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# Private Actors as Transnational Regulators: The Case of Freedom of Association

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## ABSTRACT

This article examines whether content of international public norms is significantly altered when embedded in transnational private labour regulations (TPLR); and, if it is, whether these alterations enrich or weaken the effect of these norms. Through the case study of freedom of association as regulated in five major TPLR initiatives, this research pursues a textual analysis of TPLR generated norms, in order to evaluate their content, and to assess the nature of any modifications of international labour law norms. The findings reveal that while TPLR instruments are generally perceived as merely implementing internationally accepted norms, they in fact hold a substantial norm-generating role, actively shaping the content of the norms they apply. The evidence further indicates that private actors can contribute to the design of innovative norms. At the same time, it was found that corporations had in several instances exerted negative influences over freedom of association norms, and that when additional actors participated in the regulatory process, this right was better fulfilled. In addition, while meaningful participation of public actors in private regulatory initiatives was found to effectively prevent the undermining of the right to freedom of association, global union federations were less successful in this regard.

## 1. INTRODUCTION

*'A Government representative of India had persistently expressed concern at any sort of parallel body of labour standards particularly from a private body like the ISO. She noted that the ILO, despite its sincere efforts, had achieved only limited success through its collaboration with the ISO. She wished to know what mechanism was available under the 2013 Agreement to ensure that ISO standards which were not in line with international labour standards would not be adopted. Since the ILO was the supreme body for setting international labour*

*standards and the world's guide on matters concerning the welfare of workers, private compliance initiatives that diverged from ILO standards must be discouraged.*<sup>1</sup>

The above extract is derived from a session of the Governing Body of the International Labour Organization (ILO) concerning a cooperation agreement between the ILO and the International Organization for Standardization (ISO), for the development of new ISO standards on occupational health and safety. During the collaborative process, a disagreement arose in which the ISO opined that 'ISO standards are not required to defer to international labour standards in case of conflict'.<sup>2</sup> And, indeed, the developed standards were found to be inconsistent with principles of international labour standards.<sup>3</sup> These problems eventually led the ILO to terminate the agreement and refrain from further cooperation with the ISO.<sup>4</sup>

This conflict serves as a good illustration of some of the concerns stemming from the proliferation in recent decades of initiatives for transnational private labour regulation (TPLR). This phenomenon has justly gained the attention of the ILO, which in 2010, for instance, outlined its concerns over what it described as a 'significant growth in corporate social responsibility initiatives'.<sup>5</sup> Academics have also been preoccupied with what has been described as 'an explosion of private mechanisms of labor enforcement in global supply chains'.<sup>6</sup> Undoubtedly, the widespread privatisation of international labour regulation cannot be overlooked.

Such a dominant practice requires the examination of its implications for the international labour regulatory regime. It will be argued that while TPLR initiatives are generally perceived as merely implementing internationally accepted norms, these private

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<sup>1</sup> Governing Body (325<sup>th</sup> Session) Minutes of the 325th Session of the Governing Body of the International Labour Office (Geneva 29 October–12 November 2015) [242].

<sup>2</sup> Governing Body (325<sup>th</sup> Session) Eleventh Item on the Agenda: Review of the Implementation of ILO–ISO Agreements (Geneva 29 October–12 November 2015) [2].

<sup>3</sup> Governing Body (331<sup>st</sup> Session) Tenth Item on the Agenda: Review of the Implementation of ILO–ISO Agreements (Geneva 26 October–9 November 2017) [4]–[5].

<sup>4</sup> Governing Body (331<sup>st</sup> Session) Minutes of the 331st Session of the Governing Body of the International Labour Office (Geneva 26 October–9 November 2017) [320].

<sup>5</sup> Governing Body (309<sup>th</sup> Session) Labour Administration and Inspection: Challenges and Perspectives (Geneva November 2010) [32].

<sup>6</sup> Kevin Kolben, 'Dialogic Labor Regulation in the Global Supply Chain' (2015) 36 *Michigan Journal of International Law* 425, 427.

regulatory instruments should in fact be seen as dynamic systems that can influence the nature of the norms they adopt and shape their content. TPLR thus hold the potential of deflecting the content of the international labour standards and principles that are embedded in these regulations.

Addressing this concern, this research will pursue a textual analysis of TPLR generated norms, examining and evaluating their provisions, ultimately shedding light on the directions in which TPLR initiatives are steering international labour regulation. Such a text-based analysis is important as written norms serve the basis for enforcement in practice.<sup>7</sup> Indeed, the rules themselves are ‘structuring attention and shaping actors’ interests and strategies’.<sup>8</sup> Moreover, these private norms can with time institutionalise into public ‘hard’ law.<sup>9</sup> Therefore, to the extent that these norms differ from international labour law, this can potentially have significant influence over the operation and implementation of international labour standards contained in legal texts.

