Transnational Labour Law? “Corporate Social Responsibility” and the Law

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Abstract The article traces the development of transnational concepts of corporate social responsibility (CSR), particularly in relation to International Labour Organization (ILO) standards. It analyses the relationship between transnational private law instruments, and national and international law. It points out opportunities and limits of new enforcement mechanisms, emphasising the role of national legal systems: It will only be possible to prevent the law from becoming a pawn in corporate strategies if CSR instruments become sufficiently effective.

Keywords Labour law · Transnational law · Corporate social responsibility · Complaint mechanisms · Postcolonialism · Bangladesh Accord · National arbitration councils · International Labour Organisation · ILO

1 Introduction

The 2012 Ali Enterprises textile factory fire in Karachi, Pakistan, which killed 255 workers and injured 55, some critically, is not only the worst industrial disaster in Pakistan’s history. It became a global scandal that gave rise to a variety of legal and quasi-legal actions, which in turn highlighted the impunity, lack of control and diffusion of responsibility between numerous actors that has become a typical feature of global production networks. Responsibility for the disaster could potentially be attributed to the Pakistani company on the ground (Ali Enterprises in

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Karachi), transnational clients (the German textile company KiK commissioned 70 percent of the production), and private certifiers (the Italian company RINA certified the factory with the SA 8000 standard).

The production's transnational character was mirrored in the legal proceedings. In Pakistan, a criminal investigation was initiated against the owners of the Pakistani factory. At the same time, victims filed two complaints against Pakistani enforcement authorities.¹ In Italy, criminal proceedings were undertaken against the certifier RINA (which were unsuccessful in the end). In Germany, victims and relatives filed an action for damages against KiK, which the Regional Court in Dortmund dismissed in January 2019.² Transnational NGOs, such as the Berlin-based European Center for Constitutional and Human Rights (ECCHR) coordinated many of these actions.

Upon first view, these proceedings only refer to national laws. International organisations and their rules only seem to be directly addressed in an NGO complaint against RINA filed with the OECD Italian contact point in autumn 2018. But at closer inspection, human rights and ILO conventions have played an important role in structuring the plurality of conflicts and legal cases' transnationality. The interplay of standards and norms in different legal sources and procedures is described below (Sects. 2 and 3), before the relationship between different sources of law is analysed and evaluated (Sect. 4).

2 Transnational Enterprises, ILO and CSR

The Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE Declaration), adopted by the Governing Body of the International Labour Office in November 1977,³ is an atypical instrument of international law. As stated in Recital 7, it sets out 59 principles "in the fields of employment, training, conditions of work and life, and industrial relations which governments, employers' and workers' organizations and multinational enterprises are recommended to observe on a voluntary basis." The declaration is justified rather defensively with the view that the ILO "with its unique tripartite structure, its competence, and its long-standing experience in the social field, has an essential role to play in evolving principles for the guidance of governments, employers' and workers' organizations, and multinational enterprises themselves."⁴ This wording

¹See chapters by Saage-Maaß and Faisal Siddiqi in this volume for an in-depth description of the proceedings in Pakistan.

²LG Dortmund, judgment of 10 January 2019 – 7 O 95/15.

³Adopted by the Governing Body of the International Labour Office at its 204th session (Geneva, November 1977), and amended at its 279th (November 2000), 295th (March 2006) and 329th (March 2017) sessions.

⁴www.ilo.org/wcmsp5/groups/public/%2D%2D-ed_emp/%2D%2D-emp_ent/%2D%2D-multi/documents/publication/wcms_094386.pdf (last accessed 31 January 2020).

makes it clear that with this declaration, the ILO cautiously sought to open up a new field of action, in which its authority cannot be taken for granted: regulating the conduct of private companies that are not directly subject to international law.

More than 100 years after the ILO’s foundation, and more than 40 years after the adoption of the MNE Declaration, the way these instruments are supposed to work is evidenced in an overview published by the ILO that lists references to the MNE Declaration.⁵ The “non-exhaustive” list includes declarations, decisions, guidelines and position papers from the UN, ILO, United Nations Conference on Trade and Development (UNCTAD), OECD, G20, G8, G7, BusinessEurope, European Trade Union Confederation (ETUC), International Trade Union Confederation (ITUC), African Union (AU), ASEAN, Council of Europe, EU, Southern African Development Community (SADC), and Organization of American States (OAS). The main point of the MNE Declaration seems to have become its function as an important point of reference.

This is no coincidence. Although private companies are not traditionally considered subject to international law,⁶ it has become rather undisputed that economic activity across state borders nevertheless requires regulation—if necessary, also beyond national law. For these reasons, the ILO’s 1977 MNE Declaration still very cautiously points to the facts that “multinational enterprises play an important part in the economies of most countries and in international economic relations” and that “the advances made by multinational enterprises in organizing their operations beyond the national framework may lead to abuse of concentrations of economic power and to conflicts with national policy objectives and with the interest of the workers.”⁷

The 2008 Ruggie Report, which forms the basis of the UN Guiding Principles on Business and Human Rights adopted in 2011,⁸ is a bit sharper on this point. It posits that the gap between economic global activity’s social impact and the steering capacity of politics offers a “permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation.”⁹

This difference is an expression of the fact that by the time the Ruggie Report was published, the debate had shifted considerably since the MNE Declaration. Initially,

⁵ILO, Overview of references made to ILO MNE Declaration, www.ilo.org/empent/areas/mne-declaration/WCMS_570367/lang%2D%2Den/index.htm (last accessed 31 January 2020).

