Redesigning Enforcement in Private Labor Regulation. Will it work?\textsuperscript{1}

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Abstract

Private labor regulation emerged as an international governance tool to enforce international labor standards. More recently doubts have been expressed concerning the potential of these systems to effectively improve labor conditions in supply chains. The top-down auditing form of enforcing standards is considered not appropriate to enforce international labor standards. This article assesses whether the design of these systems can be strengthened in order to better enforce international labor standards. In this context, attention turns to systems which empower stakeholders such as complaint systems. The article discusses the possibilities and constraints of these systems.

1. Introduction

The international protection of labor rights has a long history. Attempts to coordinate internationally the improvement of labor rights date from 1919, when a multilateral institution, the International Labour Organization (ILO), was established that would elaborate international norms on a range of labor-related issues. The basic idea was to prevent a global race to the bottom of labor rights\textsuperscript{2} in a world which saw increasing international competition and trade (Mahaim, 1934; Servais, 2011). It was assumed that increased trade would lead to a deterioration of a series of labor rights, such as working hours, safety of workers, etc. The debate on trade and labor rights has since then been high on the political agenda. Several empirical studies have analyzed the relationship between increased trade and labor rights and show that increased globalization can negatively affect several labor rights. Mosley (2011) developed a composite index on the protection of labor rights and showed that over a

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\textsuperscript{2} Throughout the literature terms such as labor rights, working conditions and working rights are used interchangeably. For the purpose of this chapter we consistently refer to labor rights. There is no general accepted definition of labor rights. For the purpose of this chapter we refer to labor rights as a broad body of rules pertaining to working people and their organizations which come from a variety of legal sources.
period from 1985 to 2002 the protection of labor rights declined in almost all regions of the world. She further investigated the specific relationship between increased trade (in terms of sourcing from other countries) and foreign direct investment and showed that increased sourcing puts downward pressures on labor protection. As a result, political and social forces are pursuing multiple attempts to make a further liberalization of international trade conditional upon compliance with international labor standards (Cuyvers & De Meyer, 2012).

Notwithstanding the existence of international norms and procedures at the level of the ILO several trade unions and other social movements have put the enforcement of labor standards high on the political agenda, criticizing (international) governmental agencies for not enforcing the rules sufficiently (Keck & Sikkink, 1998). In addition, not only (national and international) governmental agencies were criticized but also multinational enterprises. For social activists, the discovery of reputation as a tangible asset of businesses which they could easily attack spurred a proliferation of social protest, such as from the Clean Clothes Campaign (CCC), directly targeted at business enterprises (Bartley 2003; 2007, Esbenshade, 2004; Gereffi et. al, 2001). Many of these actions were targeted against well-known brands such as Nike and Levi Strauss, which were exposed to claims related to the violation of several key labor rights.

These developments resulted in the emergence, in the early 1990s, of new forms of private governance, which aimed to implement international labor standards across the whole value chain (Abbott & Snidal, 2009; Mattli and Woods, 2009). First, many business enterprises established codes of conduct. In 2003 the World Bank estimated that there were more than 1000 codes of conduct of individual companies in existence. Since then they proliferated even further. Several of these codes were, in turn, attacked for being too weak and window-dressing (Wells, 2007). This resulted in new forms of private governance which brought several actors and stakeholders together. Besides initiatives from international organizations such as the United Nations’ Global Compact (see Kayser et al., 2014), many private initiatives emerged, such as Fair Labour Association (FLA), Worldwide Responsible Apparel Production Program (WRAP) and the Social Accountability 8000 Standard (SA8000; Fransen, 2012). These pioneering initiatives brought together business enterprises, NGOs, unions, governments and international organizations to create new forms of international regulation. The issue of labor standards also spilled over in the many other initiatives which promote sustainability standards via certification and eco-labelling (Abbott & Snidal, 2009; Marx, 2011). These initiatives aim to implement labor standards in global production processes (global value
chains) and communicate to consumers across national markets that certified products are made according to these standards. This rise of private forms of international labor governance is now considered a core element of the “new order of regulatory capitalism” (Levi-Faur 2005, p. 27) and a leading institutional governance innovation (Cashore et al., 2004). These systems are regarded as key instruments in ratcheting up labor standards on an international scale (Sabel et al., 2000). More recently, however, doubts have been expressed concerning the potential of private governance systems to effectively improve labor rights in developing countries. Both academic and journalistic accounts point to weaknesses in their design to effectively enforce international labor standards. The top-down auditing form of enforcing standards is considered not appropriate to enforce international labor standards. This leads several authors to dismiss private governance systems and look for alternatives.

The present article takes another perspective. It assesses, on the basis of existing literature, whether the design of these systems can be strengthened in order to better enforce international labor standards. In this context, we focus our attention on systems which empower local and global stakeholders such as transparency systems and dispute and complaint systems. The article starts with an overview of the emergence of international non-state governance instruments to enforce labor standards and describes how they are designed (2). This description will make clear that these systems are heavily based on an auditing logic. Subsequently, the article discusses the weaknesses of auditing approaches (3). Next, the article explores alternatives to strengthen the design of private labor governance systems (4) and discusses the possibilities and constraints of these alternatives to effectively strengthen private labor governance systems (5). The article ends with a conclusion (6).