The existing research on the content of TPLR initiatives has focused thus far on examining their provisions in a general manner, such as by identifying the presence of references to broad categories of international labour law norms,<sup>10</sup> or on their intersection with public and customary rules which are applicable in a domestic setting.<sup>11</sup> This study aims to contribute to these debates by providing a more in-depth and comprehensive analysis of

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<sup>7</sup> This is particularly true given the seemingly shift in the discourse of companies’ compliance, from legal compliance towards compliance with private codes of conduct. See: Tim Bartley, ‘Corporate Accountability and the Privatization of Labor Standards: Struggles over Codes of Conduct in the Apparel Industry’ (2005) 14 *Research in Political Sociology* 211, 224–226.

<sup>8</sup> Tim Bartley, ‘Transnational Governance as the Layering of Rules: Intersections of Public and Private Standards’ (2011) 12 *Theoretical Inquiries in Law* 517, 541.

<sup>9</sup> *ibid* 524; Kevin Kolben, ‘Transnational Labor Regulation and the Limits of Governance’ (2011) 12 *Theoretical Inquiries in Law* 403, 430; Kenneth W. Abbott and Duncan Snidal, ‘Strengthening International Regulation through Transmittal New Governance: Overcoming the Orchestration Deficit’ (2009) 42 *Vanderbilt Journal of Transnational Law* 501, 531–532; John J. Kirton and Michael J. Trebilcock, ‘Introduction: Hard Choices and Soft Law in Sustainable Global Governance’ in John J. Kirton and Michael J. Trebilcock (eds), *Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment and Social Governance* (Aldershot: Ashgate, 2004) 3, 12.

<sup>10</sup> See, eg, Michael Urminsky, ‘Self-Regulation in the Workplace: Codes of Conduct, Social Labeling and Socially Responsible Investment’ (2001) Series on Management Systems and Corporate Citizenship, MCC Working Paper No. 1, 21–32 <[http://www.ilo.org/wcmsp5/groups/public/---ed\\_emp/documents/publication/wcms\\_142317.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_emp/documents/publication/wcms_142317.pdf)> accessed 30 April 2019; John G. Ruggie, ‘Human Rights Policies and Management Practices of Fortune Global 500 Firms: Results of a Survey’ (2006) Corporate Social Responsibility Initiative, Working Paper No. 28 <[https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/cris/files/workingpaper\\_28\\_ruggie.pdf](https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/programs/cris/files/workingpaper_28_ruggie.pdf)> accessed 30 April 2019. For an assessment of private codes of conduct, briefly touching upon their content, see: Dara O’Rourke, ‘Outsourcing Regulation: Analyzing Nongovernmental Systems of Labor Standards and Monitoring’ (2003) 31 *Policy Studies Journal* 1.

<sup>11</sup> Bartley, ‘Transnational Governance as the Layering of Rules: Intersections of Public and Private Standards’ (n 8).

TPLR provisions, while assessing the nature of their norms in comparison to international labour law.

The influence of private regulations on the content of the legal norms they apply will be examined in light of two contrasting perspectives regarding the desirability of this phenomenon. First, these regulatory initiatives can be characterised as models of ‘new governance’. Such a perspective sheds light on the potential that these initiatives hold in generating innovative norms and offering solutions to common practical problems of the workplace environment. Second, the involvement of private actors in norm-generating processes raises justifiable concerns regarding conflicts of interest, accountability, transparency and unrepresentative processes. The examination will also take into account industrial relations theories related to workplace regulation and the manner in which norms are created in the workplace. Such literature will contribute to better understanding the potential influences of private actors on workplace regulations.

This research will examine these questions, focusing on the specific case study of freedom of association. Apart from being a fundamental labour right, whose manner of regulation is worthy of scrutiny, freedom of association was chosen due to its particular risk of being undermined under a TPLR regime. This is because the degree of influence that employers maintain under such a regime might result in relatively weaker commitments when it comes to a right that is commonly perceived as weakening managerial prerogative and hindering business profitability. The norms of freedom of association will be examined through the following TPLR instruments: the SA8000 Standards of the Social Accountability International (SAI); the United Nations (UN) Global Compact; H&M’s corporate social responsibility (CSR) code of conduct, the Sustainability Commitment; and H&M’s international framework agreements (IFA). These particular instruments represent a wide scope of private actors participating in regulatory roles, including transnational corporations, NGOs and global union federations. Each of these private regulatory initiatives affects millions of workers throughout dozens of countries around the globe.

