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SECURING LABOUR RIGHTS IN GLOBAL PRODUCTION NETWORKS

Legal Instruments and Policy Options

Study commissioned by the
Chamber of Labour, Vienna



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ABBREVIATIONS

ATCA	Alien Tort Claims Act
CoC	Codes of Conduct
CSR	Corporate Social Responsibility
EC	European Commission
EFA	European Framework Agreement
EU	European Union
FTA	Free Trade Agreement
GDP	Gross Domestic Product
GPN	Global Production Networks
HR	Human Rights
IFA	International Framework Agreement
ILO	International Labour Organization
ITF	International Transport Federation
LR	Labour Rights
NCP	National Contact Point(s)
OECD	Organization for Economic Cooperation and Development
R&D	Research and Development
SIA	Social Impact Assessment
TNC(s)	Transnational Corporation(s)
TU	Trade Union(s)
UN	United Nations

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EXECUTIVE SUMMARY

The global economy, and in particular the organization of global production and international trade, has changed significantly in the last three decades. Today, international trade and global production are increasingly organised in highly fragmented and geographically dispersed production networks where transnational corporations (TNCs) break up the production process into different parts and locate them in different countries on a global scale. These transformations have important consequences for workers and the protection of labour rights. The rise of these complex global production arrangements together with a redefinition of the role of the state in the context of globalisation has led to an ‘accountability gap’ regarding labour rights. This raises the question of how transnational corporate activities and global production networks (GPN) can be regulated in order to secure labour and other human rights.

Taking into account these developments, the current report focuses on the options available to secure labour rights in GPN. The development of regulatory mechanisms that are or can be made applicable to secure labour rights in GPN has been slow. This is due to the cross-border dimension of these networks that require cross-territorial cooperation between state authorities as well as to the complexity of and asymmetric power relations between actors in GPN. In particular, GPN relationships have become increasingly complicated from a legal and labour rights perspective as supplier and subcontracting relationships have increased in comparison to subsidiary and equity relationships.

The human rights framework provides an avenue to address problems of responsibility and accountability for labour rights in GPN, as it offers a normative framework that identifies rights-holders and duty-bearers based on universally recognised normative standards. Although, the human rights framework focuses on the state as the key agent in the human rights arena, recently, the focus has started to shift and besides the state also non-state actors such as TNC have been identified as secondary duty bearers. In parallel, the redefinition of the role of the state in the context of globalisation has led to a new set of regulatory mechanisms that emerged at the national and international level. At the international level a variety of primarily soft law instruments which are not legally binding emerged in the attempt to secure key labour rights worldwide, including guidelines by international organisations and self-regulation at the sectoral or firm level. International Framework Agreements concluded between Global Union Federations and TNCs are more recent instruments aimed at securing workers rights on the international level. Given the existing and emerging options at the national, macro-regional (European) and international level, this report attempts to assess the effectiveness of different instruments with regard to labour rights protection in the context of GPN.

Our analysis shows that existing mechanisms to secure labour rights in GPN are still patchy. On the national level new promising instruments that reflect the host states responsibility to protect labour rights have emerged. For instance, some EU member states have introduced legislation to hold companies accountable for labour rights violations in supply chain relationships (“chain liability”). There are important limitations with regard to the territorial reach and categories of workers covered under the current regimes which could however be addressed in the future. The potential of incentive mechanisms such as socially responsible public procurement to enhance labour rights protection in GPN has not been realized so far as most emphasis has been put on national employment and issues of non-discrimination considerations without looking at labour rights further down in the production network. Moreover, host state responsibility for labour rights, especially in countries outside of the EU, may be compromised by a variety of factors in the context of GPN and related com-

petitive pressures and power asymmetries. States compete with each other to attract FDI and supplier contracts, and low wages and weak labour rights regulation are often 'competitive advantages' in GPN. Consequently, host states may be unable or unwilling to introduce and enforce severe obligations on TNCs with regard to labour rights and home state responsibility may become relevant. In this regard a very small number of states has been active and has provided for the possibility to bring companies to court for labour rights violations committed abroad. These regimes are promising but have currently some important limitations. They are restricted either to grave labour rights violations or require that a subsidiary commits the labour rights violation for the lead firm to be held accountable. Hence, the increasingly widespread supplier and subcontracting relationships in GPN are not covered. Further, a strong relation of the TNC to the labour rights violation has to be proven by workers which is likely to be arduous in GPN settings. This demonstrates that home state responsibility is the last resort concerning labour rights protection, and it should primarily be upon the host state to secure labour rights. But in parallel home state responsibility should be further developed and fortified.

On the European level, the EU has been rather reluctant in terms of company regulation to ensure the protection of labour rights in GPN. Although the EU does not have an explicit mandate in this matter, cross-border labour rights protection is an issue of EU wide relevance and EU member states face limits at the national level. Thus, the EU is in an unique position and better suited than any other organization to enact legislation with binding effect on EU based companies operating transnationally. However, efforts have been limited and decisive steps into the direction of labour rights accountability of companies abroad still wait to be taken. With regard to current initiatives, an extension of the aforementioned national chain liability regimes to the EU level would be one important step to secure labour rights and ensure fair competition throughout the EU. However, relationships outside the EU would not be covered under such a structure but in principle liability could be extended to incorporate operations abroad of EU based TNCs. For instance, existing EU regimes such as the Brussels I Regulation involve home state responsibility and have been used to make EU subsidiaries accountable for labour rights violations which occur outside the EU's territory. In the area of EU trade policy, the European Commission (EC) seeks to include ILO core labour standards via sustainability chapters in its bilateral trade agreements. The major weakness of this instrument is the enforcement process which is limited to cooperation mechanisms. In contrast, a dispute settlement system including sanctions is foreseen for the remaining agreement. Hence, labour rights protection is not implemented on the same level as trade issues.

On the international level, the ILO has been the primary body within the international institutional system that deals with labour issues. The ILO MNE Declaration sets forth recommendations for "good corporate conduct" and enjoys a broad backing by ILO member states and national social partners. However, it does not provide legally binding instruments to secure and monitor the implementation of the MNE Declaration. The recently established ILO Helpdesk also focuses primarily on the provision of information for management and workers' representatives of TNCs in day-to-day operations. In contrast, a third initiative, the newly established "Better Work" programme, represents a new avenue in the ILO approach as for the first time the ILO engages in monitoring the private sector. Attempts to introduce binding regulations on human rights (including core labour rights) in other UN bodies were opposed by (business) interests as well as some states. Instead, the UN appointed a special representative - John Ruggie - who introduced the 'Ruggie framework' called "Protect, Respect, Remedy". Notwithstanding its merits the framework presents a minimum baseline for companies and it is not yet ensured that companies that are not willing to respect human rights will be held accountable due to the lack of an effective legal framework of accountability, including effective complaint mechanisms. The OECD Guidelines are to date the only international soft law regime with a complaint mechanism. Since the guidelines generally require an "investment nexus", i.e. an

operation equivalent to investment for a TNC to be accountable their effectiveness is limited from the onset. Concerning the definition of the investment nexus there exists considerable uncertainty and the interpretations of the NCPs - the complaint mechanisms of the Guidelines - differ significantly.

As a response to public pressure Codes of Conduct (CoC) have been introduced at the company level which generally include basic labour rights along the lines of the ILO core labour standards. Evidence shows that although company CoC have had – to some extent – a positive influence on the protection of labour rights in GPN, they are less effective in practice. Thus, they must be seen as only one, and certainly not the most promising, avenue to global labour rights protection. The biggest limitations are the voluntary and non-standardized nature of this approach with regard to design and content as well as implementation and monitoring; the limited coherence of TNC's buying and sourcing practice on the one hand and CSR demands stipulated in CoC on the other hand; and the lack of engagement with public labour inspectorates and labour ministries as well as workers organisations which impedes on the long-term effectiveness of this instrument.

On the level of social dialogue, European and International Framework Agreements between TNCs and European and Global Trade Unions have been signed to extend cooperative industrial relations to the company's locations outside the home country. Their effectiveness depends on a number of factors such as the type of production network, the commitment of the lead firm, and the capacities as well as the political environment of the trade unions involved. European Framework Agreements (EFAs) and International Framework Agreements (IFAs) are certainly very promising instruments and should be supported and embedded in a wider regulatory framework which strengthens their enforcement structures.

Besides the proposals made in the report to improve the existing instruments for labour rights protection to make them more effective in the context of transnational corporate activities and complex global production arrangements, an international legal framework which holds TNCs accountable for labour rights violations in GPN, such as an International Convention on Combating of Human Rights Violations by Transnational Corporations, is needed. Although it will take time to reach the political consent for such a structure, the pressure from public interest groups, including trade unions, critical consumers and NGOs is rising and court cases seeking to hold TNCs accountable for labour rights violations are increasing. The current international institutional bias which favours legally binding enforcement mechanisms regarding trade and investment while showing reluctance to introduce such mechanisms for labour rights must be changed. Thus, the patchwork activities that became apparent in the analysis of instruments in this study must be on the one hand supported and further developed but on the other hand also broadened and complemented by a concerted effort to establish international binding regulations for labour rights and other human rights violations of TNCs.

ZUSAMMENFASSUNG

Die Weltwirtschaft, und im Speziellen die Organisation von globaler Produktion und internationalem Handel, haben sich in den letzten drei Jahrzehnten stark verändert. Internationaler Handel und globale Produktion sind heute zunehmend in fragmentierten und geographisch gestreuten Produktionsnetzwerken organisiert, in denen transnationale Unternehmen (TNCs) den Produktionsprozess ausgliedern und auf globaler Ebene ansiedeln. Diese Änderungen haben bedeutende Konsequenzen für ArbeiterInnen und den Schutz von ArbeitnehmerInnenrechten. Die Zunahme dieser komplexen globalen Produktionszusammenhänge, gekoppelt mit einer Neudefinition der Rolle des Staates im Kontext der Globalisierung, hat zu einer „Haftungslücke“ für ArbeitnehmerInnenrechte geführt. Dies wirft die Frage auf, wie transnationale Unternehmensaktivitäten und globale Produktionsnetzwerke (GPN) reguliert werden können, um ArbeitnehmerInnenrechte und andere Menschenrechte zu sichern.

Vor diesem Hintergrund fokussiert der vorliegende Bericht auf mögliche Optionen, wie ArbeitnehmerInnenrechte in GPN gesichert werden können. Die Entwicklung von Regulierungsmechanismen, die anwendbar sind oder angewendet werden könnten, um ArbeitnehmerInnenrechte in GPN zu schützen, ging bisher langsam voran. Das ist auf die grenzüberschreitende Dimension solcher Netzwerke zurückzuführen, die eine gebietsübergreifende Kooperation zwischen Staatsbehörden erfordern sowie auf die Komplexität von und ungleichen Machtverhältnissen zwischen den Akteuren in GPN. Im Speziellen sind Beziehungen in GPN aus einer rechtlichen und ArbeitnehmerInnenschutz-Perspektive zunehmend komplizierter geworden, da Zuliefererbeziehungen im Vergleich zu Tochtergesellschafts- und Beteiligungsbeziehungen an Bedeutung gewonnen haben.

Der Menschenrechtsrahmen bietet die Möglichkeit, Probleme hinsichtlich Verantwortlichkeit und Rechenschaftspflichten für ArbeitnehmerInnenrechte in GPN zu adressieren, da er einen normativen Rahmen schafft, der RechtsträgerInnen und PflichtenträgerInnen basierend auf universell anerkannten normativen Standards identifiziert. Obwohl der Menschenrechtsrahmen auf Staaten als „Hauptakteure“ im Menschenrechtsbereich abzielt, verschiebt sich der Fokus seit einiger Zeit neben dem Staat auch auf nicht-staatliche Akteure wie TNCs als sekundäre PflichtenträgerInnen. Parallel dazu hat die Neudefinition der Rolle des Staates im Kontext der Globalisierung zu neuen Regulierungsmechanismen auf nationaler und internationaler Ebene geführt. Auf internationaler Ebene entstand eine Vielzahl von primär „weichen“ Rechtsinstrumenten („soft law“), die rechtlich nicht bindend sind, im Versuch, grundlegende ArbeitnehmerInnenrechte weltweit zu sichern, einschließlich der Leitlinien von internationalen Organisationen und Selbstregulierung auf sektoraler oder Unternehmensebene. Internationale Rahmenvereinbarungen zwischen globalen Gewerkschaftsverbänden und TNCs sind neuere Instrumente zur Sicherung von ArbeitnehmerInnenrechten auf internationaler Ebene. Angesichts der bestehenden und entstehenden Möglichkeiten auf nationaler, makro-regionaler (europäischer) und internationaler Ebene, versucht dieser Bericht, die Wirksamkeit der verschiedenen Instrumente im Hinblick auf Schutz von ArbeitnehmerInnenrechten im Rahmen von GPN zu beurteilen.

Unsere Analyse zeigt, dass die bestehenden Mechanismen, um ArbeitnehmerInnenrechte in GPN zu sichern, noch lückenhaft sind. Auf nationaler Ebene entstanden neue, vielversprechende Instrumente, die die Verantwortung des Gaststaates („host state“), ArbeitnehmerInnenrechte zu schützen, widerspiegeln. Einige EU-Mitgliedstaaten haben zum Beispiel Rechtsvorschriften für Unternehmen eingeführt, um diese bei der Verletzung von ArbeitnehmerInnenrechten in der Lieferkette zur Rechenschaft zu ziehen („Kettenhaftung“). Hier gibt es allerdings wichtige Einschränkungen im Hin-

blick auf die territoriale Reichweite und den Schutz bestimmter ArbeitnehmerInnen, die jedoch in Zukunft verbessert werden können. Das Potenzial von Anreizmechanismen wie beispielsweise die sozial verantwortliche öffentliche Auftragsvergabe, wurde bisher noch nicht ausgeschöpft, da der Schwerpunkt oft auf nationalen Beschäftigungs- und Nichtdiskriminierungserwägungen liegt, ohne auf ArbeitnehmerInnenrechte weiter „unten“ im Produktionsnetzwerk zu achten. Darüber hinaus kann die Verantwortung für ArbeitnehmerInnenrechte des Gaststaates, speziell in Ländern außerhalb der EU, durch eine Vielzahl von Faktoren im Zusammenhang mit GPN und den damit verbundenen Wettbewerbsdruck und Machtasymmetrien beeinträchtigt werden. Staaten konkurrieren miteinander, um ausländische Direktinvestitionen anzuziehen und um Lieferverträge zu erhalten, und niedrige Löhne und eine schwache Arbeitsrechtsregulierung sind oft „Wettbewerbsvorteile“ in GPN. In diesem Zusammenhang sind Gastländer oft nicht in der Lage oder nicht willens, strenge Verpflichtungen für TNCs im Hinblick auf ArbeitnehmerInnenrechte einzuführen und durchzusetzen. Hier wird die Verpflichtung des Sitzstaates („home state“) relevant. In dieser Hinsicht sind einige wenige Staaten aktiv geworden und haben die Möglichkeit geschaffen, Unternehmen für im Ausland begangene Verletzungen von ArbeitnehmerInnenrechten vor Gericht zu bringen. Solche Regelungen sind viel versprechend, sind aber derzeit noch sehr eingeschränkt wirksam. Sie sind entweder auf schwere Verletzungen von ArbeitnehmerInnenrechten begrenzt oder verlangen, dass zumindest eine Tochtergesellschaft die Rechtsverletzung begeht, um das Leitunternehmen („lead firm“) an der Spitze von GPN zur Rechenschaft zu ziehen. Somit sind die in GPN zunehmend an Bedeutung gewinnenden Zuliefer- und Subunternehmensbeziehungen grundsätzlich nicht erfasst. Darüber hinaus muss ein starker Zusammenhang der TNCs mit der Rechtsverletzung durch die ArbeitnehmerInnen selbst nachgewiesen werden, was in GPN Konstellationen schwierig ist. Dies zeigt, dass die Verantwortung des Sitzstaates nur das letzte Mittel zum Schutz von ArbeitnehmerInnenrechten ist und dass es in erster Linie beim Gaststaat liegen sollte, entsprechend zu handeln, um ArbeitnehmerInnenrechte zu sichern. Parallel dazu sollte aber die Verantwortung des Sitzstaates weiter entwickelt und verstärkt werden.

Auf europäischer Ebene ist die EU eher zurückhaltend in Bezug auf Vorschriften für Unternehmen, um ArbeitnehmerInnenrechte in GPN zu schützen. Obwohl die EU nicht über ein explizites Mandat in dieser Angelegenheit verfügt, ist grenzüberschreitender ArbeitnehmerInnenschutz eine Frage von EU-weiter Bedeutung und EU-Mitgliedstaaten stoßen auf nationaler Ebene an ihre Grenzen. Dementsprechend ist die EU in der einzigartigen Lage und besser als jede andere Organisation geeignet, um verbindliche Rechtsvorschriften für in der EU niedergelassene, transnational tätige Unternehmen zu erlassen. Anstrengungen diesbezüglich waren bisher allerdings beschränkt und entscheidende Schritte in Richtung Rechenschaftspflicht für Unternehmen hinsichtlich ArbeitnehmerInnenrechten im Ausland warten noch immer darauf, ergriffen zu werden. Hinsichtlich laufender Initiativen wäre eine Erweiterung der oben genannten nationalen Kettenhaftungs-Regelung auf EU-Ebene ein wichtiger Schritt, um ArbeitnehmerInnenrechte zu sichern und fairen Wettbewerb innerhalb der EU sicherzustellen. Allerdings würden Beziehungen außerhalb der EU durch eine solche Struktur nicht abgedeckt werden, die Verantwortung könnte aber im Prinzip auch auf Tätigkeiten von in der EU niedergelassenen TNCs im Ausland ausgeweitet werden. Bestehende EU-Regelungen wie die „Brüssel I Verordnung“ schließen zum Beispiel die Verantwortung von Sitzstaaten ein und wurden dazu verwendet, um EU-Tochterunternehmen für ArbeitnehmerInnenrechtsverletzungen außerhalb des EU-Gebiets haftbar zu machen. Im Bereich der EU-Handelspolitik versucht die Europäische Kommission die ILO Kernarbeitsnormen durch Nachhaltigkeitskapitel in ihre bilateralen Handelsabkommen aufzunehmen. Die größte Schwäche liegt allerdings in der Umsetzung, die auf Mechanismen der Zusammenarbeit beschränkt ist. Im Gegensatz dazu ist ein Streitbeilegungsverfahren einschließlich Sanktionen nur für das restliche Abkommen vorgesehen. Der Schutz von ArbeitnehmerInnenrechten ist daher nicht auf gleichem Niveau wie der von handelspolitischen Angelegenheiten umgesetzt.

Auf internationaler Ebene ist die ILO das primäre Organ innerhalb des internationalen institutionellen Systems, das sich mit Fragen von Arbeitsrechten beschäftigt. Die ILO Erklärung über Multinationale Unternehmen (MNE-Erklärung) gibt Empfehlungen für „gute Unternehmensführung“ und genießt eine breite Unterstützung durch die ILO-Mitgliedstaaten und die nationalen Sozialpartner. Allerdings gibt es keine rechtsverbindlichen Instrumente zur Sicherung und Überwachung der Umsetzung der MNE-Erklärung. Der vor kurzem gegründete ILO Helpdesk konzentriert sich ebenfalls auf die Bereitstellung von Informationen für das Management und ArbeitnehmerInnenvertreterInnen von TNCs im Alltag. Im Gegensatz dazu stellt eine dritte Initiative, das neu eingeführte „Better Work“ Programm, einen neuen ILO-Ansatz dar, da sich die ILO hier zum ersten Mal mit der Überwachung des Privatsektors befasst. Versuche zur Einführung verbindlicher Regelungen zum Schutz von Menschenrechten (einschließlich der Kernarbeitsnormen) in anderen UN-Gremien wurden von Unternehmen und ihren Interessensverbänden sowie von einigen Staaten bekämpft. Stattdessen ernannte die UNO einen Sonderberater – John Ruggie – der das Rahmenkonzept „Schützen, Respektieren, Beheben“ (Protect, Respect, Remedy) eingeführt hat. Ungeachtet seiner Verdienste stellt das Ruggie-Konzept eine minimale Grundlage für Unternehmen dar und es ist noch nicht sichergestellt, dass Unternehmen, die nicht zur Achtung der Menschenrechte bereit sind, zur Rechenschaft gezogen werden, da ein wirksamer rechtlicher Rahmen für die Rechenschaftspflicht, einschließlich wirksamer Beschwerdemechanismen fehlt. Die OECD-Leitsätze sind bis heute die einzigen internationalen weichen Rechtsinstrumente mit einem Beschwerdemechanismus. Da die Richtlinien in der Regel einen „investment nexus“, also eine Transaktion, die dem Investment eines TNC entspricht, erfordern, ist ihre Wirksamkeit von Anfang an begrenzt. Hinsichtlich der Definition des „investment nexus“ bestehen erhebliche Auffassungsunterschiede und die Interpretationen der Nationalen Kontaktpunkte – die Beschwerdemechanismen der OECD-Leitsätze – unterscheiden sich hierzu deutlich.

Als Reaktion auf den öffentlichen Druck wurden Verhaltenskodizes (Codes of Conduct – CoC) von Unternehmen eingeführt, die in der Regel grundlegende Arbeitsrechte in Anlehnung an die ILO-Kernarbeitsnormen enthalten. Es zeigt sich, dass obwohl CoC – in gewissem Maß – einen positiven Einfluss auf den Schutz von ArbeitnehmerInnenrechten in GPN hatten, sie in der Praxis weniger wirksam sind als erwartet. Daher müssen sie als nur ein, und sicherlich nicht als der vielversprechendste, Zugang zum globalen Schutz von ArbeitnehmerInnenrechten gesehen werden. Die größten Einschränkungen sind die freiwillige und nicht-standardisierte Natur dieser Instrumente in Bezug auf Gestaltung und Inhalt sowie Umsetzung und Überwachung; die begrenzte Kohärenz der Einkaufs- und Beschaffungspraxis von TNCs auf der einen Seite sowie der CSR-Anforderungen in CoC auf der anderen Seite; und die mangelnde Auseinandersetzung und Zusammenarbeit mit Arbeitsinspektoren und Arbeitsministerien sowie ArbeitnehmerInnenorganisationen, die die langfristige Wirksamkeit dieses Instrumentes behindern.