2. The Emergence of Private Labor Governance and its Design

2.1. The Emergence of Private Labor Governance Systems

Private labor governance emerged initially primarily in the apparel and footwear industry. From the 1950s onwards, the apparel and footwear industry globalized at an impressive speed (Rosen, 2002). As a result, the industry became organized in so-called buyer-driven commodity chains (Gereffi, 1994) and supply chains which cover the globe. Many large apparel and footwear enterprises started
outsourcing production to export-driven industrializing countries such as South Korea and Taiwan. In these production facilities workers often had to work under very harsh conditions and many labor rights were violated. These labor rights violations took place in a context of state failure in which developing countries lacked either the capacity to build effective domestic enforcement mechanisms (Chayes and Chayes, 1993) or the incentives to protect labor rights because they wanted to promote export markets or were captured by private interests (Levi et al., 2012). This led, mainly from the 1980s onwards, to social protest in Europe and the U.S. In 1989, in Amsterdam, a coalition of activists picketed the main store of fashion retailer C&A. The protesters argued that women workers in a factory producing for C&A in the Philippines were fired simply for demanding the minimum wage. Out of this coalition of activists in 1990 the CCC was born, which rapidly diffused its activities throughout Europe by setting up activities in the UK, Germany, France and Belgium. Throughout the early 1990s, public awareness on the issue of labor rights also sharpened in the US. In a long sequence of media reports (see also Bartley, 2003; Rosen, 2002), business enterprises were directly targeted for not upholding labor standards throughout their supply chain (for an overview of examples see Bartley, 2003: 443). They reacted quickly, initially by adopting codes of conduct in which they announced to address labor issues throughout the supply chain. Nike and Levi Strauss were first movers in this respect and adopted codes of conduct in 1992. However, instead of silencing protests, these actions generated more inquiry and confronted business enterprises with the fact that they were not living up to their code of conduct. NGOs were particularly distrusting corporations’ self-proclaimed adherence to codes of conduct, objecting that such initiatives were “merely symbolic documents, completely detached from realities ‘on the ground’ in factories” (Bartley, 2003, p. 445).

This resulted in increased consultations between business enterprises and several stakeholders and the emergence of multi-stakeholder platforms. In 1995, US Secretary of Labor Robert Reich launched the Apparel Industry Partnership (AIP) initiative, which led to the establishment of the Fair Labor Association in 1996. Also in 1996, SA8000 was created as a multi-stakeholder organization, involving representatives from businesses, trade unions and civil society. Both initiatives were developed to organize independent monitoring and certification of factories supplying multinational enterprises based in Europe and the US. In addition, several other initiatives emerged such as *inter alia* the Worker Rights Consortium (WRC), the Fair Wear Foundation (FWF), Ethical Trading Initiative (ETI) and WRAP (Fransen, 2012).
These multi-stakeholder initiatives were quickly recognized by multinational enterprises and developed a similar institutional logic, i.e. sets of rules and procedures. This new institutional logic regarded corporations as prime standard setters in the supply chain, and advanced independent third-party monitoring as the optimal instrument to help corporations enforce standards throughout the supply chain. Monitoring took the form of auditing as many business enterprises were used to auditing practices and procedures. In order to make sure that standards with regard to labor rights were specific and stringent enough an independent standard-setting body was established. This approach was endorsed by many business enterprises, who quickly moved from a ‘codes of conduct approach’ to a ‘certification approach’ involving third parties. This is evident in the following statement by Nike, which stressed that “the needs of the nearly 800,000 workers in our contract supply chain overshadow any other group. We’ve run the course – from establishing codes of conduct, to working with external bodies to monitor factories” (statement from Nike’s FY05-06 CR-report).

2.2. The Design of Private Labor Governance Systems

What emerged from these multi-stakeholder consultations and dialogues was, among other things, a specific model to organize the implementation of labor standards throughout the supply chain. This model is built around several components (Gereffi et al. 2001; Abbott and Snidal, 2009; Marx, 2011; 2013). First, there is the setting of standards related to labor rights. Standards are defined by ‘standard-setting bodies’. The way in which these standard-setting bodies are constructed can vary significantly. Most leading private labor standard-setting bodies are multi-stakeholder initiatives bringing together business enterprises, trade unions and NGOs which have clear guidelines on stakeholder participation. A second component focuses on the formulation of clear, unambiguous and precise standards which allow for conformity assessment. Conformity assessment is a procedure to determine that a production process or product meets relevant standards. In order to assess conformity, standards should be formulated with precision. In the context of labor standards, standard-setting bodies often start with defining general principles based on selected key ILO conventions, and delegate the formulation of specific standards to working groups or committees which can take into account local conditions. The precision with which standards are defined and the identification of measurement procedures can range from being specific to very vague (Mamic, 2004). Finally, measurement procedures are elaborated for the different standards. This implies that
measurable indicators and verifiable facts are identified in order to make conformity assessment valid and reliable. These measurement procedures can then be applied in the monitoring of the implementation of standards.

The level of compliance with standards is a function of enforcement. In the context of private labor governance much attention goes to monitoring via auditing. Monitoring is a control mechanism which allows for the assessment of the implementation of standards. Monitoring refers to the assessment of conformity with standards. This can be done by the business enterprise itself, a certification body or an independent third party. In case of the latter, third parties are accredited to perform the conformity assessment. Accreditation aims to guarantee that a conformity assessment body is competent to carry out such tasks as auditing and inspection, and to come to the right conclusion as to whether a product or production process complies with a defined standard. Accredited organizations may be either international consultancy firms such as SGS and Bureau Veritas, NGOs or local organizations (Blair et al., 2008). Content-wise the conformity assessment is based on audits which are conducted according to a well-developed audit protocol based on the indicators and measurement procedures outlined by the standard-setting bodies. Many private sustainability standards and labor governance initiatives make use of third-party monitoring systems (Fransen, 2012; Marx, 2013). This has often resulted in well-elaborated systems of private labor governance. Examples of the Fair Labor Association and Social Accountability International shows that, at least on paper and in terms of procedures and rules, it has an elaborate framework to set standards and enforce them via monitoring and auditing. However, does this work in practice? Many observers have raised criticisms especially in relation to auditing as a monitoring instrument.

