

**CROSS-BORDER SOCIAL DIALOGUE AND AGREEMENTS:  
An emerging global industrial relations framework?**

# **CROSS-BORDER SOCIAL DIALOGUE AND AGREEMENTS:**

## **An emerging global industrial relations framework?**

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## Preface

Many multinational companies have adopted corporate codes of conduct that have social provisions. In some industrial countries, in fact, most multinationals have such codes. Yet there is concern that these codes, important as they are, may not translate into actual improvements in workers' rights and employment conditions. Indeed, these private initiatives often lack the kinds of monitoring mechanisms needed to ensure that social provisions are implemented in practice. Moreover, these codes are primarily a management tool, and are not negotiated with workers. In this sense, they do not deal with the fundamental difference that exists between the scope of the firm – which operates on a global scale – and workers, whose voice is expressed in a fragmented manner, in the different countries where the multinational operates.

It is in this context that new initiatives have emerged, namely international framework agreements (IFAs), which constitute the focus of this volume. In contrast to traditional corporate codes of conduct, IFAs are instruments negotiated with global trade unions. The purpose of IFAs is to stimulate global social dialogue between the multinational and the representatives of workers – that is, both where the firm is headquartered and where it operates. IFAs also aim at promoting compliance with International Labour Organization core labour standards.

This volume represents the first comprehensive overview of IFAs. It covers the 62 IFAs that existed at the end of 2007 (compared with virtually none in the early 1990s and about 20 five years ago); provides a detailed analysis of how the agreements operate in practice; examines the extent to which IFAs pave the way for cross-border industrial relations;

looks at the legal dimensions of IFAs, including recent case law on the related issue of cross-border industrial action; analyses factors that explain why there are few IFAs in two sectors (textiles, clothing and footwear; and maritime transport); and explores the options for international policy action.

More fundamentally, the volume represents a major step in understanding the possibilities for developing cross-border industrial relations, and has garnered contributions from some of the top international experts in the field. Earlier versions of their contributions were discussed at a workshop of the International Institute for Labour Studies, held on 15–16 December 2006 in Geneva.

This is a fascinating project of the Institute, and one that calls for follow-up. The next stages will involve assessments of IFAs' impact on actual working conditions and of their effectiveness vis-à-vis the policy goals of the International Labour Organization.

Raymond Torres

*Director,  
International Institute for Labour Studies*

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## Acronyms

BWI	Building and Wood Workers International (formerly International Federation of Building and Woodworkers, and World Federation of Building & Wood Workers)
CSR	Corporate social responsibility
EC	European Commission
EDF	Electricité de France
EFFAT	European Federation of trade unions in the Food, Agriculture and Tourism sectors
EFJ	European Federation of Journalists
EMF	European Metalworkers' Federation
ETUC	European Trade Union Confederation
ETUI-REHS	European Trade Union Institute for Research, Education and Health and Safety
EU	European Union
EWC	European works council
FDI	Foreign direct investment
FLA	Fair Labor Association
FOC	Flag of convenience
GUF	Global union federation
ICEM	International Federation of Chemical, Energy, Mine and General Workers' Unions
ICF	International Federation of Chemical and General Workers' Unions

ICFTU	International Confederation of Free Trade Unions
IFA	International framework agreement
IFBWW	International Federation of Building and Woodworkers
IFJ	International Federation of Journalists
IILS	International Institute for Labour Studies
ILC	International Labour Conference
IMEC	International Maritime Employers' Committee
IMF	International Metalworkers' Federation
IMO	International Maritime Organization
IOE	International Organisation of Employers
ITF	International Transport Workers' Federation
ITGLWF	International Textile, Garment and Leather Workers' Federation
ITS	International trade secretariat
ITUC	International Trade Union Confederation
IUF	International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Association
MLC	Maritime Labour Convention
MNC	Multinational corporation
MNE	Multinational enterprise
NGO	Nongovernmental organization
PSC	Port State Control
PSI	Public Services International
PTMC	Preparatory Technical Maritime Conference
TNC	Transnational corporation
UNI	Union Network International
WFSGI	World Federation of Sporting Goods Industry
WWC	World works council

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# Introduction

*Konstantinos Papadakis*<sup>1</sup>

In 2004, the World Commission on the Social Dimension of Globalization identified some 65,000 multinational enterprises (MNEs) with around 850,000 foreign affiliates as the key actors driving increasing flows of foreign direct investment (FDI) to developing countries (WCSDG, 2004, p. 33, para. 159). The World Commission noted that, in the absence of balanced multilateral rules to govern the key element of FDI, there is growing concern that incentive competition between developing countries is inducing these countries to go too far in lowering regulations, taxes, environmental protection and labour standards (WCSDG, 2004, p. 34, para. 162 and p. 86, para. 389).

Parallel to this trend, globalization has generated a mismatch between the scope of the activities of global actors (such as MNEs), which is increasingly transnational, and the scope of action of social actors (such as trade unions, social movements, nongovernmental organizations and consumers' organizations), which remains largely embedded at national level. This mismatch reflects a wider systemic disequilibrium in terms of available tools of action and power, between, on the one hand, for-profit global actors like MNEs, and on the other, not-for-profit actors in the social field, who work for an equitable distribution of the benefits of globalization.

In response to this mismatch and in the absence of a multilateral framework, numerous private initiatives have aimed at filling in this lacuna through self-regulation. Thus, MNEs increasingly put in place

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<sup>1</sup> International Institute for Labour Studies, International Labour Organization (ILO).

“soft” accountability mechanisms under the banner of corporate social responsibility (CSR).<sup>2</sup> Among them, a small number of cross-border instruments, referred to as “international framework agreements” (IFAs) or “global framework agreements”, have emerged since the late 1980s. They constitute the focus of the present volume.

IFAs can be found under different names, for example “agreement on code of conduct” (IKEA in 1988);<sup>3</sup> “joint declaration on human rights and working conditions” (BMW in 2005); “international framework agreement” (EADS in 2005); “global framework agreement on the development of good working conditions in operations worldwide” (Veidekke in 2005). Their common element is that they are negotiated instruments between MNEs and global union federations (GUFs), namely international federations of national unions by sector of activity.

This volume deals mainly with various facets of IFAs. Yet it also examines other efforts to introduce a global “social floor”, i.e., rights and entitlements accessible to all workers in the global economy, through cross-border organization, dialogue and regulation in specific sectors, namely the maritime and textile sectors. It also addresses relevant issues such as the possibility of cross-border solidarity action as a complement to cross-border dialogue.

## Data concerning IFAs

At the time of writing (December 2007), 62 IFAs existed in the world, covering approximately 5.3 million workers. Detailed information in this regard is provided in table 1 in the appendix. While the number of IFAs is small compared with the number of unilateral codes of conduct adopted by MNEs and with the global workforce of MNEs (roughly 95 million excluding subcontractors and suppliers, according to Kim, 2006), the pace at which IFAs have spread since 1988 when the first such instrument was concluded has accelerated dramatically: whereas 23 IFAs were concluded from 1988 to 2002 (15 years), another 33 were signed in the four-year period 2003–2006. By 2005, at least eight MNEs

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<sup>2</sup> This notion includes corporate codes of conduct, statements on business ethics, management standards, monitoring initiatives and multi-stakeholder initiatives. For a brief overview, see Servais (2005).

<sup>3</sup> A list of the enterprises and IFAs can be found in the appendix.

each with an IFA were ranked among the top 53 non-financial MNEs (UNCTAD, 2007). In 2007, the number of IFAs expanded further, including the textile, apparel and footwear sectors that had – until then – shown little interest (Miller, this volume). By December 2007, six more IFAs had been concluded. By the same date, the MNEs which had reached the IFAs accounted for approximately US\$ 3.4 billion in sales.

If, instead of focusing on those agreements which have been at least co-signed by a GUF, one took a “wider” definition of IFAs to include *all* kinds of transnational texts negotiated between workers’ organizations or representatives at enterprise level (including European trade unions and European works councils, or EWCs) on the one hand, and specific MNEs on the other, the number of IFAs would amount to hundreds, most of them adopted in the last few years. In 2006, the European Commission’s Directorate General for Employment, Social Affairs and Equal Opportunities identified 91 such texts (Pichot, 2006). According to more recent — albeit unpublished — data drawing on European Union (EU) research on transnational agreements, to date approximately 150 joint texts would exist, covering more than 7 million workers around the world.

In terms of the “narrower” definition of IFAs however, the sector with the most negotiated agreements is the transport equipment manufacturing industry (11), followed by construction (8) and postal and telecommunications services (4), chemical industries/utilities (water, gas and electricity) (4) and the media/culture graphical industries (4). (See the appendix tables.)

The maritime sector represents a major exception in that no IFA has been reached.<sup>4</sup> This is because, instead of an agreement covering a single MNE, the entire sector is covered by a fully fledged collective agreement negotiated between the International Transport Workers’ Federation (ITF), and the International Maritime Employers’ Committee (IMEC). It covers wages and other terms and conditions of work, including maternity protection. The Maritime Labour Convention, 2006 of the International Labour Organization (ILO) serves as an important background to these developments in that it sets, among other things, a global standard for the terms and conditions of seafarers’ employment as well as procedures for the periodical revision of seafarers’ wages.

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<sup>4</sup> If one uses the ILO definition of sectors (which identifies 22), two more sectors — education and health — are not covered by any IFA. This is not surprising as these are generally public rather than private services. However, one IFA has been signed in the public services sector, between Union Network International (UNI) and the Universal Postal Union (UPU), which is an international public institution.

The adoption of this Convention was the result of cross-border tripartite negotiations among ILO constituents and represents in itself an important international agreement on seafarers' terms and conditions of employment (Lillie, this volume). This shows that, in addition to IFAs, other innovative instruments intended to address the increasing transnationalization of economic activity have emerged through negotiations between employers (or their organizations) and workers' organizations, and therefore possess a significant industrial relations dimension. Indeed, the Maritime Labour Convention represents the most advanced cross-border industrial relations instrument to date (Papadakis et al., this volume).

In terms of organizations, the most active GUF in concluding "narrower" IFAs is the International Metalworkers' Federation (IMF), which has reached 17 agreements, followed by Union Network International (UNI) with 15 IFAs. The Building and Wood Workers International (BWI) and the International Federation of Chemical, Energy, Mine and General Workers' Unions (ICEM), have concluded 12 and 13 IFAs respectively. The International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Association (IUF) has signed five agreements. Finally, the International Textile, Garment and Leather Workers' Federation (ITGLWF), Public Services International (PSI) and the International Federation of Journalists (IFJ) have signed one IFA each. Among all GUFs, only Education International and the ITF have not yet reached an IFA.

IFAs are sometimes viewed as a European initiative to foster respect for fundamental labour rights (Daugareilh, 2006, p. 116). Indeed, most of the MNEs that have signed an IFA are of EU origin — especially German, French and Nordic. At the time of writing, *only seven* non-EU MNEs (of the 62) had signed an IFA.<sup>5</sup> These have their headquarters in the United States (US), the Russian Federation, New Zealand, Australia, Canada and South Africa. No United Kingdom, Asian or Latin American company has adopted an IFA, despite the fact that many MNEs are headquartered there.

IFAs are seen as a potential solution to the mismatch in scope of action and consequent power between MNEs and GUFs mentioned

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<sup>5</sup> Chiquita (United States, in 2001); Fonterra (New Zealand, in 2002); Anglo-Gold (South Africa, in 2002); Lukoil (Russian Federation, in 2004); Nampak (South Africa, in 2006); and National Australia Group (Australia, in 2006). See the appendix.

above. This mismatch entails an important industrial relations dimension and therefore is more likely to address the needs of both sets of actors. IFAs may represent a solution, and this may explain why they are becoming the subject of greater analysis in policy and research circles, including under the aegis of international public institutions such as the ILO and the EU (for example EU, 2005; Bé, this volume; Schömann et al., 2007).

## Historical benchmarks and factors contributing to the evolution of IFAs

The first IFA was concluded in 1988 between the French enterprise Danone (at the time BSN) and the IUF. Its precursors can be traced back to the first transnational mobilization campaigns by international trade secretariats (ITSs), the predecessors of GUFs, against specific operations of MNEs in the 1960s and 1970s, and the subsequent creation of world enterprise councils (the predecessors of today's world works councils, or WWCs). The WWCs were aimed at addressing the concerns of workers affected by restructuring and technological change through a method of worldwide coordinated bargaining, especially in the highly unionized automotive, transport, food, and chemical and energy sectors.<sup>6</sup>

The origins of IFAs also include self-regulatory endeavours adopted by both public and private actors since the 1970s in response to heightened awareness within the international policy community of the negative externalities of economic activity — largely conducted by MNEs — in respect of national sovereignty over natural resources, protection of the environment, human rights and social justice. *Publicly* driven initiatives include the 1976 Organisation for Economic Co-operation and Development (OECD) Guidelines, the 1977 ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, and more recently the United Nations (UN) Global Compact, adopted in 2000. *Privately* driven initiatives mainly comprised the adoption of corporate codes of conduct in United States-based MNEs, and, later, ISO<sup>7</sup>-type social labelling. Both types of initiatives — public and private — have always been strictly self-regulatory and voluntary.

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<sup>6</sup> See da Costa and Rehfeldt (2007); Gallin (this volume); also Bourque (2005).

<sup>7</sup> International Organization for Standardization.

Major factors that appear to have contributed to the multiplication of IFAs in recent years include the following:

- (a) The trade union movement's response to the challenges of globalization through a series of mergers in 1990-2006, so as to lead to the transformation of the ITSs into GUFs. The latest (and perhaps most significant) merger is that of the two largest international confederations, namely the International Confederation of Free Trade Unions (ICFTU) and the World Confederation of Labour (WCL) into the single International Trade Union Confederation (ITUC), on 1 November 2006 (Wills, 2002; Tørres and Gunnes, 2003; Bourque, 2005; Fairbrother and Hammer, 2005; Fairbrother et al., 2007).
- (b) The strengthening of endeavours at regional integration, especially in Europe,<sup>8</sup> favouring the creation of a supranational level of social representation. This is especially the case of the European social dialogue framework envisaged in Articles 138 and 139 of the Treaty Establishing the European Community (the EC Treaty — see Bé, this volume) and the establishment of EWCs by virtue of the EWC Directive of 1994.<sup>9</sup> This led to transnational employee representation bodies in MNEs operating in the European economic area and brought about a strengthening of European trade union umbrella organizations (or European industry federations), leading to European framework agreements and in general to a reinforcement of the idea of transnational dialogue and agreements in Europe (Block et al., 2001; Daugareilh, 2006; Fairbrother and Hammer, 2005).
- (c) A parallel move from “multi-employer” to “single-employer” bargaining (Marginson and Sisson, 1996). It should be underlined that although IFAs are transnational instruments, they concern a single employer and not an entire sector of activity (see also Sobczak, this volume).
- (d) The emergence of a new generation of managers' and workers' representatives, accustomed to a broad spectrum of innovative prac-

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<sup>8</sup> For an overview of the relevance of EWCs, see Sobczak (this volume). To a lesser extent, other regional integration endeavours favour supranational social representation: the North American Agreement on Labour Cooperation (NAALC) in the context of the North American Free Trade Agreement (NAFTA); and ad hoc initiatives in the context of the Southern African Development Community (SADC), such as the SADC Labour Relations Conference in October 1999 or the task team for improving conditions of employment in member countries established in February 2007.

<sup>9</sup> European Works Councils Directive 94/45/CE. Available at: [http://ec.europa.eu/employment\\_social/labour\\_law/docs/directive94\\_45\\_en.pdf](http://ec.europa.eu/employment_social/labour_law/docs/directive94_45_en.pdf).

tices under the influence of globalization.<sup>10</sup> In particular, as the structure of the modern MNE has become increasingly organized around national production units that are globally integrated and often buyer-driven (an early commentator on this was Gereffi, 1994) there has been a consequent need for harmonization/coordination between the national and global levels from the perspective both of management and of workers/trade unions. On the company side, managers consider that the geographical and cultural rift between the “centre” of the MNE, where the traditional trade union action takes place, and the “periphery”, where many strategic decisions are made (ultimately determining the effects on employees in the different production sites), can be healed through interaction with GUFs. On the workers’ side, the affiliates of GUFs and European industry federations perceive their affiliation to a “global” body as an indispensable way to reinforce social representation.<sup>11</sup>

## Overview of chapters

This volume brings together the contributions of 13 specialists in the field of IFAs. They come from both academic and policy-making backgrounds, such that this volume combines scholarly research with lessons learnt through experience.

The volume is divided into five parts, plus this introduction. Part 1 (chapters 1-2) depicts the history of cross-border social dialogue, focusing on the initial steps leading to the transnationalization of union action vis-à-vis MNEs. In two chapters, Dan Gallin and then Isabel da Costa and Udo Rehfeldt present the key historical episodes associated with the emergence of transnational bargaining in MNEs, drawing on their experience as a practitioner and academics, respectively. Based on his experience as the representative of the GUF (the IUF) that signed the first IFA (with Danone in 1988), Gallin depicts the events in terms of transnational union action in the 1960s and 1970s, which paved the way for the

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<sup>10</sup> One of the decisions of the European Union Multistakeholder Forum on CSR has been to shape education and the curricula of business schools in CSR-friendly ways. This Forum was quadripartite, including representatives of employers, MNEs, trade unions and NGOs. See [http://ec.europa.eu/enterprise/csr/documents/29062004/EMSF\\_final\\_report.pdf](http://ec.europa.eu/enterprise/csr/documents/29062004/EMSF_final_report.pdf), pp. 12-15 [22 Oct. 2007]. On the objective of the EU to link corporate social practices with business curricula, see also Verheugen (2007).

<sup>11</sup> This was not the case of ITSs, which were viewed more as providers of information and coordinators of ad hoc international solidarity actions; see for example Bourque (2005).

early IFAs. Da Costa and Rehfeldt offer a general overview of the origins of transnational bargaining, with a particular focus on WWCs, mainly established in the automobile industries. They also highlight the interaction between, on the one hand, voluntary bargaining, and on the other, legislative initiatives at EU level, particularly those related to the establishment of EWCs.

Part 2 (chapters 3-4) approaches the issue from an industrial relations perspective in an effort to depict those characteristics which appear to be key in analysing the actual functioning of IFAs, with one chapter by Konstantinos Papadakis, Giuseppe Casale and Katerina Tsotroudi; and one by Nikolaus Hammer. Papadakis et al. endeavour to comprehend the phenomenon of IFAs from the viewpoint of an ILO definition of collective bargaining, and to examine the potential contribution of IFAs in building a global industrial relations framework. In IFAs, they identify many elements that pertain to collective agreements (according to the ILO definition), and stress the importance of these instruments as channels for consolidating and promoting dialogue and trust between and within the two parties to negotiation, namely MNEs and GUFs.

For his part, Hammer discusses the role of IFAs in the context of changing global production structures. Based on an examination of the substantive and procedural content of IFAs as well as the institutions of labour representation, he shows that IFAs vary considerably in terms of their provisions and that in fact they are used very differently depending on the MNE “governance of global value chains” as well as union capacity and strategies. Hammer suggests that different forms of transnational coordination and strategies should be adopted by each party in the light of these variations.

Part 3 (chapters 5-6) analyses the legal dimension of IFAs, in chapters by André Sobczak and Brian Bercusson. Sobczak examines IFAs as a new form of social regulation, invented by the social partners, but without a precise legal framework, thus leaving open many questions on the agreements’ legal nature and impact. He provides a comprehensive analysis of the implications of the national and international contexts for the legal nature of IFAs, and in particular looks at the question of their legally binding or non-binding nature. Bercusson focuses on the possibility of mobilizing transnationally in order to enhance the negotiation, implementation and monitoring of agreements. He examines developments before the European Court of Justice, especially the potential impact of the ruling of the Court in the *Viking* and *Laval* cases with regard to the

role of collective industrial action in shaping cross-border regulation. This issue can have a significant effect on the negotiation and implementation of cross-border collective agreements.

Also in two chapters, part 4 (chapters 7-8) focuses on two of the most highly globalized sectors — textiles, clothing and footwear (TCF) and maritime transport — in which few or no IFAs have been concluded. (Only recently has an IFA been concluded in TCF, namely the Inditex IFA.) Doug Miller, benefiting from his experience as a unionist in the ITGLWF, explains developments in this sector by focusing on the strategies and efforts of the relevant global union aimed at developing cross-border dialogue and regulation in the face of several obstacles. The main impediments were non-disclosure of supplier locations and an anti-union environment prevailing in TCF multinational companies. (Among the 12 biggest TCF multinational companies, at least eight have no union activity.)

In chapter 8, Nathan Lillie depicts the content and functioning of the ILO Maritime Labour Convention, 2006 (MLC), a breakthrough in terms of global regulation for a sector of activity, in that it is a public instrument that entailed much tripartite negotiation in its preparation and adoption. More generally, Lillie sees in the Convention a third option to the two established methods of transposing international labour standards into shop floor practice, i.e., *national regulation and private business standards*. In sum, he believes that international labour standards could be globally enforced through effective tripartism under ILO auspices.

Finally, part 5 explores, in chapters 9-10 by Dominique Bé and Renée-Claude Drouin, respectively, the options available for policy action to two international public institutions heavily involved in IFAs — the EU (where most cross-border initiatives at enterprise level originate) and the ILO (for which the transnationalization of industrial relations touches on the core of its mandate). Bé takes stock in two areas: first, some recent European Commission initiatives that aim to establish an “optional legal framework” for *regulating*, through a directive, both transnational collective negotiations and agreements in the EU; second, the different views and concerns of the main stakeholders (employers’ and workers’ organizations) in this regard. Drouin identifies various ways in which the ILO could encourage the negotiation and proper implementation of IFAs. She reviews how different ILO policies promoting sectoral activities, technical assistance and dialogue with member States can be

used to help overcome certain difficulties associated with IFAs. These constraints include the absence of an international framework to support transnational collective bargaining; the imbalance of power between the social partner signatories to IFAs; the voluntary nature of IFAs, which makes their implementation dependent on the good-will of enterprises; and the limited resources and capacities of GUFs to negotiate and service the agreements.

The chapters of the present volume look at a different piece of the puzzle that is the emerging transnational industrial relations framework. They are ultimately aimed at: (a) shedding light on the history and recent developments in the area of cross-border social dialogue and agreements; (b) identifying methodological and knowledge gaps in this area; (c) generating a debate on current or potential areas for action by policy makers and international organizations active in this field, including the ILO; and (d) helping define new research topics and policies.

As this is a collective work comprising contributions from authors with different backgrounds (policy, academic) the reader will no doubt observe that these views do not always coincide on various policy issues (for example on the desirability of codes of conduct). Moreover, as several authors are affiliated to different institutions, it should be emphasized that the views expressed in this volume are the authors' only and do not necessarily reflect those of their institutions. Finally, the reader may notice that this volume does not contain contributions reflecting explicitly the point of view of MNEs and employers' organizations. This gap will be filled by a forthcoming International Institute for Labour Studies research project aimed at examining the impact of IFAs from their point of view.

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## Part 1 History

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# Chapter 1

## International framework agreements: A reassessment

*Dan Gallin*<sup>1</sup>

### Introduction

It will soon be 20 years since the first agreement between an international trade union organization and a transnational corporation (TNC) was signed. Sixty such agreements — or international framework agreements (IFAs) — have now been signed and it may be assumed that more will be so in the coming years. A considerable body of academic and trade union literature has developed to discuss their significance. It seems appropriate at this point to review some of this discussion in the light of what was originally intended, of what has developed since, and of future prospects.

This chapter depicts various historical events that constitute key benchmarks in the emergence of transnational labour-management relations and agreements. We first explain the original intention of the transnational negotiations undertaken between international trade secretariats (ITSs) and TNCs in the 1960s (the first section), and outline lessons drawn from this original experience (the second section). We then focus on the history of the first IFA (Danone in 1988) in the third section, and the reasons that might have motivated the TNC to reach this agreement. In the fourth section we highlight the differences between IFAs and corporate codes of conduct, and in the fifth, the relationship

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<sup>1</sup> Global Labour Institute.

between IFAs and European works councils. We conclude by discussing the issue of whether IFAs can still be considered constituting elements of an emerging global labour relations architecture, within a political and economic context increasingly hostile to trade union rights.

## The original intention

It is not difficult to trace back the origins of IFAs. They originated as the response, in the 1960s, of three ITSs (now renamed global union federations or GUFs) to the growing influence of TNCs on industrial relations, especially at national level.

The three ITSs were the International Federation of Chemical and General Workers' Unions (ICF), the forerunner of the present International Federation of Chemical, Energy, Mine and General Workers' Unions (ICEM); the International Metalworkers' Federation (IMF); and the International Union of Food and Allied Workers' Association (IUF), the forerunner of the present International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations.

The International Transport Workers' Federation (ITF) was of course the first ITS to conclude international agreements with employers' federations in the maritime industry and is thus the pioneer of international collective bargaining. Most recently, in 2000, the ITF concluded a sectoral agreement with the International Maritime Employers' Committee (IMEC). This, however, is a special case that should be examined separately (see Lillie, this volume, who examines a key episode in the history of the cross-border negotiations in the maritime shipping industry).

The three industrial ITSs were inspired by the United States (US) example of coordinated bargaining or coalition bargaining, which had been developed by unions in the Congress of Industrial Organizations (CIO), particularly the United Auto Workers union under the leadership of its president Walter Reuther. After the merger of the American Federation of Labor (AFL) and the CIO in 1955, the Industrial Union Department of the AFL-CIO continued this strategy.

The basic idea was simple: to prevent the existing fragmentation of the movement from becoming a factor of division and weakness when bargaining with a multi-plant corporation:

In the United States, trade union jurisdictional lines in certain industries are extremely blurred. ... This results in several unions having bargaining rights for different plants of the company. Each is therefore confronted by the total combined strength of the company although it may be bargaining with a local plant official. ... To offset this very great disadvantage in power at the bargaining table, the Industrial Union Department of the AFL-CIO (IUD) has developed a co-ordinated bargaining program. Under this plan all unions with collective bargaining rights within a plant of a given company work out their demands and bargaining strategy jointly. Thus a company would have a single set of demands and a single strategy to contend with, backed by a number of different unions in a common front. Although still in its initial stages, this plan has already achieved some notable successes, particularly with General Electric, Westinghouse and other companies (Levinson, 1972, pp. 103-104).

The same factors that led North American unions to adopt the coalition bargaining strategy would apply even more at international level, where by definition in almost all cases, different national unions would hold bargaining rights in different production sites of the same company.<sup>2</sup> Consequently, the necessity of working out “their demands and bargaining strategy jointly” would be even more compelling in terms of the objective of building an international countervailing union force to counter the “combined strength of the company”. It would make the coalition bargaining strategy even more relevant.

However, in addition to working towards creating an international collective bargaining situation where union and management power would be more evenly balanced, in seeking to coordinate union activities at TNC level the ITSs also responded to the perceived need of their member unions for mutual support in conflicts, whether or not within a formal bargaining framework.

As things turned out, the ICF itself successfully practised this strategy in many instances, starting in the mid-1960s (Levinson, 1972, pp. 112-17). The ICF action against the Saint-Gobain glass company in 1969 attracted international attention. It was simultaneously conducted in four countries, including a 26-day strike in the United States, and it was the first major post-World War II international trade union action based on the principle of coalition bargaining.

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<sup>2</sup> The exceptions are the labour movement in the US and Canada, and in the United Kingdom and Ireland, where some unions hold membership and collective bargaining rights in both countries.

The IMF based its response to TNCs on similar principles, starting in the automobile industry. The first IMF auto workers' conference focusing on TNCs was held in Paris in 1959. Successive conferences in the 1960s progressively built up a strategy of World Auto Company Councils for the nine world corporations, accounting at the time for 80 per cent of the Western world's production. The first three World Auto Councils (Ford, General Motors and Chrysler) were set up in June 1966, the fourth (Volkswagen-Mercedes Benz) in November 1966, and the fifth (Fiat-Citroën) in November 1968.

Through these world councils, the IMF organized specific actions, such as the participation of an experienced negotiator from the union in the country of the parent company in local negotiations at a subsidiary location. They also organized communication of economic and collective bargaining information between unions operating in the same company, and intervention by unions that had the support of the parent company in strikes at subsidiary plants.

A conference of the IMF World Auto Company Councils, held in London in March 1971, defined specific demands for each of the councils and adopted a declaration, part of which stated:

On the collective bargaining front it is imperative that the centralized control of the international corporations be countered by the closest possible co-ordination of unions in all nations representing the workers of each such corporation. ... Help must be given, in every country where it is needed, to organize the still unorganized workers of such corporations. Collective bargaining rights, including the right to strike, must be won in every country where they are now denied. National affiliates of the IMF must be provided with all the help they require to strengthen their organizations and to train their members and leaders to bargain more effectively with their employers.

We call for meetings of representatives of each of the IMF World Auto Company Councils with the top policy-makers of these respective international corporations. Among the priority items to be discussed at such meetings are information concerning investment and production plans and job security.

Common expiration dates should be established for collective bargaining contracts in all nations, corporation by corporation, so that the full weight of the totality of the firm's organized workers can be brought to bear upon each corporation, under conditions in which all unions involved are free of contractual restrictions.

In 1967, the IMF had established a Commission for Multinational Corporations to coordinate its general policy in this area. The action

program was extended beyond the auto industry to the machine and electrical engineering industries, with international meetings of unions in General Electric, International Harvester, Philips and Honeywell, among others.

Also in 1967, the IMF established a European Committee of Metal Trade Unions, as a coordinating body of the IMF in what was then the European Economic Community. This Committee worked to establish bargaining rights with several TNCs, but focused particular attention on Philips, the Netherlands-based electronics corporation.

The unions' short-term objective was an agreement securing parity of treatment of workers employed by Philips in different countries, as well as the protection of workers affected by technological change. A longer-term goal was an international collective bargaining agreement covering working conditions (including wages and hours), union rights and representation in the plants.

From 1967 to 1970, three meetings were held between representatives of the European Committee and Philips management officials. In the first meeting (September 1967), the discussions centred on the effect on employment and wage rates of changes in production processes resulting from technological innovation and from international production transfers. An agreement was reached to hold further discussions at a later date.

At the second meeting (June 1969), management agreed that unions would be given prior notice of important transfers of production from one country to another and of any changes in the limits set on production within individual plants. Management also agreed to consider union proposals on readjustment and vocational training measures for workers affected by technological change.

The third meeting (September 1970) dealt primarily with work organization and future developments of the company's economic activities. Philips representatives agreed to consider the European Committee's demands for a permanent labour-management liaison committee, for a comprehensive labour policy and for discussions at international level in advance of proposed lay-offs and international transfer of employees. They also agreed that, if production transfers were undertaken, the "redundant" workers would be guaranteed full wages and social security contributions for at least six months and that special protection would be extended to workers over 50 years old.

After the third meeting, the Philips management apparently decided against continuing to engage with the unions in a discussion of their labour relations at international level. A fourth meeting, planned for 1971, was to discuss the possibility of establishing a permanent joint advisory committee that would examine employment, social policy and industrial relations problems within the Philips group, but “owing to the company’s increasing hesitancy” this was indefinitely postponed (Levinson, 1972, p. 132).

A Philips European Forum was formed in 1996 as a European works council (EWC) under Article 13 of the EWC Directive (European Council, 1994). Like other EWCs, its mandate is limited to “information and consultation”. In February 2001, the IMF held its first Philips World Conference, with about 60 participants from 18 countries, which established a steering committee and a task force to build an effective information network. The conference also considered that the establishment of a world works council, “to complement the existing European Works Council (European Philips Forum — EPF)” was necessary, because “Philips gears its decision-making to the global level. The emerging trend whereby production plants are moved to low-wage countries requires a global organization of trade unions and company employee representatives” (IMF, 2001). There is no IFA covering Philips.

IUF had taken an active interest in international coordination of trade union bargaining since 1958, when it undertook a comparative survey of wages and working conditions in British-American Tobacco (BAT). The issue was also on the agenda of sectoral conferences in 1961 for meat and tobacco companies.

BAT was in fact the first company where the IUF organized solidarity action between member unions in different countries representing workers in the same TNC.

The action was in defence of the Pak Cigarette Labour Union (PCLU), which represented workers at the Pakistan subsidiary of BAT. The PCLU was formed in 1961 but was not recognized. Instead, the union faced lockouts, arrests, dismissals and fines. In February 1963, it went on strike, during which its general secretary was jailed for four months and 12 union members were dismissed. The IUF organized financial support for the dismissed workers and called on its members at BAT to raise the issue with their local management. In December, the general secretary of the British Tobacco Workers’ Union, Percy Belcher,

travelled to Karachi officially representing the IUF and helped to bring about negotiations between the union and the company. These negotiations resulted in the reinstatement of the dismissed workers and of the union's general secretary, as well as in the first ever collective bargaining agreement reached between any union and employer in Karachi.

In May 1964, the issue of TNCs was on the agenda of the 14th Congress of the IUF in Stockholm, which adopted the following Resolution on International Collective Bargaining:

The Fourteenth Statutory Congress of the International Union of Food and Allied Workers' Associations, meeting in Stockholm from May 27 to 30, 1964:

CONSIDERING the dominant position of international companies in all aspects of economic and social life;

CONSIDERING the growing ability of such companies to mobilize their full international potential in collective bargaining with single national unions;

CONSIDERING the threat arising to national trade union organizations from inadequate communication and coordination in their dealings with international companies;

DIRECTS the Executive Committee to take all appropriate measures to secure the recognition of the IUF as an international negotiating body and to perfect an appropriate procedure for conducting international negotiations in the food and allied industries under IUF sponsorship.

Following the congress, the IUF approached BAT with a proposal to establish a permanent joint negotiating body, but did not obtain a positive response. However, the IUF continued to organize international coordination at TNC level, typically in the context of a conflict situation.

One such action was in support of a strike by the US Bakery and Confectionary Workers' Union in October 1969 against the National Biscuit Co. (Nabisco), involving unions from 10 countries in which Nabisco had subsidiaries. The strike was successfully ended two weeks after the initial call for international solidarity.

The 16th IUF Congress held in Zurich in July 1970 again noted the concentration of power taking place at international company level and stressed the need to strengthen union cooperation at that level. It called for regular meetings of unions representing workers in the major TNCs as well as for ad hoc meetings in emergencies and for exchanges of union delegations to observe each other's negotiations within the same TNC.

In May 1972, in Geneva, the IUF held its first World Conference of Nestlé Workers, which established a Nestlé Permanent Council. The tasks of the council were to: (a) contact the management of Nestlé Alimentana SA on international questions or at the request of affiliates; (b) call future conferences focusing on Nestlé; and (c) follow up on the decisions of the conference.

The conference adopted a statement that formulated demands on job security and wages policy, but also on respect of union rights and on union participation in management policy decisions. The statement also included a political demand: it invited Nestlé to “contribute to the development of underdeveloped countries”, in particular by the following measures:

- ensure the equitable distribution of its subsidiaries’ revenues, whether in the form of wages or taxes;
- bring the prices of Nestlé products to a level where all consumers will be able to purchase them;
- bring its influence to bear to guarantee fair prices for the primary commodities which it processes;
- follow a policy of processing primary commodities where these originate, without thereby creating employment problems in its subsidiaries located in industrialized countries.

Finally, the participating unions agreed to “increase, through the IUF secretariat, the exchange of information and experiences concerning their relations with Nestlé, thereby laying the groundwork for more effective cooperation at the level of the company” and to “mutually support their demands and their struggles”.

It was also decided that the IUF secretariat would publish a Nestlé bulletin; such a bulletin did appear on an approximately monthly basis until most IUF periodical publications were replaced by a web site in the late 1990s.

In June 1972, a delegation of the IUF Permanent Council met Nestlé management at company headquarters in Vevey, Switzerland to discuss the conclusions of the World Conference, after having agreed that these talks could not become a substitute for management/labour relations at the national level.

The management representatives assured the IUF delegation that the company considered good relations with the unions of utmost impor-

tance and in particular attached importance to the respect of trade union rights by its associated companies and subsidiaries, that Nestlé intended to make the safeguarding of jobs a priority, and it would seek an understanding with workers' representatives on the material and social impacts of lay-offs resulting from rationalization measures.

The management representatives also said that the company would issue appropriate recommendations to companies manufacturing or distributing Nestlé products whenever such companies would not observe the parent's firm policy on these two issues.

Concerning Nestlé's role in "underdeveloped countries", the company stated its desire to contribute to the establishment of equitable prices for primary commodities, particularly for coffee and cocoa, at a level that would permit development and consumption in producing countries.

Both parties agreed that further meetings between representatives of the IUF Permanent Council and the Nestlé management should take place at the request of either of them.

However, relations soured in 1973 when Nestlé management refused to discuss the anti-union policies of Stouffer Foods, a recent acquisition in the United States, and when it refused to intervene in a conflict at the Chiclayo plant of Perulac, its subsidiary in Peru.

The dispute in Chiclayo occurred when the workers who had struck in sympathy with a walk-out at another Nestlé plant in Lima (Maggi) returned to work on April 10 to find that non-union workers were the only ones being paid for strike days. This resulted in another strike that lasted for six weeks, with workers occupying the plant. In a solidarity action organized by the IUF, unions representing Nestlé workers in 15 countries supported the strike. An intervention by the New Zealand Dairy Workers' Union, which threatened to close down the Nestlé powdered milk plant that supplied all Nestlé operations on the South American Pacific coast, tilted the balance.

The final settlement on 23 May met all the demands of the Perulac Workers' Union: a lump sum to be paid to the union to allow it to compensate its members for loss of earnings during the strike, a 20 per cent wage increase, an increase in paid holidays from 15 to 20 days per year dropping all charges against union members and a commitment by management to cease discrimination against them, and retroactive recog-

dition of the legality of the strike by the Peruvian Government (it had declared it illegal on 2 May).

However, the IUF regional secretary for Latin America, who had visited the union during the strike, was arrested on 5 May and expelled from the country four days later. In July, he returned to Peru and was subjected to a short police interrogation, but almost a year later the regional secretary and the general secretary of the IUF again visited Peru, having been invited by the Perulac union to participate in the inauguration of its new premises. On 24 March 1974, they were arrested in Chiclayo by security police who were led by an official who held a piece of paper with a Nestlé letterhead in his hand.<sup>3</sup> They were then transferred to Lima and expelled on 26 March.

After that, relations between the IUF and Nestlé became frosty for several years. A thaw set in, in 1989, when the IUF president Günter Döding, also president of the German Food and Allied Workers' Union (NGG), met Helmut Maucher, Nestlé chief executive officer (CEO), whom he had known as director of Nestlé Germany, and over dinner they decided that Nestlé could recognize the IUF as its international social counterpart.

This led to a resumption of annual meetings between a reconstituted IUF Nestlé Council and Nestlé management, but only at European level. These meetings were eventually formalized in 1996 as an EWC (the Nestlé European Council for Information and Consultation — NECIC). Nestlé has, however, so far refused to sign an IFA with the IUF.

Except for two informal agreements on training and equal opportunities, such agreements that exist are only procedural (frequency of meetings, composition of the delegations, countries to be included). Even on procedure, contentious issues arose: the IUF insisted that the workers' side should only include union members (officials and lay members from the production sites); Nestlé wanted to include an "independent" union in Spain that the IUF did not recognize. The IUF also wanted the meetings to cover all of geographical Europe, whereas Nestlé wanted only European Union (EU) countries included. The trade union issue was eventually resolved on IUF terms but the geographical issue was only partially resolved.

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<sup>3</sup> As seen by the author himself, who was at that time the general secretary of the IUF.

As a parallel activity, the IUF also convened regional Nestlé meetings: most recently, for Asia and the Pacific in Manila (1999) and Jakarta (2002), for Eastern Europe in Lviv (2003) and for Africa in Cape Town (2003). The seventh Nestlé conference for Latin America took place in Buenos Aires in 2003. The director of corporate human relations attended some of these recent regional meetings. Since 2004, the IUF has established a network of regional Nestlé coordinators based in Bangkok, Johannesburg, Montevideo and Moscow.

In 1998, Nestlé adopted the Corporate Business Principles, which affirm, among other things, the “respect of the right of employees to join legally recognized labour unions”. However, the establishment of formal mechanisms of communication between the IUF and Nestlé did not reduce the number of conflicts. In all parts of the world, including Europe, unions have been in conflict with local Nestlé managements in recent years over a wide variety of issues, including union rights.

## Conclusions from experience

The main conclusion that can be drawn from the experience of the ICF, IMF and IUF in the 1960s and 1970s is that their work in coordinating international union activities at TNC level was in fact a basic trade union response to a new development affecting the structure of their employer counterparts: the concentration of capital and the shift of the place where corporate power was exercised and decisions made from the national to the international level.

This response was intended to be a strategy of trade union struggle and it was motivated by the need to make this struggle more effective under the new conditions, which affected industrial relations worldwide. International coordination was viewed as a tool through which unions could build up a countervailing power comparable to that of the TNCs they were facing.

From that perspective, IFAs, although a logical outcome of international negotiations, were not the principal objective. That was to build union strength at TNC level to achieve any number of basic trade union aims, such as successfully conducting solidarity actions. This is something the ITSs would have had to do in any event, and it is still part of their basic functions, whatever institutional form it may take.

No IFAs existed in the 1960s and 1970s and those few companies (BAT, Philips and Nestlé, for example) that had agreed to meet ITS delegations to discuss industrial relations problems affecting their entire operations quickly drew back when they realised that the ITSs involved expected some form of binding commitment and serious changes in their corporate practices. Although disappointing, this did not stop the ITSs from further building union coalitions and organizing at TNC level.

The situation may best be understood if one compares the international to the national or even local level. Trade unions exist to defend the interests of their members in a variety of ways over a wide range of issues; they do not exist exclusively for the purpose of concluding collective bargaining agreements. But when it comes to bargaining, because they must defend their members' interests against opposing interests, trade unions must always be prepared for conflict and organize for conflict, even as they negotiate. A collective bargaining agreement is, in an institutionalized form, the temporary outcome of a conflict situation, whether latent or open, soft or hard. It reflects, in an institutionalized form, the balance of power, at any given time, between the contracting parties. This is why there are strong and weak agreements.

International collective bargaining is only different in so far as there is no international legal framework, such as exists in most countries at national level, to provide a guaranteed legal status to any labour/management agreement reached at international level. Since such agreements are therefore entirely voluntary, they depend even more on the balance of power between the contracting parties at the time they are concluded. This is why there are strong and weak IFAs, and this is also why there are so few of them.

## The first IFA

The first IFA was signed by the IUF and the French transnational food company BSN (renamed Danone in 1994), on 23 August 1988. Called Common Viewpoint IUF/BSN, it states that the parties agree to promote coordinated initiatives, throughout the BSN group, on four issues:

1. A policy for training for skills in order to anticipate the consequences of the introduction of new technologies or industrial restructuring. To achieve this objective, the social partners will seek to integrate this aspect into present and future plans for training;

2. A policy aiming to achieve the same level and the same quality of information, both in the economic and the social fields, in all locations of BSN subsidiaries. To achieve this objective, the social partners concerned will seek, both through national legislation as well as collective agreement, to reduce the differences observed in terms of the information between one country and another or between one location and another;
3. A development of conditions to assure real equality between men and women at work. Developing jobs and work processes have led to distortions between the situation of men and women; the social partners will therefore evaluate, location by location, the nature of the different initiatives to be adopted to improve the situation;
4. The implementation of trade union rights as defined in ILO conventions Nos. 87, 98 and 135. The social partners concerned will identify where progress can be made in improving trade union rights and access to trade union education.

The adoption of the Common Viewpoint was preceded by several meetings after 1984, between an IUF delegation, normally composed of the IUF general secretary, a member of the IUF staff responsible for coordinating BSN activities and representatives of the French IUF affiliates (the Confédération française démocratique du travail-CFDT and Force Ouvrière-FO food workers' unions), with Danone management, usually comprising the CEO (Antoine Riboud), the director of human resources and a member of his staff.

In 1986, a first meeting between the management and delegates from IUF affiliates in Belgium, France, Germany and Italy with membership in BSN was organized by the IUF in Geneva. This meeting was the first of annual meetings that have regularly taken place since, with growing participation, to include all of geographical Europe and representation from the rest of the world. On the management side, central management (the CEO, director of human resources and staff), as well as all national directors in Europe, participated. The joint meeting lasted one day; the workers' group met the day before to prepare and the day after for evaluation and to discuss the follow-up. The company covered the expenses of all meetings. The IUF appointed a coordinating union (the CFDT Food Workers' Union) for the workers' group and its national officer responsible for Danone chaired the joint meetings.

It was agreed that all IUF/Danone agreements would cover the entire operations of the company in all parts of the world. Neither the

agreements, nor the joint meetings nor their agenda were therefore “European” in nature, but worldwide in scope. Unions representing Danone workers outside Europe (Africa, Asia-Pacific, Latin America and, for some years, North America) would be represented at the joint meetings by the IUF regional secretaries for these regions. In some meetings, unions from outside Europe also participated.

Follow-up agreements to the Common Viewpoint were concluded in 1989 (on economic and social information for staff and their representatives, and on equality at work for men and women), in 1992 (on skills training) and in 1994 (on trade union rights). In 1997, a further agreement was signed on measures to be taken in the event of changes in business activities affecting employment or working conditions. This agreement, the first of its kind at international level, served as a basis for a specific agreement on social standards applicable to all plants affected by the industrial restructuring plan of 2001 for biscuit operations in Europe.

Following the adoption by the EU of the EWC Directive in 1994, an agreement establishing a Danone information and consultation committee was signed in 1996. The IUF commented as follows:

This committee, although functioning within the framework of European legislation, continues the work carried out by the IUF since 1984 on behalf of its affiliates and also continues the positive features characteristic of Danone-IUF relations since 1984:

- trade union recognition;
- at enterprise level: workers’ representatives are exclusively trade union delegates;
- at national level: full-time national officers are included in the trade union delegation;
- at international level: the secretariats of the IUF and of the ECF-IUF are members of the new structure and the other regional secretaries of the IUF represent Danone workers outside Europe. Danone accepts that in a transnational company with a global spread of activities, the international trade union movement represents the global counterpart;
- shared responsibilities: the themes for discussion are decided jointly, and the meetings are chaired by the IUF international coordinator Pierre Laurent;
- finally, the committee does not confine itself in an information and consultation role, as the EU legislation suggests, but continues the momentum of IUF-Danone relations by being a forum for negotiations on the crucial issues of concern to all Danone workers (IUF, 1997).

The Danone agreement, including its subsidiary agreements, remains the most far-reaching IFA to date, and has set the pattern for further IUF agreements with TNCs (for example, Accor, Chiquita and Fonterra) (Tørres and Gunnes, 2003, p. 9).

There has been some speculation as to why Danone was the first company to agree to an IFA of this nature. The personal views of Antoine Riboud, its founder and CEO until 1996, were undoubtedly an important factor. Riboud, who died in 2002, was a progressive Catholic with links to the French Socialist Party and viewed trade unions as legitimate counterparts at all levels. As he declared in a meeting with an IUF delegation, he wanted strong unions in his company because he could not imagine leading his company against its employees and without respecting their rights. There is no doubt that this was his sincere belief. Riboud was a man of honour.

The experiences of the IUF at that time, however, also played a role. All TNCs (including Danone) in the IUF's scope had realized that the IUF was becoming a serious counterpart. As we have seen, the IUF had sustained a bruising conflict with Nestlé in 1973, although in the end it had been resolved on union terms. In 1980, the IUF conducted a major conflict with the Coca-Cola Company, in order to secure the survival of a union at a bottling subsidiary in Guatemala (Reyes and Gatehouse, 1987, pp. 10-13; Frundt, 1987, pp. 61-3). An international campaign involving solidarity strikes at Coke plants in several countries, demonstrations and negative publicity, with widespread support from non-governmental organizations (NGOs) and political groups, obliged the company to buy the subsidiary plant, recognize the enterprise union and intervene so that the Government ceased its anti-union terror campaign, at least in that plant.

However, four years later, the directors whom Coca-Cola had put in charge of the plant absconded, and declared the plant bankrupt — leaving at least half a million dollars unaccounted for (Reyes and Gatehouse, 1987, pp. 23-24). The workers, who had feared that something like this might happen, occupied the plant the same day (18 February 1984). The IUF again made representations to the Coca-Cola Company, and the company initially refused to take responsibility (as in 1980).

The company's assumption that the IUF would not be able to replicate its campaign of 1980 proved unfounded. In fact, the 1984 campaign was even stronger than the first one. It involved: unions that had previ-

ously stood aside (notably in the United States and in Canada), which among other things sent a delegation to visit the occupied plant; a union television crew from New York that visited the occupied plant to document the occupation;<sup>4</sup> a professional, independent accountant from the Interfaith Council for Corporate Responsibility in the United States<sup>5</sup> who discovered how the directors had “cooked the books”, which they had left behind in their precipitate departure; more solidarity strikes; waiters in the Philippines and supermarket cashiers in Sweden who refused to serve or sell Coca-Cola; and more (Reyes and Gatehouse, 1987, pp. 23-24; Frundt, 1987, pp. 61-3). The damage to the company’s image was enormous.

After three months, the company wanted to settle. On 27 May, company representatives (the corporate human resources director and regional directors) met an IUF delegation (the general secretary, the North American regional secretary, the vice president of the principal North American affiliate and two officers of the Guatemalan union) in Costa Rica. After two days of tense negotiations the company agreed to sell the plant to a reputable buyer, guaranteed that the new owners would recognize the union and the existing collective bargaining agreement, agreed to employ and pay the workers occupying the plant until it reopened, and agreed that the plant would reopen with all its workers and that no-one would be laid off. On that basis, the IUF called off its solidarity campaign.

The implementation of the agreement took several more months. Coca-Cola was looking for a buyer, the workers were still occupying the plant and the IUF was standing by to resume international solidarity action. At last, on 9 November, the company announced that it had found a buyer: a consortium led by Carlos Porrás González, a reputable economist who had run businesses in El Salvador. New negotiations then had to be conducted with the putative new owners, which were concluded on 1 February 1985, just over two weeks short of the anniversary of the start of the occupation, and the plant reopened on 1 March 1985. The final settlement corresponded with the agreement reached with Coca-Cola on 27 May 1984, although the plant reopened with only 265 of the 350 workers who had been occupying it (the others were rehired

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<sup>4</sup> The film is called “The Real Thing”. It was shown at hundreds of solidarity meetings in many countries.

<sup>5</sup> Paul Abrecht of the Interfaith Center on Corporate Responsibility (ICCR), New York. His report (1984) is available in the IUF archives.

in the following months). Since then, the Guatemalan union has become the core of a national food workers' federation and the collective bargaining agreement has been regularly renegotiated, although the plant now has other owners.

The IUF has had many meetings with Coca-Cola top management since then to discuss problems arising in the Coca-Cola system, and has reached agreements on specific issues, but without a formal framework.

When the IUF met Coca-Cola management representatives on 25-27 May 1984, when the company was obviously ready to make extensive concessions to put an end to the conflict, the question arose as to whether the IUF delegation should demand the establishment of a general IFA as part of the settlement. The IUF general secretary decided against it because, with the lives of the workers in the plant still under threat (the Guatemalan army had surrounded the plant since the beginning of the occupation and was still there), he believed that the IUF should not risk delaying the settlement by introducing extraneous issues. The overriding priority had to be to protect the Guatemalan affiliate and its members. The IFA could wait.

The Nestlé conflict in 1973 and especially the conflicts with Coca-Cola in 1980 and 1984-85 received extensive press coverage. The IUF had demonstrated its capacity for creating serious inconvenience to even large and powerful TNCs. It may be safely assumed that by 1984 at the latest, the IUF had caught the attention of all leading TNCs in its field of activity.

The Danone agreement was reached outside any context of conflict, and all discussions were conducted in a friendly atmosphere of mutual respect and trust. It would be wrong to suggest that Danone had become interested in concluding an IFA with the IUF because it feared a conflict with the IUF: no serious conflict was on the horizon and, given the Danone corporate philosophy, it was highly unlikely to arise. However, Danone had perceived the IUF to be a serious international counterpart and had realized that signing an agreement with it was not only a moral and political imperative but also a smart business move.

## IFAs and codes of conduct

The distinction between codes of conduct and IFAs is sometimes ignored or blurred. For example, a list of IFAs established by the Friedrich Ebert-Stiftung, in 2002, is called the “List of Codes of Conduct/Framework Agreements”, as if they were interchangeable. A footnote says: “Some GUFs call the agreements ‘Framework Agreements’, not Code of Conduct, because there had been only a few principles fixed in the first agreement which often have been extended by additional agreements. For instance in the case of Danone the first agreement of 1988 has meanwhile been developed by six other agreements”. This is, of course, not true. Neither the IUF nor anyone else ever called the Danone agreement a code of conduct, nor did anyone ever suggest that a code was in any sense stronger than a framework agreement. A similar list, by SASK, the Finnish trade union development agency, in 2005, is also headed Codes of Conduct/Framework Agreements, with a similar footnote.

A positive article about IFAs in the IMF journal *Metal World* (Nilsson, 2002) introduces the subject by referring to IFAs “or Codes of Conduct, as they were formerly called” and goes on to say that IFAs were called codes of conduct “before that expression was compromised”. The article later correctly points out some of the fundamental differences between codes and IFAs, but the fact is that IFAs were never called codes and that the concept of codes was compromised from the beginning as a management-driven public relations exercise.

The ICFTU and some GUFs have developed “model codes of conduct” as potential stepping stones to IFAs or for lack of a better alternative. But some analysts have pointed out with reason, that:

With this voluntary initiative by management to implement social policy rules as business principles, weak unions and workers’ representatives will tend to have little say in taking this further to a framework agreement that commits both management and unions. There is reason to consider this a barrier to adopting global agreements that commit both management and unions, and thus a hinder for trade union recognition (Tørres and Gunnes, 2003, p. 45).

On the subject, these authors also note:

Codes of conduct covering issues of social responsibility are becoming more frequent. However, the extent to which this is facilitating improved communications and dialogue between employees and management is more doubtful. ... There is ... a danger that codes are seen as something

more than they really are, and used to deflect criticism and reduce the demand for negotiations or external regulation. ... In some cases, codes have led to a worsening of the situation for those whom they purport to benefit (Tørres and Gunnes, 2003, p. 443).

Most trade unionists, analysts and researchers make a clear distinction between IFAs and codes of conduct.

The ICFTU notes that

... the content of a framework agreement is often similar to the language found in some of the codes of conduct that companies have adopted for their suppliers and which cover some, or all, of the fundamental rights at work. However, that does not mean that a framework agreement is the same thing as a code of conduct. It is not.

There is a fundamental difference between a code of labour practice, which is a unilateral management pledge, mainly made to address public concerns, and a framework agreement, which is recognition that the company will engage the relevant international trade union organization and discuss issues of fundamental concerns to both parties (ICFTU, 2004).