Auf der Ebene des sozialen Dialogs wurden europäische und internationale Rahmenabkommen (European and International Framework Agreements, EFAs und IFAs) zwischen TNCs und europäischen und globalen Gewerkschaften unterzeichnet, um den sozialen Dialog zwischen ArbeitgeberInnen und ArbeitnehmerInnen auf die Standorte außerhalb des Sitzstaates auszuweiten. Ihre Wirksamkeit hängt von einer Reihe von Faktoren wie die Art des Produktionsnetzwerkes, das Engagement der Leitunternehmen und die Kapazitäten sowie das politische Umfeld der beteiligten Gewerkschaften ab. Europäische und internationale Rahmenabkommen sind sicherlich vielversprechende Instrumente, die unterstützt und in einen größeren Rechtsrahmen eingebettet werden sollten, der die Durchsetzungsmöglichkeiten von EFAs und IFAs stärkt.

Neben den in diesem Bericht gemachten Vorschlägen, die bestehenden Instrumente für den Schutz von ArbeitnehmerInnenrechten zu verbessern, um sie effizienter im Kontext von transnationalen Unternehmensaktivitäten und komplexen globalen Produktionszusammenhängen zu gestalten, wird

ein internationaler Rechtsrahmen, der TNCs für die Verletzung von ArbeitnehmerInnenrechten in GPN zur Rechenschaft zieht, etwa ein internationales Übereinkommen zur Bekämpfung von Menschenrechtsverletzungen durch TNCs, benötigt. Obwohl es Zeit brauchen wird, um politische Zustimmung für eine solche Struktur zu erreichen, steigt der Druck von öffentlichen Interessensgruppen wie Gewerkschaften, kritischen KonsumentInnen und NGOs und Gerichtsverfahren, die TNCs für ArbeitnehmerInnenschutzverletzungen zur Rechenschaft zu ziehen versuchen, nehmen zu. Die derzeitige internationale institutionelle Schieflage, die rechtlich bindende Mechanismen hinsichtlich Handel und Investitionen favorisiert, während sie gegenüber der Einführung von solchen Mechanismen bei ArbeitnehmerInnenrechten sehr zögerlich ist, muss geändert werden. Daher sollten die Patchwork-Aktivitäten, die im Zuge dieser Studie identifiziert wurden, auf der einen Seite unterstützt und weiter entwickelt werden. Auf der anderen Seite müssen sie aber auch um eine konzertierte Anstrengung zur Schaffung international verbindlicher Regelungen für ArbeitnehmerInnenrechte- und anderer Menschenrechtsverletzungen von TNCs ergänzt werden.

1. INTRODUCTION

In today's global economy, international trade and global production are increasingly organised in highly fragmented and geographically dispersed production networks where transnational corporations (TNCs) break up the production process in different parts and locate them in different countries on a global scale. These transformations have important consequences for the development prospects of countries, regions, firms and workers. While the impacts of these changes on countries, regions and firms have been studied rather extensively, comparatively little has been said about the effects on workers and labour rights. This report builds on the findings gathered by the authors in the study "Labour Rights in Global Production Networks - An Analysis of the Apparel and Electronics Sector in Romania" (2009) which attempts to fill this gap and analyses how global production networks (GPN) are configured and how the incorporation of firms into these networks impacts on the position of workers and their rights. The findings of the study indicate that in the apparel and electronics sectors labour rights that are in potential conflict with prevailing business logics inherent to GPN such as living wages, working time, work intensity and trade union rights remain contested. While improvements have been made in areas such as health and safety that constitute potential 'win-win' situations as they also relate to process upgrading from the point of the firm, the aforementioned rights would impose certain restrictions with regard to costs and flexibility and thus are in conflict with the business interests of lead firms in GPN. The study further highlighted an 'accountability gap' for labour rights in the context of GPN which raises the question of how transnational corporate activities and complex global production arrangements can be regulated to secure labour and other human rights¹.

In the light of these findings this report addresses the following question: What are the options available to secure labour rights in GPN? So far, most studies that address employment issues in the field of GPN consider workers in the sense of labour - a factor of production. A limited but increasing number of studies explicitly address workers as active agents (Hess 2009, Barrientos/Gereffi/Rossi 2008). Perceiving workers as agents underlines their entitlements and rights. In this context the human rights framework offers guidance on how to address problems of responsibility and accountability for labour rights in GPN, as it offers a normative framework that identifies rights-holders and duty-bearers based on universally recognised normative standards. For historical reasons and given the structure of international law, the human rights framework focuses on the state as the key agent in the human rights arena. Only fairly recently, the focus has started to shift and besides the state also non-state actors (e.g. private individuals, companies, particularly TNCs) have been identified as secondary duty bearers for human rights responsibilities besides the state. At the same time, the redefinition of the role of the state in the context of globalisation has led to a new set of regulatory mechanisms that emerged at the national and international level. At the international level a variety of primarily soft law instruments which are not legally binding emerged in the attempt to secure key labour rights worldwide. These include guidelines of international organisations (for example the

¹ In the context of this study, labour rights include the core labour standards as defined by the ILO (freedom of association, right to collective bargaining, prohibition of forced labour, prohibition of child labour, non-discrimination in employment) and labour-related human rights (the right to work, including adequate remuneration, and the right to rest, including reasonable working hours, as well as the right to health as far as it concerns health and safety at work). These standards are also covered in the 'Basic Code of Labour Practice' of the International Confederation of Free Trade Unions (ICFTU) which is broadly used by trade unions, NGOs, multi-stakeholder initiatives and academics. Thus, labour rights as referred to by this study are labour-related fundamental human rights.

OECD Guidelines, ILO Tripartite Declaration, UN Draft Norms) and self-regulation at the sectoral or firm level (e.g. Codes of Conduct (CoC)). International Framework Agreements concluded between Global Union Federations and TNCs are more recent instruments aimed at securing workers rights on the international level.

Given the existing and emerging options at the national, macro-regional (European) and international level, this report ventures into the current developments at these levels and attempts to assess the effectiveness of different instruments with regard to labour rights protection in the context of GPN with a focus on legal and policy instruments on corporate accountability and regulation. The objective is to introduce different options, describe their merits and limitations and discuss how they can be made effective for securing labour rights in GPN. Instruments which have been used widely or have in particular been developed to secure labour rights in GPN such as CoC or different types of chain liability in subcontracting relationships are discussed as well as instruments which are currently used in other contexts but could be made effective for the context of GPN. The analysis of the configuration of apparel and electronics production networks and labour rights issues in these networks in Romania was the main focus of the previous report and created an analytical and empirical basis from which this research can depart.

The development of regulatory mechanisms that are or can be made applicable to secure labour rights in GPN has been slow. This is due to the cross-border dimension of these networks that require cross-territorial cooperation between state authorities, and the complexity of and asymmetric power relations between actors in GPN. These relationships have become increasingly complicated from a legal and labour rights perspective due to the increasing importance of supplier and subcontracting relationships versus subsidiary and equity relationships in GPN. This is related to lead firms' strategies to concentrate on their core competencies such as research and development (R&D), marketing and branding and outsource production and increasingly other functions that were formerly considered core activities such as input sourcing or design to firms TNCs do not own and to countries with cost-advantages. Thus, TNCs have not only relocated certain activities to developing and 'transition' countries but also increasingly moved away from direct forms of control over production (e.g. through equity relationships embodied in foreign direct investment (FDI)) towards more indirect forms (e.g. outsourcing and subcontracting to suppliers). Equity relationships mean that lead firms own the production plants in foreign countries and thus there is a headquarters-subsidiary relationship between firms in different countries. However, in many sectors supplier relationships have increased in importance where lead firms work with legally independent supplier firms, in particular in the apparel sector where these relationships have been the norm for decades, but increasingly in the electronics sector as well. These different relationships are important from a legal point of view as will be discussed in the report.

The material gathered for this study consists of a literature review and analysis of the legal and policy regimes along with the case law, policy statements and publications by social partners and policymakers which are relevant for the protection of labour rights in GPN. This analysis was complemented by experts interviews on the national, EU and international level (see Annex). The study seeks to pinpoint current developments as well as shortcomings in order to fill a knowledge gap on this complex issue.

The report is structured in four sections. Chapter 1 discusses instruments on the national level by presenting the human rights responsibilities of states where labour rights violations occur (host states) and states where TNCs reside which can be made accountable for labour rights violations (home states). In this context, promising legal instruments on the national level to secure labour

rights in sub-contracting relationships that are a dominant feature of GPN will be presented as well as case law demonstrating home state responsibility.

Chapter 2 is dedicated to the analysis of the European level and assesses the relevant legal and political regimes and settings within the EU. Relevant regulations such as the Brussels Regulation as well as legal instruments that are applicable in other areas but could be used to secure labour rights in GPN (e.g. the EU Council Framework Decision on combating trafficking in human beings) will be analysed. The chapter closes with the presentation of European social dialogue activities and how EU Free Trade Agreements relate to the protection of labour rights.

Chapter 3 presents the rich soft law developments on the international level. Instruments and initiatives from international institutions such as the ILO, the UN and the OECD will be analysed and discussed regarding their implications for the protection of labour rights on the global level. Further, a brief overview on the field of business-initiated CoC at the sectoral and firm level will be followed by a discussion of the possibility of making company CoC legally binding through contractual obligations of civil law. Finally, a new instrument advocated by the international trade union movement will be considered - International Framework Agreements which are negotiated between global unions and TNCs and can be viewed as an emerging form of cross-border social dialogue.

The report concludes with current trends and recommendations on how to safeguard labour rights in GPN to, at least, narrow the global “accountability gap”.

2. INSTRUMENTS ON THE NATIONAL LEVEL

This first chapter focuses on the national level and discusses human rights responsibilities of states where labour rights violations occur (host states) and states where TNCs reside which can, in certain situations, be made accountable for labour rights violations (home states). In this context, the state's duty to protect and legal instruments to secure labour rights in sub-contracting relationships will be presented as well as case law demonstrating home state responsibility.

2.1 Host state and home state responsibility

In order to analyse state responsibility for labour rights in GPN, it is useful to distinguish between home state and host state responsibility. Host state responsibility is established when a labour rights violation takes place on the territory of that state. On the other hand, we speak of home state responsibility when a state becomes liable for labour rights violations outside of its territory. Here, other factors than territory are the basis for such a liability, for instance because the labour rights perpetrators are residents in the territory of the home state. In relation to GPN, home state responsibility is relevant if a labour rights violation occurs in a subsidiary or a supplier firm of a corporation which has its headquarters in another state. In this case, the state where the headquarters of the TNC are located is the home state and the state where the labour rights violation takes place is the host state.

Home state responsibility is an exceptional occurrence. Usually, any interference with the territorial sovereignty of a state requires very good reasons to be justified. As will be seen by the example of the US Alien Tort Claims Act, only grave human rights violations, such as forced labour, will be such a good reason to interfere with another state's sovereignty and thus reach out to adjudicate human rights violations beyond one's own border. The rationale behind this cautionary approach is the assumption that states may use the argument of home state responsibility to influence other states' political affairs. Thus, home state responsibility is and will most likely remain an instrument limited in reach. Before analysing the advantages and disadvantages of home state responsibility, we will first turn to the "common situation" of host state responsibility.

2.2 Host state responsibility

2.2.1 The state duty to protect labour rights against violations of non-state actors

The host state has the legal responsibility to respect, protect and fulfil human rights for the benefit of all persons present on its territory.² The duty to respect means that the state must not commit human rights violations, whereas the duty to fulfil human rights entails the duty to realise human rights, for example by establishing primary health care services to realise the right to health. The responsibility to protect human rights includes the responsibility to prevent and sanction human rights violations by third parties, e.g. non-state actors, including businesses through legislation or other appro-

² For details see Manfred Nowak, Introduction to the International Human Rights Regime (2003).

appropriate measures. The responsibility to protect human rights is firmly embedded in all major human rights treaties. The Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Racial Discrimination explicitly state this responsibility; concerning other human rights treaties, the responsibility to protect has been developed by interpretation of the respective treaty-based bodies.

More specifically, the Committee on Economic, Social and Cultural Rights, outlining the right to health, says: "While only States are parties to the Covenant and thus ultimately accountable for compliance with it, all members of society - individuals, including health professionals, families, local communities, intergovernmental and non-governmental organizations, civil society organizations, as well as the private business sector - have responsibilities regarding the realization of the right to health. State parties should therefore provide an environment which facilitates the discharge of these responsibilities."³

Thus, the Committee identifies the primary or ultimate responsibility of state parties but stresses a secondary or additional responsibility of private actors. Clearly, the state must create the legal, administrative and political framework for private actors to act on these responsibilities. And, if human rights violations of these actors occur, the state must provide means of sanction and redress as the ultimately accountable actor.

A body of case law has been developed on the state duty to protect to clarify its scope.⁴ These cases show that the duty to protect human rights against undue interference by third parties has been further developed and strengthened. According to the courts, the duty to protect includes active and effective steps of implementation – inactivity to fulfil this duty may lead to accountability for failure of the duty to protect human rights. More specifically, it means that the state has to create a regulatory framework and effective protection mechanisms (for example monitoring mechanisms) to protect individuals against current violations and to prevent potential violations. If the state is inactive or not active enough in creating such a framework, it may be accountable for the human rights violations of a third party. In assessing whether a failure of duty occurred, the courts apply the "due diligence" principle (duty to act diligently and reasonably)⁵ and the proportionality principle (fair balance between interest in interference and degree of interference with the right in question). For instance, in the case *Ledyayeva v. Russia*, the applicants brought suit against Russia arguing that the emissions of a steel plant near their homes endangered their well-being and health and thus constituted a violation of their rights relating to Article 8 (right to private and family life). The central question in this case, according to the Court, was how the Russian State protected the rights of the applicants by regulating private industry. The Court noted that the company's environmental protection policy was not legally binding and its realisation depended to a large extent on the good will of the plant management.⁶ Therefore, the Court concluded that a violation had taken place and the state was made accountable for the human rights violation of the operator of the steel plant.

A problem with the responsibility to protect labour rights by host states in the context of GPN is that power relationships within GPN are asymmetric and often involve a TNC based in a developed country and supplier firms in developing or 'transition' countries. Low wages and weak labour rights regulation are often 'competitive advantages' in GPN, in particular in the labour-intensive apparel and hardware electronics sectors, and access to GPN may be based on low wages and weak labour

³ Committee on Economic, Social and Cultural Rights, General Comment on the Right to Health, Nr. 14, Art 42.

⁴ See the cases *Velásquez Rodríguez v. Honduras*, *X and Y v. The Netherlands*, and *The Social and Economic Rights Action Center for Economic and Social Rights v. Nigeria*.

⁵ Equivalent to the German term „Sorgfaltspflicht“; due diligence can be defined as "diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation", see Black's Law Dictionary (2006).

⁶ *Ledyayeva*, para. 108.

rights regulation. Thus, host states balance their interest with regard to quantity of employment and exports with their interest to protect labour rights. An accountability gap becomes evident where host states are unable or unwilling to protect labour rights on their territory in the context of global competition and asymmetric power relationships in global production arrangements.

In the following section, we will review an interesting regulatory regime expressing the state duty to protect human rights in sub-contracting relations - so-called chain liability regimes.

2.2.2 National liability regimes of subcontractors for labour rights violations

As has been discussed above, subcontracting relationships (also called supplier relationships) are very common in GPN. Subcontracting in this context means that a client (in the GPN setting a lead firm or a buyer) outsources certain activities to another firm (in the GPN setting a direct or first tier supplier) and this firm extends parts or all of these activities to one or several other firms (in the GPN setting an indirect or second or third tier supplier) and so on. Given the rise of subcontracting relationships where lead firms as well as direct suppliers of lead firms subcontract work to another firm that in fulfilment of the contract violates labour standards national liability regimes have emerged recently to protect labour rights in these complex relationships⁷. The objective of these systems is to ensure that basic labour standards such as the payment of wages and social security contributions are met even if production is subcontracted to one or more local or foreign suppliers. The indirect aim is to secure social security systems and avoid a “race to the bottom” as well as the prevalence of undeclared work. However, these regimes are currently only applicable in the construction sector where such complex subcontracting relationships are common. Further, the employment relationship has to take place in the country where the lead firm is located which is relevant for the construction sector but of limited use for other sectors where employment relationships are transnational. The interesting feature of these liability regimes is that they enable workers to hold not only their immediate employer accountable but also the employer’s customer, i.e. the lead firms, buyer or the first-tier supplier, for violations of certain labour rights. So far, a handful of EU member states have developed such national liability systems. These are Austria,⁸ Belgium, Finland, France, Germany, Italy, the Netherlands, and Spain. Thus, this regime is not a common EU standard yet (see section 3.1.3).

Concerning the liability arrangements, relevant parties include the ‘guarantor’, ‘debtor’ and ‘creditor’. The ‘guarantor’ is made liable for paying the debts of the ‘debtor’ to the ‘creditor’ if the ‘debtor’ defaults. In the context of GPN a ‘guarantor’ is usually the principal contractor which can be the lead firm, buyer or the first-tier supplier. A ‘debtor’ is someone who is in debt regarding the obligation to pay wages, social security contributions etc. In the GPN context this mostly concerns the subcontractor, being the employer of the workers involved – for instance the first-, second- or third tier suppliers. If the debtor does not fulfil the abovementioned obligations vis-à-vis the ‘creditor’ - the worker - the ‘creditor’ can hold the guarantor directly accountable. The following diagram shows the relations in question:

⁷ European Commission, Modernising labour law to meet the challenges of the 21st century, Green Paper, COM(2006) 708 final.

⁸ Law Nr. 91/2008, Haftung bei Beauftragung zur Erbringung von Bauleistungen. For a detailed analysis of the Austrian legislation see Batrix Bartos and Peter Maska, Generalunternehmerhaftung. AuftraggeberInnen-Haftungsgesetz, § 67a – 67d und § 112a ASVG, http://www.wkw.at/docxtern/sgewerbe/oeffentlichkeitsarbeit/navigationspunkt_service/Generalunternehmerhaftung_Neu.pdf.

Table 1: Liability Relations

Category of person	Category of liability	GPN category
Client	Guarantor	Lead firm
Contractor	Guarantor/debtor	Direct or 1st tier supplier
Subcontractor	Debtor	2nd tier supplier
Subcontractor	Debtor	3rd tier supplier
Worker of subcontractor	Creditor	Worker of supplier

In these regimes, two categories of liability can be distinguished, (1) joint and several liability and (2) chain liability. In cases of joint and several liability, the contractor and the subcontractor can both be held liable for the entire debt of the subcontractor regardless of the degree of fault or responsibility. Thus, two actors in the chain can be made liable with the objective to hold the actor liable with the more promising financial resources. Regarding chain liability, not only the two contracting parties, but the whole chain – that is each firm in the chain – is liable for the debt. In view of the objective of recovering “essential debts” such as wages, this is clearly the more extended liability system. It is also the scheme more commonly used by EU member states. Some regimes use mixed forms of these categories or both for different categories of obligations. For example, the Austrian law uses different types of liability for posted workers within the EU and outside of the EU.⁹ The national liability systems cover three main categories of debts: wages, social security contributions, and taxes on wages.¹⁰

Looking at the scope concerning workers, this legislation has one profound limitation. Only workers who are in a formal employment relationship with a contractor or sub-contractor are covered by these regimes, including part-time and temporary workers. All regimes have specific provisions for the particularly vulnerable group of temporary workers. However, workers in informal working relationships do not have any protection. In addition, implementation and protection is more difficult to achieve for particular categories of workers, such as posted workers (workers from other countries).

In terms of territorial scope, the regimes apply throughout the country, including services provided in the country by foreign contractors and subcontractors. However, a central limitation of this instrument is that it only covers employment relationships within one country’s territory or in the future potentially within the EU’s territory (see section 3.1.3) but not employment relationships which span over different countries. Thus, even though the subcontracting relationship can be transnational as it may involve suppliers from a foreign country, the labour rights violation has to take place within the country where the client (lead firm) is located. In most GPN, supplier and employment relationships are transnational as many sectors are not bound to a place such as the construction sector where workers have to move instead of products or services.

Several regimes foresee measures in the attempt to prevent liability, and sanctions to deter incidences of unlawful behaviour leading to liability. One of these preventive measures is to verify the reliability of the subcontractor. The key actors (especially the potential guarantor) have the incentive to verify or have their partners verify how trustworthy their subcontractors are, for instance by includ-

⁹ See § 7a (2) and § 7c AVRAG (Arbeitsvertragsrechts-Anpassungsgesetz).

¹⁰ For a detailed analysis of the different legislations see Houwerzijl and Peters, Liability in Subcontracting processes in the European Construction Sector (2008), <http://www.eurofound.europa.eu/pubdocs/2008/94/en/1/EF0894EN.pdf> (accessed 9th June 2009).

ing a contractual clause obliging the contract partners to verify the reliability of their subcontractors, or to subcontract only after prior consent of the client. Legislation may provide the option or obligation to check the references of the subcontractor, request proof of a payroll number, etc. In Austria, companies have two avenues to be exempted from liability. They may join a specific list of reliable companies (“Liste der haftungsfreistellenden Unternehmen”) that is kept and monitored by the social security authorities. Or, the contractor may pay 20% of the payment directly to the social security authorities and the remaining 80% to the subcontractor.

Sanctions when breaches of the law occur are foreseen in most member states in the form of fines. Austria and Italy stipulate the exclusion from public tenders in cases of fault. Finland additionally foresees confiscation of property in cases of criminal offenses (e.g. discrimination at work) and France, inter alia, the temporary closure of temporary work agencies which is quite a severe form of sanction.

