The INTERNATIONAL JOURNAL OF COMPARATIVE LABOUR LAW *and* INDUSTRIAL RELATIONS

Wolters Kluwer
Law & Business

Published by:
Kluwer Law International
PO Box 316
2400 AH Alphen aan den Rijn
The Netherlands
Website: www.kluwerlaw.com

Sold and distributed in North, Central and South America by:
Aspen Publishers, Inc.
7201 McKinney Circle
Frederick, MD 21704
United States of America
Email: customer.service@aspenpublishers.com

Sold and distributed in all other countries by:
Turpin Distribution Services Ltd.
Stratton Business Park
Pegasus Drive, Biggleswade
Bedfordshire SG18 8TQ
United Kingdom
Email: kluwerlaw@turpin-distribution.com

The International Journal of Comparative Labour Law and Industrial Relations is published quarterly (March, June, September and December).

Subscription rates, including postage (2012): Print subscription prices: EUR 314/USD 419/GBP 231
Online subscription prices: EUR 290/USD 388/GBP 214 (covers two concurrent users)

The International Journal of Comparative Labour Law and Industrial Relations is indexed/abstracted in the *European Legal Journals Index*.

Printed on acid-free paper.

ISSN 0952-617X

Printed and Bound by CPI Group (UK) Ltd, Croydon, CR0 4YY.

Editorial Office Marco Biagi Foundation
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Publisher Ewa Szkatuła

Journal's world wide web site: http://www.fmb.unimore.it/on-line/Home/Ricercaepubblicazioni/TheInternationalJournalofComparativeLabourLawandIndustrialRelations.html

Annual subscription Kluwer Law International, P.O. Box 316, 2400 AH
Alphen aan den Rijn, The Netherlands, http://www. kluwer-law.com.

Soft on the Inside, Hard on the Outside: An Analysis of the Legal Nature of New Forms of International Labour Law

M. Antonio García-Muñoz Alhambra,* Beryl ter Haar** and Attila Kun***

With the internationalization of companies, labour issues, such as working conditions, have moved beyond the confines of national law and become subject to the transnational legal ambit. To regulate these issues, an increasing variety of instruments is used. Two fairly new instruments, in this respect, are unilateral codes of conduct that are concluded in the context of corporate social responsibility, and international framework agreements concluded by multinationals and global union federations. Both instruments are labelled as soft law since they are legally non-binding but are intended to generate normative effect. To gain a better understanding of the legal functioning of these instruments, this paper introduces an analytical framework that builds on the work in particular of Gamble, Abbott et al., Raustiala and d'Aspremont. The framework is comprised by three features of law: lawfulness, substance, and the structure to ensure compliance, with each feature divided into several elements. The analysis of the two instruments in this perspective based on a narrow and rather strict analysis within the framework suggests that the two instruments are very soft. However, based on a more reflective analysis, we find that both instruments are much harder on the outside than the (formal) inside suggests.

***Keywords**: Labour law, CSR, codes of conduct, international framework agreements, soft law, normative effect, features of law.*

1. Introduction

Social matters are regulated in several ways, including international standards, national rules, collective agreements, and individual employment contracts. Many social provisions regulate relations between the employer, generally perceived to be big and strong, and the employee, generally perceived to be small and weak. From a legal point of view, the idea is that social matters are best regulated by legally binding measures. However, more and more

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The authors thank the participants of the 3rd Seminar for young researchers on European Labour Law and Social Law, Trento, Italy, 27–30 May 2010 and in particular Profs W. Kohte (Martin-Luther-Universität Halle-Wittenberg) and T. Japsers (University of Utrecht) for their support and comments on earlier drafts of this article.

García-Muñoz Alhambra, M. Antonio, Beryl ter Haar & Attila Kun. 'Soft on the Inside, Hard on the Outside: An Analysis of the Legal Nature of New Forms of International Labour Law'.
The International Journal of Comparative Labour Law and Industrial Relations 27, no. 4 (2011): 337–363.

use is made of legally non-binding instruments, also called soft law.[1] This development is generally considered to be undesirable, because the probability of soft law having normative effect is presumed to be less likely than that of hard law instruments.[2] By normative effect we understand two things: first the creation of a ripple effect in a national legal order, for instance, because a legal act is adopted or changed, in order to meet the requirements of the instrument; and second, the capacity to enforce compliance with the normative substance of the instrument.

Whether desirable or not from a legal perspective, one of the reasons for using soft law instruments to regulate social matters is the failure of public actors, such as governments and international organizations, to adopt legally binding rules on social matters at transnational level, also called the 'governance gap'.[3] Businesses and civil society have reacted to this governance gap by adopting self-regulatory instruments.[4] In this respect two instruments are of particular interest as they both deal with the regulation of social matters within multinational organizations: unilateral corporate codes of conduct[5] and international framework agreements (IFAs).[6] Codes of conduct are a reflection of the increasing global

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[1] R.J. Dupuy, 'Declaratory Law and Programmatory Law: From Revolutionary Custom to "Soft Law"', in *Declarations on Principles, a Quest for World Peace (Liber Röling)*, eds R.J. Akkerman, P.J. van Krieken & Ch.O. Pannenborg (Leyden: Sijthof, 1977), 248; P. Taylor-Gooby, 'Introduction: Open Markets versus Welfare Citizenship: Conflicting Approaches to Policy Convergence in Europe', in *Making a European Welfare State?*, ed. P. Taylor-Goody (Oxford: Blackwell Publishing, 2004), 1–16; K.W. Abbott & D. Snidal, 'Hard and Soft Law in International Governance', *International Organization* 54, no. 3 (2000): 421–456, esp. 436–437. See, in particular, for labour issues, D.A. Morse, *The Origin and Evolution of the I.L.O. and Its Role in the World Community* (Ithaca: New York State School of Industrial and Labor Relations, Cornell University, 1969), 37–73 and M.G. Rood, 'Internationalization: A New Incentive for Labour Law and Social Security', in *Labour Law at the Crossroads: Changing Employment Relationships. Studies in Honour of Benjamin Aaron*, eds J.R. Bellace & M.G. Rood (The Hague: Kluwer Law International, 1997), 139–154.

[2] J. Klabbers, 'The Undesirability of Soft Law', *Nordic Journal of International Law* 67 (1998): 381–391; W. Witteveen & B. Van Klink, 'Is Soft Law Really Law? A Communicative Approach to Legislation', *RegelMaat* 3 (1999): 126–140; S. Borrás & B. Greve, 'Concluding Remarks: New Method or Just Cheap Talk?', *Journal of European Public Policy* 11, no. 2 (2004): 329–336; G. Davidov, 'The Enforcement Crisis in Labour Law and the Fallacy of Voluntarist Solutions', *IJCLLIR* 26 (2010): 61–82; European Commission, *Green Paper Promoting a European Framework for Corporate Social Responsibility*, COM(2001) 366.

[3] Some public international organizations, including the International Chamber of Commerce (ICC), the Organization for Economic Cooperation and Development (OECD), and the International Labour Organization (ILO) have adopted rules, though these are legally non-binding. See about this in N. Horn, 'International Rules for Multinational Enterprises: The ICC, OECD and ILO Initiatives', *American University Law Review* 30, no. 81 (1980): 923–940. See for a more philosophical consideration, see P. Macklem & M. Trebilcock, *New Labour Standards Compliance Strategies: Corporate Codes of Conduct and Social Labeling Programs*, Final Version, Faculty of Law, University of Toronto, A Research Report prepared for the Federal Labour Standards Review (2006), 5, where they quote Teubner, who introduces in this context the concept of *global law*, which he defines as a 'new body of law that emerges from various globalization processes in multiple sectors of civil society'.

[4] D. Stevis, *International Framework Agreements and Global Social Dialogue: Parameters and Prospects*, ILO Multinational Enterprises Programme, Job Creation and Enterprise Development Department. Employment Sector, Employment Working Paper No. 47, 2010, 2, who calls it 'civic regulation'; D. O'Rourke, 'Outsourcing Regulation: Analyzing Non-governmental Systems of Labour Standards and Monitoring', *The Policy Studies Journal* 31, no. 1 (2003): 2, who takes a wider perspective and calls it 'non-governmental regulation'. See also J. Murray, *Corporate Social Responsibility: An Overview of Principles and Practices*, Policy Integration Department – World Commission on the Social Dimension of Globalization, International Labour Office, Geneva, Working Paper No. 34 (2004), 4; D. Gallin, 'International Framework Agreements: A Reassessment', in *Cross-Border Social Dialogue and Agreements: An Emerging Industrial Relations Framework?* (Genève: International Institute for Labour Studies, 2008), 15–42.

[5] Macklem & Trebilock, *supra* n. 4; I. Schömann et al., *Codes of Conduct and International Framework Agreements: New Forms of Governance at Company Level*. European Foundation for the Improvement of Living and Working conditions (2008): 105.