⁶This is disputed. The mandate of the intergovernmental working group set up by the UN Human Rights Council in 2014 on Ecuador and South Africa’s initiative—to draw up a legally binding international agreement on transnational corporations and human rights—is highly controversial (cf. UN Human Rights Council, Resolution 26/9 of 26/6/2014); on the debate: Kanalan (2014), p. 495; Peters (2014); cf. German Federal Constitutional Court (BVerfG), judgment of 25 January 1977, NJW 1977, pp. 1010–1011.

⁷MNE Declaration (fn 4), Recital 1.

⁸UN Human Rights Council, Resolution 17/4 of 16/6/2011.

⁹Ruggie, “Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development” (“Ruggie Report”), 7/4/2008, UN Doc. A/HRC/8/5, No. 3.

the declaration had little influence beyond the ILO. It is formulated in terms of development policy, and understands cross-border economic activity as “relations with host countries, especially in the Third World.” The term “multinational enterprise” is accordingly defined as “enterprises which own or control production, distribution, service or other facilities outside the country in which they are established.”¹⁰

Since then, new concepts and terms have taken the stage. Firstly, corporate actors in the US developed the term corporate social responsibility in the 1990s, which seeks to address private companies’ responsibilities towards society. Secondly, the UN Guidelines for Business and Human Rights have contributed to framing problems as “business and human rights” issues.

2.1 *Labour Standards in CSR Policies*

In CSR strategies, human rights, sustainability and the global economy are considered compatible within the framework of “three pillars of sustainability:” “profit, people, planet.”¹¹ However, when CSR instruments and policies were first developed,¹² they often focused on environmental concerns.

Regulating working conditions in CSR instruments only became relevant in the second wave of policy development. Sportswear manufacturers that experienced scandals and were targeted subsequently by NGOs, human rights groups and trade union campaigns—such as the anti-sweatshop movement—pioneered in including social and labour standards in CSR.¹³ Their corporate social responsibility declarations promised to comply with minimum working hour and health protection standards. As the public paid more attention to working conditions in consumer goods production, not being able to control production standards became a significant reputational risk. Corporate social responsibility can therefore be seen as a reputation management effort.¹⁴

However, it was only in involving European companies, European works councils and global union federations that trade union rights became an increasingly important element of CSR initiatives.¹⁵ Within the corporate social responsibility framework, international trade union federations promoted transnational collective agreements, so-called international framework agreements (IFAs). These new

¹⁰ILO, MNE Declaration, www.ilo.org/wcmsp5/groups/public/%2D%2D-ed_emp/%2D%2D-emp_ent/%2D%2D-multi/documents/publication/wcms_094386.pdf (last accessed 31 January 2020).

¹¹Elkington (1997).

¹²Kocher (2008b), p. 198. See also, for example, Madhav (2012), p. 267.

¹³Kocher (2008b), p. 198.

¹⁴Cf. Kocher (2008a), p. 67.

¹⁵Blecher (2017), p. 437; Kocher (2008b), p. 198.

transnational instruments¹⁶ are explicitly designed to help establish trade union structures and networking, and therefore support collective organising in global production networks.¹⁷

At the same time, the ILO developed its 1998 Declaration of Core Labour Standards,¹⁸ one of the aims of which was to make some ILO standards more effective, particularly in the transnational sphere, i.e. in directly addressing transnational enterprises. For this purpose, the declaration’s standards were described as “fundamental,” thus positioned in a human rights context, which has been controversial. The ILO was criticised for implicitly making some of its declarations more important (“fundamental”) than others.¹⁹ The debate on the relationship between “labour rights” and “human rights” also warns that focusing on individual rights could marginalise redistribution and collective action as social policy goals and means.²⁰

The 1998 declaration focuses on the ILO’s constitutional foundations, especially conventions 87 and 98—freedom of association and collective bargaining. In addition, bans on forced and child labour, and freedom from discrimination are part of the declaration. Since the declaration’s adoption, CSR policies and international standards on “business and human rights” and “sustainability” have continuously come to refer to these core labour standards as minimum “labour and social affairs” standards. In a similar vein, sustainability clauses in modern trade agreements²¹ and the EU Generalised System of Preferences²² use these minimum standards. The revised OECD Guidelines for Multinational Enterprises also took the 1998 declaration as its starting point.²³

In retrospect, the 1998 ILO Core Labour Standards Declaration appears to have significantly promoted the anchoring of social standards (including trade union rights) in CSR policies.

2.2 *Dissemination of CSR Policies*

How can CSR’s widespread use be explained? Why have they become an integral part of corporate policies—even beyond sectors of the economy that have to reckon with serious reputation risks in their value chain?