An interesting aspect for the purpose of this study is the possibility for workers to file complaints. In most member states, workers are entitled to legal action against their employer and, depending on the specific regime, also against the contractor or client of the employer. Before starting a lawsuit, a formal request to the employer is necessary. Usually, trade unions offer legal aid to their members in such cases, and trade unions in some member states are entitled to initiate legal proceedings on behalf of the workers concerned. As regards posted workers, the posting of workers directive foresees the right of the posted worker to start proceedings in the state where they work. However, support of trade unions is not always given as such workers are usually not trade union members – only Germany reports a representation particularly for migrant workers. A specific situation is covered by French legislation: when foreign workers are undeclared and have no work permits, they are nevertheless entitled to receive wages.¹¹ In Finland, the liability schemes in the collective agreements only become operable through the dispute settlement system of the social partners. In Belgium and the Netherlands, workers may lodge a complaint about unpaid or unacceptably low wages with the labour inspectorate. In Spain, works councils may monitor compliance and file complaints with the employer or the competent legal bodies.

These regimes seem to be effective in securing workers rights in regular employment relationships. However, for temporary workers and posted workers, as well as the “invisible” informal workers that are not covered at all, the current regimes are inadequate. An example from Austria may serve to highlight some aspects regarding the increased vulnerability of these workers and, hence, the need to address their specific situation. It was found that Hungarian workers were not treated equally with Austrian workers. The practice of deducting accommodation and food costs from wages has been a frequent phenomenon (interview Austrian Chamber of Labour 2009). This unequal treatment is hardly deterred. Language barriers, inadequate information of posted workers of their rights, the burden of cross-border court proceedings and sometimes inadequate support by trade unions enhance this problematic setting. Moreover, the economically and legally precarious position of posted workers in general makes them less inclined to initiate legal proceedings. And if they do, it was reported that some employers replaced them with workers who did not know of these rights (interview Austrian Chamber of Labour 2009).¹²

To conclude, this instrument has three central limitations with regard to its effectiveness for securing labour rights in GPN: First, it is only applicable for the construction sector and not for other sectors

¹¹ Huwerzijl and Peters 2008: 27.

¹² To enhance effectiveness concerning temporary workers, some member states have introduced soft-law mechanisms. In France, employer associations and trade unions signed legally non-binding agreements to comply with legislation and avoid liability. In the Netherlands, the industry introduced self-regulatory norms to prevent user firm liability in relation to temporary workers. In addition, some collective agreements oblige the employer to use a specifically qualified agency.

where complex subcontracting relationships have become the norm. Second, it does not cover all types of workers with the same level of effectiveness. Informal workers are excluded from the scheme as only workers who are in a formal employment relationship with a contractor or subcontractor are covered. Protection is more difficult to achieve for particular categories of workers, including part-time and temporary workers and in particular posted workers. Third and most important, the instrument only covers employment relationships within one country's territory but not employment relationships which span over different countries which is the norm in most GPN which are not bound to a place such as the construction sector. Besides these important limitations, this regime bears great potential if enacted and implemented at the European or even international level and if extended to more sectors (see section 3.1.3).

Another interesting instrument to protect labour rights in subcontracting arrangements where states are involved is by means of awarding public contracts which explicitly require specific social minimum criteria. In the following section we will look at this regime more closely.

2.2.3 Socially responsible public procurement

In recent years the concentrated buying power of public authorities has been identified as a lever to influence business practices and thereby impact on the social and ecological record of firms.¹³ For instance, in the case of the EU, the volume of public procurement amounts to roughly 1.500 billion EUR annually, or roughly 16% of the members states GDP. States buy clothing for uniforms and office workers, PCs and other electronics products as well as coffee, tea, and other beverages and food products besides other goods and services.

With two directives on public procurement¹⁴ the European Commission (EC) provided member states with the possibility to adopt national procurement laws that allow the consideration of social and ecological criteria when awarding public contracts. Social and ecological criteria however remain a secondary aim of public procurement and must always be reconciled with the primary objective of economic efficiency. Additionally, such a procurement procedure must be transparent, non-discriminatory vis-à-vis the potential suppliers and not unnecessarily inhibit the free flow of goods and services. This regime is interesting for securing labour rights in GPN because it enables the public authority as the buyer – within limits as just mentioned – to promote firms which seek to monitor and secure labour rights in their supply chains.

In general, socially responsible procurement can be defined as “procurement operations that take into consideration, inter alia, the promotion of employment opportunities, build-in safeguards with respect to the standards of working conditions, strive to support social inclusion (including persons with disabilities), social economy and SMEs, promote equal opportunities and ‘accessibility and design for all’, take into account Fair and Ethical Trade issues as well as human and labour rights and seek to achieve wider voluntary adherence to CSR while observing the principles of the EU treaty and the EU Procurement Directives” (Binder 2008: 10).¹⁵

¹³ On the potential of this instrument see also John Ruggie, Business and Human Rights: Further steps toward the operationalization of the „protect, respect and remedy“ framework, para. 31., A/HRC/14/27, 9 April 2010

¹⁴ These are: Directive 2004/18/EC for public works contracts, public supply contracts and public service contracts; Directive 2004/17/EC on the sectors of water, energy, transport and postal services. The directives apply only above certain thresholds, for example, EUR 137 000 for public supply and service contracts awarded by central government authorities. See also Interpretative Communication of the Commission on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement, COM (2001) 566 final.

¹⁵ Binder, Proposed Elements for taking into account the Social Considerations in Public Procurement (2008).

There is a certain awareness among EU member states and some interest in this instrument, in particular in the area of ecological procurement ('green procurement'). However, national and local authorities are reluctant to go forward because of the lack of legal guidance and uncertainty on how the outcomes can be measured in to weigh them against the cost of such procurements (Trybus 2008: 2).¹⁶ According to the EC, a guide on how to implement social considerations in public procurement will be published in 2010 (interview DG Employment 2010). With regard to legislation of individual member states there is only limited coverage of social considerations so far. In Denmark, requirements for decent work according to ILO standards are integrated and some other EU member states have introduced regulations on social standards in public procurement.¹⁷ However, little is available on regulation throughout the supply chain.

A public procurement tender consists of the product which is being procured (subject matter of the contract) and the conditions it must fulfil (technical specifications or performance-based requirements). There may be additional considerations that make the awarding of the contract more likely (award winning criteria), and lastly, the successful bidder may be required to fulfil the contract according to certain requirements (performance in carrying out the contract). For example, in the procurement of uniforms, uniforms would be the subject matter, the requirement that some items must be waterproof a technical specification; additional requirements f.e. of practicability of the uniforms could be award-winning criteria, and the adherence of the successful bidder to certain standards in carrying out the contract would be performance criteria.

Thus, in general, there are four approaches to include social considerations in the procurement procedure:

- Option 1: inclusion in the subject matter of the contract and/or in the technical specifications which must be related to the subject matter of the contract,
- Option 2: prohibition of obtaining a public contract for any firm failing to meet standards,
- Option 3: inclusion of social considerations as award criterion,
- Option 4: compliance of award-winning contractor with social standards in carrying out the contract (performance criteria).

It seems that the inclusion of social considerations as contract performance criteria (option 4) is the least problematic possibility (Buchmüller 2009) because in contrast to option 1 and 3 they do not have to be intrinsically related to the product. For example, proof that the supply chain of a bidder is transparent is not a "bonus" which can be considered as a technical specification or an award winning criterion because a transparent supply chain does not make the product itself a better one.¹⁸ For instance, the Swedish National Road Administration's contracts include a standard clause referring to the UN Global Compact and obliging the contractor to follow certain conventions when executing the contract in Sweden (ILO and UN conventions, including core labour standards). The contractor, according to the same clause, must comply with certain reporting requirements designed to verify that goods and products used in the performance of the contract have been produced in a safe environment according to the rules of the conventions mentioned. Goods found to be in conflict with this provision must be replaced at the contractor's expense. The contractor must ensure that subcontractors abide by the same obligations. A penalty is payable for any breach of these social obligations of the contractor (Binder 2008: 63/4). This possibility is also explicitly noted by the EC.

¹⁶ Martin Trybus, Country Legal and Policy Review for SRPP in Denmark, Annex I, June 2008.

¹⁷ See European Commission, DG Employment, Corporate Social Responsibility. National public policies in the European Union (2007), available at <http://ec.europa.eu/social/main.jsp?catId=331&langId=en&pubId=61&type=2&furtherPubs=yes> (accessed 27 January 2010).

¹⁸ Weed/CorA, Nachweispflicht und Kontrolle bei der FAIRgabe, Fachgespräch, Berlin 2009, protocol available at http://www.cora-netz.de/?page_id=71 (accessed 4 February 2010).

The Commission states that “Contracting authorities have a wide range of possibilities for determining the contractual clauses on social considerations”, for example, the obligation to comply with the substance of the provisions of the ILO core conventions during the execution of the contract, in so far as these provisions have not already been implemented in national law (Commission 2001:16).¹⁹

Including social conditions as contract performance criteria is the least intrusive but also the weakest avenue to include social standards. The Austrian „SO:FAIR“ initiative proposes to include verifiable social standards in the technical specifications of the product (option 1) as in the case of fair trade products but concedes that this may be contested in the framework of EC law.²⁰ In this regard, several legal initiatives to include fair trade in the transposition of the EC directives on public procurement are currently ongoing. Recently, a case on the procurement of Max Havelaar products has been decided by a Dutch court,²¹ ruling in favour of the tender of fair trade coffee mandated by the Province of Groningen²² which demonstrates that it is possible to award the tender to a contractor who adheres to fair trade principles. The CorA network, a similar initiative in Germany, suggests that duties of the bidder to verify and report should be as clearly as possible defined in the procurement procedure in order to achieve a satisfying outcome in the implementation process and recommends to establish a central service body (“Servicestelle für sozial-ökologische Beschaffung”) which would also verify that the social conditions in the supply chain are adhered to.²³ In a number of countries, NGO and trade unions²⁴ as well as state and regional initiatives²⁵ provide guidance on how to procure fairly without violating procurement law.

In conclusion, this instrument has quite some potential and is going to be further explored on the EU level in the next years, as it is one of the top CSR priorities on the agenda of the EC (interview DG Employment 2010). Products that are produced fairly according to core labour standards and sourced in GPN could be supported by way of public procurement. However, current initiatives focus on ‘green procurement’ and on national employment and equity considerations without looking at labour rights further down in the production network. This is a profound limitation in the application of this instrument as most GPN are transnational in nature and involve suppliers located in different countries. Its main limitation however is that public procurement has to follow the primary aim of being economical and social considerations are only secondary.

Host state responsibility, especially in countries outside of the EU, may be compromised by a variety of factors in the context of GPN and related competitive pressures and power asymmetries. States compete with each other to attract FDI and supplier contracts, and low wages and weak labour rights regulation are often ‘competitive advantages’ in GPN. In this context host states may be unable or unwilling to introduce severe obligations on TNCs with regard to labour rights.²⁶ Some labour rights violations that TNCs are accused of have actually been committed in complicity with or at least in acquiescence with the host state. This situation creates an ‘accountability gap’ and home states would have a responsibility to act. In the next section, we consider the latest developments in

¹⁹ European Commission, Interpretative Communication on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement, 15.10.2001, COM(2001) 566 final, available at http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001_0566en01.pdf.

²⁰ Südwind, Handbuch Sozial faire Beschaffung (2010), 40.

²¹ Verdict 23/11/2007, DE Groningen, case nr. 97093/KG ZA 07-320.

²² FLO-I/IFAT/NEWS/EFTA, Policy Paper on the European Commission’s Guidelines for Socially Responsible Procurement (2008), p. 3 and Trybus, Country Legal and Policy Review for SRPP in Denmark, Annex I, 5.

²³ CorA, Soziale und ökologische Beschaffung jetzt! 2009, available at http://www.cora-netz.de/?page_id=71 (accessed 4th February 2010).

²⁴ For example SO:FAIR in Austria and CorA in Germany. WEED has produced guidelines on the fair procurement of computers: WEED, BUY IT FAIR, Leitfaden zur Beschaffung von Computern nach sozialen und ökologischen Kriterien (2009), <http://www.buyfair.org/index.php?id=4502> (accessed 4th February 2010).

²⁵ See section above, for example the UK guidelines, or the guidelines of the German “Städtetag”, Die Berücksichtigung sozialer Belange im Vergaberecht, Hinweise für die kommunale Praxis (2009), available at <http://www.staedtetag.de/10/schwerpunkte/artikel/00008/zusatzfenster60.html>, (accessed 4 February 2010).

²⁶ Olivier de Schutter, Towards Corporate Accountability for Human and Environmental Rights Abuses (2007), 3.

the area of home state responsibility.

2.3 Home state responsibility

As previously mentioned, home state responsibility describes the accountability of states for human rights violations committed outside of their territory. States may exercise extraterritorial jurisdiction over human rights violations committed abroad if certain links to the state exist, such as the perpetrator or victim being a national of that state²⁷, or – in the case of companies – if they are seated or have their principal business activity in that state. In the following section, legal regimes expressing home state responsibility and decisions of courts on the exercise of this responsibility which are related to the subject of this study will be presented. Home state responsibility is relevant for securing labour rights in GPN as this responsibility requires states to hold companies accountable for certain labour rights violations committed abroad, because, for example, workers were forced to work for the state that cooperated with the company (see Unocal case) or because subsidiaries of the company violated labour rights (see Lubbe case).

2.3.1 US: The Alien Tort Claims Act

The Alien Tort Claims Act²⁸ (ATCA) allows non-US citizens to seek redress for civil liability claims in US courts. Claims are limited to damages for behaviour in violation of international law such as grave human rights violations (e.g. child labour or forced labour). This statute had hardly been used until 1980 when Dolly and Joel Filartiga sued a policeman from Paraguay who had tortured and murdered one of their family members.²⁹ This case could be filed with a US court because the policeman from Paraguay was in the US at that time. This case showed that redress could be gained in a US court if a violation of international human rights law took place even outside of US borders. In the course of time, further complaints were filed, including the case of Doe v Unocal³⁰ where the court held that ATCA claims can also be brought against private enterprises. In this landmark case, a group of peasants from Myanmar sued the US American oil & gas company Unocal in the Central Californian District Court, claiming grave human rights violations of Unocal's partners, the Burmese government, committed by the state military and police forces, including allegations of forced labour. To be able to have the case heard by a US court, complicity of the US company in the human rights violation of a state actor needs to be proven. In short, complicity in this context comprises acts of support or assistance to a human rights violation. Some US courts also qualified participation in a joint venture with the human rights violator and a direct benefit from the human rights violation as complicity³¹. This case was eventually settled out of court when the danger of a decision against Unocal was eminent. Following the Unocal case, numerous claims of human rights violations outside US territory were brought against companies that are based in the US or have major business activities there such as Shell, Rio Tinto, Exxon-Mobil, Gap, Levis, Pfizer or Coca-Cola³².

Given the case law presented above, ATCA can be one national avenue of holding TNCs accountable for labour rights violations which they commit abroad. As of today, however, no judgement has

²⁷ Peter Muchlinski, *Multinational Enterprises and the Law* (1995): 124.

²⁸ 28 U.S.C. §1350.

²⁹ *Filartiga v Peña-Irala* 630 F 2d 876 (2d Cir 1980).

³⁰ *Doe v Unocal* 963 Supp 880 (CD Cal 1997).

³¹ For details on this rather complex concept see for example International Commission of Jurists, *Corporate Complicity & Legal Accountability* (2009).

³² See Sarah Joseph, *Corporations and transnational human rights litigation* (2004) 21f.

been given by a US court on ATCA claims involving a corporation and most cases were even dismissed at an earlier stage. When it became apparent that a judgement in the Unocal case was imminent and seemingly not in favour of Unocal, Unocal reached a last minute settlement with the claimants from Myanmar. The same occurred in the case of Shell which was accused of being complicit in human rights violations committed by the Nigerian military – here, an out of court settlement of 15.5 Million US\$ was reached³³.

This development is a strong signal that companies will be held to account even when human rights violations take place outside of the territory of the state in question. This is relevant for the question of securing labour rights in GPN as this implies cross-border activities and potential cross-border violations of labour rights. Although ATCA will only be relevant in cases of grave human rights violations such as forced labour and therefore, the threshold for a case to be admitted to court is high, it is an important landmark to show that transnational accountability of TNCs in the area of labour rights takes place and is a legal and factual reality. However, there remains a central limitation of this instrument in GPN settings: although theoretically, the instrument is not limited to subsidiary relationships no cases that involved labour rights violations of suppliers have yet been brought to US courts under ATCA. In the only case of allegations of labour rights violations at suppliers against apparel TNCs such as Gap and Levis, the labour rights violations took place in Saipan which is considered part of US territory.³⁴ In addition, many complaints have been dismissed because the US courts did not see themselves competent to adjudicate the human rights violations or because complicity was difficult to prove.

The situation in the member states of the EU is even less promising. Two examples will be presented to give an indication of the “European picture”.

2.3.2 Belgium: The Universal Jurisdiction Act

Since its enactment in 1993 as a wide-reaching and potentially effective mechanism to deter human rights violations committed abroad, the Universal Jurisdiction Act³⁵ has been considerably watered down as it became apparent that also high-profile political figures such as George W. Bush and Tony Blair could face court suits (for their implications in human rights violations committed in Iraq). Based on this act, a case against the oil company Total was brought to court by refugees from Myanmar in 2002. Total was accused of complicity in forced labour of workers who were building a pipeline in the country which was completed in 1998. The investigation was the first and only one in Belgium to involve a company rather than an individual. Proceedings started, but were suspended in 2003 because of legislative changes, to again resume in 2005. After six years of investigation and subsequently watered-down legislation, the case against Total was declared closed.³⁶

³³ See <http://www.nytimes.com/2009/06/09/business/global/09shell.html>. On Shell's view of the settlement see http://www.shell.com/home/content/media/news_and_library/press_releases/2009/shell_settlement_wiwa_case_08062009.html.

³⁴ Doe v. the Gap et al., No CV-01-0031, 2001 WL 1842389 (CD Cal 2001), US District Court for the Central District of California.

³⁵ Act of 16 June 1993 on the Punishment of Grave Breaches of the Geneva Conventions of 12 August 1949 and their Additional Protocols I and II of 18 June 1977, *Moniteur Belge - Belgisch Staatsblad*, 8 May 1993. On more details concerning this act, see for example Roemer Lemaitre, Belgium rules the world: Universal jurisdiction over Human Rights atrocities (2001), <http://www.law.kuleuven.be/jura/art/37n2/lemaitre.htm> (accessed 12 March 2010).

³⁶ AFP, Belgium drops Myanmar rights case against Total, March 5th 2008, <http://afp.google.com/article/ALeqM5g03FLW0Ks50sU4WgQuGU-Gay-P-w> (accessed 12th March 2010).

2.3.3 United Kingdom: Case Law

Another interesting case is *Lubbe v Cape plc*³⁷ bringing claims on behalf of several thousand South African asbestos miners related to health and safety issues against a U.K.-based multinational arising out of the operation of local mines. This case could be brought to UK courts because of EC law, the so-called Brussels Convention (see chapter 2.2.). A relevant factor was that the complaint related to acts of the headquarters in the U.K. The claim was based on the negligent omissions of the headquarters to ensure that safety measures were imposed by the subsidiaries.³⁸ After the case was dismissed because the judge deemed South Africa to be the appropriate forum for the proceedings, the appeal against this decision in the House of Lords was successful.³⁹ The House of Lords argued that the proceedings should continue in the UK courts because sending the plaintiffs back to South African courts could lead to a denial of justice, because of the difficulties in obtaining legal representation, and because of lack of experience of South African courts to handle such class action cases.⁴⁰ The case was eventually settled out of court.⁴¹

According to the research foundation Fafo, it is likely that in the short- to medium-term, future law suits against TNCs arising out of breaches of international law will be filed in the UK: „Although it is likely that arguments will be made that the breaches are actionable in and of themselves, the claims will primarily be brought within the pre-existing tort framework and will seek to link the incidents overseas with acts and omissions occurring in the U.K.“⁴²

The examples of home state responsibility presented above show that efforts to hold companies accountable for labour rights violations of TNCs' subsidiaries in the home states of TNCs are increasing. Although possibilities to do so are still patchy, it is an avenue that could be persistently and increasingly used by victims of labour rights violations and lawyers to address cross-border labour rights issues. It is however a stony path and will continue to require civil society pressure and mobilisation.⁴³ In its analysis of existing European case law in this matter, the European Center for Constitutional and Human Rights concludes that in comparison to the human rights violations documented, the cases brought to court are relatively small. Thus, efforts should be increased to bring TNCs to court to create precedents which have the potential to further develop the legal practice in this regard.⁴⁴

However, there are central limitations to home state responsibility: First, cases regarding home state regulation generally only involved equity relationships and not supplier and subcontracting relationships which are very common in the context of GPN. Although ATCA can in principle be applied to address human rights violations in subcontracting relationships, no cases that involved labour rights violations of suppliers have yet been brought to US courts under ATCA. Second, they only include certain human rights violations and not all ILO core labour standards. Third, a strong relation of the TNC to the labour rights violation has to be proven by workers which is likely to be arduous in GPN

³⁷ *Lubbe v Cape plc* [2000] 1 WLR 1545. See also Richard Meeran, Liability of Multinational Corporations: A Critical Stage in the UK, 251f., in: Kamminga/Zia-Zarifi, (eds.), Liability of Multinational Corporations under International Law (2000).

³⁸ See also Fafo, Assessing the Liability of Business Entities for Grave Violations of International Law Survey conducted as part of Commerce, Crime, and Conflict: A Comparative Survey of Legal Remedies for Private Sector Liability for Grave Breaches of International Law And Related Illicit Economic Activities, The United Kingdom (2006), at 27, accessible at <http://www.faf.no/liabilities/> (accessed 8th July 2009).

³⁹ *Lubbe v Cape plc* [2000] 4 All ER 268 (HL), <http://www.parliament.the-stationery-office.co.uk/pa/ld199900/ldjudgmt/jd000720/lubbe-1.htm> (accessed 16th March 2010).

⁴⁰ See also De Schutter, Multinationals in European Law, 270, in: Alston (Ed.), Non-State Actors and Human Rights (2005).

⁴¹ For all stages of the case see <http://www.law.monash.edu.au/castancentre/projects/mchr/trans-hr-litigation.html> (accessed 16th March 2010).

⁴² Fafo 2006: 28.

⁴³ Olivier de Schutter, Towards Corporate Accountability for Human and Environmental Rights Abuses (2007), 1.

