

Chapter 3:

Transnational private regulation and human rights: The limitations of stateless law and the re-entry of the state

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1. Introduction

In a globalised world in which de-territorialised corporations move capital and investments to far-flung places, where the promises of financial return are highest, the role of territorially delimited states becomes increasingly marginal. Public international law has so far not fully adapted to this new reality. International obligations remain incumbent on states rather than on non-state actors such as corporations, although the odds of the latter causing adverse effects on such values as human rights and the environment (including outside of their home states) have dramatically increased.¹

In this context of rising corporate power, the state-centred approach to international responsibility is only workable if states consistently assume their responsibility to protect individuals and public values from the externalities caused by the corporate pursuit of profit. But unfortunately, host states of foreign investment have not proved able or willing to subject corporate activity to stringent regulation, either because of governance failures or due to a desire to attract foreign investment.² The home states

¹ This discrepancy has informed the establishment of the GLOTHRO project, which has as its objectives deepening the understanding of extraterritorial human rights obligations and widening the understanding of human rights responsibilities, including the direct human rights obligations of corporations. See the Aims and Objectives section of the brochure entitled: *Beyond Territoriality: Globalisation and Human Transnational Human Rights Obligations (GLOTHRO)*, (European Science Foundation, 2011), 5.

² See: SRSG, *Protect, Respect and Remedy: a Framework for Business and Human Rights*, UN Doc. A/HRC/8/5 2008, para. 3. For a recent example of governance failures with respect to corporate (mis)conduct, see the widely publicised collapse of a poorly constructed Bangladeshi garment factory at Rana Plaza on 14 April 2013; a disaster which killed 1,127 people. An official report laid blame partly with local officials for wrongly granting construction approvals after receiving bribes from the building's owner ('Report on Deadly Factory Collapse in Bangladesh Finds Widespread Blame', *New York Times*, 22 May 2013).

of multinational corporations have been similarly reluctant to regulate, either out of a desire to protect their own corporations or as a result of the difficulties of extending state jurisdiction over overseas activities.³ Third states have not been eager to step in either, due to lack of interest and jurisdictional hurdles.⁴ No international treaties that bind corporations have been adopted, while international organisations largely lack the authority to enact binding rules and have limited themselves to enacting “soft law” norms which approach the “lowest common denominator”.⁵

Against this backdrop of governmental inaction, “transnational private regulation” (TPR), “regulatory standard setting”, or “new governance” by private actors has been hailed as a valuable mechanism to regulate global business activities.⁶ TPR is essentially bottom-up created⁷ *stateless law* developed and monitored by *non-state actors*: corporations (whose activities, indeed, TPR normally regulates), non-governmental organisations (NGOs), trade unions, local communities, and academics.⁸

³ See: Jan Wouters and Cedric Ryngaert, ‘Litigation for Overseas Corporate Human Rights Abuses in the European Union: the Challenge of Jurisdiction’, 40 *George Washington International Law Review*, 101-136 (2009/4). In other fields of global governance, however, states *have* been willing to exercise extraterritorial jurisdiction, e.g. as regards international crimes (universal jurisdiction; see, e.g.: Luc Reydams, *Universal Jurisdiction*, (Oxford: Oxford University Press, 2003), corruption (see, notably: the U.S. *Foreign Corrupt Practices Act* of 1977 (FCPA) (15 U.S.C. § 78dd-1, *et seq.*), and climate change mitigation (see, notably: Directive 2008/101/EC of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community, *O.J. L* 8/3 (2009)).

⁴ In a momentous decision, the U.S. Supreme Court, hearing a case regarding the scope of the Alien Tort Statute, rejected U.S. federal courts’ ‘universal civil’ jurisdiction over foreign harm caused by a foreign corporation, in effect limiting the jurisdictional reach of the statute to cases that have a strong connection to the U.S. (*Kiobel et al. v. Royal Dutch Petroleum et al.*, 133 S.Ct. 1659 (2013)).

⁵ Luc W. Fransen and Ans Kolk, ‘Global Rule-Setting for Business: A Critical Analysis of Multi-Stakeholder Standards’, 14 *Organization* 667, 670 (2007) (arguing that standards drawn up by intergovernmental organisations are the weakest on most counts and suffer most from the ‘lowest common denominator’ phenomenon).

⁶ See, for example: Benjamin Cashore, Beth Egan, Graeme Auld and Deanna Newsom, *Governing through Markets – Forest Certification and the Emergence of Non-State Authority* (New Haven and London: Yale University Press, 2004); Rodney Hall and Thomas Biersteker (eds.), *The Emergence of Private Authority in Global Governance* (Cambridge: Cambridge University Press, 2002).

⁷ On bottom-up development, see Surya Deva’s chapter in this book.

⁸ Sometimes representatives of governments and international organisations may also be included. See, for example, the Kimberley Process, an international certification scheme that regulates trade in rough diamonds. Available at: www.kimberleyprocess.com (last accessed 20 September 2014). In the case of strong

It has not only been resorted to with a view to setting apolitical technical standards across industries, but also to enhance corporate respect for public values, or global public goods,⁹ such as the protection of the environment (in particular in the forestry sector) and human rights (in particular labour rights in the apparel, toy, and cocoa sector, and physical integrity rights in the extractive industry).¹⁰ In the forestry sector, the most famous public values TPR is probably the Forestry Stewardship Council (FSC), a global, not-for-profit organisation dedicated to the promotion of responsible forest management standards worldwide, which also issues certificates to companies complying with these standards.¹¹ With regard to social responsibility, the ISO 26000 standard deserves mention, a norm which provides guidance on how businesses and organisations can operate in a socially responsible way. ISO standards are developed by technical bodies of the International Organization for Standardization, consisting of experts from industry and commerce, government, consumers, labour organisations, academic and research bodies, standards bodies and non-governmental organisations in over 160 countries.¹² This contribution focuses on TPR in the human rights field.

Human rights TPR has recently received a strong boost from the work of the UN Special Representative on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, who has drawn attention to a corporate responsibility to respect human rights, which exists independently of the state's obligation to protect human rights.¹³

involvement of the latter, TPR outcomes could be considered as *hybrid* (state/non-state) law. It will be argued below that strong public involvement in TPR processes is highly desirable.

⁹ See: Fabrizio Cafaggi, 'Transnational Private Regulation and the Production of Global Public Goods and Private "Bads"', 23 *EJIL* 695–718 (2012).

¹⁰ See, for example, the Voluntary Principles on Security and Human Rights, established in 2000, the only human rights guidelines designed specifically for extractive sector companies, and including as participants governments, companies, and NGOs. Available at: <http://www.voluntaryprinciples.org/> (last accessed 20 September 2014).

¹¹ Available at <http://www.fsc.org> (last accessed 20 September 2014). See also: the Program for the Enforcement of Forest Certification, aimed at small forest owners. Available at: <http://www.pefc.org/> (last accessed 20 September 2014).

¹² *ISO Membership Manual*, August 2013, I/7.

¹³ John Ruggie, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', *Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises*, A/HRC/17/31, 21 March 2011, Commentary to Foundational Principle no.11 ('The responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate. It exists independently of States' abilities and/

The 2011 Guiding Principles set out *how* corporations can implement this responsibility.¹⁴ Although the Principles do not explicitly refer to TPR as a mechanism for discharging this corporate responsibility, there is little doubt that TPR can strengthen corporate policy commitments to human rights, human rights due diligence, and the remediation of human rights abuses. Notably, TPR initiatives allow businesses to tailor human rights commitments to their specific field of activity and go beyond the minimal rights listed in the Guiding Principles.¹⁵ As the norms contained in TPR initiatives are industry- and multi-stakeholder- and thus bottom-up-driven, the chances of compliance may be considered higher. From a normative perspective, corporations' formal pledge of compliance with human rights standards may have particular legal consequences under international law, notably on the basis of the doctrine of unilateral act applied *per analogiam* to non-state actors,¹⁶ or on the basis of customary international law.¹⁷ Under both doctrines, however, it has to be demonstrated that, through TPR initiatives, corporations had the intention to create legally binding consequences for themselves.

This contribution opens in Section 1 with a discussion of the advantages of TPR as stateless law: because non-state actors are so closely involved in drawing up the norms regulating their own activities, they may consider

or willingness to fulfil their own human rights obligations, and does not diminish those obligations.')

¹⁴ *Ibid*, Operational Principles, nos. 16-24.

¹⁵ For these minimal rights, see: *ibid*, Foundational Principle no. 12 ('The responsibility of business enterprises to respect human rights refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work'). Mark Taylor has observed that '[t]his in no way precludes a business doing more', citing such TPR initiatives as the Voluntary Principles on Security and Human Rights (VPs), the Extractive Industries Transparency Initiative (EITI), the Global Compact (GC), the OECD Guidelines for Multinational Enterprises, and the IFC Performance Standards. Mark Taylor, 'The Ruggie Framework: Polycentric regulation and the implications for corporate social responsibility', 5(1) *Nordic Journal of Applied Ethics*, 9, 14-15 (2011).

¹⁶ See: the International Law Commission, 'Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations', UN Doc. A/61/10 (2006), Principle 1 ('Declarations publicly made and manifesting the will to be bound may have the effect of creating legal obligations. When the conditions for this are met, the binding character of such declarations is based on good faith.').

¹⁷ Compare: International Law Association, Committee on non-State Actors, *Report Sofia Conference* (2012), 5-6 (doubting whether the practice of non-state actors can contribute directly to the formation of customary international law, but signaling that such practice can be taken into account to ascertain norms that govern non-state actors' own behaviour).

such norms to be more legitimate than state law; also, as such norms directly factor in private interests, they may be more effectively tied to operational realities than state law. Section 2 inquires, however, whether this ideal account of TPR is also borne out by the realities on the ground. It is argued that - particularly in the field of business and human rights - TPR may, in practice, suffer from serious legitimacy and effectiveness shortcomings, mainly because of corporate resistance against far-reaching regulation and against strong involvement of civil society in TPR design and monitoring. To remedy these shortcomings, Section 3 proposes to reinvite the state. The state can play a key role in bolstering TPR, without necessarily resorting to command and control regulation. Section 3 studies four instances of “softer” state facilitation and orchestration of TPR that are likely to expand in the near future: public procurement, government contracting with the private security sector, financial reporting, and trade concessions. Section 4 concludes, and suggests that states expand their use of a smart regulatory tool box, deferring to non-state regulation when effective, and shoring it up when needed.