Others have been even more explicit. Riisgaard notes that code of conduct responses are frequently an example

... where businesses ... have embraced codes of conduct as protection against public opinion and as a means to sidestep demands for unionization. The RUGMARK certification system for example guarantees that no child workers have been used in the production of the labeled blankets, but does nothing to secure the rights of the remaining workforce ... A 1998 ILO investigation of 215 codes found that only around 15 per cent refer to freedom of association or the right to collective bargaining, and likewise a 1999 OECD investigation shows that only around 20 per cent of the 182 investigated codes refer explicitly to the ILO conventions on freedom of association and the right to collective bargaining ... As seen in the examples above, one can seriously question whether most voluntary initiatives reflect NGO or business interests rather than workers' interests. ... As a result, it is important to differentiate between voluntary initiatives that are negotiated with labour and initiatives that are not (Riisgaard, 2003, p. 2).

The author of this chapter has pointed out elsewhere that in many cases, far from promoting labour rights, one of the main purposes of codes of conduct has actually been union avoidance:

In 1990, 85 percent of the top 100 US corporations were found to have a code; in the UK, this figure was 42 percent, in the Netherlands 22 percent. ... However, most codes of conduct that address social issues are limited in their coverage and do not address basic labour rights. ...

This comes as no surprise since, in some cases, companies adopted codes as part of a union-avoidance strategy by pre-emption, preferring to unilaterally offer a paternalistic package than have a recognized negotiating body to deal with. As the ICFTU has pointed out, “many of the US-based companies that were the first to adopt codes were, in both principle and practice, opposed to trade unions”.... For example, the Caterpillar code states that the company seeks to “operate the business in such a way that employees don’t feel a need for representation by unions or other third parties” and the Sara Lee Knit Products code states that the company “believes in a union-free environment except where law and cultures require (SKP) to do otherwise”. The DuPont code reads: “employees shall be encouraged by lawful expression of management opinion to continue an existing no-union status, but where employees have chosen to be represented by a union, management shall deal with the union in good faith. ...

A second problem has been monitoring of compliance. Most codes do not provide for a credible independent monitoring procedure, or for strong enforcement and complaints mechanisms. Unions have argued that the existence of independent trade unions throughout the operations of transnational corporations are the most efficient monitoring system. ... Many companies have gone to great length — and expense — to resort to other monitoring systems (creating their own, contracting out to commercial monitoring enterprises or to compliant NGOs) with dubious results (Gallin, 2000).

After a detailed analysis of the differences between IFAs and corporate social responsibility (CSR) initiatives, most commonly expressed in the form of codes of conduct, Gibb observed:

When considering the argument that IFAs are no different than other CSR initiatives, or that IFAs are one form of CSR, it must be recognized that if the contribution of IFAs was limited to improving the public image or providing a marketing boost to companies, there would be as many IFAs signed as there are CSR initiatives. This is not the case (Gibb, 2005).

In a document for the 2006 IUF Executive Committee meeting, the IUF secretariat makes the same point:

Whilst some may say that IFAs are little more than agreed “codes of conduct” they are clearly significantly better. Unlike codes their very existence as signed agreements means they are explicitly built on union recognition at international level and therefore do not pose the danger of being used as an alternative to unions in the same way that many codes and CSR initiatives do (even those where unions somehow “sign on”) (IUF, 2006).

Although the one obvious difference between codes and IFAs is that most codes are unilateral company statements whereas IFAs are

negotiated labour-management agreements, it is not the only difference and actually not always the case: there are some negotiated codes. There may be a deeper underlying issue, which has to do with the view that unions take of the purpose of such agreements. If IFAs are primarily meant to address company behaviour, they may indeed appear to be no more than a stronger kind of code: stronger, because the outcome of a negotiation, but not basically different in purpose. If, conversely, IFAs are seen and used as organizing tools, the contrast with codes becomes much clearer (Egels-Zandén and Hyllman, 2007).

## IFAs and European works councils

As a rule, EWCs do not negotiate IFAs and are not signatories to IFAs. Carley (2001) observes that:

In formal terms, the prospects of EWCs developing a negotiating role are not very bright. The [EWC] Directive provides for no such role for them, stating that their purpose is to improve information and consultation and laying down only an informative/consultative role for statutory EWCs based on its subsidiary requirements.

The European Trade Union Confederation (ETUC), while supporting the development of a European framework for transnational collective bargaining (which should complement the existing framework for European “social dialogue”),<sup>6</sup> stresses that EWCs do not have a mandate for negotiations nor the right to sign transnational agreements:

The power to do this must remain solely and strictly a trade union right, owing to their representativeness long recognized by the Commission, which also specified as much in a text. Transnational agreements as such must be left up to collectively responsible and thus players with a mandate

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<sup>6</sup> A note on terminology is in order. About 20 years ago, a new vocabulary was introduced in the public discourse on industrial relations, typically involving concepts like “social partners” and “social partnership” or “social dialogue”. This vocabulary seems to have originated with the EU Treaty of Rome (1984), but has since, unfortunately, been adopted by the ILO and by most international trade union organizations. In fact, it is not designed to reflect reality but to hide it. “Partnership”, by any definition, assumes shared interests. In recent years, it has become increasingly obvious that whatever shared interests may have existed or still exist between workers and employers, they are overridden by conflicts of opposing interests in most areas of industrial relations. Today, trade unions do not have “social partners” in any real sense: the accurate term would be: “social counterparts”. As for “social dialogue”, it is a particularly vague and meaningless term, obviously designed to dilute the reality of labour-management relations, perhaps to sidestep terms like “negotiation”. Since vocabulary is never innocent, it is worth reflecting on what interest is served by introducing this kind of language.

to represent their members. ... EWCs, which we stress were only given powers of information and consultation, are not appropriate bodies for negotiations given the current state of legislation (ETUC, 2005).

Therefore, unsurprisingly:

The first and arguably the clearest conclusion is that from the available evidence, the practice of negotiating joint texts in EWCs is extremely rare. The research has found only 22 examples in nine multinationals. Given that there are probably 700 EWCs in existence, this represents only a tiny proportion of the total (little over 1 percent) (Carley, 2001, p. 47).

The existence of joint texts in EWCs is even more rare than Carley suggests, since he included six Danone agreements in that number. As we have seen, these were neither negotiated nor signed by an EWC but emerged in an entirely different context and, indeed, even before the adoption of the EWC Directive in 1994.

This does not stop Carley from claiming that the joint IUF/Danone committee, which met annually from 1987, was “one of the first EWCs”:

BSN/Danone thus established an EWC long before all but one or two other firms had done so — and long before the EWC directive was proposed — and this body (and IUF) was given a negotiating role almost a decade before any other EWC (Carley, 2001, p. 34).

In fact, the IUF/Danone committee was not an EWC at all, since neither the IUF nor the company could have possibly foreseen the future creation of a body that did not exist at that time. Furthermore, although — as Carley rightly points out — the joint IUF/Danone committee was subsequently “formalized” by an Article 13 (of the EWC Directive) agreement in March 1996, this joint committee has none of the typical limitations of the EWCs (in the sense that it is vested with negotiating powers, and is worldwide in scope). This is so precisely because it did not originate as an EWC and therefore does not conform to the standard EWC pattern.

One wonders which of the remaining 16 “joint texts” have been similarly retroactively annexed to an agenda of bolstering an assumed EWC negotiating role. The agreement of the Italian energy company ENI of 2002, for one, is also one signed by the GUF and not by the EWC.

From the point of view of an international labour strategy, three issues need to be resolved in a way consistent with trade union interests, with regard to negotiations, trade unions and geography (Gallin, 2003).

First, some EWC agreements (EFAs) explicitly rule out any negotiating role, others make provisions for certain types of negotiations. The important point is that the content of what happens in an EWC depends on mutual agreement of the social counterparts and not necessarily on what the Directive says (European Council, 1994). Unions should therefore push for what is consistent with their objectives and their interests, rather than voluntarily conforming to rules that have been invented by others and that work to their disadvantage.

Second, the trade union issue arises because the 1994 EWC Directive is a much-diluted version of the original draft of 1980, which would have given trade unions statutory representation rights. In its final and present form, it does not mention trade unions at all, so that unions have had to fight to nail down the right of their officials to be part of the EWC and to ensure that the lay members themselves be union members. Where this has not succeeded, EWCs remain vulnerable to management manipulation or to becoming outright management tools.

The main reason why the — specifically international — trade union presence is necessary is that it represents the long-term general interest of workers. In contrast, works council representatives are not necessarily committed to defending more than the specific interests of the workers of their enterprise as those interests appear to them at the time of the meeting. When each delegation comes to the meeting determined to defend its short-term interests, this can easily lead to a free-for-all where management can impose its own decisions. Whenever workers' representatives meet internationally, it is their obligation to reach a position reflecting the long-term general interest of all involved and, in order to do so, to negotiate the necessary compromises among themselves. Once they have done this, they can face management with a united position. Any other scenario is a recipe for defeat.

Drawing on the lessons of the Renault-Vilvoorde industrial conflict in 1997, following the closure of the Renault assembly plant in Vilvoorde, Belgium, and the firing of some 3,000 workers (other examples could also apply), Rehfeldt (1999) observes:

The EWC alone will always have great difficulties when it tries to define common interests of the workforce in different European plants and in different economic situations. Union intervention will always be necessary in order to facilitate a compromise between different interests and different strategic approaches. Neither the ETUC, nor the European industry federations have yet been able to play this role of interest intermediation and arbitration (Rehfeldt, 1999, p. 113).

Finally, the geographical issue arises because the EWC Directive formally only applies to EU countries, but leaves agreement on the actual coverage of the council to the social counterparts. Most companies seek to limit the EWCs to the EU only (the issue here is not so much Norway and Switzerland but those Eastern European countries that are not in the EU). The union interest is of course to secure the maximum coverage, ideally of every single operation of the company regardless of its location anywhere in the world. Thus most EWCs are confined to the EU, some cover all of geographical Europe and at least three are world-wide in scope.

Since the social counterparts are largely free to make their own arrangements when establishing an EWC, there is no reason why unions should obediently restrict themselves to the letter of the Directive. In the end, the structure and functions of an EWC boil down to a question of the existing balance of power, which of course applies to any negotiating situation. Admittedly, given the present balance of social and political power in the EU Member States and in the Commission, it is unlikely that much progress can be achieved at this time through a revision of the EWC Directive.

Because the EWCs represent, at least temporarily, a dead end, some GUFs such as the IMF have revived the world councils. Union Network International, for its part, has created a number of international union networks at TNC level, which appear to be, in fact, world councils in a more flexible form.

## **Conclusions: Back to the future?**

As we noted above, the significance and value of an IFA very much depend on the purpose it is intended to serve, which, in turn, is confirmed (or not) by its results.

The broader issue is: to what extent can IFAs still be considered the elements of an emerging architecture of international labour-management relations in a global political context that is increasingly hostile to trade union rights? In such a context, there is a danger that TNCs will be more and more tempted to ignore “social partnership” arrangements, while the options for unions are narrowing down to their “core business” — rebuilding power relations through struggle.

The situation of the labour movement is that it is confronted not only with the hostility of anti-union corporations and conservative governments here and there, but also with a worldwide political and social project, driven by transnational capital, which is fundamentally anti-democratic. It is about power in society.

This system of power is codified and given enforcement authority by the World Trade Organization and is reinforced through the international financial institutions, which are also instruments of corporate policy. It is about a new hierarchy of rights in which corporate rights outweigh all others at the level of enforcement, in a world where other international institutions, such as the ILO, or conventions on human rights, have little or no enforcement capacity.

In this world, the objective of any meaningful international labour strategy can only be to challenge and reverse the existing hierarchy of rights by changing the existing power relationships through organization.

In this context, the role of IFAs has to be reassessed. In order to become a useful part of a global labour strategy, IFAs must be primarily understood and used as global organizing tools that can be evaluated by measurable outcomes. Where rights such as freedom of association and the right to collective bargaining are affirmed, IFAs should contain provisions ensuring that such rights are actually exercised.

IFAs must confront the employment-destroying nature of the system as a whole, which is not the same thing as fighting individual plant closures. In negotiations for IFAs, the priority should be to put a stop to outsourcing and casualization, which are now rampant throughout the manufacturing and services industries. Unions must claim the right to challenge management policies and decisions when these are damaging to labour interests and to the general interests of society. In other words, IFAs can — and should — become instruments of industrial democracy.

We know that very few companies would today be prepared to sign on to such a program. That is no reason to scale down the level of ambition and to refuse to develop adequate responses to the crisis. In conclusion, one cannot do better than quote from a speech of the IUF communications director addressing the same issues:

We need to develop a political response to the corporate program, and we need to link this program to our members' day-to-day struggles in ways

which can effectively challenge the enormous shift in the balance of power which is what globalization is fundamentally about. While the challenge is enormous, we must never forget that the historic gains of the labour movement — gains which profoundly transformed the world we live in — seemed scarcely realizable when we first began to fight for them. We fought and we won. There was nothing inevitable about the corporate advances of the last two decades. We were simply out-organized at all levels, or, failed to organize because we didn't appreciate the significance of what was taking place (Rossman, 2005).

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## Chapter 2

# Transnational collective bargaining at company level: Historical developments

*Isabel da Costa<sup>1</sup> and Udo Rehfeldt<sup>2</sup>*

### Introduction

The internationalization of production and of the exchange of goods and services has undergone different cycles of intensification and transformation, the last one being generally referred to as globalization. For the management of multinational enterprises (MNEs) the move towards internationalization entails problems of industrial organization and governance; for the labour movement, too, it represents a serious challenge, which it has tried to address almost from its inception. From the creation of the First International — the International Workingmen's Association in 1864 — to the founding of the International Trade Union Confederation (ITUC) in Vienna in November 2006, the internationalization of labour has been a complex task facing — and often overcoming — many difficulties.<sup>3</sup>

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<sup>3</sup> This chapter — particularly the last section on transnational collective bargaining in the automotive sector — draws on extensive field research conducted by the authors over two decades, on the topic of transnationalization of industrial relations. An analytical report of their findings can be found in da Costa and Rehfeldt (2006a).

The last century saw a wide diversity in the development of national unions and industrial relations systems. In most industrialized countries, the period after World War II was one of national consolidation of industrial relations. However, MNEs can evade national boundaries and can shift production and investment between countries. The first international attempts to address the problems posed by such mobility among MNEs came as internationalization intensified in the 1960s and 1970s. Reviewing these historical developments of transnational collective bargaining at company level form the main object of this chapter. They are the forerunners necessary to an understanding of how international framework agreements (IFAs) later developed.

While we make a distinction between transnational agreements with MNEs signed at European level and those signed at global level, we intend to show that the two are more closely related than the discussion about IFAs has revealed so far, and we use the term transnational collective bargaining to refer to both types. By transnational collective bargaining, we mean collective bargaining practices, between employer and employee representatives, that aim at reaching transnational agreements (European, global or other international level, such as North or South American, Asian, African, and bilateral) regardless of the nature of the agreements (whether reached or not), the content of which can be just symbolic or extremely far-reaching.<sup>4</sup> We start with the origins of the first world councils; continue with developments in Europe (which fostered transnational collective bargaining); and then focus on the automobile sector to outline the articulation of national, European and global union strategies underlying transnational collective bargaining and the signing of transnational agreements. We highlight the interaction between, on the one hand, voluntary bargaining practices and, on the other, legislative initiatives at the European Union level — particularly those related to the establishment of European works councils (EWCs).

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<sup>4</sup> While we have found no better term, we do not consider all forms of transnational collective bargaining as fully fledged collective bargaining and entirely adhere to the analysis of Papadakis et al. (this volume).

## The origins of a transnational bargaining strategy at company level: World councils

The strategy of forming a countervailing power to that of the MNEs at international level was elaborated in the 1960s by the international trade secretariats (ITSs) of the metalworking, chemical and food sectors, areas that were particularly affected by the process of internationalization. Charles Levinson, assistant general secretary of the International Metalworkers' Federation (IMF) from 1956 to 1964, and then general secretary of the International Federation of Chemical and General Workers' Unions (ICF) from 1964 to his retirement in 1985, was a key figure in pushing for this strategy through his activities and writings. According to Levinson's theory, the evolution of collective action should parallel that of enterprises whose multinational character would follow a series of steps until they would no longer have any particular links to a given country. Thus transnational union action was to progress in three stages (Levinson, 1972, pp. 110-141):

- the organization of international solidarity with a union involved in a conflict at an MNE subsidiary;
- the coordination of “multiple” (p. 110) and finally simultaneous (p. 132) negotiations at different subsidiaries of the same MNE in several countries;
- integrated negotiations, also called “integrated or centralized bargaining” (p. 140) with the management of the MNE and all or some of the subsidiaries on the basis of common demands previously defined by the different national unions.

The ITSs encouraged the creation of world councils in order to coordinate union action and to provide for the exchange of information. The idea of world councils had emerged within the United Auto Workers (UAW) union in the United States (US), following a proposal by its president, Walter Reuther, in 1953, but it was adopted by the IMF automobile conference only in 1964. European unions, particularly IG Metall in Germany, were slow to join the project they perceived as motivated by the UAW's fear of job losses if, attracted by lower wages, the US manufacturers were to shift part of their production to Europe (Etty, 1978, pp. 68 ff). During this period some German firms had become multinational, and debates at the IMF conferences progressively led to the establishment by the IMF of the first automobile world councils in 1966: one

for Ford, one for General Motors (GM), a common council for Chrysler-Simca-Rootes, and a common council for Volkswagen/Mercedes-Benz.

In March 1971, delegates from seven world auto company councils met in London and adopted a common declaration that assigned union coordination and international solidarity to those councils. In the first part of the declaration, the delegates called for meetings of each council with the top management of their corporation. Information on production plans and job security figured among “the priority items” to be discussed. Common contract expiration dates were also to be sought. In the second part of the declaration, the delegates appealed to governments and international organizations to establish enforceable rules of conduct for MNEs (*Metall-Pressedienst*, 1971; Gallin, this volume).

In the following years, over 60 councils were established, covering all sectors (Tudyka, 1986; Rüb, 2002). The figure seems impressive but is weak relative to the overall number of MNEs. Some of these councils still exist but others were short-lived. In most cases they consisted in meeting structures for the union officials of the national federations that met every two or three years during the world congresses of the ITSs or the sector international conferences. The councils seldom comprised representatives elected by different subsidiaries’ employees. A working group on MNEs, set up by the IMB to assess the world councils’ activities, highlighted these kinds of internal organizational shortcomings in 1991 (IMB, 1993, pp. 174f).

Furthermore, certain ITSs sometimes used the world councils as a means of reinforcing their own power within the labour movement in relation to the affiliated national federations or to the international confederations that they either worked with (such as the International Confederation of Free Trade Unions [ICFTU]) or competed with (such as the World Confederation of Labour and the World Federation of Trade Unions [WFTU]). Several ITS leaders were openly anticommunist, and the ideological struggle was detrimental to the unity and efficiency of international trade union action. Often, as in the French case with the *Confédération générale du travail* (CGT) and the *Confédération française démocratique du travail* (CFDT), it meant the exclusion of the most representative unions of the MNE’s headquarters.

The following two examples give an idea of the complexity and difficulties of transnational union coordination at the time. At Michelin the CGT, then the majority union in the company, had set up in 1968 within

the ambit of the WFTU a “European coordination committee” with union representatives from Michelin’s European subsidiaries. Despite the ICF’s refusal to join that initiative, several Italian and United Kingdom (UK) unions of the same tendency took part. The ICF created its own world council for Michelin only in 1971, after the affiliation of the CFDT’s chemical federation. Force Ouvrière, a minority union in the company, only joined it in 1976 (Sinclair, 1978, pp. 80f). At Dunlop-Pirelli, the ICF created a council in 1972, which excluded the Confederazione Italiana Sindacati dei Lavoratori (CGIL), the majority union in the firm. The council was boycotted by UK shop stewards who preferred to establish bilateral contacts with their Italian CGIL colleagues.<sup>5</sup>

Despite a few important successes, international trade union action did not reach Levinson’s third stage — integrated negotiations — during his time in office. Reaching stage one — the organization of international solidarity during industrial conflicts — was difficult enough. The examples used by Levinson are proof of strong union activism and successful workers’ efforts for international solidarity in the 1970s.

For stage two, Levinson gives only four examples, three of which come from France: Saint-Gobain, Michelin and Rhone-Poulenc, as well as Royal Dutch-Shell. He also mentions “the case of winning wage parity between Canadian and US workers in the same company” (Levinson, 1972, p. 132). But this was an exceptional example due to the fact that workers on both sides of the border were members of the same union. The coordination of their transnational action entailed having strong strike funds and ensuring that contracts ended at the same time. There was no language barrier and the historical traditions and industrial relations structures were quite similar (da Costa, 1999). Yet even in this example, internal coordination problems existed and, since the 1970s, there has been a tendency towards union autonomy in Canada; the Canadian branch of the UAW, for instance, broke away in 1985, becoming the Canadian Auto Workers. Though this North American model was the one Levinson had in mind, the complexities of the European situation added their own difficulties, compounded when other continents were included.

As for integrated bargaining with the management of an MNE — Levinson’s stage three — the only example in the 1970s was Philips,

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<sup>5</sup> These contacts led to what some authors (Moore, 1978; Piehl, 1974) have considered as the first transnational European strike in 1972.

where on four occasions between 1967 and 1972 central management met a transnational union delegation led by the European Committee of the Metal Trade Unions (which became the European Metalworkers' Federation [EMF] in 1971).<sup>6</sup> No agreement was reached, however. A fifth meeting, scheduled for 1975, was cancelled because the EMF tried to include a representative from the IMF in its delegation (EMF, 1995, p. 24). Despite several informal contacts, Philips management refused to resume official bilateral meetings.

The EMF had taken over the collective bargaining objectives of the international labour movement, but without reference to Levinson's three-stage scheme. EMF general secretary Günter Köpke stressed that "a variety of approaches" could be used to reach transnational collective bargaining. In his view, the EMF had up to then concentrated on four main points (Köpke, 1974, p. 214f):

- the evaluation of the levels of collective bargaining;
- the comparison of the bargaining demands of the metalworkers' unions in Western Europe;
- discussions with management of the headquarters of MNEs;
- meetings with European employers' organizations.

He stressed that "the approach towards multinational companies is but one important element in the larger plan". Europe-wide trade union actions would continue to be directed towards other objectives, among which the European Commission's proposals for workers' representation at board level and EWCs (Köpke, 1974, pp. 215f).

One of the objectives of the talks with Philips had been to create a permanent liaison committee for information and consultation. This was refused by Philips management, and so the EMF approached other European MNEs. It finally succeeded in 1985 in signing a transnational agreement establishing a liaison committee with a recently nationalized French MNE, Thomson Grand Public. US scholars have noted that this was the first time that an MNE officially recognized an international union organization as a bargaining partner (Northrup et al., 1988, p. 533).<sup>7</sup>

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<sup>6</sup> These two European organizations were initially composed only of affiliates to the IMF, but they opened very early to national metal unions not affiliated to the IMF, like in 1968 to the leftist (formerly Christian) French *Fédération Générale de la Métallurgie* (FGM)-CFDT (at that time affiliated to the WCL) and to the Communist Italian *Federazione Impiegati Operai Metallurgici* (FIOM) in 1971. The EMF has been part of the European Trade Union Confederation since its creation in 1973.

<sup>7</sup> The Thomson Grand Public agreement was reached in the context of France's 1982 Auroux laws, which gave unions the right to negotiate worker representation at the national level of a multi-enterprise group.

The second such agreement was signed in 1986 between the French group Danone and the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Association (IUF), that is, directly at international level, even though it had only a Europe-wide application. It paved the way for Danone and the IUF in 1988 to sign what is generally considered the first IFA between an MNE and an ITS (see for example Gallin, this volume).

The Thomson agreement served as a precedent for negotiations between other nationalized French MNEs and the EMF and other European industry federations for the creation of what were then called European group committees. This movement inspired German unions to negotiate similar agreements, most of which were signed by German works councils and only very few were co-signed by European industry federations (Rehfeldt, 1993, pp. 78ff). Altogether, 32 such agreements were signed between 1985 and 1994, including some by Scandinavian MNEs and an Italian MNE (Kerckhofs, 2002, p. 11).

Some of the French and German agreements served as models for the Directive of 22 September 1994 on European Works Councils (the EWC Directive). Article 6 of the Directive introduced an obligation, from 22 September 1996, to negotiate the establishment of an EWC between the MNE and a "special negotiation body", with no statutory trade union presence. Article 13 exempted from this obligation those MNEs that had already signed a voluntary EWC agreement before this date. The consequence was an explosion of "voluntary" agreements in the weeks prior to 22 September 1996. More than 300 "Article 13 agreements" were signed in 1996. European industry federations signed or co-signed nearly one third of these and they continued to sign some Article 6 agreements subsequently (Kerckhofs, 2002, p. 35).

Why did it take such a long time to arrive at these developments in the area of transnational collective bargaining, seen first in Europe and not following Levinson's three-stage strategy? We would underline at least three reasons. The main reason was of course the persistent refusal of the management of most MNEs to recognize ITSs as bargaining parties, particularly outside the European Union (EU). Another was the change in the economic environment. As the economic crisis of the 1970s started to show long-lasting effects on employment, the power relations between unions and MNE employers began to shift. The unions became more defensive, which frequently gave rise to local or national strategies of job protection, and so making it more difficult to achieve international

solidarity. Finally, the internal difficulties of organizing transnational union coordination should not be underestimated. Some national unions were reluctant to transfer part of their responsibility to the international level or even grant to this level sufficient resources to efficiently carry out the tasks involved. Levinson himself thought the success of the three-stage strategy depended more on union resolve than on international institutions or employers' goodwill, but observed that the main objective of many ITSs was to support the position of their national affiliates rather than to foster stronger international cooperation (Levinson, 1972, p. 141).

Obstacles to transnational collective bargaining became the object of scientific debate in the 1970s. Research, led by Herbert Northrup, Richard Rowan, and their staff at the Industrial Research Unit of the Wharton School of the University of Pennsylvania, and implemented in a series of case studies from 1972 to 1979, outlined the weaknesses of the early attempts at transnational collective bargaining and concluded the failure of Levinson's strategy (for example Northrup and Rowan, 1979). Some researchers closer to the union movement did the same (such as ETTY, 1978; CAIRE, 1984; TUDYKA, 1986; REUTTER, 1996; and MÜLLER et al., 2003). Rebecca Gumbrell-McCormick, on the basis of extensive interviews with leading union actors, maintains that the aim of the world councils was in fact not transnational collective bargaining, but a more modest one of transnational coordination of trade union action (Gumbrell-McCormick, 2000a, p. 190; 2000b, p. 380). It is conceivable that, after the event, actors might sometimes minimize the importance of what had been their objectives, particularly when they have not been (or only partly) attained. Levinson, however, clearly referred to transnational collective bargaining, including wages and conditions, although he was well aware that such a programme would be difficult to achieve:

The third stage is the decisive one of integrated negotiations around common demands. This would involve the parent (company) and all or some of the subsidiaries. Similar wage rates would be difficult to achieve at the outset but proportionate increases could be sought. More reasonably, demands would concern job security, salary systems, pension programmes, training and retraining, industrial democracy and asset formation. Such a strategy necessarily depends upon the degree of union strength, the industrial relations history and the structure of the company's operations. It is one thing to formulate such a programme, another to carry it out. The difficulties and obstacles of all kind are enormous. (Levinson, 1972, p. 111).

The dominant vision in the 1970s' debate leaned to scepticism because a range of legal and sociological factors were seen as obstacles to transnational collective bargaining. At European level, the Balkanization of the national structures of bargaining was considered an impediment to the harmonization of the various national systems of industrial relations. The articulation of those systems into a European system of industrial relations seemed also difficult given their considerable differences in terms of, among other factors, rates of unionization, centralization of bargaining structures, relative role of the law versus collective bargaining, and the ideological orientations and strategies of the actors. There are still considerable differences between the actors and systems of industrial relations at both global and European levels.

Yet despite these differences, Levinson's final objective, transnational collective bargaining at company level started to emerge at European level, although it took a different form from that initially envisaged. What factors enabled such a change? We argue that the emergence of European-level industrial relations and particularly the EWC Directive played a major role in the road leading to transnational collective bargaining and agreements.

## **The European detour to transnational collective bargaining at company level**

In the 1970s there was widespread public concern about MNEs becoming too powerful and out of the control of nation States. Several plant closures of multinational subsidiaries arose public criticism towards the strategies of delocalization or job relocation, which were considered a threat to employment in European countries. MNEs faced restrictive actions on the part of different national governments and international regulatory moves. The Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises were adopted in 1976, soon followed by the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy of the International Labour Organization (ILO) in 1977 (revised in 2000 and 2006), and there were ongoing negotiations to establish a United Nations (UN) code of conduct for MNEs.

The OECD Guidelines were revised in 2000. They now cover all fundamental labour standards, apply to subcontractors, and include a

reinforced follow-up procedure that allows trade unions and other concerned parties to bring a case about an enterprise's failure to comply with the Guidelines. In 2004, the Trade Union Advisory Committee to the OECD developed, in cooperation with the European Trade Union Confederation (ETUC), a pilot project financed by the European Commission, aimed at increasing the awareness of the Guidelines as a possible tool for unions and EWCs (Evans, 2003; ICFTU, 2004, p. 63f).

The UN code was never adopted. The UN Programme on Transnational Corporations established in 1974 and implemented until 1992 by the UN Centre on Transnational Corporations located in New York, after a brief period in the Department of Economic and Social Development in the early 1990s was moved to the UN Conference on Trade and Development in Geneva, which focuses more on the positive aspects of foreign direct investment. In 1999 at the World Economic Forum in Davos, the UN Secretary-General evoked the idea of a "global compact", which was launched in 26 July 2000 in New York. Business leaders, as well as labour and civil society organizations, were invited to join the initiative on a voluntary basis. Its main objectives are to mainstream its ten principles in business activities worldwide and to catalyze actions in support of broader UN goals.<sup>8</sup>

The international labour movement favoured the attempts of international institutions to regulate MNEs in the late 1970s but criticized their limits, the main one being the lack of sanctions and legal instruments to force MNEs to respect the OECD Guidelines and ILO Principles. It is precisely to remedy this that the European Commission in 1980 presented a project, named the Vredeling directive after the commissioner Henk Vredeling, which aimed at giving the employees of large MNEs specific rights of information and consultation. The Vredeling directive was largely inspired by the same philosophy as the OECD Guidelines and ILO Principles.

It was also part of a series of initiatives undertaken by the European Commission since the 1960s to promote workers' representation in European MNEs, including European Collective Bargaining and the European Company projects.

This European Company Project, first proposed in 1970, contained three simultaneous channels of participation (Rehfeldt, 2006, p. 32):

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<sup>8</sup> See [www.unglobalcompact.org](http://www.unglobalcompact.org).

- European collective agreements negotiated directly between management and the trade unions present at different MNE sites;
- EWCs regularly informed about the evolution of the economic and social data of the MNE and consulted prior to any important decision;
- participation of worker representatives in the supervisory boards, inspired by the German codetermination system.

The European Company Project met with hostile reactions from both management and union organizations. The Commission therefore decided to divide the issue of the representation of workers' interests into three distinct parts, which could then advance at different speeds. Completely redrafted, the Project was adopted in 2001 by the European Council of Ministers.

The 1980 Vredeling draft directive entailed compulsory consultation in two stages in cases of total or partial closure of MNE subsidiaries. The first one was at the subsidiary level, where the employee representatives would have 30 days to formulate an opinion after being informed of the intention to close. If they considered that the project would directly affect their conditions of work and employment, management had to open negotiations. Although there was no obligation to reach an agreement, if passed this directive would have fostered the development of European transnational collective bargaining, as Henk Vredeling himself explained.<sup>9</sup> The Vredeling project also allowed employee representatives to directly address top management at headquarters, even when these were located outside the EU, if the representatives viewed the information from local management to be insufficient. If headquarters management agreed, it was possible to put together a representative body of employees of subsidiaries in the European Community, which would have the same rights as the local representatives. After the European Economic Committee and the European Parliament gave their opinions, the European Commission in July 1983 presented a modified version of the project. The most important modification was removing the chance to directly address management at headquarters. In the new version, employee representatives could only address it in writing, and their response was to be given by local management.

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<sup>9</sup> See *Le Bulletin de l'IRM. Multinational Info* No. 8, October 1983, quoted by Lemaître and Goybet (1984), p. 50.

These modifications were aimed at securing employers' approval of the directive, since the reaction of MNEs and of the Union of Industrial and Employers' Confederations of Europe (UNICE) to the project had been extremely negative. For the latter, the OECD Guidelines were quite sufficient and there was no need for European legislation. This position had the support of the UK Government of Prime Minister Margaret Thatcher. The threat of using its right of veto at the Council of Ministers was enough to prevent the adoption of the directive — at least until 1994 when the Council of Ministers, by qualified majority voting, adopted the EWC Directive. (The new voting procedure was made possible by changes to the European Treaties at Maastricht in 1992.)

The EWC Directive, which came into force on 22 September 1996, was partly inspired by the second version of the Vredeling project. It does not include mandatory bargaining in cases of restructuring but, instead, mandatory bargaining for the constitution of a body of employee representatives for the purposes of information and consultation in all MNEs employing at least 1,000 employees within the European Economic Area (EU plus Norway, Iceland, and Liechtenstein) and at least 150 in more than one Member State. It has nonetheless encouraged a particular form of transnational collective bargaining. The agreements for setting up EWCs constitute a particular European experience with transnational collective bargaining and, for the moment, the largest number of transnational collective agreements at company level, although they only concern procedures of representation and of information and consultation, and not concrete employment conditions.

The EWC Directive seems modest from a legal perspective since it only grants information and consultation rights. It is not law concerning either trade unions or collective bargaining. There is currently no European legislation on transnational collective bargaining at company level, only on collective bargaining and tripartite consultation at the inter-sector and sector levels. Moreover, following the position of the UK Government, the Social Protocol — annexed to the Maastricht Treaty (1992) and subsequently the Amsterdam Treaty (1997) — explicitly refused to transfer legislative competence on wages, union rights or the right to strike to the EU. This makes it difficult in some EU Member States to organize solidarity strikes during transnational collective bargaining.

The EWC Directive, however, does not exclude an evolution of the bargaining practices of the parties towards transnational collective bargaining at company level on a voluntary basis. From a sociological

perspective, EWCs have in fact facilitated such evolution. EWCs are not only a tool for communication between MNE management and European employee representatives — which is their assigned task — but also a tool for communication among employee representatives from different national systems of industrial relations. Such communication is a necessary prerequisite for establishing common objectives and for finding ways to apply them.

In some MNEs, relations of trust have been progressively built up, among employee representatives coming from different national systems of industrial relations on the one hand, and between management and European employee representatives on the other. In a few MNEs, these relations, together with other factors including industrial action, constituted the basis for the emergence at the beginning of this century of a new dynamic leading to an innovative form of bargaining at European level and the signing of the first substantial transnational collective agreements at company level having far-reaching consequences in terms of industrial restructuring, the most significant being those negotiated at Ford and GM Europe. These transnational agreements represent a unique European contribution to transnational collective bargaining at company level. Their content goes far beyond what is usually found in IFAs.

European framework agreements (EFAs) are not generally included in the literature on IFAs. However, while IFAs are signed by ITSs — called global union federations (GUFs) since 2002 — the vast majority of those agreements have been signed with European MNEs. Why are European MNEs suddenly more likely to sign agreements with ITSs after decades of refusing to acknowledge them as bargaining partners? Part of the answer lies in the evolution of the debate about codes of conduct, on which the literature abounds. The strategy of MNEs and even sometimes the personality of their managers have been determining factors in some cases (Danone for example — see Gallin, this volume). In the rest of this chapter, we focus on the role of EWCs and the evolution of the strategy of labour at the transnational level, both European and international. The automobile sector is a particularly illuminating example in this respect because of its importance to the development of transnational collective bargaining and the role played by the EMF and IMF.

## European and global framework agreements in the automobile sector

Since the beginning of this century, the role of some EWCs in the automobile sector has evolved from information and consultation towards transnational collective bargaining — first at Ford and GM Europe, and more recently at DaimlerChrysler — and the representation of workers has been extended beyond Europe with the creation of a new type of world works councils (WWCs) at Volkswagen, Renault and DaimlerChrysler — which have all negotiated IFAs (da Costa and Rehfeldt, 2006a; 2006b; 2007).<sup>10</sup>

The first European agreement negotiated by an EWC in the automobile industry was signed in January 2000 with the management of Ford Europe to protect the ex-Ford workers who had been transferred to Visteon Corporation, a global automotive supplier: the workers benefited from the same wages and conditions as the Ford workers, kept their seniority and pension rights, and could rejoin Ford. It was the first substantial agreement signed by an MNE at European level. It contains concrete and binding rules dealing with production and employment. The experience paved the way to other Europe-wide agreements also signed by the Ford EWC, including two for other Ford spin-offs, which protect the personnel concerned along the lines of the Visteon agreement.

The first European agreement between the EWC of GM Europe and the management of GM Europe was signed in May 2000. It had been negotiated in cooperation with IG Metall, on behalf of the EMF, and after coordination with Fiat's EWC. It protected GM employees transferred to joint ventures of GM and Fiat. In the case of the failure of the GM-Fiat alliance, which actually took place in 2005, employees kept the right to return to their former employer.

A second European agreement on industrial restructuring at GM Europe was signed in March 2001. It was negotiated after the announcement by GM management of the reduction of 10,000 jobs worldwide, of which 6,000 were to be made in Europe, including the closing down of the GM Vauxhall plant in Luton (United Kingdom). Unlike previous

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<sup>10</sup> The rest of this chapter draws on interviews with management and employee representatives at the headquarter and subsidiary levels of five major companies in the automotive sector, as well as with relevant national, European, and international union officials. See da Costa and Rehfeldt (2006a).

cases of job reductions, which had led to competing national employment security agreements, this time the EWC refused the logic of local negotiations pitting one site against another, and adopted a strategy of transnational solidarity, including both mobilization and negotiation. On 25 January 2001, the employees of nearly all GM plants in Europe took part in a common strike and an “action day” against plant closures. This put pressure on negotiations, which led to an agreement stipulating that management would avoid forced redundancies. Negotiated alternatives with local employee representatives included part-time work programmes, voluntary severance programmes, and early retirement programmes, as well as transfers to other GM locations. Vehicle production (though not car production) was to be maintained in Luton.

A third framework agreement between GM Europe management and the EWC was signed in October 2001, after the announcement of further job cuts known as the “Olympia plan”, which aimed to reduce capacity at GM Opel, Vauxhall and Saab plants. Both sides came to a common understanding, which meant that the EWC accepted the productivity objectives of the Olympia plan but that management committed itself to implementing the capacity adjustments without plant closures and without forced redundancies.

Yet in September 2004, GM Europe management announced its intention to close a production site and in October, to cut 12,000 jobs in Europe. The EMF established a “European trade union coordination group” — composed of members of the EMF secretariat, representatives of the national unions involved, as well as members of the GM EWC — which adopted a common action programme and called for a European day of action for 19 October 2004, in which 50,000 GM workers took part. The agreement signed in December by GM Europe management, the EMF, national unions and the GM EWC recognized the economic problems faced by GM and its need to reduce costs and jobs, but reaffirmed the “no forced redundancies” and “no plant closures” principles of the previous agreements, according to the strategy of “sharing the burden”, in the words of the German president of the GM EWC, Klaus Franz.

In June 2006, GM Europe management announced the closure of the Azambuja plant in Portugal. Despite a series of coordinated actions in all European plants, and GM’s promise to negotiate a new European agreement, the plant was shut down (Bartmann, 2005; Bartmann and Blum-Geenen, 2006; da Costa and Rehfeldt, 2006a and 2007).

These developments show the strength of a union strategy coordinated at European level, but also the fragility of agreements given the lack of a legal status for transnational collective bargaining at company level in Europe. Nevertheless, the GM Europe case is an example of the collective action of an EWC with over 10 years of experience that has been successful in building relations of trust and good cooperation both among its members and with union organizations at national and transnational levels. This enabled EWC members, together with union organizations at national and transnational levels (a) to put forward an innovative and important strategy to go beyond national divisions, which previously allowed one site to be pitted against another; and (b) to elaborate a coordinated European-level response to management restructuring strategies — sharing the burden. The outcome was the signing of several agreements at European level aimed at preventing plant closures and forced redundancies. The experience served as a model for the EMF's European company policy on restructuring and framework agreements.

The EMF has been increasingly involved in developing a union response to MNE restructuring, including transnational collective bargaining. The EMF has played an important role in negotiating agreements to establish EWCs in its sector, and continues to do so. An EMF coordinator, generally a union officer from the national organization of the MNE headquarters, is placed in each EWC. The 2004 GM Europe agreement further inspired the EMF to adopt a 2005 document on “socially responsible restructuring” (EMF, 2005) implemented through an early warning system resting on the EMF coordinators. In the case of even an informal restructuring, the EMF coordinator, with the EMF Secretariat, will set up a European trade union coordination group consisting of EWC representatives and one trade union officer for each national union involved. This group will try to negotiate an EFA, including job security prior to any national negotiations (EMF, 2006, p.15). The EMF has also elaborated internal rules concerning mandates for transnational collective bargaining and the adoption and signing of EFAs. The EMF experience in turn has inspired other European industry federations.

The development of transnational collective bargaining at company level is ongoing in Europe. The Social Agenda 2005-2010 of the European Commission includes the preparation of an “optional framework agreement” for transnational collective bargaining at company level.<sup>11</sup> An

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<sup>11</sup> European Commission (2005). See also the chapters by Sobczak, Bé and Drouin (this volume).

internal study of the Commission shows that there are over 90 recorded texts resulting from transnational collective bargaining and usually involving European companies, and that EWCs are involved in two thirds of the texts recorded, either together with international or European federations, both, on behalf of them, together with national unions, or alone (Pichot, 2006). Moreover, even when they do not sign, they often initiate the negotiations.

The most recent EFAs in the automobile sector are those signed by the DaimlerChrysler EWC, signing also on behalf of the EMF. The first, in May 2006, specifies the content and practical arrangements for information and consultation. The second, signed in September 2006, deals with measures to adjust staff levels. The third, signed in July 2007, regulates the realignment of the sales organization after the Chrysler separation (Metz, 2008).

The transnational collective bargaining achievements in the automobile sector must, however, be analysed with caution, and the forceful role played by unions at national, European and international levels in the sector must be kept in mind. The situation is very different from other sectors where most EWCs have a limited impact on company decisions, of which many are merely informed and not always in due time (Waddington, 2006). The ETUC considers that the EWC Directive is too weak and wants a revised version that will acknowledge the participation of unions in EWCs and their prerogative to sign EFAs. BusinessEurope (formerly UNICE), however, is staunchly opposed to such changes.

Historically in most European countries, the automobile industry has been a stronghold of unionism and a pioneer of workers' demands and industrial relations arrangements that have been later adopted by other industries at national level. The automobile industry has robust mechanisms for worker's representation, both at national and European levels, which are used by strong union actors. The EWCs at Ford, GM and DaimlerChrysler have established select committees that meet several times a year, so that personal contacts and relations of trust have been established. They are fully unionized. External trade union officers are present in all these EWCs, on the basis of agreements negotiated with managements. All of this has enabled the emergence of strategies coordinated at European level. There has also been a change in the attitude of unions, whose coordination at European level has increased allowing for a greater role for the EMF. The EMF has been recognized as a partner to

European-level negotiations, and has signed the latest agreements which entailed the delegation of a mandate to negotiate from its affiliates. Thus, at least three types of coordination have been developed: between the national and EU levels; between the EWCs and the national unions involved; and between the EWCs and the EMF. Such coordination legitimizes and gives strength to these transnational agreements at company level.

In some companies with important production sites outside Europe, unions wanted to include workers' representatives from these sites in the EWCs. In some EWCs, representatives from outside Europe were actually accepted as "observers". Volkswagen played a pioneering role in this movement. It had been the first automobile company to set up an EWC on a voluntary basis in 1990, before the adoption of the EWC Directive. In 1999 it was the first automobile company to create a WWC. Renault and DaimlerChrysler followed suit in 2000 and 2002. In these three cases, the existing EWCs served as a model and starting point for the creation of the WWCs.

In the case of Renault, the new WWC, called the Renault group committee, incorporates the functions of an EWC and those of a "national group committee" (comprising delegates from the various national-level works councils of the group). In the cases of Volkswagen and DaimlerChrysler, the European and WWCs function in parallel and with a partial overlapping of membership. This facilitates coordination and organization of common meetings.

The new WWCs have replaced the world company councils created by the IMF in the 1960s, which subsequently met sporadically. Given recent developments, the IMF has elaborated a multifaceted strategy. It now tries to transform the old IMF councils into smaller units, which would meet on a more regular basis and, if possible, with recognition and financial support from the respective MNEs. In the cases of Ford and GM, the IMF has created new union networks, called the Ford World Steering Committee and the GM Action Group. These union networks work in close coordination with the EWCs of these companies.

The WWCs of Volkswagen, DaimlerChrysler and Renault have signed IFAs, all of them co-signed by the IMF. The EWCs of GM and Ford have done the same, but with no IMF co-signature and only European-wide validity of agreements on corporate social responsibility. In the case of GM, the agreement was also signed by the EMF. In all five cases,

the EWCs or WWCs have been given an important role in monitoring the agreement, along with management.

The IMF was not only the “inventor” of the world councils of the 1960s in the automobile sector, it also set up half the 60 councils created in the 1970s, and now figures prominently among the GUFs having recently signed the largest number of IFAs. The IMF signed its first IFA in 2002. Reynald Bourque has pointed out a specific element of the IFAs signed by the IMF: they are also co-signed by EWCs (Leoni, GEA, Rheinmetall) or by WWCs (Volkswagen, DaimlerChrysler, Renault, SKF) and, in some cases, by IMF representatives (Bourque, 2005). The negotiation of some of these agreements has even been delegated to the works councils. The councils are also in charge of the follow-up of some of the agreements. By comparison, the IFAs signed by other GUFs are mostly either signed by the GUF alone or co-signed by the national union organization of the headquarters of the MNE.

## Conclusions

IFAs have been achieved thanks to a reinvigorated international union strategy supported by renewed union actors and structures, in which Europe has played an important role. Our European excursion has shown that the foundations of transnational collective bargaining may be found in Europe and are strongly related to the issue of workers' representation, notably through EWCs and WWCs. There have since been important developments in both the form of transnational collective bargaining and the process of adoption of EFAs and IFAs.

IFAs constitute the response of GUFs to the multiplication of codes of conduct on corporate social responsibility and the environment unilaterally set by a growing number of MNEs. IFAs make enterprises more responsible than unilateral and voluntary charters, particularly when they contain joint follow-up procedures. In 1996, the ICFTU produced, together with the ITSS, a “model code” containing a list of basic principles to be included in codes of conduct. They also subsequently made an explicit distinction between codes of conduct and framework agreements of international or European scope. Each GUF has now developed its own model IFA that is based, to a greater or lesser extent, on the initial ITUC agreement. The IMF model contains a follow-up procedure through a joint committee comprising equal numbers of management

and union representatives. It also provides for arbitration by the ILO or another party mutually agreed to, in the case of deadlock.

The example of the automobile sector shows the importance of the multifaceted work of union coordination, from the national to the transnational level, that must take place for international solidarity to be cemented and for collective action to succeed. In Europe, union unity was fostered by the creation and evolution of the ETUC. The founding of the ITUC in 2006 will no doubt also facilitate and encourage international collective action, of which EFAs and IFAs represent but the tip of the iceberg.

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## **Part 2 Industrial relations**

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## Chapter 3

# International framework agreements as elements of a cross-border industrial relations framework

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One of the asymmetries generated by globalization resides in the fact that while the scope of action of multinational enterprises (MNEs) is increasingly global, workers' terms and conditions of employment continue to be determined primarily at national level and to vary widely from one country to another. As noted by the World Commission on the Social Dimension of Globalization, in the absence of a balanced multilateral framework for investment there is a risk that countries may be pushed by competitive bidding for investments to offer concessions that go too far in reducing the overall benefits and impede the fair distribution of these benefits (WCSDG, 2004, p. 86, para. 389). One may add that in such conditions, workers and their trade unions may not be in a position to bargain effectively, if at all. This chapter examines international framework agreements (IFAs) as one possible way to overcome this asymmetry.

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<sup>3</sup> International Labour Standards Department, International Labour Office.

IFAs are understood as the outcome of negotiations between individual MNEs and global union federations (GUFs), that is, international workers' organizations usually operating at sectoral level. IFAs aim to establish "a formal ongoing relationship between the multinational enterprise and the global union federation which can solve problems and work in the interests of both parties".<sup>4</sup> They are meant to promote a number of principles of labour relations and conditions of work — notably in the area of freedom of association and collective bargaining — and to organize a common labour relations framework at cross-border level, that is, across the worldwide operations of the MNE, often covering not only the operations of the MNE's subsidiaries but also those of its subcontractors and suppliers.

Being a response to globalization, IFAs constitute an innovation in relation to traditional notions of industrial relations, collective bargaining, international labour law and legal obligations. This chapter attempts to compare IFAs to traditional collective bargaining instruments as these have been described in the Collective Agreements Recommendation, 1951 (No. 91) of the International Labour Organization (ILO). Through this comparison we seek to provide an answer, from an ILO perspective, to a question often raised with regard to IFAs: can they be described as industrial relations instruments akin to collective agreements? And if so, what could be their potential contribution to the process of building a transnational industrial relations framework?

## IFAs as industrial relations instruments from an ILO perspective

IFAs have generated much enthusiasm within the research and policy community, not least because their negotiation, content and implementation process are reminiscent of collective bargaining processes, adding an important industrial relations dimension to previous corporate social responsibility (CSR) practices. (See for example Gallin, this volume; Hammer, this volume; ICFTU, 2004, p. 95;<sup>5</sup> Euro-

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<sup>4</sup> According to the ICFTU, <http://www.icftu.org/displaydocument.asp?Index=991216332&Language=EN> [18 Oct. 2007].

<sup>5</sup> "[A]greements between international trade union organisations and multinational enterprises on basic shared principles — can be seen as the start of international collective bargaining" (ICFTU, 2004, p. 95).

pean Union [EU], 2005; and Laulom, 2007.) Analyses of IFAs from a legal and institutional viewpoint are provided in this volume by Sobczak and Drouin who examine this question primarily from the perspective of the resemblance of these instruments to “collective agreements” as these are defined in national contexts.<sup>6</sup>

In this section, we explore IFAs and their relationship to collective bargaining and agreements from the viewpoint of ILO instruments, and in particular Recommendation No. 91 (ILO, 1996a, p. 656). This instrument was prepared, like all ILO standards, on the basis of a comparative analysis of law and practice of ILO member States with regard to collective bargaining. It constitutes the outcome of tripartite discussions under the auspices of the ILO, and was adopted through a tripartite two-thirds majority vote at the ILO Conference. It thus provides a synthesis of the essential elements of collective bargaining from a comparative perspective endorsed by a tripartite discussion and vote.

While this instrument is primarily addressed to governments, nothing prevents private actors from taking account of the *principles* contained in it in their voluntary practices, especially as it has been prepared with the active participation of employers’ and workers’ organizations from all ILO member States.

## Definition and parties

In Paragraph 2(1) of Recommendation No. 91, collective agreements are defined as: “all agreements in writing regarding working conditions and terms of employment concluded between an employer ... or one or more employers’ organisations, on the one hand, and one or more representative workers’ organizations ... on the other”.

At first sight, IFAs satisfy this enumeration of the essential constitutive elements of a collective agreement. IFAs are undoubtedly “agreements” as implied by their name and they are jointly negotiated and concluded through signature of a written text by an employer and a workers’ organization.

The parties to IFA negotiations are usually the MNE management at headquarters (holding company) and GUFs. This seems to correspond to the reference in Recommendation No. 91 to negotiations between an

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<sup>6</sup> For a study of the recognition of the binding nature of unilateral or moral commitments by national courts in France, see Trébulle (2007).

employer and one or more workers' organizations.<sup>7</sup> However, certain unresolved questions arise as to the representativeness of the parties to such negotiations. Recommendation No. 91 refers to "representative" workers' organizations. Moreover, a relevant ILO instrument, namely the Promotion of Collective Bargaining Recommendation, 1981 (No. 163) (ILO, 1996b, p. 97), indicates in Paragraph 6 that "Parties to collective bargaining should provide their respective negotiators with the necessary mandate to conduct and conclude negotiations, subject to any provisions for consultations with their respective organisations".

In general, one may observe an asymmetry between the scope of authority or representativeness of the two sides to negotiations and the scope of coverage of the IFAs. The latter are intended to cover all MNE subsidiaries, as well as the corresponding unions.<sup>8</sup> However, as negotiations take place at headquarters level, there is limited involvement, if any, of the management and unions present in local production units which, moreover, are not signatories to the agreement. On the union side, GUFs traditionally play the predominant role in negotiating and signing the agreements given that involving all national and local unions concerned by the operations of the enterprise would be practically impossible.<sup>9</sup> Furthermore, the negotiations never include the management of national operations (although anecdotal evidence shows some informal consultations).

The issue becomes more complicated in cases where IFAs aim to cover third parties, including suppliers, contractors, subcontractors and joint ventures that have only an indirect connection to the IFA and no participation whatsoever in its negotiation. In most cases, enterprises commit themselves to informing and encouraging subcontractors or suppliers to respect the provisions of the agreement. Provisions used include phrases such as "the group will end the relationship with suppliers that

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<sup>7</sup> A relevant question in this context concerns the appropriateness of coupling the negotiation of these transnational instruments with the possibility of organizing transnational collective action undertaken in different countries at the same time. Bercusson (this volume) sheds light on this issue by examining the European Court of Justice decision in *Laval and Viking*. Warneck (2007) provides an overview of ad hoc solidarity action undertaken at EU level. However, as it stands today, Article 137(5) of the Treaty Establishing the European Community seems to exclude any regulatory competence regarding the right to strike. Empirical research on transnational collective negotiations and collective action — da Costa and Rehfeldt (2007), for example — has demonstrated that, with few exceptions (such as the highly unionized automobile industry), effective collective action is unlikely to develop further in Europe without a regulatory framework and clear roles for the different actors.

<sup>8</sup> *Electricité de France (EDF)* (in 2005) and *Arcelor* (in 2005) are examples.

<sup>9</sup> In almost half the IFAs reached by the third trimester of 2007, national unions had some (not comprehensive) involvement in negotiations. In addition, many IFAs are initiated by EU federations and European works councils (EWCs). The most comprehensive "stakeholder" participation can be found in the 2005 EDF agreement, which involved four GUFs and 20 national unions.

fail to comply” or “business partners will be encouraged to respect the principles laid down in the IFA”.<sup>10</sup>

Sobczak (this volume) studies ways to address the question of mandate and to overcome the problems that might arise with regard to the issue of representativeness.

## Content

As noted above, Paragraph 2(1) of Recommendation No. 91 defines the content of collective agreements as focusing on “working conditions and terms of employment ...”.

