for this thesis professed their satisfaction with having signed an agreement with unions, portraying it as a sign of their commitment to workers' rights.<sup>133</sup> For a GUF, however, the signing of an IFA is not 'the end of a chapter. To us, it's just a

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<sup>132</sup> Interview with head of international trade union confederation that is a signatory to international framework agreements (Geneva, 20 February 2013).

<sup>133</sup> eg corporation C3 (Interview with senior official at corporate signatory to an international framework agreement (Atlanta, 5 April 2013)).

beginning'.<sup>134</sup> Moreover, 'an IFA is not a certificate', but the framework for a process that will lead to an improvement in working conditions and the enjoyment of labour rights.

Broadly speaking, IFAs are put into practice through a mixture of formal and informal mechanisms. For instance, corporation C1 and global union federation X (GUF-X) agreed to implement their IFA through two formal annual meetings and 'small working groups, with a specific objective on a specific topic' such as gender balance and discrimination in the workforce.<sup>135</sup> More sensitive issues, including questions of adherence to workers' rights, are resolved through 'frequent informal dialogue between meetings'.<sup>136</sup> Corporation C2 and GUF-X have a similar structure for applying their framework agreement. The primary forum is an annual three-day meeting, attended by the chairman and senior executives of C2 and worker representatives, at which unions have an opportunity to discuss business strategy, human resources and labour rights issues with management.<sup>137</sup> In addition, corporation C2 and GUF-X have established joint 'small committees who meet every two months' and who are tasked with drafting new guidelines for putting into place the IFA. However, 'if there is an issue on fundamental labour rights, it will be [the head of GUF-X] who will directly address our vice-president. There is no other mechanism - we have too much bureaucracy and too much process, we want straight

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<sup>134</sup> Interview with head of international trade union confederation that is a signatory to international framework agreements (Geneva, 20 February 2013).

<sup>135</sup> Interview with manager at corporate signatory to an international framework agreement (Geneva, 2 April 2013).

<sup>136</sup> *ibid.*

<sup>137</sup> Interview with senior official at corporate signatory to an international framework agreement (Paris, 3 April 2013).

talk and action'.<sup>138</sup> Once such an issue is raised, corporation C2 will begin an investigation that may include a targeted, unannounced audit. Thus, as with corporation C1, corporation C2 and GUF-X resolve many of the most sensitive and important labour rights questions through informal dialogue rather than through formal structures.

Corporations and GUFs agree to varying degrees on the meaning of labour rights provisions in IFAs. At one extreme, corporation C1 and GUF-X agree that international labour standards are the starting point for resolving labour rights disputes.<sup>139</sup> For further guidance, they use as benchmarks those standards that provide workers with the highest degree of protection, be they ILO standards in their original form, ILO standards as interpreted by OECD Guidelines, ILO jurisprudence or local legislation.<sup>140</sup> Similarly, in its disputes with co-signatories of IFAs, the position of global union federation Y (GUF-Y) is that, 'for fundamental rights there is no room for discussion, particularly if national legislation sets an inferior standard than ILO, of course ILO standards should prevail. Of course, if national legislation is superior, then national legislation is applied'.<sup>141</sup> Where there is still a dispute about the meaning of a provision, GUF-Y will often invoke ILO jurisprudence, including decisions of the ILO Committee on Freedom of Association to support its

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<sup>138</sup> *ibid.*

<sup>139</sup> Interview with manager at corporate signatory to an international framework agreement (Geneva, 2 April 2013).

<sup>140</sup> Interview with head of international trade union confederation that is a signatory to international framework agreements (Geneva, 20 February 2013).

<sup>141</sup> Interview with senior official at international trade union confederation that is a signatory to international framework agreements (Geneva, 18 February 2013).

interpretation. These cases serve as examples to the way analogous disputes were resolved by the ILO and as such carry certain weight with corporations.<sup>142</sup>

At the other extreme, the head of GUF-X states that his organisation and corporation C3 'have the same understanding only at the most superficial level. We've read the same UN Guiding Principles, Guidelines, ILO Conventions. We know on paper what these rights are supposed to mean. The practical reality of the rights is very differently understood by [corporation C3]. There is no question we don't have the same view of what being able to access and exercise those rights actually means'.<sup>143</sup>

In instances of such a wide gulf between GUF-X and a corporation as to the meaning of a labour right, GUF-X invokes whichever international labour standards it deems to be most advantageous to its argument. These are frequently ILO standards in their modified form (in other words, as stipulated in the UN Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises, rather than as set forth by ILO conventions and jurisprudence).

The reasons for invoking ILO standards in their modified rather than their original form are two-fold. First, GUF-X believes that the UN Guiding Principles and OECD Guidelines impose an 'obligation to rise above local laws where they don't meet international standards'.<sup>144</sup> Second, as GUF-X recognises that ILO standards are only binding on states,

What we try to avoid doing is to give an impression a company is actually a constituent part that these ILO standards are geared towards, because it makes us look dumb. We find it more functional to incorporate ILO standards as they

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<sup>142</sup> *ibid.*

<sup>143</sup> Interview with head of international trade union confederation that is a signatory to international framework agreements (Geneva, 20 February 2013).

<sup>144</sup> *ibid.*

are in the framework of instruments - UN Guiding Principles and OECD Guidelines - geared directly towards modern day, real transnational corporations, and get at those standards that way. So, it's not that ILO standards don't feature; they're an essential bedrock of what we focus on when we're talking to companies.<sup>145</sup>

The outcome of GUF-X's attempt to resolve a dispute in accordance with ILO standards differs from case to case and depends on the course of subsequent negotiations with corporations.

### **Conclusion**

As has been demonstrated, international law influences the application of IFAs. Primary ILO standards are used as a benchmark by all of the corporations and GUFs studied for this project. Secondary sources of ILO standards, such as ILO jurisprudence, are also invoked by unions and frequently accepted by corporations as a reference point in resolving disputes over labour rights. Nonetheless, the influence of international law should not be overstated. Corporations and trade unions are engaged in perpetual negotiations over the application of the IFAs they have signed; in some cases, international labour standards are upheld while in others they are only paid lip service. This shows that the influence of international law is contingent on other factors, such as relationships between the unions and corporations and the right in question (unions and corporations diverge most sharply over freedom of association). Further research is necessary to determine the exact role these other factors play in the influence of international law on the application of IFAs.

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<sup>145</sup> *ibid.*

#### **IV. CONCLUSION**

The research conducted for this thesis demonstrates that international law impacts the application of codes of conduct only to a limited degree and solely with regard to certain rights. As we have seen, international standards are used as benchmarks by companies enforcing the proscription of child labour and forced labour. On the other hand, auditors and corporations applying freedom of association, non-discrimination, working hours and weekly rest clauses in codes routinely overlook international standards on these rights. Finally, while corporations and auditors are mindful of health and safety provisions in codes due to the potentially fatal consequences when they are violated, international law is largely irrelevant to their application.

These results show that the designation by the ILO of freedom of association and non-discrimination as core labour standards has little relevance to the manner in which corporations operate in practice. The principal mechanism through which corporations put their codes into practice – auditing - is not designed to detect violations of freedom of association or non-discrimination. Auditing consultancies and corporations are aware that the format of an audit - a one day visit announced ahead of time - lends itself to manipulation by suppliers. Moreover, the political objections of corporations to freedom of association give auditors a signal that they should not expend too much energy to discover how freely workers can unionise in a factory. As a result, freedom of association and non-discrimination are effectively disregarded as labour rights by most corporations and by the auditing industry.

From the perspective of corporations and how they conduct themselves in practice, it can thus be said that freedom from child labour and freedom from forced labour are the only rights they would consider as inviolable and as ‘non-

negotiable'.<sup>146</sup> Accordingly, ILO standards on freedom from child labour and freedom from forced labour carry a lot of weight with corporations; they are strongly committed to respecting these standards. In addition, the right to health and safety could also possibly ascend to this plain if corporations and auditors begin monitoring it more strictly in their suppliers' factories, as has been indicated in the wake of the recent high profile tragedies in Bangladesh. It might be said that, as far as corporations are concerned, these three labour rights - freedom from child labour, freedom from forced labour and the right to health and safety - are the *de facto* core international labour standards. They influence corporations in the application of their codes of conduct. The other international labour standards examined in this study - those on freedom of association, non-discrimination, the right to limited working hours and the right to weekly rest - have little or no influence on the behaviour of the majority of corporations.

The distinction made by corporations between the *de facto* core international labour standards and other international labour standards raises once again the question of the applicability of international law to corporations. As noted in chapter 2, scholars such as Brownlie hold that 'in principle, corporations of municipal law do not have international legal personality'.<sup>147</sup> The Guiding Principles for Business and Human Rights agreed with that position and declared that states have the 'legal duty' to protect against human rights abuses by businesses while corporations merely have a 'social norm' to respect human rights. The results of my research show that corporate attitudes towards this 'social norm' vary by the labour right enforced. In the case of rights such as freedom of association and the right to weekly rest, corporations

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<sup>146</sup> Interview with senior manager at auditing company (London, 30 January 2014).

<sup>147</sup> I Brownlie, *Principles of Public International Law* (6th ed., OUP 2003) 65.

do not, in practice, behave in a manner that would indicate they feel bound by any social, much less legal, norm to respect these rights. This casts a doubt on the Guiding Principles' position that existing standards of international law dictate a corporate social norm to respect human rights: corporations do not appear to feel bound by this social norm with regard to the majority of key international labour standards examined in this thesis.

Even where international law influences the application of codes of conduct, this influence is limited. A reason for this is the nature of international law, which is heavy on substance but light on process; in other words, it does not contain a roadmap for states (much less corporations) on how to implement international standards, which is precisely what corporations would like international law to provide.

In the wake of this lacuna, corporations have promoted auditing as a means of gauging compliance with codes. However, auditing has many weaknesses: it is a snapshot of the way a supplier works; it allows rights which are difficult to enforce (non-discrimination) or unpopular (freedom of association) to fall by the wayside; it is a corruptible process; and it is a drain on resources that has led to audit fatigue among factories and brands alike. These weaknesses make auditing an unsuitable mechanism for the implementation of international labour standards through codes.

The joint mechanisms developed by corporations A3, A5 and B1 and by MSI-A (described in part II) offer a limited hope that international standards can be effectively upheld through codes of conduct. International standards are even more influential when invoked by signatories to IFAs, the mechanism described in part III. It is likely that corporations A3, A5 and B1, the signatories of IFAs and their like-minded peers are going to expand the use of joint programmes and IFAs because they have the added advantage of allowing corporations to 'get ahead' of potential

negative developments. By strategically devolving more power to their suppliers and their suppliers' workers, corporations may well be able to induce improvements in performance and in adherence to labour rights, but also to share responsibility if and when abuses or industrial accidents do happen.

Still, the emphasis of joint programmes and IFAs on freedom of association as an enabling right is likely to limit them to those corporations, relatively few in number, who are not politically opposed to unionisation. These two mechanisms are thus unlikely to change most corporations' reliance on audits as the primary means of implementing codes of conduct.

Consequently, considering auditors' selective application of international standards contained in codes of conduct, the influence of international law on the application of codes is likely to remain selective and confined to three rights: freedom from child labour, freedom from forced labour and the right to health and safety.

## CHAPTER 5

# WHAT FACTORS AND PROCESSES DETERMINE THE INFLUENCE OF INTERNATIONAL LAW ON CODES OF CONDUCT AND ON THEIR APPLICATION?

### OVERVIEW OF CHAPTER FIVE

In chapters 3 and 4 I showed what kind of influence international law has on the construction and application of codes of conduct. As noted in these chapters, the influence of international law on codes can vary depending on the level of pressure exerted by unions and NGOs, on commercial considerations, and on other factors. In addition, the results presented in chapters 3 and 4 suggest that this influence comes about through an assortment of processes, such as mimicry and pressure. In this chapter, I will attempt to systematise these findings by examining some of the key **factors** and related **processes** that determine the extent of the influence of international law on the construction and application of codes of conduct.

Part I investigates the role of trade union and NGO pressure as a factor in the inclusion and application of international legal standards in codes of conduct. It will use as its principal case study the creation of Multi-Stakeholder Initiative A (or MSI-A) and its code of conduct, called the Fundamental Code.

Part II will then examine the processes that lead some corporations, including those that are not members of MSI-A, to mimic their peers and incorporate international labour standards contained in the MSI-A Fundamental Code in their own codes of conduct. Part III will focus on the roles that reputational risk and commercial pressure play as factors for corporations applying their codes of conduct. Part IV will present an overview of the effect that values of corporate officials have

on corporations' actions in this field. Part V will conclude by reflecting on the importance of trade union and NGO pressure as the key factor or process determining the influence of international law on codes of conduct.

## **I. TRADE UNION AND NGO PRESSURE**

### **I.A. The role of trade union and NGO pressure in creating the precursor to the MSI-A Fundamental Code - the Basic Code of Labour Practice**

A central part of the qualitative research undertaken for this thesis involves the study of the drafting of the MSI-A Fundamental Code. It is the code of conduct of Multi-Stakeholder Initiative A, a multi-stakeholder initiative that was formed in the 1990s by unions, NGOs and corporations to tackle labour rights issues in their corporate members' supply chains. MSI-A is of particular importance to my research because its code of conduct will be shown to have formed the basis of codes of both MSI-A members and of many of the other corporations and other organisations studied herein. However, in order to ascertain the influence of international law on the MSI-A Fundamental Code, I need to first investigate the origins of its precursor – the Basic Code of Labour Practice.

The genesis of the Basic Code of Labour Practice can be traced back to campaigns led by NGOs and by trade unions to improve working conditions in the toy industry, which was placed under the spotlight after a deadly fire in a toy factory in Thailand in 1993, in which 188 people died.<sup>1</sup> After this tragic event, trade union officials held discussions on ameliorating working conditions with associations of

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<sup>1</sup> Interview with representative of non-governmental organisations to MSI-A (London, 13 February 2013); Interview with official at non-governmental organisation that is a member of MSI-A and active in monitoring corporate violations of human rights (Oxford, 20 March 2013); Interview with senior official at international trade union federation and one of the founders of the MSI-A (Brussels, 16 July 2009).

corporations in the toy industry. Initial discussions focused on providing more space for the effective functioning of trade unions in toy factories through improved industrial relations.<sup>2</sup> However, once trade unions realised that corporations were not receptive to this approach, they changed tack by appealing to ‘universal values’<sup>3</sup> that would be shared by corporations in the toy industry and their suppliers in developing countries. These universal values, claimed union officials, were codified in standards promulgated by the ILO.

As ILO standards were not binding on corporations, union officials opted to create a code of conduct that would convert ILO standards into norms that would be adopted by corporations. This approach, inspired by the code of conduct adopted by Levi’s in 1991 (widely noted as the first code of conduct on labour rights),<sup>4</sup> led trade union officials to draft the Basic Code of Labour Practice.

The stated purpose of the Basic Code is to ‘promote the primacy of international labour standards and the inclusion of trade union rights in codes of conduct covering labour practices’. It was intended to ‘apply to international operations of a multinational company, aimed at limiting the worst forms of abuse and exploitation’, while also addressing ‘the responsibility of a company for the labour practices of its contractors, sub-contractors and principal suppliers.’<sup>5</sup> Its two creators (two high ranking officials in a global union federation) decided that the Basic Code should focus on what they perceived to be the key issues facing workers

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<sup>2</sup> Interview with senior official at international trade union federation and one of the founders of the MSI-A (Brussels, 15 October 2013).

<sup>3</sup> *ibid.*

<sup>4</sup> Interview with senior official at international trade union federation and one of the founders of the MSI-A (Brussels, 15 October 2013); ‘Levi Strauss & co., Code of Conduct’ <<http://www1.umn.edu/humanrts/links/levicode.html>> accessed 4 February 2015.

<sup>5</sup> ‘ICFTU/ITS Basic Code of Labour Practice’ (made available to the author).

in developing countries in the early 1990s: low wages; underage child workers; long hours; forced labour, particularly of migrant workers; health and safety; discrimination and maltreatment of workers; and ‘the overriding issue: the inability of workers to come together and bargain collectively, due to restrictions posed by national law and attitudes of employers’.<sup>6</sup> Accordingly, its content contains provisions on all of these issues, which invoke international standards, often explicitly.

An example is the provision titled ‘Employment is Freely Chosen’. Therein, the Basic Code stipulates: ‘there shall be no use of forced, bonded or involuntary prison, labour (ILO Conventions 29 and 105). Nor shall workers be required to lodge “deposits” or their identity papers with their employer.’<sup>7</sup>

The content of the Basic Code was purposefully ‘minimalist’, so as to avoid codes becoming ‘alternatives to collective agreements’, which, according to one of its drafters, is ‘what would have happened if they had been too precise’. In drafting the code, the union officials found the links between the above-mentioned issues and ILO conventions to be ‘natural’, which led them to ‘base the Basic Code on the core conventions of the ILO.’<sup>8</sup>

## **I.B. The role of trade union and NGO pressure in the drafting of the MSI-A Fundamental Code**

The manner in which international labour standards were re-stated in the Basic Code would come to have a significant influence on the eventual content of the MSI-A

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<sup>6</sup> Interview with head of international trade union federation that is signatory to international framework agreements, and one of the founders of MSI-A (Brussels, 10 May 2013).

<sup>7</sup> ‘ICFTU/ITS Basic Code of Labour Practice’ (n 5).

<sup>8</sup> Interview with head of international trade union federation that is signatory to international framework agreements, and one of the founders of MSI-A (Brussels, 10 May 2013).

Fundamental Code. The negotiations leading to the drafting of the MSI-A Fundamental Code and the creation of the MSI-A took over a year and were marked by sharp disputes over a number of issues between the three groups of stakeholders that formed the MSI-A: corporations, NGOs and trade unions. The substantive issues that provoked the strongest disagreements during the negotiations included freedom of association and collective bargaining, child labour, non-discrimination and working hours. In addition, negotiators from all sides debated the role that international law, including ILO conventions, national law and industry practice should play in the Fundamental Code. Using documents and correspondence obtained from the negotiators, I will examine in this section how these issues were resolved in the drafting of the MSI-A Fundamental Code and what role that trade union pressure played in this process.

### *Freedom of association*

The clause on freedom of association in the initial draft of the MSI-A Fundamental Code proclaims:

Employers shall adopt a positive approach towards the activities of trade unions and an open attitude towards their organisational activities. The supplier should recognise and respect the right of workers to join associations of their own choosing, and should not interfere with or discriminate against workers doing so. Where a majority of workers have freely joined an association and wish to bargain collectively, suppliers should seek to co-operate with this.<sup>9</sup>

This formulation was challenged by trade unions, which expressed their desire for a ‘clear draft on freedom of association and the right to collective bargaining in line

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<sup>9</sup> First draft of MSI-A Fundamental Code (made available to the author).

with the terms of the ILO conventions'.<sup>10</sup> As a result, third-party participants in the negotiations produced a second draft of the MSI-A Fundamental Code, stating:

**The rights to freedom of association should be respected:** Employers should respect the rights of workers to join associations of their own choosing without fear of intimidation or discrimination. Employers should adopt an open and positive attitude to the work of representative organisations controlled by the workers themselves. Representatives of such organisations should be allowed to have access to their members at the suppliers' premises to carry out their representative functions. Employers should seek to co-operate with the clearly expressed wishes of workers to bargain collectively. In countries where independent trade unions are forbidden or suppressed by law or practice, employers should adopt a positive attitude to independent worker representation and should not hinder the development of independent trades unions nor collaborate in their suppression.<sup>11</sup>

Despite the more detailed language in this clause, trade union officials still criticised this provision for its lack of recognition of the workers' right to 'establish [NB - as well as join] organisations of their own choosing'.<sup>12</sup> Without the right to establish unions or other organisations, union officials expressed a fear that workers could only choose to join management-backed unions (such as the Solidarismo unions in central America) where none other existed. They emphasised that the right to form a union was a key component of freedom of association, as defined in ILO Convention 87, and that the MSI-A Fundamental Code should reflect that.<sup>13</sup> In due course all negotiators, including those from the corporate side, agreed with this suggestion and it was incorporated into the final version of the MSI-A Fundamental Code.<sup>14</sup>

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<sup>10</sup> E-mail from one (anonymised) union official to another (anonymised) union official (19 February 1998), made available to the author.

<sup>11</sup> Second draft of MSI-A Fundamental Code 1 (made available to the author).

<sup>12</sup> E-mail from one union official to another (20 February 1998), made available to the author.

<sup>13</sup> *ibid.*

<sup>14</sup> MSI-A Fundamental Code, article 2.

Another point of contention was whether workers' representatives should have access to the workforce as a whole at the suppliers' premises, rather than just to their members. Trade union representatives argued that workers' representatives should be allowed 'to carry out, not just their representative functions (which could be interpreted as meaning they only have a function if they already have members there), but also to apprise workers of the potential advantages of unionisation (FoA Digest, para 954, cf 284th report, Case 1523).'<sup>15</sup> This caused objections among some corporate members that it would lead to 'trouble-makers' having access to the workplace.<sup>16</sup> Nevertheless, the argument that this was an international standard, as supported by the decision in the ILO case cited in the correspondence above, was ultimately accepted, and the final draft of the MSI-A Fundamental Code includes a provision that reflects this suggestion.<sup>17</sup>

The provision governing the right to collective bargaining was also a matter of dispute. A submission by the corporate representatives to the negotiations suggested that it should be phrased as follows: 'Employers should seek to co-operate with the clearly expressed wishes of a majority of workers to bargain collectively.' Union officials, who pointed to the ILO jurisprudence on the matter, disputed the idea that employers have an obligation to bargain collectively only when a majority of workers wish to do. They invoked ILO opinions in particular cases dictating that the law should not preclude minority unions from functioning and making representations on behalf of their members.<sup>18</sup> Eventually, the suggestion by corporate representatives

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<sup>15</sup> E-mail from one union official to another (20 February 1998), made available to the author.

<sup>16</sup> E-mail from an NGO representative to multiple recipients (25 February 1998), made available to the author.

<sup>17</sup> MSI-A Fundamental Code, article 2.

<sup>18</sup> ILO, *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO* (Fifth (revised) ed, ILO 2006), para 974-978.

was dropped, and the final version of the MSI-A Fundamental Code does not require the majority of workers to want to bargain before the right to collective bargaining is triggered - as per ILO jurisprudence.

Another proposal made by negotiators representing the corporate side with regard to freedom of association was that ‘the desire of those who wish to work without any formal representation, shall be respected by all parties’.<sup>19</sup> However, this suggestion was not grounded in international labour standards and was in the end rejected due to lack of support.

Ultimately, the final wording of the clause governing freedom of association and the right to collective bargaining in the MSI-A Fundamental Code reflects the most important aspects of the right as defined by ILO standards and as previously re-stated in the trade unions’ Basic Code of Labour Practice.

### *Child labour*

The clause on the prohibition of child labour of the initial draft of the MSI-A Fundamental Code stated:

**Employment of Children:** No children should be employed who are under 14 (or the legal minimum if higher). Children under 18 should not work at night or in hazardous conditions. Depending on local circumstances, children of school age over 12 may be employed part-time if still in education. Adequate transitional economic assistance and appropriate education opportunities shall be provided to any replaced child workers.<sup>20</sup>

This wording of the clause was heavily critiqued by trade union and NGO officials, which set off a protracted negotiation over its content. The first key point of contention was what the minimum age for carrying out labour should be. The

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<sup>19</sup> Amendments to the Draft MSI-A Fundamental Code by a corporate official (4 March 1998), made available to the author.

<sup>20</sup> First draft of the MSI-A Fundamental Code (made available to the author).

wording of the clause in the first draft deviates from international standards in important respects. This was noted by trade union officials, who called for the removal of the ‘incredibly over-simplified reference to 12 years old’, because ‘the way it is couched suggests that 12 becomes the norm rather than the bottom line exception.’ Instead, it was argued, the Clause should be worded in accordance with ILO Convention 138 to ensure corporations prohibit children under 15 from manufacturing their products, except under the strictly defined circumstances of the developing country exception.<sup>21</sup>

Corporate representatives replied that the Fundamental Code should enable twelve-year-old children to do agricultural work, such as harvesting, that goes on in their supply chains.<sup>22</sup> The union response to this business case for lowering the threshold was, once again, to invoke international standards - both current (at the time) and prospective. As the negotiations on the text of the Fundamental Code took place in parallel with the drafting of ILO Convention 182 (Concerning the Prohibition and Immediate Action for the Elimination of Worst Forms of Child Labour), the negotiators resorted to guessing the contents of Convention 182. Union officials nevertheless used these proposed standards as an argument against the corporate request to lower the minimum age in the Fundamental Code to 12 years of age. A union official noted at the time that ‘the new ILO Convention will almost certainly identify agriculture as a potentially hazardous occupation and will call on governments to suppress commercial exploitation of children in agriculture’.<sup>23</sup>

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<sup>21</sup> E-mail from a union official to a participant in the negotiations (3 February 1998), made available to the author.

<sup>22</sup> E-mail from a union official to a participant in the negotiations (23 February 1998), made available to the author.

<sup>23</sup> E-mail from a union official to a participant in the negotiations (23 February 1998), made available to the author.

Although this prediction ultimately did not come to pass (ILO Convention 182 did not designate any particular branch of industry as hazardous per se),<sup>24</sup> this line of argument - which invoked international standards that were not yet adopted - was enough to dissuade corporate negotiators from lowering the minimum age to 12 years of age.

Nevertheless, the proposed draft's minimum age of 14 contravened the minimum age for admission to employment set by ILO Minimum Age Convention 138.<sup>25</sup> Specifically, ILO Convention 138 sets the minimum age as no less than the age of completion of compulsory schooling and, in any case, no less than 15 years, except in countries whose 'economy and educational facilities are insufficiently developed', where national law may set a minimum age of 14.<sup>26</sup>

This question was resolved when all parties accepted they should be guided by ILO conventions. This did not, however, come without its complications. Subsequent versions of the draft Fundamental Code would try, unsuccessfully, to encapsulate the elaborate ILO standards on minimum age and child labour, complete with the many exceptions foreseen for different types of work or developing countries.

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<sup>24</sup> Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (No 182) (adopted 17 June 1999, entered into force 19 November 2000) 2133 UNTS 161 (ILO No 182), art 3 and 4, calling on each state party to determine through its national law what constitutes worst forms of child labour, defined (among other forms of child labour) as hazardous 'work, [which] by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children' (article 3(d)). However, a close reading of subsequent ILO instruments and jurisprudence since indicates that children working in agriculture would be deemed to be engaged in hazardous work, with the threshold thus likely being 18, or 16 in exceptional circumstances. See eg Recommendation Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (No 190) (International Labour Conference, 87th Session, Geneva 17 June 1999), art 3. It urges those states parties to ILO No 182 that are in the process of designating what hazardous work to give special consideration to whether children are carrying out work with 'dangerous machinery, equipment and tools, or which involves the manual handling or transport of heavy loads.' This would indicate that much agricultural work would indeed be considered as hazardous work and thereby one of the worst forms of child labour for the purposes of ILO No 182.

<sup>25</sup> E-mail from an NGO to a union representative (7 April 1998), made available to the author.

<sup>26</sup> Convention Concerning Minimum Age for Admission to Employment (No 138) (adopted 26 June 1973, entered into force 19 June 1976) 1015 UNTS 297 (ILO No 138), art 1 and 2.

Thus, the third version of the draft Fundamental Code specified that children ‘under the age of 15 may not be employed, except where national law permits employment at age 14.’ Further, ‘young persons of 13 to 15 years of age - or at least 15 years of age who have not yet finished their compulsory schooling - may be permitted to carry out light work where such work does not prejudice their education, health or development. Where national law permits, these ages are 12 and 14 years respectively’.<sup>27</sup>

Although this was a fairly accurate summation of ILO standards, corporate representatives to the negotiations did not favour this formulation because they believed it would prove to be difficult to grasp and implement for suppliers. The final wording of the clause regarding minimum age was accordingly simplified. The first part of the clause on child labour states ‘There shall be no new recruitment of child labour’,<sup>28</sup> with a child defined as: ‘Any person less than 15 years of age unless local minimum age stipulates a higher age for work or mandatory schooling, in which case the higher age shall apply. If however, local minimum age is set at 14 years of age in accordance with developing country exceptions under ILO Convention no. 138, the lower will apply’.<sup>29</sup> The clause goes on to make an exception with regard to work ‘at night or in hazardous conditions’, setting a minimum age of 18 years of age.<sup>30</sup>

The second major point of contention regarding child labour was its definition. The fourth draft of the MSI-A Fundamental Code proposed to define child

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<sup>27</sup> Draft MSI-A Fundamental Code, (24th June 1998), article 4 (made available to the author).

<sup>28</sup> MSI-A Fundamental Code, article 4.

<sup>29</sup> MSI-A Fundamental Code, appendix B.

<sup>30</sup> MSI-A Fundamental Code, article 4.

labour as ‘any work by a child younger than the age(s) specified in the above definition of a child,<sup>31</sup> except as provided for by ILO Recommendation No. 146.’<sup>32</sup>

This wording was challenged by negotiators from the ranks of NGOs, who wanted the definition of child labour to hinge on the nature of the work being carried out while de-emphasising the minimum age criterion. A negotiator thus put forward an alternative proposal stating that child labour should be defined as:

Any work that is likely to be hazardous or to interfere with the child’s or young person’s education or to be harmful to the child’s health or physical, mental, spiritual, moral or social development, and any work that does not comply with the minimum ages as specified in ILO Convention 138.<sup>33</sup>

Representatives of NGOs stated that this proposal was inspired by the ‘definition of child labour from Article 32 of the UN Convention on Rights of the Child, signed and ratified by 191 countries’.<sup>34</sup>

Both of these competing proposals were based on international standards: the former on ILO conventions, the latter on the UN Convention on the Rights of the Child (CRC). While ILO conventions drew their legitimacy from the ILO being recognised as a standard-setter for labour rights, the proponents of the CRC highlighted its status as the most widely ratified international human rights convention in order to bolster its credibility with other stakeholders involved in the negotiations.

The negotiators discussed the implications of the two proposals. In a critique of the proposal based on the CRC, a union official wrote that it wants to ‘downplay

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<sup>31</sup> The definition of a child based on a minimum age that was eventually incorporated into the final draft.

<sup>32</sup> Fourth draft of MSI-A Fundamental Code, referenced in e-mail from a corporate representative to a union official (7 July 1998), made available to the author.

<sup>33</sup> E-mail from a corporate representative to a union official (7 July 1998), made available to the author.

<sup>34</sup> E-mail from a corporate representative to a union official (7 July 1998), made available to the author.

minimum age' as a criterion for determining child labour, which is 'simply wrong', as 'in company supply chains, any work done by children under the minimum age is commercial exploitation and therefore child labour.'<sup>35</sup>

In spite of these discussions, the NGO officials and trade union officials advocating the two proposals held fast to their positions. On occasion, they raised the possibility that they would withdraw from the negotiations, hoping to coerce the corporations into an agreement on their terms. As the two international standards underpinning the two proposals had an equal degree of legitimacy in the eyes of corporate representatives and third-party participants in the negotiations, the final wording of the Fundamental Code is a marriage of the two submissions and child labour is:

Any work done by a child or young person younger than the age(s) specified in the above definitions, which does not comply with the provisions of the relevant ILO standards, and any work that is likely to be hazardous or to interfere with the child's or young persons' education, or to be harmful to the child's or young person's health or physical, mental, spiritual, moral or social development.<sup>36</sup>

In the end, the final version of the child labour clause of the MSI-A Fundamental Code was shaped substantively by international standards. When corporate negotiators attempted to deviate from age limits established by ILO standards, other negotiators (particularly those from the union side) were quick to remind them that age limits established by the ILO are de facto 'red lines' for them and that they would not support a Fundamental Code that deviates from these. The only challenge to this position that garnered support (and the only challenge that was seen as having legitimacy) came not from corporations, but from NGOs, who believed that the

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<sup>35</sup> E-mail from one union official to another (8 July 1998), made available to the author.

<sup>36</sup> MSI-A Fundamental Code, appendix B.

Fundamental Code should reflect the CRC's definition of child labour, which hinges on the kind of work being done rather than minimum age. Thus, the principal debate between the negotiators hinged on which source of international law should be reflected in the Fundamental Code.