2. The advantages of TPR as stateless law: increasing effectiveness and legitimacy

If *law* is defined as a set of rules of general application enacted by a state legislature and backed up by mandatory enforcement measures, then TPR can hardly be considered law. TPR is voluntary in nature, is not of general application, and is not enacted or enforced by the apparatus of the state. However, the concept of law need not be tied to the existence of a state. Instead, it can be created and enforced outside a formal state system by non-state actors. Indeed, under a pluralist conception of law, TPR constitutes “law” as it hardens social expectations into norms that guide social behaviour through a more or less formal decision taken by relevant normative actors (“norm entrepreneurs”).¹⁸ In fact, TPR may be considered law of a higher quality, since it may be both more effective and more legitimate than state law. This section briefly sets out *why* TPR may be imbued with a higher degree of legitimacy and effectiveness, and counters the criticism as to its democratic legitimacy deficit and its lack of formal enforcement powers.

¹⁸ Compare: Kenneth W. Abbott and Duncan Snidal ‘Strengthening international regulation through transnational new governance: overcoming the orchestration deficit’, 42 *Vanderbilt Journal of Transnational Law* 501, 531 (2009). Specifically on legal pluralism and TPR, see: Peer Zumbansen, ‘Transnational Private Regulatory Governance: Ambiguities of Public Authority and Private Power’, Osgoode Hall Law School, *Comparative Research in Law and Political Economy*, research paper 45/2012, 32 (“Transnational “Law” can thus be reconceived as transnational legal pluralism in that it methodologically responds to the fragmented, disembedded evolutionary dynamics of norm-creation in the context of world society:”).

The effectiveness of law is a function of the level of operational support the law garners from those who have to implement the norms (the “subjects of the law”).¹⁹ Such support will be particularly forthcoming if those subjects are involved in drawing up the norms. This is precisely the very essence of TPR. During the process of TPR formation, the subjects - companies - can notably inject technical and operational issues into the discussion, which, when taken into account in drafting the norms, will normally increase the chances of successful implementation. Thus, TPR may enable regulation to dovetail better with the needs of regulated actors than state law drawn up by regulators who are not necessarily privy to all operational challenges.²⁰ This operational responsiveness of TPR is further enhanced by the capacity for learning and exchange of best practices, which is inherent in horizontal TPR dialogues.

At the same time, the involvement of the various stakeholders in the process leading to the adoption of TPR norms will increase the latter’s legitimacy, as participation in law-making processes creates a sense of ownership, not only on the part of the corporations which are subjected to the norms, but also on the part of other stakeholders such as NGOs and local communities who are represented in multi-stakeholder initiatives. Legitimacy and effectiveness are obviously closely related in that a perception of the legitimacy of a norm will normally give rise to greater willingness to implement the norm; actual involvement in norm design also raises the social costs of norm violation as it deprives the violator of the “norm illegitimacy” argument. Provided that the TPR norm is created in a legitimate manner, the further question of whether this process of law-formation impacts on the binding character of such a norm for the addressees (in this case, corporations) arises. It should be recalled that, according to formal sources theories still dominant in public international law, a norm only becomes an international law norm if it has come into being through recognised norm-setting processes, typically based on the consent of the addressee of the norm.²¹ TPR, although consent-based, is not such a recognised process, primarily because it involves non-state actors rather than states. Thus, TPR cannot normally give rise to direct

¹⁹ See, further: Cedric Ryngaert, ‘Imposing International Duties on Non-State Actors and the Legitimacy of International Law’, in Math Noortmann and Cedric Ryngaert (eds.), *Non-State Actor Dynamics in International Law: from Law-Takers to Law-Makers* (Farnham: Ashgate, 2010), 69, 76-77.

²⁰ In fact, data generated by TPR processes may ‘educat[e] regulatory officials as to the practical needs of industry’ (David A. Wirth, ‘The International Organization for Standardization: Private Voluntary Standards as Swords and Shields’, 36 *B.C. Envtl. Aff. L. Rev.* 79, 88 (2009)).

²¹ See, at length: Jean d’Aspremont, *Formalism and the Sources of International Law*, (Oxford: Oxford University Press, 2011).

human rights obligations for corporations. However, as already hinted at above, recognised sources of international law, such as unilateral acts and customary international law, could be applied *per analogiam* to TPR, and on that basis confer international legal authority on TPR norms.

If, *arguendo*, TPR can contribute to the formation of direct human rights obligations for corporations, it is of key importance that it is imbued with a sufficient measure of democratic legitimacy. Direct stakeholders, such as businesses, NGOs, technical advisers, trade unions, and academics, may well all have the chance to participate in TPR design, monitoring and enforcement, but it remains the case that, in spite of all their good efforts, they are not democratically elected. This is particularly problematic with regard to private standards that pursue social and political goals, such as human rights. As social policy is normally the responsibility of a democratically mandated government, the gradual privatisation of social justice through TPR may be seen as a threat to the liberal-democratic *acquis*. These risks are overstated, however. As will be set out below, democratically elected governments do play – and should play for that matter – an orchestrating role with respect to TPR initiatives. Moreover, especially as far as human rights are concerned, the standards featuring in TPR codes are typically based on existing legal standards, previously developed by states in a domestic or international setting. TPR labour codes, for instance, may cite core conventions of the International Labour Organization.²² Arguably, this redeployment of prior state-developed law in TPR goes some way to soothing concerns as to its democratic legitimacy.

Another limitation of TPR may reside in the fact that, although its substantive content in the business and human rights field is rooted in state-developed law, corporate commitment to TPR, and compliance with it, is (unlike state law) *voluntary* and not state-sanctioned. This has obvious drawbacks, in particular at the enforcement level. For instance, if an audit firm finds a violation of a TPR labour code when monitoring compliance, the corporation cannot be “punished” in a classic sense by state-ordered fines or enforced closure. One should not fail to note, however, that the market may mete out punishment in ways that the corporation may consider to be

²² For regulatory stringency scores of six private labour regulation initiatives, see: Luc W. Fransen and Brian Burgoon, ‘A market for worker rights: Explaining business support for international private labour regulation’, 19 *Review of International Political Economy* 236, 243 (2012). The authors base the level of regulatory stringency in part on reference to codification of labour standards in the codes. Their research has demonstrated that multi-stakeholder initiatives provide for more stringent private regulation than two business-governed organisations (ICS and BSCI), because the former’s systems adhere to higher labour standards, in addition to including review from societal interest groups.

at least as harsh as state sanctions: the corporation may lose the benefits associated with subscription to a TPR labour code, and in particular forfeit opportunities for private supply-chain or government contracts that are contingent on TPR compliance.²³ In effect, non-compliance with TPR may at times exclude corporations from the market and thus threaten their very *raison d'être*.²⁴

3. The discontents of human rights TPR

The ideal account of TPR deliberations and outcomes, set out in Section 1, may fly in the face of realities on the ground. For one thing, as TPR deliberations seek a consensus among very diverse participants from industry, civil society, science, and government, they are unlikely to produce revolutionary regulatory choices.²⁵ This especially applies to TPR in the business and human rights field, which does not limit itself to the development of compatible or harmonised technical standards supported by all participants: business and human rights deliberations may be antagonistic, pitting industry against civil society, and may thus yield results that are not satisfactory and not effective in tackling the existing problems.²⁶ Secondly, it may be the case that not all stakeholders are represented in TPR processes. If such processes are dominated by one actor, their legitimacy is bound to suffer, especially in the eyes of actors who are adversely affected by the activities of the former (normally the

²³ Fabrizio Caffagi, 'New Foundations of Transnational Private Regulation', EUI RSCAS; 2010/53; Private Regulation Series-04, 30 ('Contracts may be a powerful vehicle for hardening soft law and promoting the harmonization of standards at transnational level. Transnational contracting in supply chains for example has contributed to the enforcement of international soft law.') (footnotes omitted).

²⁴ See, for example: below, Section 3(b), on government contracting with private military and security companies.

²⁵ David A. Wirth, *Op.cit.*, 87. (Arguing, with respect to ISO environmental standards: "[C]onsensus" generally means widespread acceptance after lengthy consultation. It is therefore unlikely that ISO standards will serve as a dynamic driver of improvements in environmental quality. Concern about the potential for the ISO process to produce modest, least-common-denominator outputs is frequently expressed.)

²⁶ It may suffice to recall the process leading to the adoption of the 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights', UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003). This process pitted corporations against NGOs, with the NGOs winning a pyrrhic victory. Business support was absent however and John Ruggie famously declared the Norms dead in 2006 (see Remarks by John G. Ruggie, delivered at a Forum on Corporate Social Responsibility Co-Sponsored by the Fair Labor Association and the German Network of Business Ethics Bamberg, Germany, 14 June 2006). The Norms were eventually shed in favour of the UN Guiding Principles in 2011.

corporation). In this section, both discontents of TPR – the first mainly relating to the *effectiveness* of TPR, and the second to its *legitimacy* – are tackled.