3. Weaknesses of Audit Approaches for Monitoring Labor Rights Violations

Initially, private certification schemes were welcomed as ‘one of the most innovative and startling institutional designs of the past 50 years’ (Cashore et al., 2004, p. 4) and regarded as key instruments in ratcheting up labor standards on an international scale (Sabel et al., 2000). However, academic scholars have criticized these systems on several grounds (for an overview see Bartley, 2005) and even argued that they are not designed to improve labor rights but rather aim to reduce legal and social liability (Locke, 2013), manage reputations (Henson and Humphrey, 2012) or generate new business opportunities via the creation of consumer niche markets in the context of ethical consumption (Henson and Humphrey, 2012; O’Rourke, 2013). This argument has been partially
substantiated by empirical studies which showed for example that reputation management is one key driver for participating in a private labor governance initiative, especially in the context of publicly owned firms (Marx, 2008). Firms which have less incentives to manage reputation and brand recognition are, subsequently less likely to participate in these forms of private governance.

These critical assessments have gained prominence, not only in scholarly work but also in the media. More recently doubts have been expressed concerning the potential of private systems to effectively improve labor rights in many developing countries. Some of these doubts are based on journalistic accounts of certified factories which were exposed of being in breach of these standards. Among the most dramatic cases are the recent fires in garment factories in Bangladesh and Pakistan which led to the death of many hundreds of workers (Walsh and Greenhouse, 2012; Yardley, 2012). Both factories were certified, which implies that they also should be in conformity with safety standards. Criticism focuses on four distinct aspects, all related to the design of enforcement mechanisms based on auditing (for an excellent general overview in relation to labor rights see Locke, 2013).

3.1. Selectivity of Audits

First of all, several studies and authors have criticized the selectivity in the improvement of labor rights. They argue that one can observe improvement on certain aspects but not on others. Starting from a number of key ILO conventions researchers assessed the degree to which these private systems contribute to the improvement of identified labor rights. In general private systems try to include inter alia standards with regard to the following conventions (ILO 2003; Worldbank 2003): minimum wage (C131), migrant workers (C143), occupational safety and health (C155), indigenous and tribal people (C169), forced labor (C29), freedom of association (C87), the right to organize and collective bargaining (C98), equal remuneration (C100), abolition of forced labor (C105), discrimination (C111), minimum age (C138) and worst forms of child labor (C182). Several authors note that private systems address some of the issues listed in some of these conventions but are not able to address the complexity of the combination of the many conventions and issues embedded within them. In a detailed study on the impact of the ETI in various countries, Barrientos and Smith (2007) conclude that the impact of the systems is uneven. They make a distinction between process rights and outcome standards. Process rights are enabling rights such as the freedom of association and non-discrimination, which are embedded in the core ILO conventions and provide the
opportunities to generate an improvement in outcome standards such as specific rights of employment (working hours) and health and safety policies. Barrientos and Smith (2007, p. 723) conclude that “[t]here has been greater impact in relation to outcome standards, particularly health and safety as well as working hours and documented wage benefits. But even among these standards impacts have been mixed in terms of magnitude and perceived benefits to workers. There has been least impact on process rights, with the exception of child labour.” There are only few studies which show a possible positive impact, under certain conditions, on process rights such as the case-study by Barenberg (2008) on the Worker Rights Consortium (WRC) and freedom of association.

The selectivity in addressing certain rights, especially regarding child labor, and not others have also been noted by other researchers. A report of the University of Iowa Center for Human Rights argued that many business enterprises address the issue of child labor since this has little effect on their financial performance or the cost of making products (Schrage, 2004, p. 171). As a result, they easily adopt stringent standards with regard to child labor. However, the same companies often do not prescribe stringent standards with regard to other issues such as wages and working hours. Similar results were found by researchers focusing on the Forest Stewardship Council, which under Principle 4 of its mission aims to promote labor standards in accordance with key ILO conventions. Tasso Rezende de Azevedo & Andre Giacini de Freitas (2003) for example analyzed the impact of FSC certification on labor rights in the Amazon in Brazil and found that in certified forests the logging camps and safety of forest operations are significantly better than in non-certified forests. However, with regard to other labor standards the impact was less obvious and not proven. Finally, another component of selectivity concerns the perception of what constitutes a violation of a right. As Gay Seidman (2007, chapter 5) shows in her study on the working conditions in Guatemala, some activists focus on specific cases of violations such as poor working conditions of a 15 years old child. However, when the same child grows one year older the same working conditions become less problematic and receive less attention.

3.2. Quality of Information in Auditing

Second, the quality of information in auditing has been questioned. Several issues come into play here. Effective auditing requires a well-developed auditing protocol. A walk through a factory with

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3 The distinction between process and outcome rights is not always clear-cut.
auditors relying on common sense can hardly be regarded as effective monitoring. Auditing relies mostly on a checklist approach. Auditors visit different units with questionnaires and fill out a questionnaire. On the basis of the results of the questionnaire an assessment is made. An advantage of this approach is that it allows for quantification of conditions via different indicators. A second advantage is that it standardises auditing and in this way makes different units comparable. Factories can be compared on labor and human rights conditions. However, this approach has been heavily criticized for not capturing the full picture and being incomplete. First of all, it is argued that this approach does not take sufficiently the voice of local stakeholders (workers, communities, etc.) into account in a more qualitative assessment of the implementation of standards (Maquila Solidarity Network, 2005). Secondly, it is argued that standardisation leads to routinisation resulting in auditors doing a ‘quick’ job and missing crucial information (O’Rourke, 2000; Sabel et. al., 2000). Already in 2000, Dara O’Rourke did participatory observation with auditors and wrote a highly critical report of their practices arguing that they missed clear violations of standards and were too quickly assured on remediation of breaches of standards. Similar accounts can be found in the work of Esbenshade (2004), who conducted field work in several business enterprises (see also Locke, 2013, especially chapter 2).

In addition, and this is related to the first point on a comprehensive coverage of labor issues, auditing protocols do not always contain very precise guidelines on all standards. Some standards are more easy to operationalize and measure than others. For auditing to work and generate full information on all aspects one should have clear, unambiguous and precise standards. An ILO report on codes of conduct of business enterprises and certification bodies stressed that there is quite some variation as to the stringency of standards in relation to labor standards (Mamic, 2004). In this respect they refer to ‘hard’ and ‘soft’ language. Hard language is specific, precise, fully-defined and provides a high level of commitment to a standard. Soft language is general, broad, loosely defined and displays a low level of commitment (Mamic, 2004, p. 24). When auditing proceeds on the basis of ‘soft language’, little real change can be expected.