¹⁶Blecher (2017), pp. 454–456; Thüsing (2010), p. 78; Seifert (2006), pp. 205–241.

¹⁷Kocher (2008a), p. 67; Fichter et al. (2011), p. 68; cf. Mund and Priegnitz (2007), p. 674.

¹⁸“Declaration on Fundamental Rights and Principles at Work.”

¹⁹For example, the controversy between Alston (2004), p. 457 and Langille (2005), p. 409.

²⁰Alston (2004), p. 457; more details on this debate: Kocher (2012), p. 151.

²¹Cf. Zimmer (2011), p. 625.

²²Ölz (2002), p. 319; Herkommer (2004).

²³Utz (2011), p. 8.

Competitive strategies use CSR to open up new markets and position brands. Family businesses also use it to promote a certain “corporate culture.” Global companies use CSR as part of their branding.

These developments are, however, also driven by spin-off effects, influenced by politics. Corporate social responsibility receives public funding by national governments, the European Union, international organisations, business associations such as the Business Social Compliance Initiative (BSCI), and numerous multi-stakeholder initiatives (such as the Fair Labor Association (FLA), Fair Wear Foundation (FWF), Ethical Trading Initiative (ETI) and Workers Rights Consortium (WRC)).²⁴ Important bandwagon effects stem from financial markets, where CSR has become an assessment criterion. In the past 20 years, committing to a CSR policy has become the trait of any company wanting to be seen as a global player.²⁵

2.3 *CSR Instruments and Actors*

The keyword CSR denotes private companies as actors that attempt to prevent human rights violations or promote sustainable business practices. Corporate social responsibility therefore usually starts with a company’s own actions, its general commitment to certain principles and standards through a unilateral code of conduct and/or an IFA.

One step towards making such voluntary commitments binding are contract clauses with suppliers obliging them to observe certain minimum social standards. In addition, codes of conduct and/or IFAs are often a starting point for national state incentives, as well as international, national, and multi-stakeholder organisation soft law mechanisms.

Since the adoption of the ILO Core Labour Standards Declaration, companies’ codes of conduct and private certification companies have taken them as a starting point to define “working condition” minimum standards. OECD Guidelines for Multinational Enterprises have followed. They were revised in 2000, in particular to include ILO core labour standards, but they also contain “employment and industrial relations”—many detailed standards for all areas of working life—in Sect. 5.²⁶

Other important international instruments include, among others:

- The UN Global Compact, which claims to “catalyz[e] action, partnerships and collaboration.”²⁷

²⁴More on the FLA MacDonald (2011), p. 243; Ruggie (2016); Lukas et al. (2016); Marx (2012).

²⁵Kocher (2008b), p. 198; Madhav (2012), p. 267; Gunningham et al. (2009), p. 405 (with a focus on visibility).

²⁶Tapiola (2000), p. 9; Fischer-Lescano and Viellechner (2010), p. 23.

²⁷www.unglobalcompact.org/what-is-gc/strategy (last accessed 31 January 2020).

- The International Organization for Standardization’s ISO 26000 on Social Responsibility and Corporate Social Responsibility strives to translate this into concrete quality standards.
- In Germany, the Sustainability Code²⁸ “provides support with establishing a sustainable development strategy and offers a way in to sustainability reporting.” It is part of the German government’s strategy to achieve the Sustainable Development Goals (UN Agenda 2030 for Sustainable Development).
- The German National Action Plan on Business and Human Rights, adopted by the German government at the end of 2016, is intended to “launch a process of creating a road map for the practical implementation of the [UN] Guiding Principles [for Business and Human Rights].”²⁹
- The ILO Tokyo 2020 agreement, which aims to promote socially responsible working practices in preparation for the Olympic and Paralympic Games.

2.4 *Beyond ILO Core Labour Standards*

The ILO Core Labour Standards Declaration’s success has sometimes led to a peculiar dual strategy of transnational social standards. From the outset, core labour standards do not directly address typical problems in global production networks, such as work time, health and safety, pay or maternity leave. If calls for fair working conditions in such cases refer to the ILO Core Labour Standards, resulting documents will not address specific issues such as health and safety.³⁰ However, within the discursive framework of sustainability, human rights, and CSR policies in the 2000s, more recent documents give rise to the hope that the labour standards that were not declared “fundamental” in 1998, could play a greater role in future. For example, the broader-based OECD Guidelines, UN Guiding Principles and the ILO’s Decent Work Agenda³¹ have deepened CSR policies on social standards over the past 10 years.

Against this backdrop, the ILO MNE Declaration was amended in 2000 and 2017 to include core labour standard principles such as forced labour and those in the Decent Work Agenda, including transition from the informal to the formal economy. In addition, the revisions added provisions on legal protection, compensation for victims, and information on due diligence.

²⁸ www.deutscher-nachhaltigkeitskodex.de/en-gb/ (last accessed 31 January 2020).

²⁹ www.auswaertiges-amt.de/blob/610714/fb740510e8c2fa83dc507afad0b2d7ad/nap-wirtschaft-menschenrechte-engl-data.pdf, p. 5 (last accessed 31 January 2020).