The antagonism and ensuing unsatisfactory results of human rights TPR deliberations can be explained by the divergence of interests between corporations and civil society. Corporations are profit-driven economic actors that are likely to resist far-reaching human rights-oriented TPR, unless such regulation could somehow offer economic benefits.²⁷ For corporations, standard setting in the field of business and human rights raises implementation costs that may not be offset by the expansion of business opportunities, cost cuts in other fields, or a larger market share. Human rights TPR standard setting is indeed only aimed at mitigating the adverse impact of business activity on society, and the enjoyment of human rights by persons affected by such activity. These are social goals which are extraneous to a profit-driven business venture. Therefore, it may be expected that corporations have an incentive to resist human rights TPR, unless there is a clear business case for it. A business case might be created, however, by consumer pressure, or by the threat of government regulation.²⁸

Recent social science research has tested these intuitions and has indeed demonstrated, on the basis of interviews with representatives of the clothing industry, that company choices to support international private labour regulation are shaped by a number of factors which are closely related to consumer or media pressure.²⁹ Such consumer pressure from the bottom, and the ensuing corporate support for stringent TPR, will be more likely to materialise in respect of listed firms, firms with a larger market share, firms focusing on higher consumer market segments, and firms focusing more on manufacturing and design than on the sale of products.³⁰

²⁷ There is abundant business literature on how sustainability can, or cannot, drive up corporate profits. See, for example: Knut Haanaes, David Michael, Jeremy Jurgens, Subramanian Rangan, 'Making Sustainability Profitable', *Harvard Business Review*, March 2013, 1-6.

²⁸ See also: Ludo Cuyvers and Tim De Meyer, 'Market-driven promotion of international labour standards in Southeast Asia: the corporatization of social justice', in Axel Marx, Miet Maertens, Johan Swinnen and Jan Wouters (eds.), *Private Standards and Global Governance: Economic, Legal and Political Perspectives* (Cheltenham: Edward Elgar, 2012), 114, 141 ('The day when the pursuit of social justice may be left entirely to market forces does not appear to have arrived as yet.').

²⁹ Luc Fransen and Brian Burgoon, 'A market for worker rights: Explaining business support for international private labour regulation', 19 *Review of International Political Economy* 236, 247-251 (2012), H1-H4.

³⁰ *Ibid*, H6-H9.

Support for stringent TPR also appears to be more likely in countries with institutional environments which are more supportive of CSR; typically liberal-democratic western countries.³¹ If such conditions are not present, TPR will not thrive. These results demonstrate that support for TPR is a function of consumer and institutional pressure, in the absence of which corporations will be unlikely to make strong human rights commitments through TPR, and limit themselves to bland statements which are not matched by a genuine desire to change business policies.

The second discontent of human rights TPR on the ground relates to the sincerity of multi-stakeholder participation in it. Social science research has demonstrated that reality is more prosaic than the ideal account of multi-stakeholder dialogues, involving corporations, civil society and other stakeholders, yielding legitimate and effective TPR may cause us to believe. Currently, human rights TPR is mainly designed and monitored by *corporations themselves*, with little or only token participation of other actors.³² The absence of effective multi-stakeholder platforms obviously raises the spectre of a regulatory race to the bottom that results in the adoption of norms that fail to do justice to local communities adversely affected by harmful business activities.

The malleability of the concept of multi-stakeholder initiatives (MSIs) is much to blame for the “blue washing” in which corporations may tend to engage.³³ MSI is not a term of art with a defined legal meaning. This, as Kolk and Fransen have argued, ‘entails room for multiple interpretation and even abuse’.³⁴ Indeed, corporations can enjoy the legitimacy benefits which flow from participating in, or setting up an MSI, or simply using MSI discourse, without truly involving stakeholders in such schemes. For instance, businesses may informally consult stakeholders, or nominate them to an advisory board on sustainability, without giving them a formal role in governance, decision-making, review, or monitoring; they may nominate

³¹ *Ibid*, H5.

³² Luc Fransen, ‘Multi-stakeholder governance and voluntary programme interactions: legitimisation politics in the institutional design of Corporate Social Responsibility’, 10 *Socio-Economic Review* 163, 188 (2012) (‘It seems that some business-driven programmes are trying to have their cake and eat it too: they want the external support that engagement with various stakeholder groups offers, without actually allowing these groups a central place in governance.’).

³³ “Blue washing” is a derogatory term used to denote the lack of compliance with, and enforcement of, corporate commitments to abide by human rights and environmental norms. The term may have been coined in a report by CorpWatch, ‘Tangled up in Blue: Corporate Partnerships at the United Nations’, Transnational Resource and Action Centre, September 2000.

³⁴ Luc W. Fransen and Ans Kolk, *Op.cit.* 667, 678.

“independent experts” to governing boards, assuming, without further evidence, that these experts will defend the public interest and represent civil society; or, when nominating civil society groups to boards, ensure that they do not have substantial leverage.³⁵ Also, the leading non-state entity harmonising and upgrading technical standards – the International Standardization Organization (ISO) – which has recently concerned itself with more socially relevant standards relating to environmental and social responsibility,³⁶ is dominated by the business world, with rather limited participation of civil society.³⁷

In some cases, the norm-setting process in an MSI is genuinely participatory, in the sense of involving NGOs, but then the monitoring of adopted standards may be carried out by professional auditing companies in ways that are not very different from the monitoring of standards that were formulated solely by business groups.³⁸ Moreover, since such auditing companies often perform other services for the same company, their independence may be in doubt. Failure to involve independent non-business actors, such as NGOs, in the monitoring process obviously limits the critical role of civil society watchdogs and thus increases the chances of “blue washing”.

This reluctance to fully involve civil society in MSIs may be attributed to business fatigue with civil society groups perceived as “too demanding, slow and unreliable”. With respect to retailing firms’ (as opposed to branded producers), lack of consumer pressure may also be to blame.³⁹

One could expect that this limitation of civil society participation in an MSI will undermine the latter’s legitimacy, but this is not necessarily true: some NGOs and unions have recently supported business-driven initiatives that hardly satisfy the requirements of the ideal model of representation.⁴⁰

³⁵ See, also: Luc Fransen, ‘Multi-stakeholder governance and voluntary programme interactions: legitimation politics in the institutional design of Corporate Social Responsibility’, 10 *Socio-Economic Review* 163, 176-178 (2012).

³⁶ ISO 14001 and ISO 26000.

³⁷ David A. Wirth, *Op.cit.*, 87 (submitting, in relation to ISO standard 14001, that few American non-profit environmental organisations have made a significant commitment to the ISO process)

³⁸ Luc W. Fransen and Ans Kolk, *Op.cit.*, 677.

³⁹ Luc Fransen, *Op.cit.*, 181-182.

⁴⁰ *Ibid*, 186, citing the Business Social Compliance Initiative (BSCI), whose civil society advisory board members have little influence on important decision-making procedures, but which nevertheless aligned with the more representative Social Accountability International (SAI); and the Global Social Compliance Programme (GSCP), to which the United Nations awarded the status of a UN Partnership Program for Progress in 2010, in the framework of the realisation of the UN Millennium Development Goals.

One would assume that such initiatives derive their legitimacy from the outcomes they produce (output legitimacy) rather than from the representativeness of the decision-making process (input legitimacy).⁴¹

A last limitation with regard to the participation of MSIs as they are currently designed that deserves to be mentioned is the over-representation of western NGOs, which claim to represent communities located in the global south. This western domination may obscure local concerns and entrench the western bias of international regulation:⁴² it may well be that (some) members of local communities prefer having employment in the first place rather than being employed in better quality working conditions,⁴³ whereas it is precisely the absence of the latter that causes moral outrage in the west. Nonetheless, it may be assumed that local communities and transnational NGOs somehow interact, so that NGOs eventually defend the true interests of local communities, rather than their own conception of it, but this is not a given.⁴⁴ To remedy this possible representation deficit, local round-table talks, organised by the multi-stakeholder initiative itself, can be set up, and local communities or individuals may be given direct access to a complaints procedure.⁴⁵

4. Toward a re-entry of the state

As was set out in Section 2, TPR in the business and human rights field will often fail to fully deliver, as it is unlikely that, in the absence of strong consumer pressure, profit-driven organisations will, on their own initiative, take responsibility for the adverse external effects that they cause (e.g. on the enjoyment of human rights).

⁴¹ *Ibid*, 187, citing a young Dutch NGO professional ('If it were up to me I would happily promote a business-driven program, if it has good standards and enforcement procedures.'), and holding that NGOs that have previously not taken part in TPR may be 'oblivious to its historical sensitivities'.

⁴² The western bias of international law has been severely criticised by scholars belonging to the TWAIL movement (Third World Approaches to International Law). See, for example: Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005).

⁴³ Note that the International Trade Union Confederation, in its *Global Unions Statement of Priorities for the 9th WTO Ministerial Conference* (Bali, Indonesia, December 3-6, 2013), regarding the topic 'Labour and the WTO' called on the WTO and the ILO to 'jointly undertake impact assessments of negotiating proposals on the *quantity and quality* of jobs as well as on development and production structures of countries' (emphasis added).

⁴⁴ On the interaction between western and local NGOs in building democracy in (post-)communist Eastern Europe, see, at length, Sarah E. Mendelson and John K. Glenn, *The Power and Limits of NGOs: A Critical Look at Building Democracy in Eastern Europe and Eurasia*, (New York: Columbia University Press, 2013).

⁴⁵ Luc W. Fransen and Ans Kolk, *Op.cit.* 10.

Accordingly, to ensure that corporations promote rather than undermine (global) public goods and values, some state intervention or regulation may be called for.⁴⁶ Since states do not collectively have the willingness or the means to enact stringent global corporate regulation, some softer techniques of intervention by states and international organisations will have to be contemplated. Abbott and Snidal refer, in this respect, to ‘directive and facilitative orchestration’, which comes down to public actors, notably states and international organisations, initiating and convening TPR initiatives,⁴⁷ building TPR capacity,⁴⁸ enacting reporting requirements,⁴⁹ and providing (financial) incentives to meet regulatory targets.⁵⁰ Such orchestration may also allow the limitation of the overlap in TPR initiatives, which causes confusion for consumers (impeding them from making informed choices and thus undermining the effectiveness of TPR). It also raises transaction costs for suppliers who are expected to comply with a panoply of private standards that are not necessarily congruent. Recent research with respect to labour standards in the clothing industry has indeed indicated that convergence between private regulatory initiatives has so far failed to take place, and that different regulations therefore continue to co-exist.⁵¹

⁴⁶ The rationale of regulation, as aptly enunciated by Black, may be recalled here: ‘Regulation is the sustained and focused attempt to alter the behaviour of others according to defined standards or purposes with the intention of producing a broadly identified outcome or outcomes, which may involve mechanisms of standard-setting, information-gathering and behaviour modification’. Julia Black, ‘Critical Reflections on Regulation’, 27 *Australian Journal of Legal Philosophy* 3, 26 (2002).