IFAs usually contain a commitment by the company to respect a number of principles of labour relations and conditions of work. Hammer (this volume) provides a detailed table on the substantive provisions of IFAs and various references made in IFAs to international instruments, especially ILO Conventions (see the appendix). In particular, provisions in IFAs typically contain clauses focusing on two broad categories of standards: (a) fundamental principles and rights at work (freedom of association,<sup>11</sup> collective bargaining, non-discrimination, abolition of forced labour, elimination of child labour) and minimum terms and conditions of employment (working time, wages, occupational safety and health); and (b) other conditions of work: mobility and related issues (for example transfer of pension entitlements), training, job security, subcontracting, and restructuring.<sup>12</sup> It would appear that while the former

<sup>10</sup> In the chemical, mining and energy sectors, roughly half the IFAs refer explicitly to “contractors and suppliers”. The IFA of the ENI group covers the whole group including its contractors. The same is the case for Telefónica and OTE whose IFA applies to “all activities, contractors and suppliers”. The Merloni (2001), Rhodia (2005), Arcelor (2005) and PSA Peugeot (2006) agreements explicitly refer to the consequences of non-compliance by a supplier or subcontractor, including termination of contract.

<sup>11</sup> However, provisions regarding the protection of workers’ representatives in the exercise of their functions in enterprises are less often mentioned. For example, reference to the key Workers’ Representatives Convention, 1971 (No. 135) is specifically mentioned in only half of IFAs.

<sup>12</sup> Some IFAs contain a clause on the role of social dialogue in times of industrial change or anticipation of organizational change, with a view to mitigating the impact of these changes on employment benefits and working conditions. Ideally, these agreements encapsulate three principles: (a) anticipation — taking into account the impact of changes on workers *before* strategic decisions are made (on, for example, investments, mergers and acquisitions, and restructurings); (b) information provision for guidance — dialogue on both economic and social stakes and possible ways to address them; and (c) mitigation of social consequences for local communities and the economic equilibrium of the region potentially affected by industrial change. Empirical research on *European* framework agreements shows that some of these agreements might have contributed to a smoother transition in times of industrial change. See for example da Costa and Rehfeldt (2007); ICFTU (2004). Such considerations might have even constituted an important incentive for the management of enterprises in reaching IFAs.

category responds to concerns by workers' representatives, the latter addresses MNE's concerns.

It is important to emphasize that IFAs address issues of conditions of work from the point of view of principle without entering into specific determinations of these issues — a specific time schedule or salary, for example. Thus IFAs do not define specific terms and conditions of employment, as traditional collective agreements do, but rather focus on the general framework within which management and unions can develop harmonious industrial relations. First, by reaffirming the MNEs commitment to fundamental principles of freedom of association and collective bargaining, IFAs encourage the establishment and development of trade unions in local MNE subsidiaries. Second, they set the organizational basis governing the relations not only between central management and GUFs but also between management and unions throughout the MNE structure in different countries and at different levels.

As indicated by the International Confederation of Free Trade Unions (ICFTU): “[A core] feature of the agreements is that they establish frameworks of principle and are not detailed collective agreements. They are not intended to compete or conflict with collective bargaining agreements at national level. *Indeed, they are intended to help create the space for workers to organise and bargain*” (ICFTU, 2004, p. 95; emphasis added). Therefore, IFAs have a broad perspective that corresponds at best to an “attitudinal structuring” type of bargaining (see next section); they do not go as far as discussing specific benefits and conditions: this would require a more in-depth “distributional” type of bargaining, which usually takes place at other levels (national, sectoral, enterprise, etc.).

In most cases, an IFA draws on pre-existing self-regulatory tools developed by the enterprise concerned, such as unilaterally adopted corporate codes of conduct aimed at ensuring ethical, transparent and environmentally sound business conduct. It could therefore be argued that enterprises that have signed an IFA have in a way transformed their “unilateral” codes into “negotiated” instruments. If so, these instruments could be seen as bringing about a qualitative transformation of pre-existing codes in several interrelated respects: (a) being joint instruments, IFAs express common interests for both sides of the enterprise, and are therefore viewed as carrying more legitimacy than unilaterally adopted management-driven codes; (b) they promote commitments concerning fundamental principles and rights at work, in particular, freedom of association and collective bargaining, as well as terms and conditions

of employment, contrary to codes that focus more on environmental or broad ethical corporate principles; (c) they draw on international instruments — contrary to codes of conduct, which usually reflect a commitment to respect the relevant national legislation in the countries where companies operate; (d) IFAs are much more detailed and comprehensive instruments than codes, in particular in terms of scope of application and follow-up; and (e) they are subject to joint monitoring (see next section).

### **Machinery for monitoring and dispute settlement**

Paragraph 1(1) of Recommendation No. 91 provides that “Machinery appropriate to the conditions existing in each country should be established, by means of agreement or laws or regulations as may be appropriate under national conditions, to negotiate, conclude, revise and renew collective agreements”; according to Paragraph 1(2) “The organisation, methods of operation and functions of such machinery should be determined by agreements between the parties or by national laws or regulations, as may be appropriate under national conditions”. Paragraph 7 provides that “The supervision of the application of collective agreements should be ensured by the employers’ and workers’ organisations parties to such agreements or by the bodies existing in each country for this purpose or by bodies established ad hoc”. Another relevant provision is in Paragraph 6, which provides that “Disputes arising out of the interpretation of a collective agreement should be submitted to an appropriate procedure for settlement established either by agreement between the parties or by laws or regulations as may be appropriate under national conditions”.

It appears obvious that certain references in Paragraphs 1, 6 and 7 (for example legislation for the negotiation of collective agreements, laws or regulations on dispute settlement as well as national bodies for the supervision of the implementation of collective agreements) cannot be transposed to the case of IFAs, which are instruments of their own kind, destined to apply across jurisdictions, to all the subsidiaries of an MNE and often to its subcontractors and suppliers. Nevertheless, the reference in Paragraph 1(1) of Recommendation No. 91 to the establishment of a machinery by agreement of the parties to “negotiate, conclude, revise and renew collective agreements” strikes at the heart of IFAs, all of which contain provisions on the establishment of such machinery.

Moreover, the reference in Paragraph 7 to joint supervision of the parties’ agreement corresponds to a significant feature of IFAs (which also

represents one of their main differences from other self-regulatory instruments, such as codes of conduct), namely the fact that IFAs attribute to the signatories the power of implementing and monitoring their agreement, and adopting corrective action in cases of violation.

Having said this, certain important differences exist between the mechanisms envisaged for the negotiation or renewal of IFAs and those relevant to collective agreements. Because, as noted above, IFAs aim at setting a general framework for the harmonious development of industrial relations throughout the operations of an MNE, the mechanism envisaged for the negotiation or renewal of the agreement does not focus on the revision of the IFA in the same manner as the revision of a traditional collective agreement. The latter would focus on renegotiation of wages and other conditions of employment; the review of IFAs would appear to focus on remedying the shortcomings that might impede MNE-wide effective implementation of IFAs after a few years of monitoring. Thus, the question of renegotiating IFAs is inextricably bound up with that of monitoring their application.

The monitoring and internal dispute settlement procedures set up by each enterprise in view of promoting IFAs are key to the possible consolidation of this practice, which has accelerated considerably in recent years (more than half the existing IFAs have been adopted since 2004) and its evolution in the future. IFAs generally introduce three important tools: (a) joint monitoring committees that consist of management and workers' representatives and that are intended to meet regularly in order to assess progress or deal with conflicts;<sup>13</sup> (b) proactive strategies aimed at creating a managerial culture respectful of the IFAs;<sup>14</sup> and (c) the adoption of incentives for workers' representatives at local, national and cross-border levels to report violations.<sup>15</sup>

To our knowledge there has never been a case where internal dispute settlement procedures were used. Perhaps because most IFAs are

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<sup>13</sup> Most of the IFAs contain this commitment. EDF's IFA of 2005 established a follow-up body (the Consultation Committee on CSR) of 28 members, including China.

<sup>14</sup> For example, training for local managers on the IFA constitutes the best available ex ante tool. Performance indicators through a reporting system are a good ex post promotional instrument, and several recent IFAs have established such procedures. For example, PSA Peugeot in 2006 created an IFA information kit for local managers, informing them of their duties and rights under the IFA, and set 20 performance indicators on the basis of which local managers — with input from unions — report annually on progress. EDF's IFA of 2005 contains similar procedures.

<sup>15</sup> For example, Veidekke in 2005.

recent instruments, joint review meetings do not currently seem to be held regularly, possibly hindering regular follow-up.<sup>16</sup>

The principle of subsidiarity may be viewed as relevant to the issue of monitoring and implementation of IFAs. According to this principle, which has been primarily relied upon in the context of the EU,<sup>17</sup> the central authority has a subsidiary function, performing only those tasks that cannot be performed effectively at a more immediate or local level.<sup>18</sup> A possible transposition of the subsidiarity principle to the implementation and monitoring of IFAs would be dictated by pragmatism and aim at the effective implementation of IFAs, since management would otherwise find it difficult to monitor the application of its IFA in all of its operations (the same would apply to GUFs).<sup>19</sup> In that case, subsidiarity would entail MNE management leaving the task of implementing the IFA to MNE subsidiaries (or even subcontractors and suppliers), while maintaining its authority to intervene in cases of violation and non-compliance with IFA principles.<sup>20</sup> The same would apply in the case of the union side to an IFA, where GUFs would rely on their affiliates (sector-level unions) and enterprise unions. Further research is needed to examine the possibility of transposing this principle from the (public) EU context to that of IFAs as well as (a) the implications of this principle for the effective implementation of IFAs on the ground and (b) the safeguards that might be necessary to ensure that the commitments of the parties at central level are not undermined in any way.

A related issue is that of resources dedicated to the implementation of the agreements, in particular, their monitoring and active promotion among local managers as well as subcontractors and suppliers. The

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<sup>16</sup> Empirical research conducted by the IILS on the Anglo-Gold agreement of 2002 shows that despite a provision for an annual follow-up meeting, no such meeting was convened until March 2007. Similarly, in the case of Merloni, which was the first agreement signed by the IMF in 2001, the first implementation meeting was held only in 2006. In addition, there has been no follow-up action, or very little, in the cases of Prym (2003) and Rheinmetall (2003); see IMF (2006).

<sup>17</sup> "The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein. In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty". Article 5 of the Consolidated Version of the Treaty Establishing the European Community (EC Treaty), *Official Journal C* 325/41-42, 24 Dec. 2002. Available at: [http://europa.eu.int/eur-lex/lex/en/treaties/dat/12002E/htm/C\\_2002325EN.003301.html](http://europa.eu.int/eur-lex/lex/en/treaties/dat/12002E/htm/C_2002325EN.003301.html) [10 Dec 2008].

<sup>18</sup> According to the Shorter Oxford English Dictionary, fifth edition.

<sup>19</sup> The EDF agreement refers explicitly to this principle.

amount of resources allocated by the MNE to promoting an IFA could constitute a major indicator of the employer's intention to be bound in good faith by the agreement.<sup>21</sup> In the absence of such commitment — or when only paltry resources are committed — the burden of follow-up falls largely on the shoulders of GUFs (or even NGOs).<sup>22</sup> It would appear, however, that GUFs and their affiliates at national, local and enterprise levels rarely have sufficient resources for this.<sup>23</sup> This issue is even more important if one considers that IFAs rely heavily for their success on awareness-raising mechanisms and campaigns, rather than on legally binding and sanction-driven procedures.

Existing, well-resourced forums established for information and consultation purposes, such as European works councils (EWCs), might well be useful as part of the machinery for monitoring and follow-up of IFAs as well as for resolving interpretation or implementation disputes, if they are given an explicit mandate to this effect. For the time being however, EWCs can perform this function only *ad hoc*, as they lack this mandate.<sup>24</sup>

World works councils might offer a more appropriate platform because of their global scope, provided that the Councils are clearly

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<sup>20</sup> For example, the Veidekke IFA states that in the event of complaint or an infringement of the agreement, the complaint should be raised firstly with the local site management. If the complaint is not resolved, it should be referred to the appropriate national union, which will raise the issue with the company's regional president; and if still not resolved, the complaint will be referred to the IFBWW Geneva office, which will raise the matter with the company's corporate management. Similar procedures can be found in the Norske Skog and SCA agreements.

<sup>21</sup> One of the most interesting IFAs in this respect is the one concluded at OTE (in 2001), which makes a clear and detailed provision for resource allocation in organizing the "joint annual meeting". The costs arising from implementing the agreement are borne by the enterprise. The EDF, Falck and Club Méditerranée agreements have similar provisions. The texts of these agreements, however, rarely refer to the actual costs of monitoring, implementation and evaluation.

<sup>22</sup> As the Chiquita conflict demonstrated, collaboration between the union movement and NGOs can be very effective and a major incentive for the management of MNEs in striking IFAs (Riisgaard, 2004).

<sup>23</sup> As the International Metalworkers Federation (the GUF that has signed the greatest number of IFAs) admits: "Experience has shown that effective implementation requires significant resources to conduct meetings, maintain networks and coordinate activities. It is clear that the IMF does not have the resources to itself manage this level of implementation in all of the companies with which it has signed IFAs" (IMF, 2006).

<sup>24</sup> EWCs in principle perform an information and consultation function regarding the European operations of the MNEs concerned (EWC Directive 94/45/CE, Articles 5.1, 5.2, and 6.1). Nevertheless, EWCs have co-signed approximately 13 IFAs (and approximately 75 per cent of all the joint texts signed across Europe according to Pichot, 2006) and are regularly used as forums for assessing progress made in the implementation of IFAs (Bourque, 2005, for example). The negotiating and monitoring functions of EWCs clearly go beyond their original mandate attributed by the 1994 EWC Directive. The latter is currently in the process of being amended.

authorized by the parties to monitor the IFA and are regularly convened<sup>25</sup> (some IFAs give them an explicit mandate for direct representation of an MNE's global labour force). It might therefore be interesting to study in more detail the regularity of the meetings and the follow-up of recommendations taken in world works councils.

### Scope and binding character

Paragraph 3(1) of Recommendation No. 91 provides that “Collective agreements should bind the signatories thereto and those on whose behalf the agreement is concluded”.

Many authors emphasize that IFAs are not legally binding instruments from a national legal viewpoint, since they cannot be relied upon before national courts and lead to enforceable decisions or the adoption of legal sanctions in the case of non-implementation.<sup>26</sup>

However, the fact that IFAs are not intended to be relied upon by the parties in judicial proceedings does not mean that the parties do not have the intention to be bound in good faith by their commitments as reflected in these agreements. In some countries, including the United Kingdom, a collective agreement is not legally binding unless specifically requested by the parties (which they rarely do); if such a request is not made, the enforcement of the “voluntary agreement” hinges on the goodwill or relative strength of the parties (Bamber and Sheldon, 2004, p. 514). According to Bruun (2003, p. 39), “the distinguishing feature of [the collective agreement is] its binding effect on the parties to the agreement, irrespective of whether that binding effect [is] made effective and backed up by legal or extra-legal sanctions”.

<sup>25</sup> The agreements of Hochtief (2000), Volkswagen (2002), Daimler Chrysler (2002) and Renault (2004) formally involved their world works councils in signing their IFAs. Conversely, the IFAs of Endesa (2002), Telefónica (2000), OTE (2001), Chiquita (2001) and Danone (1988) were triggered by international trade union activism initially aimed at establishing world works councils (Schömann et al., 2007). Occasionally, MNEs have taken specific steps towards setting up a world works council to monitor and implement IFAs more effectively. This is notably the case of the Peugeot PSA agreement of 2006.

<sup>26</sup> Although the non-binding character of IFAs allows no role for tribunals or (labour) courts, in at least two cases IFAs contain a reference to a competent tribunal. One, Arcelor, says that the IFA is governed by the laws of Luxembourg, and that the competent tribunals are in that country. The second, Falck, refers to Danish legislation, but not to the competence of the tribunals in that country. A question that remains is whether courts in a specific jurisdiction are truly competent in disputes arising out of the interpretation of IFAs, due to their voluntary nature, and above all whether these courts have jurisdiction to address issues that might relate to the situation of third parties, often in other parts of the world (“extraterritoriality”). See Sobczak (this volume), on the legal implications of CSR commitments; see also Trébulle (2007).

In order to assess whether IFAs are industrial instruments akin to collective agreements, one has therefore to assess the degree to which the parties feel bound by these agreements and to take the steps necessary in practice to implement them in good faith.

According to the ILO, good faith cannot “be imposed by law” but rather, “... could only be achieved as a result of *the voluntary and persistent* efforts of both parties” (preparatory work for the Collective Bargaining Convention, 1981 [No. 154] cited in Gernigon et al., 2000, p. 33; emphasis added). In this regard, the mere existence of an IFA could be an indication of the voluntary and persistent efforts of the parties to negotiate the content of such an instrument and of the parties’ intention to work together for the IFA’s promotion and application. This in and of itself might provide an indication that the element of “good faith” is present and, therefore, that such an agreement does indeed constitute a genuine commitment. However, despite such indications, there is little conclusive empirical evidence on whether IFAs are observed effectively by the parties and whether corrective action is in practice adopted in cases of violation. More research is necessary on this important point.

As a result of the lack of research on the effective implementation of IFAs, especially in countries with a weak record on labour standards, there is very little information on the impact of these instruments as regards their improving working conditions or promoting the principles of freedom of association and collective bargaining. Some examples have been reported in the 2004 follow-up report to the ILO Declaration on Fundamental Principles and Rights at Work (ILO, 2004) and show some positive impact, particularly in terms of promoting workers’ organizations at companies such as Accor, Daimler-Chrysler, Fronterra, Statoil, Telefónica and Chiquita (ICFTU, 2004, p. 100; see also IMF, 2006; Lismoen and Løken, 2001; Riisgaard, 2004; and Wills, 2002). Miller (this volume) documents the most recent example of positive impact on industrial relations during the negotiation of the first IFA in the textile sector.

In practical terms, for those involved in negotiating and monitoring IFAs, the best possible means of putting them to good use is raising awareness of violations within the local or central management of the MNE, so as to obtain progressive changes in MNE management’s conduct (and that of its subcontractors and suppliers). The possibility of having recourse to “name and shame” strategies remains, in the last resort, key to obtaining compliance.

## Dissemination

Paragraph 8(a) of Recommendation No. 91 provides that national laws or regulations may, among other things, make provision for “requiring employers bound by collective agreements to take appropriate steps to bring to the notice of the workers concerned the texts of the collective agreements applicable to their undertakings”. However, given that this provision is not relevant to IFAs, IFAs do not yet have a strong record in terms of information dissemination. Company websites reveal little visibility for them. In addition, there is little evidence that IFAs are systematically translated into the languages of all the countries where companies operate, despite the existence of relevant provisions in many agreements (Lukoil’s in 2004, for example). This may adversely affect their dissemination among local managers and unions. The problem of outreach can become even more acute in respect of subcontractors and suppliers where the links with the headquarters of the MNE or the GUF (the usual custodians of IFAs) are weaker. Dissemination is key for assessing both the “voluntary and persistent efforts of both parties” to apply the agreement and, in many respects, the “good faith” of the parties to implement the IFAs.

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In the light of the foregoing it may be said that IFAs possess some, but not all, of the essential constitutive elements of industrial relations instruments akin to collective agreements. It should be emphasized that IFAs are by no means the most advanced industrial relations instrument at cross-border level. So far, one sector — the maritime sector — has been endowed with a fully fledged international collective agreement on seafarers’ terms and conditions of employment. The latest negotiated collective agreement in this sector covers increases in wage levels as well as changes in contractual clauses to reflect the provisions of the ILO Maritime Labour Convention, 2006. The adoption and periodical renegotiation of a collective agreement in this sector since 2003 have taken place against the background of the institutional framework of the ILO serving to set seafarers’ minimum wages and to define other terms and conditions of employment for the sector through ILO Conventions and Recommendations.<sup>27</sup> Compared to such a fully fledged collective agree-

<sup>27</sup> In particular, the ILO Joint Maritime Commission periodically recommends the minimum wage for an able seafarer under the Seafarers’ Wages, Hours of Work and the Manning of Ships Recommendation, 1996 (No. 187) (now consolidated within the Maritime Labour Convention, 2006). This recommendation, which is periodically updated based on negotiations among the tripartite ILO constituents within the Joint

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ment at cross-border level, IFAs are still an imperfect industrial relations instrument and their effectiveness remains to be proved empirically.

## Possible contribution of IFAs to the emergence of a cross-border industrial relations framework

A further question to be explored concerns the potential contribution of IFAs to developing and eventually institutionalizing an industrial relations framework at cross-border level. In this section, we address this question from an interdisciplinary point of view on the basis of three sociological theories: industrial relations (behavioural theory of labour negotiations by Walton and McKersie), law (sociological objectivism by Scelle), and politics (world culture/polity globalization theory by Boli and Thomas).

### Industrial relations

From the point of view of industrial relations theory, the strategies in which the parties to IFA negotiations engage do not seem to correspond to traditional forms of collective bargaining — “redistributive” or “integrative”<sup>28</sup> — which aim essentially at the redistribution of wealth. As said earlier, the parties to IFAs usually aim to set up a general framework of harmonious relations between GUFs/unions and MNE managements, in particular by ensuring respect for fundamental principles of freedom of association and collective bargaining throughout the MNE

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Maritime Commission's Subcommittee on Wages of Seafarers, has served as an important benchmark for wage negotiations around the world, not only at national but also international level (ILO, 2006, pp. 40-41). Against this background, the 1990s witnessed the development of global collective bargaining in the maritime sector. In the early part of that decade, shipowners formed the International Maritime Employers' Committee (IMEC) for the purpose of negotiating a global industry pay agreement with the ITF for seafarers working on board “flag of convenience” ships. The first such agreement was negotiated in 2001 (ILO, 2006, p. 22). In the most recent negotiations of this agreement, under the auspices of what is now known as the International Bargaining Forum (London, 27 September 2007), the parties reached a collective agreement with effect from 1 January 2008, covering some 70,000 seafarers of all nationalities serving on over 3,500 ships. See for example <http://www.itfglobal.org/press-area/index.cfm/pressdetail/1586> [10 Jan. 2008].

<sup>28</sup> Distributive bargaining implies a negotiation process over the distribution of a fixed sum, where a gain for one side marks a corresponding loss for the other. In the IFA context, this might be an MNE's global wage agreement that guarantees a salary increase if profits grow. Integrative bargaining implies a negotiation process where both sides search ways to “expand the pie”, that is to say, develop solutions leading to benefits for both sides. In the case of IFAs, a good example would be the negotiation of a global agreement that creates a global social safety net for workers of an MNE experiencing industrial change.

structure. Thus IFAs are agreements of principle intended primarily to help create the space in which workers can organize themselves and bargain. The parties to IFA negotiations are, in fact, engaged in strategies that might be termed “attitudinal structuring” (Walton and McKersie, 1965).

Attitudinal structuring encompasses all the actions and attitudes of the parties to a negotiation, which are either consciously or unconsciously aimed at shaping the opponent’s behaviour, that is, feelings of trust towards the other, beliefs about the other’s legitimacy, feelings of friendliness towards the other, and motivational orientation. All these result in tendencies to adopt cooperative (instead of competitive or individualistic) actions towards each other (Walton and McKersie, 1965, p. 185). Negotiating IFAs resembles a process in which the parties learn from each other. Considering the increasing pace of adoption of IFAs, this attitudinal interaction might already have served as fertile ground for confidence building between some GUFs and MNEs. However, as noted, further research is needed to assess actual improvements on the ground.

In addition to bargaining between the parties to an IFA, each party also appears to engage in bargaining within its own ranks — “intra-organizational bargaining”. This includes negotiations to resolve internal conflicts and to clarify positions over strategies, tactics and generally the type of relationship that should be developed with the other side (Walton and McKersie, 1965, p. 281). Such internal bargaining may take place among MNE managers as well as among unions, in different countries and MNE subsidiaries. Such debates within the trade union movement relate to clarification of strategies, division of labour among different levels (enterprise, local, sectoral, national, regional, global), representation mandates, and the usefulness of IFAs (see for example IMF, 2006; Miller, this volume). Similar debates take place within MNEs — central MNE management may be criticized by the “periphery” or competitor companies over the need to adopt an IFA.

Overall, what these two forms of bargaining — attitudinal structuring and intra-organizational bargaining — could generate is a change in attitudes and mentalities within and between GUFs/unions and MNEs. This is an essential step in consolidating an industrial relations framework at cross-border level. In their present form, IFA negotiations seem to rely mainly on a behavioural understanding of negotiations aimed primarily at the emergence of cooperative attitudes and understandings between the parties. The two subprocesses of bargaining — attitudinal and intra-organizational — have the potential to pave the way

towards more sophisticated (redistributive or integrative) forms of collective bargaining, similar to those experienced in certain national settings or in the maritime sector at cross-border level, once the context is mature enough. In that sense, IFAs can be said to constitute a key building block towards the consolidation of a global industrial relations system.

## Law

The maritime sector's collective agreement demonstrates the importance of a legal and institutional framework in providing a platform for and buttressing negotiations. The significance of such a framework is demonstrated by the fact that IFAs make reference to numerous ILO instruments (see the appendix).

Because IFAs do not have any institutional backup or attachment to a particular legal order, a classical legal perspective would have difficulty in accommodating their legal dimension (see Sobczak, this volume). So far, only a sociological understanding of international law, known as "sociological objectivism", allows us to grasp the legal dimension of IFAs because this theory sees law not so much as a form of top-down state regulation but rather as a means to address a need for social organization in the context of increased cross-border activity generated by globalization. According to George Scelle — the main proponent of this approach — the aim of the law, including private agreements, is to satisfy the social needs of individuals and their groups, and in particular to organize social relations, including labour relations, in the context of a global society (*société internationale globale ou œcuménique*) generated by the interpenetration of peoples through international trade (*l'interpénétration des peuples par le commerce international*) in which individuals, rather than States, lie at the centre of the international legal order (Scelle, 1932; 1934).

The innovative function performed by IFAs as instruments serving the purposes of opening spaces for dialogue and organizing interaction between actors (such as global unions and MNEs) matches Scelle's vision in several respects. Indeed, Scelle would view IFAs as a "suprastate phenomenon" deriving from a social need to organize global interactions between the MNE management and its global work force in an era of globalization. IFAs would reflect the outcome of interaction between individuals (and groups of individuals) needing to organize their own dealings and indeed, constructing their own "legal framework" at cross-border level, following the dynamics created by international trade and

investment. The legal framework created by this interaction could coexist along other legal orders, including that created by the social partners through collective bargaining at national, sectoral and enterprise levels, or by each State through regulation, or further still, by States and international organizations at international or regional levels. This vision allows us to envisage IFAs as part of mutually reinforcing initiatives that could eventually lead to the institutionalization of a global industrial relations framework. In this respect, however, certain important questions need to be addressed in the process of building such a framework, including the relationship between IFAs and collective agreements at various levels and the need to safeguard the autonomy of the parties vis-à-vis public bodies.

## Politics

From the point of view of globalization theory, as said, the parties negotiating IFAs can be seen as helping to disseminate and promote a certain set of common values, such as fundamental principles and rights at work at cross-border level. The parties to IFAs may therefore be seen as performing a role that goes beyond one attributed to traditional social partners (bargaining) and that focuses, rather, on promoting a set of common values in general. This amounts to a wider role that is characteristic of actors in civil society. The world culture/polity theory of globalization would argue that in promoting this set of values, these actors actually contribute to the emergence of a cross-border industrial relations framework.

This theory describes the function of international civil society as an “enactor” of world cultural norms, shaping and channelling “culture” as a catalyst for subsequent change in state policies and laws (Boli and Thomas, 1997).<sup>29</sup> According to the theory, empirical data demonstrate that when cultural norms have been solidified through repeated civil society activity for a sufficiently long time, States end up stepping in to endorse this development, including through the adoption of legally binding regulatory frameworks.

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<sup>29</sup> The theory defines globalization as an increasingly global interdependence and intensification of contacts, the main end product of which would be a “common consciousness” of the world as a whole and consequently a common polity, or “world polity”. It demonstrates that civil society activity has contributed in the past to the generation of a range of standardized principles, models, and methods for the organization of society as well as the further development of modern-day international law through the crystallization of cultural values.

This theory predicts that if the repeated activity of GUFs and MNEs in concluding IFAs is sufficiently solidified, this self-regulatory initiative might be eventually buttressed with an institutional framework set up through public action. However, despite certain initiatives in this direction in the context of the EU,<sup>30</sup> the question of what would constitute appropriate public action in this area has not for the time being given rise to consensus either in or among the relevant actors (GUFs and their affiliates, employers' organizations and MNEs). A possible institutionalization might induce a move beyond the present attitudinal structuring and intra-organizational forms of bargaining, which are aimed precisely at building a common "culture", towards more redistributive forms of negotiations, which would be more akin to traditional collective bargaining processes.

## Conclusions

This chapter has attempted to assess the nature of IFAs as industrial relations instruments and their possible contribution to building a cross-border industrial relations framework. It has found that, first, IFAs possess some but not all of the essential constitutive elements of industrial relations instruments akin to collective agreements, as the latter are defined in ILO Recommendation No. 91. The actual record of implementation of IFAs on the ground would constitute important information in making a more exact assessment of the relationship of IFAs to collective agreements. Empirical research is necessary to provide concrete evidence of the parties' will (or lack thereof) to be bound by the provisions of IFAs and to implement them in good faith. In addition, unresolved issues remain with regard to the representation mandate of the parties to IFA negotiations, while the monitoring and dissemination practices appear, so far, to be rather rudimentary.

Furthermore, IFAs differ from traditional collective agreements in that they are not the outcome of classical forms of collective bargaining addressing, for instance, wages and other terms and conditions of

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<sup>30</sup> The European Commission, for example, announced in its Social Agenda 2005-2010 that it would look at the possibility of an optional European framework for transnational agreements that would allow the social partners to formalize the nature and results of transnational negotiation. See also Sobczak and Bé (both this volume).

employment. For the moment, the only example of a fully fledged collective agreement addressing wages and other key conditions of employment at global level is the one reached in the maritime sector. IFAs, on the contrary, are agreements of principle intended primarily to set up a general framework of harmonious relations between GUFs/unions and MNE managements, in particular by ensuring respect for fundamental principles of freedom of association and collective bargaining throughout the MNE structure. The parties to IFA negotiations are in fact engaged both in attitudinal structuring strategies, and in parallel, intra-organizational bargaining.

What these two forms of bargaining — attitudinal structuring and intra-organizational bargaining — could generate is a change in attitudes and mentalities within and between GUFs/unions and MNE managements. This is an essential step in consolidating a cross-border industrial relations framework. One might say that trade unions and MNEs function in this context not so much as classical bargaining parties but rather as civil society actors shaping and channelling “culture” as a catalyst both for change in mentalities and subsequently for the formulation of relevant public policies and laws. If the repeated activity of GUFs and MNEs in concluding IFAs is sufficiently solidified, self-regulation might be eventually buttressed with an institutional framework established through public action. At that stage, it might be possible to move beyond the two forms of bargaining, which are aimed precisely at building a common “culture”, towards more redistributive forms of negotiations.

Thus IFAs can currently be described as imperfect forms of industrial relations instruments, reflecting the outcome of interaction between individuals (and groups of individuals) in need of organizing their own dealings at cross-border level, following the dynamics created by globalization. These instruments may eventually play their part in paving the way for a fully fledged industrial relations framework at cross-border level. Related questions that need to be addressed in this process include the relationship between IFAs and collective agreements at various levels (national, sectoral, enterprise, etc.) and the role of institutionalized public action in providing appropriate support but without affecting the autonomy of the parties, which lies at the heart of voluntary instruments such as IFAs.

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## Chapter 4

# International framework agreements in the context of global production

*Nikolaus Hammer*<sup>1</sup>

The emergence of international framework agreements (IFAs) can be situated at the confluence of different forces, such as the changing international political economy — the rising power of multinational corporations (MNCs), the role of the World Trade Organization (WTO), the weakening of the nation State — and the failure to create a social counterweight within a multilateral context (see for example O'Brien, 2000). Still, labour has managed to shape a new tool of transnational industrial relations to establish fundamental labour rights, based on elements from different historical and regional episodes, global union councils and European works councils (EWCs) (Fairbrother and Hammer, 2005).

IFAs have moved some way from the international labour strategies of the 1960s, such as the campaigns against MNCs or coordinated bargaining (see for example Levinson, 1972; Gallin, this volume), and reflect the current international political economy.<sup>2</sup> A good number of IFAs for instance contain references to the MNC's suppliers and subcontractors — in some cases supplier compliance with the IFA is even mandatory —

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<sup>2</sup> IFAs also reflect the current political economy in so far as the overwhelming majority has been concluded with MNCs headquartered in Europe (see table 1 in the appendix) which reflects particular industrial relations traditions but also poses challenges for transnational labour cooperation (see below).

which points to complex inter-firm relations and the potential coverage of these agreements. Also, there seems to be a trend within recent IFAs towards a broader range of issues that are dealt with, and towards the inclusion of a greater number of trade unions from different geographical locations and scales as signatories (which mirrors general trends in the development of private standards; Nadvi and Wältring, 2004). However, given the important role of branded and retailing MNCs, the crucial issue is the social regulation of workplaces that are not controlled by those MNCs, that form part of the hinterland of global supply and value chains, and that are often in the informal economy.

Thus, apart from the considerable variation within IFA provisions, we have to recognize that IFAs are supposed to work in very different contexts, both in terms of the industrial and employer structures, as well as the trade union capacities and strategies. This chapter focuses on the implications of global production structures for the way that fundamental labour rights can be secured. The central issue in this respect concerns the double orientation of IFAs to social regulation *within* MNCs as well as *along* the value chains of those MNCs. The coordination of *intra*-firm relations poses a range of challenges that are very different to the coordination of *inter*-firm relations, and the same obviously holds for the implementation and monitoring of fundamental labour rights in those contexts. It is argued that one of the biggest challenges for IFAs is to make them work within buyer-driven value chains.

The chapter proceeds by outlining emerging structures of global production and contrasts the implications of MNCs' operations on the one hand, and the dynamics of global value chains on the other, for social regulation and labour strategies. The questions are: Where do IFAs fit into the global economy and how they can serve as tools to achieve fundamental labour rights within MNCs as well as along global value chains? The argument is based on an exploration, via survey, of the substantive and procedural content of IFAs as well as the institutions of labour representation. The survey shows that IFAs vary considerably in terms of their provisions, and the conclusion argues these agreements are in fact used very differently depending on the governance of global value chains as well as union capacity and strategies.

## Changing structures of global production systems

In theories of global production and industrial organization, the dynamics of MNCs are kept separate from those of inter-firm relations: they perform different industrial functions, operate at different levels of value-added production within global value chains, and are based on different forms of coordination and governance (Dicken, 2003; Milberg, 2004a; Gereffi et al., 2005; Ponte and Gibbon, 2005). The logic of IFAs, however, requires the international labour movement to consider (at least) two strategic movements: that *within* an MNC, and that *between* a lead firm and its global value chain/production network. Taking into account differences in MNC organization and strategy (see for example Dicken, 2003; Bair and Ramsay, 2003) as well as forms of value chain coordination and governance (Gereffi et al., 2005) will leave us with an even more complex picture. A further conceptual problem is that the literature rarely integrates labour as an agent in the social regulation of the global economy. While this is not the place to develop an approach of the *social* governance of global value chains, we shall consider IFAs in the context of global productive structures and labour strategies.

The tension between those two movements is reflected further in two historical episodes of economic and organizational restructuring — the emergence of the MNC as well as that of outsourcing and offshoring. Gereffi (2005b), for example, contrasts the rise of the multidivisional MNC and foreign direct investment (FDI) of the 1950s and 1960s in Latin America with the rise of global retailers, marketers and branded manufacturers of the 1970s and 1980s in East Asia. While the former were based on locally owned subsidiaries, geared towards import substitution and concentrated on petrochemical, pharmaceutical, automobile and production goods industries, the latter were dominated by export-substitution strategies on the basis of non-proprietary links between manufacturers and distributors and could be found in the apparel, footwear, consumer electronics and toy industries. It is this tension between those logics of industrial organization, the relation between the lead MNC and its value chain, that the labour movement has been trying to come to terms with, among others via the instrument of IFAs. On the theoretical level as well, we can distinguish between different approaches.

Feenstra (1998) characterized economic globalization in terms of the increasing integration of trade parallel to a disintegration of production. He noted the unprecedentedly high percentage of merchandise

value added that was traded in the 1980s and 1990s and, furthermore, the rising share of imported intermediate inputs in the domestic production process of Organisation for Economic Co-operation and Development (OECD) countries. In other words, not only do we observe an increase in the trade in finished goods, even the trade in inputs to produce these goods has grown considerably in recent decades. This implies more than just a quantitatively higher level of trade integration; rather, it underlines a qualitative shift from vertically integrated (“Fordist”) production to geographically dispersed production along global value chains (see Gereffi and Korzeniewicz, 1994, for example).

These developments provided the background for the labour and other social movements to campaign for a link between trade and labour standards at multilateral level within the WTO and ILO (van Roozendaal, 2002). Such a link would have created some social regulation for MNCs’ own operations as well as their (trading) activities along supply chains. However, in the absence of a compromise at multilateral level, we find only a reference to minimum labour standards in geographically limited bilateral and regional trade agreements (Greven, 2005), which, by their nature, do not take into account the wider dynamics of global value chains.

Two other strands of the literature focus on the industrial context, organizational structure, policies and strategies of MNCs and only subsequently consider implications for their global value chains. Debates within international human resource management (IHRM), for example, have focused on the transfer of policies and strategies within MNCs’ global operations, and the tension between global standardization and local adaptation (see Dickmann and Müller-Camen 2006 for a typology of IHRM strategies). They have also discussed the relative strength of home- and host-country effects (as well as integration and dominance effects; see for example Almond et al., 2005; Royle, 2004). Edwards and Kuruvilla (2005) consider IHRM issues in the light of MNCs’ internal division of labour but still remain focused on intra-firm processes, that is the MNC and the authority relation vis-à-vis its foreign operations and subsidiaries.

A different approach emphasizes the determinants of MNCs’ decisions to relocate and/or outsource parts of their production. Bair and Ramsay (2003; also Ramsay 2000) develop a contingency approach — taking into account product and process determinants, the role of labour costs and skills, market contingencies and the organizational capacity of

the MNC and its subcontractors — which helps to map the strategic options that management and labour have in MNCs' different locations.

Against this background, which emphasizes intra-firm processes and the strategic leverage of MNCs, the conception of transnational labour cooperation remains oriented towards a framework of international coordination of established representative structures — namely, networks between enterprise-level trade unions or works council bodies, the international coordination of campaigns and/or bargaining. Attempts at global social regulation are based on workplace- and enterprise-level representation and a good union presence at least in the home country. Thus, they focus on the MNC in the first place. Labour strategies in this respect are somewhat akin to the early coordination efforts and campaigns vis-à-vis MNCs developed in the 1960s, an approach that can still be found where lead MNCs have retained some of their earlier vertical integration and/or have very close relations to their suppliers and subcontractors. See for example the global trade union networks within the remit of the International Metalworkers' Federation (IMF) and the International Federation of Chemical, Energy, Mine and General Workers (ICEM).

In the absence of multilateral regulation of social and labour rights, IFAs aim at fundamental labour rights within MNCs, while at the same time trying to extend their achievements along the value chain. However, as analysed by Feenstra (1998), MNCs' role within global production is increasingly developing towards that of a lead firm that has a prominent role in coordinating complex relations with suppliers and subcontractors (Gereffi et al., 2005). The implications of global value chains can be also be seen in the emergence of a dual structure — of oligopolistic competition at one end of the global value chains, that is, between MNCs, and competitive markets in the more distant tiers of suppliers (see Milberg, 2004b).

This is where global value chain analysis has developed a useful framework to examine the type of relations between oligopolistic MNCs and their chains of suppliers. Initially, the role of hierarchy and power as well as the dynamic nature of global value chains was captured in the distinction between producer-driven and buyer-driven commodity chains (Gereffi, 1999). The former require high investments of capital and technology, thereby creating high entry barriers, so that large manufacturers (such as those in the automobile and aircraft industries) assume a leading role vis-à-vis their suppliers. Technology and capital are central

features here, which allow the lead firm to leave activities to competitive suppliers (producing to specification) and retailers, but without their losing strategic control. Buyer-driven chains are characterized by easier access to production (such as in textiles and agricultural products) leaving the leadership to those agents which are concerned with design, marketing, branding and retailing.

Shifting the perspective to the governance of global value chains — or, according to Ponte and Gibbon (2005), forms of coordination — power relations were elaborated further into a continuum between market and hierarchical forms (Gereffi et al., 2005). Close to the market end of the continuum we find *modular* value chains, where suppliers rely on customers for product specifications but possess sufficient and autonomous competencies with regard to the production process. *Relational* governance involves more complex coordination between the lead firm and suppliers, on both the product and process side, which creates a high level of interdependence (thus trust, reputation and social networks all play important roles). Finally, towards the hierarchical end of the continuum, suppliers in *captive* value chains are very dependent on lead firms that provide considerable assistance, monitoring and control throughout the production process.

Such developments have important implications for the regulation of fundamental labour rights as well as labour's strategies in achieving them. The shifts in global production structures over the last decades have led, on the one hand, to a separation between powerful industrial actors and the locus of production, and on the other, to a global segmentation of product and labour markets (Milberg, 2004b; Gereffi, 2005a). An important question in this respect is to what extent MNCs and trade unions can secure the social coordination along global value chains, and to what extent IFAs can be effective tools to this end. Examples of inter-firm social regulation show that codes or private standards can be included in commercial contracts (Sobczak, 2006); this, however, leaves open questions of implementation and monitoring, particularly in the informal economy.

From a strategic perspective, the crucial observation is that on one side of the continuum, social regulation and IFAs are targeted at lead MNCs that are primarily concerned with design, branding and retailing, that rarely own any production facilities, and that coordinate their global supplier networks primarily via modular or market forms of coordination. The crucial implication for labour, therefore, is that buyer-driven

chains are founded on a separation between production, on the one hand, and design, distribution and consumption, on the other, which means that the potential instance of social coordination — the lead MNC — is as far as possible removed from the locus of production.

At this point it is useful to keep in mind two aspects of a wider debate that dissolve strict divisions between codes of conduct and IFAs, on the one hand, and formal organized wage labour and social movements in the informal sector, on the other. First, there is an emerging literature on multi-stakeholder codes of conduct (see for example Nadvi and Wältring, 2004) as well as gendered approaches to value chains that go beyond the narrow formal labour market and focus on informal labour and reproductive work (see for example Barrientos et al., 2003). Second, labour strategies could look beyond the workplace, building alliances and networks with non-union movements in order to bridge the separation between industrial power and production as well as that between organized movements in different segments of the labour market (Wills and Simms, 2004; Wills, 2002b; Gallin, 2001). The following section provides a survey of the content of IFAs and concludes on where IFAs can be situated in the global political economy.

## International framework agreements

Despite the relatively brief history of IFAs, there is a considerable literature on transnational social and labour regulation (including Block et al., 2001; Sobczak, 2004), and an emerging literature of case studies and reports on trade union strategies and campaigns (including BWI, 2006; IMF, 2006; Descolonges, 2006; Royle and Ortiz, 2006; Edwards et al., 2006; Saincy and Descolonges, 2006; Riisgaard, 2005; Miller, this volume; 2004; IFBWW, 2004; Wills, 2002a; Lismoen and Løken, 2001). IFAs play an important role for local-global trade union networks; however, the terrain on which they operate differs according to industrial sector and the governance of global value chains (see also Schömann et al., 2007). The following offers a brief overview of existing IFAs before it expands on the implications for trade union campaigns within global production.

## Developing a tool for international industrial relations

The first IFA, concluded at BSN in 1988 (renamed Danone in 1994),<sup>3</sup> was preceded by a long history of social dialogue in the company. At that point Danone was a France-based company, shaped by the humanist vision of its founder Antoine Riboud, and essentially operating within the European market. In the mid-1980s, the traditionally good relations with national trade unions were taken further by the International Union of Food Workers (IUF) in a dialogue with Danone management. This resulted in a series of agreements: a Plan for Economic and Social Information in Companies of the [then] BSN Group (1989), an Action Programme for the Promotion of Equality of Men and Women at the Workplace (1989), an Agreement on Skills Training (1992), the IUF/BSN Joint Declaration on Trade Union Rights (1994) and a Joint Understanding in the Event of Changes in Business Activities Affecting Employment or Working Conditions (1997).

The IUF followed up the Danone IFA with an agreement with Accor in 1995. Other agreements were signed by (what was then) the International Federation of Building and Wood Workers (IFBWW) with IKEA (1998) and Faber-Castell (1999), as well as ICEM with Statoil (1998). Some global union federations such as the (then) International Confederation of Free Trade Unions (ICFTU), the IFBWW, the IMF, and the International Textile, Garment and Leather Workers' Federation (ITGLWF) drew up "model agreements", which reflected the specific challenges of the different sectors. As of late 2007, there are 62 IFAs with the IMF having concluded 17, followed by Union Network International (UNI) with 15, ICEM with 13, the Building and Wood Workers International (BWI) with 12, and the IUF with 5. The Public Services International (PSI), the International Federation of Journalists (IFJ) and the ITGLWF have signed one agreement each. Three of these IFAs were signed jointly: ICEM reached the *Électricité de France* (EdF) IFA together with PSI, the Lafarge agreement with BWI, and the Umicore IFA with the IMF.

An overview of the signatories on the trade union side shows interesting patterns between global and local actors as well as trade union and works council representation. Whereas the BWI and ICEM tend to involve national (home country) unions, the IMF agreements include

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<sup>3</sup> The appendix gives further information on the various IFAs discussed.

EWCs and European industry federations. The agreements with Hochtief, Volkswagen, Daimler and Renault also include a world works council;<sup>4</sup> those with Chiquita, EdF and France Telecom are also signed by regional employee or trade union bodies (the Coordinadora Latinoamericana de Sindicatos Bananeros, the Asia Pacific Concertation Committee and the Group Worldwide Trade Union Alliance, respectively).

In the wake of the agreements at Danone as well as the global union federations' model agreements, several key elements have come to define an IFA. The agreement has to be global in scope, comprise a reference to ILO Conventions, and require the lead MNC to influence its subcontractors and suppliers in a similar direction. On the trade union side, a global union federation has to be a signatory, unions have to be involved in implementation, and the agreement has to include the right to bring complaints (Nilsson, 2002). Whereas most IFAs refer to the eight "core labour standards" that were reaffirmed again in the ILO's 1998 Declaration on Fundamental Principles and Rights at Work (Conventions Nos. 29, 87, 98, 100, 105, 111, 138 and 182), there are significant deviations in both directions. In this regard, Hammer (2005) distinguishes between a logic of "rights" as opposed to "bargaining" agreements: whereas the former are focused on the freedom of association, the right to organize and collective bargaining, as well as workers' representation — thus establishing a "space to organize" (Wills, 2002a; Oswald, n.d.) — the latter frequently include a wider range of ILO Conventions and issues, and are often renegotiated regularly.

The existing 62 IFAs account for approximately US\$3,495 billion in sales and directly cover about 5.3 million employees. The potential benefits from an extension along the value chain are obvious. There is an immediate impact, for example, when the agreements are applied in companies that are controlled by an IFA signatory: PSA Peugeot Citroën, for instance, pledges to apply its IFA to Faurecia, a major components MNC with 61,000 employees and sales of around US\$13,000 million. In terms of the scope of IFAs, two different perspectives must be distinguished. From a legal viewpoint, it is argued that the core labour standards are binding on States by virtue of their ILO membership, regardless of whether States have ratified a particular convention or not, although this view is disputed (Duplessis, 2004). From an organizing and monitoring

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<sup>4</sup> UNI's agreement with Falck in fact establishes a world works council, rather than a commitment to fundamental labour rights as such.

perspective, a key element of IFAs is the requirement that lead firms influence their subcontractors and suppliers. However, this coverage is at times qualified by the particular set-up of the MNC's representation arrangements. The Volkswagen-IMF agreement, for instance, specifies coverage "for the countries and regions represented in the Group Global Works Council" (Volkswagen and IMF, 2002, p. 1).

IFAs constitute an important advance in establishing a terrain for international industrial relations, particularly with regard to earlier corporate codes of conduct. They define a set of key actors on the trade union side as legitimate partners for international social dialogue, most importantly the global union federations, but also European industry federations, EWCs and national trade unions. This poses important challenges for the power balance and division of labour in the international labour movement, most notably the representation of workers and unions of the "global South", but also the legitimacy of (European) works councils as opposed to trade unions (Hammer, 2005, pp. 522-527). Although the institutional platform and resources of an EWC can be very important in negotiating as well as implementing and monitoring IFAs, there are issues of representation that have not been resolved. This problem is probably exacerbated by the overwhelming concentration of IFAs concluded with MNCs headquartered in Europe. Implications of these problems for a European legal framework for transnational collective bargaining are currently discussed at European Union level (see for example Ales et al., 2006).

#### Four levels of provisions

The key substantive provisions of IFAs are anchored in the fundamental labour rights as defined in the eight core Conventions of the ILO's 1998 Declaration on Fundamental Principles and Rights at Work. Beyond this, however, four levels of provisions can be distinguished, which establish minimum labour and human rights standards, delimit the employment relation, deal with softer negotiating issues at company level (such as health and safety, training and restructuring), and finally other issues that are based on private standards (see table 2 in the appendix for an overview).

On the first level, while the majority of agreements proclaim to respect "internationally recognized human rights" in general, a good number of agreements explicitly refer to other multilateral texts (see table 3 in the appendix). Of the 62 IFAs reviewed here, 17 state that they

respect the United Nations (UN) Universal Declaration of Human Rights, 12 the UN Global Compact, 10 the ILO Declaration on Fundamental Principles and Rights at Work, 12 the OECD Guidelines for Multinational Enterprises, and 5 the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy. Less frequent are references to the Rio Declaration on Sustainable Development (IKEA), the UN Declaration on the Elimination of All Forms of Discrimination against Women as well as the UN Declaration/Convention on the Rights of the Child (EdF and IKEA). A further set of IFAs, mainly in the BWI domain, rely on the ILO HIV/AIDS Code of Practice (Impregilo, Lafarge, Lukoil, Royal BAM, SCA, Staedtler, Veidekke and VolkerWessels) and make use of various ILO codes and guidelines in the area of health and safety (Arcelor, Impregilo, Lafarge, Royal BAM, Staedtler, Veidekke and VolkerWessels).

The actual commitment to ILO Conventions can also vary considerably, for example from mentioning a single Convention (the Minimum Age Convention, 1973 [No. 138]) in the SKF agreement to the 20 Conventions and Recommendations in the IFAs with Impregilo or VolkerWessels. Despite these differences, the model of an IFA — built around the eight core Conventions plus additional Conventions depending on the corporate or sectoral context — has become largely established. With regard to those IFAs that only include a small number of ILO Conventions, in particular those concerning the freedom of association, and rights to organizing, bargaining and representation (Convention Nos. 87, 98, and 135), Hammer (2005) pointed to their character as “rights agreements”.

Putting this contrast starkly, rights agreements establish the very basis for organization in the first place, rather than explicitly recognizing and extending the minimum standards of home country industrial relations. Rights agreements are specific in that they are probably the result of first organizing efforts against hostile employers (Wills, 2002a); the ITGLWF experiences testify to the difficulties of campaigning for rights agreements in a fragmented industrial environment with employer hostility (Miller, this volume; 2004).

On the second level, IFAs include provisions on employment, wages and working time, which are located within respective national regulatory frameworks. Commitments relate mainly to the establishment of employment conditions, aim to create permanent employment contracts as opposed to fixed-term contracts, and sometimes regulate international mobility. The OTE-UNI (2001, p. 4) agreement, for example, states:

Employer's obligations to employees under labour or social security laws and regulations arising from the regular employment must be respected. The parties shall work towards creating permanent employment relationships.

Similarly, regulations concerning wages and working time refer to the respective national legal framework and emphasize, for example, "legal and industry minimum standards"; equal pay; the need to provide clear, written information on wages; the need to ban wage deductions unless expressly permitted by national law; or even benefits. An interesting element in the agreements with Brunel, Euradius, Impregilo, Inditex, Norske Skog, OTE, Portugal Telecom, Royal BAM, Veidekke and VolkerWessels is their explicit commitment to offer a "living wage", although some other IFAs include provisions that are essentially similar without using the term. The Inditex-ITGLWF (2007) agreement states:

External Manufacturers, Suppliers and their Subcontractors shall ensure that wages paid for a standard working week shall meet at least the minimum legal or collective bargain agreement, whichever is higher. In any event, wages should always be enough to meet at least the basic needs of workers and their families and any other which might be considered as reasonable additional needs.

With regard to working time, a large number of agreements define minimum rest periods, and include general policies on overtime as well as regular paid holidays.

On the third level, IFAs include provisions on health and safety, training or restructuring depending on the specific circumstances in the sector or MNC. Health and safety in particular occupies a prominent place in these agreements, as further underlined by the inclusion of only the ILO's Occupational Safety and Health Convention, 1981 (No. 155) and the Safety and Health in Construction Convention, 1988 (No. 167) (Impregilo, ISS, OTE, Portugal Telecom, Royal BAM, Veidekke and VolkerWessels apply both, while Brunel, Euradius, IKEA, Inditex, Lafarge, Nampak, PSA Peugeot Citroën, Schwan-Stabilo, Staedtler and Telefónica refer to Convention No. 155 only). In addition, a considerable number of MNCs commit to apply various industry-specific ILO codes and guidelines in this area. Equally, many IFAs state the importance of improving skills and training in preventing occupational hazards while only the agreements with Danone, EdF and Rhodia take a broader perspective that integrates training with work organization, internal labour markets, geographical mobility and restructuring. Arcelor and

EADS support lifelong learning. Another interesting area concerns provisions on the social and employment implications of corporate restructuring which primarily involve the anticipation of changes and consultation with trade unions. While Arcelor commits to seriously considering alternative proposals to restructuring and EdF offers more than the legal minimum in the case of mass layoffs, the 1997 Danone-IUF agreement on restructuring still includes the most wide-ranging provisions of this kind.

On the fourth level, IFAs often refer to private standards such as Social Accountability 8000 (Carrefour), ISO 14001 from the International Organization for Standardization (SKF, EdF), the Max Havelaar label (Carrefour) or the Joint Statement on Corporate Social Responsibility between EuroCommerce and UNI-Europa Commerce (H&M). In addition, the MNCs' own codes of conduct are often taken into account, indicating that in some cases at least, IFAs have been drawn up on the back of such codes.

What the above provisions establish is a complex multi-level system of substantive references. Fundamental human and labour rights that are rooted in multilateral treaties are focused on MNCs and their value chains. These rights, however, only serve as a minimum platform, and — in line with a subsidiarity logic — leave considerable space to national and private provisions. With regard to an emerging basis for transnational collective bargaining, what is important is that many IFAs refer not only to national and industry minimum standards — provisions in line with the local job market, etc. — but also establish a link to national legislation and collective agreements. Thus, dealing with the regulatory void at (inter-)governmental level, IFAs affirm minimum standards and create a multi-level terrain of social and labour rights within MNCs and their value chains. The crucial point in this system, however, is that enforcement of those rights relies on union organization and capacity.