### *Discrimination*

The clause regulating discrimination in the second draft of the MSI-A Fundamental Code states:

**There should not be inequality in employment:** In giving access to jobs, training and promotion or wages, employers should not discriminate between workers on grounds of gender, marital status, sexual orientation, race, caste, colour, political affiliation, religion, social origin, disability, union membership, or any other arbitrary basis, *but not disregarding the cultural or religious norms operative in the country and region.*<sup>37</sup>

This formulation was characterised as 'dreadful' by trade union representatives who stated that it gives companies carte blanche to discriminate on any of the above-mentioned grounds if it is normal to do so in the country concerned.<sup>38</sup> This would, it was argued, leave unchecked sex discrimination that goes on in *maquiladoras*, such as dismissing women when they become pregnant. The idea of a 'cultural norm' was dismissed as opening up room to discriminate and oppress 'in violation of international standards'.<sup>39</sup>

Eventually, this qualification of the right to equal treatment was expunged from the text of the MSI-A Fundamental Code, and the final provision phrased to closely reflect international standards and resemble the Basic Code.

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<sup>37</sup> Emphasis added.

<sup>38</sup> E-mail from a union official to a participant in the negotiations (23 February 1998), made available to the author.

<sup>39</sup> E-mail from a union official to a participant in the negotiations (23 February 1998), made available to the author.

### *Working hours*

The discussions on the clause of the Fundamental Code regulating working hours were characterised by consensus over the key points, namely that: no one should regularly work more than eight hours per day and forty-eight hours per week; that overtime should be voluntary and paid at a premium rate; and that workers should receive regular rest.<sup>40</sup>

The main challenge to this consensus was by corporate representatives to the negotiations who claimed that in practice ‘middle management upward would not normally receive overtime’ and that they should thus not be afforded the right to receive overtime payments.<sup>41</sup> This suggestion was rejected by union officials stating that ILO standards on overtime payments do not foresee exceptions for any categories of workers. Thus, the final version of the Fundamental Code was worded as follows:

#### **6. Working hours are not excessive**

6.1 Working hours comply with national laws and benchmark industry standards, whichever affords greater protection.

6.2 In any event, workers shall not on a regular basis be required to work in excess of 48 hours per week and shall be provided with at least one day off for every 7-day period on average. Overtime shall be voluntary, shall not exceed 12 hours per week, shall not be demanded on a regular basis and shall always be compensated at a premium rate.<sup>42</sup>

This clause only partly reflects ILO standards. Although ILO Convention no. 1 does set a standard working week of forty-eight hours, it applies only to those working in industry and not in agriculture (as is the case for many of the workers in the supply

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<sup>40</sup> Third draft of the MSI-A Fundamental Code (made available to the author).

<sup>41</sup> Amendments to the Draft MSI-A Fundamental Code by a corporate representative (4 March 1998), made available to the author.

<sup>42</sup> MSI-A Fundamental Code, article 6 (first version).

chains of MSI-A members).<sup>43</sup> Nevertheless, this standard was adopted for all MSI-A members, regardless of their business. In addition, the Fundamental Code's stipulation that overtime should be limited to twelve hours per week does not derive from ILO standards, which merely state that overtime hours should be 'reasonable' while failing to set a uniform standard.<sup>44</sup>

Despite these differences between the Fundamental Code and ILO standards, MSI-A members commonly perceived the clause on working hours as being fully in line with ILO standards.<sup>45</sup> This misconception has been ascribed to 'certain expectations in the world of what ILO conventions say', although 'too often they don't say it'.<sup>46</sup> The drafters of the Fundamental Code, knowing that ILO standards are the 'badge'<sup>47</sup> of legitimacy and credibility with the negotiators, did not dispel this fallacy.

Nevertheless, since its adoption corporate members of the MSI-A have found it difficult to apply this clause, while NGOs and unions complained that it was being applied in a manner that had unintended negative consequences for workers. For instance, some corporate members strictly applying the Fundamental Code would claim that workers contracted to work thirty hours per week would have to work more

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<sup>43</sup> Convention Limiting the Hours of Work in Industrial Undertakings to Eight in the Day and Forty-eight in the Week (No 1) (adopted 28 November 1919, entered into force 13 June 1921) 38 UNTS 3 (ILO No 1), art 2.

<sup>44</sup> ILO, *General Survey of the Reports Concerning the Hours of Work (Industry) Convention, 1919 (No. 1), and the Hours of Work (Commerce and Offices) Convention, 1930 (No. 30)*, International Labour Conference, 93rd Session, 2005 (ILO 2005), para 143-145.

<sup>45</sup> Interview with senior official at MSI-A (London, 29 January 2013); Interview with consultant on corporate accountability and advisor to MSI-A (London, 8 February 2013).

<sup>46</sup> Interview with consultant on corporate accountability and advisor to MSI-A (London, 8 February 2013).

<sup>47</sup> *ibid.*

than forty-eight hours per week before they would be paid an overtime premium.<sup>48</sup> Another common scenario would see seasonal workers, such as those employed in agriculture and farming, wishing to work more than forty-eight hours in a single week being limited by the wording of the Code.<sup>49</sup> Moreover, companies wanting to pay a premium for overtime work were unclear on how much a premium rate should be in relation to the regular hourly rate.<sup>50</sup>

Eventually, the MSI-A Secretariat and its members agreed that the Code's clause on working hours should be amended to make its provisions 'clear and practical'.<sup>51</sup> It was their intention that any changes - the first amendments to the Code in the fifteen years since its adoption - would protect workers while also being clear and easy to implement for corporations.<sup>52</sup> They further intended that these changes should be based not on 'current corporate practice' but on ILO standards and 'common sense'.<sup>53</sup>

Indeed, the re-worded clause on working hours, produced by external consultants and verified through discussions with MSI-A members, stipulates in clause 6.1 that 'working hours must comply with national laws, collective agreements, and the provisions of 6.2 to 6.6 below, whichever affords greater protection for workers. 6.2 to 6.6 are based on international labour standards'.<sup>54</sup> The

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<sup>48</sup> Interview with head of MSI-A (London, 2 April 2013). Further instances of the problems corporations had in applying this clause are discussed in more detail in chapter 4.

<sup>49</sup> Interview with manager at MSI-A (London, 29 January 2013).

<sup>50</sup> Interview with manager at corporate Multi-Stakeholder Initiative-A (MSI-A) member (Reading, 7 February 2013).

<sup>51</sup> Interview with head of MSI-A (London, 2 April 2013).

<sup>52</sup> *ibid.*

<sup>53</sup> *ibid.*

<sup>54</sup> MSI-A Fundamental Code, article 6 (second version).

re-wording heralded a significant change: whereas previously working hours would have to comply with ‘national laws and benchmark industry standards’,<sup>55</sup> now the latter have been scrapped with international labour standards being introduced as a point of reference. This despite the fact that the drafters believed that ‘ILO guidance is largely silent on the issue’<sup>56</sup> of working hours and that ‘none of these standards are that clear.’<sup>57</sup>

The re-worded clause explicitly re-states some of those international labour standards to clarify a few of the ambiguities contained in the previous version. For instance, the new version of the working hours clause contains more detailed provisions on overtime, stating that it ‘shall always be compensated at a premium rate, which is recommended to be not less than 125% of the regular rate of pay,’<sup>58</sup> a standard which originates from ILO Convention No. 1.<sup>59</sup>

Nonetheless, despite the claim made in clause 6.1, not all of the important amendments to the Fundamental Code actually reflect international labour standards. The re-worded clause stipulates that working hours ‘shall not exceed 48 hours per week’ and that ‘the total hours worked in a 7 day period shall not exceed 60 hours’ except in exceptional circumstances enumerated in the clause.<sup>60</sup>

This re-formulation of the clause still maintains a limit on the number of overtime hours an employee can work. As has been mentioned above, ILO jurisprudence has not set any such cap on overtime. However, the drafters felt the

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<sup>55</sup> MSI-A Fundamental Code, article 6 (first version).

<sup>56</sup> Interview with manager at MSI-A (London, 21 February 2013).

<sup>57</sup> Interview with consultant on corporate accountability and advisor to MSI-A (London, 8 February 2013).

<sup>58</sup> MSI-A Fundamental Code, article 6 (second version).

<sup>59</sup> ILO No 1 Convention (n 41), art 2.

<sup>60</sup> MSI-A Fundamental Code, article 6 (second version).

need to confer additional legitimacy on the re-drafted working hours clause with the ‘badge’ of ILO standards; hence the catch-all stipulation in the new clause that all of the provisions contained therein - including the one limiting total hours worked to sixty per week - are based on international labour standards.<sup>61</sup>

To recapitulate, both the first version and the revised version of the MSI-A Fundamental Code clause on working hours are substantively based on ILO standards. Although there are deviations from ILO standards in both versions of the clause, the above-mentioned research demonstrates that these deviations largely came about inadvertently, due to a lack of knowledge of international labour standards rather than due to a desire to challenge these standards. Even when the clause was re-drafted, the drafters felt obligated to lend the new wording authority by claiming it is based on ILO standards.

### *International standards*

The above sections illustrate the influence of trade union and NGO pressure during the negotiations on the wording of the MSI-A Fundamental Code with regard to clauses on specific rights, such as freedom of association and freedom from child labour. This section will examine the role that international standards played in the conceptualisation of the MSI-A as an organisation and in providing the overarching framework for the application of the MSI-A Fundamental Code.

The idea of creating the MSI-A grew out of discussions of non-governmental organisations, trade unions and corporations. These discussions were followed and facilitated by the UK government. From the outset, the concept of the MSI-A was tied to the idea that it would entail its members signing up to a ‘labour code, based on the

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<sup>61</sup> Interview with consultant on corporate accountability and advisor to MSI-A (London, 8 February 2013).

Conventions of the ILO',<sup>62</sup> which were noted as the most widely ratified and legitimate international employment standards.<sup>63</sup> This idea came from the process that led up to the negotiations on the Fundamental Code, which saw a 'growing convergence' of views of trade unions and NGOs that 'codes of labour practice should be based on the human rights conventions of the ILO'.<sup>64</sup> In addition, as was described above, the trade unions had already developed the Basic Code of Labour Practice as a forerunner to other codes, including the Fundamental Code.

The idea that the Fundamental Code should require MSI-A corporate members to adhere to international standards on labour rights was, however, challenged by some of the corporate representatives to the negotiations. Fearful of the level of commitment this would represent, they suggested that the preamble to the Fundamental Code should state that 'these standards will not be achievable in the short term, and individual supplier assessments will therefore be made against legal standards and industry best practice within each country'.<sup>65</sup>

This proposal was resoundingly rejected in the course of the negotiations on the Fundamental Code. A union official wrote, 'if accepted that would defeat the purpose of' the MSI-A, the 'whole point of' which is to stop governments and corporations from 'undercutting minimum international standards'.<sup>66</sup> Again, trade unions raised the possibility of giving up on the negotiations at this point, hoping to coerce corporations into accepting international labour standards as a starting point

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<sup>62</sup> MSI-A Draft Project Concept Note (made available to the author) 4.

<sup>63</sup> Third draft of the MSI-A Fundamental Code (made available to the author).

<sup>64</sup> E-mail from one union official to another (19 February 1998), made available to the author.

<sup>65</sup> E-mail from a union official to a participant in the negotiations (23 February 1998), made available to the author.

<sup>66</sup> E-mail from a union official to a participant in the negotiations (23 February 1998), made available to the author.

for the drafting of a code. Another similar proposal - to have 'different codes for different industries' - was floated and again rejected by NGOs and unions as diminishing the universality of human rights inherent in the ILO conventions and other international standards.<sup>67</sup> In due course, the negotiators rejected the idea that MSI-A is there to set substantive standards, as they 'exist already' in the form of ILO conventions and other international documents.<sup>68</sup> It was accepted by the parties to the negotiations that 'the job of' the MSI-A 'is to assess compliance with international standards'.<sup>69</sup>

The negotiations also tackled the related questions of which aspects of the ILO standards should apply and who they should apply to. Corporate negotiators sought to distinguish ILO standards as they apply to employers and to governments, stating that the 'focus should be on the sections of the ILO standards that are relevant to companies'. Otherwise, they feared that they were 'being asked to sign up to ILO Conventions'.<sup>70</sup> Nevertheless, this distinction was scrapped in the course of the negotiations due to fears of trade union and NGO representatives that corporations would plead they would be unable to enforce some ILO standards because they are aimed at states rather than corporations. The final wording of the Fundamental Code does not address this issue explicitly, which lends the impression that corporations have signed up to the relevant ILO conventions as a whole.

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<sup>67</sup> E-mail from one union official to another (6 March 1998), made available to the author.

<sup>68</sup> E-mail from one union official to another (19 May 1998), made available to the author. The MSI did set some substantive standards independent of ILO conventions - for instance, on working hours. Nevertheless, as will be shown in the section on working hours below, the drafters (erroneously) believed they were using an ILO standard in formulating the working hours clause of the Fundamental Code.

<sup>69</sup> E-mail from an NGO representative to a union official (25 February 1998), made available to the author.

<sup>70</sup> Minutes of MSI-A Interim Board Meeting (3 July 1998), made available to the author.

Similarly, corporate representatives to the negotiations attempted to differentiate between how ILO standards enshrined in the Fundamental Code would apply to suppliers and to corporate brands, arguing that it would be unreasonable to expect suppliers to comply with these standards in the short term. Union and NGO representatives also rejected this suggestion because they believed it would fail to tackle the central issue of suppliers' non-compliance with international labour standards.<sup>71</sup> Ultimately, the corporations founding MSI-A agreed to require their suppliers to comply with the Fundamental Code.<sup>72</sup>

The discussions also focused on whether the Fundamental Code should be based on any other international standards in addition to ILO conventions. As is mentioned above with regard to child labour, the various negotiators sometimes had differing ideas as to which international conventions and standards should be used as a frame of reference. Union representatives expressed a concern that basing the Fundamental Code on standards other than the ILO's would dilute the Code, as ILO standards are 'far clearer and more specific' than any of the other international standards regarding employment. Moreover, they claimed that the jurisprudence established by ILO supervisory bodies will enable an unambiguous interpretation of the provisions of ILO conventions, thus reducing the wiggle room of corporations in applying the Fundamental Code based on ILO conventions.<sup>73</sup>

It was eventually agreed that the Fundamental Code should also reference other international standards beyond ILO conventions to ensure it would be as

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<sup>71</sup> Minutes of MSI-A Interim Board Meeting (3 July 1998), made available to the author.

<sup>72</sup> MSI-A Principles of Implementation, Principle 1.4.

<sup>73</sup> E-mail from a union official to an NGO representative (18 February 1998), made available to the author.

comprehensive as possible.<sup>74</sup> This led to the final version of the Fundamental Code name-checking documents, such as the Universal Declaration of Human Rights<sup>75</sup> and the Organisations for Economic Cooperation and Development's Guidelines for Multinational Enterprises.<sup>76</sup> Nevertheless, in its final version the pressure by trade unions told again, as the Fundamental Code clearly gives primacy to ILO conventions as 'the authoritative and legitimate source of labour standards'.<sup>77</sup>

#### *Theoretical implications of the emergence of the MSI-A Fundamental Code*

After the above-mentioned fire at the Thai toy factory in 1993, trade unions failed in their attempts to engage corporations in collective bargaining talks over working conditions in developing countries. Following this failure, global union federations hit upon promoting 'universal values' through codes of conduct as a strategy. The unions thereby wanted to impart to corporations and, as importantly, to the outside world, that there is a set of universal values and rules – namely, ILO standards - that all actors in society, including states and corporations, have to abide by in their treatment of workers. They drafted the Basic Code of Labour Practice to serve as an example of how corporations can apply ILO standards in practice.

In doing so, unions intended to entice feelings of what Goodman and Jinks called 'cognitive discomfort' among corporations and their leadership – the discomfort stemming from the fact that corporations were behaving in a manner

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<sup>74</sup> At the early stages of the negotiations, when the idea of including issues beyond labour rights in the Fundamental Code was still being mooted, negotiators - including corporate representatives - suggested using other international standards, such as the Universal Declaration on Human Rights, to cover issues not covered by ILO conventions. However, as the negotiators agreed the Fundamental Code should only cover labour rights, this idea was subsequently dismissed.

<sup>75</sup> Labeled as the as 'the most comprehensive standard' with respect to human rights; MSI-A Fundamental Code, Appendix B.

<sup>76</sup> MSI-A Fundamental Code, Appendix B.

<sup>77</sup> *ibid.*

contrary to society's mores. The trade union tactic of appealing to universal values was successful in inducing corporations to sign up to international labour standards through codes of conduct: it eventually triggered a process akin to acculturation – 'the general process by which actors adopt the beliefs and behavioural patterns of the surrounding culture'<sup>78</sup> - among corporations.

As discussed in Chapter 2, Goodman and Jinks identified acculturation as one of the three processes through which international law influences states. In this case, acculturation can be used to explain how international law came to influence corporations as well. The initial corporations to be acculturated were those that took part in the creation of the MSI-A and the drafting of the Fundamental Code. My research above shows that the founding corporate members of the MSI-A were negotiating over the content of numerous provisions, but that they were apprehensive about being seen to be opposed to international labour standards. This apprehension ultimately led them to accept a version of the MSI-A Fundamental Code based almost wholly on ILO standards. This apprehension still exists, as evidenced by the recent process of re-drafting the working hours clause of the Fundamental Code. Although this clause was re-drafted mostly at the behest of corporate members of MSI-A, it was ultimately worded in line with ILO standards as corporations experienced 'cognitive discomfort', fifteen years after the adoption of the Fundamental Code, at the thought of enacting a clause inconsistent with international law.<sup>79</sup>

This is consistent with Goodman and Jinks' account of acculturation and is distinct from the other two processes, material inducement and persuasion, put

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<sup>78</sup> R Goodman and D Jinks, 'How to influence states: socialization and international human rights law' (2004) 54(3) *Duke Law Journal* 621, 626.

<sup>79</sup> Interview with consultant on corporate accountability and advisor to MSI-A (London, 8 February 2013).

forward by their theory of how international law exerts its influence. Corporations were not offered any material inducements to take part in the MSI-A and neither were they under threat of sanction were they to refuse to do so. Similarly, the record demonstrates that their negotiators consistently sought to weaken provisions from international law or do away with them altogether, thus indicating that they were not persuaded of the validity of international law as such. Rather, these corporations went through a process akin to acculturation, whereby they signed up to ILO standards in the Fundamental Code in return for acceptance by their counterparts among the ranks of the trade unions, NGOs and the UK government.

In signing up to the Fundamental Code, corporations also managed to acquire a degree of legitimacy – ‘a generalized perception or assumption’ that their actions are ‘desirable, proper, or appropriate’<sup>80</sup> – from their counterparts and external audiences. This further explains their motivations for adopting the international labour standards contained in the Fundamental Code, and is consistent with Cashore and Bernstein’s account (outlined in Chapter 2) of transnational private governance regimes creating rules consistent with international standards in order to gain legitimacy with their peers and the community at large.<sup>81</sup>

My research also illustrates the inadequacies of the dominant accounts of the emergence of codes of conduct. Namely, as we noted in chapter 2, numerous authors, such as Ruggie, Teubner and Gereffi and Mayer theorised that codes of conduct have been created because of a ‘governance deficit’.<sup>82</sup> This deficit, according to Teubner,

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<sup>80</sup> M Suchman, ‘Managing Legitimacy: Strategic and Institutional Approaches’ (1995) 20 *Academy of Management Review* 571, 574.

<sup>81</sup> S Bernstein and B Cashore, ‘Nonstate Global Governance: Is Forest Certification a Legitimate Alternative to a Global Forest Convention?’ in J Kirton and M Trebilcock (eds), *Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment and Social Governance* (Ashgate 2004).

<sup>82</sup> G Gereffi and F Mayer, ‘Globalization and the Demand for Governance’ in G Gereffi, *The New Offshoring of Jobs and Global Development* (The International Institute for Labour Studies 2006) 39.

consisted of a demand for regulating norms that national and international laws and institutions could not meet.

However, my empirical research has shown these accounts to be deficient in accounting for how codes of conduct emerged. Instead, it supports Bartley's and Cutler's critiques of the 'governance deficit' approach. Bartley's explanation for the emergence of certain types of codes of conduct (certification regimes) is that they emerge not simply because of a 'governance deficit' but due to a number of factors: a mix of market-connected reasons (protection of reputation, provision of information to consumers) and political contestation between companies, states, NGOs and social movements.<sup>83</sup> In his research, many corporations alter their approaches while working towards the same goal: to fashion the least demanding regulatory and institutional framework possible.

The same was true in this case; initially, corporations were resistant to having any sort of regulatory arrangement. This tactic failed once the Thai toy factory fire happened and trade unions and NGOs pressured corporations to grant employees in their supply chains their labour rights through the MSI-A and its Fundamental Code. Even then, corporations sought to water down the rights that the Fundamental Code would guarantee. However, they failed in this attempt because trade unions successfully convinced their counterparts, including the government, NGOs and other reference points, that labour rights provisions in the Fundamental Code have to be anchored to ILO standards as the relevant universal benchmark.

The creation of the MSI-A Fundamental Code was not, therefore, a case of corporations, unions, NGOs and the state simply filling the governance gap, as

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<sup>83</sup> T Bartley, 'Institutional Emergence in an Era of Globalization: The Rise of Transnational Private Regulation of Labor and Environmental Conditions' (2007) 113(2) *American Journal of Sociology* 297.

Ruggie and others might have it. Indeed, as Bartley maintains (with reference to transnational certification regimes), ‘no set of actors would have chosen, *ex ante*, precisely the set of arrangements that emerged’.<sup>84</sup> Although a driver for the emergence of codes was a governance gap, none of the creators of the MSI-A had a multi-stakeholder initiative regulated by a code of conduct as their preferred framework for governing the responsibilities of corporations towards workers’ rights. In the case of trade unions and NGOs, they favoured a mechanism that would enable them to conduct on-going dialogue with corporations, along the lines of domestic models of industrial relations. Corporations, for their part, mostly expressed a preference for no formal system of governance. The multi-stakeholder organisation and the code of conduct that emerged from these opposing positions was a result of hard-fought negotiations and compromises made on both sides. Rather than the MSI-A Fundamental Code emerging from a simple deficit of rules and governance, my research shows that it surfaced in the wake of a governance gap but that its creation and drafting was a politicised and contested process.

### **I.C The role of trade union and NGO pressure in the application of codes of conduct**

Aside from the drafting of the MSI-A Fundamental Code, the pressure exerted by trade unions and NGOs has also had a bearing on the application of the MSI-A Fundamental Code and of other individual corporate codes of conduct. The corporations studied for this thesis acknowledge that pressure by trade unions and NGOs was the driving force behind their initial efforts to address abuses of international labour standards. The ethical trading manager of corporation B1 credits

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<sup>84</sup> *ibid* 301.

NGOs and unions for their campaigns, which forced B1 to ‘find out what is in our supply chain’<sup>85</sup> and to react to it by setting up ethical trading departments and undertaking activities designed to improve workers’ conditions. This view is shared by NGOs, unions and the independent consultants interviewed for this thesis.<sup>86</sup> Some stakeholders believe that NGOs and unions had ‘a huge influence’ on corporations becoming involved in ethical trade because ‘no one wants to see NGOs with banners outside your headquarters – that’s always been the stick to beat people with’.<sup>87</sup>

The effect of union and NGO pressure in the present is less clear. A representative of a prominent labour rights NGO states that ‘it’s harder to generate pressure than it was ten years ago because there’s a more standardised response now that wasn’t available then: we’ve audited. The audit system is a massive corporate shield’.<sup>88</sup> This view is confirmed by a corporate representative who states ‘NGOs rightly pushed auditing ten years ago because you needed information, but they didn’t have a strategy for afterwards.’<sup>89</sup> In this view, an NGO campaign in the present has to be able not only to raise awareness of a corporation’s responsibility for violations of labour rights in its supply chain and to mobilise the public to translate this awareness into action, but also to explain why audits and other corporate responses are an inadequate measure for tackling these problems. This has become more difficult in the face of more sophisticated corporate public relations efforts. A concerted

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<sup>85</sup> Interview with manager at corporation that is not a member of MSI-A (London, 10 April 2013).

<sup>86</sup> Interview with official at non-governmental organisation active in monitoring corporate violations of human rights (Oxford, 4 March 2013); Interview with consultant on corporate accountability and advisor to MSI-A (London, 8 February 2013).

<sup>87</sup> Interview with consultant on corporate accountability and former official at leading international financial institution (London, 3 October 2013).

<sup>88</sup> Interview with official at non-governmental organisation active in monitoring corporate violations of human rights (Oxford, 4 March 2013).

<sup>89</sup> Interview with manager at corporate member of MSI-A (London, 22 January 2013).

corporate public relations campaign, says the NGO activist, can be ‘incredibly difficult to counter,’ far more so than when ‘companies were putting out outrageous statements such as: it’s Chinese culture to have to work 100 hours per week’.<sup>90</sup>

Corporate savvy has had a similar impact on the effectiveness of trade union campaigns. In addition, the ability of unions to generate pressure on corporations has been weakened by the persistent ‘media stories about unions that have slowly but surely eroded their image’.<sup>91</sup> These stories portray unions in a negative light, as groups that obstruct the functioning of the economy and that slow economic growth in order to protect the interests of their members, which may be inimical to the interests of those outside the unionised workforce or of the general public. This well-documented tendency<sup>92</sup> of the media has come to have a bearing on trade union strength vis-à-vis corporations.

Moreover, both unions and NGOs are constrained by their limited resources, which make it difficult for them to effectively gain insight and raise awareness of a problem that is global in scope. This lack of resources led, some stakeholders believe, to NGOs becoming ‘co-opted’<sup>93</sup> by corporations; the ethical trading manager of corporation A5 states ‘I can now walk into any meeting with all but two NGOs and will not for a second be worried. No one is campaigning with a “capital C”; everybody is into policy, co-opting, “let’s work together.” As a company, that’s brilliant for us!’<sup>94</sup>

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<sup>90</sup> Interview with official at non-governmental organisation active in monitoring corporate violations of human rights (Oxford, 4 March 2013).

<sup>91</sup> Interview with official at International Labour Organization (Geneva, 1 March 2013).

<sup>92</sup> For a detailed study, see G Walsh, ‘Trade unions and the media’ (1988) 127(2) *International Labour Review* 205.

<sup>93</sup> Interview with manager at corporate member of MSI-A (London, 22 January 2013).

<sup>94</sup> Interview with manager at corporate member of MSI-A (London, 3 October 2013).

The impact of trade unions has been curtailed, but due to a different reason. Unlike NGOs, many of which insisted on collaborating while their calls for auditing were co-opted by corporations, trade unions were not as cooperative: ‘unions didn’t see how the collaboration could be to their benefit. Instead, they would say “we’ll only talk to you if you unionise the factory.” That was too much of a leap, particularly for companies’.<sup>95</sup> As a consequence, in the view of some corporate representatives, ‘the unions missed the boat on CSR.’<sup>96</sup>

Yet, despite this, NGOs and unions have had accomplishments in pressuring corporations into changing their practices to comply with international labour standards. Some of these successes came when NGOs and unions have advocated for change by corporations belonging to multi-stakeholder initiatives. Corporate members of MSI-A are confronted by the views of NGOs and trade unions on a regular basis in MSI-A board and working group meetings. As a result, MSI-A members have agreed to tackle issues that had hitherto gone unnoticed by corporations. For instance, corporate members of MSI-A were alerted to the practice of Sumangali<sup>97</sup> by NGO members of MSI-A, who became aware of it through their partner organisations. As a result, the corporations have joined efforts to root out Sumangali.

The dynamics of the relationships within MSI-A suggest that NGOs and trade unions adopt a mixture of strategies in order to get corporations to respond to their suggestions. A representative of a prominent NGO member of the MSI-A states that this NGO is careful not to pressure corporations too strongly in order to avoid

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<sup>95</sup> *ibid.*

<sup>96</sup> Interview with manager at corporate member of MSI-A (London, 22 January 2013).

<sup>97</sup> Interview with two managers at corporate member of MSI-A (London, 1 February 2013). Sumangali is a practice in south India that has elements of child labour and forced labour; namely, cotton mills employ under-age girls on three-year ‘apprenticeships’ that are ostensibly supposed to lead to them earning money that will go towards paying their dowry, but that in reality sees them go unpaid. For more on Sumangali, see chapter 4 (n 125-130).

alienating them: ‘companies feel like they’re being pushed all the time, when they didn’t join [MSI-A] to be harangued – they could have done that without joining. They joined [MSI-A] to get expert help on how to implement the [MSI-A] Fundamental Code’.<sup>98</sup> A second NGO representative in the MSI-A affirms this: ‘we bring to the table our strong analysis of what’s happening in countries where the companies are sourcing and the voice of the workers. Our force comes from our experience and knowledge’.<sup>99</sup>

The corporate members of MSI-A, she adds, ‘don’t like campaigns and are frustrated when they’re not told we are campaigning against them without being given a heads up’.<sup>100</sup> Campaigns against MSI-A members are thus a tool of last resort, used by NGOs and unions only where discussions at the MSI-A are fruitless. Even then, a campaign may be agreed between an NGO or a trade union and an ethical trading manager of a corporation who believes that NGO or trade union pressure is needed to convince an unwilling management to act on a labour rights issue.<sup>101</sup> However, this reluctance to campaign has, over time, led to a softening of NGO attitudes towards companies; the second NGO representative says, ‘some say that NGOs are [in the MSI-A] to hold companies accountable. I used to think so before, but don’t think so now.’<sup>102</sup> Instead, she believes NGOs are there to assist companies in complying with their obligations. These views echo the above-mentioned claims of

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<sup>98</sup> Interview with official at non-governmental organisation that is a member of MSI-A and active in monitoring corporate violations of human rights (Oxford, 20 March 2013).

<sup>99</sup> Interview with representative of non-governmental organisations to MSI-A (London, 13 February 2013).

<sup>100</sup> *ibid.*

<sup>101</sup> Interview with consultant on corporate accountability and former official at leading international financial institution (London, 3 October 2013).

<sup>102</sup> Interview with representative of non-governmental organisations to MSI-A (London, 13 February 2013).

the ethical trading manager of corporation A5 that NGOs are being ‘co-opted’ by corporations in the MSI-A.

Trade unions and NGOs have also had some successes in pressuring corporations beyond the setting of MSI-A. In these instances, they are less reticent to launch campaigns against corporations that are not members of MSI-A, as they do not have a history of collaboration with the corporation in question. Thus, for instance, trade unions and NGOs were responsible for the launch of the Bangladesh Fire Accord, a legally binding agreement signed in the wake of the Rana Plaza tragedy.<sup>103</sup> The Accord commits corporate signatories to pool funds that will finance the inspection of factories in Bangladesh, repairs where safety issues are identified, and the payment of salaries to workers in these factories. The ethical trading manager of corporation A4 asserts that ‘it’s only because of external pressure’ by trade unions and NGOs that ‘the Accord has a chance’ to fulfil its mandate.<sup>104</sup>

On the other hand, NGOs and trade unions have fewer tools at their disposal outside the framework of MSI-A. Thus, if their campaign efforts do not bear fruit, they are less able to effectively pressure corporations to observe labour rights through mechanisms such as the presentation of research and joint pilot programmes. As a result, NGOs and trade unions have adapted and sought new strategies for influencing corporations. NGOs have recently been conducting surveys of corporate practices that focus on the most sensitive issues for corporations. In the words of the ethical trading manager of corporation A5, a recent survey by an NGO is ‘a lot more intelligent’ because its subjects are violations of the right to a living wage and of freedom of

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<sup>103</sup> ‘Bangladesh Fire Accord’ <[www.bangladeshaccord.org](http://www.bangladeshaccord.org)> accessed 10 February 2015.