⁴⁷ The Dutch Government, for instance, has convened industry partners in the Conflict-Free Tin Initiative (CFTI, 2012), see: <http://solutions-network.org/site-cfti/> (last accessed 20 September 2014). This initiative involves Royal Philips Electronics, Tata Steel, Motorola Solutions, Research In Motion (RIM), Alpha, AIM Metals & Alloys, Malaysia Smelting Corporation Berhad (MSC), Traxys, and ITRI, companies which use tin extracted from mines in the DRC. A pilot of this project will be evaluated in 2013.

⁴⁸ For instance, the South African Government, the Ministry of Foreign Affairs of the Netherlands, and the Government of the DRC, funded by the World Bank, have assisted in the expansion of the operational activities in Maniema (DRC, 2012) of iTSCi, a joint industry programme of traceability and due diligence designed to address concerns over “conflict minerals” such as cassiterite from central Africa. See: press report iTSCi, ‘iTSCi expands into Maniema Province bringing more Conflict-Free Minerals to the market’, 18 December 2012.

⁴⁹ See: below, Section 3(c).

⁵⁰ Kenneth W. Abbott and Duncan Snidal, *Op.cit.*

⁵¹ Luc Fransen and Brian Burgoon *Op.cit.*, examining TPR initiatives of the Fair Wear Foundation (FWF), Fair Labor Association (FLA), Social Accountability International (SAI), Ethical Trading Initiative (ETI), Initiative Clause Sociale (ICS), and Business Social Compliance Initiative (BSCI).

In this contribution, three mechanisms of public actors orchestrating – but nevertheless respecting the autonomy of – TPR initiatives in the business and human rights field will be discussed: (a) public procurement, including government contracting with private military and security companies; (b) financial reporting, and; (c) trade concessions. These mechanisms have been chosen because of their potential effectiveness and because of indications of greater state willingness to use and expand them in the years to come. The discussion is not, and cannot be, exhaustive.

4.1. Public procurement

Public incentives for human rights TPR will work particularly well when private actors are somehow dependent on public actors for business opportunities. This will ordinarily be the case when states or organisations participate in the market, e.g. through public procurement or financial investments. In fact, pursuant to Principle 6 of the Guiding Principles on Business and Human Rights Implementing the United Nations “Protect, Respect and Remedy” Framework – the “Ruggie Principles” – states even have an obligation to ‘promote respect for human rights by business enterprises with which they conduct commercial transactions.’⁵² The Commentary to Principle 6 in particular cites public procurement.⁵³ Indeed, as the value of the goods and services used by (industrialised) states and IOs is sizable,⁵⁴ human rights-based public procurement

⁵² This obligation may, however, be a strong social expectation rather than a hard obligation under international law. See: the preamble to the Guiding Principles (‘Nothing in these Guiding Principles should be read as creating new international law obligations...’) and the use of the word ‘should’ in Principle 6 – as in other principles for that matter – in combination with the Commentary to Principle 6, which cites ‘due regard to States’ relevant obligations under national and international law’ as a limitation of the scope of the Principle. On the question of under what circumstances potential victims of corporate misconduct fall within the ‘jurisdiction’ of the corporations’ home states, thereby triggering hard legal obligations to protect on the part of those states, see: Cedric Ryngaert, ‘Jurisdiction: Towards a Reasonableness Test’, Malcom Langford, Wouter Vandenhole, Martin Scheinin, and Willem van Genugten (eds.), *Global Justice, State Duties: the Extraterritorial Scope of Economic, Social And Cultural Rights in International Law* (New York: Cambridge University Press, 2013), 201 *et seq.*

⁵³ I am partly indebted to Jan-Frederik Keustermans for research assistance regarding this section on public procurement.

⁵⁴ In the European Union, the economic value of public procurement is estimated at between 19 and 20% of the total GDP of the EU. See: European Commission, DG Internal Market and Services, ‘Final Report: Cross Border Procurement above EU Thresholds’, March 2011, 15. Available at: http://ec.europa.eu/internal_market/publicprocurement/docs/modernising_rules/cross-border-procurement_en.pdf (last accessed 26 September 2014); European Commission, ‘Public Procurement Indicators 2010’, 4 November 2011, 8. Available at: http://ec.europa.eu/internal_

requirements can be a powerful, if not the most powerful, incentive to steer corporate behaviour into a human rights-friendly direction.⁵⁵ The institutionalisation of human rights-based procurement is still in its infancy, and has to overcome some legal restraints, however. With respect to EU public procurement, for instance, the European Court of Justice has ruled that social considerations can only be used as award criteria under strict limitations,⁵⁶ and in particular that the criteria must clearly add an economic advantage to the contracting state.⁵⁷ This is the classic view of public procurement law, which, apart from levelling the playing field for corporations,⁵⁸ is logically aimed at maximising the benefits for the contracting state, and thus at limiting the taxpayer's costs. That being said, the Commission supports taking account of social considerations in public procurement policy, even developing a specific guide entitled *Buying Social* in 2010.⁵⁹ However, this guide does not specifically pertain to human rights. What is more, as the Commission explicitly notes, '[r]equirements relating

[market/publicprocurement/docs/indicators2010_en.pdf](#) (last accessed 26 September 2014).

- ⁵⁵ Sue Arrowsmith, 'Public procurement as an instrument of policy and the impact of market liberalisation', 111 *Law Quarterly Review* 246 (1995); Christopher McCrudden, 'International Economic Law and the Pursuit of Human Rights: A Framework for Discussion of the Legality of "Selective Purchasing" Laws under the WTO Government Procurement Agreement', 2 *Journal Of International Economic Law* 10-11 (1999); and on the use of human rights procurement to target other states, see: Christoph Spennemann, 'The WTO Agreement on Government Procurement - a Means of Furtherance of Human Rights', *Zeitschrift für europarechtliche studien* 2001, 73. Note that human rights requirements may not only apply to the activities of the tending company, but also to those of its sub-contractors and suppliers. European Commission, *Buying Social – A guide to taking account of social considerations in public procurement* (Luxembourg: Publications Office of the European Union, 2010), 47-48; Alexandra Gatto, *Multinational Enterprises and Human Rights*, (Cheltenham: Edward Elgar Publishing, 2011), 3-29.
- ⁵⁶ The benchmark case is ECJ 20 September 1988, 31/87, *Gebroeders Beentjes BV v. State of The Netherlands*, E.C.R. 1988, 04635.
- ⁵⁷ ECJ 17 September 2002, C-513/99, *Concordia Bus Finland Oy Ab, formerly Stagecoach Finland Oy Ab v. Helsingin kaupunki and HKL-Bussiliikenne*, E.C.R. 2002, I-07213; Chistoppher Bovis, *EC Public Procurement: Case Law and Regulation* (Oxford: Oxford University Press, 2006), 433.
- ⁵⁸ Note that the playing field is not fully levelled, as the relevant Directive 2004/18/EC of the European Parliament and the Council on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, O.J. L 134/114 (2004), only extends to tenderers and products from EU member States, not from third countries. Such tenderers and products may however have access to EU markets on the basis of the WTO Agreement on Public Procurement. See: preamble paragraph 7 of Directive 2004/18.
- ⁵⁹ European Commission, *Buying Social – A guide to taking account of social considerations in public procurement*, *Op.cit.*

to the labour conditions of the workers involved in the production process of the supplies to be procured cannot be taken into account in the technical specifications, as they are not technical specifications within the meaning of the Procurement Directives'.⁶⁰ Those Directives are currently undergoing a process of reform in order to, among other things, allow for more social (including human rights) considerations in public procurement.⁶¹

Public procurement policy can respect the “stateless law” made by private actors by ratifying and rewarding TPR initiatives that further social, human rights, and sustainability goals. This allows states to *influence* rather than micro-manage TPR decision-making modes (“processes”) and adopted norms (“results”). Importantly, governmental deference to TPR initiatives has the advantage of saving precious state resources, as it shifts the high costs of monitoring compliance with corporations’ supply-chain management to private actors assembled in TPR initiatives.⁶²

⁶⁰ *Ibid*, 32, adding that ‘[u]nder certain conditions, they may, however, be included in the contract performance clauses’.

⁶¹ Commission, *Proposal for a Directive of the European Parliament and of the Council on procurement by entities operating in the water, energy, transport and postal services sectors, replacing Directive 2004/17*, COM(2011) 895 final, 2011/0439 (COD), 2. Available at: <http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0895:FIN:EN:PDF> (last accessed 20 September 2014); Commission, *Proposal for a Directive of the European Parliament and of the Council on public procurement*, COM(2011) 896 final, 2011/0438 (COD), 2. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0896:FIN:EN:PDF> (last accessed 20 September 2014). This reform can be situated in a series of reforms that increase the room for social considerations in EU public procurement law. Social considerations were already mentioned in *Communication from the Commission concerning Corporate Social Responsibility: a Business Contribution to Sustainable Development*, COM (2002) 347 final, 2 July 2002. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2002:0347:FIN:EN:PDF> (last accessed 20 September 2014). For a critical assessment, see: Éric Van den Abeele, ‘The Reform of the EU’s Public Procurement Directives: A Missed Opportunity?’, ETUI Working Paper No. 2012.11. Available at <http://ssrn.com/abstract=2202717> (last accessed 20 September 2014). Note that, in the absence of a revision, the EU Charter of Fundamental Rights may possibly be relied on to introduce social or human rights considerations into tender specifications. See: Stephen Weatherill, ‘The Internal Market’, in Steve Peers and Angela Ward, *The European Union Charter of Fundamental Rights* (Oxford: Hart, 2004), 202, fn. 48 (raising the question without answering it).