⁴⁴ European Center for Constitutional and Human Rights, ECCHR! CASES, http://www.ecc.hr.de/european_cases_database_en.html (accessed 7th February 2010).

settings. In the case of ACTA complicity has to be proven which can be legally very difficult. Regarding the situation in Europe, there are very few cases that involved home state responsibility regarding labour rights, and they only referred to a TNC itself or its subsidiary, and not supplier relationships. This demonstrates that home state responsibility is the last resort concerning labour rights protection, and it should be upon the host state where the labour rights violation occurs to act accordingly. Thus, capacity-building and strengthening of host state regulation should be supported by the home states. But simultaneously and to complement other efforts home state responsibility should be further developed and fortified. Ideally, cooperation between host states and home states should be strengthened in securing labour rights in GPN.

3. INSTRUMENTS ON THE EUROPEAN LEVEL

This chapter focuses on the European level and assesses the legal and political regimes and settings within the EU relevant for the protection of labour rights in GPN. Relevant directives as well as legal instruments that are applicable in other areas but could be used to secure labour rights in GPN will be analysed. In principle, the EU would be the appropriate institution to regulate labour rights in GPN at the European level, and it has already established regulation on other matters of cross-border nature, such as competition law. However, little has been done in the area of cross-border labour rights protection and company accountability. In the following chapter, we will look at past and current initiatives to assess the potential and direction of the EU in this regard.

3.1 The EU and Labour Rights in global production networks - past and current situation

Within the institutions of the EU, discussions on the lack of effective control over TNCs are not a new topic. As early as 1973, the European Commission (EC) proposed regulatory efforts on „multi-national undertakings“: “[T]he measures to be undertaken should not impede the development of a phenomenon with recognized economic and social advantages, but they should merely aim at guarding the Community against its harmful effects with the help of a suitable legal framework...it should apply to individuals and to undertakings, whether of national, international, Community or extra-Community foundation. ... [T]he problems raised could not be solved by adopting a few spectacular measures or a code of good conduct which by definition would be binding only on undertakings of good will. Indeed, the size of certain problems...justifies the adoption of measures of greater constraint.”⁴⁵ This relatively far-reaching proposal was made in the context of the economic crisis of the 1970s; in the wave of recovery in the 1980s, unfortunately, the momentum was lost and the proposal forgotten.

In 1977, as one of the first measures of the common EC foreign policy, the Community adopted a CoC for European firms operating in South Africa.⁴⁶ This Code contained guidelines on non-discrimination in the workplace, equal pay, access to education, and the recognition of trade unions. This was another step into the right direction but it proved unsustainable as well, due to ineffective monitoring and the lack of binding obligations on the firms.⁴⁷

In the wake of the disaster of Bhopal⁴⁸ in 1984, the European Parliament demanded in several resolutions that the Commission propose legislative measures to bind foreign branches of EU firms to uphold certain EU standards. One of those resolutions of 1999 proposed inter alia a European Monitoring Platform. However, none of these resolutions could be put into action. In reaction to the Com-

⁴⁵ European Commission, Multinational Undertakings and Community Regulations, COM (73), 7 November 1973, p. 15.

⁴⁶ For more details on EC foreign policy concerning the Republic of South Africa see <http://europa.eu/scadplus/leg/en/lvb/r12200.htm>

⁴⁷ Here, see also Martin Holland, Europe Past and Future. The European Community and South Africa: In Search of a Policy for the 1990s, International Affairs, Vol. 64, No. 3. 1988, pp. 415-430.

⁴⁸ In December 1984, a pesticide plant owned by Union Carbide Corporation (followed by Dow Chemicals in 2001) released 40 tons of toxic gas, immediately killing 3.000 people, more than 15.000 died in the following years. The settlement reached obliged Dow Chemicals to pay 470 Million US\$, however, even this comparatively small amount has not been fully disbursed to the victims yet. See Amnesty International, Clouds of injustice. Bhopal disaster 20 years on, <http://web.amnesty.org/library/print/ENGASA200152004>

mission's inactivity, the Parliament then decided to install its own ad hoc control mechanism – in 2001, public hearings were held on the activities of European oil companies in Myanmar.

In the same year, the EC issued a green paper on CSR,⁴⁹ including a definition of CSR: “Most definitions of corporate social responsibility describe it as a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis. Being socially responsible means not only fulfilling legal expectations, but also going beyond compliance and investing “more” into human capital, the environment and the relations with stakeholders (...) [C]orporate social responsibility should nevertheless not be seen as a substitute to regulation or legislation concerning social rights or environmental standards, including the development of new appropriate legislation. In countries where such regulations do not exist, efforts should focus on putting the proper regulatory or legislative framework in place in order to define a level playing field on the basis of which socially responsible practices can be developed.”⁵⁰ This EC definition addresses two critical issues: (1) CSR includes legal compliance – also for labour rights – but must go beyond it, and (2) CSR cannot be a substitute for legal regulation.

This promising definition has however not led to the expected developments with regard to CSR and regulation by the EU and recent documents of the Commission do not encourage high hopes. The latest communication „Making Europe a Pole of Excellence on CSR“⁵¹ presents the voluntary approach as the one and only trump card in the game. Not even the extensive consultation process following the green paper on CSR⁵² which revealed a considerable number of stakeholders pushing for legally binding measures changed the Commission's position in this regard. The latest activity of the Commission was the launch of a “European Alliance for CSR” including large companies, SME's and their stakeholders. The Communication emphasizes that this alliance “is not a legal instrument and is not to be signed by enterprises, the Commission or any other public authority.”⁵³

A quick glance at the Commission's position on EU Foreign policy also shows that the Commission still uses the ‘carrot without the stick’ approach: the dissemination of the CSR concept should be promoted in developing countries and TNCs should be encouraged to support human rights and workers' rights, especially in developing countries.⁵⁴ Strategically and psychologically speaking, such an incentive-driven approach may create an encouraging and positive signal for companies that are willing to get active in CSR. However, there are no binding and standardized rules and companies are free to define their own CSR standards. Further, companies that do not engage in CSR activities will not be responsive to such an approach.

Given this dilemma, a recent report of the European Parliament on CSR proposes to follow a „twin-track approach“ in pursuing both incentives and regulation. The Parliament “[a]grees with the Commission that CSR policies should be promoted on their own merits, neither as a substitute for appropriate regulation in other fields, nor as a covert approach to introducing such legislation; [and] believes the debate on voluntary versus mandatory approaches to CSR at the EU level should be 'de-polarised' by reiterating the essentially voluntaristic approach but enabling - without obligation - re-

⁴⁹ European Commission, Green Paper, Promoting a European Framework on Corporate Social Responsibility, COM (2001) 366 final.

⁵⁰ Supra, 6-7.

⁵¹ European Commission, “Implementing the Partnership for Growth and Jobs, COM (2006) 136 final.

⁵² More than 250 comments from employer, employee, consumer organisations and NGOs participating in an EU Stakeholder Forum were collected. The lines were divided along the known paths: employer organisations proposed a voluntary strategy, employee and consumer organisations voted for a more binding approach. A final agreement could not be reached. See further details in http://ec.europa.eu/employment_social/soc-dial/csr/csr_responses.htm

⁵³ COM (2006) 136 final, p. 6.

⁵⁴ Supra, p. 4.

search and dialogue into potential regulatory measures (...). When the UN Special Representative on Business and Human Rights⁵⁵ is openly considering regulatory responses to the CSR debate, the renowned Global Reporting Initiative arising from the UN Environmental Programmes is openly seeking convergence of CSR tools with business, when the UN Global Compact has removed 200 companies from its initiative for failing to abide by its requirements - the Commission will also be confronted by the reality that the "anything goes" approach of its Communication is both out-of-date and outmoded."⁵⁶

Very recently, the Commission indicated that a new communication in 2011 might take into account the work of the UN Special Representative (see 3.1.2.). Studies mandated by the Commission which seek to explore the human rights responsibilities of EU companies operating abroad are further indicators of this potential new direction.⁵⁷ However, clear actions have yet to confirm this possible new trend.

The EU is in the unique position and better suited than any other organization to enact legislation with binding effect on EU based companies operating transnationally.⁵⁸ According to Article 95 of the EC Treaty, the Commission would have the possibility to propose Community legislation in order to eliminate distortions to fair competition. In this area of distortions to fair competition, the Commission has in the past been very creative in using its competency for "cross-cutting issues" to be legislatively active. This has led to a dynamic extension of Community competencies on various issues, e.g concerning measures on critical infrastructure, an area of the third pillar before the Treaty of Lisbon but interpreted by the Commission as a topic that might interfere with fair competition.⁵⁹

Moreover, the subsidiarity principle becomes relevant here. This principle spells out that only if objectives of the EU cannot be met on the national level may the Commission step in and propose regulation on the EC level. The activities of TNCs operating across national borders present exactly the challenge that the exception to the subsidiarity principle seeks to solve. The regulation of TNCs poses significant problems as each subsidiary may be situated in a different country and different national laws may apply. It is usually unclear which national law applies to the TNC as a whole. Thus, a Community regulation covering TNCs and their subsidiaries in the member states would be necessary. A common regulation which is applicable to all EU countries would indeed prevent national regulatory differences and thus provide the famous „level playing field“, creating transparent and equal conditions for all players in the EU common market.

The following section looks at specific initiatives at the EU level in other areas which could be applied to secure labour rights protection in GPN.

⁵⁵ On the work of the Special Representative see section 3.2.

⁵⁶ European Parliament, Draft Report on corporate social responsibility: a new partnership (2006/2133(INI)), p. 6/7, para. 4 and 19.

http://www.europarl.europa.eu/meetdocs/2004_2009/documents/pr/638/638043/638043en.pdf

⁵⁷ See for example the call for tenders of the European Commission on a study of the legal framework on human rights and the environment applicable to European enterprises operating outside the EU, http://ec.europa.eu/enterprise/newsroom/cf/itemlongdetail.cfm?item_id=3334&lang=de

⁵⁸ De Schutter, The Accountability of Multinationals for Human Rights Violations in European Law, p. 276. See also Lukas/Rhösler, Vorwärts in die Vergangenheit? Die Europäische Union und Corporate Social Responsibility (2006), in: Jahrbuch Menschenrechte 2007, 126-132.

⁵⁹ See European Commission, Green Paper on a European Programme for Critical Infrastructure Protection, COM (2005) 576, http://eur-lex.europa.eu/LexUriServ/site/en/com/2005/com2005_0576en01.pdf;

3.2 An Alien Tort Claims Act on the EU level? The Brussels I Regulation

This section addresses the possibilities of EU member states to exercise extraterritorial jurisdiction concerning labour rights violations committed abroad along the lines of the US ATCA (see 1.3.1). The Brussels I Regulation⁶⁰ entitles the national jurisdictions of Member States to accept civil proceedings against corporations based in the EU for certain acts even if they have been committed outside of the EU. This regulation, along with the Council Framework Decisions on trafficking in human beings and on sexual exploitation against children (see further below), is explicitly mentioned by the European Parliament⁶¹ as a legal instrument which could be used to enforce corporate accountability for “matters relating to tort, delict or quasi-delict”⁶² committed abroad.

Art. 2(1) of the Brussels I Regulation provides that a “person domiciled in a Member State⁶³ shall, whatever their nationality, be sued in the courts of that Member State.” According to the European Court of Justice, if the occurrence of the event and the results in damage are not identical, “the defendant may be sued, at the option of the plaintiff, in courts for either of these places.”⁶⁴ De Schutter concludes from this judgement that if for example a decision of the Board of Directors of a company is taken in Member State A and this decision causes damage in Member State B, the plaintiff may choose where to sue the company and may seek the more favourable jurisdiction.⁶⁵ In addition, a company may also be sued in a Member State where it has a branch or subsidiary (Art. 5(5)). The European Court of Justice has also clarified in the Josi case⁶⁶ that the regulation applies in a dispute between a claimant from a state outside the EU (e.g. a worker of a branch of a TNC) and a defendant (the TNC) domiciled in the EU. Thus, the Regulation allows for EU Member States’ courts to hear tort actions by victims whatever their nationality or residence against TNCs or any of its subsidiaries or branches domiciled in the EU. Regarding the issues of this study, the Convention has been applied in the Lubbe Case where the House of Lords confirmed that the UK had jurisdiction over a case on labour rights violations which took place in South Africa (for further details see section 2.1.2.3).

Other areas of law than the Brussels Regulation show similar venues. In the field of penal law, the Council Framework Decision on the Combat of Trafficking in Human Beings (2002)⁶⁷ includes the liability of legal persons, including companies, with headquarters in the EU for delicts committed abroad. The Council Framework Decision obliges the EU member states to prosecute criminal activity even if it takes place outside the member state’s jurisdiction, if the legal person benefits from it. Similar provisions exist concerning the sexual exploitation of children.⁶⁸ These regimes would pro-

⁶⁰ The Brussels I Regulation, formerly known as the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, has been re-enacted as Council Regulation (EC) No 44/2001 on jurisdiction and recognition and enforcement of judgements in civil and commercial matters. Council Regulation No. 44/2001 of 22nd December 2000, full text at <http://curia.europa.eu/common/recdoc/convention/en/c-textes/brux-textes.htm>, (accessed 16th January 2010).

⁶¹ Resolution on EU standards for European enterprises operating in developing countries: towards a European Code of Conduct, Official Journal of the European Communities, C 104/181 of 15th January 1999 and Resolution on the Commission Green Paper on promoting a European Framework for corporate social responsibility”, COM(2001) 366 – C5-0161/2002 – 2002/2069(COS).

⁶² Art. 5(3) of the Convention.

⁶³ This includes „a company or other legal person or association of natural or legal persons domiciled at the place where it has its statutory seat or central administration or principal place of business (Art. 60(1)).

⁶⁴ European Court of Justice, Case C-51/97, Réunion européenne SA and others, para. 28.

⁶⁵ Olivier De Schutter, *Multinationals in European Law*, 264, in: Alston (Ed.), *Non-State Actors and Human Rights* (2005).

⁶⁶ Case 412/98.

⁶⁷ Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings, Official Journal L 203 of 01.08.2002.

⁶⁸ Council Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography, Official Journal L 013, 20/01/2004 P. 0044 – 0048.

vide a proper basis for a further development of EU law towards greater accountability of EU based companies for human rights, including labour rights violations committed in non-EU countries, thus capturing violations in GPN.

The Brussels I Regulation is currently under review after an extensive consultation process of the EC.⁶⁹ According to the proposal of the Commission, it is envisaged to explicitly extend the jurisdiction to persons (defendants) outside of the EU because of “equal access to justice on the basis of clear and precise rules on international jurisdiction.”⁷⁰ This proposal has been welcomed by a number of actors, such as Amnesty International, the European Coalition for Corporate Justice⁷¹ and the Austrian Chamber of Labour.⁷² However, the majority of submissions, for various reasons such as “sensitiveness”⁷³ and “complexity”⁷⁴ of the issue oppose such an extension. It remains to be seen whether the outcome of the consultations will change the Commission’s proposal. If the proposal were to be put into action, this would mean an important step forward to ensure greater access to justice for victims of labour rights violations by non-EU domiciled companies that operate in GPN with connection to the EU market.

Another proposal of the Austrian Chamber of Labour sent as a submission in the consolidation process merits attention for the purposes of this study. The Austrian Chamber of Labour suggests that special jurisdiction should be extended to include collective action in labour disputes such as strikes. This means that cases must be decided by the courts where the collective action takes place. As of now, if several countries are involved which is usually the case in cross-border settings, such a dispute could be drawn to the national court which is deemed more favourable to the position of the employer. In the Viking case,⁷⁵ the dispute arose over the decision of Viking Line ABP and OÜ Viking Line Eestia to reflag one of its ships, to an Estonian flag, to enable it to acquire cheaper Estonian labour to work on the ship. The Finnish Seamen’s Union, while accepting that the company had the right to employ the workers, insisted that these workers must be employed under the terms of the existing Finnish collective agreement. When the company refused to accept, the union answered with measures of collective action and called on trade unions internationally to support it, one of them being the International Transport Federation (ITF) with seat in London. Viking then sued ITF in a British court, with the result that a British court had to render a judgement on a labour dispute taking place in Finland. Thus, it can be the case that a court without any relation to the collective action in question is decisive on its outcome. The review process of the Brussels I Regulation would provide the opportunity to explicitly refer cases of collective action to the country where the dispute occurs.

⁶⁹ See http://ec.europa.eu/justice_home/news/consulting_public/news_consulting_0002_en.htm (accessed 30th March 2010).

⁷⁰ European Commission, Green Paper on the review of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM(2009) 175 final, 3. See also Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, COM(2009) 174 final.

⁷¹ Amnesty International/ECCJ, Joint Amnesty International and ECCJ submission on the Green Paper on the Review of Council Regulation (EC) No 44/2001 on jurisdiction and recognition of enforcement of judgments in civil and commercial matters (2009), 4f.

⁷² Bundesarbeiterkammer, Grünbuchüberprüfung der Verordnung (EG) Nr. 44/2001 des Rates über die gerichtliche Zuständigkeit und die Anerkennung und Vollstreckung von Entscheidungen in Zivil- und Handelssachen (2009), 8f.

⁷³ Bar Council of England and Wales, Response of the Bar Council of England and Wales to the Commission’s Green Paper on the Review of Council Regulation (EC) No 44/2001 on jurisdiction and recognition of enforcement of judgments in civil and commercial matters (2009), 2f.

⁷⁴ Conseil des barreaux européens, CCBE Response to the Green Paper on the Review of Council Regulation (EC) No 44/2001 on jurisdiction and recognition of enforcement of judgments in civil and commercial matters (2009).

⁷⁵ Judgement of 11th December 2007 – C-438/05.

3.3 Chain liability on the EU level?

Up to now, chain liability regimes only exist on the national level in some EU member states for the construction sector (see section 2.2.2.). In its draft report on the social responsibility of subcontractors in production chains,⁷⁶ the European Parliament points out that the phenomenon of subcontracting allows “social dumping” and the possibility to circumvent obligations in the area of social security. This is an issue of European dimension (which) “requires European solutions” (European Parliament 2008: 9). In particular, the report notes that all countries concerned face profound problems in view of the enforcement of liability towards foreign subcontractors and temporary agencies. As national provisions differ in protection, and some countries provide no protection at all, the draft report calls for a European liability system for subcontractors to meet the demands of the EU labour market.

The European Court of Justice seems in principle to endorse the instrument of extended liability as a means of workers rights protection. In the landmark case *Wolff & Müller*,⁷⁷ the European Court of Justice ruled that a national system that makes a firm liable for a subcontractor who fails to pay the minimum wage or contributions to a social security scheme established by collective agreement is a justified limitation of the freedom to provide services.⁷⁸

As the existing liability regimes in member countries have rendered positive results in securing workers rights, at least for some categories of workers, while also – according to some social partners – providing a level playing field for companies, it would be useful to consider such a liability regime for all member states and other sectors besides the construction sector. An EU wide application would also remove one central limitation of the national regimes because the protection of labour rights would extend to employment relationships across national borders throughout the EU. But two limitations are likely to remain which became apparent in the national regimes: First, not all types of workers are covered with the same level of effectiveness (part-time, temporary and in particular posted workers) and some types of workers are even excluded (informal workers). And, while an EU wide regime would cover employment relationships in the whole EU territory it would not extend to employment relationships outside the EU which are very important in most GPN. Besides these limitations, this regime bears great potential if enacted and implemented at the European or even international level and if extended to more sectors.

The next instrument that will be discussed on the EU level is a fairly new regime of European social dialogue which also has important implications for the protection of labour rights in GPN.

⁷⁶ Committee for Employment and Social Affairs of the European Parliament, Draft Report on the Social Responsibility of Subcontractors in Production Chains, 12 November 2008 (2008/2249(INI)).

⁷⁷ Judgment of 12 October 2004 - C-60/03.

⁷⁸ „Article 5 of Directive 96/71/EC (...) interpreted in the light of Article 49 EC, does not preclude, in a case such as that in the main proceedings, a national system whereby, when subcontracting the conduct of building work to another undertaking, a building contractor becomes liable, in the same way as a guarantor who has waived benefit of execution, for the obligation on that undertaking or that undertaking's subcontractors to pay the minimum wage to a worker or to pay contributions to a joint scheme for parties to a collective agreement where the minimum wage means the sum payable to the worker after deduction of tax, social security contributions, payments towards the promotion of employment or other such social insurance payments (net pay), if the safeguarding of workers' pay is not the primary objective of the legislation or is merely a subsidiary objective”. (*Wolff & Müller*, para. 45)

3.4 European Framework Agreements

European Framework Agreements (EFAs) are agreements between European TNCs and European trade unions and/or European Works Councils⁷⁹ on a range of labour-related and social issues of transnational nature and are therefore relevant for the protection of labour rights in GPN with a European dimension.⁸⁰ Around 60 EFAs have been concluded by 2009. Most agreements focus on the following issues (see also diagram 1.2):

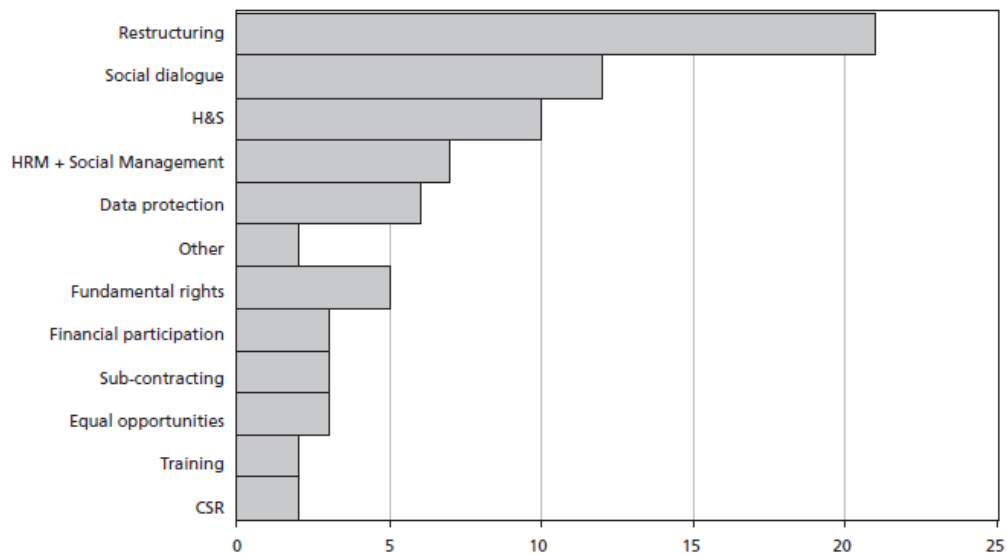
- Restructuring issues
- Organisation of social dialogue
- Equality in employment
- Health and safety
- Data protection
- Subcontracting
- CSR and human resources management

This distinguishes them from their “twins” on the global level, the International Framework Agreements (IFAs, see 3.3) which in general are focused exclusively on the protection of (core) labour rights. The majority of EFAs contain provisions on restructuring issues. Subcontracting, the topic which is most relevant for this study features less prominently. This mirrors the situation that on the level of social dialogue, restructuring issues are more pressing on the European level, whereas subcontracting issues are higher on the agenda on the international level (see 3.3). This also corresponds with the actors on these levels: the European Works Councils have been created to provide information and to be consulted in such matters as restructuring, whereas global trade unions have set other priorities relevant in their negotiations with TNCs.