The findings of this research are that private actors do shape the content of the public norms they apply. The evidence further indicates that such private influence can be both positive and negative from the point of view of promoting the values underpinning the public norms: offering at times innovative regulations while in other instances undermining the public interest. Moreover, the findings reaffirm that a key variable in determining the nature of the influence over the norms is the composition of the regulating actors. As such, it was

found that the corporation in several instances had a negative influence on freedom of association norms, and that when additional actors were involved, this right was better fulfilled. In addition, while meaningful participation of public actors in private regulatory initiatives was found to be effective in ensuring the public interest, global union federations were less successful in this regard.

The structure of this article is as follows: In section 2, the theoretical background will be presented and research questions laid out. The following section will introduce and justify the case study at hand: the regulation of freedom of association under five major TPLR initiatives. Presenting the findings, section 4 will identify the areas of divergence, both positive and negative, of the private norms of freedom of association from norms of international labour law. Section 5 concludes.

## **2. THEORETICAL BACKGROUND AND RESEARCH QUESTIONS**

### **A. Transnational Private Labour Regulation and International Labour Law**

The globalised economy has restricted the ability of traditional international labour law to ensure the respect of labour rights. While the fulfilment of labour law on an international scale is dependent on nation states' perspective and enforcement authority, a growing proportion of the economic system is operating across borders. Moreover, the global supply chain management of multinational corporations has allowed these companies to displace costs and risks down the value chain, while also taking advantage of regulatory arbitrage to avoid liabilities.<sup>12</sup> As a result, the capacity of states to regulate working conditions has been weakened.<sup>13</sup> This process has been characterised as the 'regulatory gap' within global supply chains.<sup>14</sup>

In an attempt to enhance the regulation of the globalised labour regime, a variety of soft law initiatives have been introduced<sup>15</sup> – including a growing reliance on private methods of

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<sup>12</sup> Paul Marginson, 'Governing Work and Employment Relations in an Internationalized Economy: The Institutional Challenge' (2016) 69 *Industrial and Labor Relations Review* 1033, 1033–1037.

<sup>13</sup> H. W. Arthurs, 'Labour Law without the State?' (1996) 46 *University of Toronto Law Journal* 1, 4–7; Philip Alston, 'Core Labour Standards and the Transformation of the International Labour Rights Regime' (2004) 15 *European Journal of International Law* 460, 509.

<sup>14</sup> Marginson (n 12) 1034.

<sup>15</sup> See, eg, Anke Hassel, 'The Evolution of a Global Labor Governance Regime' (2008) 21 *Governance* 231, 237.

regulation on an international scale.<sup>16</sup> TPLR refers to non-state mechanisms that are intended to ‘govern labor practices in global supply chains when domestic governments and international institutions are unable or unwilling to adequately do so’.<sup>17</sup> These private regulations have been adopted to respond to pressures exerted from civil society and consumers, over concerns regarding employees’ working conditions.<sup>18</sup> Other factors contributing to the proliferation of TPLR initiatives are the potential economic and managerial benefits to corporations, such as improved employee morale arising out of good labour conditions. These advantages can serve as a counterweight to the private costs associated with TPLR.<sup>19</sup>

TPLR instruments differ considerably from each other in several respects. A relevant point of divergence concerns the composition of the actors involved. Accordingly, some instruments include cooperation between public and private bodies, such as the UN Global Compact; while other forms are completely private, such as the various CSR codes of conduct. In addition, some of these private regulations are unilateral, while others accommodate a multi-stakeholder process. For example, unilateral CSR codes of conduct are performed at the discretion of multinational corporations, while in international framework agreements they cooperate with global union federations. Other forms, such as the SAI’s SA8000 Standards, involve civil society organisations.

The stated objective of TPLR instruments is reaching compliance with international labour law.<sup>20</sup> As we will see, this is evident also in the TPLR instruments examined in this study. However, it will be argued that these initiatives hold a greater capacity than merely adopting international labour norms. TPLR measures are often accompanied by supporting processes for the formulation of norms,<sup>21</sup> their interpretation<sup>22</sup> and their implementation.<sup>23</sup> As a result, they serve as dynamic systems that can potentially shape the nature of the

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<sup>16</sup> See, eg, Bob Hepple, ‘New Approaches to International Labour Regulation’ (1997) 26 *Industrial Law Journal* 353, 364–365.