³⁰ Compa and Vogt (2001), p. 199 mention a very prominent example where the US Congress created its own idiosyncratic definition of “internationally recognized worker rights,” without reference to ILO conventions (234).

³¹ ILO, “DW4SD Resource Platform” (Decent Work for Sustainable Development), www.ilo.org/global/topics/dw4sd/lang%2D%2Den/index.htm (last accessed 31 January 2020).

The following section concentrates on this last group of rules—control and enforcement. For a long time, the OECD Guidelines for Multinational Enterprises were unique in providing a redress mechanism (i.e. complaints to National Contact Points). Besides emphasising that effective implementation ultimately depends on private companies' institutionalised respect for workers' rights in their corporate and operational processes (i.e. “due diligence”),³² the UN 2011 Guidelines on Business and Human Rights detail interesting rules on redress and remedies.

3 CSR's Authority and Effectiveness

The recent focus on redress began in the 2000s. The debate has increasingly turned to ensuring CSR policies' authority and effectiveness,³³ or, in other terms, human rights in business and sustainable corporate policies. The terms “authority” and “effectiveness” refer to an approach that identifies a norm as “law” if legitimacy in norm-setting (for example in international law) is institutionally linked with an authority to decide if, in a specific case, the norm has been complied with,³⁴ in particular by delegating control and enforcement away from norm-setters.³⁵

3.1 *Monitoring, Auditing and Certification*

Control instruments in CSR strategies were developed at an early stage. Monitoring, auditing and certification were concepts first used in managing processes and/or production.³⁶ In transnational production networks, commissioning companies often require their suppliers to submit to concrete auditing procedures, and/or acquire certification. In some cases, the transnational enterprise monitors and conducts audits. In other cases, external auditors are used. A market of private certification companies has developed around these instruments.

In practice, effectiveness of these enforcement procedures is doubtful. Numerous concrete indications and research show conflicts of interest and other problems in monitoring and auditing procedures.³⁷ In particular, where collective and trade union rights are concerned, auditing and monitoring have systematically proved unsuitable

³²For a socio-legal approach: Kocher (2013), p. 41.

³³For these concepts, cf. Kocher (2014), p. 479.

³⁴Cf. Zürn and Koenig-Archibugi (2006), p. 243.

³⁵Abbott (2000), p. 408; Zangl and Zürn (2004), p. 21.

³⁶For further information: Pries (2010), p. 221.

³⁷Sabel et al. (2000); Locke et al. (2007), p. 23; Egels-Zandén and Lindholm (2014); Zajack (2013), p. 178; Estlund (2010), p. 203.

for detecting violations.³⁸ A particular problem is that the companies that set the standards often have control over, and make decisions about implementation and monitoring.³⁹ Often, effectiveness problems are not rooted in the process and its results, but in implementation, which mostly remains in the hands of local companies.⁴⁰ Overall, the greatest danger to effectiveness lies in management practices to superficially demonstrate “compliance,” or “creative compliance.” The term “creative compliance” was elaborated in tax evasion models, and indicates “the active response of those subject to the law, not just in political lobbying over legislation but in post hoc manipulation of the law to turn it – no matter what the intentions of the legislators or enforcers – to the service of their own interests and to avoid unwanted control.”⁴¹

In the case of IFAs, this is different, if only slightly. Their implementation and control is usually achieved through dialogue and joint problem-solving between companies, and trade unions or works councils.⁴² They are based on mechanisms that enable company employees to identify and report violations. Common mechanisms involve negotiated enforcement through information-sharing and presourcing requirements, which are often the shared responsibility of management and works councils in joint working groups and regular meetings.⁴³

Corporate control over monitoring can also be weakened in multi-stakeholder initiatives. An example is the Fair Labor Association (FLA), the oldest such initiative in the textile sector, which offers a CSR fair labour certificate for the textile industry. The FLA was founded as an NGO in the US in 1999. It includes companies such as adidas, Nike and Puma, universities such as Princeton University, and a number of NGOs such as Human Rights First and the Global Fairness Initiative; trade unions are not represented. The FLA audits and monitors the value chain of its member companies, i.e. in their suppliers in the Global South, covering approximately 5000 companies in 60 countries and a total of 3.7 million workers. The association monitors FLA code compliance of its members’ supplier factories through independent audit firms that conduct random on-sight inspections of selected factories in the value chain.⁴⁴

However, the FLA has been criticised, for example due to corporate interests’ dominance of its organisational structure and its lack of discernible progress in improving working conditions. As a consequence, the organisation has repeatedly changed its procedures, for example, introducing a complaint mechanism for

³⁸Anner (2012), p. 609; Egels-Zandén and Lindholm (2014); Terwindt and Saage-Maaß (2017).

³⁹Calliess and Zumbansen (2012), p. 59.

⁴⁰Zajak and Kocher (2017), p. 310.

⁴¹McBarnet and Whelan (1991), p. 848; cf. McBarnet (2007), p. 9.