[6] Gallin, *supra* n. 4; K. Papadakis et al., *Cross-Border Social Dialogue and Agreements: An Emerging Global Industrial Relations Framework?* (Geneva: ILO, 2008), 29; and Stevis, *supra* n. 5.

outreach and influence of multinationals.[7] Although they are widely divergent and in flux,[8] they are generally defined as:

> a set of principles and rules that govern the way social institutions should behave toward their stakeholders and the way stakeholders (especially employees) should conduct themselves toward the institution and each other.[9]

Codes of conduct often put emphasis on the social responsibility of multinational companies, and they are widely interpreted as a central aspect and tool of the corporate social responsibility (CSR) agenda. Moreover, it is argued that:

> the main objective of corporate codes is to define, monitor and enforce internal rules of behaviour in order to improve corporate homogeneity and adherence to legal obligations or specific company values, and thereby to reduce risks that might occur from a violation of national laws.[10]

More recently, codes of conduct have been moving from unilateral acts to more complex and ambitious multi-stakeholder approaches to CSR.[11] In this sense, IFAs are considered as the next step in the evolution of responses to multinationals, coming from the multinational itself in an effort to enhance the legitimacy of their CSR policies.[12] However, just as importantly, IFAs are the result of social dialogue at transnational level as a means of promoting and executing the core labour standards of the International Labour Organization (ILO).[13] In this sense, IFAs fill the governance gap between the transnational multinationals and the traditionally nationally inclined social actors.[14] Although IFAs come in a wide variety, they share some common characteristics, based on which we define them as: bi- or multilateral agreements between multinationals on the one hand and global trade unions on the other, sometimes accompanied by national trade unions and/or works councils, in order to stimulate global social dialogue and promote the core labour standards of the ILO.[15]

Although neither of the instruments is adopted by public actors and they are therefore legally non-binding, they both aim to regulate the behaviour of the multinational in respect of social issues *inter alia*. The soft law label indicates that these instruments include legal features, such as norms and compliance structures, to regulate the desired behaviour.

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[7] Schömann et al., *supra* n. 5.

[8] International Labour Office (2003), *Information Note on Corporate Social Responsibility and International Labour Standards* ILO Doc. GB.286/WP/SDG/4(Rev.), available at <www.ilo.org/public/english/standards/relm/gb/docs/gb286/pdf/sdg-4.pdf> (visited on 19 Mar. 2011) and OECD, 'Codes of Corporate Conduct: Expanded Review of their Contents', *Working Papers on International Investment*, no. 2001/6, 33. See also M. Urminsky, *Self-regulation in the Workplace: Codes of Conduct, Social Labelling and Social Responsible Investment,* Genèva: ILO, MCC Working Paper No. 1 (2002).

[9] A. Carson, M. Scott & Baetz and S. McGill, *Codes of Conduct in the Private Sector – A Review of the Academic Literature from 1987 to 2007* (2008): 2; J-M. Servais, *International Labour Law* (The Hague: Kluwer Law International, 2005).

[10] Schömann et al., *supra* n. 5, at 85.

[11] Stevis, *supra* n. 4, at 5.

[12] Schömann et al., *supra* n. 5, at 3.

[13] See, e.g., Gallin, *supra* n. 4; Stevis, *supra* n. 4.

[14] International Confederation of Free Trade Unions (ICFTU), available at <www.icftu.org/displaydocument.asp?Index=991216332&Language=EN> (last visited on 24 May 2010).

[15] For the several characteristics based on which we have derived this definition, see Schömann et al., *supra* n. 5, at 21–22; Papadakis, *supra* n. 6, at 2 and 71; Stevis, *supra* n. 4, at 2.

Determining to what extent these legal features are present in these instruments (strong or weak) and how they work together improves not only our general understanding of the legal functioning of these instruments;[16] it also improves our understanding of their general legal strengths and weaknesses in generating normative effect.[17] As such, it provides input to further legally strengthen these instruments. However, with the possible exception of Sobczak and many descriptive considerations about soft law in general,[18] such an analysis has not been carried out.

The aim of this paper is to conduct an analysis of the legal strengths and weaknesses of Codes of Conduct and IFAs. Therefore, we introduce a framework that builds on previous frameworks of Gamble, Abbott et al. and Raustiala and the considerations of d'Aspremont. The framework is comprised of three features of law: lawfulness, substance or negotium, and the structure to ensure compliance. The features are subdivided into elements that are decisive for the extent to which the respective feature is present in the instrument under examination. The underlying presumption of the framework is that when all elements of the three features are present to the greatest extent, the instrument is hard law; every element that is not present to the greatest extent weakens the instrument to soft law; when many elements are missing, the question arises as to whether the instrument actually belongs in the legal ambit. As a result, we embrace a sliding scale of law, varying from hard law to different forms of soft law to no law at all.[19] However, more interestingly, the analysis shows where the legal strengths and weaknesses of the instruments lie, which improves our understanding of the way they regulate the behaviour of the actors covered by the instruments.

After the introduction of the analytical scheme (section 2), codes of conduct (section 3) and IFAs (section 4) are analysed within the scheme. Since both instruments vary in substance and structure each time they are used, the analysis is based on the general definitions and understandings of these instruments as described above and further worked

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[16] Although they are generally accepted as soft law, this is not completely undisputed. See Davidov, *supra* n. 2.

[17] The fact that it is soft law does not necessarily mean that it is without normative influence. See on this in the context of EU soft law, D.M. Trubek & L.G. Trubek, 'The OMC and the Debate over "Hard" and "Soft" Law', in *The Open Method of Co-ordination in Action*, ed. J. Zeitlin, Ph. Pochet & L. Magnussen (Brussels: P.I.E.-Peter Lang, 2005), 83–103.

[18] Among many others, see J.E.S. Fawcett, 'The Legal Character of International Agreements', *British Journal of International Law* (1953): 381–400; O. Schachter, 'The Twilight Existence of Nonbinding International Agreements', *The American Journal of International Law* 71, no. 2 (1977): 296–304; R. Baxter, 'International Law in Her "Infinite Variety"', *International and Comparative Law Quarterly* 29 (1980): 549–566; M. Bothe, 'Legal and Non-Legal Norms – A Meaningful Distinction in International Relations', *XI Netherlands Yearbook of International Law* (1980): 65–95; A. Aust, 'The Theory and Practice of Informal International Instruments', *International and Comparative Law Quarterly* 35 (1986): 787–812; T. Gruchalla-Wesierski, 'A Framework for Understanding "Soft Law"', *McGill Law Journal* 30 (1984/1985): 37–88; C. Lipson, 'Why Are Some International Agreements Informal', *International Organization* 45, no. 4 (1991): 496–498; D. Shelton, *Commitment and Compliance. The Role of Non-Binding Norms in the International Legal System* (Oxford: Oxford University Press, 2000).

Some useful understandings come from those that oppose the acceptation of legally non-binding instruments in the legal ambit. Among which, see D. Thürer, '"Soft law" eine neue Form von Völkerrecht?', *Revue de Droit Suisse* 104, no. I (1985): 429–453; J. Klabbers, *supra* n. 2; J. D'Aspremont, 'Softness in International Law: A Self-Serving Quest for New Legal Materials', *European Journal of International Law* 19 (2008): 1075–1093.

[19] In this, we follow K.W. Abbott et al., 'The Concept of Legalization', *International Organization* 50, no. 3 (2000): 401–419.

out in the respective parts. Because the analytical scheme is intended for fairly traditional forms of international law, that is, the acts of public actors, while we are dealing with self-regulation of non-governmental actors, the analysis sometimes takes a more reflective approach in the spirit of the features and elements of the model. Furthermore, we have not done our own empirical research, although that would have been preferable regarding some aspects of the analysis, instead we have relied on research of others (in particular regarding codes of conduct) or simply made spot checks where nothing was available (in particular with IFAs).[20] Since both instruments are used to govern social matters in multi-national organizations, it is interesting to not only assess their individual legal capacities to generate normative effect but also compare those capacities. Therefore, the conclusion (section 5) not only summarizes the results of the analysis in order to understand the legal strengths and weaknesses of these instruments but also compares those findings with each other, thus providing a better understanding of how these instruments together regulate social matters at transnational level.

2. Analytical Framework to Assess the Legal Quality of International Law

Although it is problematic to construct a conclusive analytical model to analyse the legal quality of international law, we intend to outline a model that is as comprehensive as possible which allows for a systematic and therefore highly comparative assessment of the legal quality of instruments used to regulate issues at a transnational level, in other words, international law. The construction of the framework builds in particular on the frameworks proposed by Gamble,[21] Abbott et al.[22] and Raustiala[23] and is inspired by the considerations on soft law made by d'Aspremont.[24] The framework is comprised by three features of law, that is, lawfulness, substance or negotium, and the structure to ensure compliance.[25] These features are subdivided into elements that determine to what extent the feature is present within the instrument. Based on this model, it is possible to assess not only the legal quality of legally binding instruments but also that of legally non-binding instruments intended to have normative effect.

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[20] This is in particular the case with the assessment of the second feature, substance.

[21] J.K. Gamble, 'The 1982 United Nations Convention on the Law of the Sea as Soft Law', *Houston Journal of International Law* 8 (1985): 37–48.

[22] Abbott et al., *supra* n. 19.

[23] K. Raustiala, 'Form and Substance in International Agreements', *American Journal of International Law* 99 (2005): 581–614.

[24] D'Aspremont, *supra* n. 18.

[25] The division of international agreements into these three features, albeit with different interpretations, is proposed by Raustiala, in an attempt to investigate the architecture of international agreements (*supra*).

2.1. Lawfulness

The first feature, lawfulness, refers to formal aspects of the adoption of an instrument. This feature is most decisive for the (binary) question as to whether or not a legally binding instrument is created.[26] This feature is comprised by four elements: the form of the instrument (instrumentum); the procedure by which the instrument is adopted; the competence to adopt legally binding instruments; and the circumstances that surrounded the creation of the instrument. The instrumentum refers to the sort of instrument that is adopted. Although the form of the agreement is not conclusive, as cogently argued by Myers[27] and Baxter[28] and confirmed by the case law of the European Court of Justice,[29] it gives an initial impression of what the actors may have intended to create.

The second element examines the procedures concerned with the adoption of the instrument. In general, instruments that are intended to be legally binding have to be adopted by specific procedures, ensuring the lawfulness of the instruments. These procedures include rules about signatures, how and when an instrument comes into force, where and when it is to be published and how it is to be ratified. If an instrument is adopted according to such a procedure, it is more likely that the parties involved intend to create a legally binding instrument than when such procedures are not followed.

The third element is that of the competence of the actors involved to adopt a legally binding instrument. In essence, this comes down to the fact that if an instrument is adopted by actors that are not competent to do so, the instrument is adopted unlawfully and will therefore lack legal bindingness.