⁶² See, for example: John Howe, ‘The Regulatory Impact of Using Public Procurement to Promote Better Labour in Corporate Supply Chains’, *University of Melbourne Law School Research Series* 2010, Paper No.528.

In order to respect the autonomous dynamics of TPR initiatives, including their potential for auto-correction, states and organisations may want to refrain from endorsing named initiatives,⁶³ rather, they may want to prescribe in general but sufficiently transparent terms the required TPR processes and results. This will also allow human rights-based public procurement policies to stay within the limits of the law. Listing specific TPR initiatives rather than indicating general terms with which all TPR initiatives have to comply may run afoul of the principle of non-discrimination enshrined in the Plurilateral Trade Agreement on Government Procurement of the World Trade Organization (WTO).⁶⁴ This principle has also been upheld by the European Court of Justice (ECJ), which has ruled that public procurement criteria must not have either a direct or *de facto* discriminatory effect on corporations from different member states, and must accordingly be applied objectively and equally to all tendering corporations.⁶⁵ According to some authors, the use of human rights requirements in public procurement may also cause tension with the requirement of transparency (which the ECJ has considered to be implicit in the principle of non-discrimination),⁶⁶ as public procurement norms may not be sufficiently specific as to the required TPR procedures and norms, and the weight given to human rights considerations in public procurement decisions may not be objectivised.⁶⁷

⁶³ In practice, however, states and international organisations, do endorse specific initiatives. See: Kenneth W. Abbott and Duncan Snidal, *Op.cit.* 567-572.

⁶⁴ Marrakesh Agreement Establishing the World Trade Organization, Annex 4(b), *Plurilateral Trade Agreement on Government Procurement* arts. III, VI, XIII, Apr. 15, 1994, 1867 U.N.T.S. 3. Available at: http://www.wto.org/english/docs-e/legal-e/gpr-94_01_e.htm (last accessed 20 September 2014).

⁶⁵ See: ECJ 18 October 2001, C-19/00, *SIAC Construction Ltd v. County Council of the County of Mayo*, E.C.R. 2001, I-07725; ECJ 26 September 2000, C-225/98, *Commission v. The French Republic*, E.C.R. 2000, I-07445; ECJ 27 October 2005, C-234/03, *Contse SA v. Insalud (Now Ingesa)*, E.C.R. 2005, I-09315.

⁶⁶ ECJ 12 December 2002, C-470/99, *Universale Bau and Others v. Entsorgungsbetriebe Simmering GmbH*, E.C.R. 2002, I-11617. On the transparency of public procurement requirements, see also: ECJ 20 September 1988, 31/87, *Gebroeders Beentjes BV v. State of The Netherlands*, E.C.R. 1988, 04635; ECJ 17 September 2002, C-513/99, *Concordia Bus Finland Oy Ab, formerly Stagecoach Finland Oy Ab v. Helsingin kaupunki and HKL-Bussiliikenne*, E.C.R. 2002, I-07213.

⁶⁷ Christopher McCrudden, *Op.cit.*; Christian Pitschas, and Hans Joachim Priess, 'Secondary policy criteria and their compatibility with E.C. and WTO procurement law. The case of the German Scientology Declaration', *PPL.R.* 2000, 190; Sue Arrowsmith, *Government Procurement in the WTO* (London: Kluwer Law International, 2003), 327; Katherine Zeisel, 'The Promotion of Human Rights by Selective Public Procurement under International Trade Law' in Oliver De Schutter (ed.), *Transnational corporations and human rights* (Oxford: Hart, 2006), 378.

These concerns are not universally shared, however, and have not stopped some states from introducing human rights standards in public procurement. The Dutch Government, for instance, requires, on the basis of the new Public Procurement Law,⁶⁸ that its suppliers comply with international labour standards, notably on the basis of a so-called “supply chain initiative”. A supply chain initiative is a TPR initiative assembling producers, traders, trade unions, and environmental and human rights organisations with the aim of raising labour standards in production. The government has to approve the supply chain initiative, and employs a number of process and content criteria in its evaluation, namely: (1) the participation of employers, employees and civil society groups (without one group being dominant); (2) the initiative being based on the fundamental labour norms of the ILO and on universal human rights; (3) adequate compliance-monitoring, and; (4) annual reporting.⁶⁹ If the supplier participates in a supply chain initiative, the supplier automatically meets the social conditions set by the government. A number of well-known TPR initiatives have already been approved by the government.⁷⁰

This approach is laudable,⁷¹ and other states and international organisations

⁶⁸ Aanbestedingswet 2012, entered into force 1 April 2013. Article 2.80 of the Act provides that the government can impose special conditions, e.g., relating to social and environmental considerations, on the performance of a government assignment, provided that such conditions are compatible with the Treaty on the Functioning of the European Union and are listed in the announcement or the procurement documents.

⁶⁹ The conditions are not listed in the statute itself, but have been developed by the government on the basis of the statute. See: <http://www.rijksoverheid.nl/onderwerpen/aanbesteden/duurzaam-inkopen-door-overheden/voldoen-aan-sociale-voorwaarden> (last accessed 20 September 2014). The *travaux préparatoires* refer to the key conventions of the ILO, however. See: Monika Chao-Duvis en R.W.M. Kluitenberg, *Parlementaire geschiedenis Aanbestedingswet 2012* (The Hague: Instituut voor Bouwrecht, 2013), 325.

⁷⁰ *Ibid*, mentioning Fair Flowers Fair Plants, Fair Wear Foundation, Social Accountability International, Max Havelaar keurmerk voor fair trade, Union for Ethical BioTrade, UTZ Certified, Rainforest Alliance.

⁷¹ But note that the classic problems of TPR – low standards, implementation issues, compliance-monitoring – may also arise in respect of public procurement. See: the fine analysis by G. ten Kate, ‘Tying Public Procurement to Human Rights Standards’, *The Broker*, 8 September 2013 (‘The Dutch approach is to lead by example. However, there are some ambiguities when it comes to practice. The system is based on trust and, on an operational level, the social criteria cannot be guaranteed. Because the provisions can only be laid down as terms of reference, frontrunners will not be rewarded and others will not be motivated to take steps to improve working conditions in international supply chains. In addition, enterprises can just tick the ‘no risk’ box, so if the procurer is not aware of common risks, there will be no plan of action and no risk analysis. The Dutch government should provide training, tools

may want to follow it. While an amendment of the WTO Agreement on Procurement may be a long shot, it is in any event of key importance that the new EU Procurement Directive creates an unambiguous legal basis for progressive choices made by EU member states such as the Netherlands.⁷²

In one economic sector, clear legal developments in public procurement law and, in fact, TPR in general, pertaining to human rights are taking place: the sector of private military and security companies (PMSCs). These regulatory developments largely appear to be related to the fact that PMSCs carry out sensitive security-related activities that were performed by states in the past (“outsourcing”), and by the higher risk of human rights violations in the conflict zones in which such corporations are active. Recently, a major TPR initiative with respect to the activities of PMSCs has been developed: the ‘International Code of Conduct’ for Private Security Service Providers (ICoC, 2010).⁷³ Earlier, a number of hiring states had adopted a document on their own obligations and good practices regarding PMSCs.⁷⁴ In the ICoC, PMSCs commit themselves, *inter alia*, to uphold human rights in their operations.⁷⁵ Only PMSCs can sign up to the ICoC, but NGOs and states also participate in the ICoC process: all stakeholders currently form a steering group, which is establishing a

and information of risks at sector and country level. Another point of concern is monitoring compliance with the contract terms. The government does not sample or measure the effects of this policy.’).

⁷² In this context, it is of note that the European Commission has used the WTO regime to ward off demands for the use of stronger human rights requirements in EU public procurement law. The WTO Agreement on Government Procurement does not contain a human rights clause either. See: European Commission, *Communication on the Community law applicable to public procurement and the possibilities for integrating social considerations into public procurement*, COM (2001) 566, 14; Collen Hanley, ‘Avoiding the issue: the Commission and human rights conditionality in public procurement’, *E.L. Rev.* 2002, 720.

⁷³ Available at: <http://www.icoc-psp.org> (last accessed 20 September 2014).

⁷⁴ ‘Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict’. Available at: http://www.icrc.org/eng/assets/files/other/icrc_002_0996.pdf (last accessed 20 September 2014). This document clarifies, but does not create, obligations of states, as, in case of a wrongful act committed by a PMSC, the responsibility of states which have contracted out their functions to PMSCs can be engaged on the basis of Article 5 of the ILC Articles on State Responsibility. This article provides that ‘[t]he conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.’

⁷⁵ The general commitment to human rights can be found in para.6(c) ICoC. More specific commitments can be found in para. 28 *et seq.* ICoC.

mechanism to monitor PMSC compliance with the ICoC (the “independent governance and oversight mechanism”).⁷⁶

PMSCs are a distinct category of duty-bearers in international law, as, insofar as they actively participate in hostilities and are parties to an armed conflict, they are bound by norms of international humanitarian law, which also include such human rights-informed provisions such as the prohibition of torture and cruel treatment, or outrages upon personal dignity.⁷⁷ It is contested, however, whether a PMSC – like any other corporation – also has direct obligations under international human rights law. Private regulation such as the ICoC can make a difference here, as it may clarify human rights obligations which PMSCs may not (yet) have under positive international law.

The ICoC has been received rather positively as the code; contains clear human rights commitments on the part of PMSCs; has been inclusive (involving civil society actors) and is thus considered more legitimate by stakeholders; is supported by the leading PMSCs players, and; is backed up by a monitoring system.⁷⁸ Ultimately though, PMSCs, like other corporations, are unlikely to fully commit themselves to complying with cost-raising TPR human rights programmes in the absence of clear economic incentives. Again, such incentives could be (and are) offered by states and

⁷⁶ A ‘Draft Charter of the Oversight Mechanism for the International Code of Conduct for Private Security Service Providers’ was distributed on 12 January 2012. This Draft provides for far-reaching civil society participation in the governance of the Mechanism. Draft Section III.2.B.a stipulates that the Board of the Mechanism ‘shall be made up of twelve Members, four of whom shall be nominated ... by affiliated Civil Society Organizations’ (the other Members are nominated by companies and affiliated Governments). Section V provides that ‘[a]ny non-profit organization may submit a request to the Mechanism to join Mechanism’s Civil Society Pillar as a civil society organization’. Text of draft available at: http://www.icoc-psp.org/uploads/Draft_Charter.pdf (last accessed 20 September 2014). A second draft was distributed on 30 January 2013 and will be discussed in the course of 2013.