<sup>104</sup> Interview with manager at corporate member of MSI-A (London, 14 October 2013).

association, ‘questions they know we can’t answer’.<sup>105</sup> Further, the presentation of the survey is less confrontational, which means ‘no corporation has an excuse to ignore [the NGO] because they’re obnoxious.’ Global union federations and local unions have adapted by focusing less on the recognition of unions and more on developing the skills of union leaders in factories and collaborating with factory management on how to increase productivity, which would also allow for an increase in wages.<sup>106</sup>

Thus, my research shows that, despite corporate strategies to deflect and co-opt it, pressure by unions and NGOs continues to increase the likelihood that corporations will apply internationally guaranteed labour rights in their codes. In addition, it has also shown how NGOs and trade unions continuously make adjustments in attempting to influence corporations to apply their codes of conduct. It offers a good illustration of how these organisations utilise all three of the strategies noted by Goodman and Jinks – material inducement, persuasion and acculturation – in their attempts to get corporations to respect international labour standards contained in their codes of conduct and the Fundamental Code. This is especially true of trade unions and NGOs in the MSI-A seeking to influence corporate members of MSI-A. These trade unions and NGOs are mindful of maintaining relationships with corporations in the MSI-A, which sometimes leads them to back off from publicly campaigning on an issue – a form of material inducement – and switch to the strategies of persuasion or acculturation.

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<sup>105</sup> Interview with manager at corporate member of MSI-A (London, 3 October 2013).

<sup>106</sup> Interview with manager at corporate member of MSI-A (London, 22 January 2013).

## **I.D The role of trade union and NGO pressure in the drafting and application of IFAs**

The development of international framework agreements was initiated by global union federations (GUFs), motivated by a desire to gain recognition from corporations. This would, in the words of the head of one global union federation, provide GUFs with ‘a mechanism to raise at companies before we lob artillery at them and further raise an issue publicly’.<sup>107</sup> The GUFs found willing counterparts in (mostly European) companies with a history of social dialogue with unions.<sup>108</sup>

The drafting of IFAs has been characterised by direct negotiations between corporations and GUFs over workers’ rights and conditions. This process has resembled the drafting of collective bargaining agreements more than the drafting of codes of conduct. In the course of drafting IFAs, GUFs take the position that they will only sign such agreements if they contain provisions with a maximum degree of protection of labour rights, as these are ‘non-negotiable’, as well as ‘substantive content talking about accessing rights and exercising them’.<sup>109</sup> To GUFs, this is a matter of course, and companies ‘should not receive credit for simply acknowledging that workers have rights’. This is contrasted with ordinary codes of conduct, which GUF officials hold in low esteem for diluting inherent labour rights. As one GUF official says, ‘we talk with companies not on whether workers have or don’t have

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<sup>107</sup> Interview with head of international trade union confederation that is a signatory to international framework agreements (Geneva, 20 February 2013).

<sup>108</sup> Interview with manager at corporate member of MSI-A and a signatory to an international framework agreement (London, 7 February 2013); Interview with senior official at corporate signatory to an international framework agreement (Paris, 3 April 2013).

<sup>109</sup> Interview with head of international trade union confederation that is a signatory to international framework agreements (Geneva, 20 February 2013).

rights, as that's very much a code of conduct, corporate social responsibility approach'.<sup>110</sup>

As IFAs were intended to apply across borders, unions were keenly aware that the substantive content of these agreements on labour rights should be based on internationally recognised standards that could be applied 'in all operations of the company concerned regardless of whether they exist in national legislation.'<sup>111</sup> As such, unions considered the 'eight fundamental conventions on core labour rights mentioned in the Declaration on Fundamental Principles which are applicable in all ILO countries regardless of whether they are ratified by the country concerned' to be 'red lines' in their negotiations with corporations.<sup>112</sup>

In addition, GUFs sought to insert provisions on health and safety and promoting permanent employment relationships into IFAs. Unlike codes of conduct, however, many IFAs do not include provisions on wages, as GUFs believe that their national affiliates are better placed to negotiate them at a national level.<sup>113</sup> This reflects a difference in approach between unions and NGOs, which use international human rights law<sup>114</sup> to strongly advocate for the inclusion of the right to a living wage as an internationally recognised right in codes of conduct.

In the course of such concerted efforts by trade unions to introduce ILO standards into IFAs, the companies studied as part of this thesis all eventually

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<sup>110</sup> *ibid.*

<sup>111</sup> Interview with senior official at international trade union confederation that is a signatory to international framework agreements (Geneva, 18 February 2013). In the infrequent situations where national legislation provides a higher level of protection for workers, GUFs believed that this legislation should be applied.

<sup>112</sup> *ibid.*

<sup>113</sup> Interview with head of international trade union confederation that is a signatory to international framework agreements (Geneva, 20 February 2013).

<sup>114</sup> eg Universal Declaration on Human Rights (art 23) and International Covenant on Economic, Social and Cultural Rights (art 7).

accepted the content proposed by the unions. Even freedom of association, which is traditionally the most contentious issue covered by codes of conduct, was accepted for inclusion in IFAs by most companies studied, despite ‘much clearer language on freedom of association’ being used in IFAs than in codes of conduct.<sup>115</sup> This is partly the result of trade union pressure and coercion and partly the result of these companies noting various other IFAs, codes of conduct and international instruments with similar provisions, which lent credence to international labour standards as sources of rules to be enshrined in agreements with unions. For their part, the unions see no alternative for corporations than to accept that workers enjoy labour rights; as the head of one GUF said, ‘the simple question for the corporations is: as opposed to what? That they don’t have rights? So you extract yourself from the Universal Declaration of Human Rights where union membership is explicitly recognised and the world of universal rights?’<sup>116</sup>

Trade unions do not stop exerting pressure on corporations once the IFA is signed. In fact, it can be said that while some companies view IFAs as an end, unions view it as the means, which, the head of a GUF states, is,

often a fundamental difference between us and the companies. It is clear that when [corporation C2] signed its IFA a year ago they thought they came to the end of something. They didn’t understand from our perspective they just got themselves into a difficult position because they would have to substantially resource the implementation of the agreement and we’re still fighting to have them do that. If they think this is a magic-wand-waving exercise to transform the corporation, they’re wrong.<sup>117</sup>

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<sup>115</sup> Interview with senior official at international trade union confederation that is a signatory to international framework agreements (Geneva, 18 February 2013).

<sup>116</sup> Interview with head of international trade union confederation that is a signatory to international framework agreements (Geneva, 20 February 2013).

<sup>117</sup> *ibid.*

The unions view the application of IFAs as a process during which they engage in ‘hard-nosed bargaining and negotiation’<sup>118</sup> over finer points of the application of the agreement. In doing so, they invoke ILO jurisprudence and international standards such as the OECD Guidelines for Multinational Enterprises as a means of furthering their goals. In the course of this process, unions are cognisant of the value of building relationships with corporations who have shown they are disposed to enter into voluntary agreements with unions, as opposed to merely confining themselves to adopting codes of conduct. For instance, when corporation C3 refused to allow workers to fully enjoy the freedom of association, GUF-X was unwilling to repudiate these agreements publicly, choosing instead to re-focus on negotiating about points of disagreement and on persuading corporations they view as willing partners.<sup>119</sup>

Nonetheless, the default position of unions is that change in working conditions and levels of enjoyment of labour rights can only come through systematic pressure on corporations, even in the course of application of voluntary agreements such as IFAs.<sup>120</sup> This is enabled by the institutional and legal character of the IFA,<sup>121</sup> which means that GUF signatories of IFAs are less likely to let themselves be co-opted than trade union members of the MSI-A, who depend far more on the good will of their corporate counterparts in the MSI-A and are thus in a weaker position to raise issues of concern in the implementation of the Fundamental Code.

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<sup>118</sup> *ibid.*

<sup>119</sup> Interview with head of international trade union confederation that is a signatory to international framework agreements (Geneva, 20 February 2013); Interview with senior official at corporate signatory to an international framework agreement (Atlanta, 5 April 2013).

<sup>120</sup> Interview with head of international trade union confederation that is a signatory to international framework agreements (Geneva, 20 February 2013); Interview with senior official at international trade union confederation that is a signatory to international framework agreements (Geneva, 18 February 2013).

<sup>121</sup> Whereby unions are partners to corporations and IFAs have the form of a contract or a collective bargaining agreement.

Ultimately, the pressure of trade unions is the decisive factor behind the influence of international law on the content and application of IFAs. It is at the unions' insistence that IFAs were drafted to reflect ILO conventions and it is their continued perseverance that drives the application of ILO standards.

## **Conclusion**

The results of my research show that trade union and NGO pressure is, in many ways, the driver behind the influence of international law on the construction and application of codes of conduct. Most importantly, trade union and, to a lesser extent, NGO pressure was critical in giving ILO conventions a central place in the MSI-A Fundamental Code. As the record shows, negotiators from the ranks of trade unions were the driving force behind shaping the Fundamental Code on the basis of ILO conventions. Due to the mimicking of the Fundamental Code by non-MSI-A members, trade union and NGO pressure was also crucial in transmitting the influence of international law onto other corporations' codes; namely, although trade unions may not have been involved in drafting other corporations' codes, these codes would not include repeated references to ILO conventions were it not for trade union efforts in negotiations over the Fundamental Code.

Moreover, beyond the construction of codes, the research illustrates how significant a factor pressure by NGOs and trade unions is in accounting for the influence of international labour law on the application of codes of conduct. Their continued demands and advocacy efforts are the impetus for the (often inadequate) efforts undertaken by corporations to apply their codes. Nevertheless, it should be noted that, despite this concerted pressure by trade unions and NGOs, corporations

have developed successful strategies to deflect and co-opt pressure from NGOs and trade unions, thereby decreasing its impact.

Finally, considering the fact that IFAs are agreements signed between corporations and GUFs, it is unsurprising that trade union pressure also drives the application of international labour standards.

## **II. MIMICRY AND THE NEED FOR LEGITIMACY IN THE CONSTRUCTION AND APPLICATION OF INDIVIDUAL CODES OF CONDUCT**

The adoption of the Fundamental Code marked the beginning of the MSI-A's work. At this point, a wider variety of factors and processes (other than trade union and NGO pressure and coercion) began to determine the influence of international law on the corporations studied. This part will show how international law influences codes of conduct by virtue of corporations mimicking the successful actions of others who have adopted codes with international labour standards in order to gain acceptance and legitimacy among their peers, trade unions and NGOs and the public.

In the period since the adoption of the MSI-A Fundamental Code, the MSI-A's original membership has been augmented by a number of corporations, NGOs and trade unions. Although the corporate members of the MSI-A studied for this thesis provided a variety of explanations for joining this organisation, the predominant reason given is expressed succinctly by the ethical trading manager of corporation A7: 'we joined because the majority of UK retailers are in the [MSI-A], and if these guys are in the [MSI-A], there must be a good reason'.<sup>122</sup> A senior official of the MSI-A says that corporations often feel they 'ought to' join because

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<sup>122</sup> Interview with manager at corporate member of MSI-A (London, 18 January 2013).

their competitors have and because the MSI-A ‘is where retailers go’.<sup>123</sup> In other words, the driver for a lot of corporations joining the MSI-A is that they feel social pressure to conform to a set of rules shared by their peers and by the wider cultural environment (including trade unions and NGOs).

Those corporations studied as part of the thesis that have not joined the MSI-A also recognise the ‘cognitive discomfort’<sup>124</sup> that comes from being outside an organisation that includes many of their peers and competitors. For instance, while corporation B1 has not joined the MSI-A because ‘there is too much bureaucracy and red tape for people to agree on things’,<sup>125</sup> its ethical trading manager nevertheless states that ‘sometimes I wish we were [in the MSI-A] because there is strength in numbers and it’s a respectable organisation’.<sup>126</sup> Other corporations studied expressed similar sentiments.<sup>127</sup>

## **II.A Mimicry and the need for legitimacy in the construction of corporate codes of conduct**

New members of the MSI-A are bound by MSI-A rules to adopt and implement the Fundamental Code.<sup>128</sup> This represented a major change for some of the new corporate members who had never had a code of conduct on labour relations. These companies

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<sup>123</sup> Interview with head of MSI-A (London, 2 April 2013).

<sup>124</sup> R Goodman and D Jinks, ‘How to influence states’ (n 78) 643.

<sup>125</sup> Interview with manager at corporation that is not a member of MSI-A (London, 10 April 2013).

<sup>126</sup> *ibid.*

<sup>127</sup> Interview with manager at corporation that is not a member of MSI-A (Nottingham, 12 February 2013); Interview with manager at corporation that is not a member of MSI-A (London, 5 February 2013).

<sup>128</sup> MSI-A Principles of Implementation, art 1. In addition, new members commit themselves to undertake activities to implement the Fundamental Code, require their ‘suppliers to comply with it, and require them to engage with their own suppliers to comply with the Fundamental Code throughout their supply chain.’

invariably chose to adopt the Fundamental Code in its entirety as their company code of conduct without serious adaptation - what a senior manager from corporation A2 termed 'the vanilla flavour code of conduct'.<sup>129</sup>

However, the majority of corporations joining the MSI-A already had codes of conduct that were based on the MSI-A Fundamental Code and thus significantly influenced by international labour standards. For a number of the MSI-A members who joined recently, the adoption of the MSI-A Fundamental Code represented almost no policy shift, as their codes had already come to fully reflect ILO standards that form the basis of the Fundamental Code. For instance, the 2002 version of the code of conduct of corporation A1, which joined the MSI-A in 2011, had bound corporation A1 to 'comply with international laws as applicable', and contained provisions on freedom of association, child labour, forced labour, discrimination, working hours and wages that were based on, and explicitly referenced, ILO conventions.<sup>130</sup> The representative of another corporation stated that its code of conduct prior to joining the MSI-A was 'pretty much based on all international standards'.<sup>131</sup> Representatives of both corporations indicated that their codes prior to joining the MSI-A contained provisions based on ILO standards because they had copied provisions from the Fundamental Code.<sup>132</sup>

Another group of corporations joining the MSI-A had codes of conduct that were significantly, if not fully, based on ILO conventions and the MSI-A Fundamental Code. An example is the code of conduct of corporation A4 from 1998,

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<sup>129</sup> Interview with manager at a corporate member of MSI-A (Cheltenham, 6 April 2013).

<sup>130</sup> Corporation A1 code of conduct, 2002 (made available to the author).

<sup>131</sup> Interview with two managers at corporate member of MSI-A (London, 1 February 2013).

<sup>132</sup> Interview with two managers at corporate member of MSI-A (London, 1 February 2013); Interview with manager at corporate Multi-Stakeholder Initiative-A (MSI-A) member (Reading, 7 February 2013); Interview with manager at corporate member of MSI-A (London, 15 January 2013).

which proclaims that it is based on a number of ILO Conventions, including those on child labour (conventions 138 and 182) and freedom of association (87, 98 and 135). Despite this, the code and the guidelines diverge to a limited degree from the norms set by these ILO conventions. Although the A4 code ‘recognises and respects the right of workers to join groups of their own choosing’, it fails to recognise the related right to form workers’ organisations, elaborated in ILO convention 87. Corporations such as A4 thus had to slightly amend their codes to align them with the MSI-A Fundamental Code. Nevertheless, once the decision had been taken to join the MSI-A these changes to the A4 code of conduct were made without much internal discussion in the company.<sup>133</sup>

This tendency of corporations to borrow from the MSI-A Fundamental Code and its provisions on international labour standards also holds for some of the corporations studied as part of this thesis that are not members of the MSI-A: their codes are based on the same ILO conventions that MSI-A members’ codes are. The drafters of these corporate codes were influenced directly the MSI-A Fundamental Code; corporations who felt that “we must do something on labour rights”...would copy paste from what [MSI-A] members had adopted’.<sup>134</sup>

For example, although corporation B1 has not joined MSI-A because of the above-mentioned ‘bureaucracy’ and ‘red tape’, a senior manager confirmed that this company ‘got its code’ from the MSI-A Fundamental Code.<sup>135</sup> The code of conduct of corporation B1 reflects this; it proclaims it is ‘based on International Labour Organisation (ILO) conventions and recommendations’ and its provisions - on rights

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<sup>133</sup> Interview with manager at corporate member of MSI-A (London, 14 October 2013).

<sup>134</sup> Interview with consultant on corporate accountability and advisor to MSI-A (London, 8 February 2013).

<sup>135</sup> Interview with manager at corporation that is not a member of MSI-A (London, 10 April 2013).

ranging from freedom of association to freedom from child labour - are virtually identical to those of the Fundamental Code.<sup>136</sup> The original code of corporation B2, another company which is not a member of MSI-A, was ‘very much based on’ the Fundamental Code.<sup>137</sup> This is reflected in its provisions on substantive rights such as freedom from forced labour, whose wording closely mirrors that of the Fundamental Code.<sup>138</sup> The resultant effect was that these companies’ codes were based on the same ILO standards that the Fundamental Code was rooted in. They too went through the same process as corporation A7,<sup>139</sup> at the end of which they wanted to be seen to be adhering to the same rules – ILO standards – as their competitors and counterparts inside the MSI-A, thus avoiding the ‘cognitive discomfort’ that came from playing by different rules.

Thus, even MNCs that created codes of conduct to which no outside actor (such as trade unions or NGOs) was a party had a motivation to incorporate norms found in international law into their codes. Otherwise, by virtue of the transnational reach of their business and due to the advanced codes adopted by their competitors, they feared they would have the legitimacy of their codes challenged by reference to international standards.

These examples illustrate how corporations felt a powerful urge to conform and blend in with other corporations that had already adopted codes of conduct based on international labour standards. Consequently, corporations would borrow from each other’s codes, without necessarily analysing the content of the ILO standards

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<sup>136</sup> Corporation B1 code of conduct 2007 (made available to the author).

<sup>137</sup> Interview with manager at corporation that is not a member of MSI-A (London, 5 February 2013).

<sup>138</sup> Corporation B2 code of conduct 1999 (made available to the author).

<sup>139</sup> Interview with manager at corporate member of MSI-A (London, 18 January 2013).

being invoked or the legal implications of adopting codes of conduct granting labour rights to workers in their supply chains.

## **II.B Mimicry and the need for legitimacy in the application of corporate codes of conduct**

In addition to corporations borrowing from the codes of their competitors and peers, they also copy from others' practices in the course of the application of their codes. As mentioned in chapter 4, the most prevalent mechanism for applying codes is social auditing, which has become standardised to a great degree over the past fifteen years (to the point where one of the auditors interviewed during my research claims that 'they're all the same').<sup>140</sup>

The principal reason for this uniformity of audits is the need of corporations and auditing consultancies to apply codes with a mechanism that has legitimacy and that minimises risk. Auditing protocols have therefore come to be based on 'best practices' of auditing companies,<sup>141</sup> who work together in joint fora such as SMETA and GSCP to ensure they ask similar questions. This minimises social pressures for corporations who are able to point to audits as the (lowest) common denominator of what they can do to guarantee workers' rights.

As documented in chapter 4, however, the exchange of so-called best practices limits audits to uncovering violations of only three of the rights (freedom from child labour, freedom from forced labour and the right to health and safety) commonly contained in codes of conduct, with the other rights effectively ignored. For example, auditing consultancies and corporations have frequently come to see even the most

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<sup>140</sup> Interview with official at audit and compliance organisation (London, 6 March 2013).

<sup>141</sup> Interview with manager at audit and compliance facilitation organisation (London, 3 October 2013).

basic opportunities for management to hear from workers, such as comment boxes, as the realisation of the freedom of association, which clearly falls short of ILO standards.<sup>142</sup> Thus, although standardisation has driven all of the corporations studied to adopt auditing as an application mechanism, they are still not applying all labour standards contained in codes equally. This is due to countervailing factors, such as commercial pressures and reputational risk, examined in the next part.

## **Conclusion**

Following the adoption of the MSI-A Fundamental Code by MSI-A members, the great majority of corporations studied gradually began to copy its provisions into their own codes of conduct. This mimicking process would occur in one of three ways: some corporations joined the MSI-A and would then adopt the Fundamental Code as their own code; others would copy the bulk of the provisions of the Fundamental Code into their own code, only to later join the MSI-A; and a third group has copied the provisions of the Fundamental Code into their own codes despite never joining the MSI-A. Irrespective of these differences, all three groups of corporations were driven by similar considerations and impulses: to copy MSI-A members' 'successful' practices by creating a similar code (and, sometimes, by joining the MSI-A), and to thereby acquire legitimacy and acceptance among their peers, trade unions, NGOs and the public. The same impulses led many corporations to adopt auditing as a standard practice to implement codes of conduct.

This process – mimicking in order to gain legitimacy – bears some resemblance to elements of the processes of acculturation and isomorphism, developed in other contexts to explain the actions of states and organisations. As

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<sup>142</sup> Interview with official at non-governmental organisation active in monitoring corporate violations of human rights (Oxford, 4 March 2013).

noted in chapter 2, Goodman and Jinks use ‘acculturation’ to describe the manner in which international law influences states; according to them, some countries adopt international conventions not because they are pressurised to do so or because they are persuaded of their value, but because they wish to avoid the ‘cognitive discomfort’ they would feel if they were seen by the ‘wider cultural environment’ as being outside the international legal order.<sup>143</sup> Acculturation is based on the concept of isomorphism, which, as the overview of DiMaggio and Powell’s concept in chapter 2 shows, signifies the tendency of organisations to mimic other organisations’ successful practices.

As the results of my research have shown, corporations adopt codes based on the Fundamental Code and auditing practices for similar reasons; they demonstrate the corporate tendency to copy other corporations, particularly where they are reproducing practices that can garner them respect for ‘doing the right thing’ and being seen to take labour rights abuses seriously.

### **III. REPUTATIONAL RISK AND COMMERCIAL PRESSURES**

Trade union and NGO pressure drove the insertion of international labour standards into multi-stakeholder codes of conduct. Their further diffusion into corporate codes of conduct was pushed along by the tendency of corporations to copy successful practices (and thereby gain legitimacy), which also played a part in the spread and standardisation of auditing as the primary mechanism of application of codes.

Nonetheless, when it comes to both introducing and applying the international labour standards provisions in their codes, corporations are also significantly influenced by two other factors: reputational risk and commercial pressures. I define

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<sup>143</sup> R Goodman and D Jinks, ‘How to influence states’ (n 78).

reputational risk as the possibility that a corporation's standing among consumers, the media or the wider public will be compromised if its performance falls short of expectations regarding the labour rights of workers in its supply chains.<sup>144</sup> Reputational risk is influenced by outside pressure, including trade union and NGO pressure); however, the reputations of corporations can be damaged for numerous other reasons besides trade union and NGO pressure, such as the managerial disclosure of labour rights issues or association (by, for instance, belonging to the same industry) with other corporations that violate labour rights. I have therefore defined reputational risk as a separate concept to trade union and NGO pressure because it has numerous other (cultural, legal, managerial and environmental) causes. Commercial pressure refers to any economic costs or benefits that a corporation might incur when taking an action that can (negatively or positively) impact labour rights.

This part will outline how these two factors – occasionally complementary, sometimes competing – determine the actions of corporations in the field of ethical trade.

### **III.A Reputational risk and commercial pressure as positive influences**

The corporations studied are frequently motivated to respect and advance workers' rights by the twin factors of reputational risk and commercial pressure.

#### *Reputational risk as a positive influence*

A number of corporate officials interviewed highlighted reputational risk as the key factor motivating their efforts to combat labour rights abuses. The ethical trading

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<sup>144</sup> This definition incorporates some of the elements of the definition of reputational risk by Garry Honey; G Honey, 'A Short Guide to Reputational Risk' (Gower 2009) 22.

manager of corporation A5 states ‘there is a number of arguments I use about campaigns. However, the first conversation you have to have is what happened to Nike, Gap – do you want to be on the front page of the Observer? You’ve got to risk manage that’. The actions of corporation A5, he adds, ‘are about protection of [our] brand and brand reputation. And if the brand gets damaged, we know what happens in the psyche of the consumer. You don’t want that to happen’.<sup>145</sup> This is echoed by the ethical trading manager of corporation B2, who says that ‘the reputation of our brand is of paramount importance – that is why we do this’.<sup>146</sup> The corporate accountability manager of corporation A7 claims that reputational risk is the sole reason for the actions of this corporation and its competitors: ‘most successful retailers get to point where they realise they have to implement something; usually the reason at board level is risk, it's because we need to protect our brand, not necessarily where it's the right thing to do’.<sup>147</sup>

This risk-based paradigm has expanded to corporate clients and adversaries alike. Auditing consultancies are aware that audits of suppliers have to be tailored to uncover abuses of labour rights that would cause the most damage to a corporation’s reputation. Auditors, states the ethical trading manager of corporation A1, ‘are looking for red flag issues – things that would really damage a brand’s reputation, like child labour.’<sup>148</sup> The auditors have to be adept at gauging what information would be most likely to damage the reputation of their client. This does not necessarily correspond to violations of local or international law. For instance, the head of an

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<sup>145</sup> Interview with manager at corporate member of MSI-A (London, 22 January 2013).

<sup>146</sup> Interview with manager at corporation that is not a member of MSI-A (London, 5 February 2013).

<sup>147</sup> Interview with manager at corporate member of MSI-A (London, 18 January 2013).

<sup>148</sup> Interview with manager at corporate Multi-Stakeholder Initiative-A (MSI-A) member (Reading, 7 February 2013).

auditing consultancy states, ‘if it’s legal in country X to have a fourteen-year-old, that might not be reputationally acceptable’.<sup>149</sup> Conversely, ‘you might have something illegal – in India if you employ a woman in a factory you have to have a crèche, but it’s not reputationally an issue’. The ‘acid test’, he adds, ‘is if a journalist went into a factory – would he think ‘shock, horror’?’<sup>150</sup>

Reputational risk can override even legal considerations. An example uncovered during the research concerns the issue of the legality of prison labour. A corporation contemplating employing prisoners (in a country housing its production facilities) hired a consultant to investigate the possible repercussions of this arrangement. The consultant considered ILO jurisprudence, and found that ‘the ILO Committee of Experts said that as long as it’s voluntary and the wages paid to the prisoners are the same as to a private sector worker, it’s legal’.<sup>151</sup> Moreover, the consultant argued, ‘from the angle of rehabilitation, that the prisoners need to work.’ Despite the legality of its practices and arguments for employing prisoners, ultimately the corporation decided not to go ahead, as ‘the ILO convention is not our issue; our issue is the front page of the newspaper – and these jeans are made by prisoners’.<sup>152</sup>

Although the corporations studied for this thesis are predominantly retailers, non-retailers are also concerned about risks to their reputations. The ILO receives inquiries from a wide spectrum of corporations on how to devise their ethical trading policies and programmes. An ILO official states that it has even received queries from unlikely corporations who, at first glance, would appear to be ‘immune to social

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<sup>149</sup> Interview with official at audit and compliance organisation (London, 6 March 2013).

<sup>150</sup> *ibid.*

<sup>151</sup> Interview with consultant on corporate accountability and advisor to MSI-A (London, 8 February 2013).

<sup>152</sup> *ibid.*

pressure’, such as companies that produce credit cards, because these companies are not retailers and thus have few customers among the public.<sup>153</sup>

Consultancies have developed tailor-made tools to cater to the corporate focus on risk generally and reputational risk specifically. The most sophisticated tools, such as the one developed by a consultancy for corporation A6, assess the risk its reputation on the basis of a number of variables, including: which country it sources from and its human rights record; the location within that country and its socio-economic indicators; the likelihood of vulnerable workers being employed by the supplier (considering the local demographic breakdown and the local culture); and other variables. Moreover, corporations themselves have started to set their targets that are ‘very risk based – carrying out a certain number of audits and actions’.<sup>154</sup>

Trade unions and NGOs are also keenly aware of how important reputation is to corporations; indeed, they seek to use this to their advantage. As the head of a GUF says, ‘the company has a weak underbelly’ because ‘if a worker has a problem, you can hear about it two hours after it happens’, when it ‘becomes the corporation’s problem’.<sup>155</sup> This awareness allows trade unions and NGOs to challenge corporations to be more responsive to the needs of workers and to labour rights abuses in their supply chains. Nonetheless, unions, NGOs and corporations alike know that not all issues carry the same reputational risk. As a manager from corporation A5 states, ‘child labour and forced labour are the riskiest to the brand’s name, whereas freedom

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<sup>153</sup> Interview with official at International Labour Organization (Geneva, 1 March 2013).

<sup>154</sup> Interview with two managers at corporate member of MSI-A (London, 1 February 2013).

<sup>155</sup> Interview with head of international trade union confederation that is a signatory to international framework agreements (Geneva, 20 February 2013).

of association is not. We did an audit about workers that were sacked for organising, but no one cares. For companies it's about managing the risks to the brand'.<sup>156</sup>

Irrespective of the perception that violations of child labour and freedom of association pose an uneven threat to corporate reputations, the evidence presented above shows corporations are frequently driven to adopt and apply international labour standards by reputational risk. It should be noted that this occurs despite the fact that none of the corporations studied was able to produce evidence that negative representations in the media hurt their bottom line. It thus appears that reputational risk plays a part in corporate decision-making as much through the process of acculturation as it does through material inducement. In other words, although they account for their sensitivity to reputational risk by a purported desire to safeguard their profits, corporations are actually experiencing a 'cognitive discomfort' that stems from being outside the bounds of respectability.

#### *Commercial pressure as a positive influence*

Another factor that can lead to international law having a greater influence on corporations is commercial pressure. A few of the companies studied were propelled to introduce ethical trading programmes by their prospective corporate clients; namely, although these corporations are retailers, a part of their business involves selling goods and services to other companies. Thus, corporation A2 was asked by a potential corporate client about 'how to ensure there are no labour rights abuses where our products are coming from'.<sup>157</sup> Corporations A6 and A8 were similarly challenged by a client to describe its ethical trading programme. Eventually, in

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<sup>156</sup> Interview with manager at corporate member of MSI-A (London, 6 February 2013).

<sup>157</sup> Interview with manager at a corporate member of MSI-A (Cheltenham, 6 April 2013).

response to these demands from clients, both corporations joined MSI-A and signed up to the MSI-A Fundamental Code.

Beyond signing up to codes of conduct, commercial pressure can have a bearing on the way codes are applied. The ‘business case’ that many corporations make for respecting labour rights is that there is a correlation between a lack of compliance with internationally recognised labour rights standards and ‘late deliveries, a higher rejection rate and bad quality’ of the product being sourced. If workers are paid low wages and have their labour rights violated by suppliers, ‘this will cause unrest, lead to a de-motivated workforce and leave brands with an unstable supplier base’.<sup>158</sup>

Corporate officials make this argument on the basis of anecdotal data provided by their commercial departments. The empirical evidence is decidedly more mixed. Some researchers, such as Burke and Logsdon have argued that ethical trading can improve the competitiveness of a company.<sup>159</sup> Other research, however, produces more varied results and does not support the implementation of further corporate social responsibility initiatives in business practice.<sup>160</sup> A widely cited overview by Vogel suggests that,

the signal that emerges from thirty years of academic research – indicating that a positive relationship exists between social performance and financial performance – must be treated with caution. Serious methodological concerns have been raised about many of the studies and about efforts to aggregate results.<sup>161</sup>

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<sup>158</sup> Interview with manager at corporate member of MSI-A (London, 22 January 2013).

<sup>159</sup> L Burke and JM Logsdon, ‘How corporate social responsibility pays off’ (1996) 29(4) Long Range Planning 495.

<sup>160</sup> JD Margolis and JP Walsh, ‘Misery loves companies: Rethinking social initiatives by business’ (2003) 48(2) Administrative Science Quarterly 268.

<sup>161</sup> D Vogel, ‘Is There a Market for Virtue? The Business Case for Social Responsibility’ (2005) 47(4) California Management Review 19.

However, despite these controversies, the corporate officials interviewed could not cite any studies that would evaluate the ‘business case’ once the benefits of non-compliance with labour rights (principally, lower wages and costs) were factored in.

Yet, as with reputational risk, some corporate officials continue to advocate compliance with labour rights on the basis of an unproven business case. It can therefore be said that the commercial pressure for greater adherence to international labour standards occurs through processes of material inducement and mimicry: the former because of a widespread belief in the profitability of requiring suppliers to comply with labour rights, and the latter because this belief has become pervasive due to corporate tendencies to copy the practices of their peers.

In order to put the business case into practice, all of the corporations studied have inserted, in the terms and conditions of their contracts with suppliers, stipulations that both parties should respect the code of conduct of the corporation in question.<sup>162</sup> Suppliers are more likely to change their business practices in order to adhere to a corporate code of conduct if the corporation demanding these changes is a long-term partner that places large orders:

If you’re in this industry, you’ll notice that a factory will make changes for who’s giving them the money. And even then, they will say – you only have 2% of my business, while another corporation has 90% and they don’t require these changes, so we won’t make them.<sup>163</sup>

The effect of these contractual clauses in practice therefore varies according to the nature of the commercial relationship of the corporation and the supplier in question.