The fourth and last element is that of the circumstances that surround the creation of the instrument. This element appeals to the reasons why the actors involved in a particular case prefer the adoption of a legally non-binding instrument over a legally binding instrument. One of those circumstances is the complexity of the subject. A subject can be complex because the subject matter itself is complex, or because it affects several other issues.[30] Another issue is that of confidentiality, as in the case of matters of security.[31] However, political factors are also relevent in terms of whether or not the actors involved intended to create a legally binding instrument. In particular when it seems politically impossible to reach an agreement, it is more likely that the actors will make recourse to the adoption of a legally non-binding instrument in order to overcome or prevent a deadlock, rather than failing and adopting no agreement at all.

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[26] Although this argument is mainly posed to deny the existence of soft law, law is either hard or not; the essence of this argument is that law is either legally binding or not. See: D'Aspremont, *supra* n. 18; P. Weil, 'Towards Relative Normativity in International Law?', *The American Journal of International Law* 77, no. 3 (1983): 413–442.

[27] D.P. Myers, 'The Names and Scope of Treaties', *American Journal of International Law* 51, no. 3 (1957): 574–605.

[28] Baxter, *supra* n. 18.

[29] ECJ Case C-311/94, *IJssel-Vliet Combinatie B.V. v. Ministerie van Economische zaken* [1996] ECR I-5023, para. 44. Other examples are ECJ Case C-57/95, *France v. Commission* [1997] ECR I-1627; ECJ Case C-313/90, *CIRFS v. Commission* [1993] ECR I-1125; ECJ Case C-366/88, *France v. Commission* [1990] ECR I-3571. See also Klabbers, *supra* n. 2, at 387–390.

[30] Abbott and Snidal, *supra* n. 1.

[31] Lipson, *supra* n. 18.

2.2. Substance/negotium

The second feature, substance or negotium, is concerned with the normative quality of the contents of the instrument. The contents are the rights and obligations created by the instrument in order to direct the behaviour of those covered by the scope of the instrument. An instrument is more likely to generate a normative effect when it creates clear and precisely defined rights and obligations that leave hardly any margin of appreciation, when the rules are coherent with each other, and when they are formulated in legal language referring to legal discourses.[32] To determine this, the feature is subdivided into three elements: obligation, precision, and the language used.

As argued by Abbott et al., several sorts of obligation can be created, among which (from strong to weak):

- unconditional obligations;
- implicit conditions on obligations laid down in a political treaty;
- contingent obligations and escape clauses that allow for national reservations regarding specific obligations;
- hortatory obligations; and
- recommendations and guiding norms.[33]

The sort of obligation that is created can be recognized by the other two elements: precision and the language used.

Precision is, first of all, about the internal coherence of the instrument as a whole. This means that the norms of the agreement are non-contradictory in relation to each other. Second, precision is concerned with the margin of appreciation in the upholding of the rights or the execution of the obligation.[34] For example, statements of general aims and broad declarations of principles are considered too indefinite to create unconditional obligations.[35] Abbott et al. discern the following four indicators for precision (from precise to vague):

- determinate rules that only allow for a narrow margin of interpretation;
- rules that leave substantial yet limited margins of interpretation;
- rules that leave broad areas of discretion; and
- rules that contain 'standards' that are only meaningful with references to specific situations.[36]

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[32] This feature heavily draws of the underlying idea of 'the concept of legalization', as introduced by Abbott et al., *supra* n. 19.

[33] Abbott et al, *supra* n. 19, at 410.

[34] For completeness, it should be noted that there will always be some margin of appreciation, as it is observed that some vagueness is inherent to international law. U. Fastenrath, 'Relative Normativity in International Law', *European Journal of International Law* (1993): 305–340.

[35] Some scholars argue that when this is the case the actors involved intended at least to avoid legal bindingness of the instrument. Schachter, *supra* n. 18.

[36] Abbott et al, *supra* n. 19.

Further, it is possible to determine the nature of the obligation by the language that is used to formulate the rights and obligations. Law has its own rhetoric;[37] therefore, the sort of language that is used is an indication of the intention of the actors. For example, if the intention of the actors is to create a legally binding agreement, they are more likely to use legal terminology including words like 'shall', 'must', 'agree', 'obligations' and 'enter into force', instead of words like 'will', 'should', 'undertake', 'provisions', and 'come into operation' or 'come into effect' that denote the intention to create something less than a legally binding agreement.[38]

2.3. Structure

The third feature, structure, is about 'the extent to which states and other actors delegate authority to designated third parties [. . .] to implement agreements'.[39] The first element of this feature is that of dispute settlement. This is presumed to be the strongest when it is conducted by a judicial court and the weakest when settled through political negotiation. The strength of judicial courts is not so much about their (constitutional) enforcement power, rather in their function to require justification for alleged breaches of the instrument that induces more compliant behaviour from the actors involved.[40] This rests upon the assumption that 'word and deed can only diverge so much before countervailing pressures arise: while word can shift to match deed, if legal proceedings constrain the kinds of arguments that can validly be made, deed may shift as well'.[41]

The second element is concerned with the monitoring of compliance, which is considered to offer a strong structure if it is upheld by judicial courts, while it is considered to be weak when it involves methods like implementation reports, the dissemination of information and fostering learning.[42] The third element of structure is that of the delegation of further rule-making. This element is useful for the assessment of the legal nature of an instrument, since it is presumed that only a legally binding instrument can delegate the competence to further adopt legally binding instruments. Furthermore, it is a useful indicator for the normative effect an instrument may generate, since the adoption of further rules, either through the case law of a court or by the adoption of an instrument, clarify the expected behaviour.[43]

It is only in combination that these three features can give an acceptable indication of the legal nature of the instrument.

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[37] Abbott et al, *supra* n. 19, at 409–410.
[38] Aust, *supra* n. 18, at 800; Gamble, *supra* n. 21, at 39–40.
[39] Abbott et al, *supra* n. 19, at 415; Raustiala, *supra* n. 23.
[40] Raustiala, *supra* n. 23, at 606.
[41] *Ibid*.
[42] *Ibid*., 607.
[43] Abbott et al., *supra* n. 19, at 416–418.

2.4. Analytical framework

Based on the foregoing, the analytical framework shown in Table 1 can be outlined. The model can be used to assess the legal nature of legally binding instruments that are softened either because of the quality of their substance and/or their structure to ensure compliance, as well as that of legally non-binding instruments that are included in the legal ambit because they are presumed to generate normative effect.

Table 1 Framework to Analyse the Legal Nature of International Instruments

Feature	**Elements**
Legality	Form/instrumentum (treaty, single act, other forms or instruments) Adopting procedure (national ratification procedure; institutional law-making procedure; other procedures; no procedures) Competence (of the actor, in particular within the context of an international organization) Surrounding circumstances (complexities; politics; confidentiality)
Substance/ negotium	Sort of obligation (unconditional, hortatory, political) Precision (margin of appreciation; internal coherency)Language used (signal words; legal or non-legal rhetoric)
Structure	Dispute settlement (court, arbitration, or negotiation) Monitoring compliance (judicial review or implementation report) Further rule making (legally binding implementation rules; jurisprudence; legally non-binding interpretation rules)

3. Assessment of the Legal Nature of Codes of Conduct

The assessment of the legal nature of codes of conduct in general is a difficult task because there is a lack of uniformity and they are not static texts, since they are revised and adapted quite frequently. Furthermore, there are significant differences among codes of firms headquartered in different countries and among codes of firms operating in different sectors. In short, codes are widely divergent and in flux.[44]

[44] ILO (1998 Survey of approximately 258 codes of conduct and twelve social labelling programs) and OECD (2001 Study of 246 voluntary codes of conduct) studies also confirm the dramatic diversity of codes of conduct and the lack of consistency in treatment of issues in codes. For details, see also Urminsky, *supra* n. 8.

Nonetheless, on the most general level, some common features can be found. At a regulatory level, it is generally accepted that codes of conduct are used to fill the governance gap.[45] At a descriptive level, it is argued that:

> a code of conduct is a name given to a set of principles and rules that govern the way social institutions should behave toward their stakeholders and the way stakeholders (especially employees) should conduct themselves toward the institution and each other.[46]

A generally accepted definition is that of Servais, who defines a code as 'a set of rules, precepts or instructions that may or may not be obligatory under the law'; a definition that also holds true for codes of conduct.[47] Furthermore, he observes that the term is 'now customarily used to refer to the written document by which a company pledges to follow a certain policy or certain principles'.[48] These codes often place emphasis on the social responsibility of multinational companies and they are widely interpreted as a central aspect and tool of the CSR agenda. For example, the report of the European Foundation for the Improvement of Living and Working Conditions notes that 'the main objective of corporate codes is to define, monitor and enforce internal rules of behaviour in order to improve corporate homogeneity and adherence to legal obligations or specific company values, and thereby to reduce risks that might occur from a violation of national laws'.[49] From a labour law perspective, codes are private, market-based devices, promoting labour rights.

The analysis of the legal nature of codes of conduct will be based on these common features and general understandings.

3.1. Lawfulness of codes of conduct

With respect to the first element of lawfulness, the instrumentum, in theory, the following forms are identified for the adoption of codes of conducts: collective agreements signed with trade unions, unilateral acts, public declarations, additions to the company work rules, and agreements signed with non-governmental organizations (NGOs).[50] In practice, however, most codes are adopted in the form of unilateral, self-regulatory instruments through which the main decision-making bodies of companies set up rules of behaviour for managers and employees (sometimes also for suppliers and subcontractors) that reflect the principles and values of CSR.[51]

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[45] Macklem & Trebilcock, *supra* n. 3, at 5 and 14; Stevis, *supra* n. 4, at 2; Gallin, *supra* n. 4; O'Rourke, *supra* n. 4, at 2; and Schömann et al., *supra* n. 5.