Thirdly, concerning the quality of information, some observers (Locke, 2013) argue that due to an inherent conflict of interests (auditors are paid by the business enterprises) auditors have strong incentives to ‘underreport’ practices and give in on the stringency of their audit reports in order to please the ones who order the audits. This dynamic between auditors and inspected enterprises has been recently illustrated by Kim (2012) in an analysis of code enforcement and implementation in
Vietnam’s Apparel and Footwear Factories. He shows that the enforcement and implementation of private labor standards are highly political processes fraught with conflicts, negotiations on the interpretation of adherence to standards and attempts at evasion.

Finally, it remains unclear who is accountable for low quality auditing. Large auditing firms often have disclaimers on their reports that secures them from claims of negligence. This is typically the case for firms in the accounting auditing sectors who are also involved in labor auditing. Hence the auditor’s accountability with regard to the audit reports is probably low. Further research is needed to better understand the accountability of auditors with regard to the quality of their reports.

3.3. Competition between Systems - A Race to the Bottom in Auditing?

A third element which possibly influences the effectiveness of auditing is the competition between systems. The field of private sustainability standards is expanding fast. The Ecolabel Index database, which keeps track of all initiatives, currently counts 439 private sustainability standards systems. Not all are focusing on labor standards, but many include labor standards as part of their aim to promote social standards throughout the supply chain. There is very little cooperation between these systems since only a few mutually recognize one another (Marx 2013). Various initiatives that basically have the same social objectives are currently operating alongside one another. Initiatives are being developed within the various fields to achieve greater cooperation, but the results of these efforts remain insufficient. For instance, in 2005 an initiative was launched in relation to labor rights and workers’ rights with a view to organizing cooperation between the CCC, the ETI, the FLA, the Fair Wear Foundation, Social Accountability International and the Worker Rights Consortium in a pilot project in Turkey. The ‘Jo-I n’ pilot project (Joint Initiative) aimed to promote closer cooperation between the various initiatives so as to increase the impact of the systems. This pilot project did not lead to closer cooperation, and the various systems continue to operate separately (Fransen, 2011; Marx, 2011). The obstacles for closer cooperation related to several issues including the stringency of standards, monitoring procedures and sanctioning. As Fransen (2011) notes, when analyzing private labor governance systems, no real steps are taken to address competition between systems and have convergence on monitoring and auditing. In his comparative study Fransen (2011; see also 2012) shows that the prominent system for private labor governance differ significantly in

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how they organize auditing in terms of stringency, who does the audits, etc. This points to variation in effectiveness of these systems and put at least some forms of auditing into question. In addition, in a context of competing systems in which some systems are less stringent than others downward pressures might make the best systems less stringent.\(^5\)

### 3.4. Auditing in Complex Supply Chains

A fourth element which is criticized is that auditing is unable to capture the complexity of present-day supply-chains. Three elements are of relevance here. First, many large multinational firms do not only have thousands of suppliers but even these suppliers outsource, sometimes to thousands of homeworkers. This often occurs in the garment and textile industry. The stitching of footballs provides an example. Although the football industry (manufacturers of footballs) is a quite consolidated sector with relatively few players (and countries) involved (Nadvi, 2011), the effective making of a football involves many people. Thomsen and Nadvi (2010) analyzed two regions, Sialkot in Pakistan and Jalandhar in India, in which many footballs are made and which provide footballs for different buyers including megabrands such as Adidas and Nike, but also other major retailers. In these two regions more than 500 businesses are active, which have in total 3400 subcontractors themselves, which in turn outsource the effective stitching of footballs to a few thousand stitchers. Hence, only the making of one product already requires the auditing, against a set of standards, of many thousands of entities. To do this in a systematic, and sufficiently frequent, way via auditing is a very demanding task. Several researchers question whether this can be done (Locke, 2013).

A second element relates to the dynamics within supply chains between buyer and first-tier supplier. Several authors argue that due to the dynamics in supply chains it is sheer impossible to comply with all requirements and standards which are listed in a code of conduct. The main issues concern the demands of major retailers to have very short supply times, which are flexible to shifts in demand and product requirements and which are at low cost. Locke (2013) provides several case studies and examples of business enterprises which are extremely demanding in the flexibility they request. This flexibility is in part a result of current day consumer markets which allow consumers to

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\(^5\) This downward dynamic goes counter the ratcheting up argument made by Sabel et al.(2000) Whether there will be a race-to-the-top or race-to-the-bottom is an empirical question. It can be hypothesized that both dynamics can occur depending on sector, country, firm competition, etc. For example, Overdevest (2010) showed in the case of forestry sector that the FSC exerts an upward pressure on the stringency of standards and enforcement on the other private standards schemes.
‘assemble’ their own products according to their own preferences, leading to many different types of products which need to be produced. This directly impacts upon working time, excess hours, labor cost, etc., which are embedded in codes of conduct. The flexibility also implies that workplace practices change very quickly, which is difficult to capture in an annual audit. The situation of tomorrow might be very different from today.