⁴²Blecher (2017), p. 455; Fichter et al. (2011), p. 68; Sciarra (2011), p. 405.

⁴³Kocher (2009); Blecher (2017), p. 455.

⁴⁴MacDonald (2011), p. 243.

workers.⁴⁵ This is in line with a remarkable development in the CSR field: individual complaint procedures have been suggested as the key to more effective transnational governance in the field of “business and human rights.”⁴⁶

3.2 *Complaint Mechanisms in Transnational Production Networks*

Complaint mechanisms make it possible for workers to allege violations and assign responsibility. Unlike auditing and monitoring, complaint mechanisms are not based on processes or structures, but on problems, individual cases and results. This makes them function similarly to individual rights redress and legal remedies. In contrast to the top-down processes of auditing and monitoring, these procedures institutionalise the handling of individual conflicts.

An example of such case-related conflict resolution is the conciliation-like procedure developed by some national contact points in accordance with OECD guidelines.⁴⁷ Another quite early example is the “third party complaint process” the Fair Labor Association introduced in 2003.

The UN Guiding Principles now contain an even more generalised call to states and private companies to provide access to effective remedies for violations of standards (“effective remedies”). They offer the following criteria for effective private, out-of-court complaint mechanisms:⁴⁸ legitimacy (enabling trust, accountability), accessibility, predictability, access to information, advice and expertise, transparency, “rights compatibility,” and continuous learning.

4 CSR in Relation to International and National Law

In language and style, even unilateral corporate codes of conduct predominantly convey the impression of being legal instruments. This is why, independent of their legally binding quality,⁴⁹ their “legal” character is such an interesting and important topic. It can be misleading if they look like law without being able to keep the promises inherent in the law. In any case, these forms of transnational “regulation” compete with international and national laws. The following section will therefore elaborate on the relationship of CSR instruments to international and national law.

⁴⁵MacDonald (2011), p. 243.

⁴⁶Ruggie (2016), Lukas et al. (2016) and Marx (2012).

⁴⁷Cf. Calliess and Renner (2009); on effectiveness, see Sanchez (2015), p. 89.

⁴⁸UN Guiding Principles on Business and Human Rights of 2011, No. 31.

⁴⁹See Kocher (2008a), p. 67.

4.1 *Privatisation of International Law?*

By explicitly referring to international standards such as ILO conventions, private standard-setting in the form of CSR borrows from the legitimacy of these binding norms.⁵⁰ However, when an international law norm is translated and transformed into a private law context, it tends to silently change its meaning. CSR declarations and agreements implicitly claim the authority to interpret standards that originally are directed at states for private actors.⁵¹ This is what the term “privatisation of international human rights law” addresses.⁵²

This problem of translating norms from one context to another is quite common in law. It also appears if, for example, social clauses in international trade treaties refer to ILO standards. When public actors “own” the norms, there is a way out of the translation dilemma: interpretations of the treaty’s social standards could reference those of the ILO Commission of Experts, the Commission on Freedom of Association, or even mandate the ILO’s direct monitoring.⁵³

However, this is hardly a viable option for private law standards, as the ILO formulates standards for states, not private actors. To get an idea of the problems that arise when a norm is translated from a public to a private law context, we just need to look at the translation of standards that depend on a states’ legal guarantees. For example, it is completely unclear what it means when private companies promise to protect freedom of association, trade union and collective bargaining. Free trade union activity is, by definition, an activity that organises interests that conflict with employers’ interests. Interviewed company representatives were not able to express clear ideas of what it would mean to promise respect for freedom of association and collective bargaining (for example in China).⁵⁴ They mostly pointed to factory committees or grievance mechanisms that give voice to workers’ interests, but are not in any way comparable with ILO Conventions 87 and 98. In fact, factory committees and grievance mechanisms often represent potential union competition and, at times, been deliberately established by companies as competition to trade unions.⁵⁵ After all, trade union rights require a legal and social framework under the rule of law, which only a state can ensure; a company can at best behave in a non-disturbing or supportive manner.

⁵⁰Kocher (2009), p. 409.

⁵¹Herberg (2001), p. 25.

⁵²Blecher (2017), p. 471.

⁵³Cabin (2009), pp. 1081, 1088 on the “labor clause” in the Peru-US Trade Promotion Agreement.

⁵⁴Kocher (2009); Trade union rights in China: Cooney et al. (2014), pp. 61–63; cf. Hibbeler and Utz (2010), p. 17.

⁵⁵Kocher (2009), p. 409; cf. Anner (2012), pp. 609–644.