⁷⁷ See: Common Article 3 of the Geneva Conventions 1949, which refers to ‘each Party to the conflict’. If PMSC staff are incorporated into the government’s armed forces, obviously, their conduct will be governed by international humanitarian law as applicable to such forces. See: Article 4(A)(1) of the Third Geneva Convention 1949 and Article 43 of Additional Protocol I 1977. For a discussion of PMSCs’ status under international humanitarian law, see: Lindsay Cameron, ‘Private military companies: their status under international humanitarian law and its impact on their regulation’, 88(863) *IRRC* 573 (2006).

⁷⁸ For a more extensive analysis of the quality, legitimacy and enforcement of the Code, see: Nicola Jägers, ‘Regulating the Private Security Industry: Connecting the Public and the Private through Transnational Private Regulation’, 6 *Human Rights and International Legal Discourse* 56, 73-87 (2012).

international organisations hiring PMSCs.⁷⁹ Public PMSC clients may offer such incentives by making membership of high-quality TPR initiatives (such as the ICoC)⁸⁰ a compulsory precondition for public procurement and contracting. Incorporation of TPR human rights commitments in government policies and contracts is a particularly powerful incentive to coax PMSCs into signing up to high quality TPR initiatives, as states and international organisations are the most important PMSC clients, who could thus effectively shut down the business of non-compliant PMSCs. This constitutes another example of the aforementioned “orchestration” of TPR by public actors steering it into a direction that is more protective of human rights.

Ultimately, the success of human rights public procurement policies will, to a great extent, be a function of corporate trade-offs between the economic cost of forfeiting lucrative government procurement contracts and the economic cost of implementing human rights programmes. In fields of the economy that do not thrive on public procurement, and thus where “governmental consumer” demand is less strong, the use of social requirements in public procurement will be ineffective. Other incentives may then be called for, such as financial reporting.

4.2. Financial reporting

The introduction of human rights-related financial reporting requirements by governments can serve as another incentive to improve TPR standards. As the purpose of financial reporting is to increase the transparency of a corporation’s dealings with a view to protecting *investors*, governments

⁷⁹ In relation to maritime PMSCs, see, for example: Art. 13.20 of the Belgian Act of 10 April 1990 concerning the regulation of private and particular security, as amended by Act of 16 January 2013 concerning the fight against maritime piracy (setting out the licensing requirements which PMSCs must meet in order to offer their services to Belgian-flagged vessels). For U.S. law governing contractors performing private security functions outside the United States specifically the Federal Acquisition Regulation (FAR), see: FAR Case 2011-029 [78 FR 37670](#), effective 22 July 2013. A fine overview of all U.S. laws and regulations (including procurement law) pertaining to PMSCs hired by the United States, the State that is making most use of PMSCs, can be found on the Private Security Monitor of the University of Denver: http://psm.du.edu/national_regulation/united_states/laws_regulations/index.html#federal_laws_and_regulations (last accessed 20 September 2014).

⁸⁰ Note that there are also other TPR initiatives taken by PMSC industry associations. See, notably: the U.S.-based International Stability Operations Association (ISOA) (Available at: <http://stability-operations.org/index.php> (last accessed 20 September 2014)), and the UK-based British Association of Private Security Companies (BAPSC) (Available at: <http://www.bapsc.org.uk> (last accessed 20 September 2014)).

have so far barely required that company reports also include information on the company's respect for human rights in its operations: human rights violations may not affect the position of investors.⁸¹ However, nothing prevents states from requiring companies to comply, *in the public interest*, with certain reporting standards that are developed by human rights TPR initiatives. This may allow investors to take informed divestment decisions, possibly after pressure from civil society groups drawing investors' attention to corporate human rights due diligence failures.

It should be noted that financial reporting requirements create corporate obligations under *domestic law*, even if they apply to the extraterritorial activities of corporations. They do not create direct obligations under international law for corporations. Nevertheless, expanding TPR and (inter) governmental initiatives with respect to human rights reporting may in due course constitute a critical mass of regulatory initiatives which gives rise to strong international reporting expectations for all corporations.

Some states are leading by example. In Denmark, for instance, large companies are required to report their economic, environmental and social performance,⁸² or explain why they have failed to report it. Along similar lines, South African companies listed on the Johannesburg Stock Exchange are required to produce a report integrating their financial and sustainability performance, or explain why they have not done so.⁸³ In the U.S., Congress has inserted a financial reporting provision in the Dodd-Frank Wall Street Reform Act (2010) aimed at stemming the flow of "conflict minerals", the extraction and sale of which fuels protracted conflicts in Central Africa. Section 1502 of this Act obliges issuers to annually disclose whether minerals 'necessary to the functionality or production of a product [they] manufacture' originated in the Democratic Republic of the Congo (DRC) or one of the nine adjoining countries. If this is the case, issuers are required to submit a report to the Securities and Exchange Commission (SEC) – the U.S. financial regulator – and make it

⁸¹ Threats of litigation, however, may clearly impact on the company's financial position and investors' interests. See, for example: the settlement, for an undisclosed sum, reached in *Doe v. Unocal* (2005). For the joint statement of Unocal and the plaintiffs upon reaching the settlement, see: EarthRights International, 'Final Settlement Reached in *Doe v Unocal*', 21 March 2005. See also: *Doe I v. Unocal Corp.*, 403 F.3d 708 (9th Cir. 2005), vacating earlier opinions. That same year, Unocal was acquired by another oil giant, Chevron.

⁸² Lov om ændring af årsregnskabsloven, LOV no. 1403 of 27 December 2008, published on 30 December 2008.

⁸³ King Report on Governance for South Africa (2009). Available at: <http://www.library.up.ac.za/law/docs/king111report.pdf> (last accessed 20 September 2014).

available to the public (the investors).⁸⁴

The Dodd-Frank Act does not define the standard of supply-chain due diligence required to vouch for the absence of conflict minerals from products. This standard was defined by the SEC in its final rule concerning Section 1502, adopted in August 2012, where it required, after receiving comments from stakeholders, that issuers use ‘a nationally or internationally recognized due diligence framework’ in their Conflict Minerals Reports, unless such a framework is not yet available for specific minerals.⁸⁵ This implies that the SEC does not set its own due diligence rules, nor does it allow individual companies to set them. Instead, the SEC defers to the due diligence standards (to be) developed by certain TPR or hybrid (governmental/non-governmental) MSI frameworks. The SEC justified this approach on the grounds that using such a framework may result in standardization, reduce auditing costs, allow for easier comparison of reports, and ‘provide issuers with a degree of certainty that their due diligence process is reliable and will pass a regulatory review’,⁸⁶ while acknowledging that compliance with a TPR framework as opposed to an individual company framework might come at a cost for companies.⁸⁷

Currently, only the OECD conflict minerals due diligence guidance – which is an *intergovernmental* rather than a TPR initiative – is mentioned,⁸⁸ but it

⁸⁴ § 1502(b)(1)(A) & (E) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Pub. L. No. 111-203), 124 Stat 2213-18; codified at 15 USC 78m note.

⁸⁵ SEC, 17 CFR Parts 240 and 249b, Release No. 34-67716; File No. S7-40-10, RIN 3235-AK84, Conflict Minerals, 22 August 2012, 27 (‘SEC Final Rule’). Where a nationally or internationally recognised due diligence framework becomes available for any such conflict mineral, issuers will be required to utilise that framework in exercising due diligence to determine that conflict minerals are from recycled or scrap sources. *Ibid*, 32 (as regards recycled or scrap sources). In an earlier communication, the SEC already indicated that ‘we expect that an issuer whose conduct conformed to a nationally or internationally recognized set of standards of, or guidance, for, due diligence regarding conflict minerals supply chains would provide evidence that the issuer used due diligence in making its supply chain determinations.’ SEC Proposed Rules, 17 C.F.R. parts 229 and 249, Release No. 34-63547; File No. S7-40-10, 53, n.146.

⁸⁶ SEC Final Rule, *Op.cit*, 205.

⁸⁷ *Ibid*, 283 (‘[T]his requirement also will limit the issuer’s flexibility in determining the source of origin and chain of custody of their conflict minerals. If the established requirement is more burdensome than what the issuer might have otherwise considered sufficient due diligence, it might make it more costly for issuers compared to using a due diligence process based on their own facts and circumstances.’).

⁸⁸ *Ibid*, 28 (‘Presently, it appears that the only nationally or internationally recognized due diligence framework available is the due diligence guidance approved by the

stands to reason that TPR initiatives which develop due diligence standards that are widely accepted by the market and civil society groups will inform the due diligence expected by the SEC.⁸⁹ In fact, the final SEC rule explicitly contemplates other nationally or internationally recognised due diligence frameworks, provided that they meet certain quality criteria.⁹⁰ Recognition does not come automatically. Indeed, as the final rule states:

to satisfy the requirements of the final rule, the nationally or internationally recognized due diligence framework used by the issuer must have been established by a body or group that has followed due-process procedures, including the broad distribution of the framework for public comment, and be consistent with the criteria standards in [the Generally Accepted Government Auditing Standards] established by the [U.S. Government Accountability Office].⁹¹

This government incentive – referencing TPR regulation for purposes of compliance with state law – will weed out TPR initiatives that do not live up to the minimum requirements of representation and effectiveness. Thus, again, mild government intervention in the marketplace may improve the quality of stateless law dealing with the same subject matter. Indeed, progress recently made by a number of large electronics companies regarding their efforts toward using and investing in conflict-free minerals

Organisation for Economic Co-operation and Development (“OECD”).