[46] Carson et al., *supra* n. 9, at 2.

[47] Servais, *supra* n. 9, at 99.

[48] *Ibid*.

[49] Schömann et al., *supra* n. 5, at 85.

[50] Servais, *supra* n. 9, at 102–103; Urminsky, *supra* n. 8, at 17–20; R. Jenkins, R. Pearson & G. Seyfang (eds), *Corporate Responsibility and Labour Rights: Codes of Conduct in the Global Economy* (London: Earthscan Publications, 2002), 28.

[51] Schömann et al., *supra* n. 5.

There is no uniform and crystallized institutional procedure for the adoption of a code of conduct (second element of lawfulness). Moreover, they vary significantly from one company to another. As self-regulatory arrangements, they are typically passed unilaterally by corporations or, as Wedderburn argues, in this respect, 'social dialogue becomes a monologue'.[52]

Even when a code of conduct is developed in cooperation with NGOs and/or trade unions or when it is the outcome of some kind of stakeholder dialogue,[53] there is no formal adoption procedure that needs to be followed. This follows from the fact that firms in general have no legal obligation to negotiate with employees or their representatives before adopting a code of conduct. It must be underlined however that in some countries, national labour law requires employee representatives to be informed and consulted if the management decides to implement a code of conduct.[54] Although in theory this practice is advocated,[55] in particular to enhance the legitimacy of the codes,[56] it is rather exceptional and its impact is marginal. Moreover, it is argued that 'employee representatives and trade unions play virtually no active role in the process of initiating, elaborating and signing a code of conduct, thereby confirming the management-driven nature of these texts'.[57]

In respect of the third element of lawfulness, the competence of multinationals to adopt legally binding codes, two things are clear: first, they are not public actors; and second, there is no legal framework created by public actors that delegates them the necessary competence to adopt legally binding rules. However, as argued by several authors:[58] 'Regulation operates not only through the sovereign power of nation states but also through dispersed entities such as supranational bodies, TNCs and NGOs. Above all, regulation now relies for its effectiveness heavily on market mechanisms'. Furthermore, Hepple argues 'that private forms of social control are often far more important in changing behaviour than state law enforcement'.[59] It has also long been held by some that 'no

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[52] Murray, *supra* n. 4.

[53] Negotiations often produce enterprise association codes, multi-stakeholder codes and framework agreements. See Urminsky, *supra* n. 8, at 17–20. When codes are the result of negotiations involving a number of different stakeholders, they are likely to be more comprehensive and to have stricter monitoring than those which are unilaterally adopted by companies. See also Jenkins et al., *supra* n. 50, at 28.

[54] For example, in 2000, the French labour courts decided that a company's work council has to be informed and consulted by the management if the latter decides to implement a code of conduct. See Schömann et al., *supra* n. 5, at 54.

[55] For example, Schwartz, as cited by Carson et al., *supra* n. 9.

[56] There are some alternative views about the notion of 'legitimacy', which might also support the legitimacy of codes of conduct: 'While we accept that "governance without government" poses challenges for traditional notions of political legitimacy, one might also accept a very broad concept of legitimacy, rooted in the organizational sociological literature, which views a rule or institution as legitimate if relevant audiences accept it as legitimate.' Macklem & Trebilcock, *supra* n. 3, at 25.

[57] Schömann et al., *supra* n. 5, at 3.

[58] B. Hepple, 'Does Law Matter? The Future of Binding Norms', in *Protecting Labour Rights as Human Rights: Present and Future of International Supervision*, ed. George P. Politakis, Proceedings of the International Colloquium on the 80th Anniversary of the ILO Committee of Experts on the Application of Conventions and Recommendations (Geneva, 24–25 Nov. 2006) (ILO 2007); O. Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, University of San Diego, School of Law, Legal Studies Research Paper Series, Research Paper No. 07-27 (2005); B. Langille, 'The ILO Is Not a State, Its Members Are Not Firms', in *Protecting Labour Rights as Human Rights: Present and Future of International Supervision*, ed. George P. Politakis, Proceedings of the International Colloquium on the 80th Anniversary of the ILO Committee of Experts on the Application of Conventions and Recommendations (Geneva, 24–25 Nov. 2006) (ILO 2007).

[59] Hepple, *supra* n. 57, at 222–224.

regulation is possible without self-regulation',[60] and as such, corporate codes of conduct can serve as part of the legitimate implementation machinery to bolster the 'rule of law'.[61] On the other hand, it is without doubt that the establishment of private norms raises many concerns in legal scholarship and the highly ambiguous relationship between private norms and legislation is often underlined.[62]

From a more pragmatic point of view, the adoption of a code of conduct is not a matter of competence, rather it is a matter of 'capacity': it is about power, influence, visibility, and vulnerability. This is recognized in the report of the European Foundation for the Improvement of Living and Working Conditions, in which it is observed that the likelihood of having a code of conduct dealing with labour standards or industrial relations seems to be higher for companies with strong brands, in particular those in the sectors of consumer products and textiles.[63] Furthermore, the report affirms that the potential impact on the company's corporate image of a violation of fundamental social rights by the company's subsidiaries or even by its suppliers may indeed encourage a proactive CSR strategy and thus the adoption of a code of conduct.[64]

In respect of the fourth element, surrounding circumstances, we observe the following. The adoption of a code of conduct is formally voluntary, but in reality, there are many complex factors by which a company might be motivated (or even pressed) to formulate a code. In other words, codes are not just about the private self-regulation of multinationals, rather they are about private control of multinationals by market and social forces.[65] Multinationals adopt codes of conduct for various reasons:

- to respond to the increasing pressure from NGOs, trade unions and consumer groups;
- to formalize their CSR policy and integrate CSR into the corporate culture;
- to reinforce and improve their brand image, reputation and corporate culture and to reduce the risk of negative consumer reaction by increasing their legitimacy;
- to communicate principles and commitments to stakeholders;
- to guide employee behaviour;
- to enhance corporate self-defence[66] and to shield against political pressures;
- to respond to the growing 'enforcement crisis' in labour law;[67]

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[60] J. Murray, 'Corporate Social Responsibility Discussion Paper', *Global Social Policy* 4, no. 2.
[61] *Ibid.,* 7.
[62] Schömann et al., *supra* n. 5, at 7.
[63] Schömann et al., *supra* n. 5, at 35–36. See also Macklem & Trebilcock, *supra* n. 3, at 26.
[64] Schömann et al., *supra* n. 5, at 35–36.
[65] D. McBarnet & M. Kurkchiyanm, 'Corporate Social Responsibility through Contractual Control? Global Supply Chains and "Other-Regulation"', in *The New Corporate Accountability – CSR and the Law*, eds D. McBarnet, A. Voiculescu & T. Cambell (Cambridge: Cambridge University Press, 2007), 91.
[66] As Carson and McGill (*supra* n. 9, at 16) point out, several studies identify legal protection as one of the primary purposes of a code of conduct and researchers identify the existence of regulations and the potential for liability as factors in the decision to address specific conduct in a code.
[67] Davidov, *supra* n. 2.

- to address the shortcomings of social regulations at international level and the under-regulation of multinational corporations' global activities;
- to respond to concerns over global outsourcing and restructuring and to the growing need for more effective social regulation of global supply chains.

Since globalization is blurring the respective roles of the states and large corporations, corporations are trying to take the lead by way of self-regulation. Sometimes they are also trying to avoid government regulation. On the other hand, this pre-emptive function ('privatization of law') of codes may also tend to undermine public accountability in general.[68] In practice, motivations may vary from case to case and over time.

3.2. Substance/negotium of codes of conduct

As types of codes of conduct vary widely, the normative quality of the content of codes varies just as much.[69] In general, we can say that codes of conduct are not obligatory per se; however, diverse legal mechanisms can be attached to them. It is often emphasized that voluntary codes are in fact increasingly encroached on by law.[70] McBarnet, for instance, observes that 'companies routinely make commitments in their codes of conduct to comply with the law, though that is obviously a legal obligation'.[71] In this way, companies try to limit the risks of being sanctioned. In particular, large companies often use self-regulated codes of conduct to impose their own CSR policies on other businesses, such as their suppliers and subcontractors. This is carried out by the use of contractual control (via the incorporation of the codes in private contracts).[72] The result is that there exists not only a wide range of regulatory reasons but also of opportunities to shape the nature and scope of social matters in codes of conduct.

The wide array of obligations in codes of conduct can be illustrated by the way codes are applied (or not) to suppliers:[73]

- In some codes of conduct, the company only makes a vague commitment to inform or encourage the suppliers and subcontractors to respect the text or parts of it (without indicating the consequences of not adhering to these principles).
- Some codes of conduct are stricter since they stress that adherence to the code is an important factor for being chosen or maintained as a supplier or subcontractor.

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[68] B.W. Burkett, J.D.R. Craig & M. Link, *Corporate Social Responsibility and Codes of Conduct: The Privatization of International Labour Law*, Canadian Council on International Law Conference (15 Oct. 2004).

[69] Schwartz, as cited by Carson et al., *supra* n. 9, at 10.

[70] D. McBarnet, 'Corporate Social Responsibility Beyond Law, through Law, for Law: The New Corporate Accountability', in *The New Corporate Accountability – CSR and the Law*, eds D. McBarnet, A. Voiculescu & T. Cambell (Cambridge: Cambridge University Press, 2007), 31.

[71] *Ibid*.

[72] *Ibid*., 42.

[73] For more examples, see Schömann et al., *supra* n. 5, at 28.

– A rather limited number of codes of conduct, particularly in the textiles sector,[74] mention precise details of sanctions (including the termination of the contract) for those suppliers and subcontractors who do not respect the principles (or some particularly important, indicated principles) of the agreement.