A third element concerns the assumption that auditing can be pursued down the supply chain. This is true for buyer-driven commodity chains which are dominated by brands or large retailers. Large retailers or strong brands can often determine labor rights downstream in the supply chain. If these upstream actors require stronger labor rights, this will play out downstream, generating employment effects more downstream in the supply chain. Given the importance Western retailers pay to private standards (Marx, 2011) and the so-called ‘supermarket revolution’ whereby a significant amount of products are sold through supermarkets giving them increased power in supply chains (World Bank, 2008), this might influence the adoption of private standards and the use of audits. However, there is also some evidence that intermediaries in the supply chain, especially large Chinese firms, are becoming more powerful and change the balance of power in supply chains in two ways. First, as Levi et al (2012) note, some suppliers in Asia have specialized skills and know-how and have developed market niches in which they are dominant. It is not easy for ‘Western’ retailers to switch; they need to negotiate the terms of cooperation instead of stipulating them. Second, some of these firms have grown so fast, multiplying their customers (often large brands), that they no longer depend on one brand. Both dynamics increase the bargaining power of these firms in the supply chain and might influence the use of audits and monitoring instruments (and the conclusions which are drawn from them). In addition, short-term ownership and mobility of factories in supply chains might also influence the effectiveness of using audits for monitoring labor rights. In several manufacturing industries, factories, or capital sustaining them, are highly mobile and are searching constantly for locations with the lowest input costs (Levi et al. 2012; O’Rourke, 2001). Hence, as Levi et al. (2012, p. 22) note: “When challenged by workers forming unions or pressured by MNCs trying to induce compliance with private regulatory schemes, many factories will simply shut their doors without paying severance to workers and re-locate.”

These arguments are not to say that private systems are completely ineffective, but they point to several limitations (Locke, 2013; Reich, 2008). These criticisms have led some authors to dismiss these systems (Nadvi, 2008) or search for other alternatives (for a discussion of alternatives see Levi
et al. 2012 and Locke 2013). Also NGOs have been very critical of auditing. In a 2005 report with the title ‘Looking for A Quick Fix. How Weak Social Auditing is Keeping Workers in Sweathops’, the CCC (2005) heavily criticized audits for only generating superficial change and called for a system of compliance monitoring which would more involve the workers. These criticisms have led several authors, and also private governance systems, to explore ways to strengthen these systems in terms of monitoring and compliance. Special attention has turned to more bottom-up monitoring initiatives which involve local stakeholders in the monitoring process. In the following section we explore how these systems can be strengthened.

4. Strengthening Monitoring for the Protection of Labor Rights

The above discussion makes clear that one needs to develop systems which provide for a continuous monitoring of workplace conditions. The audit format has the disadvantage of being conducted by one or only a few auditors at one moment in time. In this sense, auditing is a very top-down, information-driven and highly centralized approach to monitoring. In order to provide continuous monitoring, one needs multiple ‘eyes’ or auditors which are constantly available to monitor on-the-ground conditions. In other words, one has to decentralize monitoring and provide means to have from the bottom-up first-hand information feeding into the system. One way to achieve this is to involve workers and relevant stakeholders in the continuous monitoring of the workplace conditions. In this context recent attention has turned to the development of well-developed complaint or dispute systems which are open to all workers and local stakeholders. Well-designed complaint systems can provide for continuous monitoring since they allow parties to file a complaint when a standard has been breached and hold violators of standards accountable. Hachez and Wouters (2011) refer in this context to ‘retrospective accountability’, which provides involved and affected parties the means to challenge decisions made by accredited certifiers or conformity assessors (see also Gulbrandsen, 2008). This feeds into a wider debate to promote transparency in international governance. The most developed treatment on this with regard to private sustainability standards, including labor standards, can be found in Auld and Gulbrandsen (2010). They distinguish between two forms of transparency, namely procedural transparency and outcome transparency. Procedural transparency refers to openness of the decision-making and standard-setting process. Outcome transparency refers to
openness about the outcome of the certification process and is important in the context of accountability mechanisms where stakeholders use disclosed information to hold actors accountable to their commitments. Auld and Gulbrandsen (2010) note that, while outcome and procedural transparency can occur together, this is not necessarily the case, as they highlight a potential variation in institutional design with regard to transparency. Indeed, as Marx (2013) shows, there is significant variation in whether private systems provide this type of transparency.

This form of monitoring is enhanced if stakeholders, including workers, are given appropriate opportunities to dispute or appeal decisions they found deeply problematic and if the organization provides effective, workable and fair procedures for complaints and disputes resolution. These dispute systems serve two purposes. First, they allow ‘internal’ participants (members, certificate holders) to appeal decisions. Second, they empower ‘external’ stakeholders by allowing them to raise issues relevant for the functioning of private systems. In order for this to work, one needs well-developed dispute systems and the provision of information which can form the basis for disputes. Information disclosure procedures can inform different stakeholders on the implementation of standards. Publicly available information should include specific information about auditing reports, reports on violations and reports on corrective action plans. This allows stakeholders to assess whether the reported information mirrors real conditions. This type of transparency allows for post-certification verification and provides a basis to file a complaint or appeal.

Hence, several authors have argued that dispute systems or ‘second-order monitoring’ (Barenberg, 2008) could strengthen the enforcement potential of private standards (Ascoly & Zeldenrust, 2003; Barrientos, 2003; Mamic; 2004; Marx, 2013). This is also recognized by several leading private standards systems and the International Social and Environmental Accreditation and Labelling (ISEAL) Alliance, which is a membership organization of private standards systems which adhere to a set of principles, codes and standards of the ISEAL Alliance. One set of principles are the so-called credibility principles, which refer to the presence of complaint systems.6

Some private standards systems have developed complaint systems through trial and error. The Forest Stewardship Council (FSC), one of the leading schemes, is a case in point (Marx, Bécault & Wouters, 2012). FSC developed, five years after its launch in 1993, a complaint system (‘Interim Dispute Resolution Protocol’) with the aim of involving stakeholders in the monitoring process of certified forests or firms. The idea was that stakeholders might offer or gather information on the