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<sup>162</sup> eg the Terms and Conditions of Purchase of corporation A5 state ‘[A]ll Product supplied to [corporation A5] will be manufactured in accordance with [corporation A5] Code of Practice Manual’ (‘[Corporation A5] Terms and Conditions of Purchase’, 1 (made available to the author)).

<sup>163</sup> Interview with manager at audit and compliance facilitation organisation (London, 3 October 2013).

In sum, the ‘business case’ for greater respect for internationally recognised labour rights has had some positive effect on the level of application of labour rights provisions in codes of conduct. It remains to be seen, however, whether this effect will last, considering the inconclusive evidence upon which the argument for greater adherence to labour rights is based.

### **III.B Commercial pressure as a negative influence**

The ratcheting up of compliance with labour rights due to commercial pressure is offset by its negative effects. The commercial relationships between corporations and suppliers are predicated upon the ability of suppliers to fulfil sizeable orders in very short timeframes. A failure to deliver can have profound consequences for the commercial prospects of a supplier in a market of thousands of prospective competitors in the developing world.

The corporations’ purchasing practices often exacerbate this pressure, leading to violations of labour rights. For instance, the corporations demand many samples from suppliers but these lead to comparatively few orders. For suppliers that manage to ‘get the order, you’re already in production and the corporations change the design in mid-stream, asking for different colour buttons for instance, so that production has to start again’.<sup>164</sup> In addition, corporations can impose many other changes in the course of production, such as increasing or reducing an order, extending payment terms from 30 to 60 or 90 days, and so on. This can disrupt factories, which are frequently ‘not very well organised,’ ‘run on credit’, and ‘don’t know good management’.<sup>165</sup>

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<sup>164</sup> Interview with representative of non-governmental organisations to MSI-A (London, 13 February 2013).

<sup>165</sup> *ibid.*

These corporate purchasing practices, occurring through a process of material inducement, are frequently the subject of tensions within the corporation itself. Although ethical trading or CSR departments frequently agree with the buyers in the company on the need to avoid such practices, once the buyers feel pressure from management, ‘they are being squeezed and look for the cheapest factory’.<sup>166</sup> The ethical trading manager in corporation A1 claims that ‘bosses are reluctant’ to put pressure on their buyers to adhere to international labour standards in its code of conduct because ‘buyers are ultimately judged on margin’.<sup>167</sup> This pressure on buyers is ultimately transferred onto the suppliers; the ethical trading manager of corporation A8 states: ‘suppliers know they have to abide by the code of conduct, but there is always a buyer that is putting an enormous amount of pressure on them to get the goods out’.<sup>168</sup>

The pressure to fulfil such demanding orders can frequently cause suppliers to operate in a manner that has detrimental effects on their workers’ enjoyment of labour rights. The first such detrimental effect comes from the suppliers reliance on sub-contracting; the size of the orders leads suppliers to sub-contract at least parts of these orders to other factories. Sub-contractors are almost never audited by consultancies or by companies, who may not be aware which sub-contractor a supplier is using.<sup>169</sup> They are rarely monitored by NGOs and are very unlikely to be unionised, particularly in cases where suppliers sub-contract to homeworkers (which occurs most frequently in the garment industry). Unsurprisingly, therefore, one corporate

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<sup>166</sup> *ibid.*

<sup>167</sup> Interview with two managers at corporate member of MSI-A (London, 1 February 2013).

<sup>168</sup> Interview with manager at corporate member of MSI-A (London, 29 January 2013).

<sup>169</sup> Interview with official at non-governmental organisation active in monitoring corporate violations of human rights (Oxford, 4 March 2013).

manager claims that ‘if you get a high level of sub-contracting, which is a real danger, you get the worst abuses’.<sup>170</sup> A sub-contractor ‘is not going to be paying minimum wage, because they’re not registered’ and will frequently have health and safety issues.<sup>171</sup>

Second, corporate purchasing practices can exacerbate the suppliers’ tendency to severely circumscribe the workers’ right to organise. They frequently see any form of organisation, including unionisation, as a threat to their business practices. Corporations’ audits show that suppliers occasionally fine workers for conversing during their working hours, dismiss workers who take part in union activity on the grounds of the factory and engage in other practices that stifle freedom of association.<sup>172</sup> They can frequently offer the justification that unionisation is a threat to their ability to fulfil orders and thus to the jobs and livelihoods of their workers.<sup>173</sup>

Third, in order to fulfil the stream of large, frequently changing orders, suppliers often demand their workers work longer hours than they are contracted to. Although these workers are mostly – in the experiences of auditing consultants interviewed – remunerated for this overtime, in numerous cases this pressure to deliver on an order leads to violations of the right to work limited hours.<sup>174</sup>

These examples show that corporate purchasing practices and the manner in which the corporations studied source from suppliers threaten workers’ enjoyment of

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<sup>170</sup> Interview with manager at corporate member of MSI-A (London, 3 October 2013).

<sup>171</sup> Interview with manager at corporate member of MSI-A (London, 22 January 2013).

<sup>172</sup> Interview with manager at corporate member of MSI-A (London, 3 October 2013).

<sup>173</sup> Interview with official at non-governmental organisation active in monitoring corporate violations of human rights (Oxford, 4 March 2013).

<sup>174</sup> Interview with official at non-governmental organisation active in monitoring corporate violations of human rights (Oxford, 4 March 2013); Interview with official at audit and compliance organisation (London, 6 March 2013); Interview with representative of non-governmental organisations to MSI-A (London, 13 February 2013).

labour rights. The corporations exert a downward pressure on prices, which leads to suppliers abusing their workers' rights in order to maximise profits. If suppliers were to undertake efforts to improve their record on workers' rights, 'this might have financial implications which might mean the whole factory goes bust'.<sup>175</sup> This should not be interpreted as saying that suppliers have no room for ameliorating workers' conditions, but as recognition of the effect that the ingrained purchasing practices and commercial pressure of corporations have on the enjoyment of labour rights.

Conversely, however, corporations also exert a pressure on suppliers that has a ratcheting up effect on their observance of labour rights. Corporations are aware that when suppliers violate rights such as freedom from child labour or the right to health and safety, this harms their reputations, which they think has an adverse effect on their profits. Moreover, some corporate officials (mostly in ethical trading departments) believe in the 'business case' for suppliers' observance of labour rights. For both of these reasons – reputational risk and the business case for labour rights – corporations take measures that communicate to suppliers their desire to improve working conditions.

## **Conclusion**

The threat of a loss of reputation and commercial pressure give rise to two opposing forces, one leading to a decrease and the other to an increase of observance of international labour standards. The results of my research demonstrate that commercial pressures and reputational risk can have the effect of ratcheting up observance of labour rights; they have led some of the corporations studied to join MSI-A, adopt international labour standards in their codes and to improve their

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<sup>175</sup> Interview with manager at audit and compliance facilitation organisation (London, 3 October 2013).

observance of labour rights by perceived threats to their reputations, which occasionally override even commercial interests. However, commercial pressures have also led corporations to adopt a business model that is inimical to workers' rights and that creates a systemic obstacle to the realisation of labour rights, thus reversing any gains.

In the final tally, it appears that the force exerting downward pressure on labour rights is more entrenched in corporate practices than the opposing, upward, force, which depends on the persuasiveness of ethical trading managers in corporations and a (heretofore inconclusively established) belief that violations of labour rights by suppliers reduce corporate profits. Nonetheless, it is not within the scope of this study to determine the relative strengths of these forces; the ultimate net effects of reputational risk and commercial pressure can only be determined through further research.

#### **IV. MORAL VALUES AS A FACTOR DETERMINING THE INFLUENCE OF INTERNATIONAL LAW ON CODES OF CONDUCT**

Moral values are another factor that play a part in why international law influences corporations' codes and actions.<sup>176</sup> In this part I will show how the effect of values on corporate observance of labour rights is limited to greater vigilance on violations of freedoms from child labour and forced labour and, to a lesser extent, to the right to health and safety.

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<sup>176</sup> I am referring to the moral values of corporate officials, rather than trade unions, NGOs and other stakeholders. These are subsumed under the factors of trade union and NGO pressure and reputational risk.

The CEO of corporation A6 states ‘most average businessmen don't want to be involved in exploiting people. The average Joe doesn't want any part of it’.<sup>177</sup> A senior official in MSI-A concurs: ‘most CEOs are not evildoers; they have kids and families and so on’.<sup>178</sup> The officials at the corporations studied repeatedly expressed their personal distaste for child labour and forced labour along with a conviction that their corporations should work to eradicate these practices in their supply chains.<sup>179</sup> These officials insist that ‘employees wanting to work for responsible business’<sup>180</sup> and that morale among their colleagues would suffer if corporations were to turn a blind eye to egregious labour rights abuses.

The recent tragedies in Bangladesh, including the collapse of Rana Plaza and the fire at Tazreen, have led many officials to attach a greater significance to health and safety issues. The ethical trading manager at corporation A5 noted a difference in his colleagues’ attitudes once she showed them ‘the horrific pictures’ from Rana Plaza.<sup>181</sup> This illustrates how values are diffused through the process of persuasion.

Nonetheless, a senior official of MSI-A states that he is unable to rely solely on a moral case when proposing new measures to corporate members of the MSI-A: ‘I am tired of saying to a company: you can exploit [workers] a bit, that’s ok. It’s not; it’s fundamentally unacceptable to run a business in a way that would run the risk of violating human rights’.<sup>182</sup> Moreover, while corporate officials appear to abhor child

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<sup>177</sup> Interview with head of corporate member of MSI-A (London, 17 January 2013).

<sup>178</sup> Interview with head of MSI-A (London, 2 April 2013).

<sup>179</sup> eg Interview with head of corporate member of MSI-A (London, 17 January 2013); Interview with manager at corporate member of MSI-A (London, 14 October 2013); Interview with manager at corporate member of MSI-A (London, 18 January 2013).

<sup>180</sup> Interview with manager at corporation that is not a member of MSI-A (London, 10 April 2013).

<sup>181</sup> Interview with manager at corporate member of MSI-A (London, 3 October 2013).

<sup>182</sup> Interview with head of MSI-A (London, 2 April 2013).

labour and forced labour, and are apprehensive about the right to health and safety, they appear unconcerned about serious violations of freedom of association and the right to collective bargaining, freedom from discrimination, the right to work limited hours and the right to weekly rest. Officials frequently dismiss violations of these rights by reference to the cultural or socio-economic context in which they occurred. A corporate official from corporation A7 states, 'laws on working hours have to be sensitive to the cultural situation in a country'.<sup>183</sup>

## **Conclusion**

The importance of values to my research should not be exaggerated; their impact on the influence of international law is restricted to an aversion towards child labour and forced labour and is thus narrow in scope. Moreover, even in these cases, it is trade union and NGO pressure, reputational risk or another factor that is the primary driver of the influence of international law on the corporations studied, rather than the moral values of management or of corporations more broadly.

## **V. CONCLUSION**

A variety of factors and processes have determined the influence of international law on the construction and application of corporate codes of conduct. Key among these has been pressure by trade unions and NGOs. As shown above, it has had a profound influence on the construction and application of codes of conduct. This influence can be traced back to the drafting of the Basic Code of Labour Practice and to the negotiations over the content of the MSI-A Fundamental Code. The record from these negotiations reveals wide-ranging arguments between corporate, trade union and

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<sup>183</sup> Interview with manager at corporate member of MSI-A (London, 18 January 2013).

NGO representatives over a number of provisions of the Fundamental Code, ranging from the right to establish unions to freedom from child labour. Despite the misgivings of some corporations, in the end those provisions were almost invariably aligned with the international labour standards promulgated by the ILO in its conventions – as advocated by trade unions.

It is only in areas in which ILO standards did not provide clarity, such as the amount of overtime that a worker could perform, that the drafters of the Fundamental Code felt emboldened to set new standards. In the words of one of the key participants in the negotiations, ‘although every word was argued over’, the negotiators ‘always came back to the wording of the ILO Conventions’ and of the Basic Code of Labour Practice drafted by GUFs.<sup>184</sup> Indeed, as the correspondence during the negotiations on the child labour clause shows, the only serious debate was whether to define child labour in accordance with ILO conventions, as advocated by trade unions, or in line with the UN Convention on the Rights of the Child as sought by NGOs.

The creation of the MSI-A and the drafting of the Fundamental Code were fraught and contentious. They were driven by trade unions, who settled on participating in the MSI-A governed by a Fundamental Code based on ILO standards – but only once they were unable to forge partnerships with corporations on a global level akin to domestic collective bargaining agreements. Corporations participating in the process contested this concept of the MSI-A and the Fundamental Code. They wanted the Fundamental Code to contain less onerous and less detailed provisions that would enable them to carry on as before. Thus, the MSI-A’s emergence is a result of a politicised process marked by sharp disagreements between opposing sides. It

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<sup>184</sup> Interview with head of international trade union federation that is signatory to international framework agreements, and one of the founders of MSI-A (Brussels, 10 May 2013).

supports Bartley's contention that private transnational governance agreements are not, as Ruggie, Teubner and others would have it, created simply as a result of private actors acting where international and national actors do not have the capacity. Instead, the creation of the MSI-A and its ultimate form was a compromise between unions wanting a far more developed regulatory framework and corporations wanting minimal, 'light-touch' regulation.

Moreover, trade union and NGO pressure did not abate with the drafting of the MSI-A Fundamental Code. As shown in part II, it continues to be a factor in the manner corporations apply the international labour standards provisions in their codes; this is particularly true of corporations that are members of MSI-A.

The diffusion of the provisions from the Fundamental Code protecting ILO standards demonstrates that international law also influences corporations through a secondary process: mimicry, done to acquire acceptance and legitimacy. Various corporations that were not members of MSI-A have nevertheless copied provisions from the Fundamental Code (based on international labour standards) into their codes of conduct. As the selected cases show, ILO conventions - either directly or indirectly through the Fundamental Code - have had a significant influence on the construction of codes of conduct of UK retailers (irrespective of whether or when they ended up joining the MSI-A), international organisations and corporations signing IFAs. While they clearly understood they were not bound by ILO conventions, many of them included ILO standards in their codes and put them into effect.

This occurred through mimicry and was prompted by the desire of these corporations to be seen by society at large, and their counterparts in particular, as playing by universal, internationally recognised rules. These rules are ILO standards, a source of credibility unmatched by anything they could offer. They confer

legitimacy on those who adopt them by virtue of the fact that the ILO is mandated by its member states, as well as their employers' organisations and unions, with creating international labour law.

The manner in which mimicry causes the diffusion of international standards into corporate codes and of auditing practices among corporations, resembles the process of acculturation, used in another context by Goodman and Jinks to describe how international law influences states. My results show that this instance of mimicry is also marked by a desire of corporations to avoid the 'cognitive discomfort' that comes with not playing by universally recognised rules such as ILO standards.

Other factors and processes have also been responsible for the diffusion of international labour standards provisions in the construction and application of codes. Reputational risk and commercial pressure have led many corporations to adopt and apply international labour standards in their codes. Empirical observations show that even those companies that do not include ILO standards in their codes are reluctant to adopt any substantive provisions to the contrary; interviewees canvassed thought it extremely unlikely that a corporation would hazard adopting a clause on a child labour or forced labour that would put it in clear breach of an ILO standard.<sup>185</sup>

Moreover, reputational risk and commercial considerations seem to have an outsized importance in causing the diffusion of international standards in codes, at least compared to their actual relevance for corporations. Namely, as my interviews demonstrate, corporations are unable to invoke empirical evidence to support an argument that their reputations or their bottom line would be damaged by violations

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<sup>185</sup> Interview with manager at corporate member of MSI-A (London, 3 October 2013); Interview with senior official at international trade union federation and one of the founders of the MSI-A (Brussels, 15 October 2013) and others.

of labour rights. Despite this, they attach some weight to these two factors, which continue to influence the diffusion of ILO standards in codes and in their application.

However, notwithstanding the role played by mimicry, reputational risk and commercial considerations, the research has shown that the influence of international law on corporate codes originates from, and owes most to, trade union and NGO pressure. The case studies and the results of chapter 3 support the assertion of a prominent union official that the ILO standards re-stated in the Basic Code of Labour Practice and later the Fundamental Code ‘now form the basis of most multi-stakeholder codes of conduct and other single-company codes of conduct.’<sup>186</sup> Thus, it can persuasively be argued that had unions and NGOs not pressured corporations into entrenching international labour standards in the MSI-A Fundamental Code, international law would have had, at best, an appreciably reduced influence on the construction and application of corporate codes of conduct.

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<sup>186</sup> Interview with head of international trade union federation that is signatory to international framework agreements, and one of the founders of MSI-A (Brussels, 10 May 2013).

## **CHAPTER 6**

### **LEGAL LIABILITY AS A FACTOR THAT DETERMINES THE INFLUENCE OF INTERNATIONAL LAW ON CODES OF CONDUCT**

#### **OVERVIEW OF CHAPTER SIX**

In chapter 5 I examined some of the key factors and processes that determine the extent of the influence of international law on the construction and application of codes of conduct. This chapter will complement chapter 5 by analysing the risk of legal liabilities that corporations face when they adopt and utilise codes of conduct, and what kind of factor this is in the influence of international law on codes.

Part I will examine the jurisprudence on corporate liability for violations of workers' rights protected by codes of conduct. It will focus on two jurisdictions: England and the United States. It will investigate whether an enforceable claim can be made in either England or the U.S. for holding corporations accountable for violating their codes.

Part II will focus on how corporations use this knowledge to assess the risk of legal liabilities that arises from codes of conduct. Part III will conclude by claiming that corporations have been emboldened to introduce detailed international legal standards in their codes of conduct because they presently face little risk of incurring legal liability for violating these provisions.

#### **I. CORPORATE ACCOUNTABILITY FOR VIOLATIONS OF CODES OF CONDUCT BEFORE DOMESTIC COURTS**

The emergence of corporate codes of conduct has piqued the interest of those seeking to hold corporations accountable for their actions. These documents are readily

dismissed as public-relations tools; however, lawyers have increasingly sought to use them to impose liability on corporations for violating human and labour rights. Such attempts have been based on a variety of actionable claims in false advertising, contract law, labour law and, most prominently, tort law.

This part presents an overview of the key jurisprudence relating to corporate liability for violations of codes of conduct. It will focus on two jurisdictions: United States and England. I chose to examine the risks that corporations could be exposed to when adopting codes of conduct in England because the focus of the qualitative research carried out in the thesis is on English companies. Of course, as the English legal system is intertwined with those of the European Union and the Council of Europe, my analysis of the risks English corporations could be subjected to includes a look at both English and European laws and case law.

I chose to examine the risks that corporations are exposed to in the United States for two reasons. First, it is the jurisdiction where the plurality of the world's major corporations has their headquarters (according to the Global Fortune 500 list for 2014, 128 are from the United States).<sup>1</sup> As my thesis also contains a quantitative study of the content of codes of conduct of Global Fortune 500 companies (presented in chapter 3), it is relevant to understand what legal risks the large number of these companies that are based in the U.S. faced when adopting their codes.

Second, common law principles from abroad have had an influence on English courts. For instance, in *White v Jones*,<sup>2</sup> Lord Goff used case law from the United States to support his contention that a duty of care was owed to a beneficiary by a testator's solicitor who negligently failed to put the testator's intention into effect

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<sup>1</sup> 'Global Fortune 500 list for 2014' <<http://fortune.com/global500/>> accessed 23 March 2015.

<sup>2</sup> [1995] 2 AC 207.

in a will. In another example, in *Henderson v Merrett Syndicates Ltd*<sup>3</sup> the House of Lords also invoked U.S. case law to support its view that concurrent remedies are possible in contract and in tort. In all, there is a ‘rich history of the common law borrowing ideas, answers and concepts from abroad’.<sup>4</sup> When this ‘rich history’ is allied with U.S. courts’ highly developed case law on corporate violations of human rights and the tendency of multinationals to operate in numerous jurisdictions, it is reasonable to believe that U.S. case law could thus factor into risk analyses for legal liabilities carried out by English corporations.

This part will be subdivided into sections organised around categories of potential causes of action that can be brought against companies in the United States and England. Section I.A will present and analyse the jurisprudence of U.S., English and European courts that hinge on the (lack of) protection of corporate freedom of speech and on liabilities for misleading advertising. Section I.B will offer a brief overview of cases under tort law (including the Alien Tort Claims Act in the United States) as it pertains to corporations and their liability for labour rights violations. Section I.C will examine whether codes of conduct create duties under contract law, and the implications of this for workers. Finally, section I.D will consider the prospects for the legal enforceability of the provisions of IFAs. Each section will offer an appraisal of the potential of litigation to hold corporations accountable for their violations of labour rights stipulated in their codes.

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<sup>3</sup> [1995] 2 AC 145.

<sup>4</sup> Lord Toulson, ‘International Influence on the Common Law’ (London Common Law and Commercial Bar Association, London, 11 November 2014) <[www.supremecourt.uk/news/speeches.html](http://www.supremecourt.uk/news/speeches.html)> accessed 23 March 2015.

## **I.A. False statements in corporate codes of conduct – free speech or false advertising?**

Corporate freedom of expression is a contentious issue, which has a significant bearing on attempts to hold corporations liable for violating workers' rights. While labour and consumer rights advocates frame the issue of corporate speech in terms of misleading advertising, corporations – particularly those in the U.S. - have contended that what is really at issue is their freedom to speak. For our purposes, a lot hinges on the outcome of this debate: are corporations free to make false statements in their codes of conduct or can a false statement made in a code of conduct be considered misleading advertising? In other words, can a corporation be held liable for what it puts forward in its code of conduct as misleading advertising, or are even false statements protected by freedom of expression?

### **United States**

#### *Freedom of expression and commercial speech*

The starting point for the inquiry on whether freedom of expression protects misleading corporate statements is the doctrine of commercial speech, present in the jurisprudence of both the U.S. Supreme Court and the European Court of Human Rights. The doctrine has been used by the U.S. Supreme Court and by the European Court of Human Rights to distinguish commercial speech from speech - political, artistic, and so on - that merits a higher level of protection under article 10 of the European Convention on Human Rights (which protects the freedom of expression) or the First Amendment to the U.S. Constitution (which protects the freedom of speech). Neither court has attempted to define commercial speech. Instead, both

courts have thought it best to identify commercial speech in a particular case, and then rule accordingly.

The genesis of the doctrine of commercial speech lies in the case law of the U.S. Supreme Court. For a long time, the Supreme Court was unwilling to afford any protection under the First Amendment of the U.S. Constitution to statements made by corporations.<sup>5</sup> The Court first recognised that commercial advertising is protected to a degree by the First Amendment in *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council* (1976).<sup>6</sup> Nevertheless, the Court held that commercial speech should be afforded a lesser degree of protection than other forms of speech, such as artistic speech or political speech. It opined that commercial speech should be treated differently from non-commercial speech for three reasons. The first is that the truth of commercial speech may be more easily verifiable by its disseminator. The second is that commercial speech is less easily 'chilled' because commercial speakers have an economic incentive to speak. Finally, the third is that the interest in preventing commercial harms justifies more intensive regulation of commercial speech than non-commercial speech.

The scope of the doctrine of commercial speech - and the responsibility of a corporation for its statements on its labour practices - was examined in a landmark case decided by the Supreme Court of California. The issue in *Kasky v. Nike, Inc.* (2002)<sup>7</sup> was 'whether the First Amendment protects a company's making false factual statements about its products, likely to matter greatly to some consumers in their

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<sup>5</sup> *Valentine v Chrestensen* 316 US 52 (1942).

<sup>6</sup> *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council* 425 US 748 (1976).

<sup>7</sup> *Kasky v Nike Inc* 119 Cal Rptr 2d 296 (2002).

purchasing decisions, in an effort to increase sales'.<sup>8</sup> Marc Kasky, a consumer activist, alleged that Nike's statements about labour conditions in supplier factories, made in press releases and letters to universities, were false and misleading and thus in violation of California's consumer protection (false advertising and unfair competition) laws as well as its own code of conduct.<sup>9</sup> In one of the letters sent to university presidents, Nike stated, 'wherever Nike operates around the globe, it is guided by principles set forth in a code of conduct' and 'we have been proud that in all material aspects the code of conduct is complied with. The code is not just word. We live by it'.<sup>10</sup>

Kasky's complaint alleged that Nike had knowingly made false statements. The court of first instance dismissed the suit, holding that the First Amendment protected Nike's speech, even if it was false and misleading (whether the actual statements were false or misleading was not established at this stage as Nike had challenged the right of Kasky to bring a suit on procedural grounds).

On appeal by Kasky, the California Supreme Court reversed the first instance decision, and held that Nike's speech was indeed commercial speech, for which Nike could be liable under the relevant consumer protection laws. Based on the U.S. Supreme Court's jurisprudence, it formulated a three-part test: 'categorizing a particular statement as commercial or noncommercial speech requires consideration of three elements: the speaker, the intended audience, and the content of the message'.<sup>11</sup>

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<sup>8</sup> E Chemerinsky and C Fisk, 'What is Commercial Speech? The Issue Not Decided in Nike v. Kasky' (2004) 54(4) Case Western Reserve Law Review 1143.

<sup>9</sup> *Kasky* (n 7) 302.

<sup>10</sup> *Nike v Kasky* 539 US 654 (2003) appendix to opinion of Breyer J., dissenting.

<sup>11</sup> *Kasky* (n 7) 312.

The Court found that Nike's speech satisfied each element of its test. First, Nike engaged in commerce, which gave the Court further cause to believe its speech was commercially motivated. Second, the intended audience was mostly made up of actual and potential purchasers of Nike's products. The letters that Nike sent to the colleges were 'addressed directly to actual and potential purchasers of Nike's products' and the letters to newspaper editors were statements to 'maintain and/or increase its sales and profits'.<sup>12</sup> The Court went on to note that the intended audience could include 'persons acting for actual or potential buyers or customers, or persons (such as reporters or reviewers) likely to repeat the message to, or otherwise influence actual or potential buyers or customers'.<sup>13</sup> Finally, the third element of the test was satisfied as the content of the speech consisted of representations of fact of a commercial nature that were intended to maintain and increase sales.

The first element of the test – whether the speaker engages in commerce – would appear to be relatively unproblematic for those wishing to argue that corporate codes of conduct are commercial speech (and are thus undeserving of the full protection of the First Amendment). Some could argue that under the second element of the test laid out by the California Supreme Court, the intended audiences of corporate codes of conduct are not actual and potential purchasers. Nevertheless, the fact that the great majority of codes are posted on corporate websites is a strong counter-argument, for it would appear that the desired effect is primarily to convince customers of the propriety of a corporation's actions.

The third element of the test is that the content of speech being commercial. As Piety states,

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<sup>12</sup> *ibid.*

<sup>13</sup> *ibid.*

clear-cut factual assertions, such as, "we pay our employees minimum wage" may be susceptible to proof and should not be immunized as puff or opinion...The California Supreme Court noted that such "representations of fact" would not be limited to the company's products or services, but could include "the business operations" as well.<sup>14</sup>

Eventually, Kasky's suit was settled out of court, the veracity of his claims was never established, and thus a question with policy implications was not settled. Nonetheless, the court's decision would appear to hold out some promise for those wishing to hold corporations accountable for violating their codes of conduct.

However, the ruling of the U.S. Supreme Court in *Citizens United v Federal Election Commission* presents a potentially significant setback to attempts to legally enforce codes of conduct. Namely, the Court reversed its longstanding practice and ruled that the law cannot restrict corporate electoral donations. The speaker's 'corporate identity' cannot be a factor in deciding what should be labelled as 'commercial speech'.<sup>15</sup>

This negates the first element (the identity of the speaker) of what constitutes commercial speech as proclaimed by the court in *Kasky*. It appears that speech would be categorised as commercial based only upon the latter two elements - the identity of the audience and the purpose of the speech.<sup>16</sup> This weakens the argument that a code of conduct is commercial speech that does not deserve full protection under the First Amendment. This concern is echoed by Piety, who predicts 'the language of corporate personhood' from *Citizens United* 'will be quickly adopted in the

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<sup>14</sup> T Piety, 'Free Advertising: The Case for Public Relations as Commercial Speech' (2006) 10 Lewis & Clark Law Review 367, 412.

<sup>15</sup> *Citizens United v Federal Election Commission* 558 US 310 (2010), 339-340.

<sup>16</sup> *Kasky* (n 7).

commercial speech context'.<sup>17</sup> She goes on to add that if a for-profit corporation is 'entitled to full First Amendment protection when it engages in political speech - which is in some sense peripheral to its existence - then it would seem the argument that full protection for its core expressive activity is even stronger.'<sup>18</sup>

It is too early to tell how well founded these fears are. Nevertheless, the scaling back of the doctrine of commercial speech by the Supreme Court in *Citizens United* could scupper efforts to legally enforce codes of conduct in the United States.

### *False advertising*

Having examined the issue of commercial speech in United States law, we now turn to its implications for companies in promulgating codes. Namely, if it is found that a company has made false statements in its code of conduct or related documents, and that it is not protected by the First Amendment because of the doctrine of commercial speech, what options does a prospective plaintiff who wishes to hold the company to account have? We will briefly present what scope the law offers for the claim that was made in *Kasky* – that false corporate statements made with the intent to market products, constitute false advertising.

In *Kasky*, the plaintiff was a consumer activist, not a worker affected by Nike's labour practices. There is good reason for this: under Californian unfair competition law, which *Kasky* used to bring his claim as a private plaintiff, there did not have to be injury for a plaintiff to bring an action. At the same time, the workers

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<sup>17</sup> T Piety, response to 'Our Stake in Corporate Behavior' <<http://thesituationist.wordpress.com/2010/01/23/our-stake-in-corporate-behavior>> accessed on 9 February 2015.

<sup>18</sup> T Piety, 'Citizens United and the Threat to the Regulatory State' (2014) 109 Michigan Law Review First Impressions 16.

whose working conditions were at issue were not U.S. citizens, and were consequently entitled only to limited First Amendment protection.<sup>19</sup>

However, the relevant Californian unfair competition statute was amended soon thereafter to require that a person bringing a suit under the law must have actually sustained the injury complained of in the suit. Also, the parts of the law that allowed Kasky to bring his lawsuit were amended so that somebody wanting to repeat Kasky's actions would have to 'assert in some realistic way that he or she purchased a product or service based on a representation about that product or service, such as its qualities, as opposed to something amorphous, such as the company being a "good corporate citizen."' <sup>20</sup> Therefore, it appears unlikely that a claim such as the one made by Kasky could succeed again in California.

However, some authors have claimed that the judicial system is not the only viable enforcement mechanism for codes of conduct in the United States. Lu has written about the possibility of applying the Federal Trade Commission's power to regulate deceptive advertising.<sup>21</sup> Namely, section 5 of the Federal Trade Commission Act proscribes 'unfair or deceptive acts or practices in or affecting commerce';<sup>22</sup> this allows the FTC to protect consumers by instigating administrative proceedings against advertising practices that deceive consumers or treat them unfairly.<sup>23</sup>

In its enforcement of section 5, the FTC has stated that three elements must be satisfied before it finds a practice is deceptive: first, there must be a representation,

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<sup>19</sup> T Benningson, 'Nike Revisited: Can Commercial Corporations Engage in Non-Commercial Speech?' (2006-2007) 39 Connecticut Law Review 379, 437.

<sup>20</sup> B Johnson, 'First Amendment Commercial Protections: A Practitioner's Guide' (2008) 41 Loyola of Los Angeles Review 297, 301.

<sup>21</sup> S Lu, 'Corporate Codes of Conduct and the FTC: Advancing Human Rights Through Deceptive Advertising Law' 38 Columbia Journal of Transnational Law 603.

<sup>22</sup> Federal Trade Commission Act 15 USCS §45 (1999).

<sup>23</sup> Lu 'Corporate Codes of Conduct and the FTC' 618.

omission or practice vis-à-vis the consumer population; second, the representation, omission or practice must be likely to mislead consumers reasonably under the circumstances; and third, the representation, omission or practice must be misleading in a material respect.<sup>24</sup>

When the FTC finds that the three elements are satisfied in a particular advert, it has at its disposal a range of remedies; typically, a remedy is a cease-and-desist order that would prevent the advert from running again.<sup>25</sup> Further, the FTC could order other types of remedies as well, including corrective advertising. Still, ‘there are no sanctions for engaging in deceptive or unfair practices unless the firm violates the FTC order subsequent to a finding of illegality’.<sup>26</sup> When this occurs, the FTC could sue the said company in federal court to seek civil penalties for failure to comply with an FTC order.