The content of codes of conduct is specific in the sense that they are somewhat biased and partial when it comes to the characterization of rights: they tend to focus on rights that correspond to 'win-win' situations for management and employees.[75] Clearly, however, the codes are formulated by business people, not public law makers. From an objective point of view, this casts doubts on the conceptual and ethical coherence of codes of conduct. Furthermore, the content of codes is far from uniform because they not only deal with labour-related issues but also often address other topics of CSR and business ethics.[76]

A closer look at the sort of rights laid down for the employees shows that codes of conduct refer to ILO norms, though they do this quite unsystematically. This is particularly the case with the recognition of freedom of association and collective bargaining. According to some research, there seems to be a clear trend towards a stricter reference to core labour standards in corporate codes of conduct.[77] Furthermore, codes often 'redefine' human rights, labour standards and legal definitions by way of 'self-definitions'.[78]

Although codes vary widely in many different ways in terms of their content, in general they are normative in the sense that 'they give direction on how we ought to act'.[79] In terms of obligations, 'how we ought to act' is generally expressed by the use of guidelines, goals and objectives. Consequently, their normative quality is indicated as typically 'soft'.

When focusing on the second element of the negotium, precision, some authors point out that:

> by locating the source of regulation in the transnational corporation itself, a corporate code of conduct also can identify with much more precision how general standards are to govern specific workplaces. As a result, codes can be tailored to account for the complexity and fluidity of flexible forms of transnational production that domestic or international standards, by their very generality, are ill-suited to regulate. They can also adapt relatively quickly to structural changes in a firm, sector or economy whereas domestic laws are more susceptible to becoming divorced from underlying structural conditions.[80]

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[74] For the examples of the H&M Code, Gap Code and Levi Strauss & Co. Code, see Schömann et al., *supra* n. 5, at 69.

[75] Schömann et al., *supra* n. 5, at 23.

[76] The studies of the ILO (1998: Survey of approximately 258 codes of conduct and twelve social labelling programs) and the OECD (2001: Study of 246 voluntary codes of conduct). See also Urminsky, *supra* n. 8.

[77] Schömann et al., *supra* n. 5, at 73. See also O'Rourke, *supra* n. 4, at 7.

[78] For example, codes of multinationals deal with child labour in varying terms of specificity, compliance, minimum age, monitoring and sanctions. See A. Kolk & R. van Tulder, 'Child Labor and Multinational Conduct: A Comparison of International Business and Stakeholder Codes', *Journal of Business Ethics* 36 (2002): 291–301. See also Macklem & Trebilcock, *supra* n. 3, at 29–36.

[79] Carson et al., *supra* n. 9, at 16.

[80] Macklem & Trebilcock, *supra* n. 3, at 21.

However, in our opinion, these concerns are valid only at a theoretical level. Since there are no existing universal, clear and precise social performance indicators, reporting on the implementation and performance of codes is rather hazy, where it exists.[81]

Some researchers suggest that the difference between the spirit of the law (ethics) and letter of the law (legality) should be considered when developing codes. Useful codes should be clear, comprehensive and enforceable.[82] In contrast, as practice shows, most codes are drafted in rather abstract terms without providing meaningful detail on how corporations are to respect them.

On the basis of the tone or language used (third element of the feature negotium) of the code, it is possible to differentiate between inspirational/aspirational/educational value statements versus legal/regulatory prescriptive compliance codes.[83] Clearly, as codes are voluntary, corporations draw up the type of code they prefer. However, it is still contested which type is the most effective to influence behaviour. Some researchers suggest that prescriptive codes that designate particular conduct as unacceptable are most compatible with a disciplinary function but require precise definitions. Other researchers argue that the 'educational and cultural change' functions of codes are not well served by the legalistic disciplinary model. Sometimes legislation is more useful, while other times a value-based approach is more suitable. Some scholars argue that legal liability and regulatory requirements influence the existence and format of codes addressing specific conduct.[84]

More generally, on a reflective level we find the following about the content of codes of conduct: vague language, self-serving for industry, often used as a PR gimmick, only rhetorical solutions instead of substantive ones. Some scholars, such as Sabel, argue that there is some evidence of a 'race to the top' in competition among corporate codes of conduct, especially in the garment and footwear industries. He further argues that this tendency seems to be rhetorical rather than substantive, that is, it is enshrined in the codes more than in the actual behaviour of the firms. On the other hand, Sabel acknowledges that: 'corporations would have to be extremely cynical or short-sighted – or both – to impose higher and higher standards of conduct on themselves in global settings while pressing for more and more abusive conditions in host countries'.[85]

3.3. Structure to ensure compliance with codes of conduct

The main paradox of corporate self-regulation is that 'the extent to which firms can be held accountable depends directly on the extent to which they seek to bind

[81] See about this in greater depth para. 4.3.
[82] Raiborn & Payne as cited by Carson et al., *supra* n. 9, at 25.
[83] Carson et al., *supra* n. 9, at 10 and 15.
[84] For the review of the relevant literature, see Carson et al., *supra* n. 9, at 15–16.
[85] Ch. Sabel, 'Rolling Rule Labor Standards: Why Their Time Has Come, and Why We Should Be Glad of It', in *Protecting Labour Rights as Human Rights: Present and Future of International Supervision*, ed. G.P. Politakis, Proceedings of the International Colloquium on the 80th Anniversary of the ILO Committee of Experts on the Application of Conventions and Recommendations (Geneva, 24–25 Nov. 2006) (ILO 2007), 268. About 'race to the bottom', see also Ch. Sabel, D. O'Rourke & A. Fung, *Ratcheting Labor Standards: Regulating for Continuous Improvement in the Global Workplace*, Version 2.1, available at <http://nature.berkeley.edu/orourke/PDF/RLS21.pdf>.

themselves'.[86] Nonetheless, as Macklem and Trebilcock point out, 'diverse forms of worker protection are not something new to labour law'. The problem with codes of conduct is that the diversity in protection is 'grounded in corporate as opposed to democratic choice'.[87] Similar to the other two features, the capacity of corporations to implement codes of conduct differs to a great extent. Hence, the level of protection of workers by means of corporate codes of conduct depends on the relationship to a given corporation. As a result, codes may produce 'a balkanization of industrial relations according to their belonging to different multinationals'.[88]

When it comes to the structure to ensure the implementation and compliance with codes of conduct, we observe that they generally do not provide well-elaborated mechanisms or recognized bodies for dispute settlement (first element of structure to ensure compliance). However, many codes of conduct are backed up by disciplinary or even civil sanctions for employees who do not comply. Also many codes include a reporting procedure by which employees are required to report violations of the code, often by using anonymous hotlines.[89] Futhermore, with regard to dispute resolution, Bob Hepple suggests that the ILO should facilitate this by setting up independent mediation available to multinationals and unions to resolve their differences over the application of codes of conduct and agreements (among which possibly IFAs). He further suggests, more generally, that, in the longer term, an International Labour Tribunal set-up under the auspices of the ILO will be necessary to resolve transnational labour disputes.[90]

The implementation and monitoring of codes of conduct (second element of structure to ensure compliance) typically remains in the hands of management in the form of internal compliance mechanisms, which is often delegated to the human resource or CSR departments of corporations. External auditors, such as NGOs, professional auditing firms, industry associations and/or social partners are only occasionally involved. Verification and independent evaluation are sporadic. A fairly frequent monitoring technique is that of whistle blowing, based on which employees have the right and sometimes even the duty to report any observed violation of the code, for example, via internal channels and anonymous hotlines.[91]

From a public actor procedural perspective, the positive aspect is that 'labour standards compliance generated by codes of conduct produce efficiency gains for the state by freeing up scarce administrative resources otherwise committed to the enforcement of its formal legal requirements'.[92] However, the downside of such 'privatised' monitoring is the

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[86] Murray, *supra* n. 4, at 9.
[87] Macklem & Trebilcock, *supra* n. 3, at 27.
[88] Boyer as cited by Macklem & Trebilcock, *supra* n. 3, at 27.
[89] Schömann et al., *supra* n. 5, at 4.
[90] Hepple, *supra* n. 57, at 230–231.
[91] For further details on monitoring, see Schömann et al., *supra* n. 5, Ch. 5. See also D. O'Rourke, 'Monitoring the Monitors: A Critique of Corporate Third-Party Labour Monitoring', in *Corporate Responsibility and Labour Rights: Codes of Conduct in the Global Economy*, eds R. Jenkins, R. Pearson & G. Seyfang (London: Earthscan Publications, 2002).
[92] Macklem & Trebilcock, *supra* n. 3, at 21.

assumed lack of transparency, rigidity and credibility.[93] Research confirms this lack, as it shows that voluntary codes of conduct are consistently lax in monitoring and that they have a weak, spotty record of compliance and substantive outcomes.[94] In addition, codes of conduct rely on consumer choice (and market-based sanctions) as their ultimate mechanism of enforcement to a great extent.[95] To deal with some of these criticisms, many multinationals have adopted IFAs to improve the monitoring of pre-existing codes of conduct.[96]

Since codes of conduct are not legally binding, they cannot generate or delegate further formal law-making capacity (third element of structure to ensure compliance). Nonetheless, we do recognize some form of further law-making when CSR strategies, for example, the codes of conduct, inspire further self-regulation in the sense of rights and obligations of the code being percolated down the supply chain to suppliers, subcontractors licensees and so on. This self-regulation is not necessarily confined to the 'inspiration' of further self-regulation, yet it can also be done by contractual control within the supply chains. In other words, compliance with the code of conduct on the part of the hub company can be articulated as a contractual requirement or clause in contracts with subcontractors and suppliers. Unlike domestic labour laws, codes may widen the geographical scope beyond the national jurisdictional borders when applied to labour practices in production chains.[97] It is not only jurisdictional borders that might be spanned by codes. Similarly, the traditional formal separation between different legal entities can also be transcended by codes of conduct in supply chains. All in all, codes may broaden the circle of persons covered by labour norms.[98]

Furthermore, it seems that this idea of 'chain responsibility' goes beyond self-regulatory CSR strategies and is also entering the ambit of legal thinking and public policies. Examples of this kind are the proposals of the European Coalition for Corporate Justice for 'Enhancing Direct Liability of Parent Companies' and for 'Establishing a Parental Company Duty of Care'[99] and the resolution of the European Parliament on the social responsibility of subcontracting undertakings in production chains.[100] More generally, in the context of labour law, this essentially means that transnational corporations should assume responsibility for working conditions throughout their chains and that principal

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[93] For example, O'Rourke, *supra* n. 91; as Macklem & Trebilcock (*supra* n. 3, at 35) put it, 'the incentive on a firm to implement a code is far weaker than the incentive to promulgate one'. Furthermore, according to some estimations, 80% of codes are really statements about general business ethics, which have no implementation methods. The estimation of the International Organization of Employers is quoted by Jenkins et al., *supra* n. 50, at 21.