## Implementation and monitoring

In addition to the substantive issues included in IFAs, the procedural provisions are another area where bargaining-type aspects, for example in the sense of regular consultation and monitoring of the agreement, come through. In this section three aspects central to implementation and monitoring processes are distinguished: the actual institutions and practices for implementation and monitoring; the kinds of obliga-

tions that are put on subcontractors and suppliers; and the type of actors that are involved in these processes on the labour side.

Just under two thirds of IFAs are open-ended while the remainder are concluded for a fixed term of one to three years (only the Euradius, ISS, OTE and Telefónica agreements have a five-year duration, and the Umicore agreement was concluded for a four-year period). IFAs in the ICEM domain are very often renegotiable, IMF agreements are unlimited, and the IUF and UNI agreements are either open or for a long duration. Regarding the actual follow-up and implementation of agreements, however, the majority of IFAs foresee at least annual meetings (36) whereas the parties in Faber-Castell and Staedtler meet at least every other year, and Chiquita, Endesa, France Telecom and IKEA hold two meetings a year. A significant number (20), however, do not specify the frequency of meetings.

In the majority of cases, implementation takes place within some kind of joint forum (monitoring committee, reference group or review committee), while in other cases a procedure is established where problems are reported to the executive board or senior management (Hochtief, Ballast Nedam, Veidekke, Bosch and EADS). Further, IKEA deals with monitoring via its own compliance organization, and Daimler reserves a large role for its own corporate audit unit in this process. Despite these different routes and responsibilities in implementation and monitoring, unions do have the right to bring cases in all IFAs, and the responsibility of the signatory parties to solve differences over the interpretation of the IFA is recognized in many agreements (the Skanska-BWI IFA even allows for a jointly determined arbitration board whose decisions are binding). However, at least in some cases, it is codes of conduct that specify more extensive monitoring procedures than those contained in the MNC's framework agreement (for example H&M). A final interesting feature considered here is that in 18 out of 62 IFAs, the MNC commits to cover the costs of the monitoring process.<sup>5</sup>

Regarding the extension to the supply chain, again, there are a number of different concepts (table 4 in the appendix). In order to compare the different approaches taken in this area, a distinction is drawn

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<sup>5</sup> These MNCs are Arcelor, Club Med, EdF, Endesa, ENI, Falck, Impregilo, Lafarge, Lukoil, Nampak (except UNI delegates), National Australia Group, OTE, Portugal Telecom, Rhodia, Schwan-Stabilo, Staedtler, Veidekke and VolkerWessels.

between, first, the MNC committing to inform suppliers and the intention to influence them in the sense of the IFA; second, a stricter position that sees the respect of the IFA's provisions as a criterion for establishing and/or continuing business relations and that mentions some form of consequence in this respect; and third, an approach that makes supplier compliance with the IFA mandatory. According to such a rough classification, out of 62 IFAs, 10 fall into the first category, 23 into the second and 15 into the third (the remaining IFAs do not contain explicit supplier provisions).

Whereas the first category states simply that the company will “notify its subcontractors and licensees of this agreement and encourage compliance with the standards” (Statoil-ICEM), the middle way is a commitment by MNCs to encourage their suppliers to adopt similar principles and standards, which is regarded as a favourable basis for future business relations. What will in practice be more important is that the continuing violation of fundamental rights is seen, in the last instance, as reason to terminate business relations and/or contracts.

The IFA with Renault takes a more selective line when it treats its health and safety provisions as a selection criterion for suppliers, and makes compliance with ILO Conventions No. 29, No. 105, and No. 138 mandatory. The agreements with EdF and Rhodia also require strict compliance with health and safety standards. Finally, there is a set of IFAs, in the BWI domain particularly, that make compliance compulsory along the entire value chain. The Ballast Nedam-BWI agreement (Ballast Nedam and IFBWW, 2002) for example states:

Ballast Nedam requires that its contractual partners shall support this agreement and shall also ensure that it is adhered to by any of their contractual partners who are in any way active in connection with the business activities of Ballast Nedam.

The Veidekke-BWI agreement (Veidekke and IFBWW, 2005) not only extends fundamental labour rights down the supply chain but also the provisions regarding wages:

Veidekke will use its fullest influence in order to secure compliance with the principles set out in this agreement also with its contractors, subcontractors and suppliers. ... Employees at subcontractors and hiring agencies are to have conditions at least in line with the present wage agreement regulation.

Monitoring stretches from integration of the agreement into the internal corporate audit (Leoni and Daimler, for example) to being included in the work of a separate compliance organization (IKEA). MNCs at the end of buyer-driven commodity chains (Gereffi, 1999) find advantages in making the framework agreement part of the contractual obligations of suppliers and subcontractors, together with a host of other obligations. Indeed, a cluster of MNCs imposes concrete obligations on their suppliers and, to some extent, has established a complicated governance structure for monitoring social and labour rights.

Particularly with regard to the transnational dimension of IFAs but also with regard to their focus on fundamental human and labour rights, the representation and involvement of the global workforce constitute important issues. For the time being, the home-country labour movement plays a central role in the monitoring processes, an aspect that is probably as much to do with the institutional platform for industrial relations that exists in the home country, as well as the often weaker trade union capacity in MNCs' foreign operations. Of the 62 IFAs surveyed here, 30 hold a monitoring role for the home-country trade union(s) or employee body (24 mention only those national actors in addition to the GUF), and 15 involve the EWC (10 mention only the EWC next to the GUF). In Arcelor, Daimler, Falck, France Telecom, PSA Peugeot Citroën, Renault, SKF and Volkswagen, the follow-up and monitoring of the IFA on the labour side are entrusted to a global body (sometimes an enlarged EWC) or world works council. This central role of EWCs is very much a specificity of IFAs in the IMF domain (although there has been debate about representation via EWCs — see IMF, 2006).

The emergence of such questions of representation and the division of labour within the international labour movement is a logical consequence of the extension of transnational industrial relations. This is complicated by the “dual face” of IFAs, namely the fact that they are directed at the MNC at the same time as they are directed at the value chain. Thus, the substantive as well as the procedural elements tend to be directed at established institutions of industrial relations in lead firms, which are linked to their suppliers via highly interdependent industrial-relations forms of coordination, and operate in the formal labour market. This does not mean that IFAs cannot be useful in a buyer-driven context — indeed they are, with some strategic adaptations to the particular challenges. The initial problem is to negotiate IFAs in the first place (Miller, this volume; 2004). The conclusions aim to elaborate on this context in more detail.

## Conclusions: The challenge of buyer-driven value chains for IFAs

It was argued earlier that IFAs constitute an important step in the development of international industrial relations. They recognize a range of trade union bodies as bargaining partners, and establish a terrain of minimum substantive and procedural issues that are open for negotiation — a terrain that has expanded considerably in the last few years. IFAs have moved beyond corporate codes of conduct and represent a clear advance on unilateral declarations of intent on social and labour issues. IFAs do not necessarily stop with information and consultation but, both in substantive and procedural terms, contain important “bargaining” elements and create links to more institutionalized industrial relations at national and regional level (on this matter, see also Schömann et al., 2007; Bourque, 2005).

At the same time, the proliferation of IFAs has not only happened under international-level leadership but has gained recognition at the national level. Apart from the increasing integration of national actors as signatories and parties in the implementation and monitoring process, national trade unions have also led debates and engaged with key issues of such agreements (Rüb, 2004; Descolonges, 2006). It remains to be seen whether such engagement is translated into transnational campaigns and sustained workplace capacity, and what forms of internationalism and spatial solidarities develop. Equally, there is an interesting emerging “grey area” of transnational agreements that are not conventionally referred to as IFAs (for example, the agreements signed by EWCs and without the participation of global union federations with Air France, CSA Czech Airlines, Ford Europe, General Motors Europe, Suez, Triumph International, and Vivendi/Veolia; see *EWCB 2004*; see also the agreements collected by the European Commission [Pichot, 2006]).

In terms of global production structures, IFAs are mainly geared towards MNCs’ global operations, and probably MNCs’ main suppliers. Furthermore, IFAs’ substantive and procedural provisions in fact presuppose workplace organization throughout the chain. As said above, the dilemma resulting from buyer-driven value chains that are largely coordinated via market-based mechanisms is not only that implementation and monitoring require workplace organization but also that the key agents are situated outside the realm of production. In MNCs in producer-driven value chains, it is strong home-country unions and works

councils — at world or European level — that lead representation and are well integrated in the implementation and monitoring of an IFA.

In a buyer-driven context, the lead MNC has often dissociated itself from the workplace, an environment where union organization and capacity tend to be weak. Thus, whereas organizing might more easily be concentrated on the MNC in the producer-driven context, it has to focus on the value chain in a buyer-driven environment (see also Anner et al., 2006 on the determinants of transnational labour cooperation). Equally, the key role taken by world works councils and EWCs in the first case suggests that the representation of international labour has shifted to the company level,<sup>6</sup> whereas the networking and campaigning function of international and national trade unions continues to be crucial in the second case. This is one major factor that accounts for the different “styles” that global union federations adopt for their respective IFAs. Although this contrast might not exist in the same pronounced way, it still raises a number of political and strategic questions about forms of representation and the bridging of sectoral and spatial divides in the labour movement.

In the face of the challenges of buyer-driven value chains, we can identify three interesting developments. First, IFAs are a far from static tool; their actual significance is not on the paper but in the strategic use of the paper. And it is these practices that point towards their use in organizing. For example, in addition to the early case studies by Wills (2002a), Riisgaard (2005) and Lismoen and Løken (2001), global unions increasingly report on and evaluate the uses of IFAs. For UNI for example, Medland (2006) reports that its Brazilian affiliate Sintetel managed to organize Telefónica’s call centre business and that the CWA organized in Puerto Rico against strong initial resistance; in Chile it helped to get Telefónica back to negotiate and reduce layoffs (see Royle and Ortiz 2006 for the Carrefour-UNI agreement in Spain).<sup>7</sup> This is underlined by the IUF’s emphasis on union recognition as a key element of IFAs (Oswald, 2006).

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<sup>6</sup> Within the IMF (2006), framework agreements helped to solve disputes about collective bargaining and representation rights (these episodes even resulted in the MNCs terminating the contract with the supplier).

<sup>7</sup> Despite these successes, some intellectual and political caution is in order here: organizing clearly is a complex social process to which anecdotes of good IFA practice do not do justice; equally, in hindsight, it is difficult to establish what could have been possible without an IFA.

Second, multi-stakeholder standards can be interesting instruments, particularly in the context of buyer-driven value chains, in so far as their increasing emphasis on process standards (Nadvi and Wältring, 2004) could bridge the gap between the sphere of production and that of consumption. Furthermore, the development, implementation and monitoring of multi-stakeholder standards also require alliances with actors outside the workplace. Such alliances are not always straightforward or without problems; however, there might be some overlap with more networked and community-based forms of trade unionism that were advocated by Wills (2002b; see also Hale and Wills, 2005).

A third line of dealing with the shifts in global production structures is to refocus the emphasis from enterprise-level and sectoral approach to one that centres on the cross-sectoral dimension of global value chains. The differentiation of scale, sector and space points to the dimensions and challenges of globally dispersed production for social dialogue and the labour movement. A central implication of the global organization of production lies in the strategic role of logistics and supply chain management as well as the employees in these areas. The articulation of trade union strategies along global value chains probably has to be seen as a minimum, whereas more substantive advances might be gained from a cross-sectoral approach which also integrates workers in the transport and logistics areas. Such initiatives, at the same time, need not be restricted to coalitions for the duration of particular campaigns. Bonacich (2003) for example, has put forward the suggestion of global supply chain councils, similar to world works councils (see also Fichter and Sydow, 2002 for strategies oriented at global value chains). Such an articulation of scale, sector and space will be even more challenging when current observations of a shift towards buyer-driven arrangements in value chains continue; and it remains to be seen whether regional, or indeed global, networks can establish meaningful forms of cooperation and solidarities.

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## Part 3 Legal dimensions

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# Chapter 5

## Legal dimensions of international framework agreements in the field of corporate social responsibility

*André Sobczak*<sup>1</sup>

### Introduction

Since 2000, an increasing number of international framework agreements (IFAs) have been negotiated in the field of corporate social responsibility (CSR) between multinational companies — mainly those having headquarters Europe — and international trade union federations (ITUFs).<sup>2</sup> The development of this form of regulation, aiming to define labour standards for a company's workers, its subsidiaries and sometimes its subcontractors, is facilitated by two converging elements. On the one hand, companies intend to increase the legitimacy and credibility of their strategies in the realm of CSR by transforming their unilateral commitments into negotiated texts and strategies. On the other, trade unions recognize that such negotiated strategies may complement the existing national and international instruments of social regulation, instruments that are inadequate to overcome the challenges of globalization (Sobczak, 2006).

IFAs differ from other CSR instruments, particularly from codes of conduct adopted unilaterally by the management of a company (Sobczak,

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<sup>1</sup> Audencia Nantes School of Management, Centre for Global Responsibility. An earlier draft of this chapter was published in *Relations Industrielles / Industrial Relations*, 2007, Vol. 62, No. 3, 466-491.

<sup>2</sup> For a historical approach, see Descolonges (2006).

2002a). Such codes suffer from a lack of legitimacy in continental Europe where national labour laws have always aimed at limiting the unilateral powers of the employer (Supiot, 1989) and have favoured regulation either imposed by public authorities or negotiated between the social partners. Furthermore, codes of conduct often have a limited content and do not always refer to the International Labour Organization (ILO), instead concentrating on issues that have a high impact in the media, such as child labour (Gordon and Miyake, 1999). Finally, these codes do not always pay enough attention to their implementation, and are thus often considered as “window-dressing”, and seen as part of the companies’ public relations strategies.

IFAs seem to be a more legitimate form of social regulation than other CSR instruments and provide a better guarantee of effectiveness. They generally have a more comprehensive and precise content and contain detailed provisions on monitoring and implementation. Emerging from social dialogue, they conform to the European social model (Daugareilh, 2006). This is highlighted by the fact that companies that have signed IFAs almost exclusively have their headquarters in the European Union (EU).

However, IFAs are at odds with the different legal categories of labour law at national and international levels. They correspond to a new form of social regulation created by the social partners without a precise legal framework, thus leaving open many questions as to their legal nature and impact. Nevertheless, the lack of a specific legal framework does not mean that these texts exist independently from the national and international legal environment. That environment necessarily has an impact on the legal nature of IFAs and should not be ignored by the social partners.

An in-depth analysis of the different legal aspects of IFAs is thus useful not only for the social partners that have signed these texts or plan to do so, but also for international organizations that may have a role to play in the development of a legal framework for IFAs, and more generally for transnational collective bargaining. The present chapter provides such an analysis, and in three main sections deals with the questions raised by the powers of IFA signatories; with the scope of these texts; and with their legal value.

## Powers of signatories

The legal nature of a standard depends on the powers conferred on its authors, in particular if the norm aims at defining rules of conduct applying to third parties. Given the lack of a legal framework in the field of transnational collective bargaining, no power has been explicitly conferred by labour law on any actor. Consequently, those who want to adopt IFAs have to invent new solutions.

### Signatories — employers

On the employers' side, one or more representatives of the holding company signs the IFA, even if the negotiations may in some cases also involve managers from different subsidiaries of the group.<sup>3</sup> This solution may reflect the reality of economic powers within the group, but from a legal point of view it constitutes a problem, because each of the subsidiaries has its own legal personality, even if it is highly integrated in the group. There is indeed a divorce between the holding company's control over an economic activity within the group and its lack of legal liability for the social consequences of this activity (Del Cont, 1997; Rorive, 2004). This makes it impossible to consider the holding company as the employer of the workers in the subsidiaries (Supiot, 1985), and means that the holding company may not conclude collective agreements that bind the subsidiaries. This problem is even greater if the IFA defines rules for subcontractors and suppliers, whose own legal personality excludes the possibility of the company negotiating for them.

To allow companies to conclude IFAs for their subsidiaries and subcontractors, they need to receive a mandate to negotiate legally binding commitments. The Directive of 22 September 1994 on European Works Councils uses this legal technique (European Council, 1994). For groups within the EU, the Directive imposes the obligation on the holding company of opening negotiations on information and consultation across the whole group. However, the mandate to negotiate is explicitly conferred by the Directive. Furthermore, an agreement to establish a European works council (EWC) only creates obligations for the holding company, not for the subsidiaries.

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<sup>3</sup> As with Electricité de France (EDF), for example.

IFAs, though, contain standards that have to be applied by the subsidiaries, even if the holding company can be taken to guarantee compliance with the agreement's standards. Consequently, an explicit mandate conferred on the holding company by specific legislation would clarify the legal value of IFAs and explain why the holding company has a certain responsibility for making sure that the texts are followed.

Yet given the lack of an explicit mandate, one might think that the group's subsidiaries confer an implicit mandate on the holding company to negotiate an IFA. However, the legal value of such a mandate would be insubstantial. It also seems difficult to apply this reasoning to subsidiaries joining the group after the IFA has been signed. Finally, the idea of an implicit mandate seems to be difficult to transpose to subcontractors, whose economic links with the company are weaker than those of subsidiaries. It would therefore probably be better to encourage subsidiaries and subcontractors to abide by the IFA. In an increasing number of cases, this approach is included in contracts between companies and their subcontractors.

The choice of signatory on the employers' side has an impact on the legal value of the IFA. The most frequent choice, namely the chief executive officer (CEO) of the holding company, does not seem to create any insoluble legal problems. Moreover, that the CEO signs is in line with the aim of IFAs, which is to confer responsibilities for workers on the holding company rather than on the direct employer (which would be the subsidiary entity). Subsidiaries are already governed by national labour laws in respect of their workers' rights; the IFA plays a different role in labour protection.

Turning to the choice of signatory on the workers' side, matters may be more complicated.

### Signatories — workers

On the workers' side, it cannot be accepted that workers' representatives in the holding company negotiate IFAs on behalf of workers in all subsidiaries and all subcontractors. This would not only undermine the principle of the subsidiaries' and subcontractors' legal personality, but also involve lack of representation. It would indeed be conceptually problematic that workers' representatives in a particular company in only one country could legitimately represent the interests of workers of subsidiaries globally or even of those in subcontractors. The idea of a legal mandate as used for employers may not be transposed for workers' representatives.

Given the lack of a legal framework, the social partners have had to invent and test new solutions. Different actors representing workers have signed existing IFAs. All IFAs mentioned above have been signed by an ITUF, but some of them have been co-signed by the company's EWC or by national trade unions.

### ***IFAs signed by international trade union federations***

All IFAs are signed by one or more ITUFs organized at sector level. Signing at this level avoids two main obstacles facing transnational collective bargaining at company level. First, it excludes the debates on the legal personality of subsidiaries and subcontractors. The sector-level trade union federation is intended to represent workers in all companies worldwide, the only criterion being that the companies with whom it signs an IFA belong to the relevant economic sector. Second, it avoids conflicts between the different national laws that define both the legitimate workers' representatives as well as the procedures for collective bargaining. This process seems coherent with the aim of establishing social norms at transnational level to choose an actor situated at same international level as the company.

However, neither national, European nor international labour law norms confer on ITUFs the power to negotiate collective agreements. Some national trade unions may not want to grant such a role to international federations, whose role they see only as coordinators of national federations' work. This explains why, before signing an IFA, ITUFs usually consult national unions, at least those of the country in which the holding company is headquartered.

An ITUF signing an IFA creates a problem of asymmetry between the two sides in the bargaining process. Whereas workers' representatives are organized at sector level, their partner is an individual group of companies and not a sector-level employers' association. This asymmetry contrasts with the existing legal categories in labour law, which distinguish between sectoral agreements and company agreements. It may thus represent a further obstacle to the recognition of IFAs as collective agreements as they exist at national level.

### ***IFAs signed by European works councils***

As of December 2006, 12 of the 49 existing IFAs were co-signed by ITUFs and the EWC of the relevant company. More and more companies are opting for this approach, in some sectors more than others. For example, almost all IFAs signed by the International Metalworkers

Federation (IMF) are co-signed with the company's EWC. In addition, the negotiation process in several companies was started within the EWC, even if the EWC did not ultimately sign the agreement. In other cases, the EWC has a role in implementing and monitoring the IFA. This highlights the fact that the EWC is increasingly perceived by management as a legitimate — or even the natural — discussion partner for companies headquartered in the EU.

Contrary to negotiations with the ITUF, talks conducted between the company and its EWC do not create an asymmetry in levels of representation. Negotiating with the EWC further allows the IFA negotiations to more easily take into account the specific issues of the company and to establish permanent relations between the signatory parties, which may be more difficult with an international federation whose scope of activities is much broader.

There are of course weaknesses when IFAs are signed by EWCs. From a legal viewpoint, this action is a problem in that the Directive has not granted bargaining powers to the EWC, but has limited its powers to information and consultation (European Council, 1994). This is because the transposition of the Directive into national laws does not prescribe that members of the EWC be trade union representatives, whereas collective bargaining in many EU Member States is the exclusive domain of trade unions. If the EWC is to have the power to conclude collective agreements, its composition will probably have to change in order to ensure that only trade union representatives can be appointed to it.

Another problem is that the EWC does not represent the workers of subsidiaries from non-EU countries, even if some companies have decided to transform their EWC into an international council for information and consultation. Furthermore, workers of subcontractors are not represented by any company's EWC.

When analysing these weaknesses, one must nevertheless take into account that EWCs are not the only signatories on the workers' side: EWCs co-sign with an ITUF. Combining the legitimacy of both forms of workers' representation seems to be a pragmatic solution, even if, legally, the status of the IFA remains unmodified because it is signed by two parties that have no legal power to sign such a document.

### ***IFAs signed by national trade unions***

As of December 2006, 22 out of the 49 IFAs were co-signed by ITUFs and the national trade unions of the country where the holding

company was headquartered. This option is used particularly in IFAs negotiated by the International Federation of Building and Wood Workers (IFBWW) and by the International Federation of Chemical, Energy, Mine and General Workers' Unions (ICEM). In three cases, IFAs were even signed by the three possible forms of workers' representation — one or more ITUFs, the EWC, and one or more national trade unions.

When a national trade union signs the IFA, it changes it into a national collective agreement in the country in which the holding company has its headquarters, provided that the national rules are followed. Nevertheless, it is unlikely that such an agreement will be regarded as a collective agreement in other countries because national rules differ greatly. Principles of international private law also have to be taken into account.

Two IFAs have been negotiated according to an innovative procedure that includes representatives of national unions from all countries where the company has subsidiaries. This approach favours effective implementation of the IFA based on local social dialogue. It reflects the principle of subsidiarity: the IFA defines the fundamental social rights that apply to the whole group, and stimulates decentralized negotiations. This procedure seems to be particularly suitable for subcontracting networks because it creates a balance between harmonization among countries and consideration of different national contexts.

## Content

It is useful to analyse the scope of IFAs to see how much they constitute a new form of social regulation adapted to company transformations in an era of globalization. Globalization is challenging national labour laws that are embedded in national contexts and that have often remained undisturbed by the economic links among companies in a group or in a subcontracting network.

### Scope of application

To evaluate the impact of a legal norm, it is essential to define its scope of application. This is especially true in the field of social regulation where many different norms are already operating (Sciarra, 1995). CSR norms have to go beyond legislation and collective agreements.<sup>4</sup>

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<sup>4</sup> This is the definition of CSR by the European Union (European Commission, 2002).

Most IFAs do not increase the social rights to which a holding company's workers are entitled under national labour law. However, they are of interest for workers in subsidiaries and subcontractors because the holding company recognizes its responsibility towards these workers to respect the social norms included in the IFA.

Most IFAs state that the norms they contain apply to the whole group. However, very few of them define what "the group" is. This is also a weakness in most national laws, as the definition of groups there remains very vague (Hopt, 1982; Sugarman and Teubner, 1990). At best, the group is a functional notion, the definition of which varies according to the field concerned. In the absence of any IFA definition, the group is defined by the national law of the holding company. However, it is always possible that another country's court will apply another definition. IFAs should, therefore, clearly define what constitutes the group. Among agreements with such a definition, most refer to subsidiaries in which the holding company holds the majority of the capital or voting rights.

In a similar way, only a few IFAs deal with changes in the company's structure. Certainly, an agreement will apply to companies that join the group after the IFA has been signed, even if only after a certain transition period. Yet the case of subsidiaries that are sold by the group may be more complicated. Of course, it seems hard to believe that the IFA will continue to have an impact after the subsidiary has left the group. But does not CSR imply that the holding company maintains IFA-based social guarantees when it sells a subsidiary?

About 80 per cent of IFAs refer to relations with the company's subcontractors. However, many IFAs only encourage subcontractors to respect the IFA, or parts of it, and do not contain precise obligations. In this field, too, a definition of "subcontractors" seems necessary, since the term covers very different realities. A distinction must be made between subcontractors that work regularly in the company's factories, and others.<sup>5</sup> The power of the company and its social responsibility is of course higher for the former category. If the subcontractor is heavily dependent on the company, the company's social responsibility is greater than when the subcontractor has developed specific skills, which allow for significant autonomy. Consequently, a precise definition of subcontractors would be useful.

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<sup>5</sup> This distinction is used in the IFA negotiated at Arcelor in 2005.

Only 30 per cent of IFAs state that complying with their norms is a condition for selecting and then keeping the subcontractor as a company partner. Of course, approaches based on a cancellation of the contract with the subcontractor risk having a negative impact on the subcontractor's workers, and incentives-based approaches should be preferred. However, this supposes concrete actions, and possibly even training.

### Rights conferred

In comparison to unilateral codes of conduct, IFAs have much more precise content. IFAs systematically include the four fundamental labour rights of prohibition of forced labour, of child labour, and of discrimination; and recognition of freedom of association. Indeed, in many codes of conduct freedom of association is not the focus (OECD, 1999).

In addition, almost all IFAs refer to ILO Conventions to define the social standards that they contain rather than to adopt specific standards whose legitimacy may be questioned. Any reference to ILO Conventions in an IFA signed by a holding company represents progress because (a) the company makes a commitment to apply these Conventions not only to its own workers but also to those of its subsidiaries (or even those of its subcontractors and suppliers) and (b) Conventions only impose obligations on States that have ratified them, and not on companies. The ILO has also adopted a Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, adopted in 1977 and revised in 2000, which is directed at companies, but this declaration emphasizes its voluntary nature (ILO, 2001).

For the same reason, even IFAs' reference to national laws and collective agreements has its uses. In many States, the public authorities do not sufficiently monitor compliance with labour law, and even if social norms are legally binding, they are not necessarily effective. So, when IFAs refer to compliance with national legislation, effectiveness of such compliance may be enhanced if IFAs outline procedures for monitoring and implementation.

Finally, IFAs contain norms that go beyond the field of labour law to include new issues linked to living conditions of workers, their families and other citizens influenced by the company's activities. An increasing number of IFAs include policies to fight AIDS (17 per cent). As IFAs are embedded in the CSR strategies of the company, they also often deal

with environmental protection (49 per cent). Even if the legitimacy and the expertise of workers' representatives may be questioned in this field, the link between social and environmental issues provides an interesting perspective and offers an opportunity for trade unions in a domain that has for a long time been left to nongovernmental organizations (NGOs) (Sobczak, 2006).

### Monitoring procedures

Unlike many codes of conduct and many labour law norms, IFAs often contain very precise provisions for how they should be implemented in subsidiaries or even subcontractors. Labour law norms suffer in many cases from a lack of effective implementation, particularly in certain States that cannot, or do not want to, organize an effective monitoring system. Most States have formally ratified ILO Conventions on the fundamental social rights and many States have also very precise social legislation in line with ILO standards, for example on health and safety. However, these legally compulsory norms are not necessarily effective.

The added value of IFAs is not only to reaffirm these social rights but also to organize a monitoring process that aims to make them effective. Almost all IFAs state that they will be disseminated among the whole workforce in all subsidiaries. Of course, the first condition for norms aimed at protecting workers to be effective is that workers know what they contain, but they do not always know the content of codes of conduct or even of national labour laws. IFA dissemination presupposes a pedagogical approach that cannot be limited to posters in the workplace, especially in countries where illiteracy rates are high. An interesting approach is to recognize the role of national and local trade unions in the dissemination process because it allows the unions to show the workers the impact of transnational collective bargaining.

Several IFAs define special procedures allowing workers to complain if the rights conferred by the agreement are not respected. Usually, workers (or their local representatives) are initially invited to meet local management. If the problem cannot be solved, the workers or union can contact the national trade union, which will discuss the issue with the national headquarters of the company. If the problem still cannot be resolved, the signatories of the IFA will deal with the issue. The main advantage is that such a procedure will favour the "appropriation" (or "ownership") of the agreement by managers and workers' representatives

at all levels of the company, thus reinforcing the chances that the agreement will be effective.

Almost all IFAs establish regular monitoring either by the EWC or by a special committee of the signatories. At least one annual meeting is usually held between the management and workers' representatives on the actions that they have adopted and the difficulties that they have faced. The meeting can sometimes be used to define indicators in order to evaluate the impact of the agreement. Very few IFAs explicitly mention inviting NGOs to these meetings. (Such invitations might well mark the first step from a bilateral *social* dialogue to a trilateral civil dialogue.)

The signatories can amend the initial text during the annual meeting; several IFAs explicitly allow this. No problem will arise if all signatories agree to the amendment, but lack of consensus may cause a legal problem. In any case, each of the signatories is permitted to unilaterally cancel the agreement. Such a cancellation should have no practical impact if only one of the representatives on the workers' side cancels the IFA, and the management and at least one of the different workers' representatives continue to support the agreement.

## Legal value

Given their lack of a specific legal framework, IFAs are often considered to be “soft law”, that is, no breach can be taken to the courts (for example, Hepple, 2002, p. 241). In this way, the argument runs, IFAs differ from legislative standards and collective agreements since these instruments have legal effect in most of Europe. Yet this analysis can be challenged for two reasons. First, the legally binding character of a standard constitutes no guarantee of effective implementation (Lascoumes and Serverin, 1986; Hepple, 2005, p. 66). Beyond the legal value, the social partners' collective “ownership” of the norm should also be considered. The involvement of workers' representatives in drawing up and monitoring IFAs may contribute to their — and workers' — ownership. Consequently, IFAs may be no less effective than other social norms. Second, examples in other fields show that courts may recognize the legal effect of IFAs.

## Legal nature

IFAs are not an existing legal category, and may not be considered the same as collective agreements as they are defined in national labour

law. But that does not mean that IFAs have no legal value. (For an analysis of the legal nature of new types of norms, see Teubner, 1997.)

A first means of giving legal effect to IFAs is by integrating them in other legally binding norms. Many companies include their IFA in contracts with their subcontractors. The company can also refer to the IFA in collective agreements made in each country or in each subsidiary, which would reinforce local actors' collective ownership. This would give the IFA the legal effects of a collective agreement according to national labour law. This would have the advantage of increasing legal certainty.

The courts may also recognize the legal effects of an IFA even when it is not incorporated into another legal obligation. The court may use the idea of "customary rules" that come to engender legal effects if the agreement has been applied over a certain time period. In many national labour laws, customary rules guarantee to workers that social advantages cannot be withdrawn unless a certain procedure is followed.

Courts may also rely on the concept of "unilateral commitments". This notion is used in consumer law, for example in the field of misleading advertising (Sobczak, 2004). A company would be sanctioned if it had used the IFA in its communication policy towards consumers and then failed to respect its content. This idea was the basis for the decision of the Supreme Court of California in the *Kasky v Nike Case* of May 2001, because the company had affirmed in communications towards clients that information in the media on child labour in some factories of Nike's suppliers was false (Sobczak, 2002b).

Choosing misleading advertising as the basis to sanction non-compliance with an IFA creates a shift from labour law to consumer law, which has more than legal ramifications. First, the persons who are protected by the law and who may go to court are not the workers whose rights are infringed but the consumers who have bought a good (or service) while believing in the company's social responsibility. This transforms the workers into objects of regulation whereas the underlying idea of IFAs is to empower them as actors of social regulation. Furthermore, a shift from labour law to consumer law risks introducing a distinction in regulations between the sectors and companies concerned and between the rights conferred, in so far as the consumers have to consider the issue sufficiently important to go to court. Here again, this goes against the spirit of IFAs, which aim to protect workers in all kinds of multinational

companies and to guarantee all fundamental social rights, not just the most media-sensitive ones.

Consequently, choosing consumer law and unilateral commitments as the basis for the legal value of IFAs would seem unsound. It would be better to develop a legal framework for transnational collective bargaining, at the level of companies and groups, which would rely on the experience of IFAs. Such a solution would allow the dynamics created by IFAs, with regard to their scope of application and their monitoring processes, to be used effectively, and would allow the courts to impose penalties if IFAs were not followed.

### Towards a legal framework

IFAs are a new form of social regulation in the era of globalization and global supply chains. They allow recognition of a company's social responsibility for its subsidiaries' and subcontractors' activities as well as the involvement of workers' representatives in defining and implementing them. IFAs contribute to the social partners' collective ownership of these social norms and thus to their greater effectiveness. It is even possible to see in them a certain legal nature, which should increase the attention they receive.

However, IFAs continue to leave many legal questions open, leading to mistrust by the social partners and undermining their potential. The lack of legal certainty is a problem for trade unions, for which giving support to companies' CSR strategies is new and represents an important challenge (Sobczak, 2006). It is essential for trade unions to be able to show that their support contributes to the creation of concrete advantages for their workers at a local level and that non-compliance with IFAs may lead to penalties. Otherwise, trade unions may be seen as being used in companies' marketing strategies.

The lack of legal certainty is also a problem for companies. A company that has signed an IFA may fear adverse court decisions if an action is brought against it because one (or more) of its subsidiaries or subcontractors has failed to abide by the IFA, even if the company itself has attempted to use its economic powers to force it to conform to the principles in the agreement. It is important for companies to evaluate the legal risk of signing an IFA. It is also essential that companies that sign an IFA and fail to follow it are sanctioned, to avoid discrediting all IFAs.

To guarantee greater legal certainty than at present, a legal framework for transnational collective bargaining is necessary. Ideally, it should be adopted at international level, but Europe-wide may constitute a first step and this seems more attainable in the medium term. The European Commission's Social Agenda 2005-2010 gives, as one of its aims, the adoption of an optional legal framework for transnational collective bargaining, and a report by a group of labour lawyers appointed by the Commission has drafted its main elements (Ales et al., 2006).

A legal framework for IFAs may only be optional, the social partners being free to choose its rules and to benefit from the security it offers or to continue to negotiate without one. It is indeed crucial not to limit the dynamics created by IFAs — and more generally by CSR norms — by a legal framework imposed in a general and uniform manner. IFAs prove that the lack of a legal framework can favour the emergence of interesting new forms of social regulation. But it is necessary to offer, both to companies and to workers' representatives wanting to go beyond a voluntary commitment, a framework that defines the legal nature of the IFA. The social partners would thus have to state explicitly their willingness to benefit from this optional framework — an “opt-in” clause. If not, the current “rules” would continue to apply to their agreement.

Such an optional framework should name the legitimate negotiators on both the employers' and workers' sides. It seems particularly important to set out the roles of ITUFs at sectoral level, of subsidiaries' national trade unions and of the EWC during the negotiation and the implementation of the texts. This instrument might also impose on the social partners a certain minimum content as well as provisions for the scope of application and for the monitoring process, while leaving the social partners a wide margin of freedom as to defining the scope and the forms that monitoring is to take.

Finally, the framework should define the legal value and impact of IFAs. The best solution would probably be to make it mandatory for the IFA to be transposed into legal texts in each country where the company has subsidiaries or even internally within each subsidiary, whether through unilateral management decisions or through collective agreements. The legal value of those texts would change according to national labour law, but this approach would avoid problems associated with determining which legislation to apply, because the text of the IFA would exist in each country and have a clear legal value under each country's law.

EU adoption of such an optional legal framework for transnational collective bargaining and IFAs would solve many of the current legal problems created by IFAs. Such a move may therefore favour the future development of IFAs, as well as that of transnational collective bargaining in general.

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## Chapter 6

# Implementation and monitoring of cross-border agreements: The potential role of cross-border collective industrial action

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### Introduction

The present chapter examines the potential role of cross-border collective industrial action in ensuring effective implementation and monitoring of cross-border agreements at European level, including international framework agreements (IFAs). We focus on the evolution of the debate on cross-border social dialogue and industrial action from a legal viewpoint, and in particular, on two relevant cases recently decided in the European Court of Justice (ECJ), namely Case C-438/05: *Viking* (ECJ, 2007a) and Case C-341/05: *Laval* (ECJ, 2007b). These cases have the potential to proclaim that trade unions in a European single market are free to undertake cross-border collective action, with obvious consequences for improving the implementation prospects of cross-border agreements.

The chapter is structured as follows. The first section places the issue of cross-border collective industrial action in the European Union (EU) area in context. It examines the framework within which the European cross-border social dialogue operates today, and how this framework

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was developed. The second section examines the follow-up action to the European Commission's Social Agenda 2005-2010 regarding the issue of transnational collective bargaining. The following section analyses the context within which collective action might take place in the framework of the European single market, and the fourth section the legal dimension of transnational collective industrial action and free movement in the EU context. The role of the EU Charter as a legal basis for cross-border industrial action is then analysed. The sixth section examines the ECJ's caution vis-à-vis the integration of the Charter in the Community's legal order. The conclusions refer to the ECJ's use of the Charter in the cases of *Laval* and *Viking* and the implications for transnational industrial action.

## Cross-border social dialogue in the European Union

An analysis of the implementation and monitoring of cross-border agreements requires an understanding of the *dynamic* of the process of cross-border social dialogue and its outcomes, namely cross-border agreements. In this respect, the experience of the EU may be instructive. The focus of this chapter is on what may emerge as a key element in this dynamic, namely the potential role of cross-border collective industrial action.

The current state of the evolution of EU policies on labour regulation may be sought in the European Commission's Communication of 9 February 2005 on the Social Agenda (European Commission, 2005). What is striking is that there is not one single proposal for *new* legislation in the labour law field. If labour legislation is not foreseen up to 2010, what is?

While respecting the autonomy of the social partners, the Commission will continue *to promote the European social dialogue* at cross-industry and sectoral levels, especially by strengthening its logistic and technical support and by conducting consultations on the basis of Article 138 of the [EC Treaty] (European Union, 2002; emphasis added).

This focus on social dialogue is warranted because of all the proposals on the Social Agenda, the one that the European Commission explicitly commits to adopting is on transnational collective bargaining:

The Commission plans to adopt a proposal designed to make it possible for the social partners to formalise the nature and results of *transnational collective bargaining*. The existence of this resource is essential but its use will remain optional and will depend entirely on the will of the social partners (European Commission, 2005; emphasis added).

This commitment has to be seen in the context of the social dialogue as it has developed over 20 years, and particularly in the recent past.<sup>2</sup>

The development of the European social dialogue is illustrated by an early experience of failure, which nonetheless produced a success, namely the European Works Councils (EWC) Directive (European Council, 1994). The EU social partners came close to an agreement on establishing EWCs, but failed at the last moment.<sup>3</sup> The failure of the European social dialogue on EWCs led the dynamic Commission of the time to propose, and 11 Member States of the EU (excluding the United Kingdom) to adopt, the EWC Directive in 1994.

The catalyst for the European social dialogue, which eventually led to the EWC Directive, was the Hoover case of January 1993, which involved the closure of a factory in Dijon, France and its transfer to the United Kingdom (*EIRR*, 1993). Similarly, the closure of the Renault factory in Vilvoorde, Belgium in February 1997 led to a fresh Commission initiative on information and consultation of workers' representatives, following the refusal of the European employers' organizations to engage in social dialogue at all (Moreau, 1997; *EIRR*, 1998). The framework Directive 2002/14 on information and consultation emerged only in March 2002, after long and painful negotiations among the institutions (European Council, 2002).

This experience reveals two dynamics at work. First, in the short term, events can have a catalytic effect. However, waiting on events may not be the optimal dynamic of social dialogue. Second, the impact of catalysing events is subordinate to another, longer-term dynamic, namely "bargaining in the shadow of the law" (Bercusson, 1992). It has become

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<sup>2</sup> On 14 April 2005, the European Economic and Social Committee organized a conference in Brussels, "The 20th Anniversary of the European Social Dialogue". The author presented the introduction and conclusions to the opening session of this conference.

<sup>3</sup> The reasons for failure are disputed, though some commentators point to the role of the UK employers' organization, the Confederation of British Industry. This reflects the odd position that, while the UK as a Member State had opted out of the Social Protocol, the UK social partners continued to participate in the social dialogue.

clear that the willingness of the social partners to engage in social dialogue is dependent on the political balance of power in EU institutions. If the Commission takes initiatives, if Member States mobilize in Council and if Parliament is supportive, the social partners are confronted with the likelihood of regulation. A logical calculus of self-interest points to incentives to self-regulate via social dialogue.

This clearly explains the 31 October 1991 agreement that led to the Maastricht Protocol, which appears now in Articles 138-139 of the EC Treaty (Dølvik, 1997, Chapter 8). At that time, employers and unions at EU level, faced with the Netherlands' presidency's draft of the Maastricht Treaty (which proposed expansion of social and labour competences exercised through qualified majority voting), agreed on the alternative of labour regulation through social dialogue (Bercusson, 1996a).

However, this dynamic is fragile, as it depends on the political balance of power in the EU institutions. For instance, if the Commission does not push for social policy initiatives, if there are blocking minorities of Member States in the Council of Ministers, or if the Parliament is not supportive, then the likelihood of legislative regulation recedes. In these circumstances, employers particularly are unlikely to look to alternative forms of regulation voluntarily, unless they can be offered incentives.

This is the major difference between European social dialogue and social dialogue within the Member States of the EU. Unlike trade unions in Member States, the European Trade Union Confederation (ETUC) lacks the power to force employers to bargain. This has become increasingly evident. Employers will not agree to social dialogue, or, if they do, only on marginal issues, and then only if the results do not take the form of binding obligations. Employers provide many justifications for their actions, such as the need to maintain competitiveness, flexibility and deregulation. The outcome, however, is the impoverishment of European social dialogue.

## **Follow-up to the Commission's Social Agenda**

Following the Commission's Social Agenda 2005-2010 of February 2005, a group comprising labour law academics coordinated by Professor Edoardo Ales of the University of Cassino, Italy, prepared a legal study in response to a tender advertised by the Commission (Ales et al., 2006;

Hall, 2006, pp. 12-20).<sup>4</sup> This report proposes a directive that builds on the experience of EWCs to develop an optional framework for an EU transnational collective bargaining system within which transnational collective agreements with legally binding effect could be concluded. The optional framework would be activated by a number of different mechanisms, all of which however involve the *voluntary and joint* initiative of European trade unions and employers' organizations at sectoral or cross-industry level, sometimes triggered by a joint request from an EWC and the management of the relevant multinational enterprise (MNE).

The response of the European employers' organization, the Union of Industrial and Employers' Confederations of Europe (UNICE, now BusinessEurope), has been one of opposition to any new framework for transnational collective bargaining, even an optional one. The experience of EWCs to date is indicative of the problems.<sup>5</sup>

### The experience of European works councils

The recent data published by the European Trade Union Institute for Research, Education and Health and Safety (ETUI-REHS) calculates that there were 772 MNEs with EWCs in place as of June 2005. This is 35 per cent of the total of 2,204 MNEs covered by the Directive (Kerckhofs, 2006).<sup>6</sup> It appears that initiatives to establish an EWC have not been taken in the large majority (1,432 or 65 per cent) of the MNEs concerned. One conclusion that had already been drawn in early 2000 was that "the establishment of EWCs seems never to have gained momentum and their growth rate appears to have stabilised at a relatively low level" (Platzer et al., 2001, p. 91). Most agreements were made by favourably disposed managements who made "voluntary agreements" either before the Directive was adopted, or to beat the 22 September 1996 deadline for agreements to be made under Article 13 of the Directive, which pro-

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<sup>4</sup> The Commission has organized two study seminars on this theme. See also Bé (this volume).

<sup>5</sup> "The European Commission issued a first consultation document on the possible review of the European Works Councils (EWCs) Directive on 20 April 2004. In this, it asked the EU-level social partners how they believe the EWCs Directive, which dates from 1994, can best respond to the challenges of a changing economic and social environment... [In early 2005] the European Commission issued a communication dealing with industrial restructuring and EWCs, which constitutes the second formal consultation of the social partners on EWCs... During the second half of 2005, the social partners issued their responses to the communication. The ETUC has stated that it would like to see a legislative revision of the EWCs Directive... By contrast, UNICE neither wants the Commission to prepare further legislation on EWCs, nor to interfere with local-level decisions. There have been no further pronouncements on this from the Commission during the first six months of 2006" (*ETRR*, 1996, pp. 16-18).

<sup>6</sup> For a summary, see Hall (2006), pp. 4-6.

vided that such agreements were not subject to the requirements of the Directive.<sup>7</sup> Remaining managements appear not to be so favourably inclined. It is not only management resistance which explains the decline, even though one analysis does observe that:

... the employer side may erect hurdles to hamper the establishment of an EWC. There are instances of particularly uncooperative companies where the management takes early action to block or delay an EWC initiative: for example, by refusing employee representatives the requisite information on the company's international structure or by threatening to impose sanctions (Platzer et al., 2001, p. 97).

Additionally, Platzer et al. (2001) argue that "existing structures and cultures of industrial relations at national level are a key determining factor and may have a conducive or inhibitory effect". Considerable initiative, indeed competence and even courage is called for on the part of individual employees and representatives; hence, lack of protection for those taking the initiative is not to be underestimated as an inhibiting factor. Again, there are the possible negative effects on existing industrial relations, which may be sensitive when there are national as opposed to transnational priorities.

It is too early to draw definitive conclusions about the long-term effectiveness of EWCs as mechanisms for labour's influence on multinational capital. A 1999 survey of 71 agreements reached under Article 6 of the Directive showed that:

... virtually all Article 6 agreements explicitly define the EWC as an information and consultation body, yet most of them understand consultation merely to mean a 'dialogue' or an 'exchange of views' between the EWC and central management. Only 11 percent of Article 6 agreements describe the EWC's consultative function in more detail or actually empower it to negotiate. Indeed, 10 percent of agreements explicitly rule out a negotiating role (Carley and Marginson, 1999, cited in Platzer et al., 2001, p. 104).<sup>8</sup>

Reasons for the lack of enthusiasm on the part of workers and their representatives to establish EWCs may be found in a report based on

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<sup>7</sup> Of the EWCs in 2005, 56 per cent were established on the basis of voluntary Article 13 agreements; 44 per cent are based on Article 6 agreements reached under the Directive's statutory negotiating procedure. The ETUI-REHS study points out that the average number of new EWCs established since 2001 has been between 30 and 40, and at this rate it will take another 35 years to establish EWCs in all the companies covered by the Directive.

<sup>8</sup> However, for an account of the as yet rare practice of negotiating in EWCs, see the 26 examples of joint texts concluded by management and either an EWC or some other representatives in the context of an EWC, engaging 12 multinational companies (Carley, 2002).

41 case studies of the practical operation of EWCs in companies based in five countries (France, Germany, Italy, Sweden, and the United Kingdom) (Hall, 2005, p. 18). Experience was extremely diverse. For example, information provided to employees through EWCs could be the “bare minimum”, though in most cases employee representatives judged positively this information. But as regards consultation, most employee representatives stated that their involvement was at the point at which decisions were taken by management, or even after that. In the minority of cases where employees did exercise some influence, it was only over implementation issues, not the content of the decision. Employee representatives’ general view was that EWCs were weak and their expectations were low for potential influence.<sup>9</sup>

The problems of EWCs might be addressed through revision of the EWC Directive, aimed at: making the establishment of EWCs mandatory; elaborating the duties of information and consultation in order to reinforce a duty to engage in collective bargaining;<sup>10</sup> and strengthening sanctions in order to secure effective implementation of these obligations. However, there is little indication that the European Commission in its present form (December 2007) is inclined to take any such initiatives.

### The Commission’s Green Paper on modernizing labour law

The Commission’s Green Paper of November 2006 (European Commission, 2006a)<sup>11</sup> and its legislative programme for 2007 (European Commission, 2006b)<sup>12</sup> do not even mention cross-border social

<sup>9</sup> Although the overall view expressed by case studies’ interviewees was that “the advantages and benefits of EWCs far outweigh the disadvantages”, the report concluded that “the main objective of providing workers with a view in transnational corporate decision-making processes has been achieved only ‘in a minority of cases researched’.” (Hall, 2005, p. 20).

<sup>10</sup> See *Irmtraub Junk c. WolfgangKuhnel als Insolvenzverwalter uber das Vermogen der Firma AWO*, Case C-188/03, Opinion of Advocate General Tizzano, 30 September 2004, ECJ decision, 27 January 2005.

<sup>11</sup> This begins “The purpose of this Green Paper is to launch a public debate in the EU on how labour law can evolve the Lisbon Strategy’s objective of achieving sustainable growth with more and better jobs. ... As the Commission’s 2006 Annual Progress report on Growth and Jobs emphasizes: ‘Increasing the responsiveness of European labour markets is crucial to promoting economic activity and high productivity’.”

<sup>12</sup> Under the heading, “The Priorities for 2007”, the subheading: “Addressing the challenges of European society” states: “At the heart of aspirations of European citizens, in particular young Europeans, is the breaking down of barriers to the opportunities offered by the European labour markets. ‘Flexicurity’ has been acknowledged as a promising approach to marrying labour market flexibility and the development of skills with robust social protection. The Commission will put forward proposals to encourage common principles to stimulate *flexicurity*. The Commission is undertaking a *comprehensive stocktaking of European society*, to serve as a basis for a new agenda for access and solidarity and for European policy-making into the next decade. As part of this exercise, the Commission will present a mid-term review of the implementation of its Social Agenda with a view to taking stock of EU achievements in delivering more and better jobs and offering equal opportunities for all” (European Commission, 2006b, p. 6).

dialogue or transnational collective bargaining. The Green Paper addresses the challenge of modernizing labour law. At the end of the first section, the Commission states that it seeks:

To identify key challenges which have not yet yielded an adequate response and which reflect a clear deficit between the existing legal and contractual framework, on one hand, and the realities of the world of work on the other. *The focus is mainly on the personal scope of labour law rather than on issues of collective labour law* (emphasis added).

It is significant that the Barroso Commission in 2006 put forward a project to modernize labour law with a focus on the *personal scope* of labour law affecting individual employment rather than on collective labour law, given the centrality of collective organization to labour law's protection of workers in employment. The Green Paper has multiple references to collective agreements, but all are in the spirit of the role that collective agreements negotiated between the social partners can play in promoting a flexible individual employment agenda.

There is widespread recognition of the role that collective agreements can — and do — play in promoting this, and other, agendas. What is absent from the Green Paper is whether modernizing EU labour law requires intervention to *support and reinforce* the role of trade unions, collective bargaining and collective agreements, which are so important to the individual employment agenda. The circumstances in several Member States (such as anti-union employers, reduced coverage of collective agreements and declining trade union membership) reveal the clear need for EU intervention to support collective bargaining if the Commission wishes to promote its individual employment agenda.

A distinctive characteristic of the European social model is that it attributes a central role to social dialogue at the EU and national levels in the form of social partnership. It would be a radical deviation from the European social model for the Commission to modernize labour law by separating EU labour law on individual employment from EU collective labour law.

The fundamental problem, as to how to engage employers in effective cross-border social dialogue or transnational collective bargaining, remains. The Commission's sole specific proposal in its Social Agenda for 2005-2010, on transnational collective bargaining, has been abandoned. In a conference organized by the Commission on 27 November 2006, a survey conducted by the Directorate General Employment and Social

Affairs on transnational collective agreements was presented only to be harshly criticized by UNICE. The expert study proposing a directive was brusquely buried. Instead, it was announced that no regulatory initiative was in prospect and the Commission planned at most another communication (see Bé, this volume).

## **Context: Collective action in the European single market**

The EU, a transnational European economy, as in the national economies of the EU's Member States, requires a balance of economic power between employers and workers. In EU Member States, this balance is achieved in part through the collective action of trade unions and employers' organizations. The social partners at EU level have not achieved this balance.

EU law on free movement transforms the balance of economic power in the EU; the freedom of enterprises to move throughout the European single market has shifted the balance of economic power towards employers. This is particularly evident in the overwhelming economic power of MNEs, the magnitude of transnational capital movements, the social dumping effects of global trade, delocalization, unemployment and de-skilling.

The changing balance of economic power, together with competition over labour standards, weakens European economic integration in that national labour forces become opposed to economic integration. Of course, the ability to relocate operations increases integration from the perspective of big business. The dissatisfaction that results undermines support for the European political project. There are ominous signs of strain: rejection of the proposed Constitutional Treaty; disputes over the Services Directive; and resistance to further enlargement for fear of migration of labour from new Member States.

One response to the shift in the balance of economic power resulting from the growth of the transnational economy remains the trade unions' traditional defence of collective industrial action. A crucial element in maintaining a balance of economic power within Member States is the legal right to take collective action. National labour laws include the right to collective action: though legal systems differ, no Member State outlaws it.

Under the pressure of EU law, Member States have adapted their laws to the requirements of free movement in the single market. The EU law of the common market transformed national rules governing the free movement of goods, services, capital and workers. However, national laws have not yet adapted to trade unions' response in the form of transnational collective action, which impacts on the transnational economy; unlike national strikes, transnational solidarity strikes are not legal in all Member States.

Globalization of production chains means that collective action frequently has an impact beyond national borders. National rules on collective action are inadequate to regulate transnational collective action having an impact on the free movement of enterprises in the EU. A specific legal problem arises where national laws on collective action encounter EU law (and adapted national law) on free movement of goods, services, capital or workers.

The remainder of this chapter examines the role of (transnational) collective action in its traditional role as a dynamic mechanism to promote (cross-border) social dialogue, and its radical consequence in the potential emergence of transnational collective bargaining.

## **The law: Transnational collective industrial action and free movement in the European Union**

Collective action to promote transnational collective bargaining is also a mechanism to secure effective implementation and monitoring of cross-border agreements. One axiom of labour law is that the effectiveness of labour law rules is in inverse proportion to the distance between those who make the rules and those who are subjected to them. In other words, the greater the distance the less their effectiveness; the less the distance, the greater their effectiveness. The presumption is that rules originating from social partners engaged in collective bargaining, being closest to those subject to these rules (employers and workers), achieve a higher level of effectiveness. Conversely, those emerging from legislative or administrative processes, distant from employers and workers, will have relatively less efficacy. Whatever the national equilibrium among various mechanisms of labour law-making and enforcement (legislative, administrative, judicial), the argument is that those systems in which the social partners are more prominent in rule-making will be those in which

the effectiveness of labour law is greater. Having a stake in the standard-setting process promises well for the involvement of the social partners in the mechanisms of implementation and enforcement of national law, including their freedom to decide to take collective action to secure the standards to be agreed or enforced.

This axiom of social partner participation in standard setting and enforcement is about to be tested at EU level. Whether EU law allows for the social partners to take collective industrial action has been the subject of litigation in two cases referred to the ECJ at the end of 2005, namely the *Viking* case, referred by the English Court of Appeal (ECJ, 2005a; 2007a), and the *Laval* case, referred by the Swedish Labour Court (ECJ, 2005b; 2007b).