⁸⁹ See: Jonathan C. Drimmer and Noah Joshua Phillips, ‘Sunlight for the Heart of Darkness: Conflict Minerals and the First Wave of SEC Regulation of Social Issues’, *6 Human Rights and International Legal Discourse* 131, 147 (2012) (arguing that ‘while there may be variation in due diligence at the outset, it is reasonable to expect some standardisation in the due diligence process across issuers’ and that ‘this will flow naturally from challenges by investors, the SEC and probably human rights groups, the results of which will be accepted by the market and distilled into widely-accepted standards’).

Some TPR initiatives were being designed before the passing of the Dodd-Frank Act, but according to the SEC, “stakeholders” interest in ensuring that initiatives will be compatible with SEC’s anticipated final rule appears to have provided a substantial impetus to further develop initiatives’. United States Government Accountability Office, Report to Congressional Committees, ‘Conflict Minerals Disclosure Rule: SEC’s Actions and Stakeholder-Developed Initiatives’, GAO-12-763, July 2012, 17. For an overview of the relevant initiatives, see: *Ibid*, 17-18.

⁹⁰ SEC Final Rule, *Op.cit*, 205 (‘The final rule does not mandate that an issuer use any particular nationally or internationally recognized due diligence framework, such as the OECD’s due diligence guidance, in recognition of the fact that other evaluation standards may develop that satisfy the intent of the Conflict Minerals Statutory Provision.’).

⁹¹ *Ibid*, 207.

in their products may at least in part be attributed to Section 1502.⁹² The eventual issuance of the SEC final rule is likely to further boost the development of MSIs in the field of conflict minerals.⁹³

Apart from Section 1502 of the U.S. Dodd-Frank Act, it is expected that in the near future human rights and, more broadly, TPR-steered and government-orchestrated sustainability reporting will further increase. It is of note in this respect that paragraph 47 of the outcome report of the World Summit on Sustainable Development, *Rio+20* (2012), explicitly acknowledges the importance of sustainability reporting and calls on all stakeholders to develop models of best practice.⁹⁴ This paragraph is a clear reminder that the international community expects TPR to play a leading role in corporate sustainability reporting. The commitment made in Rio is not to remain a dead letter in any event: subsequent to the adoption of the document, the governments of Brazil, Denmark, France and South Africa formed a “Group of Friends of Paragraph 47” to convince states and

⁹² The ‘Raise Hope for Congo’ campaign of the Enough Project may partly be credited for this (Available at www.enoughproject.org and www.raisehopeforcongo.org (last accessed 20 September 2014)). This project has developed a conflict-free campus and a conflict-free cities initiative, and published conflict minerals company rankings in 2010 and 2012. The 2012 report demonstrates that most firms have improved their scores from the 2010 ranking, and submits that this progress has been spurred by Section 1502 of the Dodd-Frank Act and growing consumer activism. Sasha Lezhnev and Alex Hellmuth, Enough Project, ‘Taking Conflict Out of Consumer Gadgets’, Company Rankings on Conflict Minerals, 16 August 2012. The report identifies HP and Intel as industry leaders (obtaining scores of 60 and 54 respectively), and HTC and Nintendo as laggards (obtaining scores 4 and 0 respectively).

⁹³ As long as the SEC had not yet issued a final rule (although it was required to do so by 17 April 2011, pursuant to Section 1502(b) of the Dodd-Frank Act), the development of relevant MSIs was seriously hampered. See: United States Government Accountability Office, Report to Congressional Committees, ‘Conflict Minerals Disclosure Rule: SEC’s Actions and Stakeholder-Developed Initiatives’, GAO-12-763, July 2012, 16. At the same time, the SEC’s delay in issuing the final rule could at least in part be blamed on the stakeholders themselves, as they have flooded the SEC with comments and requests, thus obliging the SEC to extend the comment period and organise additional meetings. *Ibid*, 15.

⁹⁴ Rio+20 Outcome document ‘The future we want’, 2012, para. 47 (‘We acknowledge the importance of corporate sustainability reporting and encourage companies, where appropriate, especially publicly listed and large companies, to consider integrating sustainability information into their reporting cycle. We encourage industry, interested governments and relevant stakeholders with the support of the United Nations system, as appropriate, to develop models for best practice and facilitate action for the integration of sustainability reporting, taking into account experiences from already existing frameworks and paying particular attention to the needs of developing countries, including for capacity-building.’)

corporations of the importance of corporate sustainability reporting.⁹⁵

Technical support and advice to this commitment is given by a leading TPR initiative, called the Global Reporting Initiative (GRI). GRI is a (non-binding) Amsterdam-based MSI founded in 1997 and endorsed by governments in the 2002 World Summit on Sustainable Development Plan of Implementation.⁹⁶ It has developed a “Sustainability Reporting Framework”, which enables organisations to measure and report their economic, environmental, social and governance performance,⁹⁷ including with respect to human rights.⁹⁸ After *Rio+20*, GRI will continue to play a lead role, as it is developing a next generation of its Reporting Guidelines (G4), which will make sustainability reporting easier and more accessible for governments and organisations worldwide.⁹⁹

⁹⁵ ‘More and better sustainability reporting after Rio+20’, thanks to paragraph 47 of the outcome document ‘The future we want’, Global Reporting Initiative communiqué, 2 July 2012. The Friends adopted a Charter on 11 December 2012. Available at: <https://www.globalreporting.org/SiteCollectionDocuments/para47/Group-of-Friends-of-Paragraph-47-Charter.pdf> (last accessed 20 September 2014); As far as environmental reporting is concerned, at the 2012 Rio+20 conference itself, the United Kingdom announced that all businesses listed on the Main Market of the London Stock Exchange will have to report their levels of greenhouse gas emissions from the start of April 2013. Available at: <http://www.defra.gov.uk/news/2012/06/20/greenhouse-gas-reporting> (last accessed 20 September 2014). It is not fully clear whether this government initiative of compulsory regulation will link up with existing TPR initiatives, however.

⁹⁶ Johannesburg Plan of Implementation, paragraph 18 (‘Enhance corporate environmental and social responsibility and accountability. This would include actions at all levels to (a) encourage industry to improve social and environmental performance through voluntary initiatives ... taking into account such initiatives as the ... Global Reporting Initiative guidelines on sustainability reporting.’). Since 2008 Governments have formed part of the GRI Governmental Advisory Group, the mandate of which is to provide informal high-level feedback and advice to GRI. Available at: [www.globalreporting.org > network > GRI and governments > Governmental Advisory Group](http://www.globalreporting.org/network/GRI-and-governments-Governmental-Advisory-Group) (last accessed 20 September 2014).

⁹⁷ Available at: www.globalreporting.org (last accessed 20 September 2014).

⁹⁸ The social category of the Framework includes seven human rights performance indicators. Global Reporting Initiative, Indicator Protocols Set Human Rights (HR), version 3.0, 2000-2006, (1) Investment and Procurement Practices; (2) Non-Discrimination; (3) Freedom of Association and Collective Bargaining; (4) Child Labor; (5) Forced and Compulsory Labor; (6) Security Practices; (7) Indigenous Rights.

⁹⁹ GRI press communiqué, 4 July 2012. Available at: <https://www.globalreporting.org/information/news-and-press-center/Pages/Leading-governments-join-together-to-commit-to-corporate-sustainability-reporting.aspx> (last accessed 20 September 2014).

The synergies between governments and TPR initiatives such as GRI make it highly likely that sustainable corporate reporting will increase, in particular if governments make such reporting compulsory.¹⁰⁰ In the long run, if corporate reporting practice, as facilitated or required by governments, becomes sufficiently widespread, and a conviction emerges that such a practice is also required by international law, corporations may become direct addressees of human rights reporting obligations.

4.2.a. Trade concessions

Another orchestration tool that is being used (and could be used more frequently) by governments to encourage corporations to strengthen TPR standards in the business and human rights field is the use of trade concessions: states pledge preferential access of goods on their markets provided that these goods are produced in accordance with high-quality TPR standards developed by the relevant stakeholders themselves. Such pledges could also be inserted as “bilateral” social clauses into international trade agreements.¹⁰¹

In particular, the U.S. has used the mechanism of preferential treatment of goods on U.S. markets to strengthen labour standards in factories in developing countries. It has been successful in inserting clauses in some regional and bilateral trade agreements, in particular with Latin American

¹⁰⁰ The Friends of Paragraph 47 have emphasised in this respect that they ‘are convinced that the role of Governments is essential to foster a culture of corporate transparency’, in that ‘Governments play an essential role in ensuring the effective application of laws and regulations, as well as creating a culture of corporate transparency.’ Note, however, that the Friends ‘acknowledge the importance of stakeholders’ views and perspectives, and ... commit to engage with interested stakeholders in an open and constructive dialogue’. See: Charter, *Op.cit.*

¹⁰¹ It is recalled that the agreements negotiated in the framework of the World Trade Organization do not feature a social clause that would allow states to discriminate against goods that are not produced in a “social” manner. Notably, developing countries have resisted a social clause out of fear that it would justify protectionist measures taken by industrialised countries. See, for example: ILO Declaration on Fundamental Principles and Rights at Work, 1998, paragraph 5 (stressing ‘that labour standards should not be used for protectionist trade purposes, and that . . . the comparative advantage of any country should in no way be called into question by this Declaration and its follow-up’). But, more recently, see: the World Commission on the Social Dimension of Globalization, 2004, paragraph 421 (‘no country should achieve or maintain comparative advantage based on ignorance of, or deliberate violations of, core labour standards’), and the International Labour Conference, Declaration on Social Justice for a Fair Globalization, 2008, I A (iv) (‘the violation of fundamental principles and rights at work cannot be invoked or otherwise used as a legitimate comparative advantage’).

countries. These clauses demand attention for labour conditions, although so far the U.S. has not discriminated against goods produced in factories that do not adequately comply with labour standards.¹⁰² One U.S.–supported bilateral sector agreement has proved remarkably successful, however: the *Better Factories Cambodia Initiative*, which is rooted in the 1999 U.S.-Cambodia Textile Agreement¹⁰³ and ran from 2003 through 2008. It was later continued as an ILO programme called the *Better Factories Cambodia Project*, which features a forum of the foreign companies buying the garments.¹⁰⁴ The U.S.-Cambodia agreement provided that export quotas from Cambodia to the U.S. would be raised annually on the condition that Cambodia's garment sector 'substantially comply' with 'internationally recognized labour standards.'¹⁰⁵ Depending on the level of compliance over the previous year, Cambodian-produced garments would receive a quota bonus.¹⁰⁶

Neither the Cambodia initiative nor the other bilateral/regional trade agreement clauses specifically refer to TPR. That being said, the Cambodia initiative was essentially based on Cambodian manufacturers voluntarily signing up to international labour standards, and indicating their willingness to be inspected. It also involved private stakeholders in its Project Advisory Committee, which consisted of representatives of the Cambodian government, the Manufacturers Association of Cambodia and the Cambodian trade union movement.¹⁰⁷ Accordingly, the Cambodian

¹⁰² Ludo Cuyvers and Tim De Meyer, 'Market-driven promotion of international labour standards in Southeast Asia: the corporatization of social justice', in Axel Marx, Miet Maertens, Johan Swinnen and Jan Wouters (eds.), *Private Standards and Global Governance: Economic, Legal and Political Perspectives* (Cheltenham: Edward Elgar, 2012), 114, 121-124.