⁷⁹ European Works Councils must be established in companies with 1,000 or more workers, and at least 150 employees in each of two or more EU Member States to bring together workers' representatives from all the EU Member States where the company operates in. They meet with management, receive information and give their views on current strategies and decisions affecting the company and its workforce. See ETUC, European Works Councils, <http://www.etuc.org/r/57> (accessed 14th April 2010).

⁸⁰ The term European Framework Agreement is also used for agreements of the European Social Partners on specific labour-related issues, such as part-time work, telework or on harassment and violence at work (see for example the agreement on harassment and violence at work, <http://www.tradeunionpress.eu/Agreement%20violence/Framework%20Agreement%20Harassment%20and%20Violence%20at%20Work2.pdf> (accessed 19th March 2010). Although both categories of agreements are results of social dialogue on the European level, their actors, contents, objectives and outcomes are however distinct.

Figure 1: Content of EFAs⁸¹



EFAs are meant to accompany collective bargaining agreements at the national level. In this regard, the EC expressed its intention to propose a European framework for transnational collective bargaining in 2004 and commissioned a study to explore the possibilities in this area.⁸² The study and a survey on transnational agreements were presented but no agreement could be found because employer representatives were strongly opposed to a legal framework, whereas the European Trade Union ETUC voiced its conditional support.⁸³ In its staff working document⁸⁴ on the role of TNC agreements of July 2008, the Commission links this discussion to the EU efforts concerning the Renewed Social Agenda in managing “globalisation in a balanced way and to help European citizens benefit from the opportunities presented to them” (EC 2008: 3). In this document, the EC states that it “is convinced of the potential of transnational company agreements in a context of increasing international integration” (EC 2008: 4).

As to the legal standing of EFAs, the Commission states that because of their varying levels of commitment and as they are not concluded in accordance with collective bargaining rules, EFAs should be qualified as “negotiations” (EC 2008: 5). According to the Commission, European Works Councils have inadequate competences because their mandate is limited to information and consultation activities, not collective bargaining. On the other hand national workers’ organisations do not have a mandate going beyond the national arena and it is also not clear that European workers’ organisations may lead such negotiations. Clarity could however be established by the EC by adopting a legal framework to such effect (EC 2008: 7). The legal framework could be based on Art. 139 of the EC Treaty which states that social partners may transpose collective agreements at the EU level into national collective agreements in order to establish legal standing of the agreement at the national level (Sobczak 2007: 481).

Regardless of these legal uncertainties, the Commission declares in the conclusive chapter of the working paper that it “will support initiatives to conclude transnational company agreements without

⁸¹ Eurofound, European and international framework agreements: Practical experiences and strategic approaches (2009), 29, <http://www.eurofound.europa.eu/pubdocs/2008/102/en/2/EF08102EN.pdf> (accessed 9th February 2010).

⁸² See Ales et al., Transnational Collective Bargaining: Past, Present and Future (2006), <http://www.observatorionegociacioncolectiva.org/comunes/temp/recursos/99998/228284.pdf> (accessed 12th March 2010).

⁸³ Eurofound, European and international framework agreements: Practical experiences and strategic approaches (2009), 23.

⁸⁴ European Commission, The role of transnational company agreements in the context of increasing international integration, Commission Staff Working Document, SEC (2008) 2155, 2 July 2008.

prejudice to compliance with the applicable national or Community provisions” (EC 2008: 10). The Commission also installed an expert group that will monitor developments and exchange information on how to support this process. It seems clear that regardless of EU action in this area through a legal framework, EFAs will continue to be negotiated by European TNCs and European trade unions and/or European works councils. However, a legal framework would support this strand of transnational social dialogue and remove the legal uncertainties mentioned. If EFAs were accepted as such collective bargaining agreements they would have legally binding effect and they would be far more than mere “negotiations”. Thus, this step would be a relevant mosaic piece in the effort to protect cross-border labour and social rights.

The following last instrument on the EU level looks at how labour rights protection can be incorporated into trade agreements.

3.5 EU Trade Agreements and Labour Rights

The inclusion of a social clause (e.g. consisting of ILO core labour standards) in trade agreements has been one avenue to protect labour rights in GPN. At the multilateral level in the Uruguay round, and subsequently in the World Trade Organisation (WTO) founded in 1995, social clauses have been discussed. However, no results have been achieved at the WTO level so far. Since the stalemate situation at the WTO’s Doha Development Round, trade liberalization initiatives have shifted from the multilateral to the bilateral and regional level. The US and the EU – major players in bilateral and regional trade negotiations - have incorporated labour standards in their trade agreements since the 1990s - the US in the North American Free Trade Agreement (NAFTA), the General System of Preferences (GSP) and bilateral trade agreements such as the US-Cambodia Textile agreement (see below) and the EU in its GSP system and in the future also in bilateral trade agreements. The EU currently negotiates a number of bilateral trade agreements with various countries such as Canada, India and China. Free Trade Agreements (FTAs) are an important strategy of the EU’s “Global Europe” strategy which seeks to enhance EU competitiveness in a globalized world.⁸⁵ In these agreements, the EU has the objective to include a “sustainability chapter” which seeks to consider trade related social and environmental issues to further sustainable development (Interview DG Trade 2010). This strategy has to be seen in conjunction with the promotion of the EU Decent Work Agenda⁸⁶ where the Commission identifies trade as “a factor in sustainable development” by “taking account of the social dimension, decent work and the recommendations of social impact assessments in bilateral and regional trade negotiations.”⁸⁷

This EU initiative has caused considerable controversy. On the one hand, it has been welcomed as a major step forward to reconcile trade and social issues; on the other hand, such agreements are seen as mere “trade liberalization instruments” where the social dimension is used to justify trade liberalization which is in many cases not beneficial for the EU partner countries. Since Doha, a number of international alliances have emerged that mobilize against FTAs with the objective to have them removed altogether.⁸⁸ On the EU level, in particular, civil society organizations, criticize that

⁸⁵ European Commission, Global Europe: Competing in the World, COM(2006) 567 final, http://eur-lex.europa.eu/LexUriServ/site/en/com/2006/com2006_0567en01.pdf (accessed 11th January 2010).

⁸⁶ European Commission, Promoting Decent Work for all, The EU contribution to the implementation of the decent work agenda in the world, COM(2006) 249 final, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2006:0249:FIN:EN:PDF> (accessed 11th January 2010).

⁸⁷ European Commission, Promoting Decent Work for all, 8.

⁸⁸ See for example the activities of FTA Watch, bilaterals.org, GRAIN und Médecins Sans Frontières, Fighting FTAs: An international strategy workshop, Bangkok, Thailand, July 2006, summary report, <http://www.bilaterals.org/IMG/pdf/Fighting-FTAs-summary-report.pdf> (accessed 18th February. 2010).

the EU clearly prioritizes trade issues over social issues; and in most instances, due to the unequal bargaining powers of the EU and their trade negotiation partners, the EU is in a much better position to further EU business interests. Moreover, the negotiations take place behind closed doors and prior to the consultations, trade unions and NGOs are not adequately consulted whereas business organizations' input is – at least to some extent – taken into account.⁸⁹ Also, although the EC has initiated civil society consultations, the impression prevails that they have had little impact on the negotiations themselves.⁹⁰

To minimize some of these concerns, the EC foresees sustainability impact assessments which should ensure that the impact of the respective trade agreement on social and environmental matters is properly assessed to reduce negative consequences and enhance possible positive impacts. The direct value of these impact assessments however remains unclear. In principle, such an assessment must take place before or at least while negotiations are ongoing to have relevance. In the negotiation process of the first FTA with a sustainability chapter, the EU-Korea Agreement,⁹¹ this was unfortunately not the case (interview DG Trade 2010).

Experiences with the impact of sustainability chapters could so far not be made because the first and so far only such chapter is not yet in force: the EU-Korea Agreement has been signed in 2009 and will possibly enter into force by the end of 2010 (interview DG Trade 2010) or in 2011. In substance, the sustainability chapter of this agreement includes reference to the ILO core labour standards and the commitment of the parties to effectively implement the conventions they have ratified and to make “continued and sustained efforts” towards ratifying the remaining ILO core conventions (Art 13.4 (3)). This rather hesitant formulation takes note of the fact that Korea has not ratified 4 of the 8 core conventions.⁹²

Importantly, the “non-lowering standards” clause, equivalent to the human rights principle of non-retrogression, is explicitly stipulated: no party shall weaken or reduce its labour protections to favour trade or attract investment. On the other hand, it is made clear that labour rights protection may not be used for protectionist purposes (Art. 13.2 (2)). This provision responds to the traditional criticism that labour rights may be used by countries of the North against countries of the South to protect their own firms.⁹³ Another positive aspect of the agreement is the possibility of including civil society opinions via the “Civil Society Forum” (Art. 13.13). This Forum usually meets once a year to discuss “sustainable development aspects of trade relations”. Further details on the operation of the Forum will be laid down by the EU and Korea within one year after entry into force of the agreement. However, it is unclear how this dialogue will influence the implementation of the agreement and in particular the protection of labour rights. The only paragraph addressing this issue suffers from weak wording: “[t]he Parties can present an update on the implementation of this Chapter to the Civil Society Forum. The views, opinions or findings of the Civil Society Forum can be submitted to the Parties directly or through the Domestic Advisory Group(s).”⁹⁴

The major weakness of the Sustainability Chapter lies in its enforcement mechanisms. It only foresees government consultations, and if these are unsatisfactory, the establishment of an expert panel

⁸⁹ Peter Fuchs, *Global Europe – Die neue EU-Handelspolitik im Wahn der Wettbewerbsfähigkeit* (2007), 3f, and WEED, *Freie Fahrt für freien Handel?* (2005), 49f.

⁹⁰ On these consultations see <http://trade.ec.europa.eu/civilsoc/index.cfm> (accessed 18th February 2010).

⁹¹ EU-Korea Free Trade Agreement, full text available at <http://trade.ec.europa.eu/doclib/press/index.cfm?id=443&serie=273&langId=en> (accessed 12th February 2010).

⁹² These are the conventions no. 87 and 98 on freedom of association and the right to collective bargaining, and the conventions no. 29 and 105 on forced and compulsory labour. For a list of ratifications of the core conventions see <http://www.ilo.org/ilolex/english/docs/declworld.htm> (accessed 12th February 2010).

⁹³ See for example Marzia Fontana et al., *Global Trade expansion and liberalisation: gender issues and impacts* (1998), BRIDGE report No. 42, 33f.

⁹⁴ See Art. 13.13. (3).

whose report “[t]he parties shall make their best efforts to accommodate” (Art. 13.15. (2)). No incentive or sanctions structure exists to make parties integrate the findings of the experts report. This means, in short, that the sustainability chapter is excluded from the dispute settlement system which applies to the other chapters of the agreement and foresees sanctions (for example the increase of tariff rates) for non-compliance. This is very unfortunate because a well-balanced structure of incentives and sanctions would have greatly enhanced the credibility and effectiveness of the protection of labour rights in trade agreements and would show that labour rights protection is taken as seriously as trade liberalization.

The example of the US - Cambodia Textile Agreement is interesting in this regard. In the section on labour, the agreement relates improvements in market access to labour rights improvements in the apparel sector which are monitored and reported by the ILO (for details see section 4.1.1.3). Despite some problems, this programme (which is called “Better Factories Cambodia”) has improved working conditions of Cambodian apparel workers and contributed to the protection of labour rights in a complex GPN.⁹⁵ The program has been recently extended to more countries and sectors and renamed to “Better Works”. It would be useful for the EU to consider similar support activities for its own negotiations. While it seems too late for the Korea FTA, current negotiations with other countries such as India would greatly benefit from the Cambodia experience.

Currently, the EU negotiates an FTA with Canada. The proposals of Canada⁹⁶ go further than the current EU positions. Canada presents a broader approach to labour rights by including minimum wage provisions, overtime, health and safety at work and the non-discrimination of migrants. Canada also suggests the inclusion of labour rights issues in the dispute settlement system and foresees fines for non-compliance. It remains to be seen if and how this fairly progressive approach will be watered down in the negotiation process. The draft of Canada is an important reference point to show possibilities of extending the scope of labour rights and their inclusion in the dispute settlement system and thus an equal treatment of trade and labour issues in the implementation of a bilateral trade agreement.

In conclusion, it can be said that the EU would have the potential to strongly support the protection of labour rights in GPN by incorporating labour rights into trade agreements and making market access conditional on the fulfilment of labour rights. Given the cross-border nature of GPN and the political and legal implications of the EU’s support for the decent work agenda, the exploration of this potential would be imperative.

⁹⁵ Don Wells, „Best Practice“ in the Regulation of International Labor Standards: Lessons of the U.S. – Cambodian Textile Agreement, *Comparative Labor Law & Policy Journal*, Vol. 25, 357–376 (2005); and Sandra Polaski, *Protecting Labor Rights Through Trade Agreements*, 10 *J. INT’L L. & POL’Y* 13, 13–25 (2003); more critically: Thomas Greven, *Social Standards in Bilateral and Regional Trade Agreements*, Friedrich Ebert Stiftung, Occasional Papers Series No. 16/2005, 40.

⁹⁶ Draft consolidated text as of 13th January 2010.

4. INSTRUMENTS ON THE INTERNATIONAL LEVEL

This chapter focuses on the rich soft law developments on the international level. The most relevant instruments and initiatives from international institutions, including the ILO, the UN and the OECD, will be discussed and analysed regarding their potential to protect labour rights in the context of GPN. Further, a brief overview on the vast field of business-initiated CoC at the sectoral and company level will be followed by a discussion of the possibility of making company CoC legally binding through contractual obligations of civil law. Finally, a new instrument advocated by the international trade union movement - International Framework Agreements - will be considered. Like the European Framework Agreements they are an emerging form of cross-border social dialogue.

4.1 Instruments and Initiatives by International Institutions

The origins of many instruments presented in this parts date back to the 1970s when public concern about the role and power of TNCs in the global economy was widespread and developing countries were pushing for a “new international economic order”.⁹⁷ Against this background TNCs from the developed world faced attempts for regulation on the international level. As early as 1972 the UNCTAD called for a CoC for TNCs and this endeavour was pursued, in particular by the newly established United Nations Centre on Transnational Corporations. At the same time the OECD developed and finally adopted the Guidelines for Multinational Enterprises in 1976. A year later the ILO’s Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy was adopted. The almost completed ‘United Nations Code of Conduct for Multinational Enterprises’ failed in the early 1990s because of developed countries’ resistance. A second attempt within the UN that will be discussed below - the UN Draft Norms on the human rights responsibilities of enterprises - also failed in 2005.⁹⁸ In contrast, the ILO’s Tripartite Declaration of Principles was revised in 2000 and in 2006 and the OECD’s Guidelines were revised in 2000 and are scheduled for a new revision in 2010.⁹⁹ A key reason for the different “trajectories” of these instruments lies in their nature. As will be seen in the following sections, the attempts at the international level that aim at adopting “hard law” instruments face much more resistance than the soft law variants. This also points to a bias at the level of international institutions with regard to the regulation of TNCs and their GPN. While rules regarding trade and investment enjoy strong legal standing and are enforceable via various international bodies, most rules pertaining to social and environmental considerations fall in the category of soft law and have a limited set of sanctions.¹⁰⁰

⁹⁷ Raymond Vernon: *Sovereignty at Bay* (1971), New York: Basic Books; Barnett, Richard J./Müller, Ronald E.: *Global Reach: The Power of the Multinational Corporations* (1974). New York: Simon and Schuster; Jennifer Bair: *From the Politics of Development to the Challenges of Globalization* (2007). *Globalizations* 4(4), 486-499

⁹⁸ Bernhart Mark-Ungericht, *Die Regulation transnationaler Wertschöpfungsketten als interessens-politisch umkämpftes Terrain* (2010).

⁹⁹ OECD, *Annual Report on the OECD Guidelines for Multinational Enterprises 2008: Employment and Industrial Relations*, Paris

¹⁰⁰ UNRISD, *Corporate Social Responsibility and Business Regulation*, UNRISD Research and Policy Brief 1 (2004), Geneva

4.1.1 ILO instruments and initiatives

Since its inception in 1919 the ILO has been the primary body within the UN System that deals with labour issues. Its tripartite governing structure - consisting of national governments, employers' and workers' organisations – gives it a distinct position in comparison to most other UN agencies. This governing structure allows the development of a broad agenda but at the same time it also hampers the effectiveness of the ILO as it is difficult to agree on a common position due to the diverging interests of the different stakeholders.¹⁰¹ The work of the ILO is guided by the idea that states have the primary responsibility to secure labour rights by ratifying and implementing the ILO conventions and following its recommendations. Hence, the dominant approach within the ILO has been to develop ILO conventions as well as recommendations and to urge member states to transpose them into national law and, above all, sanction violations accordingly. Unlike in other areas of international law (e.g. trade and investment agreements) where sanction mechanisms with an edge exist the sanctioning power of the ILO is rather limited and primarily allows to “blame and shame” states for violations of their labour rights responsibilities.

Hence, with regard to labour rights protection in GPN the ILO mainly aims at offering guidance and information for its constituencies. We will briefly touch upon two instruments that are most relevant in this regard, namely the ILO Tripartite Declaration on Principles concerning Multinational Enterprises and Social Policy as well as the ILO Helpdesk. In contrast, the third initiative, the newly established “Better Work” programme, represents a new avenue in the ILO approach as it extends the monitoring scope of the ILO to the private sector.

4.1.1.1 Tripartite Declaration on Principles concerning Multinational Enterprises and Social Policy

The ILO Tripartite Declaration on Principles concerning Multinational Enterprises and Social Policy (MNE Declaration) gives guidance to TNCs, governments and social partners on relevant labour and social standards. The MNE Declaration is a voluntary instrument to promote good corporate practice by setting forth recommendations for “good corporate conduct” in the area of employment (promotion of employment, equality of opportunity and treatment, employment security, training opportunities and skill enhancement), working and living conditions (wages, benefits, occupational health and safety) as well as industrial relations (freedom of association, collective bargaining, dispute settlement).¹⁰² The ILO itself calls it a „gateway“ for TNCs „to understand and implement labour standards“. ¹⁰³ Its provisions are reinforced by international labour conventions and recommendations such as the 1998 ILO Declaration on Fundamental Principles and Rights at Work which covers the ILO core labour standards and provides minimum standards. The ILO Core Labour Standards include: (1) no forced or bonded labour, (2) no child labour, (3) no discrimination in employment and (4) freedom of association and right to collective bargaining. An entire ILO programme – the Multinational Enterprises Programme – is dedicated to the promotion and follow-up of the MNE Declaration.¹⁰⁴ The programme conducts studies to assess the impact of the Declaration on the ground.¹⁰⁵

¹⁰¹ Bernhart Mark-Ungericht, Die Regulation transnationaler Wertschöpfungsketten als interessens-politisch umkämpftes Terrain (2010).

¹⁰² ILO Tripartite Declaration concerning Multinational Enterprises and Social Policy was adopted in 1977 and revised in 2000, full text available at <http://www.ilo.org/public/english/employment/multi/download/english.pdf> (accessed 8th March 2010).

¹⁰³ See ILO Helpdesk, Factsheet No. 2, http://www.ilo.org/empent/WorkingUnits/lang--en/facet--ORG--ED_EMP---EMP_ENT---MULTI- -LOC.EMP- -EMP.ENT.MNE- -2676/WCMS_DOC_ENT_DPT_MLT_EN/index.htm (accessed 8th March 2010).

¹⁰⁴ See http://www.ilo.org/empent/WorkingUnits/lang--en/WCMS_DOC_ENT_DPT_MLT_EN (accessed 8th March 2010).

¹⁰⁵ The first study was conducted in Argentina. Here, the ILO found that employment in TNCs grew faster than in local firms, but there is no systematic evidence to suggest that TNCs go beyond the statutory provisions on many industrial relations-

Further, it is involved in promotional and training activities as well as technical cooperation projects and carries out a periodic survey that tries to capture the experiences from governments, employers and workers' organizations. The results of the survey are considered by the ILO governing body and might lead to new recommendations. However, the declaration does not touch upon issues related to implementation, monitoring and verification mechanisms. This constitutes also the main limitation of this initiative. Although, it covers central labour rights and involves a global scope there are no legally binding instruments to secure and monitor the implementation of these standards.

4.1.1.2 ILO Helpdesk

The ILO Helpdesk was established in 2008 and started its work in spring 2009 in Geneva. Its aim is to provide management and workers' representatives of TNCs with a "one-stop-shop" that offers guidance on how to address labour rights issues they encounter in day-to-day operations. In this way it seeks to popularize its approach to good labour practices, including the MNE Declaration, and further the development of good industrial relations at the TNC level.