To date, however, there has been no case law on whether non-compliance with a code of conduct entails an application of the FTC’s deceptive advertising provisions in section 5. Thus, this option has not yet been utilised to hold corporations accountable for false statements emanating from their codes of conduct.

### **England and Europe**

There has not been much discussion in the United Kingdom on categorising different kinds of speech and thereby distinguish commercial speech from political speech.<sup>27</sup>

Accordingly, the doctrine of commercial speech has not received much attention in English courts. Nevertheless, it has been examined by the European Court of Human

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<sup>24</sup> FTC Act (n 22).

<sup>25</sup> Lu ‘Corporate Codes of Conduct and the FTC’ 618.

<sup>26</sup> *ibid.*

<sup>27</sup> CR Munro, ‘The value of commercial speech’ (2003) 62(1) Cambridge Law Journal 134, 134.

Rights (ECtHR). As such, it 'is not without potential significance in domestic law, made much more immediate through the passing of the Human Rights Act 1998'<sup>28</sup> which transposed the European Convention of Human Rights into English law. It will be shown that the case law of the ECtHR on commercial speech could possibly lead to problems for corporations adopting codes of conduct.

### *Commercial speech in the case law of the European Court of Human Rights*

The starting point for our examination of the case law of the ECtHR is article 10(1) of the European Convention of Human Rights and Fundamental Freedoms, which affirms that 'everyone has the right to freedom of expression'.<sup>29</sup> By implication, all forms of expression are protected under article 10(1), so that the key questions are determined by the ECtHR's interpretation of the justifications to the restrictions on the exercise of this freedom under article 10(2). Thus, for an interference to come within the margin of appreciation it has to be:

- (1) Prescribed by law,
- (2) Pursuing one or more of the legitimate aims set out in the second paragraph of Article 10 and,
- (3) Necessary in a democratic society to achieve such aims.<sup>30</sup>

In the *Markt Intern and Beermann v. Germany* (1989) and *Hertel v. Switzerland* (1998) decisions, the ECtHR considered commercial speech and appeared to give it broader scope than U.S. courts have done recently. In both cases, the speech in question mixed non-commercial with commercial considerations. In

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<sup>28</sup> *ibid* 135.

<sup>29</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 10(1).

<sup>30</sup> ECHR art 10(2); see also J Krzeminska, 'Freedom of Speech in Europe' <aei.pitt.edu/3043/2/JKrzeminska\_EUSA\_paper.doc> accessed 16 February 2015, 7-8.

each instance, the speech in question was related to consumer products but was not made by corporations or even necessarily by competitors, but by a trade magazine and a self-professed scientist, respectively. This led to unfair competition statutes being invoked by the plaintiffs in Germany (in *Markt Intern*) and Switzerland (in *Hertel*).

In *Markt Intern*, the Court cited a German case-law dictum that statements ‘intended to promote, in the context of commercial competition, certain economic interests to the detriment of another’<sup>31</sup> are disqualified from having the ability to contribute to a public debate.<sup>32</sup> The Court's finding seems to imply that the commercial motivation of the speech means the speaker did not pursue a public interest,<sup>33</sup> and that it is therefore not deserving of full protection under article 10. This is despite the fact that the statements made by the applicant were factually true.

The Court also notably gave the respondent State (Germany) wide leeway to decide whether the speech in question prejudiced the commercial interests of *markt intern*'s competitors. Germany's ‘margin of appreciation’ meant it was better placed than the Court to determine whether the statements made by the applicant constituted unfair competition. This decision indicated the Court would be willing to grant Member States discretion in matters of commercial speech and unfair competition.

In *Hertel*, the Court reiterated that ‘a margin of appreciation is particularly essential in commercial matters, especially in an area as complex and fluctuating as that of unfair competition’,<sup>34</sup> but that Switzerland's margin of appreciation was

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<sup>31</sup> *Markt Intern Verlag GmbH and Klaus Beermann v Germany* (1990) 12 EHRR 161, para 19.

<sup>32</sup> Krzeminska ‘Freedom of Speech in Europe’ (n 30).

<sup>33</sup> MH Randall, ‘Commercial Speech under the European Convention on Human Rights: Subordinate or Equal?’ (2006) 6 Human Rights Law Review 53, 74.

<sup>34</sup> *Hertel v Switzerland* (1998) 28 EHRR 534, para 47.

reduced because a genuine public debate existed in this case and because the statements in question could contribute significantly to it. This time, unlike in its decision in *Markt Intern*, the Court did not consider the speaker's (possible) commercial motivation as preclusive to him providing a significant contribution to a public debate.

In a later ruling (*Demuth v. Switzerland*), however, ECtHR departed from using the existence of a public debate as a criterion for determining whether speech was commercial in nature. Although the speech in question was once again 'mixed' and could possibly have contributed to an existing public debate, the Court went back to using the commercial motivations of the speaker as the determining factor for whether the speech would be accorded full protection under article 10 or not.<sup>35</sup>

It is submitted that the three above-mentioned cases illustrate two alternative approaches taken by the ECtHR to determining whether speech is commercial and thus deserves full protection under article 10. According to the first, the commercial motivation of the speaker is the determining factor on whether speech is commercial. In the second, the Court (in *Hertel*), highlighted the contribution of the speech to a public debate as the key question in classifying speech as commercial.

Regardless of which of these two approaches are adopted, however, the jurisprudence of ECtHR is consistent in clearly distinguishing between commercial and non-commercial speech and in affording the former a lesser degree of protection than the latter. The doctrine of commercial speech has been applied expansively to cover *true* statements by *non-corporate* speakers with no overt commercial interests. In addition, the Court has shown strong deference to member states in determining what speech could constitute unfair competition.

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<sup>35</sup> *Demuth v Switzerland* (2002) 38 EHRR 423, para 42.

This practice strongly indicates that, should the ECtHR be faced with a case in which an untrue statement from a corporate code of conduct or report was alleged to be false advertising and unfair competition under member state legislation, the Court would be very unlikely to provide the corporation protection under article 10. The Court has shown time and again that it provides a lot of latitude to Member States to use their margin of appreciation in matters of commercial speech. This conclusion is reinforced by the case law of the European Court of Justice, which has recognised the doctrine of commercial speech and applied the ‘public debate’ test in its jurisprudence.<sup>36</sup>

#### *Commercial speech in English law*

Despite the case law of the European Court of Human Rights, English law has not employed categorisations of speech. The English courts have steered clear from using the concept of commercial speech, likely due to the difficulty of defining it.<sup>37</sup>

So, how relevant is it to English courts that the ECtHR has utilised this categorisation of different types of speech? According to the Human Rights Act 1998, British courts must only consider ECtHR jurisprudence; they are not bound by it. Nevertheless, it is submitted that considering the ECtHR’s – and the U.S. Supreme Court’s – practice of providing commercial speech less protection than other forms of speech, English courts will be unlikely to afford speech by corporations (even if they do not categorise it as commercial speech) equal levels of protection, particularly if faced with what can be considered advertising. Indeed, Munro acknowledges that advertising is the one form of commercial speech that is ‘subject to a battery of legal

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<sup>36</sup> C-71/02 *Herbert Karner Industrie-Auktionen GmbH and Troostwijk GmbH* [2004] ECR I-3054, para 51.

<sup>37</sup> Munro ‘The value of commercial speech’ (n 27) 143.

requirements, supplemented by schemes of self-regulation,<sup>38</sup> including more than a hundred statutes which prohibit, restrict or affect advertising in specific ways as well as regulations on misleading advertising.

However, even if English courts will be unlikely to afford corporate speech equal levels of protection, I have to determine whether and how corporations can be actually held liable for making untrue statements in their codes under false advertising legislation. While an in-depth look at English and European unfair competition law is beyond the scope of this research, the next section should provide an indication of the relevant norms and their applicability to codes of conduct.

#### *False advertising claims in the UK*

In the United Kingdom a mix of statutory and self-regulatory instruments regulates advertising. The statutory framework is set by two regulations adopted to implement two European Union directives.

The first relevant statutory instrument is the Consumer Protection from Unfair Trading Regulations 2008 (hereafter referred to as the CPRs),<sup>39</sup> which implements EU Directive 2005/29/EC concerning unfair business-to-consumer commercial practices (hereafter referred to as the ‘Unfair Commercial Practices Directive’).<sup>40</sup> As the names imply, the CPRs and the Unfair Commercial Practices Directive primarily regulate unfair commercial practices between businesses and consumers. The second relevant statutory instrument is the Business Protection from Misleading Marketing

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<sup>38</sup> *ibid.*

<sup>39</sup> SI 2008/1277 (CPRs).

<sup>40</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council [2005] OJ L 149/22.

Regulations 2008 (hereafter the BPRs),<sup>41</sup> which implements EU Directive 2006/114 Concerning Misleading and Comparative Advertising (the Misleading Advertising Directive). The BPRs and the Misleading Advertising Directive protect traders from misleading advertising by other traders.

The BPRs and CPRs prohibit unfair commercial practices, including misleading advertising. The BPRs define misleading advertising as ‘any advertising which in any way deceives, or is likely to deceive the persons to whom it is addressed or whom it reaches and which, by reason of its deceptive nature, is likely to affect their economic behaviour.’<sup>42</sup> Advertising can mislead about the ‘characteristics of the product’, which includes the method of manufacture.

The CPRs define unfair commercial practices very similarly, while adding that a commercial practice can be misleading if a trader fails to comply with a code of conduct (which can mean any set of rules that defines the behaviour of the business) that signifies a firm, rather than ‘aspirational’, commitment of the company that it has indicated it is bound to, and that causes the consumer to take a transactional decision he would not have taken otherwise.<sup>43</sup>

Both regulations provide that traders knowingly engaging in such unfair commercial practices or misleading advertising can be prosecuted, while also providing that traders can offer a defence of due diligence in they can prove that the commission of the offence was due to a mistake or due to reliance on information supplied by another person.<sup>44</sup> Considering the difficulty that would be inherent in proving that companies breach their codes of conduct wilfully, and bearing in mind

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<sup>41</sup> SI 2008/1276 (BPRs).

<sup>42</sup> *ibid* art 3(2).

<sup>43</sup> CPRs art 5 (n 39).

<sup>44</sup> CPRs art 17 (n 39); BPRs art 11 (n 41).

that violations are likely to occur due to the actions of their suppliers (thus triggering the due diligence defence), it is unsurprising that there have been no such prosecutions on the record.

The Advertising Standards Authority (ASA), an independent body that enforces the Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing (hereafter referred to as the Code), further controls non-broadcast advertising in the United Kingdom. The Committee of Advertising Practice (CAP), a self-regulatory body drawn from advertisers, agencies and trade organisations, drafts this Code and ASA enforces it.<sup>45</sup> The Code ‘supplements the law, fills gaps where the law does not reach’.<sup>46</sup>

According to the Code’s section on misleading advertising, ‘marketing communications must not materially mislead or be likely to do so’.<sup>47</sup> Further, ‘before distributing or submitting a marketing communication for publication, marketers must hold documentary evidence to prove’ their claims.<sup>48</sup>

ASA’s remit allows it to investigate and adjudicate on complaints regarding the Code. It is to this body that individuals can complain; however, the ASA’s (recently expanded)<sup>49</sup> remit under the Code does not cover ‘corporate reports’<sup>50</sup> or ‘codes of practice’ and sets fairly narrow definitions of what an advert is for its

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<sup>45</sup> E Barendt, *Freedom of Speech* (2<sup>nd</sup> ed, OUP 2007) 393.

<sup>46</sup> The UK Code of Non-broadcast Advertising, Sales Promotion and Direct Marketing (12<sup>th</sup> ed, 2010) (the CAP Code) <<http://www.cap.org.uk/Advertising-Codes/Non-broadcast-HTML.aspx>> accessed 19 February 2015. As well as the CAP Code, non-broadcast marketing communications (such as, potentially, codes of conduct) are subject to a vast array of legislation. This legislation touches upon issues of advertising for specific industries (eg the Civil Aviation (Aerial Advertising) Regulations 1995, SI 1995/2943) or professions (eg Estate Agents Act 1979, s 16). However, these do not apply to codes of conduct and it is thus ASA’s remit and practice that is of most interest for our purposes.

<sup>47</sup> CAP Code (n 46) Misleading Advertising rule 3.1.

<sup>48</sup> *ibid* rule 3.7.

<sup>49</sup> ‘Extending the Digital Remit of the CAP Code’ <[asa.org.uk](http://asa.org.uk)> accessed 19 February 2015.

<sup>50</sup> CAP Code (n 46) Introduction art II.p and II.r.

purposes.<sup>51</sup> Thus, it still appears that the Code does not categorise corporate codes of conduct as misleading advertising.

ASA has made only one ruling on a complaint about a company's claims regarding its CSR successes; namely, ASA received a complaint that Mackie's, a Scottish ice cream maker, was falsely advertising when it claimed its products are 'carbon neutral in their production'.<sup>52</sup> Upon investigation, ASA did not uphold the complaint. However, no rulings have been made on a corporation's adherence to its claims about labour rights.

Even in case of a successful complaint, ASA's sanctions are mild; ASA does not 'adopt a legalistic attitude', but instead believes that 'adverse publicity' caused by publication of its adjudication should cause the company in question to desist from its misleading adverts. However, if misleading adverts continue to appear after ASA has adjudicated on them, ASA can refer the matter to Office of Fair Trading (OFT) for action. The OFT can ultimately seek an injunction from the court to prevent the further appearance of the adverts in question.<sup>53</sup>

## **Conclusion**

The ruling in *Kasky* has served notice to corporations that they may be held accountable for making false statements on labour rights of their suppliers' workers. However, *Kasky* also stands out for its uniqueness in the United States and England,

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<sup>51</sup> The CAP Code applies to 'advertisements and other marketing communications by or from companies, organisations or sole traders on their own websites, or in other non-paid-for space online under their control, that are *directly connected with the supply or transfer of goods, services, opportunities and gifts*, or which consist of direct solicitations of donations as part of their own fund-raising activities' (emphasis added), CAP Code (n 46) Introduction art I.h.

<sup>52</sup> *Mackie's* [2011] ref A11-150642 (ASA)  
<[www.asa.org.uk/Rulings/Adjudications/2011/10/Mackies/SHP\\_ADJ\\_150642.aspx](http://www.asa.org.uk/Rulings/Adjudications/2011/10/Mackies/SHP_ADJ_150642.aspx)> accessed 20 February 2015.

<sup>53</sup> CAP Code (n 46) 109-111.

as no similar decisions have emerged - either in the courts or through the regulatory systems described above (FTC and ASA in the United States and England, respectively) – to hold a corporation accountable for false statements made in relation to its code.<sup>54</sup>

It is also true that amendments to Californian false advertising and unfair competition laws make it very unlikely that a new *Kasky* - a consumer who did not sustain an injury due to purchasing a product from a corporation - could make a claim against that corporation for untruths in its codes of conduct. Moreover, the U.S. Supreme Court has blurred the distinction between commercial speech and political speech through its *Citizens United* decision, increasing the likelihood of corporations claiming protection of their speech under the First Amendment. Finally, despite the latitude that the ECtHR's decisions on commercial speech give states in regulating false advertising, ASA's sanctions regime appears somewhat toothless, and its remedies very restricted (e.g. ordering the cessation of misleading advertising or prohibiting its publication), thus posing little threat to English corporations making false statements.

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<sup>54</sup> In Germany, a successful complaint for consumer deception was recently filed by the Hamburg Customer Protection Agency against Lidl, the retailer. Lidl had claimed in an advertising brochure, which stated, 'We trade fairly! Every product has a story. To us it matters who is behind this story. Lidl globally advocates fair working conditions. Therefore, at Lidl, we contract our non-food orders only to selected suppliers and producers that are willing to undertake and can demonstrate their social responsibility. We categorically oppose every form of child labor, as well as human and labor rights violations in our production facilities. We effectively ensure these standards.' However, following the complaint, which included the results of allegations of inhumane working conditions for textile workers in Lidl supplier factories in Bangladesh, Lidl was forced to retract these public claims. Moreover, Lidl will no longer be allowed to refer to its membership in the Business Social Compliance Initiative. For the original complaint (in German), see <<http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/LidlawsuitreworkingconditionsinBangladesh>> accessed 18 February 2015.

Therefore, corporations appear to be facing a negligible risk of incurring liability for misleading advertising when making false statements about adhering to their codes of conduct.

### **I.B. Claims pursued on the basis of the law of tort**

In this section I will consider what sorts of liabilities the law of tort could impose on corporations violating labour rights and whether the corporations can open themselves up to further liabilities in this respect by adopting codes of conduct that protect labour rights.

#### **United States**

The first U.S. congress enacted the Judiciary Act in 1789, which contained a one-sentence statute better known as the Alien Tort Claims Act (ATCA): ‘[d]istrict courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States’.<sup>55</sup> In this section of chapter 2 I will focus on two key questions. First, what liabilities does ATCA jurisprudence create for corporations violating labour rights? In other words, are labour rights a part of the ‘law of nations’ for the purposes of ATCA? Second, can corporations be liable under ATCA or does the statute only give federal courts jurisdiction over individuals?

#### *ATCA jurisprudence on international labour rights*

A major question the U.S. courts have had to grapple with in interpreting ATCA has been how to define the ‘law of nations’. The U.S. Supreme Court in *Sosa v. Alvarez-*

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<sup>55</sup> Alien Tort Claims Act 28 USC §1350.

*Machain* found that, in enacting the statute, Congress had in mind torts corresponding to three primary offenses according to Blackstone's understanding of the law of nations in 1789: violation of safe conducts, infringement on the rights of ambassadors, and piracy.<sup>56</sup> This did not mean, however, that courts would not be able to recognise further actionable norms of international law: '[t]he door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today'.<sup>57</sup> Nevertheless,

federal courts should not recognize private claims under federal common law for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when [ATCA] was enacted.<sup>58</sup>

The Court's ruling in *Sosa* is a framework for courts to determine which norms of international law provide a cause of action. I will now examine whether, following the decision in *Sosa*, any internationally recognised labour rights have reached the required level of acceptance in customary international law to be considered part of the 'law of nations' under ATCA.

Some decisions, mostly taken prior to the Supreme Court's decision in *Sosa*, do indicate that the four core labour rights enumerated in the ILO Declaration on Fundamental Principles and Rights at Work and other international instruments could be universal and specific enough (the criteria set by the Supreme Court in *Sosa*) to fall under the rubric of the 'law of nations'.

For instance, in *Doe I v. Unocal Corp.*, the Court of Appeals for the Ninth Circuit references the Universal Declaration of Human Rights in establishing that

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<sup>56</sup> *Sosa v Alvarez-Machain* 542 US 692 (2004), 724.

<sup>57</sup> *ibid* 729.

<sup>58</sup> *ibid* 732.

‘forced labor is so widely condemned that it has achieved the status of a *jus cogens* violation’.<sup>59</sup> In another example, in *Estate of Rodriguez v. Drummond*, the court decided that the ILO conventions 87 and 98, the two key conventions on freedom of association and collective bargaining, are ‘generally recognized as principles of international law,’ even though the United States has not ratified either.<sup>60</sup>

However, *Sosa* ushered in a major shift in the practice of the courts. In the period since *Sosa* lower-instance courts have ‘overwhelmingly rejected ATCA claims based on allegations of mere sweatshop conditions’.<sup>61</sup> Given this precedent, Maryanov argues, claimants ‘may have difficulty establishing that specific and universal standards exist for minimum wages or occupational health and safety’.<sup>62</sup>

The most recent decisions are not encouraging for claimants wishing to invoke core labour rights as norms of customary international law that provide causes of action under ATCA. I will highlight two illustrative decisions – *Roe I v. Bridgestone* and *Flomo v. Firestone*.

In *Roe I v. Bridgestone*,<sup>63</sup> the plaintiffs tried to circumvent the United States’ non-ratification of most ILO conventions by arguing that the U.S. bound itself to these conventions (and convention 29 in particular) through the ILO Declaration on Fundamental Principles and Rights at Work. They argued that – as discussed in chapter 1 - the Declaration was binding on all ILO member states, regardless of which

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<sup>59</sup> 395 F 3d 932, 945.

<sup>60</sup> 256 F Supp 2d 1250, 1263.

<sup>61</sup> D Maryanov, ‘Sweatshop Liability: Corporate Codes of Conduct and the Governance of Labour Standards in the International Supply Chain’ (2010) 14 Lewis and Clark Law Review 397, 419, cites the following cases: *Jane Doe I v Wal-Mart Stores Inc* No CV 05-7307 AG (MANx) 2007 WL 5975664 (CD Cal Mar 30, 2007); *Does I v Gap Inc* No CV-01-0031 2002 WL 1000068 (DN Mar I May 10, 2002); *Aldana v Del Monte Fresh Produce NA Inc* 416 F 3d 1242 (11th Cir 2005).

<sup>62</sup> Maryanov ‘Sweatshop Liability’ (n 61) 420.

<sup>63</sup> *Roe I v Bridgestone* 492 F Supp 2d 988.

conventions they have ratified. As such, ILO member states had an obligation to respect, to promote, and to realise the principles concerning the fundamental rights that are the subjects of the conventions.

The Court was not in the mood to entertain such novel arguments. ‘That Declaration’, the majority opinion stated, ‘clearly did not impose any new binding legal obligations on the ILO member nations’.<sup>64</sup> The Court approvingly cited the ILO Legal Advisor as saying that the Declaration ‘is recognized by everyone as not being a binding instrument’.<sup>65</sup>

In *Flomo v. Firestone*,<sup>66</sup> the Seventh Circuit Court of Appeals examined whether there was indeed a norm prohibiting child labour in the ‘law of nations’ within the meaning of ATCA. The opinion, written by Judge Posner, analyses three international conventions that bear on this question: the UN Convention on the Rights of the Child and the two ILO conventions on child labour (138 and 182). The court found that these conventions present no evidence that the prohibition of child labour is indeed a customary norm in international law. According to Posner’s opinion, the relevant articles in the said conventions are much too vague to be evidence of a norm. Posner’s analysis is illustrative of the sort of ‘vigilant doorkeeping’ envisioned by the Supreme Court in *Sosa* to ensure that the scope of ATCA is not broadened. Should U.S. federal courts choose to continue to follow this line of reasoning, it will be difficult to successfully introduce any internationally recognised labour rights – even core ones – into ATCA jurisprudence.

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<sup>64</sup> *ibid* 1015.

<sup>65</sup> *ibid*.

<sup>66</sup> 643 F 3d 1013 (2011).

*When are corporations liable under ATCA?*

The recent Supreme Court decision in *Kiobel v. Royal Dutch Shell* appears to have severely circumscribed the possibility of holding corporations liable under ATCA. In its judgment the Supreme Court held that ATCA could only apply to violations of international law that ‘touch and concern the territory of the US’ with ‘sufficient force to displace the presumption against extraterritorial application’.<sup>67</sup> With regard to corporations, they are ‘often present in many countries, and it would reach too far to say that mere corporate presence [in the United States] suffices’ for that corporation to be liable under ATCA’.<sup>68</sup> Chander notes that, while the ‘decision did not bar the application of the Alien Tort Statute in cases involving events abroad entirely’, it ‘required a sufficient territorial nexus with the US’.<sup>69</sup> Although the Supreme Court did not pronounce upon whether corporations could bear international obligations to respect human rights norms,<sup>70</sup> this decision appears to limit the applicability of ATCA to U.S. corporations.

On the whole, the risk for a corporation that it will be liable for violating international labour rights under ATCA appears to be tiny, irrespective of whether it has adopted such rights in its code of conduct. As the brief overview above shows, United States’ courts have been reluctant to interpret the ‘law of nations’ broadly enough to include even the four core internationally-recognised labour rights, except in cases where they are codified by treaties ratified by the United States (and even then, treaties such as the International Covenant on Civil and Political Rights which

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<sup>67</sup> *Kiobel v Royal Dutch Petroleum Co* 133 S Ct 1659 (2013), 1673.

<sup>68</sup> *ibid.*

<sup>69</sup> A Chander, ‘Unshackling Foreign Corporations: *Kiobel*’s unexpected legacy’ (2013) 107(4) *American Journal of International Law* 829, 830.

<sup>70</sup> R Steinhardt, ‘*Kiobel* and the Weakening of Precedent: A Long Walk for a Short Drink’ (2013) 107(4) *American Journal of International Law* 841.

are bedrocks of international human rights law, have been pronounced to be unenforceable because they are not self-executing).<sup>71</sup> Moreover, the recent decision in *Kiobel* has limited the applicability of ATCA to American corporations that commit torts, at least in part, on American territory. It thus appears, following *Kiobel*, that a corporation can only be held liable if that corporation has: a) a head office, affiliate, subsidiary or other kind of corporate presence in the U.S.; and b) that American head office, affiliate or subsidiary played a significant part in the decision to commit the tort in question.

### **England and Europe**

There have been attempts in English courts to obtain redress for violations of human rights directly against corporations on the basis of tort. The claimants in the cases considered alleged harm caused by negligence arising from a breach of a duty of care. However, a major difference presents itself between these cases and the rulings under ATCA. Namely, while ATCA nominally provides jurisdiction to U.S. courts for torts committed across the world, English courts have lacked such a strong statutory basis for asserting jurisdiction.

The common law in English courts has mostly revolved around the question of whether it is possible to overcome limitations of access for prospective plaintiffs and around settling first order procedural issues. In particular, the key issues considered have been: first, are English courts the right ‘forum’ for suits alleging harm in foreign countries (in consideration of the ‘forum non conveniens’ principle)? Second, what is the choice of law in cases of personal injury? I will briefly consider the common law on each of these issues. Finally, I will also discuss the Court of

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<sup>71</sup> *Sosa* (n 56) footnote 64.

Appeal's recent decision in *Chandler v Cape*<sup>72</sup> on the breadth of the duty of care of corporations.

### *Forum non conveniens*

English courts traditionally held that an action for a tort committed abroad must be brought in the defendant's domicile.<sup>73</sup> This would mean that claimants from developing countries could not bring cases against parent companies in England because they would have to bring the action before the courts of the country where the subsidiary of the company was domiciled.

English courts were thereby enforcing the principle of 'forum non conveniens' under which a two-part test determined whether an English court could hear an action: (i) is there a forum that has a more real and substantial connection to the case than England; (ii) if so, are there nevertheless reasons why justice would require that the English court should retain jurisdiction? The interests of justice would sometimes mean that the only prospect of obtaining justice in claims against English MNCs would be to pursue claims in England, as lawyers and experts were unavailable to represent claimants before their local courts.<sup>74</sup>

The principle of 'forum non conveniens' has, however, been contested in recent years. First, the European Union enacted the Regulation on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (the so-called 'Brussels

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<sup>72</sup> *Chandler v Cape PLC* [2012] 1 WLR 3111.

<sup>73</sup> eg *Re Harrods (Buenos Aires) Ltd* [1991] All ER 334 (CA).

<sup>74</sup> R Meeran, 'Tort litigation against Multinational Corporations for Violation of Human Rights: an Overview of the Position Outside the United States' (2011) 3(1) City University of Hong Kong Law Review 1.

Regulation’)<sup>75</sup>, which allowed a company to be sued in its place of domicile for civil claims in tort,

even when the damage occurred outside the EU and the victim is a non-national, as long as the “event giving rise to the harmful event” (for example, a tort committed through a decision by the board of directors) occurred within a European forum jurisdiction.<sup>76</sup>

Next, the European Court of Justice (ECJ) ruled in *Owusu v. Jackson* that national courts in the EU do not have the power to halt the proceedings on the grounds of ‘forum non conveniens’ in cases brought against EU-domiciled defendants, where the alternative venue is outside the EU.<sup>77</sup>

A less restrictive line has also recently been taken in some English cases (though not as challenging to forum non conveniens as that taken by the ECJ in *Owusu*). Litigation was ‘bogged down for years’<sup>78</sup> in *Connelly v. RTZ Corp, plc*<sup>79</sup> and *Lubbe & 4 Others v Cape plc*.<sup>80</sup> Eventually, in *Connelly*, the House of Lords laid down the principle that a claimant who would be denied substantial justice in his local courts because of an inability to pay for lawyers and experts, but who could get such representation in English courts, would be allowed to proceed with his claim in England. Lord Goff stated that a UK forum would be more suitable in ‘the interests of all the parties’ and ‘for the ends of justice.’<sup>81</sup>

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<sup>75</sup> Council Regulation No 44/2001 of 22 December 2000 on jurisdiction and enforcement of judgments in civil and commercial matters [2001] OJ L12/1.

<sup>76</sup> C Kaeb and D Scheffer, ‘The Paradox of Kiobel in Europe’ (2013) 107(4) *The American Journal of International Law* 852, 853.

<sup>77</sup> C-281/02 *Owusu v. Jackson* [2005] I-1383.

<sup>78</sup> Meeran ‘Tort litigation’ (n 74) 11.

<sup>79</sup> [1997] UKHL 30, [1997] 3 WLR 373.

<sup>80</sup> [2000] UKHL 41, [2000] 1 WLR 545.

<sup>81</sup> *Connelly* (n 79).

The challenge to the ‘forum non conveniens’ doctrine in *Owusu* seems to have led, however, to recent changes to the Brussels Regulation, adopted in December 2012. According to the recast regulation,<sup>82</sup> English and other EU Member State courts do, after all, have the discretion to decline jurisdiction and stay proceedings against parties domiciled in an EU Member State where a related action is pending before a court in a third (non-Member) state if:

- a) [I]t is expedient to hear and determine the related actions together to avoid the risk of irreconcilable judgments resulting from separate proceedings;
- (b) it is expected that the court of the third State will give a judgment capable of recognition and, where applicable, of enforcement in that Member State;
- and
- (c) the court of the Member State is satisfied that a stay is necessary for the proper administration of justice.<sup>83</sup>

Nevertheless, the recast regulation also allows English and other EU Member State courts to continue proceedings ‘at any time’ if:

- (a) it appears to the court of the Member State that there is no longer a risk of irreconcilable judgments;
- (b) the proceedings in the court of the third State are themselves stayed or discontinued;
- (c) it appears to the court of the Member State that the proceedings in the court of the third State are unlikely to be concluded within a reasonable time; or
- (d) the continuation of the proceedings is required for the proper administration of justice.<sup>84</sup>

In the light of these changes, which came into force in January 2015, it remains to be seen whether English courts will continue with a less restrictive interpretation of ‘forum non conveniens’, thus expanding the possibility that they could provide redress for victims of torts committed by English companies and their subsidiaries abroad.

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<sup>82</sup> Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition of enforcement of judgments in civil and commercial matters (recast) [2012] OJ L351/1.

<sup>83</sup> *ibid* art 34(1).

<sup>84</sup> *ibid* art 34(2).

However, despite the recent changes in EU law and their implications for the doctrine of ‘forum non conveniens’, the sheer length and enormous legal costs of all of the above-mentioned cases in English courts meant that all were settled and none proceeded to trial. This means there are potentially insurmountable practical obstacles to claimants who bring cases from abroad against corporations domiciled in the U.K. before English courts.

### *Choice of law*

An additional important question to consider in such cases, assuming English courts have jurisdiction, is which law is applicable for violations of duty of care abroad – the law of the host state or of the home state (English law)? This issue has not been settled. On the one hand, the rules of private international law applicable in the EU require, in non-contractual cases, the application of the substantive law of the country in which the damage occurs<sup>85</sup> unless the prospective claimant and defendant have their habitual residence in the same country, in which case the law of that country will apply.<sup>86</sup> An exception to these rules can be invoked where the tort is manifestly more closely connected with another country.<sup>87</sup>

On the other hand, in *Lubbe v Cape plc* the Court of Appeal ruled that foreign law is arguably less likely to apply if the parent company is alleged to have been *directly* liable due to management acts performed in the *home state* (although, as the

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<sup>85</sup> Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L199/40 art 4(1).

<sup>86</sup> *ibid* art 4(2).

<sup>87</sup> *ibid* art 4(3). Another choice of law rule of relevance is set out in article 9 of Rome II, which sets out the rule in relation to damages caused by industrial action. In such cases, the law applicable to a tortious act is that of the habitual residence of the claimant and defendant, where they both reside in the same country. If they do not reside in the same country, the applicable law is that of the country where the industrial action is to be, or has been, taken.

matter settled, the question of the applicable law was never determined).<sup>88</sup> As Meeran states, the choice of applicable law could have serious implications for a claimant's prospect of success, for instance in relation to claims arising from employment, where local workmen's compensation law bars claims against employers (such a bar was raised in *Connelly*).<sup>89</sup> However, English courts have not settled this issue.