[94] T. Campbell, 'A Human Rights Approach to Developing Voluntary Codes of Conduct for Multinational Corporations', *Business Ethics Quarterly* 16 (2006): 225–269.

[95] Macklem & Trebilcock, *supra* n. 3, at 22 and 42.

[96] Schömann et al., *supra* n. 5, at 3. See about compliance structures for IFAs also para. 5.3.

[97] Macklem & Trebilcock, *supra* n. 3, at 21 and 26.

[98] A. Sobczak, 'Are Codes of Conduct in Global Supply Chains Really Voluntary? from Soft Law Regulation of Labour Relations to Consumer Law', *Business Ethics Quarterly* 16 (2006): 167–184.

[99] European Coalition for Corporate Justice, *Legal Proposals to Improve Corporate Accountability for Environmental and Human Rights Abuses* (2008), available at <www.corporatejustice.org/IMG/pdf/ECCJ_FairLaw.pdf>.

[100] European Parliament Resolution of 26 Mar. 2009 (2008/2249(INI)).

contractors (or hub companies) should be responsible for the labour law obligations of their subcontractors.[101]

In the spirit of further rule making, we also note that CSR strategies, including codes of conduct, can have several 'spillover' effects that can actually generate indirect legal effects. The first possible 'spillover' effect we notice in this respect occurs in legal practice. As public statements, codes of conduct do not only influence public opinion but also open up the corporation to criticism from civil society and the imposition of higher ethical standards. Moreover, as public statements, they may require judicial practictioners, such as judges, to take these self-imposed standards into account when resolving a dispute that concerns issues that are part of such a code.

Second, the growing number of corporate codes of conduct leads Bob Hepple to put forward the proposal that international labour law somehow should deal with this phenomenon. Such regulation should not only be limited to the afore-mentioned suggestion of systematic facilitation of dispute resolution but also include the integration of ILO standards into these codes. One way the ILO could encourage this would be through a framework convention. If this suggestion is put into practice, this could be seen as a 'spillover' effect in terms of an indirect effect on international labour law.

We notice a third possible 'spillover' effect within the realm of national law making. In this context, we discern at least two new legal developments. First, legal initiatives are emerging that either directly or indirectly foster voluntary arrangements and self-regulation. This is the case with so-called 'light touch', supplementary regulatory approaches that advocate self-regulation in the sense that they leave some leeway for industry to develop their own regulatory regimes, such as codes of conduct, as long as certain legally defined conditions and guidelines are met.[102] Another example in this respect would be the regulatory mechanisms by which the adoption of a code of conduct can be the basis for selective, gradual sanctioning[103] and can serve as a tool for limiting certain legal risks, for instance, by exempting employers from certain requirements. An example of such a regulatory regime would be the Sentencing Guidelines in the United States, providing lower sanctions for companies that have adopted and implemented codes of conduct.[104] In this context, Davidov mentions that employment laws can be amended to exempt from

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[101] It is clear that, before the codes of conduct movement, MNCs systematically argued that overseas suppliers were simply independent contractors and that the hub companies had no responsibility at all for wrongdoings of these suppliers. To some extent, the codes of conduct movement have seemingly changed this unjustifiable and unethical conviction. Nowadays, there are even legal proposal for some kind of global 'duty of care'. Cf. I.M. Young, 'Responsibility and Global Labour Justice', *The Journal of Political Philosophy* 12, no. 4 (2004): 365–388.

[102] In this context, see also Macklem & Trebilcock, *supra* n. 3, at 45, where they argue that 'The state could choose to leave some elements of norm production in private hands and establish a strong monitoring scheme. Or it could leave monitoring to non-state actors and create incentives for corporations to maximize compliance. Or it could prescribe forms of stakeholder involvement in norm production, monitoring and enforcement to enhance the legitimacy of voluntary measures.' An example of such regulation can be found in Hungary, in the Labour Code (Act 22 of 1992), Art. 70/A, which deals with 'equal opportunity plans'.

[103] The concept of 'responsive regulation'. See also Hepple, *supra* n. 57, at 223–224.

[104] Schömann et al., *supra* n. 5, at 23. For another example given in this report (35), see the Sarbanes-Oxley Act in the United States, adopted after the Enron scandal, imposes the adoption of codes of conduct and procedures that make it possible for employees to disclose code violations on the part of companies listed on the US stock market.

the requirements of such laws (under certain conditions) an employer who adopts a 'code of conduct'.[105] Both kinds of regulatory initiative provide incentives for employers to develop internal schemes, including codes, in order to ensure compliance with the law. States can strengthen such incentives by means of various mechanisms, which in the end bolster the regulatory potential of the codes of conduct.[106]

Second, we notice that legal initiatives are emerging to make legally enforceable what business perceived as voluntary (or beyond the law). In this context, some kind of legal accountability is attached to voluntary, self-regulatory commitments, for instance, under consumer protection laws. If a company is using its code of conduct as a PR instrument but in fact fails to comply with it, this can be considered to be 'misleading advertising'.[107]

Although we do not intend to imply that these new legal developments are a direct consequence of the codes of conduct movement in general, we notice a development that is clearly indicating that convergence between regulatory and self-regulatory approaches of governance is on the agenda now more than ever. CSR codes of conduct have an indirect, inspirational effect on national law-making, with the result that the CSR codes of conduct themselves be increasingly encroached on by national legislation.[108]

A fourth 'spillover' effect we discern is in the context of duties of employees. Codes of conduct usually provide a guide for employee behaviour and often create new duties for employees, and breaches of the code may have consequences in terms of the employment contract. Many codes of conduct explicitly provide for disciplinary or even civil sanctions for employees whose behaviour does not conform to the principles laid down. In many cases, employees are also required to report violations of the code that they may observe using anonymous hotlines.[109]

In addition to the several 'spillover' effects we distinguish in the legal realm, we also recognize that the obvious limitations[110] of purely unilateral codes of conduct has recently led to the intensification and diversification of civil society initiatives, sometimes referred to as 'civil regulation'. As civil regulation has risen in prominence, corporate responses have moved from unilateral codes of conduct towards increasingly more complex and ambitious multi-stakeholder approaches to CSR.[111]

4. Analysis of the Legal Nature of IFAs

Like codes of conduct, IFAs come in different forms and vary considerably. However, there are some general characteristics based on which we are able to outline a general idea

[105] Davidov, *supra* n. 2.
[106] For example, by socially responsible public procurement laws; disclosure laws; laws which requiring home corporations doing business abroad to adhere to specific codes of conduct. See also Murray, *supra* n. 4, on attempts in Australia and the United States to devise 'corporate code of conduct' legislation.
[107] Cf. Art. 6(2)(b) of Directive 2005/29/EC on Unfair Commercial Practices.
[108] McBarnet, *supra* n. 69, at 31.
[109] Schömann et al., *supra* n. 5, at 4.
[110] As indicated in the parts about ensuring compliance.
[111] Stevis, *supra* n. 4, at 2.

of the legal nature of IFAs. First, the purpose and main function of IFAs in general is to stimulate global social dialogue between the multinationals and the representatives of workers and the promotion of the ILO core labour standards.[112] As such, IFAs formalize 'ongoing relationships between the multinational enterprise and the global union federation which can solve problems and work in the interests of both parties'.[113] Second, like codes of conduct, IFAs fill a governance gap in regulating labour matters in transnational companies. Another similarity is the absence of public actors: IFAs are bi- or multilateral agreements between multinationals on the one hand and Global Union Federations (GUFs) on the other, often accompanied by European works councils.[114] Third, the scope of IFAs is not necessarily limited to the actors involved in the adoption of the agreement but can also involve the subcontractors and suppliers of the multinationals.[115]

Since IFAs are diverse, we need to make some general remarks in this respect as well. There are three main approaches:

- IFAs as the latest development of CSR strategy tools towards more complex multi-stakeholders approaches;[116]
- IFAs as a public policy response to the heightened awareness within international organizations about the externalities of economic activities of multinationals;[117]
- IFAs as the outcome of a broader construction of transnational industrial relations in which there is a governance gap.[118]

Our analysis focuses on the last approach to IFAs, including instruments that are used to regulate transnational industrial relations.

4.1. Lawfulness of IFAs

The choice of instrumentum (first element of lawfulness) in the adoption of IFAs is as simple as the name: they are bi- or multilateral agreements. Despite this apparently simple distinction, there is an ongoing discussion as to whether the agreements are a form of private contract between the parties or whether they are collective agreements as we know

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[112] Schömann et al., *supra* n. 5, at 21–22.

[113] According to the ICFTU, available at <www.icftu.org/displaydocument.asp?Index=991216332&Language=EN> (last visited on 25 May 2010).

[114] Papadakis et al., *supra* n. 6, at 2.