### *Viking*

Not surprisingly, as an organization of workers operating in the globalized market of international transport, the International Transport Workers' Federation (ITF) has been at the forefront of developments that confront (a) national laws protecting the economic power of workers taking collective industrial action with (b) EU law protecting the economic power of employers exercising freedom of movement for goods and services. The campaign by the ITF against flags of convenience (FOCs) in the maritime industry involves ITF affiliates taking industrial action in support of other affiliated unions in dispute, often in other countries.

The *Viking* case concerns industrial action by the Finnish Seamen's Union (FSU) in Helsinki against Viking Line Abp (Viking). Viking, a Finnish shipping company, owns and operates the ferry *Rosella*, registered under the Finnish flag and with a predominantly Finnish crew covered by a collective agreement negotiated by the FSU. The *Rosella* operates between Helsinki in Finland, a member of the EU since 1995, and Tallinn in Estonia, which became a member of the EU in May 2004. During 2003, Viking decided to reflag the *Rosella* to Estonia, which would allow the company to replace the predominantly Finnish crew with Estonian seafarers, and to negotiate cheaper terms and conditions of employment with an Estonian trade union.

In late 2003, Viking began negotiating with the FSU about the possible reflagging. Negotiations for a new collective agreement for the *Rosella* were unsuccessful and the FSU gave notice of industrial action beginning on 2 December 2003. The right to strike is protected in

Finnish law by Article 13 of the Finnish Constitution as a fundamental right. The FSU claimed that it had a right to take strike action to protect its members' jobs and the terms and conditions of the crew.

The FSU, an ITF affiliate, requested that the ITF assist by informing other affiliates of the situation and by asking those affiliates to refrain from negotiating with Viking pursuant to the ITF FOC policy. Under this policy, affiliates have agreed that the wages and conditions of employment of seafarers should be negotiated with the affiliate in the country where the ship is ultimately beneficially owned. In this case, the *Rosella* would remain owned by Viking, a Finnish company, even if reflagged to Estonia. According to the FOC policy, therefore, the FSU would keep the negotiation rights for the *Rosella* after reflagging. To support the FSU, on 6 November 2003, the ITF sent a letter to all affiliates in the terms requested. Further meetings took place and on 2 December 2003 a settlement agreement was reached. Viking claimed they were forced to capitulate because of the threat of strike action.

In August 2004, shortly after Estonia became a EU Member State, Viking commenced an application in the Commercial Court of England and Wales for an order to stop the ITF and the FSU from taking any action to prevent the reflagging of the *Rosella*, which would contravene its right to free movement under EU law. Viking was able to start proceedings in England because the ITF has its headquarters in London. In June 2005, the English Commercial Court granted an order requiring the ITF and the FSU to refrain from taking any action to prevent the reflagging, and further requiring the ITF to publish a notice withdrawing its letter to its affiliated trade unions. The judge considered that the actions of the ITF and the FSU were contrary to European law. The ITF and the FSU appealed against this decision in the Court of Appeal.

In a judgement given on 3 November 2005, the Court of Appeal decided that the case raised important and difficult questions of European law and referred a series of questions to the ECJ. It also set aside the order granted by the Commercial Court against the ITF and the FSU. Proceedings in London were put on hold until the ECJ provided answers to the questions that the Court of Appeal has referred (see below). Following the recent ECJ answers to these questions, the case is to be returned to the Court of Appeal for a final decision. However, the judgement of the ECJ has already become part of European law and should apply throughout the EU (see also Bercusson, 2007a, pp. 279-308).

## *Laval*

Baltic Bygg AB is a Swedish subsidiary fully owned by “Laval” un Partneri Ltd Laval, a Latvian company. Baltic Bygg was awarded a public works contract in June 2004 by the City of Vaxholm in Sweden for construction works on a school.<sup>13</sup> Negotiations on a collective agreement between the Swedish Building Workers’ Union (Svenska Byggnadsarbetareförbundet, or Byggnads) and Laval began in June 2004, but Laval refused to sign a collective agreement on terms acceptable to Byggnads. Instead, Laval entered into a collective agreement with the Latvian Trade Union of Construction Workers. Byggnads gave notice of industrial action and industrial action was taken by Byggnads and the Swedish Electricians’ Union (Svenska Elektrikerförbundet) in late 2004, including a peaceful boycott of the building and construction work. The right to strike is protected as a fundamental right by the Swedish constitution. Laval started proceedings before the Swedish Labour Court claiming, among other things, violation of its freedom of movement under the EC Treaty. The industrial action continued and Baltic Bygg AB went bankrupt. The Swedish Labour Court referred questions to the ECJ.

The issues at stake are as follows. In both cases, the employers’ claim was based on EU law: that the industrial action had violated the employer’s freedom of establishment and to provide services, as provided in the EC Treaty, Articles 43 and 49. As the unions claimed in the Swedish Labour Court in the *Laval* case regarding the Swedish Constitution, the FSU in the *Viking* case invoked the Finnish Constitution, which protects the fundamental right to strike. At first instance in *Viking* in the English Commercial Court, the judge upheld the employer’s complaint, on the grounds that EU law overrode any national law, even the national constitution of a Member State.

However, the EC Treaty provisions on free movement are not absolute. Free movement is limited by public policy considerations, both in the Treaty<sup>14</sup> and as developed by the ECJ through its extensive case law. The reference to ECJ jurisprudence made by the English Court of Appeal in *Viking* highlights the limits to free movement: whether EC Treaty provisions on free movement may be limited by collective action that is lawful under national law is the specific issue. One question raised,

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<sup>13</sup> Latvia became an EU Member State in May 2004. Sweden has been an EU Member State since 1995.

<sup>14</sup> Articles 30 (goods), 39(3) (workers), 46(1) (establishment), 55 (services), 58(1) (capital).

consequentially, is whether EU law includes a fundamental right to take collective action, including strike action, as declared in Article 28 of the EU Charter of Fundamental Rights.<sup>15</sup>

## The Charter of Fundamental Rights and the European Court of Justice

The European Union's Charter of Fundamental Rights proclaimed at the summit held in Nice on 7 December 2000 (European Union, 2000) attracted much attention, not least because it seemed likely that the Convention on the Future of Europe established following the Laeken summit of December 2001 to prepare a constitution for the EU would propose that the Charter be incorporated into the text. The EU Charter was Part II of the Treaty establishing a Constitution for Europe proposed at the EU summit in June 2004 (European Union, 2004). However, this proposed Constitutional Treaty failed to be ratified following its rejection by referenda in France and the Netherlands in 2005. The Charter survives in the Reform Treaty proposed at the EU summit in Lisbon in December 2007. The "Lisbon Treaty", which also remains to be ratified by all EU Member States, provides for the Charter to have legally binding status.<sup>16</sup>

The EU Charter includes provisions that are at the heart of labour law and industrial relations in Europe.<sup>17</sup> The incorporation of the EU Charter into the primary law of the EU will have an impact not only on the EU's institutions but perhaps even more on the Member States, which are bound by the Charter through the doctrine of supremacy of

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<sup>16</sup> The Charter of Fundamental Rights becomes legally binding and has the same legal rank as the Treaties, although its text will not be in the Treaties. The Charter was solemnly proclaimed at a plenary session of the European Parliament by the presidents of the Parliament, the Council and the Commission on 12 December 2007 and subsequently published in the *Official Journal*. The Treaty article giving the Charter its legally binding character will refer to the abovementioned proclamation. A protocol introduces specific measures for the United Kingdom and Poland establishing exceptions with regard to the jurisdiction of the ECJ and national courts for the protection of the rights recognized by the Charter. For discussion of this position and others, see Bercusson (2007b).

<sup>17</sup> Freedom of association (Article 12), right of collective bargaining and collective action (Article 28), workers' right to information and consultation within the undertaking (Article 27), freedom to choose an occupation and right to engage in work (Article 15), prohibition of child labour and protection of young people at work (Article 32), fair and just working conditions (Article 31), protection of personal data (Article 8), non-discrimination (Article 21), equality between men and women (Article 23), protection in the event of unjustified dismissal (Article 30).

EU law. The inclusion of fundamental rights concerning employment and industrial relations in an EU Charter incorporated into the EU Treaties may well confer on them a constitutional status within national legal orders. In some cases, the EU Charter's labour standards and industrial relations requirements may exceed those of Member States' laws. Similarly, the ECJ may adopt interpretations consistent with international labour standards, while national labour laws may fall short. In sum, the EU Charter promises a renewal of labour law, both at European transnational level and within EU Member States.<sup>18</sup>

The ECJ will become a central player in the enforcement of the EU Charter. It will decide disputes where Member States are charged with failing to implement or allegedly violating rights in the EU Charter. The Court has played this role in the past, relying on free movement of goods, services, capital and labour, guaranteed in the EC Treaty, to override national restrictions on free movement. The EU Charter provides a further means whereby the Court can promote European integration, this time in the social and labour field.

Litigation based on the EU Charter could become an important means of securing social and labour rights, and could influence the political agendas of both EU institutions and Member States. For example, the ECJ may be willing to recognize, as protected by the EU Charter, those fundamental trade union rights that all, most, or even a critical number of, Member States insist should be protected. The Court may interpret the articles of the EU Charter on fundamental trade union rights consistently with other international labour standards and could be sensitive to where national laws have protected trade union rights. A comprehensive and consistent litigation strategy could enable trade unions to use the rights guaranteed by the EU Charter to shape a system of transnational industrial relations at EU level.<sup>19</sup>

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<sup>18</sup> See the commentary in Bercusson (2006a).

<sup>19</sup> For this reason, it is important that trade unions should have direct access to the Court to intervene, or initiate complaints before the Court, to protect fundamental rights. For a note analysing the prospects for the ETUC's obtaining the status of a "privileged applicant" under the EC Treaty, Article 230 see Bercusson (2000a), p. 720; (2000b), pp. 2-3. For a longer analysis, see Bercusson (1996b), p. 261.

## Response of the European Court of Justice to the Charter

Since its proclamation on 7 December 2001, the Charter has been cited repeatedly by all the Advocates General of the ECJ in their opinions delivered before the Court makes its final judgements, and in decisions of the Court of First Instance (CFI), which was created in order to relieve the ECJ of its growing caseload and has assisted the Court since 1989.<sup>20</sup> However, the ECJ remained extremely cautious in its response to the Charter as regards integrating it into the Community legal order, preferring to rely on the existing range of international human rights instruments. The legal advice and policy orientations encouraging references to the Charter, to be found in the opinions of all the Advocates General, were for long ignored or cautiously circumvented by the Court.

For example, one ECJ decision involving the EU Charter was the *Omega* case (ECJ, 2004). This concerned an alleged restriction on free movement of services and goods as a consequence of a German regulation banning a video game in which players killed people. The German defence invoked the German constitutional principle of protection of human dignity as falling within the permissible public policy derogation to free movement. The ECJ concluded:

Community law does not preclude an economic activity consisting of the commercial exploitation of games simulating acts of homicide from being made subject to a national prohibition measure adopted on grounds of protecting public policy by reason of the fact that the activity is an affront to human dignity (ECJ, 2004, para. 41).

In its reasoning, the Court recalled that fundamental rights form an integral part of the EU legal order and, in para. 34 of the judgement, specifically cited paras. 82-91 of the opinion of Advocate General Stix-Hackl. Paragraph 91 of that opinion stated:

The Court of Justice therefore appears to base the concept of human dignity on a comparatively wide understanding, as expressed in Article 1 of the Charter of Fundamental Rights of the European Union. This Article reads as follows: "Human dignity is inviolable. It must be respected and protected" (ECJ, 2004, para. 91).

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<sup>20</sup> In the first 30 months of its existence, up to July 2003, there were 44 citations of the Charter before the European courts. For details of these 44 cases, see the appendix, prepared by Stefan Clauwaert and Isabelle Schömann, in Bercusson (2006b), pp. 633-714.

The Court itself would not directly cite the EU Charter. Rather, the first judicial reference to the EU Charter was made by the CFI in a decision of 30 January 2002. In *Max.mobil Telekommunikation Service GmbH v Commission*, the CFI twice referred to provisions of the EU Charter, first Article 41(1) (right to good administration), and then Article 47 (right to an effective remedy and to a fair trial) in the following terms:

Such judicial review is also one of the general principles that are observed in a State governed by the rule of law and are common to the constitutional traditions of the Member States, as is confirmed by Article 47 of the Charter of Fundamental Rights, under which any person whose rights guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal (ECJ, 2002, paras. 48 and 57).

Even as a mere political declaration, the EU Charter appeared to be accepted by all the Advocates General and the CFI as reflecting fundamental rights that are an integral part of the EU legal order — but not by the ECJ.

## European Court of Justice citation of the Charter

The question was whether, and for how long, the ECJ could hold out. The answer arrived with the first citation of the EU Charter five and half years after its proclamation by the European Court, in *European Parliament v Council*, decided on 27 June 2006 (ECJ, 2006). The European Parliament had sought the annulment of a subparagraph in a Council directive on the right to family reunification. In so annulling, the Court stated:

The Parliament invokes, first, the right to respect for family life. ... This principle has been repeated in Article 7 of the Charter which, the Parliament observes, is relevant to interpretation of the ECHR [European Convention for the Protection of Human Rights and Fundamental Freedoms] in so far as it draws up a list of existing fundamental rights even though it does not have binding legal effect. The Parliament also cites Article 24 of the Charter ...

The Parliament invokes, second, the principle of non-discrimination on grounds of age which, it submits ... is expressly covered by Article 21(1) of the Charter (ECJ, 2006, paras. 31-32).

But in contrast, the Court refers to the Council's submission as adopting the following position: "Nor should the application be exam-

ined in the light of the Charter given that the Charter does not constitute a source of Community law” (ECJ, 2006, para. 34).

As to the Court’s own view of the precise legal effects of the Charter, the key text in the judgement is under the rubric, “Findings of the Court” (ECJ, 2006, para. 35), with regard to the issue, “The rules of law in whose light the Directive’s legality may be reviewed” (ECJ, 2006, para. 30). The Court states:

The Charter was solemnly proclaimed by the Parliament, the Council and the Commission in Nice on 7 December 2000. While the Charter is not a legally binding instrument, the Community legislature did, however, acknowledge its importance by stating, in the second recital in the preamble to the Directive, that the Directive observes the principles recognised not only by Article 8 of the ECHR but also in the Charter. Furthermore, the principal aim of the Charter, as is apparent from its preamble, is to reaffirm “rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the [ECHR], the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court ... and of the European Court of Human Rights” (ECJ, 2006, para. 38).

In other words, while not legally binding itself, the Charter reaffirms rights that are legally binding due to their provenance from other sources that are recognized by EU law as legally binding sources.<sup>21</sup> The Court elides this subtle distinction (reaffirming other binding instruments versus declaring rights) when, in another section under the rubric, “Findings of the Court”, it uses the word “recognises”:

The Charter recognises, in Article 7, the same right to respect for private or family life. This provision must be read in conjunction with the obligation to have regard to the child’s best interests, which are recognised in Article 24(2) of the Charter, and taking account of the need, expressed in Article 24(3), for a child to maintain on a regular basis a personal relationship with both his or her parents (ECJ, 2006, para. 58).

The recognition was made easy for the Court, as noted by Advocate General Kokott in her opinion of 8 September 2005:

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<sup>21</sup> “[T]he constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the [ECHR], the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court and of the European Court of Human Rights”.

In so far as it is relevant here, Article 7 of the Charter of Fundamental Rights of the European Union ... is identical to Article 8 of the ECHR. Moreover, the first sentence of Article 52(3) of the Charter (Article II-112 of the Treaty establishing a Constitution for Europe) provides that its meaning and scope are to be the same (ECJ, 2006, para. 60).

As interesting as her reference to the (then) proposed Constitutional Treaty is the following statement of Advocate General Kokott:

Article 21 of the Charter of Fundamental Rights of the European Union expressly prohibits certain forms of discrimination, including that based on age. While the Charter still does not produce binding legal effects comparable to primary law, it does, as a material legal source, shed light on the fundamental rights which are protected by the Community legal order (74) (ECJ, 2006, para. 108).<sup>22</sup>

It is perhaps significant that the Court should have first cited the Charter in a legal action by one (supranational) EU institution, the Parliament, against another, the Council (representing the Member States). In this context, the statements of the Court concerning the Member States are important. The Court repeats the mantra that fundamental rights “are also binding on Member States when they apply Community rules” (ECJ, 2006, para. 105).<sup>23</sup>

The tension between the law of the EU and that of the Member States is particularly evident in disputes over EU competences. The ECJ may rely on the Charter to support EU legislative initiatives based on the EU Charter against challenges from Member States or other EU institutions. The Charter may also be used by EU institutions challenging Member States’ failures to implement, or even violations of rights in, the

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<sup>22</sup> Footnote 74 of the opinion cites opinions of other Advocates General, including that of Advocate General Tizzano in Case C-173/99, *Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU) v Secretary of State for Trade and Industry*, [2001] ECR I-4881, Opinion of Advocate General, 8 February 2001, the second citation of the Charter before the ECJ some two months after its proclamation, and other opinions by Advocate General Kokott herself.

<sup>23</sup> This leaves open the question of when it can be said that the Member State’s law is implementing Community rules; see for example Case C-144/04, *Werner Mangold v Rudiger Helm*, decided 22 November 2005. The Court concludes (para. 104): “consequently, they are bound, as far as possible, to apply the rules in accordance with those requirements...”. This could be read two ways. First, Member States are obliged to apply Community rules in accordance with fundamental rights. If this is not possible, their application (indeed, the Community rule itself) is challengeable as violating fundamental rights. Alternatively, Member States are obliged to apply Community rules in accordance with fundamental rights only as far as possible. If this is not possible, their application (and the Community rule) is still valid. It would seem that the first interpretation is preferable, and supported by the Court’s immediately preceding statement, which appears to emphasize Member States’ margin of appreciation, but again only “in a manner consistent with the requirements flowing from the protection of fundamental rights”.

EU Charter. In this way, as stated earlier, the ECJ plays a political role in overcoming political opposition to European integration, a role it has frequently fulfilled in the past, relying on fundamental freedoms (of movement of goods, services, capital and labour) guaranteed in the EC Treaty. The EU Charter now provides another legal basis on which the ECJ may choose to rely in overcoming challenges to European integration in the social and labour field.

## European Court recognition of a fundamental right to collective action

The EU Charter represents values integral to “Social Europe”. In the sphere of employment and industrial relations, these values include those reflected in the fundamental rights to collective bargaining and collective action embodied in Article 28 of the Charter. Litigation before the ECJ confronts the Charter with freedom of movement in the European single market.

In *Viking* and *Laval*, employers were seeking to override national and international guarantees of the right to collective action, invoking their freedom of movement in EU law. The references to the ECJ pose the question of whether collective industrial action at EU level contravenes the EC Treaty provisions on free movement, or whether the ECJ will adapt the EU law on free movement to redress the balance of economic power on a European scale. The reference to the ECJ by the English Court of Appeal in *Viking* highlights the issue of the limits to free movement: whether EC Treaty provisions on free movement may be limited by collective action that is lawful under national law. One specific issue raised is the potential applicability of Article 28 of the EU Charter, which provides for the fundamental right to take collective action, including strike action.

The issues put by the English Court of Appeal to the European Court raise the question of whether EU law includes a fundamental right to strike. The potential role of collective industrial action in shaping cross-border collective bargaining and the implementation of cross-border collective agreements may be determined by the response to this question by the ECJ. The Advocates General in *Viking* and *Laval* delivered their opinions on 23 May 2007. Both of them cited the EU

Charter in proclaiming the existence of a fundamental right to take collective action protected by the Community legal order.<sup>24</sup>

The ECJ delivered its judgement in *Viking* on 11 December 2007 (ECJ, 2007a) and in *Laval* on 18 December 2007 (ECJ, 2007b). In both cases the ECJ cites Article 28 of the EU Charter and proclaims:<sup>25</sup>

... the right to take collective action must therefore be recognised as a fundamental right which forms an integral part of the general principles of Community law the observance of which the Court ensures ... (ECJ, 2007a, para. 44; see also ECJ, 2007b, para. 91).

In both *Laval* and *Viking* the ECJ affirms that protection of this fundamental right:

... is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty, such as the free movement of goods ... or freedom to provide services ... (ECJ, 2007b, para. 93; ECJ, 2007a, para. 45).

The ECJ reinforces this by adding:

... it must be observed that the right to take collective action for the protection of workers is a legitimate interest which, in principle, justifies a restriction of one of the fundamental freedoms guaranteed by the Treaty ... and that the protection of workers is one of the overriding reasons of public interest recognised by the Court (ECJ, 2007a, para. 77).<sup>26</sup>

However, in both cases the ECJ qualifies these affirmations of the fundamental right to take collective action for the public interest in the protection of workers with the statement that: “[Its] exercise must be reconciled with the requirements relating to rights protected under the Treaty and in accordance with the principle of proportionality ...” (ECJ, 2007b, para. 94; ECJ, 2007a, para. 46).

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<sup>24</sup> Advocate General Mengozzi, paras. 78; 142; Advocate General Maduro, para. 60. For a critical analysis of the opinions of the Advocates General, and proposals for resolving the issues at stake in *Viking* and *Laval*, see Bercusson (2007c).

<sup>25</sup> The quotation in *Viking* refers to: “the right to take collective action, including the right to strike, must therefore be recognised...”.

<sup>26</sup> In *Laval*, para. 107: “...it must be observed that, in principle, blockading action by a trade union of the host Member State which is aimed at ensuring that workers posted in the framework of a transnational provision of services have their terms and conditions of employment fixed at a certain level, falls within the objective of protecting workers”.

## An “anti-social dumping principle”

The judgements in *Laval* and *Viking* offer a variety of propositions aimed at assisting national courts to assess the “proportionality” of collective action by workers and their organizations in relation to economic freedoms of employers. In the two cases before it, the ECJ offers guidance aimed at the specific threat of social dumping in the form of an “anti-social dumping principle” of proportionality.

This emerges in most detail in the ECJ’s statements in *Viking* regarding the primary collective action of the FSU and the secondary collective action of the ITF. As regards the primary collective action of the FSU, the question concerns the public interest test of protection of workers which, says the ECJ: “would no longer be tenable if it were established that the jobs or conditions of employment at issue were not jeopardised or under serious threat” (ECJ, 2007a, para. 81).

The ECJ then proceeds to provide indicators (but only by way of example: “in particular”) of what would establish “that the jobs or conditions of employment at issue were not jeopardised or under serious threat”. This would require an undertaking by the employer that was:

... from a *legal* point of view, as *binding* as the terms of a collective agreement and if it was of such a nature as to provide a *guarantee* to the workers that the *statutory provisions* would be complied with *and* the terms of the *collective agreement* governing their working relationship *maintained* (ECJ, 2007a, para. 82; emphasis added).<sup>27</sup>

The only way an employer can show there is no jeopardy or threat is to guarantee jobs and conditions of employment — otherwise, collective action is justifiable. In practice, this is a mandate for collective bargaining, as such a guarantee is the first trade union demand to be put forward. Failure to give the guarantee, to reach a collective agreement, so that jobs or conditions or employment are “not jeopardised or under serious threat”, thereby justifies collective action. Collective action will not be taken in practice if collective agreements are reached guaranteeing no jeopardy or threat to jobs and conditions of employment.

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<sup>27</sup> Note the parallel with the protection of workers under Council Directive 77/187 of 14 February, 1977 on the approximation of the laws of the Member States relating to the safeguarding of employees’ rights in the event of transfers of undertakings, businesses or parts of businesses, *OJL* 61/26, as amended by Directive 98/50/EC of 29 June 1998, *OJL* 201/88, consolidated in Directive 2001/23 of 12 March 2001, *OJL*/82/16. The parallel is reinforced if “working relationship” includes the collective relationship with the trade union, as presumably it does as it is in a collective agreement.

As regards the secondary collective action by the ITF, the ECJ states:

... ITF is required, when asked by one of its members, to initiate solidarity action ... irrespective of whether or not that owner's exercise of its right of freedom of establishment is liable to have a harmful effect on the work or conditions of employment of its employees. Therefore, as Viking argued during the hearing without being contradicted by ITF in that regard, the policy of reserving the right of collective negotiations to trade unions of the State of which the beneficial owner of a vessel is a national is also applicable where the vessel is registered in a State which guarantees workers a *higher* level of social protection than they would enjoy in the first State (ECJ, 2007a, para. 89; emphasis added).

The implication is that solidarity action is only unlawful if higher (or equivalent) conditions are available in the State of reflagging. If not, collective action is justifiable to protect workers' conditions. Of course, it is logical that if the State of reflagging guarantees a *higher* level, no collective action is likely to be taken. It may be argued that, as a matter of practice, conjecture about future conditions in the State of reflagging cannot be foreseen. The answer is: as in the case of the FSU, they must be guaranteed by legally binding agreements.<sup>28</sup>

The substance of the statements regarding the FSU and ITF may be characterized as justifying collective action where employers do not guarantee equivalent jobs and conditions, in the form of legally binding collective agreements. The FSU's collective action is justifiable as, in the absence of such binding agreements, jobs or conditions or employment may be presumed to be "jeopardised or under serious threat". The ITF's action is justified where higher or equivalent conditions cannot be guaranteed.

In substance, this is a principle that collective action is justifiable to counter "social dumping" — where existing jobs and conditions are

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<sup>28</sup> The next paragraph of the Court's judgement does not clearly state this, but it may be read in by implication (ECJ, 2007a, para. 90): "... collective action such as that at issue in the main proceedings, which seeks to induce an undertaking whose registered office is in a given Member State to enter into a collective work agreement with a trade union established in that State and to apply the terms set out in that agreement to the employees of a subsidiary of that undertaking established in another Member State, constitutes a restriction within the meaning of that Article [43]. That restriction may, in principle, be justified by an overriding reason of public interest, such as the protection of workers, provided that it is established that the restriction is suitable for the attainment of the legitimate objective pursued and does not go beyond what is necessary to achieve that objective".

threatened and no guarantees are forthcoming of equivalent protection.<sup>29</sup> The ECJ stated this even more emphatically in *Laval*:<sup>30</sup>

In that regard, it must be pointed out that the right to take collective action for the protection of the workers of the host State against possible social dumping may constitute an overriding reason of public interest within the meaning of the case-law of the Court which, in principle, justifies a restriction of one of the fundamental freedoms guaranteed by the Treaty ... (ECJ, 2007b, para. 103).

## Conclusions

One obstacle to the taking of transnational collective action has been, at best, its uncertain legal status, and at worst, its explicit prohibition in some national labour laws. The ECJ has declared that trade unions, entitled to take collective industrial action in a national context, are similarly free in a European single market to exercise cross-border collective action. If the European Commission remains passive, with consequences for a moribund European social dialogue, and employers refuse voluntarily to engage, trade unions may have no alternative but to draw on the collective strength they have traditionally used in collective bargaining at national level: to take transnational collective action in order to conclude cross-border collective agreements.

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<sup>29</sup> The principle is reminiscent of case law on the Posting Directive 96/71, which allows the host Member State to impose mandatory employment conditions unless equivalent protection is provided by the home Member State. This element is found in Advocate General Mengozzi's Opinion in *Laval*. At a more fundamental level, it translates as an application of the equal treatment principle: the exercise of freedom of establishment to another Member State is conditional on equal treatment of posted workers with other workers in each Member State both before and after the relocation.

<sup>30</sup> In the *Laval* decision (ECJ, 2007b, para. 103), citing, among other authorities, para. 77 of the *Viking* decision of the previous week (ECJ, 2007a). Although the ECJ disqualified the collective action in *Laval* by reference to the labour standards in the Posting Directive 96/71 as transposed into Sweden, the ECJ's understanding of the application of the Posting Directive 96/71 in the Swedish context is questionable, and the Swedish Labour Court may take a more informed view of the facts when it comes to decide the case.

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## **Part 4 Varieties of dialogue and regulation at cross-border level**

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## Chapter 7

The ITGLWF's policy on cross-border dialogue in the textiles, clothing and footwear sector:

Emerging strategies in a sector ruled by codes of conduct and resistant companies

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### Introduction

The central problem for trade unions in the global textiles, clothing and footwear (TCF) sector is the absence of a mature system of industrial relations in most of the countries where production is located. From the perspective of the International Textile, Garment and Leather Workers' Federation (ITGLWF) — the global union federation representing some 240 affiliated TCF unions in 110 countries — such a system is defined as the presence of well-organized workforces in supplier factories, organized by recognized, trained and independent trade union representatives able to engage in grievance and dispute resolution, as well

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as in periodic but regular collective bargaining with the management of production sites.<sup>2</sup>

In an industry with approximately 26 million workers in its formal sector (ILO, 2000), the extent to which industrial relations can be defined as “mature” is indeed very limited. Furthermore, official figures for union density in the sector are not available.<sup>3</sup> Thus, while the affiliated membership data for the ITGLWF in 2006 give a figure of 1.7 million, there is still an unspecified number of unions that have chosen not to affiliate to the global union federation for ideological or other reasons. Based on available data, a density figure of 12 per cent is probably exaggerated, when one takes into account the (very conservative) International Labour Organization (ILO) estimate of workers in the sector (which does not cover those informal parts of the industry) and other inaccuracies in the recording of membership.<sup>4</sup> Moreover, this figure masks major differences among unions in the various subsectors of the TCF sector.<sup>5</sup>

This chapter elaborates several major features of the TCF sector that present significant obstacles in the way of ITGLWF action aimed at organizing workers across borders. The first part provides data and examples that demonstrate, among other things, that the notion of “cross-border organizing” (euphemistically called “organizing along supply chains” — see below) appears to be over-optimistic and premature, to the extent that buyer-driven production chains are based on a very complex

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<sup>2</sup> This includes encouraging companies to establish a skilled human resources function, to embark on an agreed programme of joint manager/worker training aimed at developing a better understanding and promotion of dialogue, and to negotiate a set of management systems dealing with industrial relations aimed at enhancing mutual understanding and providing the means to avoid future problems, including (a) a procedural agreement on relations between the company and the union, covering the rights and responsibilities of each; (b) a disciplinary procedure setting out clearly what happens in the event that disciplinary action becomes necessary; and (c) a complaints and grievances procedure that provides mechanisms for resolving complaints at source. See ITGLWF (2006d).

<sup>3</sup> For a discussion of methodological problems in determining unionization and collective bargaining coverage, see Lawrence and Ishikawa (2005).

<sup>4</sup> The Asia region of the ITGLWF reported in a small-scale survey density of less than 10 per cent (ITGLWF, 2007a).

<sup>5</sup> An example from the field is perhaps illustrative. In the textile and apparel cluster in Bangalore, the total workforce is estimated at 600,000. The Garment Workers Union estimates its membership at 54,000 (9 per cent); however, only 4,000 of its members actually pay membership dues. Alongside the Garment Workers Union (which is part of the Indian National Garment and Leather Workers Federation), the Garment and Textile Workers Union estimates its membership at 1,200, with a presence in some 85 factories. Finally, the Communist-aligned All India Trade Union Congress is present in 10–12 units, and the Centre of Indian Trade Unions in some 12 factories, but they both have an unspecified membership. (Information given by Napanda Muddappa, General Secretary of the Garment Workers Union, Bangalore.)

and opaque web of relations among the various tiers of outsourced production. The second part focuses on the strategy of the ITGLWF in the areas of multinational research and networking, which are viewed as a necessary step in any efforts to organize workers and pave the way towards a form of social dialogue across borders. The third section of the chapter outlines some reasons that explain the particular approach taken by the ITGLWF towards cross-border dialogue with multinational companies (MNCs) in the industry, including the absence of transparency of supply chains, the (mis)perception of codes of conduct as satisfactory forms of global social compliance, the rise of multi-stakeholder initiatives and the embedded culture of “union avoidance” in the industry. The final section outlines the background to the conclusion of the first international framework agreement (IFA) in the TCF sector with an MNC.

## Textiles, clothing and footwear: Figures and misperceptions

In 2006, the ITGLWF undertook a survey of union membership in the sector (see table 7.1). With a 30 per cent response rate, the survey reveals a decline in trade union membership. Even where trade union recognition has been achieved (some 2,000 new units being recognized in the last few years) collective bargaining remains seriously underdeveloped (ILO, 2000, pp. 60-69; for a case study see Miller, 2005; 2007; ICFTU, 2006; Miller et al., 2007), and in many cases undermined by the adoption of alternative modes of workers' representation whose independence is often questionable (Fair Labor Association, 2005).

Table 7.1. Results of ITGLWF membership survey, 2006

Region	Responses/ affiliates	Affiliated membership based on levies	Members	New members	Members lost	Net gain/ loss	New units organized
Africa	23 / 59	379 250	95 345	10 393	16 605	-6 212	1 438
Americas	7 / 36	238 635	23 853	6 523	3 339	3 184	4
Asia & Pacific	19 / 70	461 705	195 842	16 066	17 951	-1 885	234
Europe	24 / 62	700 859	217 051	26 118	28 774	-2 656	302
<b>Total</b>	<b>73 / 241</b>	<b>1 780 449</b>	<b>532 091</b>	<b>59 100</b>	<b>66 669</b>	<b>-7 569</b>	<b>1 978</b>

Source: Returns to ITGLWF 2006 Membership Survey as of July.

**Box 7.1. ITGLWF agenda for action on multinational enterprises, 2004**

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The ITGLWF will:

- A.** promote cooperation between affiliates dealing with the same multinational enterprises;
- B.** build an organizing strategy throughout the operations of selected multinationals operating in the sector, including European, US, Taiwanese and Korean companies, which covers the operations in importing countries, as well as contracting, subcontracting and licensing operations;
- C.** in conjunction with its regional organizations, develop a dialogue with multinational enterprises with a view to concluding international framework agreements relating to trade union organization and collective bargaining as well as to information and consultation rights;
- D.** promote the creation of world-wide company councils within individual multinational corporations;
- E.** encourage affiliates to make use of framework agreements and codes of conduct as a tool for organizing workers and improving working conditions;
- F.** campaign to reduce the number of codes of conduct in operation, to ensure they are firmly grounded in the main Conventions of the ILO, are managed on a multi-stakeholder basis and are applied with the same intent as the ILO Conventions and that they include a system of implementation, internal monitoring and viable independent verification, with regular impact assessments;
- G.** campaign to ensure that codes of conduct are not used as a substitute for effective labour legislation, nor as an alternative to union organization;
- H.** demand that companies externally sourcing their production provide full disclosure of their suppliers worldwide;
- I.** campaign to make merchandisers and retailers responsible for the conditions under which goods they market are produced;
- J.** campaign for changes to national and international company legislation which would require companies to take into account and publicly disclose their social, environmental and economic impacts with a view to securing a legally binding international framework on corporate responsibility.

Source: ITGLWF.

Consequently, the policy of the ITGLWF on “cross-border social dialogue” (see box 7.1) cannot be disassociated from a strategy for “cross-border organizing” (Frundt, 2000). Because production in the TCF sector is buyer-driven (Gereffi, 1999) — outsourced by retailers and

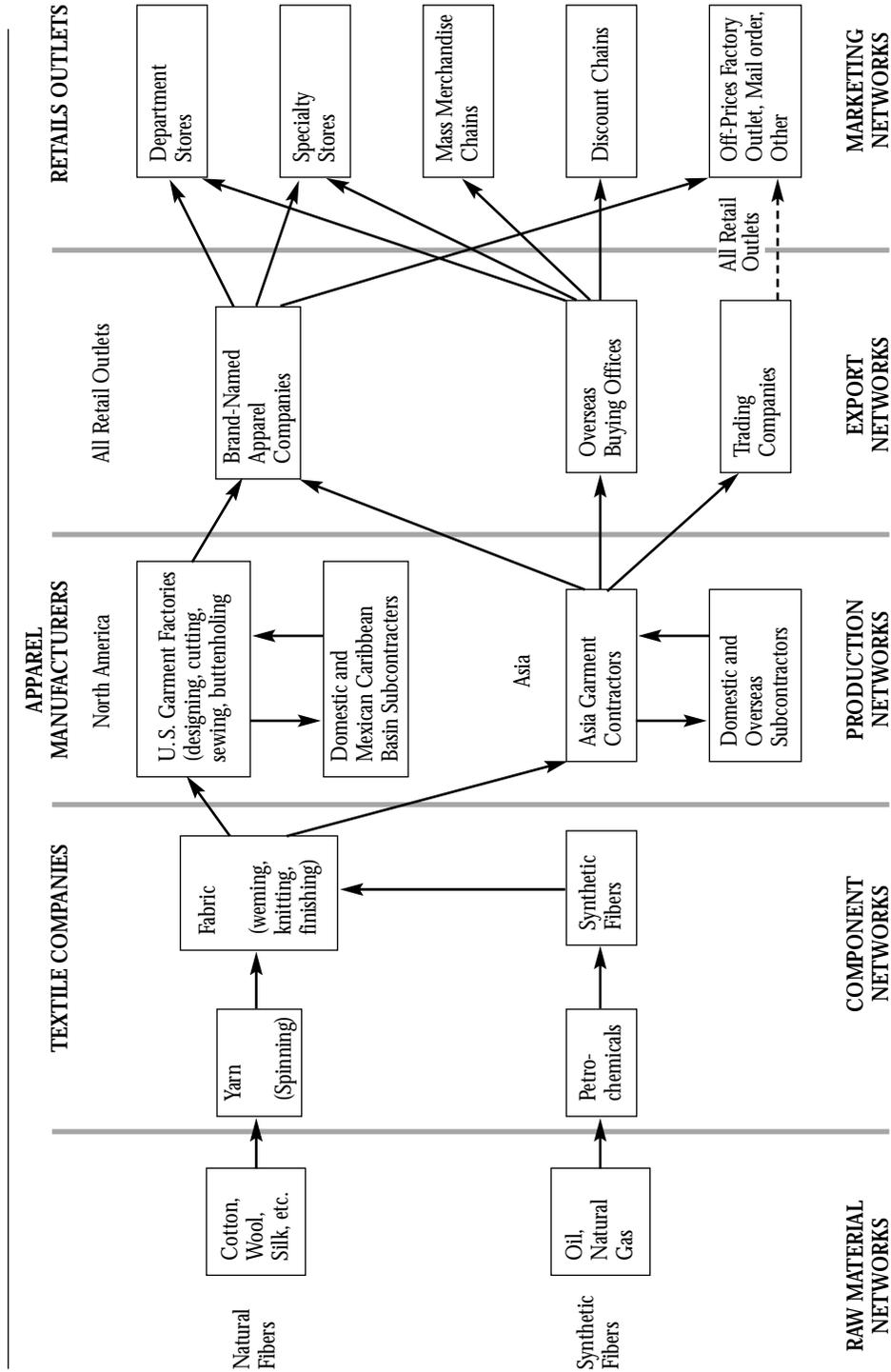
brand owners that are headquartered in major buyer blocs (United States [US], European Union and Japan) and wielding considerable commercial and potential political control over social relations in the factories within their supply chains — the ITGLWF has long recognized the strategic importance of being a signatory to agreements with MNCs. However, a main objective in negotiating such enabling instruments is their use in promoting core employment standards, in particular the ILO instruments Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98). Such agreements could then be used as a means for securing the resolution of trade union recognition disputes in an MNC's supply chain, wherever these occur. In this respect, the policy of the ITGLWF as laid out in box 7.1 is no different from that of global union federations in other sectors (see Müller and Rüb, 2005).

However, the particular trajectory that the ITGLWF has pursued in its efforts to secure agreements, and the difficulties that it has encountered in this process, have to be viewed against the backdrop of a globally outsourced manufacturing base (Miller, 2004). MNCs in the TCF sector are positioned at various points along a global value chain and within a series of interconnected networks. Gereffi (2001) has usefully represented these networks graphically from a US perspective. This is reproduced in figure 7.1.

This graphic merits a few observations. First, looking horizontally along the chain, the TCF transects several industries/sectors and therefore the jurisdictions of several global unions. Raw material networks in both textile and footwear industries embrace the chemical and agricultural sector, and buyer and retail networks are clearly rooted in trading activities. From a jurisdictional viewpoint, this means that at least four other global union federations, in addition to the ITGLWF, have a potential interest, namely, the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Association (IUF) in, for example, cotton manufacture; the International Federation of Chemical, Energy, Mine and General Workers' Unions (ICEM) in synthetic fibres, among other products; Union Network International (UNI) in areas such as retailing; and the International Transport Workers' Federation (ITF), if one includes the logistics of TCF products.

Such an observation might appear irrelevant were it not for the fact that increasing reference is made to the concept of “organizing along

Figure 7.1. The apparel commodity chain



Source: Gereffi (2001).

supply chains” (for example Lund, 2003; Barber, 2006). As we explain below, even when focusing on those segments of the value chain covered by the ITGLWF's jurisdiction, loose use of this concept can result in over-ambitious and quite unrealistic notions of cross-border organizing. Firstly, quite simply, global unions are not yet in a position to mobilize their resources to organize workers *along* the TCF product supply chains in this strict sense.<sup>6</sup>

Second, and perhaps more important from an ITGLWF perspective, outsourced apparel production results in multiple brands sourcing from the same supplier factory as suppliers inevitably look to have as broad a client base as possible. In this situation, the enforceability of any IFA with a retailer or a brand owner in relation to its supplier factories is directly linked to the volume of production that the retailer or brand owner sources from that factory.

Third, in the apparel supply chain, added value and the potential for effective governance are greater towards the buyer end of the spectrum (Gereffi, 1999) as brand owners and retailers can dictate price and quantity through the orders they place and can switch production from one supplier to another and from one country to another.

Fourth, looking at the parts of a value chain from a vertical perspective, companies operating within the *formal* segment of these networks tend to own their means of production and service delivery. This makes it possible to establish some transparency as to the structure and patterns of ownership and control of the firms in question for the purposes of networking and organizing. However, this works only up to a point, since the phenomenon of outsourcing is as prevalent within each link or network of the chain as it is between each network. Indeed, adopting a vertical perspective permits us to see how much networks have become internally fragmented into tiers beneath the first-line contractor and constitute a vast informal “underbelly” of subcontracted manufacture and home-working, where the employment relationship in all tiers of production is governed by contractual flexibility and vulnerability.

These features are not reflected in Gereffi's global governance model. Given the gendered nature of the supply chain, the debate on

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<sup>6</sup> In the context of current merger discussions between global unions, the ITGLWF will begin talks in 2009 with either UNI or ICEM/IMF (ITGLWF, 2007b). Some rationalization is likely, which might assist in targeting multinationals and in strengthening cross-border dialogue. See Vannieuwenhuysse (2007).

cross-border dialogue can easily become de-feminized, despite the high degree of (often hidden) female employment in the sector (Barrientos, 2005). As a result, the cross-border dialogue and organizing activities of the ITGLWF are, admittedly, still focused as a matter of priority on the establishment of “mature” systems of industrial relations for workers in the largely formal first-tier part of the TCF sector, and are aimed at unions that are still largely male dominated.

The hidden nature of this vertical underbelly is reflected to a certain extent to the lack of transparency in terms of the existing horizontal commercial relationships between companies across networks. Until recently, it was virtually impossible to depict an overview of the task in hand for transnational trade union networking and organizing (Barrientos, 2002). Although a process of supply chain consolidation is under way following the ending of the Agreement on Textiles and Clothing in 2004 (Nordás, 2005), many brand owners and retailers have only a partial knowledge of where their products originate precisely, because they often depend on traders and agents for sourcing. They may also be unaware of the subcontracting activities of their known first-tier suppliers (Hurley and Miller, 2005). Thus, outsourcing in TCF has contributed to a lack of transparency and of formality of production relations in the sector, the presence of which are key prerequisites for any serious effort by a global union aimed at networking and organizing workers within its jurisdiction.

In sum, because cross-border organizing efforts tend to occur at best sporadically and reactively,<sup>7</sup> it is perhaps misleading to use the phrase “organizing along a supply chain”. It is simply not within the logistical capacities of a small global union such as the ITGLWF, and even the wider global union community, to network *along* such supply chains. The following paragraphs illustrate the point.

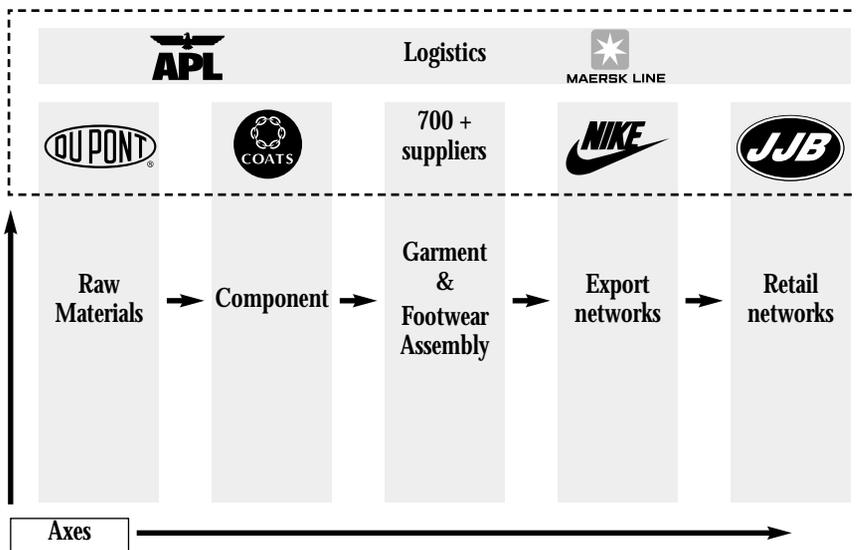
Figure 7.2 shows how a company such as Nike would locate within an export network.<sup>8</sup> Nike coordinates all aspects of the design and marketing operations from its headquarters in Beaverton in the United States. Its products are retailed in nationally based specialist sports shops, such as JJB Sports in the United Kingdom (UK), as well as the company’s own stores.

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<sup>7</sup> Namely, in the form of international solidarity campaigns originated by unions in the countries hosting the marketing networks, to protest against violations of freedom of association in the production networks.

<sup>8</sup> Nike also has extensive retail operations so straddles the final two parts of the value chain.

Figure 7.2. Organization of the Nike supply chain



Source: Author.

Nike contracts production out to some 700 first-tier suppliers, which use the components approved by the company on the basis of global key accounts with supplier firms such as Coats (Miller, 2004), which in turn uses artificial fibre for the core of its industrial yarn supplied by DuPont. Nike products are then shipped by multinational logistics companies such as Maersk and APL. From the ITGLWF's viewpoint, there may be some interest in cross-border dialogue with Nike on behalf of those 28,000 workers directly employed by the company around the world, notably in regional and national offices, not least because Nike does not have an in-house union (see table 7.2). Having said that, the part of the workforce that represents the real trade union prize ought to be the estimated 800,000 workers who are employed by the Nike contract factories worldwide (Nike, 2007, p. 11).

In addition, the peculiarities of the apparel sector, in which supplier factories generally manufacture for a range of brands that may switch their orders to new suppliers on a yearly or monthly basis, mean that it makes little sense for the ITGLWF to network on a brand basis.<sup>9</sup>

<sup>9</sup> Whether the same argument applies to the negotiation of an IFA is, however, doubtful.

**Table 7.2. Trade union presence in headquarters of multinational companies in textiles, clothing and footwear**

Name of company	Headquarters	Product country	Trade union presence
1 Sara Lee Corp Brand App	US	Knitwear	None
2 VF Corporation US	US	Jeanswear	None
3 Levi Strauss & Co	US	Jeanswear	Unite Here at distribution centres in US <sup>a</sup>
4 Jones Apparel Group Inc	US	Womanswear	None
5 Liz Claiborne US	US	Multiprod. clothing	None
6 LVMH-Gruppe Clothing	France	Prêt-à-Porter	None
7 Zara-Ind Dis. Text.	Spain	Mens- and womenswear	HQ not organized but a relationship exists between ITG affiliate and the company. Union presence in the distribution centre and some of the factories in Arteixo <sup>b</sup>
8 Nike Garment	US	Activewear	None
9 Ralph Lauren — Polo	US	Multiprod. clothing	None
10 Kellwood Co	US	Multiprod. clothing	None
11 Onward Kashiya Co	Japan	Menswear	UI Zensen presence in HQ clerical but production outsourced <sup>c</sup>
12 Adidas AG	Germany	Activewear	IGBCE, Works Council, Supervisory Board, EWC <sup>d</sup>

US = United States.

Sources: <sup>a</sup> Unite Here; <sup>b</sup> CCOO Fiteqa; <sup>c</sup> UI-Zensen; <sup>d</sup> IG Metall.

Finally, the migration of production from the former manufacturing centres of the buyer blocs such as the United States, European Union and Japan, together accounting for almost 80 per cent of global textile and clothing imports, has entailed a loss of trade union strength. Coupled with the emergence of new-economy brands that adopt a philosophy that may be encapsulated as “not dirtying our hands with production”, the

headquarters of many leading MNCs in the retail and export networks now maintain only functions such as design, buying, supply chain management and trading. These functions are usually populated by a young workforce with little trade union consciousness. Table 7.2 shows the outcomes of a 2006 ITGLWF survey on trade union activity in the headquarters of the top 12 MNCs in the TCF sector, based on Euratex (2004) data: of the 12 companies surveyed, some trade union activity was reported in only four of them, and none in the remaining eight.

### Targeting multinational companies for cross-border dialogue in textiles, clothing and footwear

Despite the above structural constraints, the ITGLWF fully understands the importance of research and networking as essential elements for paving the way for cross-border dialogue (Brecher et al., 2006). Following some bitter industrial conflicts in Central America, the ITGLWF realized the need to target companies and promote the idea of IFAs more proactively (ITGLWF, 1998). In an ambitious project launched in 2000, it selected between 10 and 15 MNCs in the TCF sector, on the basis of a range of criteria including (a) the global reach of the brand and the vulnerability of companies to negative media publicity and consumer pressure; (b) the existence of strong issues around which workers (and women workers in particular) might organize; (c) the existence of a union presence in headquarters and, if possible, in the operations of the company in question; and (d) the likelihood of a successful negotiation of an IFA.

Following these criteria, a short list of four target companies (Coats PLC, Daun & Cie AG, Pou Chen, and Vanity Fair Corporation) was drawn up with a view to exploring the feasibility of networking ITGLWF's affiliates and negotiating an IFA with these companies (Miller, 2004; see table 7.3). With the exception of Vanity Fair, all selected companies owned and controlled their production and therefore largely fitted the mould of companies in other sectors that have been traditionally targeted for cross-border dialogue.<sup>10</sup>

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<sup>10</sup> Researching and networking trade union representatives at the factory locations of these target companies in order to prepare the way for cross-border dialogue were readily achievable within the textiles and footwear companies selected, where production remained in house (because of the capital intensive nature of the operations). Some of the operations in question are of course not entirely free from outsourcing. For instance, hand-stitching in certain types of footwear allows for workshop and home-working production; the textile and yarn factories must follow the migration of apparel production (Miller, 2004, p. 219).

Table 7.3. Four target companies for international framework agreements

Company	Position in value chain	Subsector	Global brand reach	Brand sensitivity	Strong issues	Union presence in HQ and operations	Likelihood of international framework agreement	Form of networking required
Coats PLC	Component network	Thread and zips	Yes	No	Yes	Yes	Yes	Vertical
Daun & Cie AG	Component network	Engineered and classical textiles	No	No	Yes	Yes	?	Vertical
Pou Chen	Production network	Footwear original equipment manufacturer	No	No <sup>a</sup>	Yes	Yes	?	Vertical
Vanity Fair Corporation	Export network	Branded apparel	Yes	Yes	Yes	No	?	Horizontal

<sup>a</sup> Pou Chen is a major footwear supplier for leading sportswear brands. Violations of core labour rights in its factories would immediately impact on the brands sourcing from those units. This among other reasons might have led leading brands such as Nike to maintain an almost permanent presence within its contract factories in China, Indonesia and Viet Nam.

Source: Author.

Between 2001 and 2005, the ITGLWF organized multinational workshops to bring together trade union representatives within an expanded list of targets: Coats — yarn (ITGLWF, 2001; 2002a; 2005a); Aditya Birla — synthetic yarn and textiles (ITGLWF, 2004a); Bata (Africa) — footwear (ITGLWF, 2002b); Pou Chen — footwear; and Daun & Cie — engineered and classical textiles. Workshops were also organized with the participation of two branded apparel companies and Ramatex Bhd (a large, knitted apparel manufacturer). The branded companies were Triumph, in lingerie, one of the few clothing MNCs that owns much (about 80 per cent) of its production facilities; and Levi Strauss Co, a company that had begun to close its factories and switch to offshore production. The purpose of these workshops was to disseminate the ITGLWF's policy on MNCs, exchange information on collective agreements, discuss the desirability and feasibility of pursuing an IFA with the company, and elect a coordinator for each company network.

With the exception of Coats and Daun & Cie, where networking proved essential in pushing IFA negotiations to a very advanced but ultimately unsuccessful stage (Miller, 2004), the experience of establishing and maintaining global coordination networks within MNCs has been extremely patchy. In some cases, efforts stalled as a result of turnover in network membership, or restricted computer access for network members. In other cases, there was an absence of a sustained political focus and/or lack of commitment on the part of some network members (ITGLWF, 2005b). In the case of Pou Chen, networking initiatives proved almost impossible, given the existing ITGLWF policy of “critical disengagement” vis-à-vis the All China Federation of Trade Unions, and problems relating to accessing shopfloor representation in Viet Nam.

No attempt was made to organize a network within Vanity Fair for two reasons. First, the company operates as a typical US branded manufacturer that outsources its production to largely undisclosed locations in Central America.<sup>11</sup> Second, and more important, UNITE, the US affiliate of the ITGLWF, did not wholeheartedly commit itself to the policy of IFAs. Instead, UNITE targeted Vanity Fair workwear firms in Central America in an effort to boost the prospects of those UNITE-organized

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<sup>11</sup> Some Vanity Fair workwear and jeans brands owned factories in Central America and could be traced through the US Port Import-Export Reporting Service.

shops in New York City that gained contracts for uniforms from the municipality.<sup>12</sup>

In short, the top-down networking efforts undertaken by the ITGLWF for cross-border dialogue proved to be a failure to an extent, even though the existing EWCs and on some occasions national structures (through codetermination, for example) provided for strategic trade union access to decision making with at least two of the initial targeted companies.

### Why no IFA?

As explained above, given that the bulk of the 26 million strong global workforce<sup>13</sup> in the TCF sector is located in manufacturing networks composed of some 300,000 supplier factories, organizing and networking workers internationally within apparel production networks has proved fruitful only if it is done in wholly owned manufacturing MNCs operating in this sector (SOMO, 2003; Appelbaum, 2005; ITGLWF, 2006b). However, as recent reports to the Executive Committee of the ITGLWF demonstrate, these companies are largely headquartered in Asia and usually offer strong resistance to any trade union organizing efforts, wherever their facilities are located (ITGLWF, 2006c; 2007a). In only a handful of Asian-owned MNCs do ITGLWF affiliates maintain a presence at headquarters and have negotiated collective agreements with companies such as Ramatex Bhd (Malaysia), Delta Galil (Israel), Asics (Japan), and Mizuno (Japan), which potentially constitute targets for IFAs.