4.2 *The Competition Between Private Standards and National Law in the Global South*

The possible competition between private standards and producing countries' legal systems constitutes a further problem. Codes of conduct and private agreements usually promise to abide by local national laws,⁵⁶ while at the same time developing their own control and interpretation mechanisms. Transnational enterprises and multi-stakeholder organisations thus become development policy actors in countries of the Global South.⁵⁷

The resulting coexistence between private standards and national laws entails some ambivalence. On the one hand, there is a danger that these states' legal systems could become caught up in a regulatory "race to the bottom" with private dispute resolution mechanisms.⁵⁸ There have been cases in which companies responded to local actors' demands for compliance with national law by referring them to the (lower) "transnational" or company minimum standards.⁵⁹

On the other hand, "ripple effects"⁶⁰ or ratcheting-up, i.e. a race to the top, is also possible and, in fact, envisaged.⁶¹ Production sites are often located in countries with deficient (labour) law mobilisation⁶² and implementation—due to corruption, entanglement of political and economic elites, weak rule-of-law institutions, weak or divided trade unions or a strong power imbalance between capital and labour—factors that hinder labour laws' effective enforcement.⁶³ CSR's promotion is often based on the hope that these instruments could serve as a lever for gradually improving working conditions—as additional law enforcement tools or a way to provide human rights with more effective redress mechanisms that could become enshrined in national law.⁶⁴

4.2.1 *The Bangladesh Accord on Fire and Building Safety*

The Accord on Fire and Building Safety in Bangladesh (Bangladesh Accord) is a good example of some of these contradictions. It was concluded in the aftermath of the Rana Plaza factory collapse in 2013. It is a framework agreement between transnational enterprises in the garment and retail industry and global and local

⁵⁶Kocher (2008b), p. 198; McBarnet and Kurkchiyan (2007), p. 59; Hyde (2012), p. 83.

⁵⁷More on labour law and development policies: Ashiagbor (2019).

⁵⁸Hepple (2005), p. 62, referring to arbitration mechanisms in the context of *lex mercatoria*.

⁵⁹Kocher (2009), p. 422.

⁶⁰Compa and Vogt (2001), pp. 204–208.

⁶¹Sabel et al. (2000).

⁶²Cf. Brookes (2013), p. 181; Zajak et al. (2017), p. 899.

⁶³Cf. Hepple (2005), p. 87; cf. Körner-Dammann (1991).

⁶⁴Blecher (2017), pp. 437, 440–448.

trade unions, with NGO participation. In the event of a conflict, the agreement provides for arbitration under the rules of the United Nations Commission on International Trade Law (UNCITRAL), and thus a legally enforceable arbitration award.⁶⁵ The Bangladesh Accord Foundation that oversees the agreement is based in the Netherlands. An ILO representative serves as the chair of its steering committee.⁶⁶

Bangladesh is one of the most important production countries for textile products worldwide. In 2016, the World Justice Project’s listed it in 103rd place out of 113 countries in the Rule of Law Index,⁶⁷ with a government described as “hostile to labour rights.”⁶⁸ The accord operates against this background. It has been of great importance to more effective law enforcement and contributed considerably to the protection of workers’ rights through its many inspections⁶⁹ and mechanisms to accompany change processes in local companies.

The accord has always competed with other initiatives, most notably the Alliance for Bangladesh Worker Safety, which was founded by the North American enterprises that opposed the accord and does not include binding arbitration mechanisms.⁷⁰ At the same time, Bangladesh strengthened the state labour inspectorate by creating the Remediation Coordination Cell (RCC) within the Bangladesh Department of Inspection for Factories and Establishments. The ILO helps coordinate the RCC, and Canada, the Netherlands and the United Kingdom fund it. It stands to reason that the accord spurred these other mechanisms, and they would not be here today without it.

In an attempt to regulate collision between the regimes, the RCC was mandated with inspecting factories not covered by either the accord or the alliance. It seems that this did not keep conflicts at bay. When the accord expired after five years in 2018, the Bangladeshi government slowed down negotiations on a possible extension, insisting on its own sovereignty in occupational safety issues. The accord was extended transitionally by three years, until 2021 (Transition Accord), and the signatories agreed to work with the Bangladeshi government and ILO to transfer the accord’s functions to a national government agency.⁷¹

⁶⁵In detail: Zimmer (2016); Salminen (2018), p. 411.

⁶⁶More details by Blecher (2017), pp. 452–453.

⁶⁷WJP Rule of Law Index 2016, p. 39, www.worldjusticeproject.org/sites/default/files/documents/RoLI_Final-Digital_0.pdf (last accessed 31 January 2020).

⁶⁸Vogt (2017), p. 84; ILO, “Report of the High-Level Tripartite Mission to Bangladesh,” 2016, www.ilo.org/wcmsp5/groups/public/%2D%2D-ed_norm/%2D%2D-relconf/documents/meetingdocument/wcms_488339.pdf (last accessed 31 January 2020), resulting in a “special paragraph” (marg. 141–145) at the 105th International Labour Conference.

⁶⁹According to the accord, more than 30,000 factories have been inspected since its launch.

⁷⁰In addition, there is the 2013 “Bangladesh Sustainability Compact” with the EU, and the ILO and International Finance Corporation programme “Better Work Bangladesh”, Vogt (2017), p. 88.

⁷¹The accord’s website, www.admin.bangladeshaccord.org/wp-content/uploads/2018/08/2018-Accord.pdf (last accessed 31 January 2020).