¹⁰³ UCTA, 20 January 1999.

¹⁰⁴ In 2011, the buyers' forum of the project consisted of 32 brands that compromised 60% of Cambodia's garment export. See: Clean Clothes Campaign, *10 Years of the Better Factories Cambodia Project: a Critical Evaluation*, 2012, 8. An example of a Cambodian company involved is M&V International Manufacturing Ltd, an example of a foreign buyer involved is H&M. For an evaluation of the entire project, since its very inception, after 10 years, see: Clean Clothes Campaign, *10 Years of the Better Factories Cambodia Project: a Critical Evaluation*, 2012.

¹⁰⁵ UCTA, 20 January 1999, Article 10(D).

¹⁰⁶ Between 2000 and 2004, for instance, the quota bonus varied between 9 and 18%, compared to exports the previous year. Sandra Polaski, 'Combining Global and Local Forces: The Case of Labor Rights in Cambodia', Carnegie Endowment for International Peace, 2006, 4 (also published in 34(5) *World Development* 2006).

¹⁰⁷ The Project Advisory Committee (PAC) has been continued under the Better Factories Cambodia project and currently comprises three representatives each from the Royal Government of Cambodia, the garment manufacturer's association (GMAC) and trade unions. For more information, including the specific tasks of the PAC, see: http://betterwork.com/cambodia/?page_id=302#sthash.erkbxSK0.dpuf (last accessed 20 September 2014).

initiative could rightly be considered a private regulatory initiative. Private actors were, however, not involved in compliance monitoring; this was exclusively done by the International Labour Organization (ILO), which had never done so before.¹⁰⁸

The Cambodian initiative turned out to be a remarkable success, not only because of the involvement of various private stakeholders, but also – and perhaps chiefly – because of the incentives offered by governments (the U.S. government in particular) and the support given by an international organisation (the ILO) to private actors' commitments to live up to international labour standards.¹⁰⁹ However, the initiative was not watertight, as it did not prevent non-compliant businesses from continuing to reap the benefits of preferential trade access to the U.S.: such access was granted on the basis of *substantial collective compliance* with internationally recognised labour standards, which enabled certain businesses to free-ride on the efforts of others.¹¹⁰ Later, however, the Cambodian government agreed by law to condition the availability of export quota for Cambodian businesses on their participation in the monitoring programme.¹¹¹

The successful Cambodian experiment has not been fully replicated elsewhere, possibly because the Cambodian circumstances were not present. Such circumstances included: (1) strong public guidance by importing states willing to give preferential treatment and by international organisations willing to offer expertise, and by the host state facilitating the initiative; (2) the presence of local business associations that were willing to subscribe to human rights norms, implement them in practice, and allow inspections (bottom-up pressure); (3) the existence of a highly developed monitoring and inspection system backed by an international organisation and foreign donors; (4) an export-oriented economy in which international trade incentives could thrive; (5) a rather transparent domestic supply chain with manufacturing firms that did not depend on

¹⁰⁸ See: www.betterfactories.org ('About us') (last accessed 20 September 2014). The monitoring organisation is called BFC (Better Factories Cambodia).

¹⁰⁹ Ludo Cuyvers and Tim De Meyer, *Op.cit.*, 138-141, also refer to the excellent information management system for monitoring and reporting, and the planned exportation of the mechanism to other countries.

¹¹⁰ Donald Wells, "'Best practice" in the regulation of international labor standards: lessons of the U.S.-Cambodia textile agreement', 27 *Comparative Labor Law and Policy Journal* 357-376 (2006).

¹¹¹ Prakas No. 108 MOC/M2001, Cambodian Ministry of Commerce, March 28, 2001. See, also: D. Vogel, 'The Private Regulation of Global Corporate Conduct: Strengths and Limitations', 31. Available at: <http://www.kellogg.northwestern.edu/research/fordcenter/documents/10.03%20Vogel%20globalgov%20NW.pdf> (last accessed 20 September 2014). Sandra Polaski, *Op.cit.*

shady subcontractors, and; (6) western garments purchasers' willingness to condition purchasing decisions on local suppliers' continued compliance with international labour standards *after* the expiry of the preferential trade agreement.¹¹²

It is difficult to say whether such purchasing decisions are informed by a conviction that purchasers are legally obligated to protect human rights in relation to their suppliers. However, if major retailers' reaction to the ILO's recently unveiled plan to name and shame Cambodian factories that do not comply with labour standards is anything to go by, it appears that there is an emerging consensus that retailers should refrain from buying from their suppliers when corrective action is not swiftly taken after labour law problems have been detected.¹¹³

In spite of the propitious background of the Cambodia initiative, the circumstances mentioned may not be so unique to Cambodia. Ultimately, the success of a fair labour standard initiative simply hinges on the *willingness* of a multitude of stakeholders – states, international organisations, corporations, trade unions, NGOs *et cetera* – to have it succeed through collaborative arrangements. Therefore, governments and international organisations may want to further explore the potential orchestration of local or transnational private regulation initiatives through preferential trade agreements.

Nevertheless, to fully realise the potential of government-backed TPR in this field, the vexing issue of the compatibility with WTO law on import restrictions based on foreign production processes – such as processes carried out in substandard labour conditions – is in need of clarification (after all, it is not an accident of history that the GATT does not feature a social clause in its Article XX). While, as such, trade distortions as a result of TPR may not be problematic, since they are created by non-state actors rather than states, government endorsement of TPR may well rise to the level of state regulations or requirements covered by Article III of the GATT that unacceptably discriminate against foreign manufacturers and protect domestic manufacturers, even if they protect a global value such as human rights. Additionally, from a global justice perspective, states contemplating the imposition of sanctions on goods imported from states where manufacturers are involved in violations of (international) labour

¹¹² *Ibid*, 32 (referring to Gap and Nike).

¹¹³ 'Cambodian Garment Factories Come Under Scrutiny: U.N.-Backed Group to Publicize Safety Failings Over Government Objection', *Wall Street Journal*, 23 September 2013 (citing Wal-Mart and H&M's support for the ILO plan, which is implemented from 1 January 2014 onwards).

law, may want to give some thought to the adverse effects which such sanctions may have on local employment¹¹⁴ – an issue that was also raised above in respect of western-dominated TPR.

5. Concluding observations

In the field of global business and human rights, stateless law has entered the regulatory arena: transnational corporations, often in cooperation with other stakeholders, have developed private standards that regulate corporate conduct, especially in developing countries where state willingness to regulate is low. Such transnational private regulation may have definite advantages over state regulation: it is more responsive to the needs of businesses and allows them to genuinely internalise the norms, thus increasing their effectiveness. Nonetheless, as human rights TPR is not simply concerned with technical standardisation, but rather with the promotion of public values, corporations have shown certain resistance to meaningful TPR norm-setting and genuine involvement of other stakeholders, especially in the absence of sustained consumer pressure. Nonetheless, it appears that the international community now expects that corporations take part, in good faith, in regulatory initiatives aimed at strengthening human rights. Few corporations would submit that they have no responsibility at all as regards human rights. These top-down and bottom-up dynamics may, in due course, translate into the crystallisation of direct corporate obligations in respect of a number of core human rights standards.

Before this can occur, however, TPR in the human rights field may have to be shored up by offering some external incentives. States and international organisations, as public regulators serving the public good (including human rights), are ideally placed to offer these incentives. There are signs that public regulators are taking this regulatory challenge seriously, but more needs to be done to increase the quality of TPR. In this contribution, the progressive development of a number of pertinent public-law mechanisms – public procurement and government contracting, financial reporting requirements, and trade concessions – has been advocated.

It is important to realise that this new type of “facilitative” or “orchestrating” government intervention differs from classic command regulation: it does

¹¹⁴ This largely explains the developing countries’ opposition to a “social clause”, although northern NGOs and trade unions have continued to urge a greater role for labour rights in trade policy. See, for example: International Trade Union Confederation, ‘Global Unions Statement of Priorities for the 9th WTO Ministerial Conference’ (Bali, Indonesia, 3-6 December 2013).

not require that businesses comply with a fixed set of rules. Rather, it allows businesses to choose the regulatory option they see fit, provided this option meets minimum standards of quality and due process. Often, businesses may not even be obliged to comply with any rules, but then they may forfeit the (possibly sizable) benefits - e.g. government contracts or licensing - that come with participation in recognised TPR initiatives.

Ultimately, the aim of this new kind of soft government intervention is not to re-assert the power of the state and supplant stateless law, but rather to support and improve the latter, and defer to it when adequate. It is no exaggeration to say that this represents a paradigmatic shift in our thinking about the desired nature and scope of government regulation in the 21st century.