6 http://www.isealalliance.org/our-work/defining-credibility/credibility-principles
performance of a forest company with respect to the standards being used in an evaluation. This information could include instances of disputes between the forest managers and other stakeholders, examples of non-compliance with standards and principles and also general (positive and negative) opinions about the standing of the forest company in the community or region.\textsuperscript{7} Over the years the complaint system of FSC has been refined and is now in full operation (for an elaborate discussion see Marx, Bécault and Wouters, 2012). Also some private standards systems, which focus exclusively on labor standards, have developed complaint systems. The FLA has a complaint system which is open to third parties and requires business enterprises to have internal complaint channels. Third party complaints are those that come from outside the factory workforce, such as community groups and NGOs, unions or governmental bodies and officials. For third parties some conditions are attached to filing a complaint. The complaint must contain reliable, specific and verifiable evidence or information that the alleged non-compliance has occurred.\textsuperscript{8} When a complaint is accepted by the FLA, a complaint handling procedure is set in motion which involves the participating company and its accredited independent external monitors. If the alleged non-compliance did occur, the company and its accredited independent external monitor must report how the company has remediared such non-compliance, and whether the company has developed an effective means of preventing and remediating such non-compliance in the future. In addition to third party complaints the FLA also has a system of investigations which are launched by the FLA itself when it has indications of non-compliance. In support of the complaint and investigation mechanism, the FLA supports transparency of information by preparing an extensive standardized public report evaluating compliance with the standards.\textsuperscript{9} These reports should enable third parties to verify conditions of the factories.

However, FSC and FLA are exceptions in the world of private sustainability standards when it comes to having well-developed complaint systems. As Marx (2013) shows many private systems

\textsuperscript{7} FSC Guidelines for Certification Bodies, Subject 2.19, 2.1.
\textsuperscript{8} http://www.fairlabor.org/html/amendctr.html#3rdpartycomplaint
\textsuperscript{9} These reports contain inter alia the following information: identification of the brands, whether the participating company has effectively implemented internal and independent external monitoring programmes, remediated instances of non-compliance, internal monitoring systems, identification of the accredited independent external monitors used by the company, the number of applicable facilities (suppliers) subject to inspection by accredited independent external monitors, a summary of specific aspects of the participating company’s internal or independent external monitoring programmes that are particularly innovative or exemplary, a summary and assessment of any significant and/or persistent patterns of non-compliance, and instances of serious non-compliance and a summary and assessment of the remediation steps taken or initiated by the company to prevent the recurrence of any significant and/or persistent patterns of non-compliance, or instances of serious non-compliance.
lack dispute and complaint systems and the minority of systems which have one vary significantly in how they design them in terms of who can file a complaint (access) and on the topics for which a complaint can be filed\textsuperscript{10}. Hence, several systems lack a clear complaint system which would be able to ensure bottom-up monitoring. Consequently, the adoption of complaint systems by more private standards systems might strengthen the effectiveness of these systems. This, however, will depend on several sometimes contradictory dynamics. In addition, even if complaint systems are in place the question arises whether they will be effective and strengthen private labor governance systems. Both issues are discussed in the following section.

5. Will Bottom-up Monitoring Strengthen Private Governance Systems?

Whether complaint systems will strengthen private governance systems will depend on two assessments. First of all, do they achieve what they aim to do? Second, will they be adopted by private governance schemes?

5.1. Impact of Complaint Systems

Do complaint systems contribute to more effective enforcement and compliance management? Three issues have to be considered here. First, there is little empirical evidence to support or dismiss the claim that complaint systems contribute to effective enforcement. The FLA has a complaint and investigation system for several years and provides some information on its website which allows a brief exploration of the number of complaints that have been filed so far. The available information on the website of the FLA shows that complaint systems have been operational for some time (since 2003) but that they only have been used more recently. Moreover, the overall number of complaints and investigations (30 in total) is (very) limited given the number of facilities that are certified. In addition, complaints seem only to emerge in a few countries, mostly in Latin America, China and Turkey. Many large retailers and brands source from Asian countries such as Bangladesh, Vietnam, etc. were apparently no complaints are emerging. This might give an indication of the limitation of complaint systems to work in several countries. In order words, the effective use of complaint systems will depend on two assessments. First of all, do they achieve what they aim to do? Second, will they be adopted by private governance schemes?

\textsuperscript{10} It can be noted that several companies offer so-called “hot lines” to complain. Little information is available on how and whether they work. However, this mechanism is distinct from a dispute settlement mechanism which is developed by the private standards themselves and which is not organized on the level of the firm.
systems might only occur in some countries and not in others. In this context it should also be noted that employer retaliation against employees who file complaints is a real threat, especially in cases where it is very difficult to anonymize complaints. This might be a deterrent to complaints in countries which have very weak or no legal and institutional safeguards against retaliation.

Second, the use of complaint systems will also be a function of the incentives which workers and local groups have to file a complaint. Little data are available on this. It could be hypothesized that these incentives vary greatly from one country or region to another depending on political and economic factors. Concerning political factors, Locke (2013), based on a large-scale analysis of audit reports of Nike, shows that compliance with and enforcement of labor standards is higher in countries with a stronger rule of law than in countries which score weaker on rule of law indicators. It could be argued that complaint systems will probably work better in countries with a stronger rule of law than with a weaker rule of law system (see also Mosley, 2011 for the effects of political conditions in enforcing labor standards more generally). Concerning economic factors, two issues are to be considered. The first issue pertains to the assessment of the impact of labor standards on the competitiveness of firms. The conventional argument holds that, behind compliance, private labor standards in general will inhibit competitiveness due to increasing the cost of labor. This can lead to job losses and even to the closure of plants. This might form a disincentive to adopt private standards or join systems with more stringent compliance systems. However, it should be noted that some private systems can also generate access to markets and increase the export share of producers positively. This dynamic might generate additional employment and income effects for those producers and workers who can adhere to these standards (Maertens and Swinnen, 2012). Some evidence concerning the latter is provided by Robertson et al. (2011), who analyzed factories in Cambodia who participated in the Better Factories program, which is also a program which aims to enforce international labor standards through monitoring (for a critical assessment see International Human Rights and Conflict Resolution Clinic Stanford Law School and Work Rights Consortium, 2013). They did not find that this influenced the probability of plant closure due to a loss of export. They argued that it might even increase the probability of plant survival, which could be an effect of the opening up of markets demanding products adhering to these standards. This is not to argue that there is no trade-off between labour protection and competitiveness in some case but that it is not necessarily true that stronger protection of labor standards automatically results in loss of competitiveness. A second issue concerning the use of complaint systems focuses on local labor
markets. It might be argued that in labor markets where labor demand is high and supply is short one might observe an increase in the willingness to hold business enterprises to account for their promises with regard to labor standards. Workers in this labor market context have increased bargaining power since they can easily switch from one employer to another. In labor markets with an abundance of labor supply, workers and their representatives might be more prudent in lodging complaints out of fear of losing jobs.