The Transition Accord agreed that Bangladesh would take over the accord's tasks after fulfilling certain prerequisites.⁷² However, the Bangladeshi government ordered the accord to cease operations by November 2018. The Bangladesh Supreme Court issued an interim injunction to prohibit the accord from operating. Then, in May 2019, the government reached an agreement with the Bangladesh Garment Employers Association (BGMEA) to continue the accord's operations for one year.⁷³ As a consequence, BGMEA, fashion companies and national trade unions have started to create a new organisation, the RMG⁷⁴ Sustainability Council (RSC), which should eventually take over the accord's staff and infrastructure. It seems quite doubtful that the Bangladeshi institutions will be able to make significant progress without the accord as a competing mechanism.

4.2.2 Cambodia and Myanmar: National Arbitration Councils

The ILO has focused on strengthening state labour inspection and labour law enforcement.⁷⁵ Cambodia, another country that is an important global textile producer, serves as an interesting example of how the ILO has interpreted its role.

As early as 1999, the US concluded a trade agreement with Cambodia which guaranteed the latter better access to the US market, while at the same time obliging Cambodia to improve working conditions in the textile sector. As a result, the ILO created national and regional labour arbitration councils in 2003—tripartite labour dispute arbitration systems to compensate for the lack of independent labour courts and the Cambodian legal system's more general shortcomings. These served as a model for Myanmar's national arbitration council established in 2012—by the Settlement of Labour Disputes Law—a pre-trial, multi-level tripartite labour dispute arbitration system, which arbitrates disputes down to enterprise-level.⁷⁶

The Cambodian Arbitration Council is an independent governmental institution that is funded by Sweden, Switzerland, the US, Australia, the World Bank, the ILO, as well as the transnational enterprises adidas, Levi Strauss and Gap. In Cambodia, these arbitration tribunals have become the central law enforcement instrument in the country's labour law landscape. Its arbitrators have earned great respect and recognition for the way they practice independent adjudication. It is hard to predict the outcome if, as planned, Cambodia adopts and integrates the Cambodian Arbitration Council into its judicial system. It could positively affect the development of the rule of law, or weakening the arbitration system and thereby the rule of law it promotes.

⁷²In 2017, an ILO representative in Dhaka estimated several years for this task (according to Vogt 2017, p. 84).

⁷³www.business-humanrights.org/en/bangladesh-accord-to-continue-operations-for-281-working-days-as-transition-agreement-is-reached (last accessed 31 January 2020).

⁷⁴This abbreviation refers to the "ready-made garment" industry.

⁷⁵Hofmann (2019), pp. 121–122.

⁷⁶Zajak (2017b); cf. Ediger and Fletcher (2017).

4.3 *Transnational Labour Law?*

The relationship between different regulatory regimes of cross-border economic activity involving private actors has been discussed as “transnational law.” The “transnationalisation” of law, or “transnational law,”⁷⁷ refers to a debate about overlapping or competing regulatory regimes, such as international law, national law, European law, private contracts, as well as non-governmental, contractually stipulated rules. These do not have always clear, hierarchical relationships with each other,⁷⁸ resulting in “legal pluralism.”⁷⁹

So far, however, this debate has focused on areas of the law such as *lex mercatoria*, in which transnational non-state (arbitration) proceedings are functional equivalents of adversarial adjudication.⁸⁰ As such procedures guarantee the law’s legitimacy and authority, use of the term “law” seems justified.⁸¹ Accordingly, transnational *lex mercatoria*’s general legal character, due to existing transnational arbitration mechanisms, guarantee delegated norm enforcement and control by way of conflict resolution.⁸²

With regard to labour law, the existence of a transnational institutional system similar to the law is doubtful to the extent as no equivalent enforcement procedures have been observed.⁸³ That is why the increasing development of specific transnational complaint mechanisms represents an important step towards labour law’s transnationalisation. On the other hand, the fate of the first transnational labour dispute arbitration mechanism, the Bangladesh Accord, shows how unstable competition with national law is in spite of conflict-of-law rules and coordination instruments.⁸⁴

Conflicts of interest and power imbalances in labour law disputes contribute significantly to the fact that labour law’s transnationalisation is much less advanced than transnational commercial law. “Creative compliance”⁸⁵ corporate strategies are too widespread; too often law-like rules are merely used as strategic competitive resources.⁸⁶ As long as private-law corporate standard-setting relies on international and local national law’s legitimacy, without being able to guarantee independent authority or effectiveness, it is merely “*ein Spiel mit dem Recht*”—an imitation of the law.⁸⁷

⁷⁷ Calliess and Maurer (2014); Renner (2014), p. 750. cf. Blackett and Trebilcock (2015).

⁷⁸ Viellechner (2013), p. 1.

⁷⁹ Merry (1988), p. 869; Teubner (1996), p. 255; Seinecke (2015).

⁸⁰ Renner (2014); Viellechner (2013), p. 1.

⁸¹ Kocher (2014), p. 479.

⁸² Stein (1995), p. 70; Cutler (2003), p. 26.

⁸³ Kocher (2014), p. 479; cf. Blackett and Trebilcock (2015); Rogowski (2013).

⁸⁴ Teubner (2005), p. 108; Calliess and Zumbansen (2012), p. 19.