With Ramatex Bhd and Delta Galil, for example, both of which wholly own their production facilities, the case for vertical transnational networking is strong. However, in other companies, such as the Japanese sportswear brands Asics and Mizuno (both largely operating outsourced production in China), the immediate relevance of an IFA with one brand only may prove to be of questionable value, given that the workers in their supplier factories also produce goods for other brands. Nevertheless,

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<sup>12</sup> Oral report by Eric Hahn to the Strategic Approaches Sub-Committee of the ITGLWF Dhaka, 13 October 2002.

<sup>13</sup> Unofficial estimates suggest that at least the same number of workers again may be employed in the less formal parts of the sector.

the potential for networking and organizing workers nationally can improve if it is coupled with disclosure of locations. As explained below, the ITGLWF's policy therefore focuses not so much on horizontal networking *along* a brand supply chain, but rather on coordinated *national* supply-base organizing in those MNCs that have disclosed their suppliers' locations.

Such a strategy does not preclude the negotiation of an IFA between the ITGLWF and an MNC. However, such an agreement to late 2006 continued to prove elusive for the ITGLWF. Successful negotiations of IFAs in other sectors have depended on a strong trade union presence in the headquarters country (Tórres and Gunnes, 2003; Müller and Rüb, 2005; Hammer, 2005, p. 523), and, arguably, on the existence of robust institutional industrial relations arrangements permitting trade union access at strategic levels of decision making within companies. As seen earlier, organized labour, in apparel in particular, has a sporadic and certainly weakening membership foothold in the headquarter countries of key MNEs.

Moreover, attempts to organize and network workers' representatives along multinational supply chains have been dogged by an absence of disclosure of factory or vendor locations. In addition, there is the vexed issue of the proliferation of codes of conduct, which are viewed as alternative instruments to IFAs since they have been unilaterally drawn up by companies and often implemented with nongovernmental organization (NGO) rather than labour involvement. The waters have also been muddied by the emergence of multi-stakeholder initiatives — bringing companies, in some case trade unions, NGOs, and other interested parties together in an effort to avoid duplication and criticism via the establishment of a jointly agreed code, greater public transparency and the provision of third-party auditing/verification services.<sup>14</sup> Finally, and perhaps most significantly of all, the clothing and footwear supply chain remains notoriously anti-trade union (ICFTU, 2006; ITGLWF, 2006d).

In the following section we look at each of these factors and the ITGLWF response in turn — disclosure of locations, codes of conduct, multi-stakeholder initiatives and MNCs' avoidance of unions.

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<sup>14</sup> SAI International, Ethical Trading Initiative, World Responsible Apparel Programme, Fairwear Foundation, Business Social Compliance Initiative, Worker Rights Consortium, Global Compact, Fair Labor Association.

## The disclosure debate

The lack of transparency on employment practices within global supply chains has attracted growing criticism in recent years, resulting in a range of proposals for disclosure by MNCs (Doorey, 2005; 2007). The policy of the ITGLWF and some NGOs<sup>15</sup> has focused on full disclosure of supplier locations. In the ITGLWF's draft IFA, disclosure of locations has always been a crucial transparency provision, without which any normative chapter would have no meaning (Miller, 2004, pp. 219 and 223). Furthermore, regular disclosure of locations enables organized labour and NGOs to track the supply-base consolidation process that has been under way since the expiry of the Agreement on Textiles and Clothing in December 2004.

There are very clear signs that these calls for disclosure have begun to bear fruit. Students against Sweatshops has compelled university apparel licensees in the United States to disclose their suppliers' locations on the Worker Rights Consortium website ([www.workersrights.org](http://www.workersrights.org)). This has, in turn, prompted a few companies to opt for full disclosure on their own corporate websites. Social Accountability International has pursued a policy of publicly disclosing its certified facilities, although these give no indication of the buyers that source there.<sup>16</sup> A major breakthrough occurred when Nike, on publishing its second Social Responsibility Report in 2005, decided to release some 700 addresses of its first-tier suppliers on its website.<sup>17</sup> The ITGLWF had lobbied Nike hard on this (Doorey, 2007, p. 37).

Shortly afterward, some other companies followed suit: Puma, Levi Strauss & Co, Timberland, and Reebok. Other companies have held back or provided qualified disclosure. Adidas has provided the ITGLWF with national supplier lists on request. Mizuno has released a list of those factories that have undergone a company audit. In the wake of the Spectrum factory collapse in Bangladesh (see the section "Breakthrough", below), the Spanish multinational Inditex agreed to supply the ITGLWF with its

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<sup>15</sup> Ethical Trading Action Group, Canada. Available at: <http://en.maquilasolidarity.org/en/node/219/print> [29 Jan. 2008].

<sup>16</sup> For a listing see <http://www.itglwf.org/DisplayDocument.aspx?idarticle=1158&langue=2> [4 Oct. 2006].

<sup>17</sup> Available at: [http://www.nike.com/nikebiz/gc/mp/pdf/disclosure\\_list\\_2005-04.pdf](http://www.nike.com/nikebiz/gc/mp/pdf/disclosure_list_2005-04.pdf) [4 Oct. 2006]. The presence of the general secretary of the ITGLWF on the report review committee was a significant factor in the decision by Nike to disclose.

list of country suppliers as part of a joint risk-assessment effort. Since one of the purposes of an IFA is to assist affiliates in their organizing efforts (Riisgaard, 2005; Wills, 2002), a key objective in ITGLWF policy could be achieved at a stroke without having an agreement with these companies: the provision of key data for the affiliates of the ITGLWF to consider when planning national organizing drives, particularly in relation to those retailers and merchandisers with which the ITGLWF is beginning to develop a constructive social dialogue in other forums (see below).

Thus, the disclosure of supplier locations has largely contributed to a shift in focus in the ITGLWF's multinational strategy, since it provided what was for the ITGLWF a prerequisite for adopting an IFA. Added to the fact that most MNCs in the TCF sector have now adopted a corporate code of conduct aimed at promoting a body of labour standards similar to that contained in IFAs, it has suddenly become possible for the ITGLWF to develop a type of organizing strategy vis-à-vis the MNCs that have disclosed their supplier locations. In sum, this has meant a shift in focus towards the use of emerging relationships between the ITGLWF and corporate social responsibility (CSR) staff in MNCs, for the development of a more proactive approach at national level in implementing the freedom of association and collective bargaining standards contained in the codes of disclosing MNCs.

### Codes of conduct

Among sectors, TCF has arguably generated the largest body of codes of conduct in an effort to lay down the basis for social compliance in its supply chains. The ITGLWF has had to vie with a “code of conduct and compliance industry” where MNCs have had a predilection for coopting NGOs and consultants rather than courting organized labour in their efforts to establish global social dialogue. In the absence of negotiated IFAs and more formal proactive dialogue with an MNC, the ITGLWF as a matter of policy had been encouraging affiliates to use codes of conduct as the normative reference point in any unresolved national disputes with a supplier, particularly where labour standards contained in the multinational buyer's code had been breached.<sup>18</sup> Although the trade union position was to present IFAs as alternatives to codes of conduct (Kearney and Justice, 2003), codes were nevertheless

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<sup>18</sup> See <http://www.itglwf.org/pdf/HowtoUseCodes-pp43-56.pdf> [4 Oct. 2006].

still deemed to serve a purpose as a norm prevailing in a supply chain which workers could use particularly in such a poorly organized sector.

Moreover, a code of conduct and an IFA are not mutually exclusive: it is by no means a given that a successfully negotiated IFA in the TCF sector would supplant or replace an existing corporate code and related compliance efforts. This is because, although an agreement would cement a relationship between the ITGLWF and a particular MNC, the suppliers may still be bound by contractual commercial relationships with other MNCs which, as clients, may have stipulated different requirements. During a factory visit to the Triumph facility in Thailand, it could be observed that several different “codes” were pinned on the notice boards by the staff canteen — the company code that had been negotiated between the European works council and the company,<sup>19</sup> the Adidas Standards of Engagement and the global social accountability standard SA 8000. The company justification for this was that although the company essentially produced its own brands, it nevertheless acted as supplier to some major labels which insisted on their own code or third-party code requirements.

In the majority of cases where affiliates and other organizations bring an urgent appeal to the attention of the ITGLWF, the focus is usually on the failure of a supplier to observe the freedom of association and collective bargaining provisions of a particular buyer’s codes (ITGLWF, 2004b; see also Rimml, 2003). Increasingly, this type of case has involved degrees of direct local intervention by the general secretary of the ITGLWF, often accompanied by CSR staff of the major buyers, to pressure the management of suppliers to, for example, reinstate sacked trade union organizers and put in place an industrial relations framework (ITGLWF, 2006c).

### **ITGLWF involvement in multi-stakeholder initiatives**

Some of interventions have been made as a result of the ITGLWF’s involvement in multi-stakeholder initiatives. Such initiatives are common in the TCF sector. In them, civil society organizations, employers and even government officers are involved in the design and implementation

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<sup>19</sup> Triumph International’s Code of Conduct, based on the Corporate Image of Triumph International and the Charter of the European Social Partners of the Textile and Clothing Sectors, signed on 12 December 2001. Available at: [www.triumph-international.com/downloads/Code\\_of\\_Conduct\\_GB.PDF](http://www.triumph-international.com/downloads/Code_of_Conduct_GB.PDF) [4 Oct. 2006].

of standards and a variety of reporting, auditing, monitoring, verification and certification systems. Their development has a business logic since numerous companies have long recognized the tremendous duplication involved in the proliferation of codes and of code compliance efforts, as well as the need for some independent form of verification of their monitoring efforts (Utting, 2002).

The ITGLWF has become an active member in several multi-stakeholder initiatives: Social Accountability International (SAI),<sup>20</sup> the UK Ethical Trading Initiative (ETI)<sup>21</sup> and the Multi-Fibre Arrangement Forum.<sup>22</sup> In the case of the SAI, the ITGLWF played a central role in developing the SA 8000 standard, which is widely viewed as the most robust in the industry. Furthermore, information on the locations of factories certified under SA 8000 have been distributed to affiliates. In one or two isolated cases, sacked trade union representatives have been reinstated under threat of invoking the SA 8000 complaints mechanism. In the case of the ETI, which very much takes a “learning organization” approach to CSR, the ITGLWF has invoked the complaints mechanism to resolve freedom of association violations in UK retail supply chains and is participating in some ETI working parties. Finally, the Multi-Fibre Arrangement Forum — established after the expiry of the Agreement on Textiles and Clothing in 2004 in an effort to address impending job losses — has involved staff from the ITGLWF in discussions with participating companies on guidelines for managing the impact of restructuring on factories in vulnerable supply bases. There is little doubt that the ITGLWF's involvement in such initiatives has raised its profile and fostered working relationships, particularly between the general secretary of ITGLWF and other staff, and the CSR managers of corporate members.

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<sup>20</sup> SAI has the following member companies in TCF: Texline, Charles Voegelé, Synergies Worldwide, GAP Inc., Eileen Fisher, Otto Versand, and Timberland. In 2006, the general secretary resigned from the board of SAI after a decision was taken to work closely with the Business Social Compliance Initiative — a retailer-dominated organization that has embraced neither labour nor NGOs in its governance structures or compliance efforts.

<sup>21</sup> ETI has the following member companies in the sector: Asda, Cutter & Buck, DCC Corporate Clothing, Debenhams Retail, Dewhirst Group, Flamingo Holdings, Gap Inc., Inditex, Levi Strauss & Co, Madison Hosiery, Marks and Spencer, Marshalls, Monsoon, Mothercare, New Look, Next, Pentland Group, Quantum Clothing, Rohan Designs, Somerfield Stores, William Lamb Footwear, and Tesco.

<sup>22</sup> Available at: <http://www.mfa-forum.net/>. Participating organizations include AccountAbility; Business for Social Responsibility; Co-operative Group; Ethical Trading Initiative; Fair Labor Association; Fundemas; Gap Inc.; George/ASDA; Interfaith Centre on Corporate Responsibility; International Textiles, Garment & Leather Workers' Federation; Littlewoods; Marks & Spencer; Maquila Solidarity Network; Nike; Oxfam International; Social Accountability International; UNDP Asia Trade Initiative; UN Global Compact; and World Bank Group.

## Union avoidance

Sectorally, TCF is notorious as a sector in which, at least as far as supply chains are concerned, trade unions are at best avoided, at worst deliberately dismantled by the management of supplier factories. Globally, the picture is somewhat more complicated. MNCs, which purport to operate according to their codes of conduct or according to multi-stakeholder initiative codes of which they are members, are bound to observe the principles of freedom of association and collective bargaining. Yet for most of the 1990s, calls by the ITGLWF to specific companies for dialogue to resolve the victimization of workers during national recognition disputes were generally ignored. Where necessary, the ITGLWF has adopted more creative approaches to bring resistant employers to the bargaining table. In the case of a targeted German multinational, where the owner of the company had flatly refused to consider any “central guidelines” on employment standards, the threat of a global petition and leafleting campaign in German factories forced the company to begin negotiations on an IFA. Although negotiations remained inconclusive, coordinated trade union action clearly had an impact (Miller, 2004; ITGLWF, 2004b).

In the case of an MNC component supplier that had been taken over by a private equity concern, negotiations for an IFA were at an advanced stage before collapsing, following notification from central management that it would be adopting its own code of conduct. After a 12-month interregnum, the ITGLWF organized a workshop for trade union representatives in the Asian facilities of the company. The process of clarifying the programme for this event required renewed contact with the company and the ITGLWF was asked to attend a meeting at the company’s headquarters, at which company strategy, production locations and an outstanding Organisation for Economic Co-operation and Development complaint were discussed (Miller, 2004; ITGLWF, 2006b).

Following an international workshop held in 2003 for trade unionists within the wholly owned operations of Ramatex Bhd, the ITGLWF wrote six times to the company with concerns about trade union and workers’ rights at several of its global facilities. On each occasion the company failed to respond, but when a serious violation occurred involving foreign migrant workers at its Namibian factory, prompting the ITGLWF to write to the buyers sourcing from the factory and to the Namibian Government, the chief executive officer began direct email contact with the general secretary in an effort to resolve the dispute.

In 2003, jointly with Oxfam International and the Clean Clothes Campaign, the ITGLWF engaged in a global campaign for improvements in working conditions for sportswear workers in the run-up to the 2004 Athens Olympics. Campaign activities, launches, materials and other resources developed among the international secretariats of the three organizations focused on Mizuno, Puma, Asics, New Balance, Kappa, Fila, Lotto and Umbro.

The overall aim of the campaign was to persuade the International Olympic Committee and its sponsoring sportswear companies to recognize the limits of existing approaches on regulating abuses of workers' rights in sports-goods supply chains and to engage directly with the labour movement in developing a collective programme to address these weaknesses. One of the central planks was the call for a sustained effort to address the problematic areas of freedom of association and collective bargaining and for the negotiation of an international framework agreement for the entire sector, between the World Federation of Sporting Goods Industry (WFSGI) and the ITGLWF.<sup>23</sup> The campaign "lever" in the first instance was the publication of a research report in the media on violations in the sector, which led to "verification" meetings between some companies and the campaign team. This has led at times to ongoing dialogue between the ITGLWF and the companies in relation to general supply-chain management issues, health and safety and the resolution of specific disputes.

At two meetings held under the informal auspices of the ILO between the campaign team, leading corporate members of the WFSGI, and representatives of the International Olympic Committee, it became apparent that as a trade association the WFSGI had neither the authority nor the resources to engage in such a campaign. Moreover, some leading corporate members of the WFSGI made it known that they preferred to see sectoral matters addressed by the offices of the Fair Labor Association (FLA), a multi-stakeholder initiative with a significant sportswear-brand membership.<sup>24</sup> It became apparent that an agreement with some

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<sup>23</sup> See [http://www.fairolympics.org/background/programme\\_of\\_work.pdf](http://www.fairolympics.org/background/programme_of_work.pdf) [4 Oct. 2006].

<sup>24</sup> The Fair Labor Association grew out of the Apparel Industry Partnership, originally set up by President Clinton in 1996 to address issues related to anti-sweatshop campaigns. In 1998, the US trade union UNITE and several NGOs (mainly faith groups) exited the process, which had reached an advanced stage, over disagreements on code content issues (mainly living wages and hours of work) and issues related to monitoring (mainly frequency, selection of suppliers to be inspected, selection of auditors and transparency; see Gereffi et al., 2001; O'Rourke, 2003).

of the leading sportswear corporate members of the FLA, rather than with the WFSGI, might be possible (ITGLWF, 2005c). However, in return, the ITGLWF would be expected to go back on the withdrawal from the board of the FLA in 1998 of UNITE and United Students Against Sweatshops, which had resulted in a loss of credibility for the FLA. Some FLA officers considered formal recognition of the FLA by the ITGLWF as an action that would have helped restore this credibility. While such a sectoral framework agreement would essentially have addressed trade union rights, the ITGLWF felt that major shortcomings in the FLA's own code provisions in respect of wages and working hours were too great for it to take the matter further (ITGLWF, 2006e).

Although talks over a sectoral framework agreement had therefore stalled, sportswear brand owners were nevertheless interested in meeting with ITGLWF affiliates in Asia specifically to address the issues of freedom of association and collective bargaining. A regional seminar involving CSR staff from Adidas, Asics, Lotto, Nike and Puma, and affiliates from Cambodia, Hong Kong (China), India, Indonesia, Malaysia, the Philippines, Sri Lanka, Thailand, and Viet Nam was held in Viet Nam one year after the Athens Games. One significant agreed outcome was to replicate such an event at national level, but in the presence of suppliers (ITGLWF, 2005d).

Underpinning these trajectories is a marked shift in the thinking of leading companies in relation to the existing code compliance model towards root cause analysis and the explicit pursuit of global partnerships with stakeholders (Nike, 2005, p. 11; Adidas, 2005, p. 17; GAP, 2005, pp. 19, 34-41), and external critiques of this auditing model, such as O'Rourke (2000; 2004); Bendell (2001); Ascoly and Zeldenrust (2003); Esbenshade (2004); Pruett (2005); and Locke et al. (2007). In their public recognition of the limitations of the current compliance model, leading sportswear companies have acknowledged the importance of a developmental approach and social dialogue between trade unions and management. This has been evidenced by their willingness to participate in national seminars in the Philippines (ITGLWF Philippines Projects Office, 2006), Indonesia (Serikat Pekerja Nasional, 2006) and Thailand (ITGLWF, 2006d), and by involving ITGLWF affiliates and their suppliers in implementing freedom of association and collective bargaining measures.

Such initiatives help to make progress, although brand representatives are, correctly, keen to point out that they are not in the business of

organizing workers on behalf of unions. That would indeed fly in the face of the principle of freedom of association. There is little doubt, however, that the discrimination of workers on the grounds of trade union membership and activity does, as in the case of other forms of discrimination, deserve *positive* remedial action. At present, initiatives under consideration range from suppliers' awareness training to the brokering of negotiated "access" or "neutrality agreements" or non-interference guarantees to facilitate trade union recognition on the part of brands and retailers, rather than simply reacting to the many complaints of violations of ILO Conventions Nos. 87 and 98 as they emerge.

## Breakthrough?

In April 2005, Spectrum — a knitwear factory that employed some 2,000 workers in the Savar district of Dhaka, Bangladesh, and producing for some 23 (mainly European) retail brands, collapsed, killing 64 workers and injuring 84. The factory had been built on a swamp without proper foundations. Permission had been given for a four-storey building, but the owners had added a further five floors, and placed heavy machinery on the top floors. In the wake of this disaster, the ITGLWF organized a mission of major buyers to the site. The delegation consisted of representatives from the ITGLWF itself, the Business Social Compliance Initiative, the Cotton Group of Belgium, Inditex of Spain, Karstadt Quelle of Germany, and ETI of the United Kingdom. The first employer member of the delegation to respond almost instantly to the needs of the workers in Bangladesh was Inditex: in addition to making €35,000 available for the establishment of a Spectrum Fund, the company announced its intention to embark on an improvement programme with its 73 suppliers, disclosing their locations as part of a programme of work with local unions in Bangladesh.

In a series of joint follow-up visits aimed at establishing proper administration of the Spectrum Fund, the general secretary of the ITGLWF and the head of CSR of Inditex began to discuss ways in which the company and the ITGLWF could work together to address compliance issues in the company's supply chain.<sup>25</sup> This culminated in an IFA

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<sup>25</sup> The company had traditionally based the bulk of its manufacturing activity in Spain where CCOO-Fiteqa, the local ITGLWF affiliate, had membership in several supplier factories.

that was formally signed in October 2007 (ITGLWF, 2007c). Prior to this, two serious freedom of association violations had occurred at supplier facilities belonging to River Rich in Cambodia and TopyTop in Peru in the first half of 2007 (ITGLWF, 2007d). These incidents required country visits by both the general secretary of the ITGLWF and the head of CSR of Inditex, which resulted in the establishment of workplace systems of industrial relations and capacity-building programmes. In the period up to the formal signing, staff from the ITGLWF initiated work with the CSR department of Inditex with a view to revamping the company's audit methodology and engaging on the issue of purchasing practices.

## Conclusions

This chapter has outlined the flexible multi-track approach pursued by the ITGLWF in its quest for cross-border social dialogue with MNCs in the TCF sector. The peculiarities of globally outsourced apparel production have a critical impact on the trajectory of ITGLWF's policy and practices with regard to MNCs. Despite the problematic nature of seeking meaningful cross-border dialogue along apparel supply chains, the ITGLWF has nevertheless succeeded in securing its first IFA with an apparel retailer — Inditex. It remains to be seen whether this will lead to similar agreements with other global brands or retailers in the same sector. Alongside this goal, the ITGLWF continues to seek dialogue via involvement in multi-stakeholder initiatives, global campaigns and national meetings between brand owners, their suppliers and ITGLWF affiliates, in order to address the difficult implementation of freedom of association and collective bargaining principles. Crucially, the recent disclosure of supplier locations by leading companies in this sector represents, in many respects, the attainment of a major policy objective of the ITGLWF with regard to MNCs.

Nevertheless, the promise that has been held out by the willingness of CSR managers to engage in dialogue on the implementation of freedom of association and collective bargaining, and by their efforts to encourage suppliers to attend such meetings, marks the beginning of a critical process. It is not the role of MNCs to organize on behalf of a global union or its affiliates and companies know their place in this respect. However, the contested terrain is the extent to which forms of positive action can be resorted to in order to address the ongoing

discrimination against trade union organizers and members. The ITGLWF is thus pursuing, alongside a conventional IFA, other types of global agreements that would focus primarily on the issues of trade union access, neutrality and non-interference. Arguably, the opportunities for moving towards mature industrial relations in parts of the industry have never been better, but MNCs seeking to respond positively to root cause analysis of compliance failures within their supply chains know that the key issue is to get their suppliers to fully understand and accept the meaning of freedom of association. For the ITGLWF and its affiliates, Hyman's observation that the actual composition of trade union membership in many countries still reflects the composition of the working class half a century ago is powerfully relevant. If the unions that manage to organize in the apparel and footwear sector are to reach out to as many young men, women and migrant workers as possible in those supply chains, then they will have to adopt more imaginative methods of representation and recruitment and "seek alliances with other collective agencies once treated primarily with distrust and disdain" (Hyman, 2005, p. 149).

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# Chapter 8

## The ILO Maritime Labour Convention, 2006: A new paradigm for global labour rights implementation<sup>1</sup>

*Nathan Lillie*<sup>2</sup>

### Introduction

The forces that increasingly shape industrial relations are international, transnational, supra-national, or all three. International trade and investment put workers in distant locations in competition with one another. Transnational firms benchmark labour costs and work practices across borders (Sisson and Marginson, 2002; Katz and Darbishire, 1999), while unions and nongovernmental organizations (NGOs) compare conditions in factories around the world, pressuring firms to observe labour rights under threat of consumer boycott (Christopherson and Lillie, 2005). Supranational organizations, in which nation States “pool” their sovereignty (most notably the European Union) form a new arena of industrial relations outside and in a sense above national industrial relations systems (Marginson and Sisson, 2004). Global labour rights standards are increasingly used as a frame of reference for judging the practices of employers and the claims of labour rights advocates. In

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<sup>1</sup> An abbreviated, preliminary version of the findings on which this chapter is based was published in Lillie (2006, pp. 105-119).

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so far as corporations retain unilateral control of how these rights are applied, this trend represents a privatization of rights formally guaranteed in the public sphere. The case of the ILO Maritime Labour Convention, 2006 (MLC) shows, however, that where there are sufficiently transnational and coherent global political actors representing labour and capital (particularly labour), global tripartitism in the International Labour Organization (ILO) context holds the promise of reintroducing effective state enforcement of labour standards.

Within the ILO, 181 member country governments and representatives of the “social partners” (unions and employers) write the international conventions that are the basis for the current global labour rights regime. As with international regimes generally, ILO labour standards exert normative pressure on governments to comply with and implement standards in national legislation. ILO standards have also become the basis of private international standards regimes, used by transnational corporations (TNCs) to respond to or preempt criticisms of complicity in labour rights violations. In maritime shipping, neither the state-centred nor the emerging private labour standards regime serves the functional requirements of existing transnational labour market actors (unions and employers)<sup>3</sup> particularly well. In 2001, seafaring unions and shipowners in the ILO’s Joint Maritime Commission proposed a consolidated maritime labour convention, bringing together in a single instrument many existing maritime labour conventions, updating them, and applying an enforcement mechanism. The new instrument, passed after years of sometimes difficult negotiations in the February 2006 Maritime Session of the International Labour Conference (ILC), borrows elements both from the existing ILO global labour rights regime and from the global maritime safety regime, centred on the International Maritime Organization (IMO). The MLC will come into force when ratified by at least 30 member States registering ships totalling at least 33 per cent of world gross tonnage.

The MLC paradigm applies different aspects of state authority in a fragmented manner, knit together by practices of maritime industrial regulation. Beside the traditional member State implementation model, in which member States commit to respecting ILO standards in their own sovereign space, the MLC will have member States enforcing labour

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<sup>3</sup> In the shipping industry, it is accurate to describe both employers and unions as transnational actors (Lillie, 2004).

standards directly on *each other's* ships through the established maritime mechanism of port State Control (PSC). This involves a shift in the boundaries of state sovereignty in some respects, because ships, in a legal sense, have been regarded as floating pieces of their flag States' territories. However, practically, PSC will also operate as an incentive encouraging shipowners and flag States to adequately regulate their own shipping. In this sense, the flag State role still remains primary.

Pressures to change the boundaries of sovereignty, as far as labour rights are concerned, arose from the transnationally organized interests of maritime industry actors representing capital and labour at the global level. Political impetus for the convention came from pressure on shipowners to implement globally uniform standards in an industry deregulated through flags of convenience. Global collective bargaining in the industry has resulted in a significant faction among of shipowners being forced to operate under union collective agreements (Lillie, 2004). This faction, associated with the International Maritime Employers' Committee (IMEC), International Merchant Mariners Association of Japan (IMMAJ) and other employer members of the Joint Negotiating Group (JNG), seeks to "level the playing field" with low-standard operators by re-regulating the industry at the global level. The emergence of this conciliatory shipowner faction opened political opportunities for unions to push for enforceable global labour standards, and in particular to make the link between labour rights and PSC. In addition to reflecting the interests of the industry actors, the text was also shaped by the tripartism of the ILO, and the precedents set by existing international regimes: in particular the labour rights and maritime safety regimes.

ILO Conventions are passed through voting in assemblies consisting of unions, employers and governments. Unions and employers are divided into two "social partner" groupings of national associations. For the maritime section of the ILO, the social partners are referred to as the "seafarers' group" (workers/unions) and "shipowners' group" (employers'/shipowners' associations). Unlike transnational pressure groups in other intergovernmental organizations, union and employer representatives at the ILO have voting rights. The social partner groupings are led by representatives from among the International Transport Workers' Federation (ITF) and International Shipping Federation (ISF) national affiliate organizations, although national social partner representatives need not be members of those organizations.

In maritime shipping, social partner group strategies are closely tied into the internal politics and global collective bargaining strategies of the unions' and shipowners' international associations. A curious brand of global trade unionism and industrial relations has emerged from the ITF's Flag of Convenience (FOC) campaign. The FOC campaign began in 1948, when seafaring unions first took notice of attempts by some shipowners to "flag out" to developing countries with "flag of convenience"<sup>4</sup> ship registers. Since the 1970s, the campaign emphasis shifted from ending the FOC system completely to wage bargaining for FOC seafarers. Since 2001, it has involved explicit global industry-level wage bargaining for seafarers on FOC ships (Lillie, 2004).

The leadership of the shipowners' group has been closely associated with IMEC, and IMEC's policy of detente with the ITF. Part way through the negotiations, an internal power struggle took place among the shipowners. A new "hard-line" leadership emerged for a time, which was no longer as close to IMEC, and was unsure whether it really wanted the MLC at all. In the end, hard-line shipowner strategies did not prevent the Convention from being signed, or result in significant modifications to the text. The shipowners' group finished the MLC negotiations under its original conciliatory leadership. The disruption reveals factions created by the variable influence of the ITF flag of convenience campaign on different shipowners' groups, and different understandings in the industry of how best to react to ITF pressure.

## Significance of the ILO Maritime Labour Convention, 2006

When the MLC comes into force, this will signal an important change in the way that global labour rights are governed in the maritime industry, but even more significantly it sets a precedent for labour rights and global governance generally. Although a logical continuation of current and ongoing developments, it codifies maritime shipping's fundamentally new way of implementing labour standards. The MLC builds on maritime regulatory experiences from PSC; on the IMO's 1995 Standards of Training, Certification and Watchkeeping convention and

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<sup>4</sup> Many shipowners prefer the term "open" register, but "flag of convenience" is probably the more commonly used term.

**Table 8.1. Three labour standards regulatory paradigms**

Model	National regulation	Private business standards	Maritime Labour Convention
Political formulation mechanism	Tripartite model negotiation of conventions, entry into force through ratifications.	Picking and choosing existing international labour Conventions to adhere to. Driven by corporate strategy and the priorities of corporate social responsibility partners.	Tripartite model, driven by coherent “insider” social partner group.
Articulation mechanism	Enforcement through shaming of national governments into implementing and enforcing in national law.	Enforced through corporate human resource management policy, through pressure on suppliers, through the demands of marketing, and through relations with corporate social responsibility partners.	Enforcement through fragmented state authority, building on top of existing maritime regulation: labour supply States, flag States, and port State Control.
Enforcement problems	Fragmented by uneven geographical application. Enforcement limited by sovereignty, insufficient monitoring capacity, and interstate competition for investment.	Fragmented by uneven corporate application, limited by corporate enforcement in supply chains, effective application primarily limited to trans-national corporations and suppliers.	More comprehensive system than the others, with means of limiting geographical and intercompany fragmentation.

Source: Author.

related initiatives; and on the power relations in maritime industrial relations created by the ITF’s collective bargaining strategy, and capital’s responses to it. There are two established paradigms for articulation of the international labour standards regime into shop floor practice — national regulation and private business standards — with the MLC presenting a third (table 8.1).

MLC is different from the traditional national regulation model in that it is based not only on the structure of the interstate system, but also on the structure of the maritime shipping business. Consistent with an

ideal type of global system built on national varieties of capitalism (Hall and Soskice, 2001) represented in international politics by national governments (Richards, 1999), labour standards have historically been a national responsibility with enforcement and legitimacy monitored by labour organizations and their political partners. They arose from international deliberations in ILO, but were implemented (or not implemented) by national governments using much the same diplomatic process as other international agreements (O'Brien et al., 2000; Weisband, 2000). Under the MLC, although nation States enforce the standards, they do so not only on themselves as flag States in response to obligations to international treaties, but also on each other and directly on shipowners as port States. Transnational enforcement machinery no longer looks like (officially) harmonized parallel sovereign systems, but more like a globally integrated network involving various levels of government authority.

The MLC model of labour standards differs from the more recently developed private business standards model in that authoritative external actors enforce the regime, and the MLC's provisions have a better defined legal status than do business standards. The failure of effective enforcement through the state-centred paradigm has stimulated a move to privatize labour standards, implemented through corporate social responsibility (CSR) and corporate codes of conduct. In some cases, these policies are implemented by firms unilaterally, perhaps through hiring an auditing firm or participating in a monitoring regime; in other cases, they involve negotiating the terms of the code of conduct with trade unions. Union-negotiated agreements, called international framework agreements (IFAs), are in some respects similar to collective bargaining agreements, but in most respects are simply CSR policies to which the trade union movement has given its approval. In effect, the "subject" of standard making has shifted from the nation State to the multinational firm (Murray, 2001).

Implementation of labour standards by firms and business associations, whether through IFAs or other means, often draws on ILO standards, relying on a normative tradition of human rights, but is fundamentally based on the concept of achieving efficiency through standards. IKEA for example in its code of conduct, which is formalized with the union movement in an IFA, relates achievement of high environmental and labour standards to business efficiency (Christopherson and Lillie, 2005). As such, it is premised on the idea that respect for human rights

is voluntary, that is, that businesses should respect human rights as part of a strategy of enlightened customer relations and good human resources practices. The International Organisation of Employers (IOE), which represents employers at the ILC, explains that observance of labour rights standards must be conditional on their economic sustainability (IOE, 2002). Presumably then, if it turns out that CSR does not actually enhance corporate profits, the case for respecting labour standards falls apart. In this sense, self-regulation of labour rights is not so much as an attempt by businesses to improve workers' lives, as to define and limit the terms of debate by colonizing the political space with a business-friendly structure, and to create and exploit niche markets for socially responsible consumers. Voluntary CSR is inherently self-limiting in that regard since respecting human rights becomes a strategy, with implementation conditional on it being more profitable than not respecting human rights.

## Maritime industry regulatory structure

To understand how the MLC's labour rights paradigm compares to the other two, it is necessary to discuss the maritime industry's regulatory framework. The MLC exists at the intersection of two regimes: the regime regulating global labour standards, and that regulating international shipping safety and pollution. The MLC relies on precedents from both, and draws on the regulatory capacities of flag States, port States, labour supply States, international organizations, shipowners, and unions at various junctures. Its structure matches the transnational nature of the maritime industry, knitting together fragments of the old nationally centred systems in transnational ways. The central strategy is to encourage what DeSombre calls "clubs" of responsible shipowners and flag States (DeSombre, 2006), the entry to which is ultimately monitored by PSC.

In shipping, globalization has occurred through the displacement of the industry into a disembedded transnational space — via the FOC institution. The ability of shipowners to escape to relatively unregulated FOCs creates a space for substandard shipping to operate. An often-cited OECD study (OECD, 2001) shows that substandard shipowners have a competitive advantage over those who observe international standards for ship operation. This advantage comes through externalizing social and environmental operating costs through complex and opaque off-shore corporate structures (Metaxas, 1985; Stopford, 1997, pp. 438-439). As a

result, as DeSombre points out, in the shipping industry clubs are quite common, and involve both state and non-state actors in their creation and enforcement. Since the FOC system makes it difficult to enforce standards universally through traditional State regulatory means, actors seek instead to figure out where it is possible to regulate access to some desired good, whether it be national markets, port facilities, port labour or insurance cover, and exclude from access to it those who do not respect their standards (DeSombre, 2006).

There are three aspects to state regulatory power in maritime shipping: flag States, port States, and labour supply States. Attempts to create transnational regulatory clubs can invoke any of these, as well as the powers of private actors such as unions, shipowners' associations, insurance companies, protection and indemnity insurance clubs,<sup>5</sup> banks, and classification societies. Increasingly, the tendency is to integrate the various public and private regulatory tools, so as to build mutually reinforcing points of regulation at which substandard shipowners can be excluded.

## Flag States

Flag States, in theory, have sovereign authority over all vessels in their register, and are nominally the most important regulators in maritime shipping. Flag States are expected to implement in legislation relevant ILO and IMO conventions. They are also expected to maintain inspection apparatus to ensure that the ships they register comply, and apply legal sanctions on the shipowner if they do not. Flag States, when they are actually regulating as flag States, have the most consistent and comprehensive authority of any shipping industry actor.

In a world without FOCs, a regulatory regime based on flag State enforcement would probably be adequate. However, shipowners may elect to flag their ships in any country that will have them. Since choice of flag is influenced by the enforcement of standards under that flag, there is a constant temptation for countries to change their regulations specifically to attract shipowners. Shipowners operating at a high standard may choose to continue to fly high-standard flags, but those seeking to reduce costs will move to flags where enforcement is weaker.

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<sup>5</sup> Protection and indemnity insurance clubs (or P&I clubs) are non-profit-making collective insurance clubs for shipowners. See [http://www.ukpandi.com/UkPandi/InfoPool.nsf/HTML/About\\_IG](http://www.ukpandi.com/UkPandi/InfoPool.nsf/HTML/About_IG) for a description, or DeSombre (2006, pp. 181-198) for a discussion of their role in industry self-governance.

Therefore under current conditions, flag State authority does not constitute a comprehensive regulatory enforcement regime for global shipping.

The MLC includes a strong element of flag State enforcement. However, other elements, such as PSC, are also included. PSC provides a backup, and encourages negligent flag State administrations to enforce international standards, because ships flying flags with poor enforcement regimes are more likely to attract the attention of PSC inspectors (see next subsection).<sup>6</sup>

### Port State Control

PSC is used to support a “club” of flag States and shipowners who fly their flags by making flags with weak inspection regimes undesirable for ships visiting ports with strict PSC regimes (DeSombre, 2006, chapters 3 and 5). The MLC extends this concept, already operative in technical aspects of shipping safety, to labour rights issues. Since the early 1980s, maritime accidents and other problems created by flag State negligence have prompted many countries to inspect vessels that call at their ports. Port State inspection rights are legally based on the right of States to protect their own citizens and shore lines, even when this hinders freedom of navigation or violates flag State sovereignty. PSC rights are interpreted as allowing countries to enforce accepted international agreements on ships visiting their ports, but fall short of allowing the enforcement of national laws, as this would be deemed too great a restriction on the principle of free navigation (Keselj, 1999).

PSC works through spot inspections. A certain percentage of ships calling in port are inspected, and those in severe violation of safety standards are detained until repaired. Detentions only occur in a minority of cases when deficiencies are detected. With less severe shortcomings ships are allowed to sail, provided that they undergo a subsequent inspection to determine whether the shortcomings have been remedied.

PSC inspections enforce rules collectively decided in the IMO and ILO, although until recently PSC officials had not usually been trained to check for labour violations. PSC has seen some success in improving standards in the industry, but has serious limitations. Penalties are

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<sup>6</sup> The Paris Memorandum of Understanding, for example — a regional organization coordinating port State inspections in Europe — assigns points to ships to determine the likelihood of inspection. Ships flying “problem” flags are more likely to be inspected (<http://www.parismou.org/>).

corrective rather than punitive, so that some shipowners wait until they are caught to make repairs. There are also many possibilities for evasion, and it is impossible to carry out a thorough safety inspection in the time available to PSC inspectors (Bloor, 2003). Nonetheless, tightening PSC enforcement appears to have had an effect on flag State behaviour, because some flag States have responded to pressure from shipowners to raise standards by deregistering low-standard shipowners. Because of improved flag State control, remaining shipowners are subject to less scrutiny by PSC. In this way, the “club” effect created by PSC is mediated through flag States (DeSombre, 2006, pp. 98-114). In a statement by the group of union leaders representing the seafarers’ side of the MLC negotiations, the seafarers’ group explained the relationship between PSC and flag State responsibilities: “Port State Control in the ILO context would be based on compliance with the CMLC [MLC] at shipboard rather than flag State level. It would not displace the primary obligation of the flag State ...” (Seafarers’ Group Statement, 2005).

### Labour supply States

Giving a regulatory role to the labour supply State, or seafarer’s State of residence, is a relatively recent innovation. Labour supply State obligations have now been included in international conventions relating to skill certification, identity documents and recruitment (Dirks, 2001). Although labour supply States rarely have the authority or capacity to intervene comprehensively in shipping regulation, they do have some authority over and responsibility towards their seafarers, and are therefore another link in the chain of responsibility.

Most important, it is the labour supply States that train and certify — or as sometimes happens, fail to train adequately but certify anyway — the seafarers who work on open register shipping. As a result, during the 1990s, at the urging of the maritime industry and trade unions, national governments revised and updated a 1978 IMC Convention, Standards of Training Certification and Watchkeeping, and made it enforceable through PSC and a “White List” of labour supply countries deemed to be compliant. This amendment, known as STCW 95, places an onus on labour supply States to show that their training schools can adequately educate seafarers to international standards. The threat of exclusion from the international labour market, by omission from the White List, is the incentive for labour supply States to improve seafarer training, as shipowners will not want to hire seafarers whose certificates attract extra

attention from PSC (Lillie, 2006, pp. 89-104). Labour supply States are less directly involved in enforcement of the MLC. However, they are expected to enforce the requirements of the MLC on labour-recruitment agencies operating in their territory, which mainly relate to ensuring that the costs of using recruitment agencies are borne by the shipowner, and not the seafarer.

## Labour market competition

The interests of labour market actors in the MLC negotiations were conditioned by the extreme globalization of the labour market that occurred under the FOC system. The seafarers' group interests were firmly embedded in the ITF's strategy of global maritime labour market control. Likewise within the shipowners' group, both the conciliatory and hard-line interest groupings reflected different views on how to best deal with the ITF's bargaining strategy. Both seafarers' and shipowners' group interests were therefore influenced by global maritime labour market conditions, and the manner in which the seafaring labour market has globalized.

Although not all ships competing in international trade are under FOCs, the competitive dynamic of the industry is defined by the FOC institution. This rose to significance after World War II, and has become particularly prevalent since the 1970s (Northup and Rowan, 1983). Since FOCs do not generally have nationality-based hiring restrictions, multinational ship crews are now the norm, and a global institutional infrastructure has developed to hire ship crews from low-wage seafaring labour-supply countries for work anywhere in the world (Alderton et al., 2004). The freedom to hire from anywhere has allowed maritime labour sourcing to shift geographically, searching for suitable labour at the lowest possible cost. Just after World War II, FOC crews were drawn from many diverse countries, including those in northern Europe. By the 1970s, northern Europeans had become too expensive, and sourcing shifted to southern Europe, the Republic of Korea, and Africa. Through the 1970s and 1980s, Filipinos began to displace other groups, in part as a result of the Philippine Government's policy of encouraging the export of cheap labour for foreign exchange (CIIR, 1987). With the opening of the eastern bloc, the Russian Federation and other post-Communist countries challenged the primacy of the Philippines and India (which has always been a major seafaring labour supplier) by flooding the market with highly trained seafarers (Johnsson, 1996).

Despite a certain amount of inter-union political struggle, often exploited by employers, the ITF has so far been able to integrate into its bargaining system, or if not possible exclude from the market, each new aspiring labour supplier country in turn (Lillie, 2004). An essential component of FOC campaign success is the enforcement of union contracts through transnational structures for worker mobilization, contract monitoring and seafarer representation. Maritime unions exploit interdependencies in transportation production chains by leveraging union strength in one part of the chain — ports — to further the interests of workers in another part of the chain — on board ships at sea. The basic tactic is to compel shipowners to sign collective bargaining agreements using ship boycotts by port workers, performed at the point when a ship attempts to load or unload, or to exit a port. Because time spent in port is expensive for shipowners, this is effective (Lillie, 2006). Port unions, tied together by the ITF's inspector network, provide the main power resource on which the ITF's global bargaining and political strategies are based.

Through its private union-based labour standards regime, the ITF has already seized a stronger position in effectively defining global shipping regulation than that of the shipowners. ITF bargaining strategy takes wages out of competition by segmenting the global labour market into internationally competitive shipping (including FOCs), high-standard national flags (which are left to national unions), and developing-country national flags (Lillie, 2004). Global employers' federations, the International Maritime Employers' Committee (IMEC), and the International Mariners Management Association of Japan (IMMAJ) (as well as some national shipowner associations), now negotiate with the ITF in the International Bargaining Forum over pay scales for seafarers on FOC ships. Agreements have been multi-year ones, although the Forum meets at least yearly, or even more often in years when pay negotiations take place. The 2007 Forum talks resulted in a pattern agreement for pay and working conditions for approximately 70,000 seafarers on about 3,500 ships (ITF Press Release, 22 Sep. 2007). In 2004, about 8,170 ships in total carried ITF-approved contracts (ITF FOC Campaign Report, 2004), including those with Forum agreements.

Employers have attempted, so far in vain, to put forward a credible alternative system of labour market regulation to union collective bargaining. Shipowners promote the ILO minimum wage for seafarers, set according to a bargaining process defined by the ILO Wages, Hours of Work, and Manning (Sea) Recommendation, 1996 (No. 187), as a

legitimate alternative to ITF contract rates. Since 2005 this wage has been \$500 per month.<sup>7</sup> The ITF views the ILO rate as an appropriate minimum only for national flag shipping (and presumably only on shipping flying the flags of developing countries). It is used as a benchmark for collective negotiations in some countries, but is not vigorously enforced by the ITF, or anyone else. There have also been half-hearted attempts at business self-regulation. The ISF publishes “good employment practice” guidelines for shipowners, which incorporate ILO Conventions and Recommendations, as well as the ISF’s own policies. According to *Lloyd’s List*, these “guidelines were in part designed to underline the organization’s positive agenda”, and deflect criticism that the ISF was resisting a regulatory agenda put forward by others (*Lloyd’s List*, 1 January 2001). During a disagreement in the ILO MLC talks over the use of PSC to enforce labour standards (discussed later), some shipowners approached the labour standards certification body Social Accountability International about an alternative private labour rights certification approach. From the ITF’s perspective, however, regulation through ILO or CSR standards would be weaker and more laxly enforced than through ITF standards.

Furthermore, maritime shipping is mostly a market for producers, rather than directly for consumers. CSR-based standards tend to depend on the demands of consumer markets, and except in a minority of cases involving passenger ships, it is not clear that there is a consumer market in which pressure for “voluntary” corporate standards could be organized. As long as the ITF has the industrial power resources available to enforce its agreements, it has little reason to accept laxer means of standards implementation, and in any case it may not have appropriate pressure tools available to enforce consumer-based standards. Shipowners’ attempts to move to a more ILO- or CSR-based model can be seen as an attempt to shift the political struggle to a field more advantageous to them.

In the struggle to shape the developing private regulatory regime of the shipping labour market, the ITF is in many respects ahead of the shipowners. Although the regulatory starting point — an open market in which it is very difficult to enforce non-market-based regulation —

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<sup>7</sup> The ILO rate is calculated on base pay, and does not include overtime and benefits, unlike the ITF contract rate. With overtime and benefit pay added in, the total labour cost figure is \$817. This figure, and not the \$500 figure, is more comparable to the ITF rate (*Lloyd’s List*, 29 July 2003).

clearly favours those shipowners best able to avoid regulation, it leaves open a political “regulatory space”, which the ITF has filled.

## Maritime Labour Convention contents and functioning

The MLC supersedes most ILO seafaring labour Conventions and Recommendations, although the important recent Seafarers’ Identity Document Convention (Revised), 2003 (No. 185) is not included. Conventions that are deemed obsolete because the issues they address are no longer relevant, or that have been replaced in function by IMO conventions are also omitted from the MLC. Countries ratifying the MLC are no longer bound by the previously ratified conventions it supersedes, and are instead bound by the provisions of the MLC.

The instrument’s structure introduces various innovations, some that are borrowed from the IMO experience, and some that resolve problems unique to the ILO’s situation. The MLC is divided into articles, regulations and titles, as well as a preamble and appendices. In addition to setting a framework containing fundamental rights and principles, as well as seafarers’ employment and social rights, articles address administrative issues for managing the document, such as entry into force, amendments and definitions. Titles are substantive content, and consist of regulations, standards (called Code A) and guidelines (Code B). Regulations set out the aims of each title, implemented in the way described in the code. Code A is mandatory, in that each ratifying country will be expected to change its legislation to be compatible with it. Substantial equivalence is allowed, so that national laws deemed to provide equivalent or superior protection to seafarers need not be changed. Code B contains a good deal of detail, but is only intended to provide guidance in implementing Code A and the regulations, and in that sense it is not mandatory. Code B is an innovation arising out of the MLC negotiation process, and facilitates the inclusion of recommendations and poorly ratified conventions without giving those instruments greater status than they in effect already have. From the IMO experience, the convention borrows a “tacit amendment procedure”, to allow the updating of aspects of the rules without a full meeting of the ILC. Negotiation participants considered this important because it is difficult to predict the impact of a convention as large

and complex as this one. Revisions may be necessary, and these would be very time consuming under the normal ILO process.

Inspection and enforcement procedures draw heavily on the IMO and PSC experience, as well as referencing the earlier ILO Labour Inspection (Seafarers) Convention, 1996 (No. 178) (which in turn relied on IMO and PSC precedents in its formulation).<sup>8</sup> Important to the MLC's impact will be the principle of “no more favourable treatment”, borrowed from IMO conventions, which ensures that port States can monitor compliance of ships flying FOC which are non-signatories, so that flag States, rather than having an economic incentive not to ratify and to be regulatory havens for non-compliant shipowners, have an incentive to ratify and to implement the MLC so that their shipping will not be singled out by PSC inspectors as problematic.

## ILO as an institutional setting for labour standards negotiations

International relations scholars have shown that the bureaucratic and decision-making characteristics of international organizations have an effect on bargaining outcomes (Reinalda and Verbeek, 2004; Cox and Jacobson, 1973). This is evident in the tripartite structures of the ILO, where the social partners — unions and employers — tend to be the driving force behind legislation. Governments make up half the voting group, while each of the social partners is allocated one quarter of the vote each (2:1:1). Through a process resembling something between diplomatic negotiations and collective bargaining, the three groups negotiate conventions and recommendations. As with maritime conventions generally, the actual negotiation of the MLC document took place in preparatory meetings administered by the ILO Social Dialogue/Sectoral Activities Branch (SECTOR). After being negotiated in the SECTOR framework, maritime conventions then go to the full Maritime Session of the ILC, which meets approximately every 10 years, for a final discussion and formal vote. This is a special procedure. General conventions are negotiated and voted on in the ILC by representatives from national multi-sectoral and sectoral union federations, business associations and governments.

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<sup>8</sup> The Convention's text, drafts, minutes of meetings, and various position papers are available at: <http://www.ilo.org/public/english/dialogue/sector/sectors/mariti/consol.htm>.

Because of the highly international nature of the shipping environment, the ILO, since its inception, has treated the welfare of seafarers as an area deserving of special attention, with industry-specific machinery. Thirty-nine Conventions and one protocol to a Convention have been adopted in the maritime sector, out of a total of 188 Conventions. No other industry has received anywhere near this much attention — fishing and dock work are in second and third place with six and five Conventions each, respectively. The rules of procedure and the institutional balance of power is the same, however, for general Conventions and maritime shipping Conventions. Presumably, if a proposed instrument is put forward by consensus in the framework of the maritime section of SECTOR, it will then be adopted at the ILC, since the required consensus between interested parties has already been mobilized. Few conventions are voted down in the ILC (Boockman, 2003).

Because of its complexity, the MLC had an extended negotiating procedure. Special high-level tripartite working group meetings took place in December 2001, October 2002, July 2003, and January 2004, in order to have a mature document ready for the September 2004 Preparatory Technical Maritime Conference (PTMC), where the negotiations were to be completed. The debates of the January 2004 working group, as well as the PTMC, followed a multiple working group committee structure, because of the large numbers of issues to be addressed. This allowed for much more intensive discussions, moving forward at the same time on a variety of issues. After failure to come to agreement at the PTMC on certain aspects of the draft convention, the negotiators agreed to postpone consideration by the ILC from February 2005 to February 2006, and held a supplementary tripartite intersessional meeting in April 2005 to work out the remaining points of disagreement. The resulting document was discussed and approved by a vote of the Maritime ILC in February 2006.

The 2:1:1 voting configuration on the surface gives governments dominant influence. However, unlike the social partners, governments do not vote, strategize or negotiate as a coherent block. The union side, and to a large extent the employers, have unified strategies, speak through designated group spokespeople, and tend to vote as blocks.<sup>9</sup> As a result,

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<sup>9</sup> Boockman (2003) shows that unions always vote with their group, and always vote “yes” for every convention. This is not as surprising or one sided as it may seem — if a labour rights convention were unacceptable to the union side, it would be unlikely to go forward to a vote in the first place. Employers, however, do not always vote together, nor do they support every convention.

the social partners exercise a great deal of influence. The social partners often treat governments as an audience to be influenced on issues where the social partners cannot find agreement. This is not to say that governments have no substantial influence. They are not only “swing” voters on key issues, but they also greatly influence the real world impact of the convention by ratifying it or not. Their influence, is, however, more passive than that of the social partners, in that the social partners shape the convention according to their preferences within the constraints of what they believe will be acceptable to a critical mass of governments.

Within negotiations, discussions are divided into plenary meetings and caucuses. Governments’, unions’ and employers’ groups are all present at plenary meetings chaired by an elected Conference President from the governments’ ranks, or by one of the three vice-presidents from the governments’, employers’ or workers’ ranks. In plenary, group spokespeople are usually the only ones to speak from among the social partners, meaning each social partner group speaks with one voice. Governments, however, generally speak for themselves. Although they have a group rapporteur, this is purely for reporting purposes. Plenary sessions alternate with group meetings, which are closed strategy sessions where each group attempts to arrive at a unitary position.

In the MLC caucuses, the unions’ and employers’ groups tended to be dominated by core constituents who were well networked and informed about the issues under discussion. The core groups included the group chairs, representative(s) from the groups’ international associations (ITF and ISF), as well as some of the more interested leaders from national unions or employer associations. However, less central constituents provided input as well, particularly when representing their own national situations. Social partner delegates planned strategies for influencing the positions of specific national governments in the caucuses. Sometimes, this involved mobilizing a particular union or shipowner delegate to advise or pressure their national government representative, in hope of moving the government’s position closer to that of the social partner group in question. The governments’ group meetings, on the other hand, were not as much strategy planning sessions as the social partners’ group meetings, but sometimes resembled an extended plenary. Unlike the views of the unions and employers, government views tended to be too divergent on contentious issues for a unitary strategy to emerge.

Between the larger and more formal meetings, much of the actual negotiation (particularly on complex issues) occurred in small specialized

ad hoc working groups between social partner representatives and governments with a particular interest in the issue at hand. Overall coordination of the negotiations was provided by the steering committee consisting of the chairs and vice chairs of the various working groups. Many of the more contentious issues were resolved in small, informal groups of key players. These then reported back to their caucuses to mobilize consensus around the solutions that they had produced.

## Actors and interests

Space precludes full discussion of the negotiations, so this analysis will focus on key issues in Title V, Compliance and Enforcement, the most contentious title of the MLC. Until the July 2003 meeting, there seemed to be a consensus among the social partners that the MLC should include a strong PSC element, even if there was disagreement on specific issues. In the January 2004 meeting, however, it became clear that the shipowners' group was having a change of heart. Hard-line shipowners began to question previously agreed text, and challenge each of the practical enforcement provisions as these came under discussion. These attempts to change the text proved unsuccessful, in that the final document contains specific language allowing the use of port State authority to inspect and detain ships for violations of seafarers' rights.