Third, the strengthening potential of complaints systems will finally be determined by the sanctions attached to them. Private governance initiatives have different approaches with regard to sanctioning systems, and also a bit of a ‘difficult’ relationship. Private governance systems have of course a sanctioning component whereby firms are de-listed or de-certified if they do not adhere to the standards. However, several systems are reluctant to apply very stringent standards since they also aim to generate change and learning effects. They fear that if they have a very strong compliance-based model they might deter businesses from joining. For example, the FLA stresses that businesses should not pull production from non-compliant factories. By contrast, business enterprises are encouraged to work with factory management to improve workplace conditions and protect the rights of the workers responsible for manufacturing their products. This approach corresponds to approaches which have been advocated by scholars (Locke, Amengual and Mangla, 2009), who argue that a commitment-based model with strong collaboration between auditors and suppliers could overcome the fallacies of a classic compliance approach which has a stronger focus on sanctioning. A similar point is made by Auld et al (2014) who point out that these private systems not only work on a logic of control but also on a logic of empowerment. There is obviously a delicate balance to be struck between learning and sanctioning in this case. However, for complaint systems to work, the threat of exit should be credible. Otherwise also complain systems will not contribute much to generating effective change with regard to labor rights.

5.2. Adoption of Complaint Systems

Besides the effective impact they generate there is also the question whether complaint systems, in those cases where they have not yet been adopted by private systems - and this is the majority - will be adopted. One can hypothesize that there is reluctance to mechanisms which might inspire collective forms of voice. Firms might consider complaint mechanisms as a ‘Trojan horse’ which introduces forms of collective action and possibly collective power. Here too, different dynamics
come into play. For those systems who lack complaint mechanisms, the incentives for adoption will determine whether they will adopt them or not. These incentives can go in different directions.

First, it will depend on the demand for more stringent systems. Demand can come in several ways of which two are most important: consumer demand and government demand. First, consumer demand and the rise of ethical consumerism (O’Rourke, 2012) might demand more stringent standard systems, which for example include complaint systems. Whether this will influence private standards systems and their design is unclear since consumer demand for private standards systems is not straightforward. First of all, some systems do not even work with labels and do not communicate directly to consumers. For those who do, consumer demand might provide an incentive to strengthen their system conditional on the fact that consumers will effectively know that some systems are more stringent than others. There is little evidence supporting the latter. There are actually some indications that there is significant confusion on the explosion of the number of labels and what they aim to achieve. Some authors argue for the certification of certifiers or private standard systems in order to distinguish the credible ones from the non-credible ones (Sabel et al., 2000; Van Waarden, 2012). Hence, direct pressure from consumers will probably be limited.

More significant for the impact on private standards systems is the commitment by governments to support private standards schemes. This is becoming increasingly important and results in interactions between public policy-making and private standards (Eberlein et al., 2013). At least two forms of support are significant. First, the inclusion of private certification schemes in legislation. An interesting example in this respect is EU Regulation 995/2010 on the prevention of sales of illegal timber and timber products within the EU. Importers of timber products must provide for legality verification, i.e. attestation that the imported forest products originate from legally harvested forests. Article 6 explicitly mentions that this legality verification can take the form of third-party certification based on private standards. These private standard systems need to be accredited. In the accreditation requirements the presence of efficient complaint systems might be included. At this stage this is not the case, but in the future this might become the case, generating incentives for systems to adopt complaint systems. A second common way for governments to provide incentives for the adoption of private standards which include labor standards is Sustainable Public Procurement (SPP). The purchasing power of governments has a significant potential to influence markets towards sustainability through the quantity of their purchases (OECD, 2008). SPP implies making the granting of a public contract conditional on sustainable performance, by
integrating certain environmental and social criteria into the procurement procedure. Such practices include public authorities demanding for example clothing for state employees which is made according to a set of core ILO conventions. The procurement rules can determine the design of private standards schemes. For example, article 43 of the Directive on public procurement (2014/24/EU) lays out the criteria with which private standards systems have to comply in order to be recognized in the context of SPP. Article 43 stipulates that the standards are “established in an open and transparent procedure in which all stakeholders, including government bodies, consumers, manufacturers, distributors and environmental organisations, may participate, […] are accessible to all interested parties, […] the label requirements are set by a third party over which the economic operator applying for the label cannot exercise a decisive influence” (Official Journal of the European Union, 2014, L94-122). These provisions determine the design of these systems. As a result many private standard systems have open and consultative procedures to develop and set standards (Gulbrandsen, 2012; Marx, 2013). At this stage, however, there are no requirements to have a complaint system. If this would be included in public procurement it might also generate a strong incentive for adoption. Currently, no such incentives are there.

Finally, besides external institutional pressures to adopt complaint systems as outlined above, private standards systems might decide to adopt these systems. As has been seen above (supra, 4), some of them already have done so. For others market pressures might deter them from adopting more stringent systems. From a strategic point of view of the private standards system it could be argued that dispute systems make private standards systems more stringent, which provides disincentives for business enterprises to join. They might invest significantly to join a private standards system but be confronted with protest leading to no clear gain for them. Here private standards systems have to balance several, sometimes conflicting, preferences. On the one hand, they want to expand market share and certify an increasing number of organizations. On the other hand, they need to appease long term supporters, often activist NGOs, in order to gain and hold legitimacy. These groups have different preferences with regard to the stringency of the systems. NGOs may demand stringent systems which include complaint procedures whereas industry might prefer lighter compliance systems. Balancing these two can be very difficult. Tully (2004; see also Ponte 2006) analyzes this tension in a case study on the Marine Stewardship Council (MSC). He argues that the MSC is incapable of producing an outcome which satisfies the preferences of all participants and that NGOs’ preferences are often “marginalized in favour of attracting industry support and enhancing
internal commercial management procedures” (Tully, 2004, p. 15). As a result, private systems can face different pressures to adopt complaint systems or not.