The Helpdesk deals with questions related to international labour standards but it does not provide information on national labour laws or national industrial relations practices. As its name suggests the Helpdesk offers guidance only and does not endorse any initiative of companies, nor does it check companies' compliance with labour rights. It draws on various declarations and instruments developed within the ILO, in particular on the ILO Declaration of Fundamental Principles and Rights at Work and the MNE Declaration. Since its launch it has among other activities produced information material dealing with responsible restructuring, elimination of various forms of discrimination in the workplace, workers housing and international labour standards for plantation workers. According to the relevant sub-committee the work of the Helpdesk within its first year of operation can be seen as a success.¹⁰⁶ To what extent this additional initiative can further good labour practices in GPN remains to be seen. But the scope of this initiative is of course limited as it only involves the provision of information but no other instrument to secure labour rights. Its establishment however is a clear signal that the ILO has taken CSR¹⁰⁷ and the engagement with the private sector in this area on its agenda.

4.1.1.3 "Better Work" Programme

In contrast to the two instruments mentioned above, the "Better Work" programme indicates a change in the ILOs approach as for the first time the ILO extends its scope for monitoring beyond states and gets involved in monitoring the private sector. The programme is operated by the ILO in partnership with the International Finance Corporation (IFC) - part of the World Bank Group - and builds on a bilateral initiative between the US and Cambodia called "Better Factories Cambodia" (see box 1).

related aspects. Most interesting for the purpose of this study, evidence was presented that TNCs cooperated with suppliers who did not adhere to labour standards (López et al., Country Report Argentina, Pilot Exercise for evaluating the effect given to the ILO Tripartite Declaration on Principles concerning Multinational Enterprises and Social Policy (2009), 7/8). It also became evident that the declaration is not known to workers and thus they could not give evidence in how far the declaration is implemented in their firm (López et al, 11).

¹⁰⁶ ILO Governing Body, Report of the Subcommittee on Multinational Enterprises, GB.307/11, March 2010.

¹⁰⁷ The ILO describes CSR along the lines of the EC definition: "Corporate social responsibility is a way in which enterprises give consideration to the impact of their operations on society and affirm their principles and values both in their own internal methods and processes and in their interaction with other actors. CSR is a voluntary, enterprise-driven initiative and refers to activities that are considered to exceed compliance with the law." (ILO Governing Body 2006, http://www.unescap.org/tid/projects/csr_mons1_ilo.pdf, accessed 23rd April 2010).

Box 1: Better Factories Cambodia¹⁰⁸

The ILO monitoring programme in the Cambodian apparel sector is the most comprehensive and systematic monitoring effort to date and is a promising attempt to promote compliance with labour standards through trade agreements. It combined positive incentives to comply with labour standards offered under the bilateral textile agreement between the US and Cambodia (see section 3.5) with the responsibility of the ILO for monitoring of compliance. All factories in the textile and apparel sector in Cambodia, except for a number of subcontractors, are registered with the scheme and a team of local Khmer speaking inspectors is engaged in a constant 10 months cycle of monitoring visits to ensure that all factories undergo inspection visits culminating in factory reports and a publicly available synthesis report. The process is streamlined via a computerized information management system which global buyers and suppliers can access.

The program is based on two key and innovative policies: first, the creation of a trade agreement that provided positive market access incentives as rewards for improved labour conditions and, second, the inauguration of a new monitoring role in the private sector by an international organization. Up to then, linking trade and labour rights involved creating disincentives (e.g. preferential market access could be reduced if labour laws were not enforced). Cambodia however was guaranteed a baseline quota in the context of the Multi Fibre Arrangement (where developed countries limited textile and apparel imports by imposing bilateral quotas which was in place until the end of 2004) which could be extended annually based on progress of working conditions in the previous period. As the arrangement was repeated each year it created the potential for continuous improvements. The US Cambodia agreement with its requirement for reliable, timely and credible information about actual factory conditions required the ILO to move beyond its traditional scope of action in the public sphere.

Two major shortcomings in the initial arrangement were adjusted in the course of the project: first, the ILO monitoring programme provided for voluntary participation by factories but the quota bonus was awarded to the whole country based on the overall performance of the apparel sector. This created a free-rider problem. The Cambodian government established a regulation that limited the availability of export licenses to the US to those firms participating in the monitoring programme which resulted in full participation and a complete monitoring of the sector. Second, the ILO monitoring programme required reports on working conditions but there was no decision about the form of the reports, in particular if they should report aggregate or individual firm information. The reporting was divided in two stages: A first report published aggregate results for all firms inspected. These synthesis reports give an overview of problems in the sector without naming individual firms. After a period of time where factories have time to remedy the problems found, the factories are re-inspected. If problems had not been remedied they would be reported for each factory by name in a subsequent report. This system secured a high level of transparency.

The “Better Factories Cambodia” programme has been perceived as a big success by many actors, including governments, international institutions and donors. However, sector trade unions have also pointed out that notwithstanding the merits of the programme its impact tends to be overestimated as violation of key trade union rights, low wages and long working hours continue to be the reality of apparel workers in Cambodia. These violations confirm that labour rights which are in potential conflict with prevailing business logics inherent to GPN have remained contested as they would impose certain restrictions with regard to costs and flexibility and thus are in conflict with the business interests of lead firms in GPN. Hence, sector trade unions suggest that labour rights in global apparel production networks will be more effectively protect “if and when the multinational

¹⁰⁸ Based on “Better Factories Cambodia”-website, Miller et al. 2008, Polaski 2009.

buyers are fully integrated into the process, are disclosed in publicly accessible monitoring reports along with offending suppliers, and confronted with the impact which their buying practices has on the capacity to make real headway on wages and working hours.¹⁰⁹

The ILO and the IFC launched the “Better Work” programme in 2008 with the aim of replicating the Cambodian experience in other countries. Hence, currently new countries, including Jordan, Vietnam, Haiti, Indonesia, China, Bangladesh, Pakistan, India, Nicaragua and Morocco are targeted and the programme also aims to reach beyond the apparel sector.¹¹⁰ This instrument shows great potential for securing labour rights in GPN. However, it is important that all local actors, including trade unions, NGOs, local labour inspectorates and relevant government bodies are involved in the process and that the relation between buyers’ buying practices and labour rights violations is clearly made which requires that information on buyers’ buying practices are enclosed and that they are fully integrated in the process. A central objective of “Better Works” should be to build local capacity. Thus, the programme should closely work together and strengthen the capacity of local labour inspectorates and relevant ministries and eventually, ILO-monitoring should be replaced by local labour inspectorates.

4.1.2 UN Draft Norms and the UN Special Representative

As mentioned in the beginning of this chapter, different attempts have been made to develop instruments within the UN to regulate TNC activity. Here we look at the most recent one - the UN Draft Norms on the human rights responsibilities of enterprises. The UN Draft Norms¹¹¹ were developed by the UN Sub-Commission on the protection and promotion of human rights in a process of 6 years and were finalized in 2003.¹¹² According to the Norms, states have the primary responsibility for human rights but enterprises have a secondary responsibility in certain areas, such as core labour rights, non-discrimination, and the promotion of economic, social and cultural rights.¹¹³ After submission to the Human Rights Commission (now Human Rights Council) and an extensive consultation process with companies, trade unions, states, academia and NGOs a heated debate started. Broadly speaking, most companies and business associations – with some exceptions, for example the Business Leaders Initiative on Human Rights – considered them to be too far-reaching and/or confusing.¹¹⁴ Others, such as a few states, many NGOs and some academic institutions saw them as an important landmark in the realisation of company accountability for human rights violations. The debate was highly controversial and no agreement could be reached in the Human Rights Commission. Thus, the Draft Norms are still “stuck” at this level.

However, some companies which have already engaged with human rights in their CSR policies have welcomed the norms as providing human rights standards for business and have done a “road-testing” of the norms, in an effort to integrate these standards into their business operations. A human rights matrix¹¹⁵ including the standards of the norms has been developed by the Business Leaders Initiative on Human Rights to help assist this effort and it has been used by companies like

¹⁰⁹ Miller, D./Aprill, C./Certeza, R./Nuon, V. (2007) 'Business as Usual' – Governing the Supply Chain in Clothing Post MFA Phase-Out. The Case of Cambodia.

¹¹⁰ Better Work (2009): The Better Work Programme, Stage II July 2009 – June 2012, Geneva March 2009, http://www.betterwork.org/public/global/copy_of_index/files/fileinnercontentproxy.2009-04-27.8653403652 (accessed 9th April 2010)

¹¹¹ Sub-Commission on the Protection and Promotion of Human Rights, Norms on the responsibilities of transnational corporations and other enterprises with regard to human rights, E/CN.4/Sub.2/2003/12/Rev.2 of 26th August 2003.

¹¹² See Resolutions 1998/8 and 2001/2. For a detailed account of the drafting history see Weissbrodt/Kruger, Business as Non-State Actors, 322f., in: Alston (ed.), Non-State Actors and Human Rights (2005).

¹¹³ Draft Norms, paras. 2-14.

¹¹⁴ Lukas/Hutter (2009), 187f.

Statoil, and based on this matrix, standards were developed for and implemented in the Austrian oil company OMV.¹¹⁶

The former Human Rights Commission, instead of endorsing the Draft Norms, agreed to nominate a Special Representative on the human rights responsibilities of TNC and other business enterprises in order to clarify the following main areas (among others):¹¹⁷

- To clarify standards of corporate responsibility and accountability
- To elaborate on the role of states in effectively regulating and adjudicating the role of TNC and other enterprises

Regarding these issues, the nominated Special Representative, John Ruggie, has developed a framework called “Protect, Respect, and Remedy” where he outlines the following standards based on international law: (1) companies, regardless of their size and type, have to respect all human rights, including labour rights, (2) states, based on their obligations through the ratification of human rights treaties, have to protect individuals on their territory against human rights abuses of third parties, and (3) both actors, companies and states, have to provide for remedies such as complaint mechanisms which ensure that human rights violations of companies are properly addressed.¹¹⁸

This framework has been far less controversial and has been welcomed by most actors involved in the business and human rights debate. Relevant institutions such as the EC (see section 3.1.1) and the OECD (see next section) have underlined the importance of the framework and have sought to align their initiatives in this regard with the work of the Special Representative. At the same time a number of NGOs has highlighted that the framework presents a very pragmatic approach and only minimum baseline for companies. Further, it is not yet ensured that companies that are not willing to respect human rights will be held accountable due to the lack of an effective legal framework of accountability.¹¹⁹

It is clear that this framework is a minimum standard and baseline, and further work must be conducted to address specific problems such as those in supply chains, which will probably require more of a TNC than only the responsibility to respect human rights. The Ruggie reports have so far looked at the broader picture of the human rights responsibilities of companies but without going into detail concerning specific topics other than the ones mentioned in the mandate. But they have at least touched upon supply chain responsibility: “Supply chains pose their own issues. It is often overlooked that suppliers are also companies, subject to the same responsibility to respect human rights as any other business. The challenge for buyers is to ensure they are not complicit in violations by their suppliers. How far down the supply chain a buyer’s responsibility extends depends on what a proper due diligence process reveals about prevailing country and sector conditions, and about potential business partners and their sourcing practices. A growing number of global buyers are finding it necessary to engage in human rights capacity-building with suppliers in order to sustain the relationship.”¹²⁰

¹¹⁷ For the whole mandate see Commission on Human Rights, Human Rights and transnational corporations and other business enterprises, E/CN.4/2005/L.87 of 15th April 2005.

¹¹⁸ Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Protect, Respect and Remedy: a Framework for Business and Human Rights, A/HRC/8/5 of 7th April 2008, and Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Business and human rights: Towards operationalizing the “protect, respect and remedy” framework, A/HRC/11/13 of 22nd April 2009 (hereinafter Ruggie Report 2009).

¹¹⁹ Amnesty International, Submission to the Special Representative of the Secretary-General on the issue of Human Rights and Transnational Corporations and other Business Enterprises, July 2008.

¹²⁰ Business and human rights: Towards operationalizing the “protect, respect and remedy” framework, para.75.

It is certainly true that suppliers are bound by law to adhere to labour rights standards as much as the TNC which buy from them. However, the challenge lies in making them comply with these responsibilities. As we have seen in the previous study, power asymmetries, competitive pressures and related industry dynamics - mainly shaped by lead firms which often are TNCs - exert considerable pressure on suppliers to meet tight production deadlines and produce at low costs, which can be detrimental to the compliance with labour rights, including fair wages and non-excessive working time. Moreover, it is hardly possible to expose suppliers to the same public scrutiny and pressure than TNCs.

Concerning questions to what extent TNCs are responsible to respect human rights in their supply chains, Ruggie addresses two key elements: the sphere of influence and due diligence¹²¹. The sphere of influence was seen as too vague a concept and thus replaced by due diligence which can be more clearly defined as an established legal principle. Taking this duty to act diligently, Ruggie establishes the following factors that have to be considered by a company to determine its responsibility:

- Country and local context of the business activity
- Impacts of the company's activity within that context as a producer, buyer, employer, etc.
- Whether and how the company might abuse the relationships connected to its activities.

According to Ruggie, "[c]ompanies do not control some of these factors, but that is no reason to ignore them. Businesses routinely employ due diligence to assess exposure to risks beyond their control and develop mitigation strategies for them."

Applying the due diligence principle to GPN, it is first and foremost essential that lead firms assess the impact of their purchasing decisions and sourcing policies on suppliers. Deadlines that are too tight and will lead to overtime of suppliers' workers, and pricing pressures that make suppliers have to cut production costs, including wages, will be a violation of the due diligence principle and thus will amount to non-adherence to human rights responsibilities. Similarly, if lead firms are not able to reach and influence their suppliers in their supply chain in terms of control and capacity-building, the consequence must be to reduce the supply chain to a level where such an influence can still be exerted. Thus, it should be the responsibility of the TNC to have influence on and control over the supply chain to be able to secure labour rights. As we have seen in the chapter on chain liability regimes, regulation already foresees this issue.

Thus, the Ruggie criteria are useful but minimum standards to work with concerning labour rights in GPN but the framework still has to be specified in several areas, in particular with regard to labour rights responsibilities in GPN. But in contrast to other UN initiatives the Ruggie framework is very pragmatic and does not include steps towards binding TNC regulation – at least so far.

In the next section, the OECD Guidelines for Multinational Enterprises will be analysed. They are currently under reform and there are efforts to include the work of the UN Special Representative in this process.

¹²¹ Ruggie Report 2008, para. 65f., and Report 2009, para. 71.

4.1.3 OECD Guidelines for Multinational Enterprises

4.1.3.1 Scope and implementation of the Guidelines

The OECD Guidelines are up to now among the most relevant soft law instruments to hold companies accountable in cross-border settings. They have been elaborated by the OECD member states and contain provisions on labour issues, human rights, corruption and the environment. In the review process in 2000 - with the involvement of trade unions and NGOs - ILO Core Labour Conventions were included and their applicability was expanded to include supply chain operations of TNCs. However, the attempt of civil society organisations to make the Guidelines binding failed.¹²²

Although the Guidelines were expanded to include supply chain operations of TNCs the language used in this extension is quite weak: "Encourage, where practicable, business partners, including suppliers and subcontractors, to apply principles of corporate conduct compatible with the Guidelines."¹²³ In the OECD Commentary to the Guidelines, it is stated that this extension is an "acknowledgement of their importance to suppliers, contractors, subcontractors, licensees and other entities with which MNEs enjoy a working relationship. It is recognised that there are practical limitations to the ability of enterprises to influence the conduct of their business partners. The extent of these limitations depends on sectoral, enterprise and product characteristics such as the number of suppliers or other business partners, the structure and complexity of the supply chain and the market position of the enterprise vis-à-vis its suppliers or other business partners. The influence enterprises may have on their suppliers or business partners is normally restricted to the category of products or services they are sourcing, rather than to the full range of activities of suppliers or business partners. Thus, the scope for influencing business partners and the supply chain is greater in some instances than in others. Established or direct business relationships are the major object of this recommendation rather than all individual or ad hoc contracts or transactions that are based solely on open market operations or client relationships."¹²⁴

An important further limitation for securing labour rights in GPN is the requirement of an "investment nexus". According to the Business and Industry Advisory Committee to the OECD, any transaction covered by the Guidelines must include an "investment nexus", i.e. an operation equivalent to investment. Mere trade-related cases are outside the scope of the Guidelines. This means that generally only equity relations but not supplier and subcontracting relations which are very common in GPN are covered. However, as long as a direct influence of the investor on the commercial transaction in question can be proven, an "investment nexus" exists. Thus, "(t)his means that under certain narrowly defined conditions and depending on the nature of the commercial relationship trade cases could in fact be regarded as falling under the scope of the Guidelines."¹²⁵

Concerning these "conditions", there is considerable uncertainty and the interpretations of the National Contact Points (NCPs), the complaint mechanisms of the Guidelines, differ significantly. For example, the Dutch NCP takes a wider view of the issue: "[T]he majority of reports concern factual circumstances that take place in other countries, involving a subsidiary or supplier. The Netherlands is one of the countries that takes a broad interpretation of the investment nexus in this situation. The main focus in determining whether there is an investment-oriented relationship is not on ownership,

¹²² Mark-Ungericht 2010, Die Regulation transnationaler Wertschöpfungsketten als interessens-politisch umkämpftes Terrain; OECD Declaration on International Investment and Multinational Enterprises (2000).

¹²³ Guidelines, chapter II, para. 10.

¹²⁴ See text of the Guidelines with integrated commentary, p. 13, [http://www.oalis.oecd.org/olis/2000doc.nsf/LinkTo/NT00002F06/\\$FILE/JT00115758.PDF](http://www.oalis.oecd.org/olis/2000doc.nsf/LinkTo/NT00002F06/$FILE/JT00115758.PDF) (accessed 23rd February 2010).

¹²⁵ Business and Industry Advisory Committee to the OECD, Business Brief, Vol. II, No. 2, June 2004, http://www.biac.org/pubs/mne_guidelines/business-brief-2-2-final.pdf (accessed 23rd February 2010).

but on the degree of influence that the Dutch company can exercise on its foreign partner. If the situation does not involve ownership but does involve trade relations, the NCP looks at aspects such as: the duration of the relationship (or trade relationship) between the buyer and supplier, the percentage of the supplier's annual production that the buyer purchases, whether the products have brand labels from the Dutch buyer (i.e. whether the product is sold as the buyer's own product), specific buyer requirements for production methods, working conditions or environmental standards, etc., whether the buyer supplies product designs, specifications or semi-manufactured goods, and the degree of contact between the Dutch company and the local stakeholders (government, trade unions, etc.)."¹²⁶

Thus, many GPN relationships including TNCs having regular relationships with suppliers, requiring specific standards (e.g. labour rights standards, product quality, technical standards, etc.) and being engaged in stakeholder relationships would fall under the purview of the Guidelines - at least in the Netherlands. However, other NCPs have applied a very strict and narrow interpretation¹²⁷ of the Guidelines and have rejected complaints concerning suppliers on the ground of lack of investment nexus. Thus, a certain arbitrariness can be found: depending on the national NCP, labour rights violations in GPN will be addressed - or not.

Accordingly, the NGO network OECD Watch¹²⁸ concludes that in their current form and application, the guidelines are rather weak "on supply chain responsibility".¹²⁹ In this regard, OECD Watch and Eurosif provide a useful guide to assess adherence to the supply chain provision of the Guidelines.¹³⁰ They recommend to first gather information about the supply chain, e.g. if the company has mapped its supply chain, number and location of suppliers, influence on suppliers, length of relationship with suppliers. Then the "investment nexus" is explained and examples of alleged violations of supply chain responsibility are given. Lastly, questions on company policy and practice are presented: does the company have a policy towards suppliers? Does it apply this policy beyond its direct suppliers (1st tier suppliers)? Are violations incidental or structural? How often did/do violations take place? Is compliance independently monitored? Does the CSR department influence decision-making in other departments, such as the purchasing and sourcing department?

The answers to these questions will be a good indicator whether compliance with the Guidelines is given. In many instances, compliance is inadequate and trade unions as well as NGOs have brought complaints of alleged violations of the Guidelines to the OECD National Contact Points.

4.1.3.2 The National Contact Points

The NCPs are the complaint mechanism of the guidelines. As has been shown, the NCPs are not uniform in their structure and effectiveness but vary considerably, also depending on their national set-up. Some NCPs are fully integrated in governmental institutions (for example in the Ministry of Economic Affairs as is the case in Austria) whereas other NCPs have a more independent structure. NCPs cannot issue decisions binding upon the parties but can only give recommendations, they provide mediation but not adjudication. The current NCP structure does not qualify as a credible

¹²⁶ See <http://www.oecdguidelines.nl/ncp/filing-complaints/> (accessed 23rd February 2010).

¹²⁷ See for example OECD Watch/Germanwatch, The OECD Guidelines for Multinational Enterprises and Supply Chain Responsibility (2004), <http://www.germanwatch.org/tw/kw-sup04.pdf> (accessed 24th February 2010).

¹²⁸ The network consists of a diverse range of civil society organisations working on human rights, labour rights, consumer rights, transparency, the environment and sustainable development. For the full list of member organisations, see <http://oecdwatch.org/about-us/members> (accessed 24th February 2010).

¹²⁹ OECD Watch, Summary of the OECD Watch side event at the OHCHR consultation on business and human rights (2009), http://oecdwatch.org/publications-en/Publication_3291/view (accessed 24th February 2010).

¹³⁰ OECD Watch, Assessing Adherence to the OECD Guidelines' Supply Chain Provision (2007), http://oecdwatch.org/publications-en/Publication_3010 (accessed 24th February 2010).

non-judicial complaint mechanism in the sense of the above mentioned Ruggie-Framework. At present, the NCPs do not comply with the requirements of legitimacy due to their lack of independence from governmental structures; nor with predictability as certain issues such as the investment nexus are still unclear and subject to differing interpretations; nor with transparency because the NCPs still struggle with properly balancing the need for a certain level of confidentiality with the requirement to be transparent in terms of the Ruggie criterion.¹³¹ Thus, there is room for improvement of the NCP structure to become more effective in supporting the implementation of the Guidelines.¹³²

Regarding NCP “case law”, unfortunately, the OECD does not provide an online-database on the cases brought to the NCPs. But the OECD Watch does (see figure 2). In sum, around 200 complaints have been filed by trade unions and NGOs since the inception of the NCPs, but only a handful has been concluded. Among these complaints 16 labour rights complaints have been filed, among them 4 concerning the supply chain. Thus, the database shows that actual cases that have been concluded are rather sparse. While the investment nexus is a major bottleneck for holding companies accountable for labour rights violations in GPN the role of the NCP is also a problem. In this regard the Trade Unions Advisory Committee at the OECD highlights that “improving the effectiveness of the Guidelines depends above all else on improving the effectiveness of the NCPs.”¹³³ Recently, there are some promising signs of enhanced accountability of corporations for their suppliers. In the next section, the structure and “case practice” of the UK NCP will be presented as an emanation of progressive implementation of the Guidelines in this regard.