#### *Duty of care – Chandler v Cape*

A key substantive issue that English courts have tackled has been to resolve under which circumstances a parent company domiciled in the UK owes a duty of care to victims of its subsidiary in another country. In *Chandler v Cape*, the Court of Appeal deliberated whether Cape plc owed Chandler a duty of care for the asbestosis he contracted while working Cape Products, a (now-defunct) wholly-owned subsidiary of Cape plc.<sup>90</sup> Although it would 'emphatically reject any suggestion' that it was 'piercing the corporate veil',<sup>91</sup> the Court managed to circumvent it by claiming there was sufficient 'proximity' between the party owing the duty (Cape plc) and the party owed the duty (Chandler) because Cape plc exerted some control over its subsidiary, Cape Products. In its judgment, the Court ruled that Cape plc 'either had or ought to have had superior knowledge of relevant health and safety issues' and 'was aware or ought to have known of the risk to employees' of its former subsidiary.<sup>92</sup>

This ruling 'demonstrates a willingness on the part of UK courts to find that the separation of legal personality between parent and subsidiary does not preclude

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<sup>88</sup> *Lubbe* (n 80).

<sup>89</sup> Meeran 'Tort litigation' (n 74) 16.

<sup>90</sup> *Chandler* (n 72).

<sup>91</sup> *ibid* 3128.

<sup>92</sup> *ibid*.

the possibility of legal responsibility on the part of the parent corporation'.<sup>93</sup> It indicates an increasing likelihood that,

English courts will consider, in contrast to *Kiobel*, that a parent corporation domiciled in that state has assumed a duty of care towards third parties affected by the operations of subsidiaries located elsewhere, at least where the parent corporation has developed and implemented group-wide policies and practices.<sup>94</sup>

Further, this judgment also raises the question of whether a duty of care could be owed by corporations to third parties affected not just by the operations of their subsidiaries, but also by the operations of their suppliers. While the judgment applies to a parent-subsidiary relationship, it could be argued that in many instances the corporation-supplier relationship also satisfies the above-mentioned requirements: corporations sometimes have superior knowledge of relevant labour issues to their suppliers and are aware of the risk to employees through audits designed to implement codes of conduct. Moreover, while a corporation 'might choose not to develop high global standards and policies to avoid such a duty of care, to do so would be to act contrary to the requirement of due diligence'<sup>95</sup> under the UN Guiding Principles and would present a reputational risk to the corporation in question.

If a corporation were found to owe a duty of care to its supplier's employees, 'this could have a profound effect on the labour conditions in factories around the world.'<sup>96</sup> Nonetheless, it appears unlikely that a court would find that a corporation has a sufficient degree of control over its supplier to pass the *Chandler* test and

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<sup>93</sup> A Sanger, 'Crossing the Corporate Veil: the Duty of Care Owed by a Parent Company to the Employees of its Subsidiary' (2012) 71(3) Cambridge Law Journal 478, 481.

<sup>94</sup> R McCorquodale, 'Waving Not Drowning: *Kiobel* Outside the United States' (2013) 107(4) The American Journal of International Law 846, 848.

<sup>95</sup> *ibid.*

<sup>96</sup> Sanger (n 93) 480.

establish a duty of care to its victims – unless that corporation was responsible for the overwhelming majority of orders from that supplier over a significant period of time. As research in chapters 4 and 5 has shown, that is rarely the case for retail corporations, where the dictates of the ‘fast fashion’ economic model have led to corporations sourcing from many suppliers that they frequently change.

## **Conclusion**

While ATCA offers a strong statutory basis for plaintiffs wishing to hold MNCs accountable before U.S. courts, the results have not lived up to its promise. Considering the courts’ conservative interpretation of the scope of the ‘law of nations’ since the *Sosa* decision, the restrictive application of the statute to corporations under *Kiobel*<sup>97</sup> and the untested idea that adopting a code of conduct creates a duty of care under ATCA, it is unlikely that corporations will be too worried about the adoption of a code having an adverse effect under ATCA. Thus, it would appear that ATCA would serve to hold corporations liable only for the most egregious violations of international law such as torture and crimes against humanity, rather than breaches of labour rights under codes of conduct.

Claiming for compensation before English courts is also difficult, as corporations appear to face little risk under the law of tort for breaching their codes of conduct and the international labour rights standards recognised therein. Although the *Chandler v Cape* decision could provide a means to hold corporations accountable for the actions of their suppliers, the length and the formidable costs of bringing claims for transnational torts before English courts have proven to be a disincentive for lawyers and thus a formidable obstacle to claimants.

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<sup>97</sup> *Kiobel* (n 67).

Consequently, the overall record before English courts is that claimants from abroad have found it very hard to get redress for personal injury suffered as a result of MNCs' negligence. Claimants' lawyers (with a few exceptions) have shown a distinct lack of enthusiasm for undertaking cases against MNCs as these cases are complex, risky, hard fought and resource-intensive,<sup>98</sup> while the law has presented a series of obstacles – first in the guise of ‘forum non conveniens’, then also with the question of applicable law.

Woutgers and Ryngaert have argued that when an MNC commits itself to upholding international standards in its code of conduct, a failure to comply with them may be evidence of its failure to live up to its duty of care, even in regard to the operations of the MNC's overseas subsidiaries.<sup>99</sup> However, this argument does not sit well with the reality in English courts, which is that so few of the claims turn on issues of substantive law. As Meeran has said,

the commercial reality of costly high profile litigation...is that these cases are unlikely to involve a trial on the merits or a finding of liability against MNCs. Indeed, these cases are frequently terminated by procedural applications that are only peripherally related to the merits of the cases.<sup>100</sup>

On the whole, for our purposes, there appears to be little cause for concern for corporations in expanding their duty of care by adopting codes of conduct.

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<sup>98</sup> Meeran (n 74) 18.

<sup>99</sup> J Woutgers and C Ryngaert, ‘Litigation for Overseas Human Rights Abuses in the European Union: the Challenge of Jurisdiction’ (2009) 40(4) *George Washington International Law Review* 939.

<sup>100</sup> R Meeran ‘Tort litigation against multinationals (“MNCs”) for violation of human rights: an overview of the position outside the US’ <<http://business-humanrights.org/sites/default/files/media/documents/richard-meeran-tort-litigation-against-mnacs-7-mar-2011.pdf>> accessed 19 February 2015.

### **I.C Contractual obligations to suppliers' workers arising from codes of conduct**

I will now consider a third category of risk for corporations: once the MNCs include their codes of conduct into the terms and conditions of their contracts with suppliers, do they assume a contractual obligation in common law towards their suppliers' workers to ensure these workers enjoy the rights promulgated in the codes? I will show in this section that corporations in the United States and the U.K. presently face little risk of contractual liability from the inclusion of their codes of conduct in contracts with suppliers.

#### **United States**

In a landmark ruling by the Ninth Circuit Court of Appeals, *Doe v. Wal-Mart*, the Court found that when a corporation signs a contract with a supplier that includes, in its terms and conditions, an obligation on the part of the supplier to follow that corporation's code of conduct, this does not confer the rights contained in the code on the supplier's workers.<sup>101</sup>

The suppliers' workers brought claims against Wal-Mart based on working conditions in garment factories located in China, Bangladesh and other locations. These claims relied primarily on Wal-Mart's code of conduct, which was included in the supply contracts that suppliers in these countries were required to adhere to.

More specifically, the claimants claimed that they have a legal entitlement to the rights provided in the code of conduct. These rights required their employers – Wal-Mart's suppliers – to adhere to local laws and local industry standards regarding working conditions like pay, working hours, forced labour, child labour and

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<sup>101</sup> *Doe v Wal-Mart Store, In.* No 08-55706  
<<http://cdn.ca9.uscourts.gov/datastore/opinions/2009/07/10/08-55706.pdf>> accessed 19 February 2015.

discrimination.<sup>102</sup> The claimants made their claim on the basis of four distinct legal theories, of which I will now highlight the first three, as they are linked with the idea examined in this part:

(i) First, the plaintiffs are third party beneficiaries of Wal-Mart's promise to suppliers that it would monitor their compliance with the code of conduct contained in supply contracts;

(ii) Second, Wal-Mart is the plaintiffs' joint employer; and

(iii) Third, Wal-Mart negligently breached a duty to monitor the suppliers and protect the plaintiffs from the suppliers' working conditions.<sup>103</sup>

With regard to the first claim, the court held that Wal-Mart's code ('Wal-Mart will undertake affirmative measures, such as on-site inspection of production facilities, to implement and monitor said standards') did not create a legal obligation for Wal-Mart to monitor compliance by the suppliers. The Court argued that the language and structure of the agreement shows that Wal-Mart reserved the right to inspect the suppliers, but did not adopt a duty to inspect them. The agreement contains no adverse consequences for Wal-Mart if it does not monitor the supplier. Thus, according to the Court, as the contract between Wal-Mart and the supplier did not create an obligation for Wal-Mart, it could not provide the claimants with a right of action as third party beneficiaries of the contract.<sup>104</sup>

With regard to the second point, the Court found that Wal-Mart did not have a contractual duty because it was not the claimants' joint employer, as they had alleged. The Court held that the contract between Wal-Mart and the suppliers did not provide

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<sup>102</sup> *ibid* 8616.

<sup>103</sup> *ibid* 8618.

<sup>104</sup> *ibid* 8619.

it with immediate day-to-day control of the workers – thus Wal-Mart could not be called a joint employer.<sup>105</sup> Finally, the third claim – that Wal-Mart negligently breached a duty to monitor the suppliers and thereby protect the plaintiffs - was also rejected by the court, in accordance with its ruling that the contract and the code of conduct did not create a duty for Wal-Mart.<sup>106</sup>

Despite the claimants' defeat on the facts, some commentators have argued that 'down the line, some courts may recognize a duty on policy grounds when a company publicly represents the purpose of its code of conduct to ensure fair labor conditions for workers in its supply factories'.<sup>107</sup> Additionally, other circuits may review a third-party beneficiary claim more favourably. Maryanov points out that the facts of *Doe v. Wal-Mart* are similar to *Wolfgang v. Mid-America Motorsports, Inc.*, where the Tenth Circuit Court of Appeals upheld the claim of a race car driver who claimed he was an intended beneficiary of a contract between the speedway owner and a race promoter.<sup>108</sup> The court found that a provision in the contract reserving the right of the race promoter to cancel a race or practice due to unsafe racing conditions was intended to insure the safety of the plaintiff, thus establishing him as a third-party beneficiary.<sup>109</sup>

Other case law from the United States appears, however, to suggest that there is little room for optimism among those that consider codes of conduct to be contractually binding on corporations. In the *Weber Shandwick Worldwide v Reid*

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<sup>105</sup> *ibid* 8621.

<sup>106</sup> *ibid* 8623.

<sup>107</sup> Maryanov, 'Sweatshop Liability' (n 61) 432.

<sup>108</sup> *Wolfgang v Mid-America Motorsports Inc* 111 F 3d 1515 (10th Cir 1997).

<sup>109</sup> *ibid* 1524-25.

decision, a federal district court in Illinois laid out a framework under which codes of conduct could be considered contractually binding.<sup>110</sup> The Court found that:

1. The code must contain a clear enough promise that an employee would reasonably believe that an offer has been made;
2. The code must be disseminated to the employee in question so that he is aware of its contents and reasonably believes it to be an offer; and
3. The employee must accept an offer by commencing or continuing to work after learning of the policy statement.<sup>111</sup>

In that particular case, however, the court found that the code of conduct did not contain clear promissory language and was thus not a contract that conferred rights to suppliers' workers. Namely, according to the court, the code of conduct's use of the phrase 'may result in disciplinary action' was too indefinite to create a binding contractual obligation. Had the code been more precise and stated that a certain kind of conduct 'will result in disciplinary action', that would have been precise enough to create a binding obligation.<sup>112</sup> A similar line was taken by the Court of Appeals for the Ninth Circuit, which found in *Brinkley v Honeywell, Inc.*, an unreported case, that in order for statements in codes to be binding, they must 'constitute promises of specific treatment in specific situations, not merely policy statements'.<sup>113</sup>

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<sup>110</sup> K Kenny, 'Code or Contract: Whether Wal-Mart's Code of Conduct Creates a Contractual Obligation Between Wal-Mart and the Employees of its Foreign Suppliers' (2007) 27 *Northwestern Journal of International Law and Business* 453, 459.

<sup>111</sup> *Weber Shandwick Worldwide v Reid*, No 05 C 709 2005 US Dist LEXIS 14482 \*1, \*8 (ND III May 12, 2005).

<sup>112</sup> *ibid* \*12.

<sup>113</sup> No 93-35402 1994 US App LEXIS 23834 \*1 (9th Cir 1994).

## **England and Europe**

The assertion that codes of conduct incorporated into terms and conditions of MNCs contracts with suppliers create a contractual obligation on the part of MNCs towards suppliers' workers has not been tested before English courts. One possible reason is that, in English law, the doctrine of privity would present a substantial hurdle for such a claim. Further, a claim would have to be judged on common law principles, according to which a contractual obligation is recognised under several conditions; the code of conduct would have to,

contain a clear enough promise so that an employee can reasonably believe an offer was made; second, the agreement must be disseminated or announced in such a way that the employees can consider it an offer; third, the employees, must have accepted the offer explicitly or implicitly. Their consent can be expressed by the fact that they started or kept working after they discovered the new policy.<sup>114</sup>

Possibly as a result of these hurdles, such claims have not been reported in England to date.

The most notable case in European courts involves (once again) Wal-Mart, this time in the guise of its German subsidiary. Namely, when Wal-Mart introduced a Statement of Ethics (a different document to the code of conduct in question in *Doe v. Wal-Mart*), a German version was communicated to all employees in Wal-Mart's German subsidiary. The Works Council of Wal-Mart Germany decided to take legal action against this Statement because it felt its codetermination rights had been violated. Namely, depending on the size of the firm, employees in German firms can establish works councils that are granted certain consultation and participation rights. The employer may independently issue ethical norms of conduct only as long as their content does not refer to topics and regulations that are captured by the Works

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<sup>114</sup> C Marzo, 'From codes of conduct to international framework agreements' (2011) 62(4) Northern Ireland Law Quarterly 469, 476.

Constitution Act. The Council claimed it was not consulted by Wal-Mart and that the Statement was therefore invalid and that Wal-Mart should be fined if it failed to withdraw the document.<sup>115</sup>

In its decision, the Regional Labour Court ruled that the codified requirements to use the telephone hotline, the prohibition to accept any gifts or gratuities as well as the norms for preventing harassment and inappropriate conduct were subject to codetermination because they go beyond legally proscribed rules of conduct.<sup>116</sup> Although the decision refers to Wal-Mart's code of conduct ('Statement of Ethics'), its relevance to the question of legal enforceability of codes is limited; the code's provisions were pertinent only in the regard that their content triggered procedural safeguards to consult the Works Council under German labour law. Thus, the court did not make a ruling on whether the code itself was legally enforceable. More importantly, the code gave rise to duties to Wal-Mart's own workers, who are already protected (as this case shows) by a well-developed legal and judicial system. The issue of whether codes of conduct create a duty of care to suppliers' workers was not addressed by this ruling.

## **Conclusion**

The line taken by the U.S. courts appears to be that, in order to consider codes to be enforceable contracts, they must contain promises of a very specific nature and the MNC promulgating the code of conduct would have to be able suffer adverse consequences for not respecting the code. This creates a very restrictive standard and leaves corporations facing little risk of liability for breach of contract.

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<sup>115</sup> T Talaulicar, 'Global Retailers and their Corporate Codes of Ethics: the case of Wal-Mart in Germany' (2009) 29(1) *The Service Industries Journal* 47, 49-50.

<sup>116</sup> *ibid* 51.

This restrictive standard betrays a lack of knowledge of the dynamics of the relationships between large MNCs and their suppliers, which are characterised by an asymmetry of power. It treats codes of conduct and supply agreements as ordinary contracts when they are anything but: they are usually drawn up unilaterally by the MNC, and presented to suppliers in a ‘take it or leave it’ manner. Thus, they are unlikely to contain provisions that would cause MNCs to suffer adverse consequences for not monitoring them. As Van de Walle points out:

This scenario borders on injustice when, as in *Doe v. Wal-Mart*, the outsourcing company stipulates in contract that the outsourced laborers are to be afforded basic labor standards akin to those promulgated among its direct employees, since the outsourcing company benefits from the positive public image this commitment creates while not actually possessing a legal duty to follow through with the monitoring or ensure any workplace protections to its “independent contractors.”<sup>117</sup>

Therefore, if the language of the codes is to be interpreted as granting MNCs rights without corresponding duties, corporations are free to benefit from the positive public relations with no fear of repercussions for not complying with the terms they set.

Nevertheless, despite its negative outcome for the plaintiffs, the *Doe v. Wal-Mart* ruling has not totally dampened the spirits of some commentators who believe that codes of conduct could grant suppliers’ workers legally enforceable rights in tort or contract law. Susan Bisom-Rapp states that ‘given the right factual circumstances a code might constitute a legally binding contract’, although she recognises that ‘*Doe v. Wal-Mart* indicates courts considering such claims will apply common law principles very narrowly’. Nonetheless, she concludes, ‘for employers, the case represents both the promise and perils of corporate self-regulation.’<sup>118</sup>

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<sup>117</sup> J Van de Walle, ‘*Doe v. Wal-Mart: Revisiting the Scope of Joint Employment*’ (2009) 30 *Berkeley Journal of Employment & Labor Law* 589, 601.

<sup>118</sup> S Bisom-Rapp, ‘Workers for Foreign Suppliers Lose in Suit against Wal-Mart’ (*Workplace Prof Blog*, 15 July 2009) <[http://lawprofessors.typepad.com/laborprof\\_blog/2009/07/susan-bisom-](http://lawprofessors.typepad.com/laborprof_blog/2009/07/susan-bisom-)

If the *Wal-Mart* ruling was considered strictly in the light of principles of contract law, such cautious optimism could be warranted. As I have pointed out above, there is precedent for third parties benefiting from contracts in analogous circumstances (*Wolfgang*). Nevertheless, it is hard to shake the feeling that it comes on a wave of decisions at all levels of the U.S. court system (*Citizens United, Kiobel*) that seek to unfetter corporations from as many obligations as possible. This trend leaves little room for novel claims against corporations, such as the ones made in *Wal-Mart*.

The prospects of using codes of conduct to create enforceable rights for suppliers' workers in England and in European jurisdictions remains, as has been shown, largely unexplored. While the ruling of the Regional Labour Court in Germany represents a victory for Wal-Mart's workers, the truth is that it was achieved largely on the back of German labour law. Moreover, no similar claims have been made in England, which signals the difficulties in making such claims before English courts. Further decisions will signal whether this case is the herald of greater corporate accountability.

In conclusion, it appears that corporations who insert their codes of conduct into terms and conditions of contracts with suppliers are facing only a small risk of incurring liability for breach of contract.

### **I.D The enforceability of international framework agreements**

In this section, I will briefly examine the risks that corporations assume when they sign international framework agreements (IFAs). By way of reminder, an IFA 'is an instrument negotiated between a multinational enterprise and a Global Union

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rappthomas-jefferson-provides-us-with-this-post-about-last-weeks-decision-by-the-ninth-circuit-in-doe-v-wal-m.html> accessed 9 February 2015.

Federation (GUF)<sup>119</sup> in order to establish an ongoing relationship between the parties and ensure that the company respects the same standards in all the countries where it operates.’<sup>120</sup>

Since there is little in the way of relevant case law in either the United States or in England, I will confine myself to presenting the crux of the argument(s) as to how IFAs could be legally enforced in court. The legal effect of IFAs depends to some degree on their legal characterisation. Unfortunately, there is no known case law that has pronounced on the legal characterisation of IFAs. According to a European Commission study, it would be conceivable for IFAs to be characterised as either collective agreements, contracts, unilateral commitments, or advertising.<sup>121</sup> We have already considered the latter two options in our discussions of the legal effect of codes of conduct. Therefore, we will now consider what liabilities could flow from corporations if IFAs were characterised as collective agreements or contracts.

As voluntary collaborative tools that establish a framework for dialogue, to some authors IFAs are analogous to *collective bargaining agreements*.<sup>122</sup> In the United States, Coleman argues, this is no barrier to them having legal effect; IFAs ‘can be enforced under s. 301 of the Labour Management Relations Act as a labour agreement in U.S. federal courts’.<sup>123</sup>

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<sup>119</sup> A Global Union Federation is an international association of national trade unions organising in specific industry sectors or occupational groups.

<sup>120</sup> As defined by the ILO’s Multinational Enterprises Programme. ‘International Framework Agreements: a Global Tool for Supporting Rights at Work’ <[http://www.ilo.org/global/about-the-ilo/newsroom/features/WCMS\\_080723/lang--en/index.htm](http://www.ilo.org/global/about-the-ilo/newsroom/features/WCMS_080723/lang--en/index.htm)> accessed on 9 February 2015.

<sup>121</sup> European Commission, ‘Mapping of transnational texts negotiated at corporate level’ (2008) EMPL F2 E/bp (D) 14511, 20.

<sup>122</sup> S Coleman, ‘Enforcing International Framework Agreements in U.S. Courts: a Contract Analysis’ (2010) 41 *Colombia Human Rights Review* 601.

<sup>123</sup> *ibid* 603.

A claimant wishing to give IFAs legal effect as collective bargaining agreements in England would have to surmount two obstacles. The first is to determine whether GUFs, as signatories of IFAs, can be regarded as trade unions under the relevant statutory definition of a ‘collective agreement’. Namely, under the terms of the Trade Union and Labour Relations (Consolidation) Act 1992, a collective agreement is ‘any agreement or arrangement made by or on behalf of one or more trade unions and one or more employers or employers’ associations and relating to one or more of the matters specified’,<sup>124</sup> including ‘terms and conditions of employment, or the physical conditions in which any workers are required to work’.<sup>125</sup>

It can be argued that IFAs do not fall within the definition of a collective agreement as they are signed by federations of unions and are concerned with the terms and conditions of workers in unions across the world. However, these federations of unions are comprised of national unions, including unions in the United Kingdom,<sup>126</sup> thus meaning that IFAs also cover the terms and conditions of workers in the UK. Moreover,

organisations which themselves consist wholly or mainly of trade unions or representatives of trade unions, and whose principal purposes include the regulation of relations between workers and employers or employers’ associations, or the regulation of relations between their constituent or affiliated organizations, are also regarded as trade unions.<sup>127</sup>

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<sup>124</sup> Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA 1992) s. 178(1).

<sup>125</sup> *ibid* s 178(2).

<sup>126</sup> eg for the UK union membership of the former International Textile, Garment and Leather Workers Federation, now a constituent part of Industriall global union, see <<http://www.industriall-union.org/affiliates/united-kingdom>> accessed 19 February 2015.

<sup>127</sup> S Deakin and G Morris, *Labour Law* (5<sup>th</sup> ed, Hart 2009) 696, invoking TULRCA 1992, s. 1(b).

Thus, the fact that are signed by GUFs should be no obstacle to their recognition as having been signed by ‘trade unions’ for the purposes of the Trade Union and Labour Relations (Consolidation) Act.

Nonetheless, the possibility of giving IFAs legal effect as collective agreements is likely to fall at the second hurdle; namely, collective bargaining agreements in the UK are understood to be gentlemen’s agreements<sup>128</sup> that, generally, are not legally enforceable between the collective parties.<sup>129</sup> A collective agreement under the terms of the Trade Union and Labour Relations (Consolidation) Act 1992, is,

conclusively presumed not to have been intended by the parties to be a legally enforceable contract unless the agreement is in writing and contains a provision which (however expressed) states that the parties intend the agreement to be a legally enforceable contract.<sup>130</sup>

Bearing in mind that the courts have taken ‘a strict approach to what is required to demonstrate this intention’<sup>131</sup> and that none of the IFAs considered in the course of preliminary research had the kind of provision signifying an intent to make the contract enforceable, it appears very unlikely that corporations can be liable under English labour law for breaching an IFA.

Moreover, according to a European Union (EU) study, IFAs cannot have status of collective agreements in any of the EU countries covered by the study (including France, Germany, Italy, Belgium and the Netherlands) because of a variety of procedural reasons under national legislation and/or practice (for instance, if the

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<sup>128</sup> T Novitz, ‘Big unions and big business: Can international framework agreements promote development at a local level?’ in T Novitz and D Mangan (eds), *The Role of Labour Standards in Sustainable Development: From theory in sustainable practice?* (OUP 2011).

<sup>129</sup> Deakin and Morris, *Labour Law* (n 127) 784.

<sup>130</sup> *ibid* 785.

<sup>131</sup> *ibid*.

party representing the employees (such as the European Works Council, of an international union federation) is not recognised as such by the workers or does not fulfil the conditions of representativeness; or the negotiation of the transnational text does not follow the rules established for the negotiation of company agreements).<sup>132</sup>

Therefore, we turn to the idea that IFAs should properly be characterised as *contracts*, which means that their legal effect can likely be determined through general principles of contract law. Should a claim be brought against an MNC for breach of an IFA, the corporation would be likely to invoke general principles of contract law, common to U.S. and English law, and noted above.

MNCs would be likely to argue that IFAs lack the requisite elements of a valid contract.<sup>133</sup> They may wish to rely on some or all of the following arguments:

- *The language of IFAs does not show that the parties intended to be bound.* This is partially true. While some IFAs express strong commitments (ENI states that it ‘observes universally accepted labor laws’ and complies with the ‘core labor standards’),<sup>134</sup> others express their commitment in aspirational terms (Renault ‘undertakes to respect its employees and to enable them to prosper wherever they are in the world’);<sup>135</sup>

- *The agreements are not supported by adequate consideration.* An MNC could argue that the GUFs, as signatories of the IFA, provide no consideration, thus rendering the IFA dissimilar to a contract. However, GUFs could argue they provide consideration

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<sup>132</sup> European Commission ‘Mapping of transnational texts’ (n 121).

<sup>133</sup> Coleman, ‘Enforcing International Framework Agreements’ (n 122) 621.

<sup>134</sup> ‘Text of the Global Agreement between ICEM and ENI: Agreement on Transnational Industrial Relations and Corporate Social Responsibility’ (2002)  
<[http://training.itcilo.org/actrav/courses/2005/A3-50909\\_web/resources/technical\\_files/7.1%20Compilation\\_FAs.pdf](http://training.itcilo.org/actrav/courses/2005/A3-50909_web/resources/technical_files/7.1%20Compilation_FAs.pdf)> accessed 10 May 2015.

<sup>135</sup> ‘Renault Group Employees’ Fundamental Rights Declaration’ (2003)  
<[http://training.itcilo.org/actrav/courses/2005/A3-50909\\_web/resources/technical\\_files/7.1%20Compilation\\_FAs.pdf](http://training.itcilo.org/actrav/courses/2005/A3-50909_web/resources/technical_files/7.1%20Compilation_FAs.pdf)> accessed 10 May 2015.

by promising not to engage in a negative publicity campaign that damages the company's reputation and affects sales. In some IFAs 'the union's promise is not explicitly spelled out, while in others (e.g. Chiquita) the parties agreed to 'avoid actions that could undermine the process...such as public international campaigns'.<sup>136</sup> Indeed, it is the presence of consideration that would distinguish *Doe v. Wal-Mart* from a suit alleging violations of an IFA because in such a suit claimant unions would be enforcing their claim as direct, rather than third party, beneficiaries. The union is party to the contract at issue, and so gains the ability to enforce it directly against the MNC.<sup>137</sup>

- *The agreements are too vague to be judicially enforced.* However, my research has shown that IFAs contain more precise definitions of internationally recognised labour rights than do codes of conduct.

## **Conclusion**

There appear to be strong legal arguments to support the contention that an IFA could be characterised as a binding contract. Despite this, no claims appear to have been made by workers against MNCs for violating the terms of an IFA. This may be the result of the widely-held view among trade unions that disputes with employers should be resolved through negotiations and, as a means of last resort, through strikes, rather than through legal action. It is therefore unclear what risks face corporations that sign and violate an IFA.

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<sup>136</sup> Coleman, 'Enforcing International Framework Agreements' (n 122) 627.

<sup>137</sup> *ibid.*

## II. CORPORATE ATTITUDES TO THE RISK OF LEGAL LIABILITY

Having shown in Part I that corporations run little risk under English and U.S. law of being held liable for statements made in their codes of conduct, in Part II I will examine what effect this has had on the ability of corporations to reference international labour standards in their codes of conduct.

In the early phase of the widespread adoption of codes of conduct, corporations were wary of any potential liabilities they might incur if they sign up to a code that they, or their suppliers, would eventually violate. One of the biggest stumbling blocks to the creation of MSI-A in the 1990s was the hesitation of the major founding corporate members to sign because of a ‘general concern’ about ‘what the legal status of [the MSI-A Fundamental Code] would be if the corporations signed up to it’.<sup>138</sup> The lawyers for one of the major corporate founders carried out an extensive analysis of what liabilities could arise as a result of actions that a company ‘did or didn’t take, or actions of their suppliers or whether liabilities could arise as a result of actions of members of the [MSI-A]’.<sup>139</sup> Eventually, a study of the law made it apparent that corporations were unlikely to be liable for violating a code they are signatories to, giving confidence to founding corporations to sign up to the MSI-A Fundamental Code and its extensive commitments to ILO standards. Corporations were further encouraged to form a multi-stakeholder initiative with unions and NGOs because they felt that the European model of industrial relations would make it unlikely for unions and NGOs to seek to resolve disputes through the courts.<sup>140</sup>

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<sup>138</sup> Interview with consultant on corporate accountability and former senior official at MSI-A (Oxford, 4 March 2013).

<sup>139</sup> *ibid.*

<sup>140</sup> *ibid.*

Corporations that have subsequently joined the MSI-A have relied on their predecessors' analysis of the law in deciding whether to sign up to the Fundamental Code. This is particularly true of smaller corporations that have scarcer resources and do not have in-house legal teams to help guide them. Corporation A6 'felt the accreditation of [MSI-A] was well enough thought through, the due diligence having been performed' by other corporations, and that it 'was following in good footsteps'.<sup>141</sup> Thus, many of the corporations studied reasoned, they would join the MSI-A and adopt the Fundamental Code as their code of conduct without fear of being held liable for violating it.

The initial analysis of the risk of liability by the lawyers of one of the corporate founders was sufficient grounds for many corporations to join the MSI-A. In this respect, this process resembled the manner in which corporations signed up to codes of conduct, as outlined in chapter 5. Namely, once sufficiently large corporations decided to take the risk, other corporations went on to assume that risk as well, through the process of mimicry in order to acquire legitimacy. It was not a case of these corporations taking a rational informed decision on the legal risks associated with adopting a code of conduct as much as them simply following the practices of their successful peers in signing up to the Fundamental Code and other codes based on ILO standards.

Moreover, although some NGO and trade union members of the MSI-A have called for corporate members of the initiative to be held legally accountable for violating the international labour rights standards contained in the Fundamental Code, senior officials at the MSI-A have dissuaded them by arguing that they would not be able 'to get companies to join' if the MSI-A Fundamental Code were legally

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<sup>141</sup> Interview with head of corporate member of MSI-A (London, 17 January 2013).

enforceable.<sup>142</sup> This has also impacted the manner in which NGOs and unions approach relations with corporations. In particular, even NGOs who engage in strategic litigation are aware that it is ‘incredibly difficult’ to successfully sue European corporations for ‘violations elsewhere’, irrespective of whether this involves a breach of a code of conduct or the Fundamental Code.<sup>143</sup> Consequently, NGOs have placed more of a focus on cooperating with corporations on implementing the provisions of the Fundamental Code.<sup>144</sup>

While the issue of liability appears settled within the confines of the MSI-A, other corporations are still wary of the risks inherent in signing a code of conduct containing pledges to respect ILO standards. The ethical trading manager of corporation A5 maintains corporations do not want ‘pressure or consequence’ from signing up to voluntary agreements.<sup>145</sup> The ILO offers assistance to corporations who ask for help in formulating their codes; its officials are approached by ‘managers and boards’, as well as ‘legal counsel’ who are ‘afraid of future precedents, and creating your own noose, which is why they don’t like detail in codes of conduct or public commitments’.<sup>146</sup>

The corporate fear of liability stemming from codes and other policy commitments is illustrated in the case of an important new initiative, the Bangladesh Fire Accord (BFA). BFA is a legally binding agreement ‘designed to make all garment factories in Bangladesh safe workplaces that respect standards on health and

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<sup>142</sup> Interview with head of MSI-A (London, 2 April 2013).