6. Conclusion

This article focused on private labor governance and the design of these systems to globally enforce labor rights. It first outlined the emergence of these systems which resulted in a specific design relying heavily on auditing as a tool for enforcement and monitoring of labor rights. The design of private systems and their reliance on auditing was further described. Next the article discussed at length the deficiencies of auditing as an enforcement tool with a specific focus on:

- The selectivity of labour rights which are enforced, highlighting that some rights, such as rights related to child labor are more easily enforced through these mechanisms than other rights, such as freedom of association and non-discrimination.
- Criticisms on the quality of information in auditing which are related to the limited involvement of local stakeholders in the auditing process, the routinisation of the auditing process resulting in rather superficial audits and a possible conflict of interest of the auditors.
- A possible race to the bottom of enforcement due to the increasing number of private initiatives which rarely cooperate.
- The limited ability of an auditing approach to capture the complexity of supply-chains which are characterized by long outsourcing chains in which multinationals outsource to suppliers which in turn outsource to other suppliers. In addition, supply chains are increasingly dynamic operating with short supply times, which are flexible to shifts in demand and product requirements. This flexibility requirement directly impacts upon working time, excess hours, labor cost and other labor issues which cannot be captured in an annual audit. Finally, international supply chains are increasingly dominated by intermediate firms in emerging economies which are less inclined to pursue corporate responsibility strategies concerning labor rights.

In order to address these deficiencies proposals have been made to complement monitoring via auditing with bottom-up monitoring approaches which localize monitoring and compliance. In this context recent attention has turned to the development of well-developed complaint or dispute
systems which are open to all workers and local stakeholders. In a subsequent section we introduced the debate on complaint systems followed by an extensive discussion of whether or not they contribute to strengthening private governance systems. The article identified different factors which might influence the effectiveness of complaint systems to strengthen enforcement, focusing on the impact of the complaint systems where they exist and the likely adoption of these systems in private initiatives where they do not yet exist.

Concerning the impact we noted, first, that there is currently little evidence to support or dismiss the claim that complaint systems contribute to effective enforcement. The available information does not allow us to draw any strong conclusions. The evidence indicates that complaint systems are relatively little used where they exist, and only in specific countries. Second, we argued that the use of complaint systems will be a function of the incentives which workers and local groups have to file a complaint and that these incentives in turn are partially determined by political and economic factors. Concerning political factors we hypothesized that complaint systems will probably work better in countries with a stronger rule of law than with a weaker rule of law system. Concerning economic factors we focused on the influence of competitiveness and local labor markets on the likelihood of adopting stringent systems. Especially the supply and demand on local labor markets might influence the likelihood to adopt more stringent private labor governance systems which include complaint systems. In labor markets with high demand and low supply the bargaining power of, and hence the use of complaint systems by, workers might be greater. Thirdly, we noted that the impact of complaint systems to strengthen the effectiveness will also be determined by the sanctions which are attached to violating labor rights. Here we observed that private systems do not only operate in a ‘control’ logic but also in an empowerment and learning logic, which provides incentives to be reluctant to apply strong sanctions such as de-listing or de-certifying.

Next, we focused on the factors influencing the adoption of complaint systems in private labor governance arrangements where they are not yet present. Here we argued that the likelihood of developing a complaint system is a function of demand for such systems. This demand can come from consumers demanding more stringent certification systems. However, we did not find much support in the literature that there is a real consumer demand for this. More significant for the impact on private standards systems is the commitment by governments to support and work with private
labor standards schemes. The pressures from this side on strengthening private systems might be more substantial. Governments use private certification systems in regulatory actions and through sustainable public procurement. When they use them they often stipulate minimum requirements that private systems need to adhere to in order to get recognized. Currently, there are no requirements concerning the adoption of complaint systems. However, when this would materialize, the adoption of complaint systems by private initiatives might increase rapidly.

What do we learn from this? The article argued that complaint systems might, to a degree, strengthen private governance systems but that this is conditional on several contextual political and economic factors. These favorable conditions are only present in certain countries or regions within countries, which limits the potential of increasing their effectiveness through strengthening their design. In addition, several private governance systems face different incentives to adopt these complaint systems. Also, those cases which have complaint systems show a rather limited use of them. This is not to argue that developing complaint systems in private labor governance regimes is not a way forward. They can strengthen enforcement, but only to a certain degree.

In order to genuinely strengthen the enforcement of private labor governance systems and their capacity to govern labor standards globally, additional action is required. Two routes seem especially relevant in this context. First, private initiatives should further explore ways to develop procedures for ‘bottom up’ monitoring so that workers and stakeholders can continuously monitor compliance with labor standards. New ICT technologies which are explored in the area of ‘citizen science’ offer important new tools to monitor on a day-to-day basis. Initiatives in this area might significantly contribute to outcome transparency of private governance via empowering a diversity of stakeholders and involving them in monitoring. How this concretely can work is an interesting area for future research. Second, it is increasingly obvious that private forms of governance are becoming ever more entangled with public regulatory initiatives. Public and private increasingly ‘co-regulate’ (Schukat et al., 2014), constitute hybrid forms of governance (Schleifer, 2013; Ponte and Daugbjerg, 2015), complement and supplement each other (Lambin et al. 2014), and interact with one another (Eberlein et al, 2013). This integration of private initiatives in broader regulatory initiatives might significantly influence their uptake. If this coincides with a strengthening of their enforcement and monitoring procedures, the contribution of private initiatives to the global protection of labor rights may be
enhanced. Hence, a key challenge will be how private governance systems can be integrated in more comprehensive approaches to address labor standards in a global economy.
References


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