Figure 2: OECD Watch Database: Labour Rights Complaints¹³⁴

¹³¹ On the criteria see Ruggie report 2008: 24.

¹³² OECD Watch has made a detailed proposal for a “Model NCP”, see Model National Contact Point. Proposals for Improving and Harmonizing the NCP’s, http://oecdwatch.org/publications-en/Publication_2223 (accessed 28th February 2010).

¹³³ TUAC, Submission to the OECD Investment Committee, October 2009.

¹³⁴ These are: Clean Clothes Campaign v. Nike, Clean Clothes Campaign v. Adidas, ICN v. Adidas Netherlands, and ICN v. Kubianga; see http://oecdwatch.org/cases/Case_171/@_@casesearchview?type=Keyword&search=en_Labour%20rights (accessed 9th March).

Keyword: Labour rights

16 cases relating to 'Labour rights':

Title	Issue	Date filed	Status
Thai and Filipino labour unions vs Triumph International	Labour rights at Triumph Thai & Philippine garment factories	3 December 2009	Filed
ForUM and Friends of the Earth Norway vs Cermaq ASA	Cermaq ASA's salmon farming in Canada and Chile	19 May 2009	Filed
Workers Assistance Center et al vs. Chongwon Fashion Inc	Korean textile companies' labour abuses in the Philippines	3 September 2007	Rejected
Workers Assistance Center et al vs Il Kyung Co., Ltd.	Korean textile companies' labour abuses in the Philippines	3 September 2007	Pending
CGTP et al vs. Grupo Altas Cumbres	Banco del Trabajo's labour rights abuses in Peru	25 April 2007	Closed
Global Witness vs. Afrimex	Afrimex's mineral trading in the DRC	20 February 2007	Concluded
Protest Toyota Campaign vs. Toyota	Toyota's anti-trade union practices in the Philippines	4 March 2004	Blocked
CBF vs. National Grid Transco	NGT's mining practices in Zambia	25 July 2003	Closed
Unite et al vs. Brylance Inc.	Brylance's anti-trade union practices in the US	8 October 2002	Withdrawn
CCC vs. Nike	Labour rights violations in Indonesian supply chain	5 September 2002	Rejected
CCC vs. Adidas	Labour rights violations in Indonesian supply chain	5 September 2002	Concluded
FoE Netherlands vs. Nutreco	Nutreco/Marine Harvest's salmon farming in Chile	22 August 2002	Concluded
Germanwatch vs. Continental AG	Continental AG's labour practices in Mexico	27 May 2002	Concluded
ICN vs. Adidas Netherlands	Labour violations in Indian football production	20 June 2001	Concluded
ICN vs. Kubbinga	Labour violations in Indian football production	20 June 2001	Rejected
RAID vs. Binani	Binani's corruption in mining industry Zambia	1 May 2001	Withdrawn

4.1.3.3 An example of good practice: The NCP of the United Kingdom

The UK NCP consists of officials from the Department for Business, Enterprise, and Regulatory Reform (BERR) and the Department for International Development (DFID). Following criticism of the effectiveness of the NCP, the UK government engaged in consultations on how to improve the NCP. One of the changes made in this process was the establishment of a steering board that overviews the NCP. It represents trade unions, companies and NGOs. Its members have a clear mandate from their constituencies to raise concerns and suggest improvements.¹³⁵ In terms of transparency, the NCP issues public initial and final statements on all new cases.¹³⁶ Additional funding has been released to provide the NCP with mediation training and the option to resort to independent mediation in specific cases. The case International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations against Unilever plc concluded in October 2009 demonstrates that the use of the guidelines by a progressive NCP can render promising results (see box 2). This case aptly shows that the initial refusal of the lead firm to be held accountable for labour rights violations of its service providers could be changed in the course of the mediation process which demonstrates the potential of the Guidelines in terms of supply chain responsibility.

Box 2: International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations (IUF) against Unilever plc on Pakistan's Khanewal factory

The IUF alleged that Unilever deliberately constructed a system of employment at its Khanewal factory based almost exclusively on temporary workers and was refusing to change the workers' status from temporary to permanent after the mandatory nine-month period of continuous service, allegedly

¹³⁵ BERR/DFIDH, UK National Contact for the OECD Guidelines: Annual Return for the OECD Investment Committee 2007/2008, December 2008, <http://www.bis.gov.uk/files/file49810.pdf> (accessed 29th March 2010).

¹³⁶ See a list of cases including these statements at <http://www.bis.gov.uk/policies/business-sectors/low-carbon-business-opportunities/corporate-responsibility/uk-ncp-oecd-guidelines/cases> (accessed 29th March 2010).

in breach of Pakistan's employment law. The IUF explained that temporary workers do not have the same access to collective bargaining as permanent workers in Pakistan and also do not receive the same benefits. The IUF also alleged that those temporary workers who demanded demanding permanent status and petitioned the Punjab Labour Court in Multan were subject to threats, coercion and violence from members of management.¹³⁷

Unilever stated that it cannot be held responsible for the work status of workers employed by independent local service providers and that it insists upon service providers complying with Unilever's Business Partner Code and with Pakistan's law. Unilever also stated that employees of Unilever's independent service providers are free to form their own unions separate from Unilever Employees Federation of Pakistan (which can only represent Unilever's permanent staff in the country). Unilever denied that workers were subject to threats, coercion or violence.¹³⁸

After mediation by an independent mediator, the parties agreed that there will be a significant change in the model of employment at Khanewal based on a combination of directly employed permanent labour in non-seasonal manufacturing and contract agency workers. Unilever will establish 200 permanent positions at Khanewal in addition. This is in addition to the existing 22 positions. Unilever shall ensure that the third party service provider companies provide appropriate payment to their employees both who receive permanent positions and who do not receive permanent positions in settlement of any outstanding statutory payments. This assurance includes Unilever's agreement to assume responsibility for the payment of any and all payments not met by the service provider.

The UK NCP is being monitored closely by the relevant OECD institutions and it is to be hoped that its approach will be seen as the direction for the further development of the implementation of the Guidelines in the light of the ongoing review process of the Guidelines.

4.1.3.4 Current Review of the Guidelines

At the OECD Ministerial Council Meeting in June 2009, the member states decided to again review the Guidelines. In the course of this review process, stakeholder consultations with trade unions and NGOs have taken place.¹³⁹ The mandate from the Council sounds quite promising: the aim is to "increase the relevance" of the Guidelines and "clarify private sector responsibilities". However, this could go both ways. On the one hand, it could mean to disseminate the Guidelines more widely without changes in content or even a draw-back from the existing standards. On the other hand, it could be used as a vehicle to progressively develop the Guidelines by strengthening more independent NCPs such as the UK NCP, endorsing the broad interpretation of the term "investment nexus" as followed by the Dutch NCP, and employing a more comprehensive approach as invoked by the "due diligence" concept in the Ruggie-Framework. In the later case the Guidelines have the potential to become one of the leading global instruments to further "private sector responsibilities".

¹³⁷ NCP UK Final Statement, 2, <http://www.bis.gov.uk/files/file53915.pdf> (accessed 30th March 2010).

¹³⁸ Supra, 3.

¹³⁹ See for example the submission of Trade Union Advisory Committee to the OECD (TUAC) of 7th October 2009, including detailed proposals for improvement, http://www.tuac.org/en/public/e-docs/00/00/05/86/document_doc.phtml (accessed 28th February 2010).

4.2 Codes of Conduct

In response to growing public scrutiny, consumer pressure and NGO allegations concerning human rights violations of companies since the 1980s, some companies responded with unilateral CSR measures.¹⁴⁰ Since then, numerous activities have been undertaken under the wide umbrella of CSR, also in the area of labour rights in GPN, and a multitude of CoC at the sectoral and company level committed to, inter alia, labour rights compliance, have been created.¹⁴¹ As there are no authoritative standards or model codes to comply with, we see a wide variety of CoC with different levels of standards and protection. In the following sections, standards and protection mechanisms concerning labour rights are explored. Further, the possibility to make these voluntary CoC legally binding via contractual clauses will be discussed.

4.2.1 Labour Rights in Codes of Conduct

Most CoC include at least some of the ILO Core Labour Standards as the bottom line of labour rights protection. Very few refer to the International Covenant on Economic, Social and Cultural Rights which stipulates the right to work, including the right to a decent wage. The International Confederation of Free Trade Unions has created a model code, the ICFTU Code of Labour Practice which should serve as an example for companies wishing to comply with labour rights. The Code contains eight standards – the ILO Core Labour Standards and “other generally accepted labour standards” stipulated in basic ILO conventions and recommendations (see box 3). This code is widely accepted and broadly used by trade unions, NGOs, multi-stakeholder initiatives and academics.

Box 3:

The ICFTU Code of Labour Practice
<ul style="list-style-type: none">• No forced or bonded labour• No child labour• No discrimination in employment• Freedom of association and right to collective bargaining• Right to a living wage• No excessive working time• Occupational health and safety measures• Right to establish a permanent employment relationship

¹⁴⁰ UNRISD 2004

¹⁴¹ The number of companies that have created CoC are still comparatively small. According to Bernstein and Greenwald, who analysed data of 2.508 TNCs, only 28% have a supplier policy, and 15% have established a specific labour rights code for suppliers. Less than 6% endorse specific labour rights standards such as the ILO core labour rights. 6% monitor suppliers or set labour rights improvement targets; and only 7% provide for enforcement procedures (Aaron Bernstein and Christopher Greenwald, *Benchmarking Corporate Policies on Labor and Human Rights in Global Supply Chains* (2008), 4.

The ICFTU Code covers basic labour rights comprehensively and would thus be a preferable model and benchmark of compliance.¹⁴² However, labour rights standards development is very uneven across TNCs codes, and the above-mentioned standards can be found in all variations which makes it very difficult to compare labour rights performance of TNCs and their supply chains. Thus, a main limitation of CoC is that they do not follow a uniform set of standards with regard to labour and other rights but each CoC covers different standards depending on the sectoral and company actor and their interest¹⁴³. Besides the different content of CoC, the actual implementation and monitoring of these CoC is a key challenge.

4.2.2 Effectiveness of Codes of Conduct

Generally, CoC are non-binding instruments which cannot be legally enforced in the supply chain. In this regard, one of the key challenges in the area of CoC implementation has been to ensure compliance with CoC at all levels of the supply chain. The common instrument to secure compliance is through audits which are either conducted internally by the company or through external organizations. The development of CoC to improve working conditions in GPN has brought improvements in some areas but also shows several limitations when it comes to effectively securing labour rights. A growing body of literature highlights the following issues:¹⁴⁴

- Inefficiencies in multiple audits for the same supplier by each buyer,
- Widespread false evidence and double-book-keeping by suppliers,
- Limited capabilities of third party and in-house auditors to understand and detect violations, particularly of freedom of association,
- A focus on policing and finding flaws, rather than on advising and fixing problems,
- Limited scope for reaching sub-contractors and the more vulnerable casual and home-based workers,
- Internal misalignment within firms between social responsibility and economic imperatives,
- Lack of engagement with public labour inspections and other efforts to improve governance and compliance over the long term.

Some of these issues were also brought up in our previous study on the apparel and electronics sectors in Romania and are inherently linked to the complexities of and power relations in GPN. We found that although CoC generally cover basic labour rights, audits were so far mostly concerned with health and safety issues, paying less attention to wages, overtime or trade union rights which are critical to improve overall working conditions. Improvements such as better lighting, ventilation or ergonomic chairs relate to process upgrading as they also increase productivity by a more 'efficient' use of the 'human resource'. In contrast to these 'win-win' situations, issues that are in conflict with the prevailing business logic (e.g. living wage, working time, trade union rights) remain contested. Respecting those rights would entail restrictions with regard to flexibility and prices/wages paid. Thus, the selective nature of improvements suggests that the 'business case' was at least equally important as the 'social case'. There is also a lack of coherence at the buyers' level since the per-

¹⁴² Multistakeholder initiatives such as the Ethical Trading Initiative use the same standards; see Ethical Trading Initiative Base Code, <http://www.ethicaltrade.org/eti-base-code> (accessed 15th March 2010).

¹⁴³ UNRISD 2004

¹⁴⁴ OECD-ILO, Annual Report of the OECD Guidelines for Multinational Enterprises – Employment and Industrial Relation (2008), p.230

sons in charge of CoC and CSR and the ones in charge of production and price negotiations are generally not the same and their agendas are not geared to each other. Hence, apparel suppliers are confronted on the one hand with tight price and delivery time demands as well as last minute changes to orders from the clients' sourcing department and on the other hand with demands from the CSR department that has usually not the power to reward the supplier for investments and improvements in working conditions (e.g. via higher prices or more stable contractual relationships)¹⁴⁵.

As the limits of conventional CoC-approaches have become apparent, some of the more pro-active TNCs have adopted a so-called "Beyond Monitoring" approach¹⁴⁶. Having experienced the limited effectiveness of supply chain control through audits, because impacts were not sustainable and incidences instead of root causes were addressed, companies such as Nike turned to capacity-building of and dialogue with suppliers rather than top-down control to ensure compliance.¹⁴⁷ Some have also identified the inclusion of workers in the compliance procedure as a critical criterion of success.¹⁴⁸ As this is an ongoing process, its impact cannot be assessed yet, however, the stronger focus on the principal rights-holders, the workers, is per se a big step forward. Parallel to this development, the question still remains whether CoC can be made binding and legally enforceable in the supply chain.

4.2.3 Codes of Conduct and contractual obligations

Quite a number of TNCs have integrated parts or referred to the entire CoC in contracts with their suppliers. As an integral part of the supplier contract and thus of a contractual obligation of civil law, these provisions can be enforced in civil courts. A few companies such as Nike have a gradual sanction system for such situations. In case of violations of labour rights, the supplier gets the opportunity to remedy the situation. If no compliance occurs within a given time frame, the contract will be terminated. Only in cases of very severe labour rights violations (such as the systematic use of child labour) will a termination be immediate.

However, this contractual obligation cannot be extended to third parties but is only enforceable between the two parties of the contract. Thus, it is a binding mechanism for first tier suppliers, but not for suppliers further down the chain. What would however be feasible is the possibility to include an obligation for the first-tier suppliers to subcontract only to suppliers who will adhere to the labour standards as stipulated in the CoC. In this context, the CoC would be part of the contract between the first- and second-tier supplier and would be enforceable between these two suppliers. Questions of controlling compliance with the labour rights standards stipulated in the contract still remain. However, so far, this is the only way of giving binding effect to labour rights in company CoC.

In conclusion, evidence shows that company CoC have had – to some extent – a positive impact on the protection of labour rights in GPN, but they are less effective than some had hoped or promised. Thus, they must be seen as only one, and certainly not the most encouraging, avenue to global labour rights protection. The biggest limitations are the following: (1) the voluntary and non-standardized nature of this approach with regard to design and the content as well as implementa-

¹⁴⁵ Plank/Staritz/Lukas 2009.

¹⁴⁶ Stephanie Barrientos/Sally Smith, *The ETI Code of Labour Practice: Do workers really benefit?* (2006) and *Business for Social Responsibility, Beyond Monitoring: A Vision for Sustainable Supply Chains* (2007)

¹⁴⁷ Richard Locke/Fi Quin/Alberto Brause, *Does Monitoring improve Labour Standards? Lessons from Nike* (2006), http://www.hks.harvard.edu/m-rcbg/CSR/publications/workingpaper_24_locke.pdf; see also Nike, *Evolving beyond monitoring*, <http://www.nikebiz.com/crreport/content/workers-and-factories/3-1-3-evolving-beyond-monitoring.php?cat=overview> (accessed 10th March 2010).

¹⁴⁸ See for example Stephanie Barrientos/Sally Smith, *The ETI Code of Labour Practice: Do workers really benefit?* (2006) and *Business for Social Responsibility, Beyond Monitoring: A Vision for Sustainable Supply Chains* (2007), 5f.

tion and monitoring; (2) the limited coherence of TNC's buying and sourcing practice on the one hand and CSR demands stipulated in CoC on the other hand - only if CoC are part of the core business of TNCs and procurement practices are aligned with labour rights stipulated CoC can have a sustainable impact on suppliers; and (3) the lack of engagement with public labour inspectorates and labour ministries as well as workers organisations which impedes on the long-term effectiveness of this instrument.

In the last section of this chapter, a trade union driven instrument is explored which indicates that cross-border labour rights protection is possible if a certain level of cooperation between companies and trade unions can be reached.

4.3 International Framework Agreements¹⁴⁹

IFAs are a form of cross-border social dialogue and constitute transnational agreements with the main purpose of ensuring international minimum labour standards in all of the target company's locations. In general, IFAs are negotiated between TNCs and Global Unions which makes them distinct from their "twins" – the EFAs – which involve European TNCs and European trade unions and/or European Works Councils (see 2.4.). IFAs can be used as a tool to extend labour policies and cooperative industrial relations to the company's locations outside the home country and some provide for a monitoring process to enforce labour rights throughout the GPN.

In contrast to CoC which mostly represent unilateral initiatives by companies and are usually implemented and monitored unilaterally by companies, IFAs involve companies and trade unions on a global level and can thus be seen as a major momentum of collective bargaining processes at the transnational level. Most IFAs include procedures whereby the signatories may jointly develop implementation and monitoring procedures. Hence, some Global Trade Unions see IFAs as a welcome alternative to company CoC and view them as more effective and legitimate than CoC.¹⁵⁰ Figure 4 shows the main differences between CoC and IFAs, including the recognition of all core labour standards, the coverage of suppliers and involvement of trade unions in the implementation process as well as negotiation and dialogue between labour and management.

Figure 4: Characteristics of CoCs and IFAs¹⁵¹

¹⁴⁹ This section is largely based on Karin Lukas, The Protection of Labour Rights in Global Production Networks, in: Corporate Social Responsibility and Social Rights, *facultas/Nomos* (forthcoming).

¹⁵⁰ Schömann/Sobczak/Voss/Wilke, International framework agreements: new paths to workers' participation in multinationals' governance?, in: Does good corporate governance need worker participation? (2008), 113, *European Review of Labour and Research*, Vol. 14, no. 1.

¹⁵¹ International Metalworkers Federation, IMF – The Power of Framework Agreements (2003), 4, <http://www.newunionism.net/library/organizing/IMF%20-%20The%20Power%20of%20Framework%20Agreements%20-%202003.pdf> (accessed 12th May 2009).

Codes of Conduct	International Framework Agreements
<ol style="list-style-type: none"> 1. Unilateral initiatives 2. Do not necessarily recognise all core labour standards 3. Rarely cover suppliers 4. Monitoring, if any, controlled by management 5. Weak basis for labour-management dialogue 	<ol style="list-style-type: none"> 1. Negotiated between labour and corporate management 2. Recognise all core labour standards 3. Usually cover suppliers 4. Unions involved in implementation 5. Strong basis for dialogue between trade unions and management

Although IFAs vary in content, all of the agreements are based on the ILO core labour standards and a number of agreements go beyond the recognition of the ILO Core Labour Standards by ensuring decent wages and working conditions as well as health and safety measures. Some recent IFAs, such as the one between INDITEX and the Global Textile Workers' Federation in 2007 also include the right to a permanent employment relationship. Thus, it seems that all standards of the ICFTU Code of Labour Practice are gradually being applied in IFAs. Some IFAs also make reference to other international codes and principles, such as the UN Declaration on Human Rights, the UN Global Compact, and the OECD Guidelines for Multinational Enterprises.¹⁵²

Most IFAs apply to the whole company group; some indicate that their commitment varies depending on the degree of control lead firms have within their subsidiaries (Sobczak 2007: 471). The majority of IFAs contain provisions that bind suppliers to the stipulated obligations. However, the concrete formulations differ in the degree to which they are binding (Müller/Platzer/Rüb 2008: 7). Nearly half of the agreements required that the TNCs inform their suppliers and encourage them to respect the principles laid down in the IFA. But only 14% of the IFAs contained measures to ensure that suppliers comply with the IFA and only 9% were obligatorily applied to the whole supply chain, with the TNC assuming full responsibility (Eurofound 2008).¹⁵³

By 2009, over 70 IFAs have been signed, the first by Danone in 1988 and the pace of adoption has accelerated in the last years, with half of them adopted since 2004 (ILO 2008). About 90% were signed by companies with headquarters in the continental EU 15 countries or Norway. In most cases, the request to negotiate IFAs came from the home country trade unions and European works councils.

Experiences with the implementation of existing IFAs vary considerably and largely depend on union organization and capacity (Hammer/ILO 2008: 101). In some instances, employees have merely been informed about the existence of an IFA, in others, concrete steps have been taken to build international union networks and to develop action plans to ensure that complaints are acted upon. In most instances, at least one annual meeting is devoted to the monitoring of the application of the

¹⁵² Torsten Müller, Hans-Wolfgang Platzer, Stefan Rüb, International Framework Agreements – Opportunities and Limitations of a New Tool of Global Trade Union Policy, Friedrich Ebert Stiftung, Briefing Paper No. 8/2008, p.6.

¹⁵³ See

<http://www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/internationalframeworkagreement.htm>

agreement. Usually, a specific committee is mandated with the implementation of the IFA. In fewer cases, a problem reporting procedure is laid out. Other approaches include the integration of the IFA in the internal audit process (see for example Daimler) or the monitoring being handed over to a separate compliance organization (IFA IKEA). Sometimes, monitoring of implementation is supported by NGOs. An interesting monitoring procedure has been established in the IFA of PSA Peugeot Citroen, it involves both a monitoring procedure at the local and the group level.

Generally, trade unions are sceptical towards monitoring by external agencies, such as certification or accounting firms, being doubtful of their independence (Kearney and Justice 2003: 108/9).¹⁵⁴ Thus, their favoured option is monitoring by themselves and the employees. This, however, requires adequate structures of independent trade unions at most, if not all, locations of the company and its suppliers. Further, this requires a well-functioning communication structure between the local trade union and the global trade union as most problems will have to be dealt with at the global trade union level (Müller et al. 2008: 10).