⁸⁵ McBarnet (2007); McBarnet and Whelan (1991), p. 848.

⁸⁶ Cochoy (2007), p. 91.

⁸⁷ Kocher (2010), p. 34.

4.4 *The Role of National Law in the Global North*

Labour law's transnationalisation does not relieve the burden on national law in any way. Rather, it places new regulatory demands on transparency and clarity in consumer and capital markets, such as which legal obligations arise from competition and tort law in transnational commercial activity.⁸⁸

Furthermore, any company can use the term CSR to promote whatever policy they wish. Policymakers, consumers and trade unions cannot differentiate window-dressings from credible efforts to take responsibility. On this backdrop, effective disclosure obligations about companies' CSR measures could help create a more level playing field between companies that use CSR terms and concepts.⁸⁹ Such rules have been envisioned by the EU's so-called CSR Directive,⁹⁰ which obliges EU member states to require large companies to report "non-financial information." In Germany, the directive was implemented in German Commercial Code (HGB) 289(b-e), which now requires capital market-oriented firms, financial institutions and insurance companies with more than 500 employees to supplement their management report with a section on concepts, results, risks and key performance indicators (HGB 289c(3)) for the "non-financial" aspects mentioned in HGB 289c(2), inter alia employee and social issues, and respect for human rights.

These reporting obligations also require transnational enterprises to report how they exercise human and labour rights "due diligence." This is only an obligation to disclose. If a company has not established due diligence mechanisms, it only needs to say so in its management report (HGB 289c (4)).

A more effective way to increase the credibility of transnational CSR policies would be to legally oblige companies to comply with human rights due diligence obligations in their transnational economic activities. The 2010 US Dodd-Frank Act's section 1502 on use of "conflict minerals" (especially from DRC) is a model for such regulation. French law 2017-399 of 27 March 2017 "on the duty of care of parent companies and controlling companies" goes even further.⁹¹ It adds article L 225-102-4 and -5 to the French Commercial Code (Code de Commerce), obliging companies with least 5000 employees in France, or at least 10,000 employees worldwide, to develop and publish a monitoring plan (*plan de vigilance*), to identify and prevent potential human rights violations arising from their business activities. Subcontractor and supplier activities are also covered, and remedy mechanisms that sanction non-compliance and damages are provided.

⁸⁸McBarnet (2007), p. 9; Dilling (2009); Glinski (2005), p. 187; Kocher (2005), p. 647.

⁸⁹McBarnet (2007), p. 9; Kocher et al. (2012); Kocher and Wenckebach (2013), p. 18; Locke et al. (2007), p. 22.

⁹⁰Directive 2014/95/EU of the European Parliament and Council of 22 October 2014 amending Directive 2013/34/EU, as regards disclosure of non-financial and diversity information by certain large undertakings and groups.

⁹¹"Relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre;" Hoffberger (2017), p. 465.

In Germany, too, such an approach, including transnational enterprises’ liability for exploitation in the supply chain, is advocated by NGOs.⁹²

5 Summary

Corporate social responsibility instruments and policies are of significant importance to directly address business responsibility for human rights. The ILO’s Core Labour Standards Declaration has greatly contributed to making collective rights a central component of, and promoting labour standards in, CSR policies.

At the same time, CSR policies entail a privatisation of law that leads to entangled legal and management logic.⁹³ CSR standards’ competition with norms of national or international law causes further law enforcement and development policy problems. The interaction between state and private actors’ “law” requires more than conflict-of-law rules.⁹⁴ Globalisation poses a “race to the bottom” danger to labour markets,⁹⁵ which can only be countered if national, international and transnational law mutually reinforce one other. This can be achieved through feedback, i.e. sharing experience from local and national levels, which feeds the design of international and transnational instruments, and vice versa.⁹⁶

The ILO is therefore right to re-emphasise the importance of law enforcement mechanisms in countries of the Global South.⁹⁷ However, countries in the Global North where many/most of consumers live also face challenges. They will have to create an effective legal framework to sustainably ensure CSR’s transparency, credibility and effectiveness.

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⁹²For the most recent demands, cf. Initiative Lieferkettengesetz, <https://lieferkettengesetz.de/aktuelles/>; for the government bill of March 2021: <https://www.bmz.de/de/entwicklungspolitik/lieferkettengesetz> (both accessed 2021-04-15); also: Kocher et al. (2012); Kocher and Wenckebach (2013), p. 18; contributions in Krajewski and Saage-Maaß (2018); Scheper and Grabosch (2015); Klinger et al. (2016).

⁹³Edelman et al. (2001), p. 1589.

⁹⁴Teubner (2005), p. 105; Calliess and Zumbansen (2012), p. 19.

⁹⁵Heppele (1999), p. 360.

⁹⁶Cf. Halliday and Carruthers (2007), p. 1135; Zajak (2017a), p. 530. There is an interesting study on the on translations and retranslations at Bangladesh village courts: Berger (2017); Merry (2006), pp. 38–51.

⁹⁷Hofmann (2019), pp. 121–122.

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