<sup>17</sup> Kolben, ‘Dialogic Labor Regulation in the Global Supply Chain’ (n 6) 436.

<sup>18</sup> *ibid* 428.

<sup>19</sup> Bob Hepple, ‘Race to the Top? International Investment Guidelines and Corporate Codes of Conduct’ (1998) 20 *Comparative Labor Law & Policy Journal* 347, 355.

<sup>20</sup> Hugh Collins, Keith Ewing and Aileen McColgan, *Labour Law* (Cambridge: CUP, 2012) 72–73.

<sup>21</sup> See, eg, ‘Revision Process’ (*Social Accountability International*) <<http://www.sa-intl.org/index.cfm?fuseaction=Page.ViewPage&pageId=1546>> accessed 30 April 2019.

<sup>22</sup> See, eg, ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (204th Session Geneva 16 November 1977) 17.

<sup>23</sup> See, eg, OECD Guidelines for Multinational Enterprises (OECD Publishing 2011) 65–89; ‘UN Global Compact Policy on Communicating Progress’ (*UN Global Compact*, 1 March 2013) <[https://www.unglobalcompact.org/docs/communication\\_on\\_progress/COP\\_Policy.pdf](https://www.unglobalcompact.org/docs/communication_on_progress/COP_Policy.pdf)> accessed 30 April 2019.

international labour law norms that are embedded in TPLR instruments and deflect their content. This can occur through the choice of norms, namely the provisions which are included and the ones omitted; the specification of broader norms to particular workplace situations; and by way of practical application to different incidents. Such an observation on the modus operandi of TPLR instruments leads to the first question that will be examined in this study: can we identify in the texts of TPLR instruments modifications to the content of international labour law norms?

## **B. Private Actors Can Innovatively Influence the Generated Norms**

The use of TPLR in global labour governance can be described as a transnational form of the ‘new governance’ model of regulation.<sup>24</sup> While new governance describes a broad and diverse range of regulatory measures, scholars generally agree on several characterising elements common to them all.<sup>25</sup> According to new governance literature, traditional regulation was based on a centralised process, operated by the state, and which resulted in mandatory rules.<sup>26</sup> As per the international level, traditional labour regulation was performed by an international organisation, the ILO, and through the adoption of labour conventions that ratifying countries are committed to apply.<sup>27</sup> Conversely, contemporary new governance, including TPLR, reflects a regulatory shift towards a decentralised process, involving diverse private actors, and operating through voluntary, ‘soft law’ measures. States and international organisations are expected to provide the ‘orchestration’ of this system as a whole.<sup>28</sup>

The new governance theories suggest several advantages of these regulatory measures for the reproduction of norms. First, the decentralised process allows to draw on the expertise and experiences of dispersed actors, rather than relying solely on the public regulator.<sup>29</sup> This, in turn, promotes experimentation between different approaches.<sup>30</sup> Moreover, the involvement of the affected stakeholders, mainly workers and corporations,

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<sup>24</sup> Kolben, ‘Dialogic Labor Regulation in the Global Supply Chain’ (n 6) 428; Abbott and Snidal (n 9) 512.

<sup>25</sup> Kolben, ‘Dialogic Labor Regulation in the Global Supply Chain’ (n 6) 431; Abbott and Snidal (n 9) 507–509.

<sup>26</sup> Abbott and Snidal (n 9) 520–530; Orly Lobel, ‘The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought’ (2004) 89 *Minnesota Law Review* 342, 371–373, 381, 388.

<sup>27</sup> Abbott and Snidal (n 9) 533–537.

<sup>28</sup> *ibid* 520–532, 541–545; Lobel (n 26) 373–385, 388–395, 400–404.

<sup>29</sup> Abbott and Snidal (n 9) 528–529; Lobel (n 26) 373, 379–380.

<sup>30</sup> Abbott and Snidal (n 9) 552–553; Lobel (n 26) 382.

contributes to addressing common problems and to fostering solutions that are tailored to individual circumstances.<sup>31</sup> These actors are also better positioned to react quickly to changing circumstances in the workplace.<sup>32</sup> Indeed, these advantages are further reinforced by the flexible nature of the norms.<sup>33</sup>

The application of the new governance theories to the current discussion suggests that TPLR could offer international labour law innovative and timely norms that are responsive to the needs of the regulated. Accordingly, this study will examine this second question: can we identify in the texts of TPLR instruments positive influences on the content of international labour law norms?