Basically all IFAs allow trade unions to raise problems and bring cases to be solved. Some IFAs define special procedures in such situations. Usually, the workers or their representatives are invited to discuss the issue with management. If no solution is found, the issue is brought to the next level and dealt with by the national trade union and the company headquarters. If the problem still remains unresolved, the IFA signatories are bound to find a solution (Sobczak 2008: 124). However, up to now, there have been relatively few examples of instances where complaints have been raised under an IFA.

Moreover, the involvement of mostly trade unions from developed countries raises issues of representation in other locations of TNC operation. As mentioned, the large majority of IFAs have been concluded in EU member states. Most IFAs give home state trade unions or works councils, but also the European Works Councils the mandate to monitor the IFA process. This seems to represent the current power relations and the “division of labour within the international labour movement” between trade unions in developed and ‘transition’ and developing countries (Hammer 2008: 104). In addition, problems of legal representation arise. Although sector-level Global Trade Union Federations have the mandate to represent in principle all workers in companies of that sector worldwide, national or supranational labour law does not confer the power to negotiate collective bargaining agreements to Global Trade Unions as this is the role of national trade unions and workers representatives (Sobczak 2007: 482). Moreover, labour law distinguishes between sector and company agreements, and the IFA is a mixture of both agreements. Thus, many IFAs are signed by both the sector-specific Global Trade Union and a European Works Council to reconcile this asymmetry. However, what remains still unresolved in this constellation is the problem of workers in subsidiaries and suppliers in non-EU countries. To counter this problem, some IFAs have been signed by national trade unions in all countries where the company has subsidiaries (Sobczak 2008: 121). This approach addresses both issues of representation and decentralisation to ensure that those who are legitimised on the ground to negotiate for workers are also those who implement the IFA.

Very relevant for GPN is the “double orientation” to social regulation that is followed by IFAs - “that within an MNC and that between a lead firm and its global value chain/production network” (Hammer in ILO 2008: 90/91).¹⁵⁵ Thus, IFAs and related organizing and monitoring efforts may not only focus along the lines of specific companies and sectors, but across firms and sectors along GPN. This broad focus makes it possible to extend IFAs beyond subsidiary relationships also to supplier rela-

¹⁵⁴ N. Kearney, D. Justice, “The New Codes of Conduct” – Some Questions and Answers for Trade Unions, 92-114, in: I. Wick, *Workers’ tool or PR ploy? A guide to codes of international labour practice*, Friedrich Ebert Stiftung/Südwind 2003.

¹⁵⁵ Nikolaus Hammer: *International Framework Agreements in the context of global production*, in: Papadakis (ed.)/ILO, *Cross-border social dialogue and agreements*, Geneva 2008

tionships in GPN. Similar to including a CoC in the contract with suppliers, the IFA can be made binding to the supplier by integration in the contract or as part of a company collective bargaining agreement. Monitoring would then be done by local trade unions in cooperation with the respective Global Trade Union which would establish a monitoring process which makes the enforcement of labour rights effective throughout the whole "chain" (Sobczak 2008: 124).

Various factors influence the enforcement of IFAs within a GPN. One factor to take into account is the nature of the network. Depending on the governance structure and the associated power relations, lead firms will have more or less influence to enforce the IFA in their subsidiaries and with their suppliers. Further, the motives of the TNC and the trade unions as well as the power-base of the trade union within the respective company need to be taken into account. The political context is important as well: in countries where labour relations are traditionally conflictive (USA, UK), unions seem to regard IFAs as an organising tool. In contrast, in countries with more institutionalised and cooperative labour relations (Austria, Germany, Sweden), unions tend to see IFAs more pragmatically as a first step toward a continuous dialogue with a company in order to solve concrete problems at the international level (Müller/Platzer/Rüb 2008, p. 8/9).

Some legal issues remain which may be problematic in the enforcement process. It is still uncertain whether IFAs have independent legal standing, if they are not part of contractual obligations or of collective bargaining agreements. According to Schömann et al., IFAs which have only been signed by the representative of the headquarters of the lead firm will not satisfy the requirements of national labour law in the countries where subsidiaries and suppliers are located. To bring more clarity into the question of the legally binding nature of IFAs, Sobczak proposes an international or at least a European legal framework to accommodate initiatives by companies and trade unions wishing to secure labour rights in GPN (see also section 3.1.4 on EFAs). Similarly to the suggestions concerning European Works Councils, legislation which confers an explicit mandate to lead firms to negotiate agreements for their subsidiaries would clarify the question of the legal standing of such agreements. As this legal framework is not yet in place, the legally least risky solution is currently the transposition of the IFA at each subsidiary either by collective agreements or unilateral management regulation.

Compared to other strategic options available to trade unions concerning labour rights protection in GPN, IFAs are certainly a promising instrument. In particular, IFAs tend to offer more effective compliance mechanisms in terms of implementation of labour rights than unilateral company CoC and involve relevant actors from the corporate and labour side. They are seen by some as "the most dynamic element among the unions' approaches vis-à-vis the companies" (Müller et al. 2008: 11). However, they do face considerable constraints. The geographical distribution of IFAs clearly indicates that Western Europe remains the focal point of activities. Further, there exist important power imbalances between TNCs and trade unions which may limit the content and scope of IFAs. However, their increasing prominence in the area of global business regulation can be seen as "the result of a growing motivation on the part of both multinationals and unions to close the current legal gap in international and European labour law in order to (self-) regulate the social consequences of globalisation, and ensure adherence to labour and social standards, though for different reasons." (Schömann et al. 2008: 121). IFAs can therefore be seen as one important instrument which should be embedded in a larger European and international framework to secure basic labour rights globally.

5. CONCLUSIONS AND RECOMMENDATIONS

The global economy, and in particular the organization of global production and international trade, has changed significantly in the last three decades. Today, international trade and global production are increasingly organised in highly fragmented and geographically dispersed GPN. These transformations have important consequences for workers and labour rights protection. The development of these complex global production arrangements together with a redefinition of the role of the state in the context of globalisation has led to an 'accountability gap' for labour rights. Against this background the guiding question of this report was how transnational corporate activities and GPN can be regulated to secure labour rights.

Previous unilateral and nation-bound instruments have lost effectiveness to secure labour rights in this new environment of global production. But the development of new regulatory mechanisms that are or can be made applicable to secure labour rights in GPN has been slow. This is due to the cross-border dimension of these networks that require cross-territorial cooperation between state authorities as well as to the complexity of and asymmetric power relations between actors in GPN. However, there are some promising developments on different levels.

New instruments have emerged on the national level. For instance, some EU member states have introduced legislation to hold companies accountable for labour rights violations in supply chain relationships ("chain liability"). There are however important limitations as labour rights violations have to occur in the territory of the regulating state which importantly limits their reach in GPN since they generally span over different countries. Not all types of workers are covered with the same level of effectiveness (i.e. informal, part-time and temporary workers) and so far these regimes are limited to the construction sector. But chain liability schemes can in principle be extended to other sectors and to international or at least EU-wide labour rights violations and can be made effective for more kinds of workers. Incentive mechanisms such as socially responsible public procurement still wait to be put to use for GPN settings as current initiatives focus on 'green procurement' and on national employment and issues of anti-discrimination considerations without looking at labour rights further down in the production network. A central limitation for current public procurement initiatives is their focus on short-term economic criteria (in the narrow sense) that restricts the possibilities for considering social criteria. But due to the importance of states as buyers they would have the potential to positively influence compliance with labour rights in GPN and act as a role model. Moreover, host state responsibility for labour rights, especially in countries outside of the EU, may be compromised by a variety of factors in the context of GPN and related competitive pressures and power asymmetries. States compete with each other to attract FDI and supplier contracts, and low wages and weak labour rights regulation are often 'competitive advantages' in GPN. In this context, host states may be unable or unwilling to introduce and enforce severe obligations on TNCs with regard to labour rights.

A very small number of states has been active with regard to home state responsibility and has provided for the possibility to bring companies to court for labour rights violations committed abroad. These regimes are promising but have currently some important limitations. They are limited either to grave labour rights violations or require that a subsidiary commits the labour rights violation for the lead firm to be held accountable. Hence, the increasingly widespread supplier and subcontracting relationships in GPN are not covered. Further, a strong relation of the TNC to the labour rights violation has to be proven by workers which is likely to be a major obstacle in GPN settings. In the case of the US ACTA complicity of the TNC has to be proven which can be legally difficult. In

Europe, there are very few cases that involved home state responsibility regarding labour rights. This demonstrates that home state responsibility is the last resort concerning labour rights protection, and it should be upon the host state to secure labour rights. But in parallel home state responsibility should be further developed and fortified.

On the EU level, little efforts have been seen in terms of company regulation to ensure labour rights protection in GPN. Although the EU does not have an explicit mandate in this matter, cross-border labour rights protection is an issue of EU wide relevance and EU member states face limits at the national level. Here, the subsidiarity principle becomes operational which foresees that matters which cannot be solved on the national level must be solved on the EU level. Thus, the EU is in the unique position and better suited than any other organization to enact legislation with binding effect on EU based companies operating transnationally. However, efforts have been limited and decisive steps into the direction of labour rights accountability of companies abroad still wait to be taken.

Extending the aforementioned national chain liability to the EU level and making it operational for other sectors than construction would be one important step to secure labour rights and ensure fair competition throughout the EU. However, while an EU wide regime would cover employment relationships in the whole EU territory it would not extend to employment relationships outside the EU which are very important in most GPN. Existing EU regimes such as the Brussels I Regulation involve home state responsibility and have been used to make EU subsidiaries accountable for labour rights violations which occur outside the EU's territory. Court cases in this matter have been very limited up to now but are likely to increase. In the area of EU trade policy, the EC has the objective to include sustainability chapters, including ILO core labour standards, in its bilateral trade agreements. The major weakness is however the enforcement process which is limited to cooperation mechanisms. Thus, the sustainability chapter is excluded from the dispute settlement system which applies to the other chapters of trade agreements and foresees sanctions (e.g. increase of tariff rates) for non-compliance. This is very unfortunate as sanctions would have greatly enhanced the credibility and effectiveness of the protection of labour rights in trade agreements and would show that labour rights protection is regarded on equal terms with trade issues. The example of the US - Cambodia Textile Agreement is interesting in this regard. In the section on labour, the agreement relates market access improvements to labour rights improvements in the apparel sector which are monitored and reported by the ILO. Despite some problems, this programme (known as "Better Factories Cambodia") has contributed to the protection of labour rights in a complex GPN. It would be useful for the EU to consider similar programmes for its bilateral trade agreements.

On the international level, the ILO has been the primary body within the international institutional system that deals with labour issues. Its most relevant instrument for the protection of labour rights in GPN settings – the MNE Declaration – sets forth recommendations for "good corporate conduct". While it does enjoy a unique backing by all ILO members states and national social partners and is global in scope its major weakness is that it does not touch upon issues related to monitoring and verification mechanisms. Hence, there is no legally binding mechanism to secure and monitor the implementation of the agreed standards. Similarly, the recently established ILO Helpdesk focuses primarily on the provision of information for management and workers' representatives of TNCs to help them address labour rights issues they encounter in day-to-day operations. In contrast, the third initiative introduced in this report, the newly established "Better Work" programme (which is based on the Better Factories Cambodia programme), represents a promising new avenue in the ILO approach as for the first time the ILO gets involved in monitoring the private sector.

Efforts by the UN to introduce binding regulation on human rights (including core labour rights) have failed due to divergent political and business interests against such regulations. Instead, the UN appointed a special representative - John Ruggie - who introduced a framework called "Protect,

Respect, Remedy". This framework states that (1) companies, regardless of their size and type, have to respect all human rights, including labour rights; (2) states, based on their obligations through the ratification of human rights treaties, have to protect individuals on their territory against human rights abuses of third parties; and (3) companies and states have to provide for remedies such as complaint mechanisms which ensure that human rights violations of companies are properly addressed. Notwithstanding its undisputable merits the framework presents a minimum baseline for companies and it is not yet ensured that companies that are not willing to respect human rights will be held accountable due to the lack of an effective legal framework of accountability, including effective complaint mechanisms. The 'Ruggie framework' presents a very pragmatic approach towards TNC regulation and departs in this respect from earlier efforts at the UN level.

The only international soft law regime with a complaint mechanism, the OECD Guidelines, requires an "investment nexus", i.e. an operation equivalent to investment for a TNC to be accountable. Thus, it generally does not cover the very common supplier relationships in GPN. However, as long as a direct influence of the investor on the commercial transaction in question can be proven, an "investment nexus" exists. Concerning the definition of the investment nexus there exists considerable uncertainty and the interpretations of the NCPs, the complaint mechanisms of the Guidelines, differ significantly. Further, actual cases concerning GPN that have been concluded by NCPs are rather sparse.

As a response to public pressure in the wake of alleged labour rights violations of TNCs, company CoC have been introduced which generally include basic labour rights along the lines of the ILO core labour standards. Having experienced the limited effectiveness of supply chain control through audits, because impacts were not sustainable and incidences instead of root causes were addressed, some companies turned to capacity-building of and dialogue with suppliers rather than top-down control to ensure compliance. Evidence shows that although company CoC have had – to some extent – a positive influence on the protection of labour rights in GPN, they are less effective than some had hoped. Thus, they must be seen as only one, and certainly not the most encouraging, avenue to global labour rights protection. The biggest limitations are the voluntary and non-standardized nature of this approach with regard to design and content as well as implementation and monitoring; the limited coherence of TNC's buying and sourcing practice on the one hand and CSR demands stipulated in CoC on the other hand; and the lack of engagement and cooperation with public labour inspectorates and labour ministries as well as workers organisations and employee representatives which impedes the long-term effectiveness of this instrument.

On the level of social dialogue, European and International Framework Agreements between TNCs and European and Global Trade Unions have been signed to extend cooperative industrial relations to the company's locations outside the home country. Some framework agreements also provide a monitoring process to enforce labour rights throughout the GPN. Compared to other options available for labour rights protection in GPN, these are certainly very promising instruments. However, their effectiveness depends on a number of factors such as the type of production network, the commitment of the lead firm, and the capacities as well as the political environment of the trade unions involved. With regard to EFAs a problem is that their legal status is unclear and the EC qualifies them only as 'negotiation'. If EFAs were accepted as EU-level collective bargaining agreements they would have legally binding effect and thus, they would be far more than mere "negotiations". EFAs and IFAs are very promising instruments and should be supported and embedded in a wider regulatory framework which enhances their enforcement structures.

In a nutshell, the following diagram presents the instruments relevant for GPN which were analysed in this study and identifies their advantages and disadvantages and the main actors involved.

Table 2: Relevant instruments to secure labour rights in GPN

National Level				
Instrument	Short Description	Advantages	Disadvantages	Actors involved
Chain liability regime	Host state regulatory instrument to hold lead firm/suppliers accountable for LR in GPN	Addresses non-payment of wages and social security contributions in subcontracting cross-border relationships	Only covers formally employed workers residing in the host state; deficiencies regarding posted workers	Companies, host state, worker(s) In some states involvement of social partners in legislation and implementation
Public procurement	State incentive system to include social issues such as LR in state procurement ("Fair procurement")	States can give public tenders to companies that monitor LR compliance in the supply chain	Due to legal uncertainties not yet widely used Social considerations are secondary to economic criteria	Companies, states
Alien Tort Claims Act - US	US legislation to hold companies accountable for grave LR violations committed abroad	Companies can be held accountable for grave LR violations committed abroad	Has not been successfully used for LR in GPN outside of US territory	Companies, home state, host state, worker(s)
Universal Jurisdiction Act - Belgium	Belgian legislation to hold non-state actors accountable for grave LR violations	Initial legislation had strong potential to hold companies accountable for LR violations	Legislation was considerably weakened by amendments	Companies, home state, worker(s)
European Level				
Instrument	Short Description	Advantages	Disadvantages	Actors involved
Brussels I Regulation	EC legislation that allows reference of LR cases in third countries to EU member states courts	Instrument to hold companies and subsidiaries accountable for LR violations committed abroad	Cannot be used for supplier relationships relevant for GPN	Companies, EU state, worker(s)
EU Chain Liability regime	Extension of national liability regimes on EU level	Would create a minimum standard on key labour rights at EU level	Not yet realized	Companies, EU, TU
European Framework Agreements	European social dialogue instruments that address cross-border LR	Address LR issues in GPN on the European level	Require willingness of lead firm and capacities of TU/EWC	Companies, European TU, EWC

	issues		Some legal uncertainties	
EU Bilateral Trade Agreements	Trade agreements which include (core) LR	Possibility to promote LR in trade relations	LR protection is not legally enforceable	EU, host state
International Level				
Instrument	Short Description	Advantages	Disadvantages	Actors involved
ILO Declaration on Multinational Enterprises	Legally non-binding declaration	Includes international LR standards for companies	Promotional instrument, no legal enforcement mechanism	Companies, host states, ILO
ILO Helpdesk	ILO support mechanism for companies willing to address LR issues	Effective advisory mechanism for companies willing to promote LR	Mere support mechanism without enforcement capacity	Companies, ILO
ILO Better Work Programme	ILO company monitoring mechanism	Has been useful in improving a number of LR	Less effective in improving LR such as decent wages and working hours	Companies, host states, ILO
UN Draft Norms	UN standards on LR responsibilities of companies	Far-reaching standards, secondary LR responsibility of companies	Has not been endorsed by the competent UN body	States, companies
Ruggie Framework	Framework outlining the human rights responsibility of companies and states	Clear and widely accepted framework on the HR responsibilities of companies	Minimum baseline for companies; cannot replace a legally binding int. framework	States, companies
OECD Guidelines for Multinational Enterprises	Legally non-binding guidelines addressing LR responsibilities of companies, including supply chain issues	Relevant soft law instrument in cross-border settings, includes a complaint mechanism (NCP)	Relatively weak on supply chain responsibility	States, companies
Codes of Conduct	Self-regulatory mechanisms of companies	Some CoC address LR in GPN; can be legally enforced with 1 st tier supplier	Various LR standards; a number of enforcement problems	Companies
International Framework Agreements	International social dialogue instruments that address cross-border LR issues	Address LR issues in GPN	Require willingness of TNC and capacities of global TU	Companies, Global TU

This analysis demonstrates that although a number of legal and policy instruments have emerged which can be used to protect labour rights in GPN, they all face considerable constraints in one way or another. Besides the proposals we have made to improve the existing instruments to make them more effective to protect labour rights in GPN, an international legal framework which can hold corporations accountable for labour rights violations in GPN, such as an International Convention on Combating of Human Rights Violations by Transnational Corporations, is needed to complement this patch work of initiatives. There are two proposals which have been made in this regard. An international convention for states only which bind companies on their territory, or a convention which is adopted by states and corporations alike.¹⁵⁶ Although a direct accountability of non-state actors which would be the case in the second option is underdeveloped in international law, it is not excluded.¹⁵⁷ For example, companies can already be made liable for environmental damages on the international level.¹⁵⁸ In this regard, it has been highlighted that initially, the consent of all UN member states is not necessarily required but that a group of like-minded states may take the first essential steps toward such a convention. This has been the case for the Ottawa Convention on the Prohibition of Landmines or the preparation process for the establishment of the International Criminal Court.¹⁵⁹ This convention should be complemented by an International Court of Human Rights that would adjudicate complaints once national avenues have been exhausted or are seen as ineffective to bring about justice for TNCs' human rights violations.

Although it will take time to reach the political consent for such a structure, the pressure from public interest groups, including trade unions, critical consumers and NGOs is rising and court cases seeking to hold TNCs accountable for labour rights violations are increasing. For example, in April 2010, the TNC Lidl was brought to court where it was alleged that Lidl misleadingly advertised labour rights compliance of its clothing suppliers in Bangladesh. This is the first time that a company is held accountable for labour rights violations in supplier firms in Germany.¹⁶⁰ The current international institutional bias which favours legally binding enforcement mechanisms regarding trade and investment while showing reluctance to introduce such mechanisms for labour rights must be changed. Thus, the patchwork activities that became apparent in the analysis of instruments in this study must be on the one hand supported and further developed but on the other hand also broadened and complemented by a concerted effort to establish international binding regulations for labour rights and other human rights violations of TNCs.

¹⁵⁶ Lukas/Hutter (2009): 211f.

¹⁵⁷ August Reinisch, *The Changing International Framework* (2005): 82.

¹⁵⁸ Lukas/Hutter (2009): 154.

¹⁵⁹ Jens Martens, *Prekärer Pragmatismus: Die Arbeit des UN-Sonderbeauftragten für Wirtschaft und Menschenrechte*, *Journal for Human Rights*, zfmr 2009.

¹⁶⁰ In a first reaction, Lidl withdrew its advertisements in this matter. See ECCHR *Lidl muss Werbung zurückziehen*, <http://www.ecchr.de/lidl-klage/articles/lidl-muss-werbung-zurueckziehen.620.html> (accessed 27th April 2010).

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ANNEX: LIST OF INTERVIEWS

The following interviews were conducted in September 2009 and January 2010:

ILO:

Martin Ölz, ILO, Non-discrimination issues

Kostas Papadakis, ILO, International Framework Agreements

Anna Biondi and Frank Hoffer, ILO Workers Bureau

Roy Chako, ILO Employers Bureau

Anne Posthuma, ILO, Global Production Networks

Emily Sims, ILO Helpdesk

Karen Curtis, ILO, Freedom of assembly

European Commission:

Elisabeth Aufheimer, Social Dialogue, DG Employment

Susan Bird, CSR issues, DG Employment

Sabine Böhmert, ILO issues, DG Employment

Torsten Christen, CSR issues, DG Employment

Frank Siebern-Thomas, Social Dialogue, DG Employment

Ditte Juul-Joergensen, Trade and Sustainable Development, DG Trade

Other relevant institutions:

Walter Gagawczuk, Austrian Chamber of Labour, Social Policy

Jennifer Holdcroft, International Metalworkers Federation

Patrick Itschert, National Unions of Workers in the Textile, Apparel and Leather Industries

Isabelle Schömann, European Trade Union Institute

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