[115] Papadakis et al., *supra* n. 6, at 68.

[116] Stevis, *supra* n. 4, at 2.

[117] I. Da Costa & U. Rehfeldt, 'Transnational Collective Bargaining at Company Level: Historical Developments', in *Cross-Border Social Dialogue and Agreements: An Emerging Global Industrial Relations Framework?*, ed. Papadakis (Geneva: International Labour Office, 2008), 43–64. In this respect, the authors remark that 'In the 1970s, there was widespread public concern about MNEs becoming too powerful and out of the control of nation states. (. . .) MNEs faced restrictive actions on the part of different national governments and international regulatory moves. The OECD worked on the Guidelines for Multinationals Enterprises, which 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'.

[118] Gallin, *supra* n. 4, at 39.

them at national level. In this respect, Sobzack notes that these agreements actually should not be compared with national collective agreements as they are a specific form of legal instrument, rather they should be conceived in their own specific terms at an international level.[119]

There is no formal procedure by which IFAs should be adopted (second element of lawfulness). However, they are always co-signed by the representatives of the management of a multinational and a worker's organization.[120] Despite the absence of formal procedures, scholars have defined some informal rules of adoption, drawing a distinction between rules concerned with the preparatory phase, and those concerned with the negotiation phase and the elaboration of the text.[121] Preparatory rules define the settings in which the whole process of negotiating and agreeing IFAs takes place, for example, the possibility of joint meetings, while the rules that are concerned with the negotiation phase tend to lay down the parameters within which the negotiations take place, for instance, the possibility of meeting separately or consulting researchers.[122] Both kinds of informal procedural rules can be found in internal guidelines or recommendations agreed upon by the parties.[123]

Due to the lack of a legal framework in the field of transnational collective bargaining, no power is explicitly conferred by labour law on any actor.[124] Nonetheless, the issue of competence is a delicate one since the normative effect of the IFA depends on the representativeness of the parties involved with the negotiations.[125] This is in particular the case when the scope of the IFA includes subcontractors and suppliers of the multinational. On the employer side, problems about representation arise when the employer representative is not given a mandate to negotiate for subcontractors and suppliers. In this case, the IFA will not be legally binding upon them.[126]

On the workers' side, a problem arises when the employees of subsidiaries and subcontractors are not represented by their own representatives.[127] To overcome this lack of representation, other workers' organizations are asked to co-sign the IFA, including national trade unions and European works councils. However, this solution is not conclusive, as it gives rise to other limitations.[128]

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[119] A. Sobczak, 'Legal Dimensions of International Frameworks Agreements in the Field of Corporate Social Responsibility', in *Cross-Border Social Dialogue and Agreements: An Emerging Global Industrial Relations Framework?*, ed. Papadakis (Geneva: International Labour Office, 2008), 116–121.

[120] Papadakis et al., *supra* n. 6, at 69.

[121] See Schömann et al., *supra* n. 5, at 49–57.

[122] This is the case of the 'Joint learning process between managers and employee representatives at EDF group', where 'the first step was a three-day forum co-organized by the management and the EWC in April 2003 at which the future signatory parties had the opportunity to discuss the issues with representatives of NGOs, international trade unions and researches'. See Schömann et al., *supra* n. 5, at 53.

[123] See 'IFA Recommendations adopted by the Executive Committee Sevilla, Spain, May 2007'. Available in PDF format in eight languages at <www.imfmetal.org/index.cfm?c=14863>.

[124] Sobczak, 2008, *supra* n. 119, at 117.

[125] E. Ales et al., 'Transnational Collective Bargaining: Past, Present and Future' Final Report, European Commission, Directorate General Employment, Social Affairs and Equal Opportunities, February 2006, at 21 (available at <http://ec.europa.eu/social/main.jsp?catId=707&langId=en&intPageId=214>).

[126] Sobczak, 2008, *supra* n. 119, at 117.

[127] *Ibid.*, 118.

[128] *Ibid.*, 119 and Ales et al., *supra* n. 125, at 21–27, respectively.

The resort to IFAs is driven by several factors. One factor is the governance gap or lack of public regulations. Another driving factor is the mismatch between the global performance of multinationals and the national regulation and collective bargaining of labour matters and the need to regulate and bargain about these issues at transnational level.[129] Besides these legal factors, there are also 'objective' factors that stimulate the adoption of IFAs, including the degree of transnationalization of the company, the sector in which the company is active and the corporate culture and quality of social dialogue within the company.[130] Other driving factors for the adoption of IFAs are identified by an analysis of the preambles of forty-seven IFAs assigned by the European Foundation for the Improvement of Living and Working Conditions.[131] Three of the main factors identified in this analysis are the contribution to the performance of the company and the satisfaction of stakeholders; the emergence of international social dialogue contributing to the development and implementation of fundamental social rights, in particular those defined by the ILO; and the definition or recall of legally binding standards and the development of procedures for guaranteeing their implementation throughout the company.

4.2. Substance, negotium, of IFAs

IFAs vary greatly with regard to the sort of obligations they impose and the language they use. This is the case within agreements as they deal with different matters that require different approaches. Nonetheless, in general, we observe that the obligations are largely unconditional when they deal with fundamental social rights and working and employment conditions, while they become much vaguer when they deal with CSR issues or business ethics.[132]

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[129] See Gallin, *supra* n. 4; Da Costa & Rehfeldt, *supra* n. 117; and Schömann et al., *supra* n. 5.

[130] Stevis, *supra* n. 4, at 11, who argues that '[t]he origins of the IFAs suggest that corporations from countries characterized by some form of coordinated capitalism are more likely to consider an IFA than corporations from countries with more liberal and thus conflictual traditions. The fact that 57 of the 70 IFAs are from continental Europe offers support for this hypothesis'.

[131] Schömann et al., *supra* n. 5, at 39.

[132] See, e.g., in *Ford of Europe agreement upon social rights and social responsibility principles* of 4 Dec. 2003, where we can find differences in language used when dealing with employee representation: 'Ford of Europe recognises and respects its employees' right to associate freely and bargain collectively. The Company will work constructively with the FEWC to promote the interests of our employees and thereby supports European regional cooperation of employee representatives. In locations where employees are not represented by a body of employee representation/unions, the Company will provide opportunities for employee concerns to be heard. Timely information and consultation is a prerequisite for successful communication between management and employee representatives. Information will be provided in good time to enable representatives to appropriately prepare for consultation. Collective bargaining on conditions of work is the expression in practice of freedom of association within the workplace, a responsibility to bargain in good faith in order to build trust and productive workplace relations. Even when disagreement occurs, all parties will be bound by group collective and legislative requirements and the aim will be to reach adequate solutions. And when dealing with environmental protection: Ford of Europe will respect the natural environment and help preserve it for future generations by working to provide effective and practicable environmental solutions and avoiding waste. The Company will work to continuously reduce the environmental impacts of our business in line with our commitment to contribute to sustainable development. The Company will measure, understand and responsibly manage its resource use, especially the use of materials of concern, and the use of non-renewable resources. Ford of Europe seeks to ensure coherence between social, economic and environmental objectives'. Ford of Europe and the Ford European Works Council Agreed upon Social Rights and Social Responsibility Principles. Available from the ETUI-REHS EWC database <www.ewcdb.eu/show_company.php?grpco_ID=275> (visited on 9 Mar. 2011).

When it comes to the precision with which the obligations in IFAs are defined, we find very precisely defined provisions as well as others that are rather vague. An example of a precisely defined provision is the definition of 'group' in the PSA Peugeot Citroën IFA:

> This Global Framework Agreement applies directly to the entire consolidated automobile division, research and development, manufacturing, sales and support services, and to the finance, transport and logistic divisions for current and future subsidiaries, over which the corporation has a dominant influence, either through majority ownership or, when ownership is limited to 50%, through the corporation's responsibility for managing social issues in the subsidiary concerned.

An example of a vaguely defined provision is the one about the revision of the Nampak IFA:

> In order to achieve the objectives and undertakings given in this document, Nampak and UNI will engage in an ongoing dialogue and will meet regularly, for purposes of sharing relevant information about Nampak's business and its strategies.

We also observe great differences in the language used within different agreements and in different parts. However, in general, an argument can be made that compared to other instruments used to govern social matters on a transnational level, such as CSR codes of conduct, IFAs in general seem to have a stronger normative quality, because some of them include provisions that create unconditional obligations that are clearly formulated and use unmistakably legal rhetoric. More precisely, in IFAs many provisions can be found that use words, like 'shall', 'must', 'agree' and 'obligation', which echo legal rhetoric. At the same time, we also find terms like 'will', 'should' and 'provisions', echoing non-legal rhetoric, hence more the opposite: to avoid legal bindingness. In itself, this is not surprising, since the former kind of provisions are concerned with fundamental social rights and working and employment conditions, while the latter provisions deal with CSR issues or business ethics.

4.3. Structures to ensure compliance with IFAs

With respect to structures to ensure the implementation of and compliance with IFAs, we see that almost all IFAs include well-elaborated mechanisms and recognized bodies to settle disputes (the first element of structures to ensure compliance). Many IFAs provide for the establishment of committees comprised by representatives of management and workers in order to resolve disputes. To ensure regulatory monitoring in this sense, most IFAs require these committees to meet at least once or twice a year.[133] In addition to the possibility for employees to complain about the breach of their rights laid down in the agreement,[134] IFAs include incentives that stimulate employees to report violations of the IFA to their representatives at local, national and transnational level.[135] This can also be indicated with the term 'whistle blowing'.