The seafarers' group's negotiating goals were clearly related to overall ITF collective bargaining strategy. From the union perspective, the main advantages of the MLC were the extension of at least some minimum labour standards to non-union seafarers, and the involvement of government inspectors in maritime labour inspection on international shipping. By establishing enforceable standards for the still quite large non-union labour market segment, the ITF could take some of the cost pressure off unionized shipowners, making its bargaining job easier. The consensus in the seafarers' group was that the MLC was worth the risk of legitimating the FOC system if it included strong enforcement mechanisms, but not otherwise.

Shipowners' stated interest in the convention was to obtain a level playing field on labour costs, and a "one-stop shop" to certify compliance with international labour standards. They hoped that by establishing standards based on uniform business practices, they could head off ITF and unilateral government action, as well as exclude lower-standard oper-

ators from the industry. Not all shipowner associations had the same priorities, however. Some appeared to prefer that the MLC, or at least a strictly enforced MLC, would not go forward. Others were sceptical about the prospects for wide ratification, and worried that if the convention was ratified by their own country, but by not other countries, they would be put at a disadvantage — particularly if enforcement provisions were weak. As a result of conflicting interests, the shipowners' group experienced internal turmoil, with those sceptical about the convention in the ascendant during the 2004 PTMC.

Government views cannot be summed up as easily, although there were a few consistent trends. Governments preferred the convention to be easily compatible with their existing practices. There were budgetary concerns about the cost of inspections and the need to train inspectors in labour rights issues. Many governments voiced opposition in the 2004 PTMC to a strong enforcement mechanism and in particular to allowing PSC to detain ships on labour rights grounds. They cited the subjectivity of inspectors, the practical difficulties of labour inspection and the drastic financial consequences for a shipowner of having a ship detained, as reasons why PSC should not be permitted to detain ships on labour rights grounds (although, apparently, these objections did not apply to detentions relating to the physical condition of the ship).

It appears that some governments, for whatever reason, did not want labour rights and enforcement explicitly connected in the MLC, but also did not wish to state their opposition outright. Their views, however, only emerged in January 2004 after the shipowners' change of position, and probably in response to shipowner lobbying efforts (at least, this was the view of some seafarers' group members). After the April 2005 intersessional meeting, where the shipowners' and seafarers' groups worked out their differences on the MLC's enforcement mechanism, these sceptical governments became more supportive. They still brought forward practical objections to certain details of the enforcement procedures, but these tended to be more narrowly focused on improving the MLC's functioning than on undermining the consensus on enforcement.

Table 8.2 shows some of the areas of disagreement in the working group committee on certification and enforcement, the positions of the seafarers' and shipowners' groups on each issue during the September 2004 PTMC negotiations, and the final resolution in the text as approved by the ILC.

The most fundamental points of disagreement during the September 2004 PTMC revolved around the role of PSC, and the obligation of flag States to withdraw certificates from ships not in compliance with the convention. Access of union officials, access of seafarers to the text of the convention, and access of seafarers to outside representation could not reasonably be denied, although a good deal of confusion resulted from shipowner attempts to insert language limiting the effect of these clauses. Other issues could be and were cleared up, usually after a concession from the shipowners, when they realized that their position contravened important principles of human rights law or the ILO Constitution.<sup>10</sup>

When it became apparent during the PTMC that the shipowners and a number of governments were unwilling to approve language allowing PSC inspection and detention of a ship on labour rights grounds, the entire seafarers' group walked out of the meeting. They accused the governments who disagreed with them of either not really understanding the issues, or of being opposed to including practical labour rights enforcement in the MLC. The parties decided to meet again to resolve their differences in a "special mechanism" in April 2005, and consideration by the ILC was put back from 2005 until 2006.

In the April 2005 meeting, the seafarers' group made it clear that weak enforcement provisions would be a deal-breaker. Unions regarded PSC and ship detention as the real back-stop to all other enforcement provisions, without which, in their view, the rest of the convention would be meaningless. While some shipowner representatives and governments maintained that, in their view, the MLC should only consolidate existing conventions, and not go beyond them, the seafarers' group made it clear that it would not support an MLC that failed to go beyond existing conventions and precedents in terms of enforcement and compliance. Its goal, and its price for supporting a level playing field for shipowners, was to move beyond existing precedents for labour rights enforcement. A seafarers' group statement reads:

It is clear that the enforcement provisions of the [MLC], including those relating to PSC, need to go further than those provided for under the ILO

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<sup>10</sup> This was the situation, for example, during the discussion of seafarers' right of access to outside representation, where the employers' proposed language would have put very significant restrictions on seafarers' rights to accessing more favourable treatment in national law (protected in Article 19 Paragraph 8 of the ILO constitution). The employers' proposal would also have violated Articles 19 and 20 of the United Nations Universal Declaration of Human Rights. The seafarers' group felt that ILO conventions should not oblige countries to violate long-standing human rights norms.

Table 8.2. Positions of the social partners on compliance and enforcement issues

	Seafarers' group positions on inspection and compliance	Shipowners' group positions on inspection and compliance	Resolution in PTMC and final text
<b>Authority of flag State inspectors</b>	Serious breaches of "seafarers' rights" as set out in the convention should be grounds to detain a vessel. The term "rights" should be used.	The term "rights" should not be used "as this convention was not a bill of rights for seafarers, but rather a consolidation of minimum maritime labour standards". Withdrawal of certification was not justified on labour rights grounds alone, there must be a health and safety concern.	In the PTMC, this was unresolved. The final text gives flag State inspectors the authority to detain a ship when they believe there is a "serious breach of the requirements of the Convention (including seafarers' rights)..."
<b>Authority of port State inspectors</b>	Inspectors are professionals who should have some leeway to decide whether or not to inspect a vessel. Any serious breach of the convention should be grounds for detention, including but not limited to health and safety of the seafarers.	Certificates should be prima facie evidence of compliance. Only if an inspector has clear grounds to believe the convention is being violated should an inspection occur. Only working and living conditions should be inspected; and of the provisions of the conventions, only health and safety issues should justify detention of a vessel.	In the PTMC, many areas of disagreement were unresolved, and more governments appeared to support the shipowner position. Final text makes certificates prima facie evidence of compliance, but inspectors may inspect if they receive a complaint or if there are "clear grounds" for suspecting non-compliance. A "serious" breach of the convention, including of "seafarers' rights", are grounds to detain a ship.

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Table 8.2. (Cont.)

	Seafarers' group positions on inspection and compliance	Shipowners' group positions on inspection and compliance	Resolution in PTMC and final text
<b>Access of union officials</b>	Should be able to examine and verify certificates.	Only "authorities" should be able to examine and verify certificates.	Resolved in favour of seafarers in the PTMC.
<b>Access of seafarers to convention text</b>	Should have access to original text of convention/certificates of compliance; should be visible in public areas of ship.	Rights and certificates should be kept with the captain; only authorities should be able to examine and check validity of certificates.	Resolved in favour of seafarers in the PTMC.
<b>Validity period of certificates</b>	3 years.	5 years.	Resolved through straight compromise: a 5-year certificate, with an interim inspection in the PTMC.
<b>Access of seafarers to outside representation</b>	Should have on-board and on-shore complaints procedures, through whatever employer, union and flag and port State legal mechanisms available, clearly in the text, so that seafarers know they have this right.	Wanted to narrow down seafarers' avenues of complaint to employer-based and flag State mechanisms, and insert language that might discourage seafarers from seeking redress.	Resolved in favour of seafarers in the PTMC.

PTMC = Preparatory Technical Maritime Conference.  
Source: Author.

Convention No. 147 regime. If that is not the case, the Seafarers would consider that the mandate we were given had not been fulfilled and that the delicate package the consolidation process was supposed to deliver was fundamentally flawed (Seafarers' Group Statement, 2005, p. 12).

Codification of weak standards without enforcement would give union approval to the FOC system without unions receiving the main thing that they wanted in return, namely a viable enforcement regime.

Shipowners seemed to hold more influence over States than did the unions, so for the unions to achieve their goals, there also had to be a strong interest within the shipowners' group in an enforceable convention. The motivation for interest came from outside the negotiations; certain shipowners sought to extend enforceable regulation to other shipowners who make a strategy of lower costs through regulatory evasion. Some shipowners would have preferred regulation based on voluntaristic business principles, but the regulatory objective of a level playing field was not achievable without strong PSC enforcement provisions. The internal politics of the shipowners' group experienced considerable turmoil as a result, and their collective objectives were not always clear. Despite pursuing a hard-line strategy of challenging enforcement provisions for a time, in the end the conciliatory strategy prevailed. The text sent to and approved by the ILC reflects the interests of the conciliatory shipowners, and the most important aspects of the seafarers' group's demands.

The MLC was approved with no votes against it at the 2006 Maritime ILC. Only Liberia, the Republic of the Marshall Islands and Bahamas have ratified it at the time of this writing (March 2008), but it is quite early yet for ratification. The Commission of the European Union (EU) is pushing for EU Member States to ratify, and has proposed that the shipping industry social partners translate the convention into an EU directive using the EU's special corporatist legislation procedure. If the convention is passed as an EU directive, the EU will very nearly be able to bring the convention into force all by itself, because the EU consists of 27 countries, some of which are major flag States. Other countries will then be likely to hurry to ratify as well, because of the importance of EU ports. The principle of no more favourable treatment ensures that non-ratifying flag States will be at a disadvantage, because they will attract more attention from inspectors.

## Discussion

The MLC negotiations show how, as capital globalizes, so do the state forms needed to support it. Much of the pressure for global reregulation of maritime shipping is arising from intensified class conflict, and the need for a global industrial relations system to resolve it. Investigation of the politics behind the MLC supports the contention that globalizing States are not “retreating” (Strange, 1996), but neither are they continuing as insular entities, “sovereign” in the traditional sense of the word. Rather, States are “transforming” (Sorenson, 2004), as new forms of governance emerge, based perhaps on templates from the interstate system, but where this is the case, these forms of governance function in new ways. Regulatory demands on institutions like the ILO increase, as actors call on them to take on regulatory roles that nation States individually no longer can fulfil.

In some respects, the MLC could be regarded as a reassertion of long-abandoned state regulatory authority over maritime labour standards. Despite the growth of private transnational industrial relations systems, ILO agreements continue to be embedded in the formal structures of an international system based on relations between sovereign States. The formal institution of national sovereignty and the intergovernmental global political framework are crucial to the MLC’s governance system. The ILO made this clear when in the January 2004 MLC working group an ILO legal expert stated in response to a question about whether shipowners could violate the convention: “Member states adopt this convention. Only member states can violate this convention. A shipowner is not a member state. A shipowner cannot violate this convention. But a shipowner can violate the standards set out in this convention”.

Clearly, the State retains importance as a central source of authority, in that it continues to mediate and apply international agreements. However, in a sense, the State’s role in the MLC is more as an intermediary than a coherent interest. There was a low level of state autonomy in formulating the MLC, and the implementation of the MLC’s “club” formation strategy involves a high degree of interlinked sovereignties. The degree to which States can in practice elect not to implement or enforce the MLC will be very limited (assuming of course that enough flag States ratify it for it to come into effect, and that enough port States ratify it to ensure that there is a strong incentive to comply).

Although the formal institution of sovereignty is important in the MLC, it was formulated essentially by unions and shipowners and is aimed primarily at influencing the behaviour of private shipowners. While the MLC seeks to influence flag State behaviour, the primary pressure on flag States to ratify and comply will come not from ILO suasion or pressure from other governments but via the flagging preferences of shipowners. The ILO's tripartite decision-making process encourages the formulation of transnational class-based interests. In the maritime shipping industry, transnational class-based actors have sufficiently well-developed organizations and interests to take advantage of this, and build a functional global social partnership.

Corporatism and social partnership at the national level are (or, perhaps more realistically, used to be) state strategies for defusing class conflict through incorporation of fractions of the working class (Panitch, 1981). In the MLC case, States did not exhibit sufficient autonomy from capital to have an actual strategy; rather the class-based interests of the maritime industry actors proved the decisive influence on the formulation of the MLC. Nonetheless, States collectively behaved as agents of capital, restructuring in ways conducive to transnational regulation, so as to fulfil their traditional role of stabilizing and protecting the capital accumulation process by providing the enforcement mechanisms sought by the industry actors. Specifically, through the provisions of the MLC, they regulate the labour market by protecting labour rights as a public good for capital, favouring certain politically influential capital factions, and defusing the class conflict that threatens to undermine the capital accumulation process. The ILO's brand of global tripartitism is one possible solution to the need to develop and legitimize global systems of labour regulation.

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## **Part 5 Policy action**

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# Chapter 9

## A report on the European Commission initiative for a European framework for transnational collective bargaining

*Dominique Bé<sup>1</sup>*

### Introduction

The present chapter depicts the rationale of the European Commission's initiative in the area of transnational social dialogue at company level, as well as the views and initial reactions of the European social partners. The first section places the Commission's initiative in the context of the European social dialogue, and explains the reasons that may have led to this initiative. The second section focuses on the major outcomes of transnational collective bargaining taking place at enterprise level in the European context, while the third explains the approach taken by the Commission in this area as well as its first actions. The fourth section deconstructs the Commission's initiative by offering an account of the outcomes of the consultations organized by the Commission aimed at generating a consensus among European social partners on the shape that the Commission initiative should have. The penultimate section offers a brief overview of the stance of European social partners, notably BusinessEurope (formerly UNICE) and the European Trade Union Confederation (ETUC). The final section lays out the next steps that the

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Commission is expected to take in this area. The chapter draws on primary sources, and the personal experience of the author.

## **Transnational collective bargaining within the framework for European social dialogue**

The current framework for European social dialogue is defined by Articles 138 and 139 of the Treaty establishing the European Community (the EC Treaty). Article 138 provides that “before submitting proposals in the social policy field, the Commission shall consult management and labour on the possible direction of Community action” and “on the content of the envisaged proposal”. Furthermore Article 139 recognizes that social dialogue at European level “may lead to contractual relations, including agreements” which “shall be implemented either in accordance with the procedures and practices specific to management and labour and the Member States or at the joint request of the signatory parties, by a Council decision on a proposal from the Commission”. Social partners thus play a major role in the definition of European social standards. This framework, however, exclusively concerns dialogue between management and labour at Community level and does not cover transnational social dialogue and collective bargaining at enterprise level.

Therefore, when inviting the social partners to “explore the possible synergies between the European social dialogue and the company level”, the Commission did not refer to synergies between social dialogue at the European level and transnational collective bargaining. It referred instead to “the link between the sectoral social dialogue and European works councils (EWCs)”, in particular with regard to issues addressed simultaneously within EWCs and by the social partners at sectoral level (European Commission, 2004, p. 8).

Furthermore, in its 2004 communication on social dialogue, the Commission made separate references to a framework for the European social dialogue, in particular with regard to autonomous agreements, on the one hand, and to a framework for transnational collective bargaining, on the other. Considering that the autonomous agreements resulting from the European social dialogue are “not always easy to understand to those not directly involved in their dialogue, partly because of the diverse range of titles and formats employed, and the rather loose use of terminology”, the Commission stated the “need for a framework to help

improve the consistency of the [European] social dialogue outcomes and to improve transparency” (European Commission, 2004, p. 11). It proposed as a first step a typology of European social dialogue outcomes and a drafting checklist for new generation social partner texts while inviting the social partners to negotiate their own framework. It also announced several measures that could ultimately be part of such framework, in particular ex ante and ex post assessments as well as the publication of autonomous agreements. At the same time, the Commission announced that it would separately “consult the social partners on their outcome regarding the development of a Community framework for transnational collective bargaining” (European Commission, 2004, p. 11).

## **The reality of transnational collective bargaining in Europe**

With the exception of the agreements issued from the European social dialogue and of the agreement signed by International Transport Workers’ Federation (ITF) and the International Maritime Employers’ Committee (IMEC) in 2000, transnational collective bargaining takes place at enterprise level involving multinational enterprises (MNEs), most of them headquartered in Europe, together with global and European trade union federations, world and European works councils and national trade unions.

The main outcomes of transnational collective bargaining are: global or international framework agreements (IFAs) signed by MNEs and global union federations; and European framework agreements (EFAs) signed by MNEs and their world or European works councils. An estimated 110 transnational framework agreements (both IFAs and EFAs) had been signed at company level by end-2007.

Approximately 60 MNEs have concluded IFAs with global unions federations since 1988 (see Hammer, this volume). Most enterprises involved in IFAs are based in continental Europe but the geographical scope of most IFAs is global, relating to business activities and employees worldwide. IFAs cover roughly 5 million workers, who are directly employed by the signatory enterprises. The total number of workers is, however, much higher when one includes those working for business partners, subcontractors and suppliers subject to IFAs. IFAs are mainly focused on promoting compliance with fundamental workers’ rights, but

recent IFAs increasingly address workplace and corporate social responsibility (CSR) issues.

While set up for the purpose of information and consultation, and not negotiation or bargaining, EWCs are, however, involved in transnational collective bargaining through IFAs and EFAs. Through involvement in the negotiation and signing of about a dozen IFAs, EWCs have concluded EFAs with about 20 MNEs since 1996. Most EFAs have been signed with MNEs based in Europe, but also with European subsidiaries of MNEs headquartered in the United States (US). Most EFAs have a regional, that is, European, geographical scope, and are largely focused on workplace issues.

## **Towards a European Union framework for transnational collective bargaining**

In 2004, the European Commission announced an initiative concerning transnational social dialogue at company level, which would supplement the existing structure of European social dialogue.

### **First Commission announcement**

The Commission made a first reference to its intention to propose a European framework for transnational collective bargaining in its 2004 communication on social dialogue, where it noted that:

... interest in and the importance of transnational collective bargaining ha[ve] been increasing in recent years, particularly in response to globalisation and economic and monetary union. EWCs are adopting a growing number of agreements within multinational companies which cover employees in several Member States. There is also a growing interest in cross-border agreements between social partners from geographically contiguous Member States, as well as agreements between the social partners in particular sectors covering more than one Member State (European Commission, 2004, p. 11).

In this first reference to transnational collective bargaining, the Commission referred thus to the company level as well as to the regional and sectoral levels, in particular framework agreements agreed by MNEs and their EWCs, and regional agreements between social partners.

The Commission announced its intention to launch an initiative for a European framework for transnational collective bargaining when it said that it was “conducting a study of transnational collective bargaining” and that at a later stage it would “consult the social partners on their outcome regarding the development of a Community framework for transnational collective bargaining” (European Commission, 2004, p. 11).

## Second Commission announcement

In the Social Agenda 2005-2010 adopted on 9 February 2005, the Commission restated its intention to establish a European framework for transnational collective bargaining as

... providing an optional framework for transnational collective bargaining at either enterprise level or sectoral level could support companies and sectors to handle challenges dealing with issues such as work organization, employment, working conditions, training. It will give the social partners a basis for increasing their capacity to act at transnational level. It will provide an innovative tool to adapt to changing circumstances, and provide cost-effective transnational responses. Such an approach is firmly anchored in the partnership for change priority advocated by the Lisbon strategy (European Commission, 2005, p. 8).

In its second reference to a proposed framework for transnational collective bargaining, the Commission clarified its scope, which would encompass transnational collective bargaining at enterprise and sectoral levels, but no longer referred to cross-border regional agreements.

The Commission added that its proposed framework would clarify the nature of transnational collective bargaining and the consequences of possible agreements, by stating that it planned “to adopt a proposal designed to make it possible for the social partners to formalise the nature and results of transnational collective bargaining”. The Commission stressed, however, that its framework for transnational collective bargaining would “remain optional” and “depend entirely on the will of the social partners” (European Commission, 2005, p. 8).

The initiative for a European framework for transnational collective bargaining was listed under the objective of promoting a European labour market rather than that of modernizing industrial relations. While the Commission stressed the “key role of the social dialogue” under the heading “A new dynamic for industrial relations”, underlining that it

would “continue to encourage the social partners to contribute fully to the Lisbon mid-term review including by the conclusion of agreements, at all levels” and that it would “continue to promote the European social dialogue at cross-industry and sectoral levels, especially by strengthening its logistic and technical support and by conducting consultations on the basis of Article 138 of the EC Treaty”, it did not make a specific reference to its proposal for a framework for the European social dialogue (European Commission, 2005, p. 8). In the meantime, the European social partners had responded positively to the invitation made to them in the 2004 communication on social dialogue, and announced in their 2006-2008 work programme that they would

... based on the implementation of the telework and stress agreements and the frameworks of actions on the lifelong development of competences and qualifications and on gender equality, further develop their common understanding of these instruments and how they can have a positive impact at the various levels of social dialogue (ETUC et al., 2006, point 8).

## Commission study report and seminars on transnational collective bargaining

### First study, on transnational collective bargaining

As announced in its Social Agenda 2005-2010, the Commission contracted in early 2005 a group of experts consisting of labour law academics to produce an analysis of recent developments in transnational collective bargaining in Europe. The objectives of the study were to provide an overview of developments in transnational collective bargaining in Europe, to identify the practical and legal obstacles to its development, and to make proposals to address these obstacles, in order to provide a knowledge base for the possible development of a European framework for transnational collective bargaining.<sup>2</sup>

In September 2005, this group submitted its report to the Commission (Ales et al., 2006). The report concludes that in the absence of a legal framework, transnational agreements cannot be termed collective agreements, and supports the development of an optional framework for transnational collective bargaining. It proposes the adoption of a direc-

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<sup>2</sup> For more detail, see Ales (forthcoming).

tive creating an EU transnational collective bargaining system. This system, which would be complementary to national systems, would define the formal requirements of transnational collective agreements, their bargaining agents and procedures, as well as compliance control and dispute resolution systems.

### **First seminar, on transnational collective bargaining**

On 17 May 2006, the Commission invited about 100 representatives from social partners and Member States to the first seminar on transnational collective bargaining (European Commission, 2006a). The results of an initial analysis of existing transnational agreements (European Commission, 2006b) as well as the results of the first study (Ales et al., 2006) were discussed. Representatives of management and labour from the French MNE Arcelor also presented their experience in negotiating transnational agreements.

While trade unions supported the development of an optional framework for transnational collective bargaining, the majority of employers questioned its usefulness and appropriateness. The seminar concluded that further assessment of experiences in negotiating and implementing transnational agreements was necessary.

### **Second study, on transnational agreements**

In order to prepare the second seminar, the Commission launched a study focused on transnational agreements having European scope (in terms of the territory of application). Analysis of the texts was complemented by an analysis of motivations through a survey among human resources managers and EWCs using the following questions: what are the motivations to conclude transnational agreements? What are the intentions of parties in taking commitments, in particular in terms of legal consequences? How do they assess the implementation of transnational agreements, including challenges and obstacles? The study was based on a sample of 25 European companies.

### **Second seminar, on transnational agreements**

The Commission convened the second seminar on 27 November 2006 to present the results of its second study and of case studies. Employers repeated their strong opposition to the creation of a framework for transnational collective bargaining but agreed with trade unions

on the usefulness of pursuing research and exchange of experience on the subject. The Commission announced a communication — to be drafted in consultation with the social partners — to take stock of progress so far and to be the basis of further activities.

## Views of European social partners

European social partners reacted very differently to the Commission's initiative for a European framework for transnational collective bargaining: employers firmly opposed the proposal, while the ETUC offered conditional support.

### Union of Industrial and Employers' Confederations of Europe

From 2004, the Union of Industrial and Employers' Confederations of Europe (UNICE), known since 23 January 2007 as BusinessEurope, repeatedly stressed its objections. Its arguments have evolved from denying the trend towards the development of transnational collective bargaining to disputing the need for a framework for transnational collective bargaining, stressing the risk for social dialogue at European level as a whole.

In a position paper, UNICE argued that the Commission's proposal for a European framework for transnational collective bargaining would get in the way of developing social dialogue in Europe: "the suggestion regarding [the] establishment of a more extensive framework for the European social dialogue to be seen as a Community framework for transnational collective bargaining" is "bound to hamper rather than facilitate the development of social partnership in Europe" (UNICE, 2004, p. 2).

This view is explained further below, in a list of six reasons given by UNICE. UNICE also disputed any claim that the Commission's proposal might complement the existing framework for European social dialogue, stating that it "does not believe that devising a more extensive framework for the European social dialogue is necessary and would have the strongest objections to the Commission preparing such a framework itself" (UNICE, 2004, p. 4). Furthermore, UNICE appeared to have understood that the Commission's initiative would apply to the whole European social dialogue, as it protested that presenting this framework

as “a Community framework for transnational collective bargaining” was “unacceptable and misleading as European negotiations and the resulting framework agreements which establish broad principles are fundamentally different from collective agreements resulting from bargaining on wages and working conditions in the Member States” (UNICE, 2004, p. 4). The initial objections of UNICE therefore concerned the status and appropriateness of the new initiative in the context of the existing framework of the European social dialogue as well as the risk of strengthening that existing framework.

UNICE reiterated its opposition to an optional EU framework for collective bargaining in its reaction to the Social Agenda, stressing that “there is no need for an additional layer of EU collective bargaining over and above the national, sectoral, regional or company level, and the current Treaty provisions on EU social dialogue provide the right basis for the development of EU social dialogue” (UNICE, 2005). UNICE confirmed its hostility by focusing on the lack of added value of the Commission’s initiative in the context of the existing EU framework for social dialogue.

Following the first (17 May 2006) seminar, UNICE repeated its strong opposition while slightly modifying its arguments. Rather than criticizing the proposed framework as an ineffective solution, it denied the very existence of any problem, emphasizing that “the claimed existence of a trend towards the development of transnational collective bargaining at EU level was not based on sound analysis” (UNICE, 2006a).

UNICE’s objections to the European framework on transnational collective bargaining were repeated once more after a UNICE seminar of 26 September 2006, which involved “representatives of multinational companies which have signed agreements with workers representatives at international level as well as enterprises which have not”. UNICE questioned the need for a European framework for transnational collective bargaining as it stated that “companies having adopted international framework agreements did not encounter legal obstacles and that the nature of these texts could not be compared with collective agreements” (UNICE, 2006b).

Subsequent to the second (27 November 2006) seminar, UNICE confirmed its opposition to the creation of an EU optional framework for transnational collective bargaining in an unpublished position paper of 11 December 2006, in which it gave several reasons.

First, it saw “no need for an EU optional framework for transnational collective bargaining” as existing EC Treaty provisions (Articles 138 and 139) already allowed for cross-industry and sectoral social partners to negotiate agreements at the European level, while individual companies were opposed to a framework for transnational collective bargaining at company level. It also denied the existence of problems of implementation of transnational texts that would justify the development of an EU framework for them. If needed, transnational agreements could rely on national procedures and rules for their implementation.

Second, the organization considered that “transnational social dialogue in companies is not collective bargaining”: it is just dialogue. UNICE felt that most transnational texts resulting from transnational social dialogue “have been discussed with employee representatives” but they were not agreements as such and, if they were, they were not intended to be legally binding.

Third, UNICE judged that “the European level is not the right one to deal with issues tackled in global agreements” as most transnational texts tackle global issues and have a global scope. Existing international texts such as the ILO Tripartite Declaration on Multinational Enterprises and Social Policy and the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises were more appropriate as guidance than an EU initiative, it felt. Moreover, it stressed that “there is no legal basis in the EU Treaty for the Commission to propose an optional framework for transnational collective bargaining”.

Fourth, it was concerned that “introducing an EU optional framework would be counterproductive” to promoting transnational collective bargaining. The absence of an EU framework was not hampering the development of transnational collective bargaining but, on the contrary, putting in place “a one-size-fits-all framework, even if optional, would be counterproductive” as the implementation of the transnational texts “must be tailored to the specific company situation and to the legislative and industrial relations framework in which they operate”. Promoting a framework for transnational negotiations would “have the effect of rigidifying the positions of both sides and harm the development of a positive attitude to social dialogue in multinational companies”, it believed.

Fifth, UNICE considered that “an EU optional framework for collective bargaining would interfere in national industrial relations” as it “would lead to the development of EU litigation and enforcement

procedures which would impact on the existing national rules which are very different in each Member State”. UNICE also raised the issue of the various parties’ capacity to deliver, in particular considering the mandate and competence of employee representatives.

Finally, it insisted that the priority lay in implementing social and employment policies as well as existing information and consultation rules, rather than in debating a new framework for transnational collective bargaining “for which there is no need”.

Overall, UNICE’s opposition to the proposed framework for transnational collective bargaining appears to rely on two seemingly inconsistent arguments: on the one hand, UNICE questions the reality of the development of transnational collective bargaining in Europe; on the other, it considers that transnational collective bargaining could develop healthily without the support of a European framework and that, in any case, a European framework would cause more problems for the rest of the European social dialogue than it would solve for transnational collective bargaining.

## International Organisation of Employers

Because most transnational collective bargaining involves European MNEs, it makes sense to put UNICE’s reaction to the Commission’s proposal alongside that of the IOE (IOE, 2007).

The IOE has adopted a cautious position on transnational collective bargaining, in particular IFAs. It acknowledges the development of transnational agreements in the context of globalization but stresses that employers and trade unions may have incompatible expectations for the outcome of transnational collective bargaining as “companies that have signed IFAs principally see them as a vehicle for deepening dialogue, first and foremost, and not as an industrial relations exercise” while “International Trade Unions see them as the latter”. This concern is reflected to a certain extent in UNICE’s view that “European negotiations and the resulting framework agreements which establish broad principles are fundamentally different from collective agreements resulting from bargaining on wages and working conditions in the Member States” (UNICE, 2004, p. 4).

While UNICE has not yet expressed its position regarding the development of transnational collective bargaining per se, the IOE is mostly concerned by the potential national impact of commitments

taken at the global level through IFAs, in particular regarding the legal status of IFAs; inconsistencies between them, national law and local agreements; and their impact on local partners and suppliers.

## European Trade Union Confederation

The ETUC did not refer to the proposal for a European framework for transnational collective bargaining in its comments on the 2004 Commission communication on social dialogue (ETUC, 2004). It did not specifically comment on the proposal either when the Commission confirmed it in the Social Agenda (ETUC, 2005a). It did at last support the framework's development in its resolution on the coordination of collective bargaining in 2006, when it issued preliminary guidelines for an ETUC position on a European framework for cross-border bargaining (ETUC, 2005b).

The ETUC supported this framework, which should complement the existing framework for European social dialogue at inter-professional and sectoral level. The ETUC considered it necessary because transnational collective bargaining is developing in the context of globalization, but its effectiveness is hampered by the absence of a framework (ETUC, 2005b). The ETUC was also aware that the scope of transnational agreements is expanding to include basic workers' rights and CSR, as well as other employment issues. For these reasons the ETUC considered that "this Commission initiative meets an undeniable need and must figure within a consistent framework that strengthens and regulates industrial relations at European level with an eye to bolstering the European social dialogue", thereby countering two of UNICE's arguments regarding the absence of need and risk for the whole social dialogue effort.

While the ETUC criticized the Commission for launching a study on transnational collective bargaining without consulting the social partners — despite their special role in the context of social dialogue and collective bargaining — the main ETUC criticism was, however, directed at UNICE's opposition to the idea of a European framework for transnational collective bargaining. The ETUC qualified it as inconsistent with the reality of the single internal market and with the objectives of European social dialogue.

The ETUC identified several issues to be addressed before implementing such a framework, in particular: the definition of validation standards for transnational agreements; their binding character and asso-

ciated legal framework; the possible sanctions and means of recourse; the European Court of Justice's specialization in the field of labour law; actions intended to deal with potential conflicts of interest during bargaining or the implementation of agreements; and the hierarchy of standards negotiated at cross-border level among the various contractual levels.

In addition, the ETUC identified three requirements for a European framework for transnational collective bargaining. First, with regard to the negotiating mandate and the right to sign transnational agreements, the ETUC considered that transnational agreements should be negotiated by trade unions, since they are mandated and have the right to negotiate agreements, while EWCs are bodies set up for information and consultation but not for negotiation. Second, concerning the interaction with collective bargaining at other levels, the ETUC warned that the European framework should ensure that transnational bargaining does not interfere with national powers and responsibilities regarding collective bargaining. Third, on acquired rights, the ETUC demanded that transnational agreements should include a non-regression clause so as not to weaken rights acquired at other levels — transnational agreements should not lead to adoption of the lowest denominator of existing national agreements (ETUC, 2005b).

## International Confederation of Free Trade Unions

Since transnational collective bargaining at European and global levels involves primarily Europe-based MNEs and global union federations, as well as EWCs and national trade unions from Europe, it is useful to compare the ETUC's position on transnational collective bargaining with the viewpoint on global social dialogue held by the International Confederation of Free Trade Unions (ICFTU — now integrated into the International Trade Union Confederation).

In its resolution on “the social responsibilities of business in a global economy”, the ICFTU recognized “the importance of global social dialogue” and welcomed the conclusion of IFAs, adding that “such framework agreements can offer important avenues for solving problems, including obtaining trade union recognition and organising” while stressing that they “must complement rather than replace or compete with local or national collective agreements” (ICFTU, 2004a). The ICFTU has highlighted in particular that IFAs should be signed by trade unions

and should not put at risk nor undermine collective bargaining achievements at other levels (ICFTU, 2004b).

Both the ICFTU and the ETUC share a positive but cautious approach to transnational social dialogue and collective bargaining at company level, stressing in particular that employees must be represented by trade unions and that transnational social dialogue at that level, as well as its outcome, should not undermine collective bargaining at other levels.

## Next steps

Between 2004 and 2007, the initiative of the Commission evolved and gained in focus: the proposal that initially involved a “Community framework for transnational collective bargaining” embracing transnational collective bargaining at company, trans-border and sectoral levels, now concerns an optional framework for European framework agreements that are signed by EWCs in most cases.

Recognizing that launching a legislative proposal for a framework for transnational collective bargaining and the associated formal consultation of the social partners would be premature at this stage, the Commission intends to take stock of the situation and make proposals for further steps in a communication now planned for mid-2008.

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# Chapter 10

## The role of the ILO in promoting the development of international framework agreements

*Renée-Claude Drouin*<sup>1</sup>

### Introduction

To date, international framework agreements (IFAs) have generally developed without any direct assistance from States or international organizations. For some time, global union federations (GUFs) have been advocating this distinctive regulatory model to promote fundamental labour rights and social dialogue in global production chains. The increasing number of agreements negotiated in recent years shows that multinational corporations (MNCs) are becoming more receptive to the GUFs' initiative. Data available on the implementation of IFAs in practice also reveal that they are beneficial for parties on both sides of the employment relationship — employers and workers.<sup>2</sup> Yet this voluntary social dialogue is still only emerging and its continuing growth might well depend on the ability of state actors and international organizations to adequately support this private regulatory initiative.

There are good reasons why the International Labour Organization (ILO) should pay special attention to the development of IFAs and that they function well. Above all, IFAs' aim to promote fundamental labour

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<sup>2</sup> On the implementation of the agreements, see Drouin (2005), pp. 158-190; Wills (2002), pp. 675; Riisgaard (2005), pp. 707 and 723-725; and Descolonges (2006), pp. 85-90.

rights and social dialogue in global production chains is a goal in line with two strategic objectives of the ILO's Decent Work Agenda and corresponds to an area of concern highlighted by the World Commission on the Social Dimension of Globalization in its report (WCSDG, 2004, pp. xiii and 111-112.).<sup>3</sup> So far, IFAs' contribution to that agenda has been modest, due to the limited number of agreements concluded, but it is potentially highly valuable for the institution. In a context where international labour norms are increasingly becoming privatized (Alston, 2004, p. 457), IFAs also appear as a credible and legitimate regulatory model. Unlike a large number of voluntary initiatives, nearly all IFAs refer to the fundamental labour rights proclaimed in the 1998 ILO Declaration on Fundamental Principles and Rights at Work<sup>4</sup> and they frequently make reference to core ILO Conventions,<sup>5</sup> albeit to a lesser extent.<sup>6</sup> IFAs moreover involve the relevant actors on both sides of the employment relationship through the agency of their representatives.

In looking at the role of the ILO in promoting IFA development, it is essential to bear in mind the need for the organization to strike the right balance between intervening and preserving the social partners' autonomy. The ILO should essentially intervene to foster and channel the capacity of private actors to enter into agreements and to implement these agreements effectively. To circumscribe the potential role of the ILO more clearly, one must first be aware of the challenges facing the negotiation and implementation of IFAs.

Among the difficulties that need to be addressed in order to advance cross-border social dialogue at enterprise level are: the absence of an international framework to support transnational collective bargaining; the imbalance of power between social-partner signatories to IFAs; the

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<sup>3</sup> Delegates to the 2004 International Labour Conference also felt that decent work in global production systems was one of six major areas where the ILO was well placed to move the agenda forward. See ILO (2004a), p. 9, para. 44.

<sup>4</sup> The four rights are: freedom of association and the right to collective bargaining; the elimination of forced and compulsory labour; the abolition of child labour; and the elimination of discrimination in the workplace.

<sup>5</sup> The core labour conventions are: Convention 29 concerning forced or compulsory labour, Convention 87 concerning freedom of association and protection of the right to organise, Convention 98 concerning the application of the principles of the right to organise and to bargain collectively, Convention 100 concerning equal remuneration for men and women workers for work of equal value, Convention 105 concerning the abolition of forced labour, Convention 111 concerning discrimination in respect of employment and occupation, Convention 138 concerning minimum age for admission to employment, and Convention 182 concerning the prohibition and immediate action for the elimination of the worst forms of child labour.

<sup>6</sup> For an overview of the content of IFAs, see Hammer (this volume) and Drouin (2006), p. 703.

voluntary nature of IFAs, which makes their implementation dependent on the good-will of enterprises; and the limited resources and capacities of GUFs to negotiate and service the agreements.<sup>7</sup> Can the ILO encourage self-regulation by the global social partners (international unions, employers' organizations and the management of MNCs) in a way that removes or eases some of these obstacles?

In some of his more recent reports (ILO, 2004b; 2004c), the ILO Director-General has acknowledged the potential for IFAs to play a constructive role in the promotion of social dialogue and respect for fundamental labour rights, but the organization has not yet elaborated any concrete policy for them. The WCSDG, and the Director-General in his 2004 annual report to the International Labour Conference, have simply recommended that the ILO monitor the development of IFAs and provide assistance to the parties involved if they express the need for it (WCSDG, 2004, para. 566; ILO, 2004c, p. 26). This initial reaction, although timid, denotes a positive outlook for IFAs. It seems that the agreements might well be applied in a fruitful manner if integrated into certain ILO policies as a means to fulfil some of the strategic objectives of the Decent Work Agenda.<sup>8</sup> IFAs and ILO instruments for the promotion of fundamental labour rights and social dialogue could therefore be mutually reinforcing.

This chapter analyses several ILO steering mechanisms that could be used to assist the development and growth of IFAs. It also assesses these mechanisms' potential to help overcome some of the difficulties facing the evolution of IFAs as a medium for the promotion of fundamental labour rights and social dialogue. The chapter considers more specifically three ways in which the ILO could support the development of IFAs: recognizing international trade union rights in international labour Conventions and other instruments, promoting IFAs through sectoral activities, and providing dispute resolution services as well as technical assistance to trade unions and employers.

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<sup>7</sup> See Drouin (2006).

<sup>8</sup> Although the promotion of fundamental standards — the first strategic objective — is essentially targeted at member States, IFAs bring about a means to further the realization of this objective in MNCs. Moreover, IFAs could contribute to the fourth strategic objective — social dialogue — by contributing to some of its operational objectives, for instance “strengthened social partners” and “the development of social dialogue at sectoral level to improve global labour and social outcomes”. The ILO's strategic objectives, operational objectives and projected outcomes are laid out in ILO (2004a). See in particular p. 28 with regard to fundamental human rights and p. 29 with regard to social dialogue.

## Recognizing international trade union rights in International Labour Conventions and other instruments

The development of IFAs is intrinsically related to the possibility of trade unions forging solidarity links and using collective action internationally. For the international trade union movement, international solidarity seems to be one of the most valuable methods for providing democratic alternatives to globalization (Munck, 2002, pp. 13 and 177). But while it is easy to say that global problems require global solutions, the globalization of trade union strategies — including the conclusion of IFAs — is not as straightforward as the globalization of capital (Haworth and Ramsay, 1986, p. 55).

National regulation often circumscribes workers' solidarity action, at times creating possibilities for workers, but at other times restricting their leeway. Legal impediments to cross-border solidarity most commonly take the form of limitations to affiliation with international organizations of workers, prohibition of solidarity strikes or other industrial action, and restrictions on freedom of association and collective bargaining rights (Servais, 2000, pp. 44-5). At international level, the absence of a legal framework for industrial relations and the imbalance of power between MNCs and international trade unions constitute two of the most important problems for the development of transnational social dialogue and collective bargaining.

The rights to freedom of association and to collective bargaining are formally protected by ILO Convention No. 87 on Freedom of Association and Protection of the Right to Organise, and Convention No. 98 on the Right to Organise and to Collective Bargaining.<sup>9</sup> Yet the international dimension of these rights is only imperfectly tackled in the relevant Conventions. On the one hand, Article 5 of Convention No. 87 specifically provides for the right of trade unions and employers' organizations to "affiliate with international organisations of workers and employers". The importance of this right in a context of globalization has been emphasized by the Committee of Experts on the Application of Conventions

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<sup>9</sup> Other Conventions also relate to the right to freedom of association and collective bargaining: Right of Association (Agriculture) Convention, 1921 (No. 11), Workers' Representatives Convention, 1971 (No. 135), Labour Relations (Public Service) Convention, 1978 (No. 151) and Collective Bargaining Convention, 1981 (No. 154).

and Recommendations, the ILO body set up to examine government reports on ratified Conventions, which stated: “the world labour market also highlights the relevance of the right to affiliate to an international organisation of employers or workers. Representation at international level with a global perspective has always been of fundamental importance to the trade union movement” (ILO, 1998a, p. 16).

Still, the right to bargain collectively, as protected in ILO Conventions, is essentially envisaged in a national context, as Article 4 of Convention No. 98 illustrates:

Measures appropriate to *national conditions* shall be taken, where necessary, to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers’ organisations and workers’ organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements (emphasis added).

There is no official recognition or encouragement for transnational social dialogue and collective bargaining in the relevant ILO Conventions. This means that there is no specific legal ground for the negotiation of IFAs or, for that matter, any other type of consultation or dialogue process with MNCs.

Moreover, there is no recognition in the related ILO instruments of the right to exercise international solidarity action, such as a strike action involving workers in more than one country or a boycott against an MNC. This has important practical implications since, as a growing number of enterprises organize their activities on a transnational basis, the need arises for workers to be able to launch industrial action across national boundaries.<sup>10</sup>

By itself, the right to strike has been recognized by the ILO Committee of Experts as an intrinsic corollary of the right to organize.<sup>11</sup> However, *sympathy* or *solidarity* strikes are often heavily restricted and in some

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<sup>10</sup> The new transnational production structures of MNCs and just-in-time requirements have increased the vulnerability of enterprises to industrial action, especially strikes that affect an essential part of the network and in turn may hamper, or even halt, the overall process of production; see Breitenfellner (1997), pp. 531 and 547. Involving foreign workers from the same enterprise in a dispute can therefore provide trade unions with additional leverage during collective negotiations.

<sup>11</sup> The right to strike, including the right to sympathy strikes, is not expressly mentioned in Convention No. 87, but derives from Articles 3 and 10 of the convention pertaining to the organization of trade unions’ activities and programmes. See ILO (1994), paras. 147-148 and 151.

instances strictly prohibited in national legislation.<sup>12</sup> On that subject, the ILO Committee of Experts and Committee on Freedom of Association have taken a somewhat mixed approach. Their general rule on solidarity strikes is enunciated in the Committee of Experts' 1994 General Survey on Freedom of Association: "A general prohibition on sympathy strikes could lead to abuse, and workers should be able to take such action, provided the initial strike they are supporting is itself lawful" (ILO, 1994, para. 168). In a study of statements and jurisprudence from the Committee of Experts and Committee on Freedom of Association — the tripartite committee of the ILO Governing Body responsible for the examination of complaints alleging violation of the principles of freedom of association — on the matter, Paul Germanotta has noted that:

... while they are not prepared to tolerate outright prohibitions, the committees contemplate accepting significant restrictions on the solidarity action workers "should be able to take", quite apart from the one resulting from the condition of legality of the primary action, set forth in the explicit proviso of the basic principle (Germanotta, 2002, p. 17).

The legality of the primary action as a requirement for sympathy strikes appears as a hindrance to the development of cross-border solidarity. As Bob Hepple has stressed:

The main problem with the CE's [Committee of Experts'] approach is that it makes lawful sympathy or secondary action dependent upon the lawfulness of the primary dispute. If the law applied is that of the country in which the primary dispute occurs, this limitation may make it impossible to take solidarity action with workers in a country where strikes are prohibited or severely restricted. Testing the legality of the primary dispute by the law of the country in which the sympathy action occurs is also beset with difficulties because of the different institutional arrangements and collective bargaining in each country (Hepple, 2003, p. 24; see also Hepple, 2002, pp. 253-255).

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<sup>12</sup> International solidarity action is seldom the topic of national labour regulation. One must therefore refer to rules establishing conditions for intra-national sympathy action to assess the lawfulness of sympathy strikes, also referred to as secondary action. Some authors have noted that under national systems of labour law, the legality of solidarity action is usually determined by two main conditions, "the lawfulness of the action by workers involved in the original dispute and a direct 'connection' with the original dispute itself". See Germanotta (2002), p. 4, quoting A. Pankert (1977); and Morgenstern (1984). A further question concerning the legality of solidarity strikes under national law relates to the determination of which country's regulation is to be used to decide on the legality of the supported action.

A more sensible solution, as advocated by both Hepple and Germanotta, would be to simply require a common interest between workers involved in the primary and secondary actions.<sup>13</sup>

In the context of the implementation of IFAs, the limitations to sympathy strikes imposed by national laws might prevent workers employed by an enterprise from fully exercising their collective power in the event that a violation of an agreement occurs at a specific site. Workers might not be in a position to take industrial action legally in support of other people whose fundamental labour rights have been infringed but who are employed by the company in different plants and countries. This creates an imbalance of power between the parties in the process of social dialogue since the consequences of non-compliance with an agreement are tempered, on the employers' side, by the restrictions to international solidarity action on the part of workers.<sup>14</sup> Social dialogue channels created by IFAs are therefore in need of the sanction mechanisms that are inherent in traditional industrial relations systems (Lo Faro, 2000, p. 101).

In a study on trade union rights, Keith Ewing and Tom Sibley have suggested that the ILO modernize Conventions No. 87 and No. 98 (freedom of association and collective bargaining) to respond to the need to adapt the standards to the context of globalization (Ewing and Sibley, 2000). They propose the development of a new text that both restates the principles of freedom of association and collective bargaining as they have been interpreted by the ILO bodies<sup>15</sup> and that provides for extended rights for international trade union federations. As regards the latter, their proposal reads as follows:

The rights of international trade union federations:

- the right to be consulted by and bargain with multinationals on transnational employment matters;

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<sup>13</sup> For Germanotta, the common interest of workers is to be determined by workers themselves and "every struggle by workers anywhere has a direct and immediate bearing upon the interests of workers everywhere, given that they are members of the same economic class within the same global economic system" (Germanotta, 2002, p. 32).

<sup>14</sup> As Otto Kahn-Freund emphasized some time ago: "There can be no equilibrium in industrial relations without a freedom to strike" (Kahn-Freund, 1972, pp. 224). This observation, based on national collective bargaining practices, seems to hold true in today's global context.

<sup>15</sup> Notably the Committee on Freedom of Association and the Committee of Experts.

- the right to be consulted by and bargain with multinationals on the application and observance of core labour standards throughout the corporate structure, and throughout the supply chain;
- the right to organise industrial action against multinational enterprises and the right of workers to take part in such action (Ewing and Sibley, 2000, p. 33).

If the ILO were to endorse such a proposal, it would greatly promote the development of IFAs. First, it would encourage social dialogue and collective bargaining at international level. Second, it would partly redress the imbalance of power between parties to the agreements by allowing workers to put pressure on MNCs through the use of industrial action. However, the right to organize industrial action should not be the sole prerogative of international trade union federations, as the wording of Ewing and Sibley's proposal suggests. In practice, transnational solidarity actions are sometimes coordinated by different national trade unions. A new ILO convention should adequately reflect this situation and allow national trade unions to take part in consultations with MNCs and to organize industrial action.

While updating the existing ILO Conventions to ensure the protection of international trade union rights seems a valuable means of promoting the development of IFAs, concrete proposals to follow this course of action are likely to face strong opposition from some of the organization's constituents, especially the employers' group. At least, this is the prediction drawn from the history of the adoption of the ILO's Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy in 1977 (ILO, 2006a).

From the mid-1960s, concerns about the growing importance of MNCs on the international scene and the impact of their activities on social and labour conditions worldwide led the ILO to convene tripartite meetings to consider the opportunity for and possible forms of an ILO intervention on the matter.<sup>16</sup> During the discussions, workers' experts and representatives expressed the need to extend protection, at international level, of the right of workers to take part in trade union activities

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<sup>16</sup> In 1967, the International Institute for Labour Studies organized a symposium on transnational industrial relations. In 1972, the ILO held a Tripartite Meeting on the Relationship Between Multinational Corporations and Social Policy. This was followed by two additional tripartite meetings on MNCs in 1976 and 1977. The subjects and outcomes of these meetings are summarized at: <http://www.ilo.org/public/english/employment/multi/tripartite/history.htm>.

(ILO, 1972, para. 95). They advocated the adoption of an ILO convention on MNCs, notably including with regard to industrial relations: recognizing trade unions; facilitating trade union work at international level; prohibiting unfair bargaining practices, such as the threat to transfer production abroad; and providing adequate information to the trade unions on the national and global operations of enterprises (ILO, 1976a, paras. 108-109).<sup>17</sup> The employers' experts and representatives, for their part, were largely opposed to the possibility of collective bargaining at international level, which they saw as both undesirable and unrealizable (ILO, 1972, para. 88).

While many possible elements and forms of principles and guidelines relating to MNCs were explored (ILO, 1976b), the consensus that finally emerged in the form of the Tripartite Declaration fell short of the workers' initial expectations: the instrument does not have the legal binding effect that a convention would have produced, and the chapter on industrial relations does not contain specific recommendations on transnational collective bargaining and consultation.

Yet the ILO Tripartite Declaration tackles some of the challenges posed to the organization of labour by the activities of MNCs. Governments are urged to apply the principles of Article 5 of Convention No. 87 "in view of the importance, in relation to multinational enterprises, of permitting organizations representing such enterprises or the workers in their employment to affiliate with international organizations of employers and workers of their own choosing" (ILO, 2006a, para. 45). The Declaration specifies that "representatives of the workers in multinational enterprises should not be hindered from meeting for consultation and exchange of views among themselves" (ILO, 2006a, para. 47) and that "Governments should not restrict the entry of representatives of employers' and workers' organizations who come from other countries at the invitation of the local or national organizations concerned for the purpose of consultation on matters of mutual concern" (ILO, 2006a, para. 48). It further states that MNCs, in the context of collective negotiations, should not threaten to transfer the whole or part of their activities from the country concerned in order to influence these negotiations unjustly (ILO, 2006a, para. 53).

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<sup>17</sup> The workers' group's position echoed the standpoint of some prominent international trade unions, such as the International Confederation of Free Trade Unions (ILO, 1973, pp. 84-87).

A pragmatic approach to the inclusion of international trade union rights in existing ILO standards could be to amend the industrial relations chapter of the Tripartite Declaration, recommending to member States and MNCs that these rights be respected in accordance with the suggestions advanced previously in this chapter. The voluntary character of the Declaration could certainly impact positively on the willingness of the ILO constituents to proceed with such amendments.

Irrespective of the revision of the Tripartite Declaration so as to include international trade union rights, the ILO could promote the conclusion of IFAs through its In Focus Program on the Promotion of the ILO Tripartite Declaration. Associated with this programme is the newly created In Focus Initiative on Corporate Social Responsibility (CSR), which “seeks to advance the ILO’s leadership in this area by promoting the principles laid down in the MNE Declaration as the foundation for good CSR policy and practice” (ILO, 2006b, para. 4). Although IFAs are not, strictly speaking, CSR initiatives, they could be presented as elements of good practices that firms can be engaged in with a view to respecting the principles laid out in the Tripartite Declaration.

These suggestions would certainly help to create an international framework for the negotiation of international agreements. However, certain obstacles to the right to freedom of association and collective bargaining emanate, as previously mentioned, from national legislation. In turn, the ILO must continue to promote the ratification of Conventions by its Member States. The commitment of States to abide by recognized standards is only useful in so far as it is matched with concomitant action on the ground. Modifications to national laws as well as changes in institutions and practices are among the practical steps that are commonly required to ensure that States do not merely pay lip service to fundamental labour rights.

Technical cooperation from the ILO is particularly vital in the process of labour law reform and judiciary training (ILO, 2004d). The ILO’s assistance guarantees that those involved in reforms at national level understand the background and are aware of the jurisprudence relevant to ratified Conventions. Experience with technical assistance programmes reveals that “changing attitudes, laws, institutions and practices require a sustained national effort over several years” (ILO, 2006b, para. 10). Consequently, the ILO must not only promote respect for fundamental labour rights and international trade union rights to governments,

but also provide governments with the means to introduce and achieve the reforms that are required at national level.

## Promoting IFAs through sectoral activities

In his 2004 annual report to the International Labour Conference, the ILO Director-General pointed out that sectoral activities could present different opportunities to promote global social dialogue and to discuss labour issues related to global production systems (ILO, 2004c, 25). Sectoral work at the ILO dates back to the 1940s. It was initiated because of the recognition that certain labour and social issues have a specifically sectoral character and that general matters such as globalization, the impact of technological changes or the situation of specific groups of workers may raise different concerns and take different forms according to the sector involved. The overall objective of the Sectoral Activities Department (now Branch) is to facilitate the dissemination and exchange of information among ILO constituents on labour subjects that have an impact on particular sectors. For example, it undertakes research on topical sectoral matters, and through the organization of sectoral meetings it provides an international forum for governments and for employers' and workers' representatives to exchange views and form an international tripartite consensus on sectoral issues. The discussions held during these gatherings can lead to the adoption of conclusions and resolutions on issues that affect the sector concerned.

The interest of sectoral meetings in the development of IFAs is that they provide space for transnational dialogue. In the absence of an international framework for collective bargaining, GUFs use various strategies to convince MNCs to conclude an agreement (Drouin, 2006). Among the different patterns of negotiation that can be identified from empirical study of the agreements, the most successful appear to be those involving national or local unions from an MNC's country of origin in the negotiation of the accords and using European works councils (EWCs) as platforms for the conclusion of an agreement. This reveals that existing structures for social dialogue and collective bargaining at national and European levels play an important role in the development of IFAs. However, negotiating IFAs with GUF national affiliates or under the auspices of an EWC carries the risk of not involving all the relevant interested parties, notably workers in developing countries who are expected to

benefit the most from the agreements.<sup>18</sup> This is especially true given that most GUF affiliates involved in negotiating IFAs are based in Europe. There is therefore a risk of undermining the global outlook of IFAs by putting a European stamp on this initiative.<sup>19</sup> Could ILO sectoral meetings, which possess a truly international character, serve as alternative platforms for the negotiation of IFAs?