<sup>143</sup> Interview with official at non-governmental organisation active in monitoring corporate violations of human rights (Oxford, 4 March 2013).

<sup>144</sup> *ibid.*

<sup>145</sup> Interview with manager at corporate member of MSI-A (London, 22 January 2013).

<sup>146</sup> Interview with official at International Labour Organization (Geneva, 1 March 2013).

safety. It includes independent safety inspections at factories and public reporting of the results of these inspections'.<sup>147</sup> The retailers that join are responsible for contributing to a common pool of resources and for the additional funding of repairs of those factories where inspections identify safety issues, along with workers' salaries for the duration of the repairs.

The BFA was signed by its founders in 2013; a version was initially proposed by the Clean Clothes Campaign (CCC), an NGO, 'a couple of years before, but only two brands indicated a willingness to sign',<sup>148</sup> which was too few to get the BFA off the ground. The principal objection of corporations lobbied by CCC was that they would incur liability for repairs of factories in Bangladesh as a result of being signatories of the BFA.<sup>149</sup>

Eventually, however, tragic events and the fear of bad publicity trumped corporate concerns over legal liability. The collapse of Rana Plaza, which killed at least 1,129 workers of various factories housed in the building, 'changed the game completely'.<sup>150</sup> Many U.K. and European corporations that had hitherto been unwilling to sign up to the CCC accord changed their views, believing that 'the amount of press that would come' after the next such incident would leave only those that have acted preventively spared from negative publicity.<sup>151</sup> As a result, as of February 2015, over 190 retailers have signed the BFA, which has, according to the latest available data, inspected 1103 of factories in Bangladesh.<sup>152</sup>

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<sup>147</sup> 'Bangladesh Fire Accord' <<http://www.bangladeshaccord.org>> accessed on 16 February 2015.

<sup>148</sup> Interview with manager at corporate member of MSI-A (London, 14 October 2013).

<sup>149</sup> *ibid.*

<sup>150</sup> *ibid.*

<sup>151</sup> Interview with manager at corporate member of MSI-A (London, 3 October 2013).

<sup>152</sup> <<http://www.bangladeshaccord.org/inspection-reports/>> accessed on 10 May 2015.

The risks facing corporations that have signed IFAs are somewhat different to those facing corporations that have adopted codes of conduct. The co-signatories of IFAs, GUFs, have mostly viewed IFAs as a framework for ongoing negotiations to improve working conditions, rather than as a legally enforceable document.<sup>153</sup> As a result, GUFs are unlikely to seek to hold corporations accountable in court for breaching IFAs, despite the arguments made for enforceability of IFAs in section I.D. Coleman speculates that claims are likely to be pursued in court only in most egregious cases when relations between global unions and MNCs have broken down.<sup>154</sup>

### **III. CONCLUSION**

This chapter has shown that there are few risks of legal liabilities for corporations when they breach their codes of conduct and IFAs and that this is a significant factor that encourages corporations to adopt codes and IFAs that pledge to protect international labour standards.

Namely, none of the avenues explored in this chapter – including claims for false advertising, claims in tort or for breach of contract – look promising for those wishing to hold corporations accountable for violating labour rights provisions in their codes. Such claims face two major hurdles: they are based on an interpretation of the law that U.S. and English courts find too expansive; and they are complex, labour- and cost-intensive, and thus unattractive to lawyers for prospective plaintiffs. Overall, despite a number of attempts to hold corporations accountable in court under various causes of action, corporations run little risk of being held liable for adopting and violating codes of conduct with international labour rights standards.

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<sup>153</sup> Interview with head of international trade union confederation that is a signatory to international framework agreements (Geneva, 20 February 2013).

<sup>154</sup> Coleman, 'Enforcing International Framework Agreements' (n 122) 603.

This analysis of the law is also shared by corporations, who believe they are unlikely to incur liability for violating codes. As a result, corporations have felt emboldened to adopt codes that pledge to protect labour rights to an ILO standard, despite their inability or unwillingness to follow up on this pledge. However, they are wary of potential changes in the law that would make them liable for how their codes of conduct are phrased and the actions they take to implement them.

Indeed, it is possible that the first successful claim based on an IFA will buck the trend of large MNCs signing IFAs; this remains to be seen. The effect of a successful claim against a corporation for violating its own code of conduct is also yet to be determined; the corporate officials interviewed for this thesis indicate that, were corporations answerable in court for violating their own codes, they would be highly likely to mitigate their risks by watering down the labour rights provisions of their codes.<sup>155</sup> In this hypothetical scenario, corporate officials state, the costs of adopting codes would outweigh the benefits, and corporations would cease to adopt codes with international standards as these are already seen by some businesses as too onerous and rigid. My research has further shown that a change in the law to make codes enforceable would likely cause corporations to back away from codes or at least scale down existing detailed provisions borrowed from international labour law.

Whether such a change would have a net positive impact on the level of protection of labour rights in corporate supply chains is unclear; considering the practical difficulties of bringing cases of violations of labour rights in developing countries to U.S. and English courts, any change in the law would also have to be accompanied by increased access to justice for claimants to have a concrete effect. As

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<sup>155</sup> Interview with manager at corporate member of MSI-A (London, 22 January 2013).

this is unlikely to occur soon, however, we are likely to witness more corporations that adopt codes influenced by international labour rights standards.

## CHAPTER 7

### CONCLUSION

#### OVERVIEW OF CHAPTER SEVEN

In chapter 1, I established that the thesis has a two-fold aim. The first aim was to ascertain the extent of the influence that international law has on corporations through the construction and application of their codes, and how and why this influence occurs. It was hoped that this would provide empirical grist to the ongoing debate<sup>1</sup> on how to regulate, at the international level, corporate responsibility for violating labour rights. It would also inform the discussion about the role of codes of conduct in the light of the suggested obligations for corporations under the ‘Protect, Respect and Remedy’ framework of the Guiding Principles on Business and Human Rights.<sup>2</sup> Finally, it would develop new insights into the diffusion of international norms to the private sphere, and add to the literature on the normative relationship between international law and private forms of regulation. Part I distils my research to fulfil this aim by showing the extent of the influence of international law on codes and how and why it occurs.

The second aim was to evaluate the usefulness of codes of conduct as mechanisms for holding corporations accountable for violating international labour standards. The thesis would thereby make a contribution to the growing literature on the impact of codes on labour rights of workers in supply chains. Part II examines the results of the research and draws conclusions on the value of codes and what, if any,

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<sup>1</sup> United Nations Human Rights Council (UNHRC), ‘Elaboration of an International Legally Binding Instrument on Transnational Corporations and Other Business Enterprises with respect to Human Rights’ (25 June 2014) A/HRC/26/L.22/Rev.1.

<sup>2</sup> United Nations Office of the High Commissioner for Human Rights (UNOHCHR), ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’ (2011) HR/PUB/11/04.

viable alternatives there are to regulate corporate accountability for labour rights violations.

I conclude in Part III by noting the increasing influence of international law on the construction, and to a lesser degree, on the application of codes of conduct. It occurs principally due to the pressure exerted by trade unions and NGOs, but also due to reputational risk, commercial pressure and mimicry by corporations. This influence has been selective, with corporations applying provisions in their codes that protect the rights carrying the biggest reputational risks. This finding contradicts key literature, which posited that private forms of regulation, such as codes, are freestanding and lie outside the sphere of international norms.

I also note that the deficiencies of codes and audits mean that changes are required in the international framework for improving corporate accountability. These changes might include the creation of a binding international treaty, although its viability can only be determined by further research. In the meantime, advocates of a fairer regulatory framework should look to strengthen corporate accountability through collaborative programmes based on worker participation.

## **I. THE EXTENT OF THE INFLUENCE OF INTERNATIONAL LAW ON CODES**

As shown in chapters 3 and 4, international law has had a markedly different level of influence on the **construction** and **application** of codes.

### **I.A Influence of international law on the construction of codes of conduct**

International law has had an increasing influence on the construction of codes of conduct. As shown in chapter 3, there was an increase in the inclusion of ILO

standards in codes of conduct over time. This was true across all of the labour rights examined: freedom of association, the right to collective bargaining, freedom from child labour, freedom from forced labour, non-discrimination, the right to health and safety, the right to weekly rest and the right to limited working hours.

Moreover, the corporations whose codes were studied in chapter 3 did not, as a rule, change their codes over time to lessen the degree of alignment with international labour standards, but to increase it. This would indicate that respecting international labour standards is, at present, ‘a global standard of expected conduct’, as stated in the Guiding Principles on Business and Human Rights.<sup>3</sup> While corporations that adopt new codes or revise existing ones may adopt provisions that make no reference to ILO standards or skirt around the detailed content of labour rights, they are very unlikely to enact provisions that contravene ILO standards. This would be seen as a violation of a social norm and would thus be unacceptable to their counterparts in the trade union and NGO sectors.

The pattern of widespread adoption of international legal norms by corporations refutes influential accounts of the relationship between international law and corporate codes of conduct. Teubner, Backer and other influential pluralist and constitutionalist legal scholars have asserted that corporate codes of conduct are legal instruments that constitute a ‘freestanding autonomous, self-communicating system’.<sup>4</sup> According to this account, the rise of codes has been accompanied by the decline of international law, which has little input in the process of the creation of codes: ‘Juridification and constitutionalisation of multinationals through corporate codes are instances of independent law-formation, and therefore have little to do with national

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<sup>3</sup> *ibid* Principle II, Point 11.

<sup>4</sup> L Cata Backer, ‘Multinational Corporations as Objects and Sources of Transnational Regulation’ (2008) 14 *ILSA Journal of International and Comparative Law* 499.

or international politics and law', Teubner argues. The 'sources of law' of codes, he continues, 'lie outside spheres of national law-making and international treaties'.<sup>5</sup>

Moreover, Teubner claims that the 'usual norm-hierarchical relationship' between state and private law does not hold in the case of international instruments and codes, and that international instruments 'do not work as the constitutional basis for the authorization of private codes'.<sup>6</sup> Finally, he goes as far as to argue that 'there is a clear factual and normative primacy' of private codes over international instruments on corporate accountability, in the sense that private codes exclude national and international laws from their 'legal space'.<sup>7</sup>

The results of my research show this account to be mistaken. They demonstrate that it is codes that are based on international standards, because the latter have a degree of legitimacy that the former lack; namely, codes are constructed by private actors acting in their own interests, while international treaties are an expression of universal values produced through a more inclusive and democratic process. It is therefore not wholly surprising that the Fundamental Code, a multi-stakeholder code of conduct constructed by corporations, unions and NGOs on the basis of international law, was the code that eventually served as a model for corporations subsequently creating codes on their own. All of these corporations were aware that the genesis and content of the Fundamental Code provided it with legitimacy among outside audiences that could be bestowed upon their codes as well if they were to borrow from its provisions. Subsequently, many of them went on to

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<sup>5</sup> G Teubner and A Fischer-Lescano, 'Regime-Collisions: the Vain Search for Unity in the Fragmentation of Global Law' (2004) 25 *Michigan Journal of International Law* 999, 1010.

<sup>6</sup> G Teubner, 'Self-Constitutionalizing TNCs? On the Linkage of "Private" and "Public" Corporate Codes of Conduct' (2011) 18 *Indiana Journal of Global Legal Studies* 617, 631.

<sup>7</sup> *ibid* 632.

adopt these provisions, without particular consideration for the legal implications or origins of these norms.

The research ultimately shows that, contrary to Teubner's assertions, a hierarchical (possibly even 'constitutional') relationship exists between norms of international law and norms found in codes of conduct. In this relationship, ILO standards, it could be argued, represent a set of 'constitutional' norms that codes of conduct do not significantly deviate from. It would appear that future codes would be very unlikely to contain provisions that are clearly contradictory to ILO conventions or other major international standards.

*Factors and processes determining the influence of international law on the construction of codes*

The influence of international law on the construction of codes has occurred due to a series of factors and processes. Chief among these is external pressure by trade unions and, to a lesser degree, by NGOs. Trade unions have played a decisive role in the creation of codes of conduct and in ensuring that codes are substantively based on international law. Although trade unions were not initially in favour of codes of conduct as mechanisms for holding corporations accountable, once they decided upon them as a strategy, they appealed to the other participants in the negotiations over the creation of the MSI-A that its Fundamental Code should be based on 'universal values', best represented by the conventions and jurisprudence of the ILO. Without trade union pressure it is likely that codes would have remained vague documents propagating general ethical principles.

Another important factor in the influence of international law on the drafting of codes is that corporations face few risks of incurring legal liabilities for breaching

their codes and IFAs. As shown in chapter 6, a plaintiff wishing to claim against corporations for violating the provisions of their codes is likely to be faced with an expensive and arduous road that will probably end in failure. This has given corporations the confidence to adopt international standards in codes, knowing they will almost certainly not be liable in court for violating them.

Following the promulgation of the MSI-A Fundamental Code, other corporations studied looked to it as a definitive guide on what their codes should contain. As noted in chapter 5, this process occurred in one of three ways: some corporations adopted the Fundamental Code as their own code after joining the MSI-A; others would copy the bulk of the provisions of the Fundamental Code into their own code, only to later join the MSI-A; and a third group based their own codes on the Fundamental Code despite never having been members of the MSI-A. These corporations mimicked their competitors and peers, who had established a ‘best practice’ that they sought to follow. This process bears some resemblance to acculturation, the process that Goodman and Jinks use in another context - to describe why states adopt international conventions. Both processes saw the subjects (corporations and states, respectively) adopt ILO conventions to avoid the ‘cognitive discomfort’ that comes from failing to adhere to universally recognised rules.

The influence of international law on the construction of codes was further shaped by reputational risk. It helps to account, to a large degree, for the fact that freedom from child labour and freedom from forced labour were the two most represented ILO standards in codes of conduct. Finally, the influence of international law on the drafting of codes can also be traced to commercial pressures. Namely, some of the corporations studied decided to adopt a code only once their corporate

clients urged them to demonstrate their dedication about tackling labour rights abuses in their supply chains.

*Differences in the extent of influence of international law on the construction of codes*

The increase of influence of international law on the construction of codes is not uniform. As has been shown in chapter 3, the largest increase in the alignment of provisions in codes with international labour standards took place in relation to freedom from discrimination, freedom from forced labour and freedom from child labour, while a slower rate was noted for freedom of association and the right to collective bargaining, as well as for non-core rights - the right to weekly rest, the right to limited working hours and the right to health and safety.

As is clear from these results, corporations did not simply adopt international standards in their entirety. Left to their own devices, without external pressure, corporations have mostly incorporated ILO standards - core labour standards and other rights (such as the right to limited working hours) alike – into their codes. This indicates that corporations increasingly consider the CLS to be a set of standards that they should be held to. At the same time, this rate of incorporation of international standards in codes has increased most slowly for those rights – such as freedom of association – that corporations consider of lesser importance for their image. As a result, the evolution of the content of corporate codes has seen them afford workers the highest degree of protection from abuses that garner the most public attention.

**I.B The influence of international law in the application of codes of conduct**

A similar interplay of factors accounting for the influence of international law on the drafting of codes helps to explain its (markedly smaller) influence on their

application. In the absence of external (trade union and NGO) pressure and the risk of legal liability, and with an ever-present reputational risk, corporations have been more selective in applying the international labour standards contained in their codes.

On the one hand, they have been vigilant about ensuring that their supply chains should not contain children or victims of forced labour or, alternatively, that such workers are immediately compensated and put through a remediation programme. Similarly, in the wake of recent tragedies in Bangladesh, corporations moved quickly to sign the Bangladesh Fire Accord which creates legal obligations on their part to repair suppliers' factories that are found to be faulty, while also paying the salaries of workers in those factories during their temporary closure. By contrast, and as shown in chapter 4, corporations have a lax approach to workers' freedom of association and the right to collective bargaining, as well as the right to limited working hours and the right to weekly rest.

Therefore, the reality of the application of international labour standards by corporations can be distinguished from its normative framework. The data shows that corporations regard only two of the core rights proclaimed by the ILO – freedom from child labour and freedom from forced labour – along with the right to health and safety, as being of paramount importance. Corporations spend the overwhelming majority of the resources earmarked for the application of their codes seeking to uncover violations of these three rights and to shield themselves from the consequences of their violations.

I would thus argue that freedom from child labour, freedom from forced labour and the right to health and safety constitute the *de facto* core international labour standards. This leaves the other *de jure* core labour rights (non-discrimination, freedom of association, the right to collective bargaining) as well as the other labour

rights examined in this study (the right to weekly rest, the right to limited working hours) on the outside looking in. Corporations claim these rights are too difficult to root out by existing auditing practices; my research suggests that corporations do not have the will to systematically address violations of these rights, considering the smaller reputational risk they carry.

It is unlikely that advocates of freedom of association and the right to collective bargaining can entice the public to be as exercised about violations of these rights as it is about child labour and forced labour. This raises the question of whether freedom of association, the right to collective bargaining and other rights that are not among the *de facto* core rights can be effectively applied through codes and audits, or whether the only way to ensure these rights are respected is through external regulation. This issue will be further examined in the concluding part of this chapter.

## **II. THE EFFECTIVENESS OF CODES IN UPHOLDING INTERNATIONAL LAW**

As discussed in chapters 4 and 5, the application of international standards contained in codes of conduct has been inconsistent.

On the one hand, corporations have had some successes in uncovering abuses of freedom from forced labour and freedom from child labour. The principal method they use is to audit suppliers through third parties or through their own specialised audit departments. In my research I have described how pre-announced, daylong audits are limited as a tool for uncovering abuses of forced labour and child labour, which has led to suppliers becoming skilled at avoiding detection by auditors. Despite these imperfections, corporate audits have rooted out some violations of forced labour and child labour in supply chains.

Moreover, when such examples have been uncovered, corporations have actively engaged in the remediation of their adverse impacts to victims and their families. As noted in chapters 4 and 5, corporations have worked with suppliers and with children on remediation in situations where the supplier was found to be engaging in child labour; many corporations have strict rules of engagement that prohibit them from continuing to work with a supplier until such a situation is rectified. In addition, some corporations have established ongoing programmes to arrange schooling and economic support for children that are victims of child labour, along with a variety of other remediation measures. The same is true in cases when audits (or other sources, such as NGO reports) have uncovered examples of forced labour.

Corporations have also taken important steps to unearth and remedy violations of the right to health and safety, particularly in Bangladesh. Until the recent Rana Plaza disaster prompted a re-think in the approach to this right, the record of audits in rectifying health and safety violations had been somewhat mixed; indeed, the corporate officials interviewed voiced widespread suspicion that auditors can turn a blind eye to violations in order to stay on good terms with suppliers, creating unsafe conditions in sites such as the Ali Enterprises factory, in Pakistan, that was audited by Social Accountability International just weeks before a fatal fire burned it down, killing 290 workers.<sup>8</sup> However, the Bangladesh Fire Accord appears to be a watershed moment in retailers' efforts to address health and safety issues in that country; it represents an unparalleled collective effort to address the dangers of working in factories in Bangladesh that had previously been unimaginable. Time will

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<sup>8</sup> D Walsh and S Greenhouse, 'Inspectors Certified Pakistani Factory as Safe Before Disaster' <[http://www.nytimes.com/2012/09/20/world/asia/pakistan-factory-passed-inspection-before-fire.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/09/20/world/asia/pakistan-factory-passed-inspection-before-fire.html?pagewanted=all&_r=0)> accessed 18 February 2015.

tell whether these efforts will be successful and whether they will be replicated in other countries.

On the other hand, however, corporations applying their codes through audits have had little success in uncovering and remedying violations of the other international labour standards examined. The thesis identified five principal reasons for the disparity in the application of international standards contained in codes. First, international labour law and human rights law contain indicators that are more relevant and accessible for corporations in their efforts to measure the enjoyment of outcome-oriented rights, such as freedom from child labour, than process-based rights, such as freedom of association and the right to collective bargaining. Nonetheless, there are many different ways of implementing a rule in practice. This feature of international law is therefore as much of a real hindrance for corporations as it is a convenient excuse for why they cannot ensure workers enjoy process-based rights such as freedom of association.

The remaining reasons for the disparity in the application of international standards contained in codes specifically pertain to the inconsistent application of trade union rights. The second reason is that some corporations often have no more than a token commitment to protecting trade union rights. In my research I have shown that corporations have come to include trade union rights in codes through external pressure or through mimicry, rather than because of a real commitment to the fulfilment of these rights. As shown in chapter 5, while corporate officials claim they would never countenance violations of child labour and forced labour in their supply chains without addressing them, they are far less forceful with regard to freedom of association and the right to collective bargaining. They have internalised the values according to which child labour and forced labour are seen as abhorrent practices that

can only be tolerated if they are mitigated by remediation programmes, but they remain indifferent, and occasionally hostile, to the promotion of trade union rights.

Third, codes are of limited use in addressing violations of trade union rights because they are often developed and applied without the meaningful participation of workers. My research provides support for this claim. Although trade unions were involved in the development of the Fundamental Code, corporations developed subsequent codes by themselves, with the Fundamental Code and ILO standards as their guide. However, without the involvement of workers, corporations watered down provisions on freedom of association and the right to collective bargaining. Further, workers' participation in audits is also limited, and depends to a large degree on the enthusiasm of auditors, who vary in their approach to this issue. The auditors' principal interlocutor is the supplier's management; workers' representatives are interviewed in most cases, but these interviews may or may not be held alone and with the approval of management. In these circumstances, workers are unable to effectively participate in audits and to transmit their concerns about the obstacles they face in organising and exercising their trade union rights.

Fourth, audits – as carried out by the overwhelming majority of auditors – are an inadequate tool for addressing violations of freedom of association and the right to collective bargaining. As shown in chapter 4, audits are designed in a manner that is not conducive to uncovering violations of these rights, while auditing companies may be too dependent on corporations for business to probe deeply into this issue. In my research I have found both auditors and corporations to be aware of their symbiosis. Corporate officials often expressed their scepticism of the results of audits and of the auditors' motivations. There was a widespread impression that auditors 'fix' their audits to ensure they uncover enough violations so that they are required to carry out

a follow-up audit, but that these violations should be small enough to maintain the overall good reputation of the corporation. This was supported by some of the trade union officials interviewed, who argued that auditors overlook their claims of violations of trade union rights, possibly on account of commercial considerations. As a result, the auditing of codes comprises ‘an inherent tension between commercial actors who prioritize commercial imperatives over compliance with labor codes and social actors who prioritize workers’ rights’.<sup>9</sup>

Auditors are also unwilling to devote sufficient attention to freedom of association and the right to collective bargaining. They view these rights as difficult to measure, dependent on local context and national law and are unclear as to their content. This attitude among auditors led the few corporations, such as A3 and A5, who place an emphasis on trade union rights, to hire and train their own auditors on how to uncover violations of these rights. They believe that the attitude of large auditing consultancies makes them unsuitable in their efforts to ensure effective trade unions and worker representation in their supply chains.

Most importantly, audits are a structurally flawed tool for gauging workers’ enjoyment of freedom of association and the right to collective bargaining. It is difficult to assess through an audit what role management interference may have played in the lack of a union at the workplace or in the establishment of a rival union more sympathetic to management. Another reason for this is the timeframe; audits are normally pre-announced and are carried out in a single day, making it difficult to interview the requisite number of workers and management and find out enough

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<sup>9</sup> S Barrientos and S Smith, ‘Do workers benefit from ethical trade? Assessing codes of labour practice in global production systems’ (2007) 28(4) *Third World Quarterly* 713, 717.

about the functioning of unions to make a judgment about workers' enjoyment of trade union rights.

Finally, the fifth reason for the disparity in the application of international standards found in codes is that corporations provide suppliers with little reason to respect trade union rights. As many of the NGO and trade union representatives and even corporate officials interviewed pointed out, corporate buying practices, with their focus on price and timely delivery, drive suppliers to violate labour rights in their codes. While this lack of incentives to improve the level of enjoyment of workers' rights is common, many of those interviewed for this thesis have stated that suppliers are willing to address outcome issues, such as health and safety, in order to appease the corporate buyer, but are loathe to allow any challenge to their authority in the guise of a trade union or other forms of free worker organising. This result corresponds to conclusions drawn by both Anner<sup>10</sup> and Barrientos and Smith,<sup>11</sup> who have contended that allowing unions to form is a much larger long-term cost for suppliers' management than addressing outcome issues, as the formation of a trade union would fundamentally disrupt the balance of power between management and workers.

My findings demonstrate that codes and audits have had a negligible impact on workers' enjoyment of the internationally guaranteed rights to freedom of association and to collective bargaining. As noted in chapter 5, corporations A3, A5 and B1 have realised this and have introduced alternative measures for the application of codes with regard to trade union rights. They are implementing programmes designed to provide suppliers with incentives to improve the level of observance of

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<sup>10</sup> M Anner, 'Corporate social responsibility and freedom of association rights: The precarious quest for legitimacy and control in global supply chains' (2012) 40(4) *Politics and Society* 609.

<sup>11</sup> S Barrientos and S Smith, 'Do workers benefit from ethical trade?' (n 9).

freedom of association and the right to collective bargaining. The collaborative programmes run by these corporations support the strengthening of their suppliers' productivity and management systems; in return, the corporations demand that trade unions in suppliers' factories should be enabled to carry out their duties and to be recognised by the supplier.

It remains to be seen what the effects of these initiatives will be, as there are few measurable results of the programme to date. In the meantime, however, it can be said that audits are unlikely to lead to real improvements of trade union rights in supply chains. The lack of enthusiasm by corporations for trade union rights has manifested itself in the way audits are designed, leaving even the most diligent of auditors little chance of uncovering violations of these rights.

Thus, while audits have effected some improvements noted in the level of enjoyment of outcome-oriented labour rights such as freedom from child labour and forced labour, they have not had success in increasing the level of workers' enjoyment of freedom of association and the right to collective bargaining. I would therefore contend that audits are a flawed tool for securing the internationally guaranteed labour rights of workers in supply chains.

## **II.A International framework agreements and other mechanisms**

In the course of my research, I also examined international framework agreements (IFAs) as an alternative to codes of conduct and audits. As noted in chapters 3 and 4, provisions in IFAs are reflective of ILO standards to a very high level. This is unsurprising, given that these agreements are signed by global union federations (GUFs), which pressured corporations into including provisions that guarantee international labour standards.

Trade union pressure has also been key in ensuring that the joint mechanisms established by unions and corporations to apply IFAs are used to address violations of all labour rights, including trade union rights. In this respect, the application of IFAs differs significantly to the application of codes through audits. The key difference between these application mechanisms is that trade unions and workers are active participants in the application of IFAs. Trade unions can address their concerns, regarding labour rights generally and freedom of association specifically, directly to corporations in regular meetings held to review the application of IFAs, or through informal contacts. The leadership of GUFs adopts differing tactics in their dealings with corporate management: it ranges from cajoling to pleading to mobilising public campaigns. Despite these variations, the overall framework within which IFAs are applied is collaborative and inclusive. This differs significantly from audits, where workers are passive participants that are sometimes included only upon approval by the management of the supplier, if at all.

The results of the research on the application of IFAs, and the development of nascent programmes by corporations A3, A5 and B1, highlight some of the flaws of codes and of audits as their application mechanisms. IFAs provide a comprehensive set of provisions protecting trade union rights and a more robust application mechanism than codes because of the involvement of trade unions and workers and because of their collaborative and inclusive approach. IFAs and the other programmes examined are enforced by the two parties, rather than by external organisations (such as auditors) that have a commercial interest in currying favour with suppliers and corporations and that lack commitment to trade union rights. Finally, IFAs and the programmes instituted by corporations A3, A5 and B1 are applied throughout the

year, rather than arguably only on a single day, as may be the case with codes and audits.

Another important distinction is that corporations have traditionally had a ‘technical or compliance perspective’ regarding codes and audits.<sup>12</sup> By contrast, collaborative models such as IFAs allow corporations to de-emphasise the compliance perspective inherent in codes and audits and lead them to focus on dialogue with trade unions and workers. The adoption of these collaborative models has led corporations to consider a new set of indicators to measure their effectiveness, one that goes beyond the compliance mindset imposed by codes and audits. For instance, Papadakis suggests that the success of a corporation in applying an IFA could be measured by indicators that go beyond gauging the ‘(a) implementation of its provisions’, to also considering:

(b) the promotion of sound industrial relations between the parties to the agreement; (c) the provision of a framework for workers to organize at plant and local levels; (d) the facilitation of dispute resolution; and (e) the establishment of a framework for sustainable industrial relations.<sup>13</sup>

Although these are only prospective indicators, they serve as an illustration of how the adoption of IFAs and other collaborative mechanisms would lead corporations away from the compliance mindset to a more comprehensive approach that could work in the favour of workers’ trade union rights in particular, and labour rights in general.

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<sup>12</sup> *ibid* 725.

<sup>13</sup> K Papadakis, ‘Globalizing industrial relations: what role for International Framework Agreements’ in S Hayter (ed), *Role of Collective Bargaining in the Global Economy: Negotiating for Social Justice* (ILO and Edward Elgar 2011) 277.

### III. CONCLUSIONS AND PROSPECTS

In the course of my research I have shown there is an influence of international law on the construction and, to a smaller degree, on the application of codes. However, the increased influence of international law, particularly on the application of codes, has been selective; while corporations are acting to ensure a higher level of respect for some of the labour rights of workers in corporate supply chains, such as freedom from child labour and freedom from forced labour, they have very inconsistently applied provisions in their codes that protect rights carrying a smaller reputational risk, such as trade union rights.

The influence of international law on the construction and application of codes has occurred, in part, due to corporations mimicking the practices of their competitors, due to corporations wanting to minimise reputational risk and because of commercial pressures. International law would not, however, have the influence on corporate codes that it had were it not for pressure by trade unions and NGOs on corporations. My thesis finds that the creation and application of codes is a politicised contest. In this contest, it was not inevitable that codes would be based on international treaties; rather, it was only following external pressure that this occurred. This should help scholars to properly conceptualise the emergence of private governance regimes on corporate accountability.

The supremacy of international law over codes established by my findings refutes the accounts of key authors such as Teubner who claimed codes are freestanding sets of rules that are normatively independent from international law. As privately made rules, codes could not compete with universal, publicly promulgated and democratically made rules found in international law. This is evidenced by the process of drafting the MSI-A Fundamental Code; the suggestions made by

corporations on the labour rights provisions of the Fundamental Code (an attempt to privately make rules) were rejected because they were viewed as self-interested and lacking in legitimacy in comparison to ILO standards.

The results of my research also touch upon the contemporary debate on how to improve corporate accountability. Broadly speaking, this debate is framed by two positions: one stating that the international regime regulating corporate responsibility for labour rights should be based on a form of self-regulation (such as codes and audits), and the other claiming that international law should regulate corporations through legally binding instruments.

The former position is epitomised by the ‘Protect, Respect and Remedy’ framework created by the Guiding Principles on Business and Human Rights. The framework is based, in part, on the idea of that corporations have a ‘social’ obligation to respect internationally recognised human rights and CLS. This obligation consists of corporations: having ‘policy commitments’ (or codes of conduct) on human rights; carrying out due diligence; and having in place remediation programmes. Corporations have increasingly adopted undertakings to respect CLS, introduced audits as a means of implementing these undertakings and have adopted remediation programmes as well.

However, although it may have appeared that that the adoption of the Guiding Principles has put this issue to bed, the recent adoption of a Human Rights Council resolution calling for the establishment of a working group to work on a draft of a binding treaty<sup>14</sup> shows this debate is not over yet.

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<sup>14</sup> UNHRC, ‘Elaboration of an International Legally Binding Instrument’ (n 1).