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[133] Schömann et al., *supra* n. 5, at 68–69.
[134] Sobczak, 2008, *supra* n. 119, at 124.
[135] 'Usually IFAs encourage employees to contact their local management if they discover any breach of the text. They can, of course, rely on the support of the local employee representatives. If the problem cannot be solved at this

Even more than codes of conduct, IFAs provide elaborate monitoring mechanisms (the second element of the structure to ensure compliance). Unlike codes of conduct, these procedures are not based on external monitoring, like external audits; hence, they rely on negotiation and internal discussion within the framework of social dialogue.[136] As such, it is observed that almost all IFAs establish regular monitoring procedures, either by a special committee of the signatory parties, which can be the same as used for dispute settlement,[137] or by a European works council when it is involved with the respective IFA.[138] One specific feature of IFAs for monitoring compliance is that they advocate proactive strategies aimed at creating a managerial culture to respect and comply with the content of the IFA[139] and the dissemination of the IFA among the employees of the organization.[140]

A rather atypical feature for soft law in general is the fact that the majority of IFAs include provisions that foresee sanctions to promote compliance with the IFA by suppliers and subcontractors. A far reaching sanction is, for example, the termination of the contract between the multinational and the supplier or subcontractor.[141] As a result, IFAs go one step further than Codes of Conduct, since they not only regulate social issues but also enforce compliance with these issues throughout the global supply chain.

Another form of monitoring compliance characteristic of IFAs is the possibility to re-negotiate certain provisions.[142]

Although IFAs are generally conceived as legally non-binding, they do generate further rule-making (the third element of the structure of IFAs). That is to say that the 'big principles', such as the ILO labour standards specified in IFAs, are further developed in the bargaining processes at national or local levels.[143] In the same way, IFAs can be transposed into the national legal order, giving them the same legal status as national collective agreements when national unions (co-)sign the IFA.[144]

Like codes of conduct, it may be observed that IFAs generate several spillover effects that indirectly generate legal effects. A first spillover effect is that IFAs may have an impact on ILO labour standards, since they reaffirm and implement those rights and obligations.[145] Second, as pointed out by some scholars, IFAs can have an impact on industrial relations and social dialogue at national and local level.[146] Furthermore, IFAs can have all the same spillover effects as codes of conduct (see section 4.3). As a result, IFAs can influence

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level, the employee or the union can contact the national union, which will discuss the issue with the national headquarters of the company. If the problem can still not be solved at this level, the signatory parties of the IFAs will deal with the conflict'. Source: European Foundation for the Improvement of Living and Working Conditions, 'Codes of Conduct and International Framework Agreements: New Forms of Governance at Company Level', 2008, at 70.

[136] Schömann et al., *supra* n. 5, at 63.

[137] Sobczak, 2008, *supra* n. 119, at 125. Sometimes the monitoring is entrusted to a works council. See Schömann et al., *supra* n. 5, at 63.

[138] Schömann et al., *supra* n. 5, at 63.

[139] *Ibid.,* 70.

[140] Sobczak, 2008, *supra* n. 119, at 124.

[141] Schömann et al., *supra* n. 5, at 69.

[142] *Ibid.,* 63. See also the second example in s. 5.2.

[143] Sobczak, 2008, *supra* n. 119, at 121.

[144] *Ibid.*

[145] Schömann et al., *supra* n. 5, at 73.

[146] *Ibid.*, 77.

the corporate culture either by formally changing certain corporate cultural objectives and principles or by an affirming approach which seeks to enforce/reinforce existing practices.[147]

5. Conclusions

With the internationalization of companies, labour issues, such as working conditions, have moved beyond national boundaries and become subject to the transnational legal ambit. However, due to the failure of public actors to adopt legally binding rules to govern these transnational labour issues, private actors, especially multinational enterprises (MNEs) and GUFs, have stepped up and introduced new forms to regulate labour matters on the transnational level. Two of these forms, unilateral codes of conduct as part of CSR of MNEs, and IFAs concluded between one or more MNEs and GUFs, sometimes supported by European works councils, have been analysed in this paper. This analysis has focused on the legal structure in order to understand their legal strengths and weaknesses. In this analysis, we introduced a framework comprising the three features of law, further divided into several elements that represent a sliding scale of law varying from hard law to different forms of soft law and no law.

The analytical framework has two limitations. First, it is based on a 'traditional' conception of law, that is, law adopted by public actors, while we are dealing with self-regulation by non-governmental actors. To overcome this limitation, the analysis not only strictly interprets the elements of the framework but also includes a reflective approach to those elements. Another limitation of the analysis is the lack of empirical research that would be required for a more content-based analysis. In the analysis, we have either relied on the research findings of others, in particular regarding the analysis of codes of conduct, or made use of spot checks when nothing was available, which was mostly the case with the IFAs.

Regarding the three features of law (lawfulness, substance, and the structure to ensure compliance), we notice the following. From a narrow public law perspective, both instruments are adopted unlawfully, because only public actors are able to legitimately adopt rules that are legally binding upon third parties, which in the case of codes of conduct and IFAs are the employees, subcontractors and suppliers of the multinational. However, when a more reflective approach is taken, good arguments can be made that the actors involved have at least a material competence to adopt these instruments. First, there is a governance gap that needs to be filled. In the case of codes of conduct and IFAs, this gap is filled by the multinationals and GUFs. In terms of the principle of subsidiarity, multinationals and GUFs are the ones most closely related to transnational labour issues, and therefore, it could be argued that they are also competent to self-regulate these issues. Second, at national level, it is generally well accepted that both sides of industry conclude agreements on labour issues.

[147] *Ibid.*

They are also organized at some regional levels, within the European Union under the name of social dialogue and at international level within the ILO. When this principle is taken one step further, it is almost self-evident that both sides of industry meet at transnational level in order to conclude agreements that include labour issues. In respect of IFAs, we also observe that in particular GUFs try to enhance their competence by co-signing the IFAs negotiated by European work councils and national trade unions.

In respect of the normative quality of the substance or negotium of the instruments, we have to make a distinction between the two instruments. In general codes of conduct tend to include self-redefined labour standards that correspond to a 'win-win' situation for both management and employees. As a result, we do not find it surprising that these rights have only been laid down in guidelines, expressing how the company ought to act and not how it is required to act. Moreover, they are generally characterized by the use of vague language, self-serving for industry, and often used as a PR gimmick, mainly offering rhetorical solutions instead of substantive ones. Consequently, codes of conduct appear to be little more than window dressing, which in terms of our analysis softens their normative quality considerably. IFAs give a diffuse impression of their negotium, varying from vague recommendations and guidelines, avoiding legal rhetoric to precisely formulated unconditional rights and obligations but not shying away from legal rhetoric. The latter provisions are in particular used to formulate labour standards and working conditions. Our conclusion is therefore that the negotium of IFAs is substantially harder than that of codes of conduct.

Although the paradox of (corporate) self-regulation is that the actors involved can only be held accountable to the extent that they seek to bind themselves, the most interesting part of both instruments concerns the structures they have created to ensure compliance. The analysis show that both instruments set up some form of 'chain accountability', for instance, by using private contractual control, meaning that compliance with the code or the IFA of the principal or hub company can be articulated as a contractual requirement or clause in contracts with sub-contractors and suppliers. What the analysis also shows is that it is not uncommon for this form of control to be backed up by a (hard) sanction, like the termination of the contract between the multinational (or principal or hub company) and the subcontractor or supplier. This is remarkable because one of the main characteristics of soft law in general is that the enforcement of compliance is neither backed up by judicial review nor by sanctions. From a pragmatic point of view, the sanction of termination of the contract may in practice be an even stronger mechanism than judicial review, since it provides a strong economic incentive to comply with the norms.

Furthermore, when we again take a more reflective approach to the analytical framework, we notice another remarkable capacity of both instruments to create a normative effect, a capacity that we call 'spillover effects'. There are several ways in which these 'spillover effects' are generated. This varies from traditional effects of soft law, like an interpretative role in judicial review and paving the way for the adoption of hard law on an international and national level, to more innovative developments such as 'light touch'

supplementary self-regulation, leaving some leeway for employers to develop their own regulatory regimes and to incorporate the duties of employees into their labour agreements.

When we take the foregoing into consideration, our conclusion is that based on a narrow interpretation using the analytical framework both instruments, codes of conduct and IFAs, are very soft: they have no legal standing since the actors involved lack formal competence. In general, the normative quality of the substance varies from very vague to quite precise; and the structure to ensure compliance is limited to internal dispute settlement mechanisms and monitoring of general performance. However, in taking a more reflective approach to the analysis, both instruments seem to be much harder on the outside than the formal inside suggests: the actors involved have inherent competence to deal with labour issues. Although the normative substance is vague, they give an impression of how the actors covered by the instruments ought to act. As a result of the behavioural expectations created by the substance, the instruments are able to generate 'spillover' effects that may have hard consequences, like the termination of a contract between the hub company and a subcontractor. Our overall conclusion is that although the formal inside of these instruments is soft, their normative effect on the outside can be hard.

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The subscription prices for 2012(volume 28, 4 issues) are
Print subscription prices: EUR 314/USD 419/GBP 231
Online subscription prices: EUR 290/USD 388/GBP 214(covers two concurrent users). This journal is also available online. Online and individual subscription price available upon request. Please contact our sales department for further information at +31 172 641562 or at sales@kluwerlaw.com.

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Citation
The International Journal of Comparative Labour Law and Industrial Relations may be cited as follows: (2011)(4) *IJCLLIR*.

Refereeing process
Articles for publication in the IJCLLIR are subject to double-blind peer review.

ISSN 0952-617x

The International Journal of Comparative Labour Law and Industrial Relations is published quarterly by Kluwer Law International BV, P.O. Box 316, 2400 AH Alphen aan den Rijn, The Netherlands.
Periodicals Postage Paid at Rahway N.J., USPS No. 013–141.

U.S. Mailing Agent: Mercury Airfreight International Ltd.,
365 Blair Road, Avenel, NJ 07001, U.S.A.

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Avenel NJ 07001, U.S.A.