In recent years, many sectoral meetings have led to the adoption of conclusions and resolutions that (a) specifically ask the ILO Governing Body or governments and social partners to promote the application of the Tripartite Declaration as well as the fundamental labour rights enshrined in the 1998 ILO Declaration on Fundamental Principles and Rights at Work, and that (b) encourage the establishment of processes of social dialogue. Discussions on social dialogue and labour standards in global production chains and IFAs took place in meetings in 1998, 2002 and 2005 (ILO, 1998b; 2002a; 2002b; 2005a). For instance, during the Tripartite Meeting on the Promotion of Good Industrial Relations in Oil and Gas Production and Oil Refining held in February-March 2002, a representative from the International Federation of Chemical, Energy, Mine and General Workers' Unions (ICEM), who had been invited to the meeting as an observer, raised the issue of IFAs, explaining their objectives and the experience that his global union federation had had with this initiative (ILO, 2002c, para. 8). He challenged companies in the industry to sign framework agreements and to create an international employers' organization, as found in other industries. His position was endorsed by other workers' representatives (ILO, 2002c, para. 9), but the comments of employers' representatives were more elusive, touching on the issue of tripartite dialogue at international level more generally, without taking a stance on IFAs (ILO, 2002c, para. 10). The accords were also linked to the Global Compact<sup>20</sup> when a workers' spokesperson urged employers to contemplate signing an agreement with the ICEM covering the principles of the compact (ILO, 2002c, para. 48-51). The conclusions

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<sup>18</sup> ICEM members outlined this risk during their third World Congress in August 2003. Similar pre-occupations were also raised by IMF affiliates (IMF, 2006).

<sup>19</sup> IFAs are indeed sometimes seen as a European initiative to foster respect for fundamental labour rights. See Daugareilh (2006), p. 116.

<sup>20</sup> The Global Compact is a corporate citizenship initiative of the United Nations Secretary General. Through this initiative, businesses are asked to enter, on a voluntary basis, into a partnership with the United Nations and to respect a set of 10 principles relating to human, labour and environmental rights wherever they operate. These include the four fundamental labour rights of the 1998 ILO Declaration. See: <http://www.globalcompact.org/> [5 Mar. 2007].

of the meeting stressed in particular that “national and regional agreements and voluntary global accords between the parties concerned can play a role in improving industrial relations” (ILO, 2002c, “Conclusions”, para. 3).

Social dialogue and the role of the ILO was also an item on the agenda of the Tripartite Meeting on Employment, Employability and Equal Opportunities in the Postal and Telecommunications Services held in May 2002, and the issue of IFAs was raised more specifically (ILO, 2002d, para. 77 ss.). Although workers’ representatives who mentioned the subject saw IFAs as a positive development in social dialogue, employers’ members were more cautious, embracing the principle of social dialogue as a general concept, while stressing the impossibility of adopting a single approach that would have global validity.<sup>21</sup>

At the same meeting, a worker’s representative asked the ILO and the participants to take action to set up consultative mechanisms with MNCs that would support the future development and negotiation of IFAs and codes of conduct (ILO, 2002d, para. 77). This proposal was, however, not retained in the final conclusions, or in the meeting’s recommendations. The conclusions allude only very briefly to IFAs: “Global framework agreements have already been concluded by Telefónica and OTE with workers’ organizations on labour and employment issues, taking into account international labour standards. Such arrangements can facilitate efforts by the social partners to work together in the process of sectoral change, and to find solutions to shared problems” (ILO, 2002d, para. 19).

More recently, during the Tripartite Meeting on Employment, Social Dialogue, Rights at Work and Industrial Relations in Transport Equipment Manufacture held on 10-12 January 2005, the participants

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<sup>21</sup> The UNI-Telefónica IFA (see the appendix) was described in detail during the discussion and an employer’s representative from the company commented on the enterprise’s experience with the accord. His words were summarized in the proceedings of the meeting as follows: “An Employer adviser (Spain) commented on the Telefónica agreement which had already been referred to several times. His company believed in social dialogue and had signed the agreement with UNI undertaking to respect and guarantee a series of workers’ rights in countries where it operated. These rights, enshrined in various ILO Conventions, were already being respected by the company, so the agreement merely gave expression to what was already happening. The agreement could not replace the will of governments who retain responsibility for ratifying and implementing ILO Conventions. While the company was very happy with the agreement, it also understood that not all countries had the same cultural context or the same level of development in their labour and trade union relations” (ILO, 2002d, para. 79). This position on the framework agreement seems somewhat half-hearted for a representative of a company that is a signatory to the accord.

also discussed the issue of IFAs and their relevance for global social dialogue and concluded: “Freely negotiated agreements between employers and workers’ organisations, including international framework agreements (IFAs), promote social dialogue and core labour standards in accordance with the provisions of the ILO Declaration” (ILO, 2005b, para. 12).

As these examples show, sectoral meetings can provide a privileged space for dialogue on IFAs by the two sides of an industry. At present, the main achievement of sectoral meetings as regards IFAs has been to allow dissemination of information and sharing of experience about the instruments. It must be stressed that discussions on IFAs during sectoral meetings so far have been initiated by participants and have not officially been put on the agenda. A more targeted and proactive promotion of IFAs through these gatherings by the ILO itself therefore might generate additional results.

For instance, sectoral meetings could be more widely used to allow the tripartite constituents to become familiar with IFAs, namely what they are, what they are not, their objectives, their typical content, and how they have been implemented on the ground up until now. This might in turn dispel some misconceptions and fears about IFAs, notably on the part of enterprises. More generally, the dissemination during meetings of information on social dialogue and respect for fundamental labour rights in global production chains can also increase opportunities for participants to learn about good practices and reflect on the possibility of promoting them or integrating them into their operations.

Sectoral meetings might also present opportunities to actually negotiate agreements or some sort of joint understanding on fundamental labour rights. First, they offer a forum for GUFs and other workers’ representatives to make an initial contact with representatives from MNCs taking part in the meetings and to evaluate the latter’s receptiveness to the idea of negotiating IFAs and becoming partners with GUFs in transnational social dialogue. Second, participants could also call for the negotiation of IFAs by social partners in a specific sector inside a resolution, jointly draft a model agreement, and recommend its adoption and observation to social partners in the sector. Another option would be to adopt a common statement on fundamental labour rights and CSR complemented by a follow-up procedure, as the European social partners have done in several sectors.<sup>22</sup>

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<sup>22</sup> See for instance EuroCommerce and UNI-Europa Commerce (2003).

Sectoral meetings could, moreover, provide space for the negotiation of sectoral agreements such as that in the tobacco industry. That initiative brings together sectoral business associations, GUFs, nongovernmental organizations and enterprises in an effort to eliminate child labour in this field of commerce. Although the scheme focuses on one specific issue, it is nonetheless possible to envisage sectoral agreements covering the small spectrum of fundamental labour rights included in the 1998 ILO Declaration on Fundamental Principles and Rights at Work. Sectoral agreements or common statements on fundamental labour rights and social dialogue could extend the benefits ensuing from IFAs by broadening the current scope of the accords, which is limited to individual enterprises. The association of additional partners with sectoral initiatives, notably NGOs, could also bring extra resources for follow-up and implementation.

These are optimistic scenarios since the benefits that can ensue from sectoral meetings in terms of social dialogue and agreements on fundamental labour rights are constrained in several ways. For one thing, the possibility of holding discussions on global social dialogue and IFAs during sectoral meetings depends on the topics that are put on the agenda. Priorities for each sector for the coming years have already been fixed by the ILO, but as the promotion of social dialogue is the primary strategic objective of the Sectoral Activities Branch, this should not prevent discussions on IFAs during meetings, if the ILO wants to make it a priority. Another limitation comes from the capacity of the participants at sectoral meetings: GUF representatives are invited as observers and their attendance is therefore theoretically not automatic. Affiliated trade unions can nonetheless express their interest in discussions about IFAs, as was done by IG Metall during a tripartite meeting of the transport equipment manufacturing sector (ILO, 2005c, para. 31). It also seems that it would be easier to negotiate an agreement at sectoral level when there is a counterpart of the GUFs on the employers' side, that is, a sectoral employers' organization.<sup>23</sup> The low frequency of meetings also limits their potential as a forum for discussion on IFAs.

Sectoral meetings were a main focus of the Sectoral Activities Department (now Branch) until the last review of the programme that

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<sup>23</sup> To facilitate sectoral dialogue, the ICEM called for the creation of an employers' organization in the oil and gas industry during a tripartite meeting of this sector, but this idea did not appeal to employers' representatives (ILO, 2002c, para. 6).

began in 2000 and ended in 2003.<sup>24</sup> The review led to the adoption of a new approach to sectoral activities, effective as of the 2004-2005 biennium, which consists of a combination of sectoral meetings, follow-up activities to meetings, and action programmes (ILO, 2003a, para. 32; ILO, 2003b). Under the new programme, sectoral meetings follow the same procedure as before, although their number, which was previously set at 12 per biennium, has been greatly reduced to make way for action programmes.<sup>25</sup> The newly created action programmes are generally developed by the ILO through consultation and small planning meetings with tripartite constituents. Consultations and planning meetings allow the office to select a theme for action, determine the type of activities that a programme will pursue and decide its scope, whether national or regional. A number of countries are subsequently invited to take part in the programme and national steering groups are created to implement the programme.

Without in any way judging the effectiveness of action programmes in promoting social dialogue, as they are conceived at the moment they seem to provide little space for discussion on initiatives such as IFAs. There are several reasons for this. First, the theme and activities chosen for action programmes may not offer the opportunity to raise this issue. Second, even when the topic tackled is linked to social dialogue and MNCs in one way or another, it might be difficult for national steering group constituents to bring up the topic of IFAs, especially because of the decentralized nature of these groups and the identity of the participants. Workers' representatives in national steering groups would have to be familiar with IFAs to be in a position to raise the issue. In addition, representatives from the employers' group might not be the typical partners for IFAs, that is, MNCs. That said, if action programmes succeeded in triggering discussions on social dialogue in global commodity chains, even at national level, they might lead to corporate responsibility initiatives and, in the most confident scenario, to agreements on fundamental labour rights.

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<sup>24</sup> This most recent review was prompted by the integration of the programme into the Social Dialogue Sector, following the development of the ILO's four strategic objectives in line with the Decent Work Agenda and the consequent restructuring of the Office (ILO, 2000, para. 1).

<sup>25</sup> Three tripartite sectoral meetings, including a preparatory technical maritime conference, were included in the sectoral agenda for 2004-2005. They were supplemented by four meetings of experts, one regional maritime symposium, and one subregional tripartite meeting on the tobacco industry. In comparison, the programme for 2002-2003 comprised 13 tripartite sectoral meetings, including two in the maritime shipping industry, and two complementary meetings of experts.

During the last review of the Sectoral Activities Programme, the workers' group expressed its concerns that action programmes would not meet their expectations for more concrete follow-up measures (ILO, 2003b, para. 9). Undertaking these programmes has indeed led to a drop in the number of sectoral meetings, whereas conclusions of meetings held not long before the new approach had recommended mechanisms to ensure a continuing dialogue among constituents. These conclusions usually suggested the convening of small sectoral tripartite consultative groups that would meet as often as necessary to share views on global developments. Certainly the opportunity for global sectoral dialogue leading to the conclusion of IFAs was narrowed with the reform put in place in 2004.

Yet the most recent Sectoral Activities Programme for 2008-2009 proposes to introduce a new form of activity: global dialogue forums (ILO, 2007, paras. 38-40). (The proposals for activities in 2008-2009 also include the creation of clusters or groups of sectors and the participation of constituents in priority setting.) These are described as "shorter, more focused, smaller-scale tripartite or bipartite meetings" whose objectives are "to provide additional opportunities for sectoral dialogue on specific issues" (ILO, 2007, para. 38). If the ILO goes ahead, such forums could provide an additional, welcome space for the promotion of IFAs and global social dialogue.

## **Dispute resolution services and technical assistance to trade unions and employers**

As for any private labour law initiative, effective implementation of IFAs is critical to their credibility. Consequently, IFAs provide for review mechanisms and social dialogue procedures. Concrete measures and instruments include communication and dissemination policies, programmes for education and training on the agreement, the presence of representatives with administrative responsibilities, informal channels for reporting concerns, periodic consultations and meetings, review committees, formal complaint procedures, on-site inspections, management systems and facilities for trade unions (Drouin, 2006, pp. 740-746). The main objective of these procedures is to establish different ways to peacefully solve problems and improve respect for fundamental labour rights in the MNCs concerned. IFAs therefore essentially delineate a course of

action for social dialogue between the parties. This leads to situations where, although workers and GUFs are informed and consulted on labour rights implementation, final decisions may ultimately rest in the hands of the enterprise. In turn, compliance with the agreement is largely the company's responsibility.

The parties to IFAs have taken a pragmatic approach to the agreements' implementation. GUFs generally recognize that changes in management policy take place gradually and that compliance must be regarded as an ongoing process. Still, there are some risks of IFAs failing to meet their objectives. For instance, a firm could refuse to correct violations that would generally be considered as unacceptable, such as the use of the worst forms of child labour prohibited by the ILO's Worst Forms of Child Labour Convention, 1999 (No. 182). Moreover, while the implementation of IFAs is an evolutionary process, the inability or unwillingness of firms to change certain practices or to improve working conditions at an acceptable pace would also jeopardize their credibility. If companies are seen using IFAs as "window dressing", this could have an impact on the trade unions involved, which could face accusations of turning a blind eye to the practices of non-compliant enterprises.

The need might therefore arise for certain forms of mediation or adjudication mechanisms when social dialogue fails to deliver a solution acceptable to both parties. The agreement concluded between the IFBWW (now integrated into the BWI) and the Swedish construction company Skanska is the only accord that contains a clear-cut procedure for reporting complaints that can lead to a binding decision by an arbitration board.<sup>26</sup> In the absence of an arbitration procedure tailored to the parties' wishes, could one of them seek redress for the violation of the terms of an IFA by way of litigation before a national tribunal? This raises the puzzling question, still not totally settled, of the legal status of IFAs under different domestic legal regimes (Sobczak, this volume; Sobczak, 2006, p. 93). As interesting as this question is on a theoretical level, in practice the parties do not generally envisage recourse to law to enforce an agreement. In fact, many GUF representatives show a lack of interest in legally enforcing IFAs.

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<sup>26</sup> The decision of the arbitration board is binding on both parties. So far, they have not resorted to this arbitration procedure, which is reminiscent of traditional labour law and industrial relations approaches to solving labour disputes.

In this context, an avenue for alternative dispute settlement could be for the ILO to provide mediation and/or arbitration services to IFA parties. The ILO seems especially well placed to assume the task of neutral conciliator considering the expertise of its personnel in relation to the precise content, meaning and interpretation given to fundamental labour rights and core labour Conventions. The mediator therefore could aid the parties in gaining a better understanding of the implications of their commitment to respect the rights enunciated in a number of ILO instruments and give adequate guidance for the implementation of IFAs on the ground.

In essence, the function of mediation does not entail the adjudication of a dispute. Hence, another option for the ILO in assisting the effective implementation of IFAs would be to provide arbitration services to the parties. This could take the form of a dispute resolution procedure akin to the one attached to the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy or inspired by the work of the Committee on Freedom of Association. Here, the objective of the intervention would be for the arbitration body to analyse the claims of the parties involved and issue a report containing recommendations for the adequate application of the labour rights included in a framework agreement. The parties could voluntarily accept to abide by these recommendations. As a general rule, the ILO should be able to intervene, irrespective of the form of its involvement, at the request of one of the parties concerned.

The inadequate application of an IFA can be explained by various factors. One is the unwillingness of the parties to abide by their commitments. Another is the lack of skills and resources to implement and monitor the agreement satisfactorily. With regard to the latter, the ILO is in a position to design capacity-building activities related to the implementation of IFAs. Although technical cooperation is often overlooked in the legal literature, it is a means of action employed by the ILO that plays an important role in the promotion of fundamental labour rights and social dialogue — the two strategic objectives of the Decent Work Agenda that form an integral part of IFAs.<sup>27</sup> Technical cooperation relating to tripartism and social dialogue usually takes the form of projects aimed at institutional development and the improvement of constituents'

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<sup>27</sup> The obligation of the ILO to offer assistance to its member States in order to attain the objectives of the 1998 Declaration on Fundamental Principles and Rights at Work is explicitly mentioned in para. 3 of this instrument.

capacities, notably capacity-building projects for employers' organizations and for workers (ILO, 2004e). The ILO's Bureau for Employers' Activities (ACTEMP) and the Bureau for Workers' Activities (ACTRAV) take an active part in this kind of project, which often takes the form of training activities for the constituents of each group. The international training centre of the ILO in Turin runs a programme both for employers' and workers' activities. Globalization, CSR and fundamental labour rights have been among the most topical issues during training sessions for both employers' and workers' organizations in the last few years (ILO, 2006c).

The programme for employers' activities at the Turin centre offers training and services in diverse areas that include capacity building, occupational health and safety, business development, CSR, productivity and industrial relations.<sup>28</sup> Some of the most recent events organized by ACTEMP have also revolved around globalization and CSR.<sup>29</sup> These subjects are very closely linked with IFAs, and therefore, information on the accords could theoretically be disseminated during employers' training activities. In practice, the priorities of capacity-building projects for employers' organizations are determined in consultation with ACTEMP or employers' organizations in the countries concerned by specific technical assistance programmes. ACTEMP has close links with the IOE, which has a somewhat cautious approach to IFAs (IOE, 2004). Nevertheless, the IOE has published an employers' guide to IFAs, and this in itself denotes a certain interest on the part of employers to be informed on the issue (IOE, 2004). The guide, however, puts more emphasis on the enterprises' concerns about the instrument than on the added value that the accords bring to the signatory enterprises. This raises the question of whether the use of this guide in training sessions would make employers wary about signing an agreement.

ACTRAV carries out an important programme of workers' education activities on general subjects as well as issues of specific interest, to strengthen the capacity of workers' organizations to take part in the development process at country level and to attain decent work goals at the national, regional and sectoral levels (ILO, 2004e, paras. 12-13). For these activities, it receives assistance from the ILO's Turin training centre,

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<sup>28</sup> ILO, International Training Centre, Employers' activities. Available at: [http://www.itcilo.it/pub/page\\_main.php?VersionID=2&ContentTypeID=102](http://www.itcilo.it/pub/page_main.php?VersionID=2&ContentTypeID=102) [5 Mar. 2007].

<sup>29</sup> Bureau for Employers' Activities, ILO, Recent events. Available at: <http://www.ilo.org/public/english/dialogue/actemp/conf/reevent.htm> [28 Jan. 2008].

whose programme of activities for workers is very detailed and addresses a wide range of issues. Globalization, as said, is a very topical subject for workers' education and therefore training sessions provide numerous opportunities to familiarize trade unions with IFAs. For example, in 2004, the Centre conducted a seminar on international labour standards, framework agreements and international financial institutions for IUF affiliates in the Commonwealth of Independent States. The technical assistance to workers' organizations provided by the ILO through the centre offers a very concrete means to reinforce the ability of GUFs and their affiliates to negotiate and service the agreements by disseminating information and transferring competences to workers' organizations. As such, it can help to address some of the difficulties faced by GUFs with regard to the negotiation and implementation of agreements.

By strengthening capacity for social dialogue in workers' and employers' organizations, technical assistance programmes can contribute to the development of IFAs since they address one of the difficulties related to their negotiation and implementation. This contribution is, however, very specific and fairly limited given the list of obstacles that might impede the effective application and evolution of IFAs. Also, if the ILO uses technical assistance to foster the development and growth of IFAs, it will also have to combine it with other mechanisms.

## Conclusions

Labour law, especially in the field of collective labour relations, is a discipline that has in most instances evolved in reaction to social changes — rather than initiating such changes. It was the practice of collective bargaining, when it first developed, that prompted its transposition into legal terms, rather than the reverse, raising questions on the most appropriate means for “enabling the facts to enter the law” (Lo Faro, 2000, p. 87). The practice of social dialogue in global production chains entailed in IFAs is still in its infancy, but its promises demand that ways to integrate this practice into the international system of labour law be sought.

As this chapter has shown, the ILO has different reflexive mechanisms at its disposal to assist the development of IFAs. First, regulatory conversations with member States could encourage the adoption of international conventions and instruments on international trade union rights. Currently, while existing conventions protect the right to affiliate

with international organizations of workers and employers, they do not yet recognize the right to transnational collective bargaining or the right to exercise international solidarity actions such as cross-border sympathy strikes. Affirming these rights in a convention or another instrument, such as the Tripartite Declaration, would surely encourage social dialogue and collective bargaining at international level and contribute to redressing the imbalance of power between the parties to IFAs. Overall, this would create a favourable environment for the negotiation and implementation of IFAs. The recognition of trade union rights in international labour Conventions or other instruments relies, however, on the willingness of States to respond positively to the guidance and pressures of the ILO on the matter. Therefore, the opposition of some of the ILO's constituents could prevent the adoption of a new instrument or the revision of existing ones.

The ILO could also actively promote the negotiation of IFAs through sectoral activities and, more specifically, sectoral meetings. The latter can provide an international forum to discuss social dialogue initiatives and to allow dissemination of information and sharing of experience about IFAs. So far, discussions on IFAs have taken place at a few sectoral meetings, although these discussions were initiated by participants at the meetings and not put on the agenda by the ILO. A more proactive promotion of IFAs during sectoral meetings by the organization itself could bring about certain opportunities to negotiate agreements or joint understandings on fundamental labour rights. Sectoral meetings could in turn provide an international platform for the negotiation of IFAs. These prospects, however, are constrained by the limited number of sectoral meetings and the scarce resources available to them.

The final means of action envisaged in this chapter is the provision by the ILO of dispute resolution services and technical assistance to trade unions and employers in order to further the effective implementation of IFAs. Offering dispute resolution services could assist the parties in solving existing disagreements concerning the application of the accords. Technical assistance could support capacity building that is needed by MNCs and trade unions to monitor and service the agreements adequately. The only serious obstacle to the ILO's implementing this proposal seems to be limited resources.

Certainly, other ways for the ILO to encourage growth of IFAs need to be explored. One of them would be through partnership with other international organizations. The report of the World Commission on the

Social Dimension of Globalization emphasized the need for all relevant international institutions to “assume their part in promoting the core international labour standards and the Declaration on Fundamental Principles and Rights at Work” (WCSDG, 2004, p. 94). Through its involvement in the United Nations Global Compact initiative for instance, the ILO could develop innovative ways to disseminate information on IFAs and promote their negotiation.

That said, the analysis undertaken in this chapter leads to the conclusion that the contribution of the ILO to the consolidation of IFAs’ positive outcomes so far rests on fragile ground. The ILO has to rely on its traditional means of actions — regulatory conversation with its member States and the use of cooperation, technical assistance, persuasion and shame<sup>30</sup> — to foster the development of IFAs since it does not hold coercive powers to impose international labour standards and social dialogue practices on governments or on private actors such as MNCs and GUFs. These are the well-known traditional limits to the ILO’s actions. The acknowledgement by member States of the importance of transnational social dialogue and their strong commitment to promoting transnational collective bargaining will be needed for the ILO to play a meaningful role in the development of IFAs.

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<sup>30</sup> The term “regulatory conversation” is borrowed from Julia Black and has been used by Jill Murray to describe the dynamic of the relationship between the ILO and its member States. See Black (2002), p. 163; Murray (2003), p. 129. Edward Weisband uses the expression “discursive multilateralism” to describe the same dynamic (Weisband, 2000, p. 643).

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# Appendix

## Overview of provisions in international framework agreements<sup>1</sup>

Table 1. Multinational corporations and trade unions in international framework agreements (latest versions)

MNC	Year	Headquarters	Main Activities	Sales (million US\$)	Global Union Federation	Employees
<b>IKEA</b>	1998	Sweden	Home Furnishings & Housewares Retail	22 194.2	BWI	104 000
<b>Faber-Castell</b>	1999	Germany	Office, School & Art Supplies	332.4	BWI	6 500
<b>Hochtief</b>	2000	Germany	Construction	20 459.7	BWI	46 847
<b>Skanska</b>	2001	Sweden	Construction	18 325.5	BWI	56 000
<b>Ballast Nedam</b>	2002	Netherlands	Construction	1 728.3	BWI	3 701
<b>Impregilo</b>	2004	Italy	Construction	2 211.9	BWI	10 147
<b>Veidekke</b>	2005	Norway	Construction	2 634.1	BWI	6 351
<b>Schwan-Stabilo</b>	2005	Germany	Office, School & Art Supplies	240.5	BWI	3 145
<b>Lafarge</b>	2005	France	Construction	22 324.9	BWI/ICEM	71 000
<b>Royal BAM</b>	2006	Netherlands	Construction	11 406.8	BWI	30 338
<b>Staedtler</b>	2006	Germany	Office, School & Art Supplies	208.6	BWI	3 000
<b>VolkerWessels</b>	2007	Netherlands	Construction	3 773.2	BWI	16 400
<b>StatoilHydro</b>	1998	Norway	Energy & Utilities	68 281.7	ICEM	25 435
<b>Freudenberg</b>	2000	Germany	Industrial & Automotive Manufacturing	4 248.6	ICEM	33 542
<b>Endesa</b>	2002	Spain	Energy & Utilities	27 171.8	ICEM	26 800
<b>Norske Skog</b>	2002	Norway	Paper & Paper Product Manufacturing	4 615.7	ICEM	8 038
<b>Anglo-Gold Ashanti</b>	2002	South Africa	Metals & Mining	2 715.0	ICEM	61 453

<sup>1</sup> Compiled by Nikolaus Hammer for the ILS.

Table 1. (Cont.)

MNC	Year	Headquarters	Main Activities	Sales (million US\$)	Global Union Federation	Employees
<b>ENI</b>	2002	Italy	Energy & Utilities	114 718.2	ICEM	73 572
<b>RAG</b>	2003	Germany	Metals & Mining	18 386.31 <sup>1</sup>	ICEM	98 000
<b>SCA</b>	2004	Sweden	Paper & Paper Product Manufacturing	13 781.5	ICEM	51 022
<b>Lukoil</b>	2004	Russian Federation	Energy & Utilities	68 109.0	ICEM	148 600
<b>EDF</b>	2005	France	Energy & Utilities	77 706.8	ICEM/PSI	156 524
<b>Rhodia</b>	2005	France	Chemicals	6 946.1	ICEM	17 077
<b>Umicore</b>	2007	Belgium	Metals & Mining	11 629.6	ICEM/IMF	10 562
<b>WAZ</b>	2007	Germany	Publishing and Media	1 681 477.7	IFJ	16 000
<b>Indesit/Merloni</b>	2001	Italy	Appliances	2 731.6	IMF	17 000
<b>Volkswagen</b>	2002	Germany	Auto Manufacturing	138 361.6	IMF	328 599
<b>Daimler<sup>2</sup></b>	2002	Germany	Auto Manufacturing	328 599	IMF	360 385
<b>Leoni</b>	2002	Germany	Industrial and Automotive Manufacturing	2 781.4	IMF	34 075
<b>SKF</b>	2003	Sweden	Industrial Manufacturing	7 758.6	IMF	41 090
<b>GEA</b>	2003	Germany	Industrial Manufacturing	5 733.9	IMF	19 250
<b>Rheinmetall</b>	2003	Germany	Auto Parts Manufacturing	4 787.7	IMF	18 799
<b>Prym</b>	2003	Germany	Auto Parts Manufacturing	299.3	IMF	3 804
<b>Bosch</b>	2004	Germany	Auto Parts Manufacturing	43 684	IMF	261 291
<b>Renault</b>	2004	France	Auto Manufacturing	54 787.9	IMF	128 893
<b>Röchling</b>	2004	Germany	Auto Parts Manufacturing	883.6	IMF	6 041

Table 1. (Cont.)

MNC	Year	Headquarters	Main Activities	Sales (million US\$)	Global Union Federation	Employees
<b>BMW</b>	2005	Germany	Auto Manufacturing	64 644.4	IMF	106 575
<b>EADS</b>	2005	Netherlands	Aerospace & Defence	52 025.3	IMF	116 805
<b>ArcelorMittal<sup>3</sup></b>	2005	Netherlands	Steel Production	58 870.0	IMF	320 000
<b>PSA Peugeot Citroën</b>	2006	France	Auto Manufacturing	74 664.5	IMF	211 700
<b>Brunel</b>	2007	Netherlands	Business Services	658.4	IMF	6 148
<b>Inditex</b>	2007	Spain	Apparel Manufacturing & Retail	6 890.7	ITGLWF	69 240
<b>Danone</b>	1994	France	Dairy Products	18 580.6	IUF	88 124
<b>Accor</b>	1995	France	Lodging	10 029.3	IUF	170 000
<b>Chiquita</b>	2001	United States	Fresh Fruit & Vegetable Production	4 499.1	IUF	25 000
<b>Fonterra</b>	2002	New Zealand	Dairy Products	8 288.1	IUF	17 400
<b>Club Med</b>	2004	France	Travel Agencies & Services, Lodging	1 1411.6	IUF	14 845
<b>Telefónica</b>	2001	Spain	Telecommunications Services	71 919.4	UNI	234 900
<b>Carrefour</b>	2000	France	Discount & Variety Retail, Grocery Retail	102 774.8	UNI	456 295
<b>OTE</b>	2001	Greece	Telecommunications Services	7 773.1	UNI	11 755
<b>ISS</b>	2003	Denmark	Commercial Cleaning & Facilities Management Services	9 866.1	UNI	391 400
<b>Metro</b>	2003	Germany	Grocery Retail	79 002.3	UNI	208 616
<b>H&amp;M</b>	2004	Sweden	Apparel & Accessories Retail	9 911.2	UNI	40 368

Table 1. (Cont.)

MNC	Year	Headquarters	Main Activities	Sales (million US\$)	Global Union Federation	Employees
<b>Falck</b>	2005	Denmark	Health Care Services	606.6	UNI	13 813
<b>UPU</b>	2005	Switzerland	Inter-governmental Organisation	n.a.	UNI	n.a.
<b>Euradius<sup>4</sup></b>	2006	Netherlands	Graphical Industries	n.a.	UNI	600
<b>Nampak</b>	2006	South Africa	Packaging Manufacturing	1 979.6	UNI	14 376
<b>Portugal Telecom</b>	2006	Portugal	Telecommunications Services	5 738.4	UNI	32 3891
<b>Securitas</b>	2006	Sweden	Security Services	8 830.3	UNI	215 000
<b>National Australia Bank Group</b>		Australia	Banking & Financial Services	15 958.3	UNI	38 433
<b>France Telecom</b>	2006	France	Telecommunications Services	68 262.1	UNI	191 036
<b>Quebecor</b>	2007	Canada	Commercial Printing	6 086.3	UNI	2 880
<b>TOTAL</b>				<b>3 495 307.2</b>		<b>5 300 979</b>

<sup>1</sup> 2005 figures; <sup>2</sup> Daimler sold 80 per cent of its Chrysler shares in 2007; <sup>3</sup> Mittal Steel took over Arcelor in 2006 and is currently formulating a CSR strategy for the whole group; <sup>4</sup> Euradius was taken over by the Sheridan Group in 2006.

Sources: Hoovers; MNC web sites and annual reports; GUF web sites.

Table 2. Substantive provisions in international framework agreements

MNC	ILO Conventions (and Recommendations where specified) <sup>1</sup>	Employment	Wages	Working Time	Health & Safety	Training	Restructuring
<b>IKFA</b>	29, 87, 98, 100, 105, 111, 138, 155, 164, 182	X	X	X	X		
<b>Faber-Castell</b>	29, 87, 98, 100, 105, 111, 135, 138; Rec. 143	X	X	X	X		
<b>Hochtief</b>	“The following agreements of the ILO”	X	X	X	X		
<b>Skanska</b>	29, 87, 98, 100, 105, 111, 135, 138, 182; Rec. 143	X	X	X	X	X	
<b>Ballast Nedam</b>	“Relevant conventions and recommendations of the ILO”	X	X	X	X		
<b>Impregilo</b>	1, 29, 47, 87, 94, 95, 98, 100, 105, 111, 131, 135, 138, 155, 161, 162, 167, 182; Rec. 116, Rec. 143	X	X	X	X	X	
<b>Veidekke</b>	29, 87, 98, 100, 105, 111, 135, 138, 155, 167, 182; Rec. 143	X	X	X	X	X	
<b>Schwan-Stabilo</b>	29, 87, 98, 100, 105, 111, 135, 138, 155, 182; Rec. 143	X	X	X	X		
<b>Lafarge</b>	29, 87, 98, 100, 105, 111, 135, 138, 155, 182		X	X	X	X	
<b>Royal BAM</b>	29, 87, 98, 100, 105, 111, 135, 138, 155, 167, 182; Rec. 143	X	X	X	X	X	
<b>Staedtler</b>	29, 87, 98, 100, 105, 111, 135, 138, 155, 182; Rec. 143	X	X	X	X	X	
<b>Volkswagen</b>	1, 29, 47, 87, 94, 95, 98, 100, 105, 111, 131, 135, 138, 155, 161, 162, 167, 182; Rec. 116, Rec. 143	X	X	X	X	X	

<sup>1</sup> See the full titles at the end of the table.

Table 2. (Cont.)

MNC	ILO Conventions (and Recommendations where specified)	Employment	Wages	Working Time	Health & Safety	Training	Restructuring
<b>Statoil</b>	29, 87, 98, 100, 105, 111, 138				X	X	
<b>Freudenberg</b>	29, 87, 98, 100, 105, 111, 135, 138		X		X		X
<b>Endesa</b>	“Compliance with ... the ILO Conventions on ...”				X	X	
<b>Norske Skog</b>	29, 87, 98, 100, 105, 111, 135, 138, 182; Rec. 143	X	X		X	X	
<b>Anglo-Gold Ashanti</b>	29, 87, 98, 100, 105, 111, 138, 182				X		
<b>ENI</b>	29, 87, 98, 100, 105, 111, 135, 138, 182				X	X	
<b>RAG</b>	“The social rights and principles ... orientated according to the relevant treaties and conventions of the ILO”		X	X	X		
<b>SCA</b>	“principles derived from the ILO Declaration ... (core conventions)”	X	X		X	X	X
<b>Lukoil</b>	29, 87, 98, 100, 105, 111, 138, 156, 182		X		X	X	X
<b>EDF</b>	29, 87, 98, 100, 105, 111, 135, 138, 182		X		X	X	X
<b>Rhodia</b>	29, 87, 98, 100, 105, 111, 138, 156	X	X		X	X	X
<b>Umicore</b>	29, 87, 98, 100, 105, 111, 135, 138, 182; Rec. 143	X		X	X	X	
<b>WAZ</b>	87, 98						X
<b>Indesit/Merloni</b>	29, 87, 98, 100, 105, 111, 135, 138, 182						
<b>Volkswagen</b>	“Take the ILO Conventions concerned into consideration”		X	X			X

Table 2. (Cont.)

MNC	ILO Conventions (and Recommendations where specified)	Employment	Wages	Working Time	Health & Safety	Training	Restructuring
<b>Daimler</b>	"Principles orientated at the Conventions of the ILO"		X	X	X	X	
<b>Leoni</b>	87, 98, "oriented towards relevant UN Conventions of ILO"		X	X	X	X	
<b>SKF</b>	138		X	X	X	X	
<b>GEA</b>	29, 87, 98, 100, 105, 111, 138, 182	X	X	X	X	X	
<b>Rheinmetall</b>	29, 87, 98, 100, 105, 111, 138, 182		X	X	X	X	
<b>Prym</b>	29, 87, 98, 100, 105, 111, 138, 182		X	X	X		
<b>Bosch</b>	"Following principles take their lead from the basic labour standards of the ILO"; 98, 100, 138, 182		X	X	X	X	
<b>Renault</b>	29, 87, 98, 100, 105, 111, 138		X	X	X	X	X
<b>Röchling</b>	29, 87, 98, 100, 105, 111, 138, 182		X	X	X	X	
<b>BMW</b>	29, 87, 98, 100, 105, 111, 138, 182		X	X	X	X	
<b>EADS</b>	29, 87, 98, 100, 105, 111, 135, 138, 182		X	X	X	X	X
<b>ArcelorMittal</b>	29, 87, 98, 100, 105, 111, 138, 182		X	X	X	X	X
<b>PSA Peugeot Citroën</b>	29, 87, 98, 100, 105, 111, 135, 138, 155		X	X	X	X	X
<b>Brunel</b>	29, 87, 98, 100, 105, 111, 135, 138, 155		X	X	X	X	
<b>Inditex</b>	29, 87, 98, 100, 105, 111, 135, 138, 155, 159; Rec. 143, Rec. 190	X	X	X	X	X	
<b>Danone</b>	87, 98, 135	X	X	X	X	X	X

Table 2. (Cont.)

MNC	ILO Conventions (and Recommendations where specified)	Employment	Wages	Working Time	Health & Safety	Training	Restructuring
<b>Accor</b>	87, 98, 135						
<b>Chiquita</b>	29, 87, 98, 100, 105, 111, 135, 138, 182				X		X
<b>Fonterra</b>	29, 87, 98, 100, 105, 111, 135, 138, 182				X		X
<b>Club Med</b>	"The principles set out in the ILO Conventions"	X					
<b>Telefónica</b>	1, 29, 47, 87, 94, 95, 98, 100, 105, 111, 131, 135, 138, 155, 182; Rec. 116	X	X	X	X	X	
<b>Carrefour</b>	87, 98, 135, "Carrefour has also condemned child labour in order to prevent slavery and forced labour"						
<b>OTE</b>	1, 29, 47, 87, 94, 95, 98, 100, 105, 111, 131, 135, 138, 155, 167, 182; Rec. 116, Rec. 143	X	X	X	X	X	
<b>ISS</b>	1, 29, 47, 87, 98, 100, 105, 111, 135, 138, 155, 167, 182; Rec. 116, Rec. 143	X	X	X	X	X	
<b>Metro</b>	"Respect the right to collective bargaining and employees' freedom of association within the scope of national rights and laws. Metro Group ensures that employees, who have decided to become members of a union, are not dismissed or in any other way disadvantaged as a result of their union membership".						
<b>H&amp;M</b>	29, 87, 98, 100, 105, 111, 135, 138, 182						

Table 2. (Cont.)

MNC	ILO Conventions (and Recommendations where specified)	Employment	Wages	Working Time	Health & Safety	Training	Restructuring
<b>Falck</b>	This agreement establishes a World Works Council.						X
<b>UPU</b>	This agreement establishes cooperation to promote social dialogue.				X	X	X
<b>Euradius</b>	1, 29, 47, 87, 94, 95, 98, 100, 105, 111, 131, 135, 138, 155, 182; Rec. 116, Rec. 143	X	X	X	X	X	
<b>Nampak</b>	87, 98, 100, 105, 135, 155, 182; Rec. 143		X	X	X	X	
<b>Portugal Telecom</b>	1, 29, 47, 87, 94, 95, 98, 100, 105, 111, 131, 135, 138, 155, 167, 182; Rec. 116, Rec. 143	X	X	X	X	X	
<b>Securitas</b>	"Draws on the ILO's fundamental principles on rights at work"		X	X	X		
<b>National Australia Group</b>	"Workers' rights must be recognised under the International Labour Organisation Conventions ..."						
<b>France Telecom</b>	29, 87, 98, 100, 105, 111, 138, 182			X	X	X	X
<b>Quebecor</b>	87, 98, 100, 105, 111, 135, 138, 182				X		

Table 2. (Cont.)

**List of cited ILO Conventions and Recommendations**

- C1 Convention Limiting the Hours of Work in Industrial Undertakings to Eight in the Day and Forty-eight in the Week, 1919.
- C29 Convention concerning Forced or Compulsory Labour, 1930.
- C47 Convention concerning the Reduction of Hours of Work to Forty a Week, 1935.
- C87 Convention concerning Freedom of Association and Protection of the Right to Organise, 1948.
- C94 Convention concerning Labour Clauses in Public Contracts, 1949.
- C95 Convention concerning the Protection of Wages, 1949.
- C98 Convention concerning the Application of the Principles of the Right to Organise and to Bargain Collectively, 1949.
- C100 Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value, 1951.
- C105 Convention concerning the Abolition of Forced Labour, 1957.
- C111 Convention concerning Discrimination in Respect of Employment and Occupation, 1958.
- C131 Convention concerning Minimum Wage Fixing, with Special Reference to Developing Countries, 1970.
- C135 Convention concerning Protection and Facilities to be Afforded to Workers' Representatives in the Undertaking, 1971.
- C138 Convention concerning Minimum Age for Admission to Employment, 1973.
- C155 Convention concerning Occupational Safety and Health and the Working Environment, 1981.
- C156 Convention concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities, 1981.
- C159 Convention concerning Vocational Rehabilitation and Employment (Disabled Persons), 1983.
- C161 Convention concerning Occupational Health Services, 1985.
- C162 Convention concerning Safety in the Use of Asbestos, 1986.
- C167 Convention concerning Safety and Health in Construction, 1988.
- C182 Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, 1999.
- R116 Recommendation concerning Reduction of Hours of Work, 1962.
- R143 Recommendation concerning Protection and Facilities to be Afforded to Workers' Representatives in the Undertaking, 1971.
- R190 Recommendation concerning the prohibition and immediate action for the elimination of the worst forms of child labour, 1999.

Note: the year records when the IFA was first signed, the ILO Conventions refer to the latest available version of an IFA.

Sources: International framework agreements; ILO.

Table 3. References to other multilateral agreements

UN Universal Declaration of Human Rights (1948)	IKEA, Impregilo, Veidekke, Royal BAM, Staedtler, VolkerWessels, ENI, SCA, Lukoil, EDF, Umicore, WAZ (Art.19), Indesit, EADS, Inditex, Securitas, France Telecom
European Convention on Human Rights (1950)	WAZ (Art.10)
UN Declaration of the Rights of the Child (1959)	EDF
UN Declaration on the Elimination of All Forms of Discrimination against Women (1967)	EDF
OECD Guidelines for Multinational Enterprises (1976)	Ballast Nedam, Impregilo, Veidekke, Lafarge, Royal BAM, Staedtler, VolkerWessels, WAZ, GEA, EADS, Inditex, H&M
ILO Code of Practice on Occupational Safety and Health in the Iron and Steel Industry (1983)	Arcelor
UN Convention on the Rights of the Child (1989)	IKEA, Inditex
Rio Declaration on Environment and Development (1992)	IKEA
ILO Code of Practice on Safety and Health and in Forest Work (1998)	VolkerWessels
ILO Declaration on Fundamental Principles and Rights at Work (1998)	IKEA, Impregilo, Veidekke, Lafarge, Royal BAM, Staedtler, VolkerWessels, Indesit, H&M, Securitas
ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (2000)	Impregilo, Lafarge, Royal BAM, Staedtler, VolkerWessels
UN Global Compact (2000)	Lafarge, Anglo-Gold Ashanti, Lukoil, EDF, Rhodia, WAZ, Renault, BMW, EADS, PSA Peugeot Citroën, H&M, France Telecom

Table 3. (Cont.)

ILO Code of Practice on Safety in the Use of Synthetic Vitreous Fibre Insulation Wools (glass wool, rock wool, slag wool) (2000)	VolkerWessels
ILO Code of Practice on HIV/AIDS and the World of Work (2001)	Impregilo, Veidekke, Lafarge, Royal BAM, Staedtler, VolkerWessels, SCA, Lukoil
ILO Guidelines on Occupational Safety and Health Management Systems (2001)	Veidekke, Lafarge, Royal BAM, Staedtler, VolkerWessels

Sources: International framework agreements.

Table 4. Procedural provisions in international framework agreements

Multinational corporation	Duration	Supplier relations	Implementation	Meetings	Trade union involvement (other than GUF)	Mediation/ arbitration
<b>IKEA</b>	Reneg. 2001; Open	Mandatory	Implementation via "IKEA Way on Purchasing Home Furnishing Products"; established compliance organization	Twice/ year		
<b>Faber-Castell</b>	Open		Joint monitoring committee	Biannual	IG Metall	
<b>Hochtief</b>	Open	Mandatory	Report to executive board; officer appointed for application		IG BAU	Joint (IFA)
<b>Skanska</b>	Open	Information/ influence	Joint application group dealing with compliance; joint site inspections at least every year		EWC	Arbitration board to be jointly determined; decisions are binding
<b>Ballast Nedam</b>	2 years	Mandatory	Report to executive board; officer appointed for application	Annual	FNV Bouw, works council	Joint (IFA)
<b>Impregilo</b>	Open	Mandatory	Consulting group	Annual	Feneal-UJL, Filca-CISL, Fillea-CGIL	Joint (IFA)
<b>Veidekke</b>	2 years	Criterion/ consequence	Senior management responsible for implementation; local rep training for monitoring	Annual	Fellesforbundet, Norsk Arbeidsmands- forbundet, Chief Shop Steward	Joint (IFA)

Table 4. (Cont.)

Multinational corporation	Duration	Supplier relations	Implementation	Meetings	Trade union involvement (other than GUF)	Mediation/ arbitration
<b>Schwan-Stabilo</b>	Open	Criterion/ consequence	Joint monitoring committee, monitoring conducted every two years at productions and sales subsidiary locations	Annual	IG Metall, works council	
<b>Lafarge</b>	Open	Criterion/ consequence	Joint reference group to follow up and monitor	Annual		Joint (IFA)
<b>Royal BAM</b>	Open	Mandatory	Joint reference group to follow up and monitor	Annual	FNV Bouw, Hout-en Bouwbond CNV	Joint (IFA)
<b>Staedtler</b>	Open	Mandatory	Joint monitoring team to evaluate and supervise implementation	Biannual	IG Metall, works council, local trade unions or employee reps	
<b>VolkerWessels</b>	Open	Mandatory	Joint monitoring group to evaluate and review implementation	Annual		Joint (IFA)
<b>Statoil</b>	2 years (renewed 2001, 2003, 2005)	Information/ influence	Joint annual meetings to review implementation; training to facilitate implementation	Annual	NOPEF	
<b>Freudenberg</b>	Dec. 2001 (renewed 2002)		Joint annual meeting to monitor the agreement	Annual	IG BCE	

Table 4. (Cont.)

Multinational corporation	Duration	Supplier relations	Implementation	Meetings	Trade union involvement (other than GUF)	Mediation/ arbitration
<b>Endesa</b>	Dec. 2003		Six-monthly international consultation meetings	Twice/year	FM-CC;OO, FIA-UGT	
<b>Norske Skog</b>	2 years (renewed 2007)	Information/influence	Joint annual review meeting; Senior management responsible for implementation	Annual	Fellesforbundet, Chief Shop Steward	Joint (IFA)
<b>Anglo-Gold</b>	Open		Subcommittee to deal with cases	Annual	(South African NUM as co-signatory)	
<b>ENI</b>	2 years	Criterion/consequence		Annual	FILCEA-Cgil, FEMCA-Cisl, UILCEM-Uiil	
<b>RAG</b>	1 year		Regular consultation and information about implementation		IG BCE, works council	
<b>SCA</b>	2 years (updated 2007)	Information/influence	Annual joint meetings	Annual	Pappers, EWC	
<b>Lukoil</b>	1 year	Information/influence	Annual joint meetings	Annual	ROGWU	

Table 4. (Cont.)

Multinational corporation	Duration	Supplier relations	Implementation	Meetings	Trade union involvement (other than GUF)	Mediation/ arbitration
<b>EDF</b>	3 years	Criterion/ consequence	Joint implementation; Consultation Committee on EDF Group Corporate Social Responsibility (CCSR)	Annual	FNME-CGT, FCE-CFDT, FNEM-FO, CFE-CGC, CFTC, Unison, Prospect, Amicus, GMB, VDSZSZ, Solidarnosc, SOZE, Luz y Fuerza, SUTERM, SINTERGIA, SENGE, Employee reps of Asia-Pacific Branch	CCSR (IFA)
<b>Rhodia</b>	3 years	Mandatory	Joint review of application of the agreement	Annual		
<b>Umicore</b>	4 years	Information/ influence	Joint committee responsible for monitoring the implementation; report from external auditor	Annual	EWC Chair	
<b>WAZ</b>	Open		Subcommittee to consider structure and content of group forum discussions; group forum includes union reps from national units and local management	Annual	EFJ, national union reps	

Table 4. (Cont.)

Multinational corporation	Duration	Supplier relations	Implementation	Meetings	Trade union involvement (other than GUF)	Mediation/arbitration
<b>Indesit/Merloni</b>	Open	Criterion/consequence	Monitoring by National Joint Commission; report on implementation at annual EWC and National Information Meeting, or directly to worker reps/unions	Annual	EWC, national information meeting, (FIM, FIOM, UILM as co-signatories) Group Global Works Council	
<b>Volkswagen</b>	Open	Criterion/consequence	Implementation is discussed within the framework of the Group Global Works Council			
<b>Daimler</b>	Open	Criterion/consequence	Senior management responsible for compliance; Corporate Audit also to examine and take action		Corporate management to regularly report to and consult with international employee representatives (representatives for DC Enterprise Works Council, EWC, World Employee Committee; UAW as co-signatories)	

Table 4. (Cont.)

Multinational corporation	Duration	Supplier relations	Implementation	Meetings	Trade union involvement (other than GUF)	Mediation/ arbitration
<b>Leoni</b>	Open	Criterion/ consequence	Internal Auditing Department will monitor compliance; report and discussion at annual EWC meetings	Annual	EWC	
<b>SKF</b>	Open	Information/ influence	Regular joint supervision		World works council	
<b>GEA</b>	Open	Criterion/ consequence	Information on observation of agreement will take place in the EWC and EWC presiding committee	Annual	EWC (EMF as co-signatory)	
<b>Rheinmetall</b>	Open	Criterion/ consequence	Senior management and workers' representatives responsible for implementation; information exchange in EWC	Annual	EWC (EMF as co-signatory)	
<b>Prym</b>	Open	Criterion/ consequence	EWC is informed and consulted about implementation	Annual	EWC	
<b>Bosch</b>	Open	Mandatory	Part of Management System Manual; senior management responsible for implementation; implementation discussed with Europa Committee		EWC	

Table 4. (Cont.)

Multinational corporation	Duration	Supplier relations	Implementation	Meetings	Trade union involvement (other than GUF)	Mediation/ arbitration
<b>Renault</b>	Open	Mandatory	Management and group works council will ensure implementation; evaluation together with signatories		Employee representatives, Group Works Council (FGTB, CFDT, CFTC, CGT, CC.OO, CSC, FO, UGT, CFE-CGC as co-signatories)	
<b>Röchling</b>	Open	Criterion/ consequence	Senior management and employee representatives responsible; information and discussion in EWC	Annual	EWC (EMF as co-signatory)	
<b>BMW</b>	Open	Criterion/ consequence	Consultations on compliance will take place periodically via the Euro-Forum		EWC	
<b>EADS</b>	Open	Criterion/ consequence	Senior management responsible for compliance; reporting and consultation at EWC		EWC (EMF as co-signatory)	To be agreed by Head of HR and EWC
<b>Arcelor</b>	3 years	Criterion/ consequence	Joint group level committee responsible for monitoring implementation		Representative from EWC, IMF/EMF, each geographical area	(EMF as co-signatory)

Table 4. (Cont.)

Multinational corporation	Duration	Supplier relations	Implementation	Meetings	Trade union involvement (other than GUF)	Mediation/ arbitration
<b>PSA Peugeot Citroën</b>	Open (review every 3 years)	Criterion/ consequence	Joint local social observatories to be set up in each major country to monitor application; report to Peugeot Extended European Council on Social Responsibility	Annual	Expanded EWC (possible transformation into Global Council), EMF	
<b>Brunel</b>	Open	Criterion/ consequence	Parties will meet to discuss any concerns raised by a party to the agreement concerning its implementation		AMWU, ACTU (AMWU as co-signatory)	
<b>Inditex</b>	Open	Mandatory	Joint committee to review application of agreement; IFA linked to Inditex Code of Conduct for External Manufacturers and Suppliers	Annual	Joint (IFA), ILO advice in last instance	
<b>Danone</b>	Open		Review during plenary meetings			Joint (IFA)
<b>Accor</b>	Open					
<b>Chiquita</b>	Open	Criterion/ consequence	Joint review committee; contact person from Chiquita, IUF, Colsiba	Twice/ year	Colsiba	
<b>Fonterra</b>	Open	Information/ influence	Joint review committee	Annual	NZDWU	
<b>Club Med</b>	3 years		Joint implementation committee	Annual	EFFAT, EWC	

Table 4. (Cont.)

Multinational corporation	Duration	Supplier relations	Implementation	Meetings	Trade union involvement (other than GUF)	Mediation/ arbitration
<b>Telefónica</b>	5 years	Information/ influence	Joint responsibility for implementation via regular meetings; joint group to report to UNI and Telefónica presidents			Joint (IFA)
<b>Carrefour</b>	Open	Criterion/ consequence	Joint monitoring			
<b>OTE</b>	5 years	Criterion/ consequence	Implementation via joint meeting; either side to appoint a contact person; joint monitoring group if necessary	Annual	OME-OTE	Joint
<b>ISS</b>	5 years	Mandatory	Implementation via Code of Conduct; joint implementation and recommendations			Joint
<b>Metro</b>	Open		“In the scope of social dialogue on an international level, the umbrella organizations of the national employer associations and unions in commerce are METRO Group’s external partners. The METRO Group Euro-Forum constitutes the internal discussion platform for transnational topics”.		Group Euro-Forum	

Table 4. (Cont.)

Multinational corporation	Duration	Supplier relations	Implementation	Meetings	Trade union involvement (other than GUF)	Mediation/ arbitration
<b>H&amp;M</b>	Open		Joint responsibility for implementation			
<b>Falck</b>	Open		This agreement establishes a World Works Council in accordance with Art.13 EWC Directive	Annual	WWC Employee Representatives	Joint (WWC)
<b>UPU</b>	Open		This agreement establishes cooperation to promote social dialogue.			
<b>Euradius</b>	5 years	Mandatory	Annual joint meetings	Annual	Central Works Council, FNV KIEM	
<b>Nampak</b>	Open	Information/influence	Annual joint information and discussion meetings	Annual	UNI-affiliated unions	Joint (IFA)
<b>Portugal Telecom</b>	2 years	Mandatory	Annual joint information and discussion meetings	Annual	SINTTAV, STPT, SINDETELCO	Joint (IFA)
<b>Securitas</b>	2 years, then Open	Criterion/consequence	Implementation group; local implementation group if required	Annual	Swedish Transport Workers' Union	Joint (IFA)
<b>National Australia Group</b>	Open		Annual joint information and discussion meetings	Annual	FSU, Amicus, FINSEC	
<b>France Telecom</b>	Open	Mandatory	Joint implementation	Twice/year	Group Worldwide Trade Union Alliance, CFDT, CGT, FO	Joint (IFA)
<b>Quebecor</b>	Open	Criterion/consequence	Joint implementation	Annual		

Sources: International framework agreements.