My findings reflect on the strengths and weaknesses of self-regulation and thus have some important implications for this debate. **First**, my research demonstrates that there is a certain value to corporate codes and, to a lesser degree, to audits as tools for their implementation. The adoption of codes based on ILO standards by the corporations studied has meant that these standards have become a social norm that corporations should not deviate from, at least in policy terms. This has resulted in codes that increasingly reflect the CLS that form the basis of the Declaration on Fundamental Principles and Rights at Work. Although some commentators have been quick to dismiss codes as nothing more than propaganda, the increasingly demanding commitments undertaken in codes have also impacted the application of international standards. Corporations have voluntarily assumed responsibility for upholding ILO standards and are apprehensive about being called to task by trade unions, NGOs and the public if they fail to do so. In reality, this has caused corporations to focus on preventing child labour, forced labour and (recently) health and safety violations, the three issues they believe could be most harmful to their reputation and that they have internalised the most as values. Nevertheless, this is a development that likely would not have occurred without the diffusion of international labour standards in codes and audit mechanisms.

**Second**, my research has also revealed that the increased influence of international law on codes is selective, especially with regard to the application of trade union rights. This finding has particular implications for the regulatory framework on corporate accountability. Namely, the inconsistent application of freedom of association and the right to collective bargaining described in part II of this chapter indicates that the corporations can formally fulfil their obligation to respect as foreseen by the Guiding Principles without an impact on the actual

observance of these particular rights. Despite some version of the elements of the obligation to respect formally being in place – a code pledging to respect freedom of association, due diligence carried out (in the guise of an audit) and a remediation programme – most of the corporations studied did not appear to increase their suppliers’ workers enjoyment of trade union rights. One conclusion that can be drawn from this finding is that there are too many obstacles (innate corporate hostility, the structural inadequacy of audits, the lack of participation of workers) for a self-regulatory system based on codes and audits – such as the one that the Guiding Principles advocate - to guarantee workers in supply chains their freedom of association and right to collective bargaining.

This ties in to the **third** implication of my findings. Namely, as shown in chapters 3-5, IFAs and other collaborative programmes appear to have more success (or, at least, more focus) on securing workers’ enjoyment of their trade union rights. Unlike audits, which are a ‘snapshot’ of the situation at a supplier’s facility, collaborative and inclusive programmes ensure an ongoing stream of information from workers, thereby allowing problems to be addressed as they arise. More importantly, these models engage workers rather than treat them as passive objects of regulation. They allow workers to actively seek to improve the enjoyment of their labour rights, without depending on the proclivities of an auditor or the good will of management. This raises the possibility that those corporations that do wish to implement all of the provisions in their codes should replace, or at least complement, audits with more collaborative and inclusive programmes that are based on the participation of workers. These programmes present an appealing alternative to audits as tools for implementing international standards contained in codes and IFAs.

**Fourth**, another implication of the selective enforcement of labour rights by corporations is to strengthen the case for external regulation and a binding international treaty. This notion should be given further credence by another finding of my thesis. Namely, as shown in chapters 3-5, international conventions do not provide sufficient guidance to corporations wishing to implement them (through codes), particularly with regard to questions of process and rights such as freedom of association. It can be argued that corporations would benefit from acquainting themselves with the work of the ILO's committees; however, even where specialists have taken it upon themselves to do so, they have found that the body of international labour law does not answer some of the questions that corporations have about how to apply certain provisions in their codes. Thus, as discussed in chapter 5, when MSI-A re-drafted its clause on working hours, its experts could not find guidance for corporations on the key question of what the limit on the number of overtime hours is for an employee.<sup>15</sup> It can also be argued that the ILO already provides guidance to corporations through its Tripartite Declaration of Principles Concerning Multinational Enterprises and Policy.<sup>16</sup> However, neither the corporations studied nor those seeking to pressure them, such as NGOs and trade unions, reference this document, thus blunting its usefulness in this regard.

Under the system of self-regulation currently in place, international standards are effectively renegotiated on the ground in a series of small interactions between corporations, auditors and suppliers. These interactions result in a watering down of some ILO standards, with those on freedom of association and the right to collective bargaining most affected. A binding international treaty may serve to make those

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<sup>15</sup> See ch 5 text to n 54-59.

<sup>16</sup> International Labour Office, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Policy* (ILO 2006).

standards clearer to corporations and suppliers and thus less amenable to renegotiation on the ground. It would also place all labour rights on the same footing, rather than allowing corporations to selectively adopt and enforce rights. This would require a sea change in the scope of international law and may be politically impossible; yet, as demonstrated by this thesis, the imprecise obligations regarding process-based rights such as freedom of association may require such a transformation. It can further be argued on the basis of my research that a binding international treaty is needed to enforce trade union rights (and other rights whose violations carry little reputational risk) because there is little public pressure on corporations to change their practices in this respect. Moreover, the research has shown that corporations are unlikely to make such changes on their own, which strengthens the case for external regulation.

The four above-mentioned implications for the debate on the international regulatory framework for corporate accountability that I have drawn from my research should, however, be treated with some caution because of the limitations of my findings. First, as noted in Chapter 1, my research examined the first layer of behavioural responses by corporations to their own codes of conduct, but did not measure the ultimate level of ‘compliance’ with codes of conduct for the workers affected ‘on the ground’. Consequently, my findings on the level of application of codes would need to be verified by further study of conditions in factories. Second, the findings pertain to the functioning of the system of codes and audits; but my research did not examine the questions arising out of the possible creation of a binding international treaty. Accordingly, the strengths and weaknesses of a self-regulatory system portrayed in my findings should be weighed against the strengths, weaknesses and (legal and political) viability of a binding instrument.

It remains to be seen what the eventual outcome of the debate on the international regulatory framework will be. Irrespective of this, however, advocates of a fairer international regulatory regime should also continue to demand that corporations develop a new model of private regulation featuring strengthened unions working collaboratively with corporations. Without the participation of workers and unions, corporations are likely to continue to selectively apply international labour standards found in their codes.

The adoption of a collaborative model of application of international labour standards is likely to come about only through continued external pressure. Although the adoption of international labour standards did not require continued external pressure in all of the corporations studied,<sup>17</sup> the same cannot be said of the application of international labour standards: without external pressure corporations have applied them selectively (by focusing on freedom from child labour, freedom from forced labour and the right to health and safety) and neglected to protect the other labour rights of workers in supply chains.

However, collaborative initiatives that bring workers and their representatives into decision-making structures challenge the balance of power in relations between workers and management and between corporations, suppliers and unions. They contest the corporations' claim to self-regulate their activities through codes and mechanisms that are solely in their control. Unlike audits, they support worker agency and democratic participation.<sup>18</sup> For these reasons, such initiatives are unlikely to

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<sup>17</sup> While external pressure initially caused corporations to commit themselves to stricter international standards, the adoption of such standards in codes has recently occurred through diffusion and because of cognitive discomfort.

<sup>18</sup> A Blakett, 'Global Governance, Legal Pluralism and the De-centered State: A Labor Law Critique of Codes of Corporate Conduct' (2001) 8 *Indiana Journal of Global Legal Studies* 401.

succeed without external pressure, as the majority of corporations have shown themselves unwilling to weaken their dominant positions vis-à-vis workers and unions in supply chains. With many corporations relinquishing their responsibilities in this regard, it is therefore crucial that trade unions and NGOs build on their accomplishments in introducing international labour standards in codes by continuing to advocate for collaborative and inclusive models of industrial relations that can challenge the supremacy of audits as the principal private mechanism for the enforcement of workers' rights.

## APPENDIX 1

### A MODEL FOR ANALYSING AND GRADING CODES OF CONDUCT AND INTERNATIONAL FRAMEWORK AGREEMENTS

<p><b>Common scale for awarding points for each of the eight international labour standards in a code of conduct/IFA (freedom of association; right to collective bargaining; freedom from child labour; freedom from forced labour; non-discrimination; health and safety; working hours; weekly rest)</b></p>
<p><b>1. Points awarded:</b></p> <ul style="list-style-type: none"><li><b>0 Points:</b> Right not mentioned in the code of conduct/IFA (only terms like ‘ethics’, ‘laws’, etc.);</li><li><b>1 Point:</b> Right not specifically mentioned in code of conduct/IFA, but pledge to respect ‘internationally recognised standards’, ‘human rights’, ‘civil liberties’, etc.;</li><li><b>2 Points:</b> Right not specifically mentioned, but international source documents referenced in code of conduct/IFA (ILO conventions, Universal Declaration of Human Rights, Global Compact, or like instrument);</li><li><b>3 Points:</b><ul style="list-style-type: none"><li>a. Right specifically mentioned in code of conduct/IFA, though not elaborated on, and international source documents not referenced; or</li><li>b. Right specifically mentioned in code of conduct/IFA, international source documents referenced but qualified (rather than ‘bolstered’) by national laws;</li></ul></li><li><b>4 Points:</b> Right specifically mentioned in code of conduct/IFA (but without more substantive detail), and international source documents referenced without qualification by national legislation.</li></ul>
<p><b>Scale for awarding additional points – by right (points awarded additionally for each of the eight above-mentioned rights)</b></p>
<p><b>1.1 Additional points for freedom of association</b> Aspects of the right developed through ILO supervision (contained in ILO convention 87, other conventions, jurisprudence of the Committee on Freedom of Association (CFA)):</p> <ul style="list-style-type: none"><li>a) Right to form union of own choosing <b>(.2 additional points awarded if present in the code);</b></li><li>b) Right to join trade unions of own choosing; company will not make employment of any worker subject to not joining/quitting union (ILO convention 98) <b>(.2 additional points awarded if present in the code);</b></li><li>c) Procedures - Right to draw up their constitutions and rules, access of union leaders to the workplace (ILO convention 135), political activities allowed outside workplace <b>(.2 additional points awarded if present in the code);</b></li><li>d) Right to strike <b>(.2 points awarded if present in the code);</b></li><li>e) Workers’ representatives shall not be subject to discrimination <b>(.2 additional points awarded if present in the code).</b></li></ul>

<p><b>1.2 Additional points for the right to bargain collectively</b></p> <p>a) Collective bargaining should be <i>voluntary</i> without recourse to ‘measures of compulsion’ <b>(.5 additional points awarded if present in the code)</b>.</p> <p>b) Employees can choose <i>representative organisations</i> for the purpose of engaging in collective bargaining <b>(.5 additional points awarded if present in the code)</b>.</p>
<p><b>1.3 Additional points for freedom from forced labour</b></p> <p>Aspects of the right contained in ILO conventions 29 and 105 and ILO jurisprudence:</p> <p>a) Bonded, prison labour; <b>(.5 additional points awarded if present in the code)</b>;</p> <p>b) Workers not required to lodge ‘deposits’, valuables or their identity papers with their employer. <b>(.5 additional points awarded if present in the code)</b>.</p>
<p><b>1.4 Additional points for freedom from child labour</b></p> <p>Aspects of the right contained in ILO conventions 138 and 182:</p> <p>a) Does the code include a minimum age for employment? Is this a universal minimum age or are country-specific exceptions indicated? (Only workers above the age of 15 years, or over the national compulsory school-leaving age if higher, shall be employed (ILO convention 138)). <b>(.5 additional points awarded if present in the code)</b>;</p> <p>b) Children under the age of 18 shall not perform work that is likely to harm their health, safety or morals (ILO convention 182). <b>(.5 additional points awarded if present in the code)</b>.</p>
<p><b>1.5 Additional points for non-discrimination</b></p> <p>Aspects of the right contained in ILO convention 100 and 111:</p> <p>a) Discrimination is defined in convention 111 as ‘any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation’ <b>(.5 additional points awarded if present in the code)</b>;</p> <p>b) Equal remuneration for men and women (ILO convention 100) <b>(.1 additional points awarded if present in the code)</b>;</p> <p>c) Discrimination extended to ‘any other grounds’, or if such grounds are named (such as sexual orientation) <b>(.4 additional points awarded if present in the code)</b>.</p>
<p><b>1.6 Additional points for occupational health and safety at work</b></p> <p>These are general provisions; instruments pertaining to specific categories of workers, such as workers in hazardous occupations, are only used where a code of conduct or IFA being graded directly pertains to them:</p> <p>a) (i) Employers should ensure: workplaces, machinery, equipment and processes under their control are safe and without risk to health; substances are not risky; adequate clothing and equipment is provided; adequate first aid arrangements are provided; workers are provided with adequate information on measures taken and with appropriate training; that remedial action is taken if alerted by workers on dangers to life and health (ILO convention 155; subsequent instruments, such as convention 174 on the prevention of major industrial accidents, or convention 148 on noise, pollution and vibration, spell out the requirements vis-à-vis certain categories of work in more detail); or</p> <p>(ii) With regard to commercial offices, premises must be kept clean, have good ventilation, lighting, temperature, normal lay-out, supply drinking water, washing facilities, suitable seats, facilities for changing non-work clothes, protection from</p>

harmful substances and noise (ILO convention 120: Hygiene (Commerce and Offices)) **(.3 additional points awarded if present in the code)**

b) Employers should ensure work is organised with respect to work hours; take all practicable measures with a view to eliminating excessive physical and mental fatigue; undertake studies and keep abreast of scientific knowledge on health and safety; appoint workers' safety delegates and health committees (ILO recommendation 164) **(.3 additional points awarded if present in the code);**

c) Employers should cooperate in the implementation of measures relating to occupational health services (ILO convention 161); the office of health and safety of a corporation with more than one establishment should provide the highest standard of services, without discrimination, to the workers in all its establishments, regardless of the place or country where they are situated (Recommendation 171). **(.1 additional points awarded if present in the code);**

d) Employers should be required to set out (where warranted) their policies on health and safety and bring this information to workers; verify implementation of applicable standards by monitoring, inspection and audits; keep relevant records (for example of all accidents on work) (ILO recommendation 164) **(.2 additional points awarded if present in the code);**

e) Workers' safety delegates, committees should get adequate information and be consulted on health and safety measures; have access to all parts of workplace and be able to communicate with the workers, inspectors and take part in negotiations; be given protection from dismissal - no measures prejudicial to a worker should be taken by reference to the fact that he complained of a breach of statutory requirements or an inadequacy in the measures taken by the employers in respect of health and safety (ILO convention 155, recommendation 164) **(.1 additional points awarded if present in the code).**

### **1.7 Additional points for hours of work**

These are general provisions; instruments pertaining to specific categories of workers, such as drivers, are only used where a code of conduct being graded directly pertains to them:

a) Hours in industrial undertakings (enumerated in ILO convention 1, including transport, mining and most other branches of the economy, other than an undertaking in which only members of the same family are employed) shall not exceed eight hours/day and forty-eight hours/week, with exceptions: the provision doesn't apply where persons are employed in shifts (though average over three weeks can't exceed eight hours/day and forty-eight hours/week); limits of work can be exceeded in case of accident, urgent work, force majeure, or where nature of work processes requires continuous work (no more than fifty-six hours on average) **(.5 additional points awarded if present in the code);**

b) Employers' responsibilities (under both ILO conventions 1 and 30) are to notify workers of the hours at which work begins and ends, and notify workers of rest intervals **(.2 additional points awarded if present in the code);**

c) Employers have to maintain wages when reducing hours; also, hours should gradually be reduced to forty hours/week with no reduction of wages **(.2 additional points awarded if present in the code);**

e) All work in excess of normal hours should be deemed overtime; overtime should be paid more than regular work (rates are often developed by collective agreement) **(.1 additional points awarded if present in the code).**

### **1.8 Additional points for the right to weekly rest**

- a) (i) All those to whom ILO convention 106 applies (workers employed in commerce and offices (but not family establishments)) shall be entitled to an uninterrupted weekly rest period of not less than twenty-four hours over a week; this period should, where possible, coincide with normal rest periods in country (e.g. weekends); or  
(ii) There are permanent exceptions - due to nature of work, or service or size of population to be served; where such exceptions are made, workers will get compensatory rest of an equivalent duration (the older convention (no. 14) states that this should be done 'as far as possible', whereas the newer one (no. 106) does not have this qualification; either is acceptable) **(.5 additional points awarded if present in the code).**
- b) There should be no reduction in wages if these measures on weekly rest are implemented **(.2 additional points awarded if present in the code);**
- c) The employer must make known the period of weekly rest (ILO convention 14) **(.3 additional points awarded if present in the code).**

### **2.1. The language undertaking the obligation in the code of conduct or international framework agreement**

- 1 Point** awarded when the language undertaking the obligation is aspirational (for example, 'we strive to have a supply chain free of child labour');
- 3 Points** awarded when language undertaking the obligation is prospective (for example, 'we shall not use child labour');
- 5 Points awarded** when language is statement-of-fact (for example, 'we do not use child labour').

The final score can be '2' or '4' where the language for the different rights is a mix of the above.

### **2.2 The nature of the corporation's obligation in the code of conduct or international framework agreement**

- 1 Point** awarded when the nature of the corporation's obligation is fairly weak (for example, 'to observe' human rights);
- 3 Points** awarded when the nature of the corporation's obligation is stronger (for example, 'to respect' human rights);
- 5 Points** awarded when nature of the corporation's obligation is robust (for example, 'to protect' human rights).

The final score can be '2' or '4' where the language for the different rights is a mix of the above.

## **APPENDIX 2**

### **INTERVIEW CODES**

This appendix lists the codes of the interviews carried out as part of the qualitative research for this thesis. The interviews were coded as anonymity was promised to the interviewees.

Interview 1: Interview with manager at corporate Multi-Stakeholder Initiative-A (MSI-A) member (Reading, 7 February 2013).

Interview 2: Interview with manager at audit and compliance facilitation organisation (London, 3 October 2013).

Interview 3: Interview with two managers at audit facilitation organisation (London, 1 March 2013).

Interview 4: Interview with official at non-governmental organisation active in monitoring corporate violations of human rights (Oxford, 4 March 2013).

Interview 5: Interview with official at audit and compliance organisation (London, 6 March 2013).

Interview 6: Interview with official at non-governmental organisation that is a member of MSI-A and active in monitoring corporate violations of human rights (Oxford, 20 March 2013).

Interview 7: Interview with manager at corporate member of MSI-A (London, 6 February 2013).

Interview 8: Interview with manager at corporate signatory to an international framework agreement (Geneva, 2 April 2013).

Interview 9: Interview with representative of non-governmental organisations to MSI-A (London, 13 February 2013).

Interview 10: Interview with two managers at corporate member of MSI-A (London, 1 February 2013).

Interview 11: Interview with head of international trade union confederation that is a signatory to international framework agreements (Geneva, 20 February 2013).

Interview 12: Interview with senior official at international trade union confederation that is a signatory to international framework agreements (Geneva, 18 February 2013).

Interview 13: Interview with manager at corporate member of MSI-A and a signatory to an international framework agreement (London, 7 February 2013).

Interview 14: Interview with official at International Labour Organization (Geneva, 1 March 2013).

Interview 15: Interview with manager at corporate member of MSI-A (London, 29 January 2013).

Interview 16: Interview with head of corporate member of MSI-A (London, 17 January 2013).

Interview 17: Interview with manager at corporate member of MSI-A (London, 27 March 2013).

Interview 18: Interview with head of MSI-A (London, 2 April 2013).

Interview 19: Interview with manager at MSI-A (London, 21 February 2013).

Interview 20: Interview with manager at MSI-A (London, 21 February 2013).

Interview 21: Interview with senior official at international trade union federation and one of the founders of the MSI-A (Brussels, 16 July 2009).

Interview 22: Interview with manager at MSI-A (London, 29 January 2013).

Interview 23: Interview with manager at MSI-A (London, 8 April 2013).

Interview 24: Interview with senior official at corporate signatory to an international framework agreement (Paris, 3 April 2013).

Interview 25: Interview with manager at a corporate member of MSI-A (Cheltenham, 6 April 2013).

Interview 26: Interview with senior official at corporate signatory to an international framework agreement (Atlanta, 5 April 2013).

Interview 27: Interview with manager at corporation that is not a member of MSI-A (London, 13 February 2013).

Interview 28: Interview with manager at corporate member of MSI-A (London, 14 October 2013).

Interview 29: Interview with manager at corporation that is not a member of MSI-A (Nottingham, 12 February 2013).

Interview 30: Interview with manager at corporation that is not a member of MSI-A (London, 5 February 2013).

Interview 31: Interview with official at non-governmental organisation that is a member of MSI-A and active in monitoring corporate violations of human rights (Norwich, 2 May 2013).

Interview 32: Interview with manager at corporate member of MSI-A (London, 18 January 2013).

Interview 33: Interview with manager at corporation that is not a member of MSI-A (London, 10 April 2013).

Interview 34: Interview with consultant on corporate accountability and former official at leading international financial institution (London, 3 October 2013).

Interview 35: Interview with manager at corporation that is not a member of MSI-A (London, 9 April 2013).

Interview 36: Interview with manager at corporation that is not a member of MSI-A (London, 16 January 2013).

Interview 37: Interview with manager at corporate member of MSI-A (London, 22 January 2013).

Interview 38: Interview with consultant on corporate accountability and former senior official at MSI-A (Oxford, 4 March 2013).

Interview 39: Interview with manager at corporate member of MSI-A (London, 3 October 2013).

Interview 40: Interview with head of international trade union federation that is signatory to international framework agreements, and one of the founders of MSI-A (Brussels, 10 May 2013).

Interview 41: Interview with senior official at MSI-A (London, 29 January 2013).

Interview 42: Interview with manager at corporate member of MSI-A (London, 24 March 2009).

Interview 43: Interview with manager at corporate member of MSI-A (London, 15 January 2013).

- Interview 44: Interview with official at international trade union federation and board member at MSI-A (London, 17 January 2011).
- Interview 45: Interview with senior official at international trade union federation and one of the founders of the MSI-A (Brussels, 15 October 2013).
- Interview 46: Interview with official at non-governmental organisation that is a member of MSI-A and active in monitoring corporate violations of human rights, and representative of non-governmental organisations to MSI-A (Oxford, 17 February 2009).
- Interview 47: Interview with consultant on corporate accountability and advisor to MSI-A (London, 8 February 2013).
- Interview 48: Interview with consultant on corporate accountability (Madrid, 9 January 2014).
- Interview 49: Interview with communications manager at auditing company (London, 27 January 2014).
- Interview 50: Interview with senior manager at auditing company (London, 30 January 2014).
- Interview 51: Interview with senior manager at auditing company (Munich, 31 January 2014).
- Interview 52: Interview with senior manager at auditing company (London, 3 February 2014).
- Interview 53: Interview with consultant on corporate accountability (Brighton, 10 February 2014).

## APPENDIX 3

### CORPORATIONS STUDIED FOR THE THESIS

This appendix lists the corporations used in the qualitative research for this thesis. The corporations were coded as anonymity was promised to them.

#### Corporations under 'A' - Multi-Stakeholder Initiative A (MSI-A) members

A1 - UK-based retailer

A2 - UK-based retailer

A3 - Spanish-based retailer

A4 - Belgian-based retailer

A5 - UK-based retailer

A6 - UK-based retailer

A7 - UK-based retailer

A8 - UK-based retailer

#### Corporations under 'B' - Multi-Stakeholder Initiative A (MSI-A) non-members

B1 - UK-based retailer

B2 - UK-based retailer

B3 - UK-based retailer

B4 - UK-based retailer

#### Corporations under 'C' - Corporations that have signed International Framework Agreements

C1 - Swiss-based retailer

C2 - French-based retailer

C3 - US-based retailer

## APPENDIX 4

### RESULTS OF THE CONTENT ANALYSIS STUDY (GRADES OF CORPORATIONS' CODES)

Key: FA – freedom of association; CB – right to collective bargaining; FL – freedom from forced labour; CL – freedom from child labour; ND – non-discrimination; MS – maternity status; HS – health and safety; H – right to limited hours of work; WR – right to weekly rest; LO – language of obligation; NO – nature of obligation.

Name of corporation and year of its code	FA	CB	FL	CL	ND	MS	HS	H	WR	LO	NO
AssicurazioniGenerali2009	4.00	4.00	4.00	4.40	3.90	0.00	3.00	2.00	2.00	1	3
AssicurazioniGenerali2003	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0	0
Aviva2009	2.00	2.00	2.00	2.00	4.40	0.00	3.00	2.00	2.00	1	1
Aviva2003	2.00	2.00	2.00	2.00	4.00	0.00	3.00	2.00	2.00		1
Bouygues12009	3.20	2.00	4.00	4.00	4.10	0.00	3.00	2.00	2.00	1	
Bouygues12003	3.20	0.00	0.00	0.00	2.80	0.00	3.00	0.00	0.00	1	3
Bouygues2-2009	2.00	2.00	4.50	3.20	3.90	0.00	3.00	3.00	2.00		
Bouygues2-2003	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00		
BP2009	3.00	2.00	2.00	1.00	3.00	0.00	3.00	3.00	2.00	1	2
BP2003	2.00	1.00	2.00	4.00	2.00	0.00	3.00	0.00	0.00	1	1
Chevron2009	4.00	4.00	4.00	4.00	4.00	0.00	3.00	2.00	2.00		1
Chevron2003	3.00	1.00	3.00	3.00	3.00	0.00	3.50	1.00	1.00	3	1
Citigroup2009	4.00	4.00	4.00	4.00	4.80	0.00	4.00	2.00	2.00	1	1
Citigroup2003	0.00	0.00	0.00	0.00	4.50	0.00	4.00	0.00	0.00		
ConocoPhillips2009	2.00	4.00	2.00	4.00	4.00	0.00	3.50	2.00	2.00	3	1
ConocoPhillips2003	1.00	3.00	1.00	1.00	3.00	0.00	3.50	0.00	0.00	3	1
Ericsson2009	3.40	3.20	4.90	5.00	5.00	5.00	4.30	3.00	0.00	4	1
Ericsson2003	3.20	3.20	3.50	5.00	3.50	5.00	3.30	3.00	0.00	2	1
GE2009	4.20	4.00	5.00	4.00	4.70	5.00	3.50	4.60	4.00	1	1
GE2003	3.00	3.00	3.00	3.00	3.70	5.00	3.40	0.00	0.00	1	3
Hitachi2009	4.00	4.00	4.00	4.00	4.50	0.00	3.00	0.00	0.00	3	1
Hitachi2003	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0	0
Fujitsu2009	1.00	1.00	3.00	3.00	3.80	0.00	3.00	1.00	1.00	3	1
Fujitsu2003	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0	0
IndianOil2009	3.00	3.00	3.00	3.10	2.60	0.00	3.00	0.00	0.00		
IndianOil2003	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0	0
Intel2009	3.00	3.00	4.10	4.50	4.50	0.00	3.20	3.00	0.00	3	
Intel2003	3.00	0.00	3.00	3.00	3.40	0.00	3.20	3.00	0.00	1	
JapanTobacco2009	0.00	0.00	0.00	5.00	4.00	0.00	3.50	3.00	1.00	3	
JapanTobacco2003	1.00	1.00	1.00	1.00	4.20	0.00	3.20	1.00	1.00	0	
McDonald's1-2009	3.00	0.00	3.00	3.00	3.00	0.00	3.00	0.00	0.00	2	1
McDonald's1-2003	1.00	1.00	3.00	3.00	3.00	0.00	3.00	0.00	0.00	2	1
McDonald's2-2009	0.00	0.00	3.50	3.40	3.00	0.00	3.30	3.00	3.50	3	
McDonald's2-2003	0.00	0.00	3.50	3.40	3.00	0.00	3.30	3.00	3.50	3	
Microsoft1-2009	0.00	0.00	0.00	0.00	3.20	0.00	3.00	0.00	0.00	0	
Microsoft1-2003	0.00	0.00	0.00	0.00	3.20	0.00	3.00	0.00	0.00	0	
MorganStanley2009	2.00	2.00	2.00	2.00	4.90	5.00	3.00	2.00	2.00	3	3
MorganStanley2003	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0	0
Motorola1-2009	3.20	3.00	4.90	4.50	4.00	0.00	3.10	3.00	3.50	4	
Motorola1-2003	0.00	0.00	0.00	0.00	0.00	0.00	3.00	0.00	0.00	0	

Motorola2-2009	3.20	3.00	4.90	4.50	4.00	0.00	3.00	3.00	3.50	4	
Motorola2-2003	3.20	3.00	3.50	4.50	4.00	0.00	3.00	3.00	3.50	4	
NEC2009	1.00	1.00	3.00	3.00	3.30	0.00	3.30	0.00	0.00	2	1
NEC2003	1.00	1.00	1.00	1.00	3.30	0.00	1.00	1.00	1.00		1
Skanska2009	3.40	1.00	4.25	4.50	4.20	0.00	4.30	2.00	2.00	5	3
Skanska2003	3.40	1.00	4.25	4.50	4.20	0.00	4.20	2.00	2.00	5	3
SocieteGenerale2009	4.00	4.00	4.00	4.00	4.00	0.00	0.00	0.00	0.00	1	1
SocieteGenerale2003	4.00	4.00	4.00	4.00	4.00	0.00	0.00	0.00	0.00	1	1
Total2009	2.00	2.00	2.00	2.00	4.00	0.00	3.60	2.00	2.00		1
Total2003	2.00	2.00	2.00	4.00	4.00	0.00	3.60	2.00	2.00		1
UBS1-2009	4.00	4.00	4.00	4.00	4.10	0.00	3.00	0.00	0.00	3	1
UBS1-2003	4.00	4.00	4.00	4.00	4.00	0.00	0.00	0.00	0.00	3	1
UBS2-2009	3.00	4.00	4.50	4.40	4.10	0.00	3.00	3.00	2.00	3	3
UBS2-2003	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0	0
Volvo2009	3.00	3.00	3.00	3.10	3.40	0.00	3.00	0.00	0.00	2	1
Volvo2003	3.00	3.00	3.00	3.10	3.40	0.00	3.00	0.00	0.00	2	1
Barclays2009	3.00	2.00	4.00	4.50	4.00	0.00	3.00	2.00	2.00	1	2
Damler2009	4.10	4.00	3.00	4.00	4.10	0.00	4.00	4.00	2.00		1
Danone2009	3.00	3.00	3.00	3.00	3.00	0.00	3.00	3.00	2.00	1	
DeutscheTelekom2009	3.00	3.00	4.00	3.00	4.00	0.00	3.00	3.00	2.00	1	5
Ford2009	4.20	4.00	4.00	4.50	4.50	5.00	3.00	3.00	2.00	3	
Goodyear2009	3.40	3.00	3.50	3.50	3.70	5.00	3.00	0.00	0.00		1
HSBC2009	0.00	0.00	0.00	3.00	0.00	0.00	3.30	0.00	0.00		
MANGroup2009	2.00	2.00	2.00	2.00	3.00	0.00	2.00	2.00	2.00		1
Pepsi2009	3.40	0.00	3.50	3.50	3.90	5.00	3.90	0.00	0.00	5	
Philips2009	3.40	0.00	4.00	4.10	4.50	0.00	3.60	3.00	2.00	3	1
Sprint2009	2.90	0.00	4.00	0.00	4.00	0.00	3.00	2.00	2.00	2	5
L'Oreal2009	3.00	0.00	3.00	3.00	3.90	0.00	3.20	3.00	0.00	1	
ExxonMobil2009	4.20	4.00	4.00	3.00	4.70	0.00	3.90	2.00	2.00		
Microsoft2-2009	1.00	1.00	3.90	3.90	3.30	0.00	3.00	3.00	0.00		

**Name of corporation  
with a signed IFA**

Lukoil	4.2	4	4.5	4	4.1	5	3.5	2	2		
Lafarge	4.2	4	4.5	5	5	0	4.4	3.1	3.5	3	
CIETT	4	4	4	4	4	0	0	0	0	1	1
Danone	4.4	4	0	0	0	0	0	0	0	1	
Carrefour	4	4	4	4	4	0	1	1	1		1
EADS	4.6	4	4	4.5	4.6	0	4	4	2	1	
Danske Bank	4.6	4.5	4	4.5	4.9	0	4.2	3	0	3	
Volkswagen	3.4	3	3.5	3	3.5	0	3	3	0	3	
DaimlerChrysler	4.2	4	4	4	4.1	0	4	4	2	1	1
Skanska	3.8	2	4.75	4.5	4.8	0	3.2	3	2	3	
Metro	3.2	3	0	0	0	0	0	0	0		
Peugeot	4.6	4	4.5	4.5	4.5	0	4.2	3	3		
Bosch	4.6	4	4	4	4.4	0	4	3	3	3	
Renault	4.2	4	4	4.5	4.5	0	4.2	3	0	3	
Eni	4.4	4	4.5	4	4.5	0	3	2	2		
Statoil	4.2	4	4.5	4	4.6	0	3	1	1		

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