### **C. Private Actors' Interests Can Influence the Generated Norms**

When considering the involvement of private actors in norm-generating processes, a first group of regulations are those which exclude state participation. In these regulatory models, governance is reached through negotiated interactions involving various non-state actors,<sup>34</sup> with states playing a minor role.<sup>35</sup> The logic underlying the involvement of these actors is precisely due to their ability to reflect the interests, preferences and opinions of the regulated groups they are representing.<sup>36</sup> It is therefore expected that these interests will be reflected to a certain extent in the norms that are generated through these processes.

However, the influence of private actors over norms of international labour law invokes a number of concerns. Among them, is the risk of subordinating the public interest to the narrow interests of the private actors involved.<sup>37</sup> It can also be claimed that private regulators are not subject to public accountability.<sup>38</sup> As such, the actions of multinational corporations, for instance, are likely to reflect their shareholders' interests, rather than the employees'.<sup>39</sup>

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<sup>31</sup> Abbott and Snidal (n 9) 526, 529, 552; Lobel (n 26) 382.

<sup>32</sup> Abbott and Snidal (n 9) 546; Lobel (n 26) 376, 395–400.

<sup>33</sup> Abbott and Snidal (n 9) 530–531; Lobel (n 26) 388–395.

<sup>34</sup> Eva Sørensen and Jacob Torfing, 'The Democratic Anchorage of Governance Networks' (2005) 28 *Scandinavian Political Studies* 195, 195–196.

<sup>35</sup> Errol Meidinger, 'Competitive Supragovernmental Regulation: How Could It Be Democratic?' (2008) 8 *Chicago Journal of International Law* 513, 516.

<sup>36</sup> Sørensen and Torfing (n 34) 205–206.

<sup>37</sup> Michael Edwards and Simon Zadek, 'Governing the Provision of Global Public Goods: The Role and Legitimacy of Nonstate Actors' in Inga Kaul, Pedro Conceicao, Katell Le Goulven and Ronald U. Mendoza (eds), *Providing Global Public Goods: Managing Globalization* (Oxford: OUP, 2003) 200, 201, 211.

<sup>38</sup> Claire Cutler, 'Private International Regimes and Interfirm Cooperation' in Rodney Bruce Hall and Thomas J. Biersteker (eds), *The Emergence of Private Authority in Global Governance* (Cambridge: CUP, 2002) 23, 32.

<sup>39</sup> Kolben, 'Dialogic Labor Regulation in the Global Supply Chain' (n 6) 438–439.

Another potential conflict arises if the private regulators externalise the costs of regulation on third parties that are absent from this process.<sup>40</sup> In addition, where regulatory commitments are undertaken on a voluntary basis, and often as a response to consumer pressure, it can be expected that they will mirror fluctuations of market-based consumer demand.<sup>41</sup>

A second group of regulations of relevance to the current study are those which can be categorised as state-centred.<sup>42</sup> In these regulations, the state is conceived to hold a leading position, by setting priorities and outlining objectives.<sup>43</sup> States participate in such forms of self-regulation in order to achieve better policy results than by ‘command and control’ regulation alone.<sup>44</sup> It is thus understood that the motivation behind these regulations is the promotion of norms that reflect the public interest.

The question of how to identify the ‘public interest’ is not a straightforward one.<sup>45</sup> Moreover, the ability of state-based regulation to reflect the public interest is not flawless. Among the problems that were raised, it was argued that states are exposed to ‘regulatory captures’, where their regulatory agencies serve the interests of particular groups that manage to organise and lobby successfully.<sup>46</sup> Other concerns focus on the inability of political institutions to take into account diversity and changing conditions.<sup>47</sup> In the context of the current study, where states often operate through international organisations, there are further concerns according to which transnational labour regulations will reflect the interests of powerful member states,<sup>48</sup> and that the ‘public interest’ they promote within countries will be defined by foreign constituents.<sup>49</sup>

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<sup>40</sup> Fabrizio Cafaggi, ‘Rethinking Private Regulation in the European Regulatory Space’ (2006) European University Institute Working Paper LAW No. 2006/13, 41–42  
<<http://cadmus.eui.eu/bitstream/handle/1814/4369/LAW2006.13.PDF?sequence=1&isAllowed=>>  
accessed 30 April 2019.

<sup>41</sup> Kolben, ‘Transnational Labor Regulation and the Limits of Governance’ (n 9) 408.

<sup>42</sup> See, eg, David Levi-Faur, ‘From Big Government to Big Governance?’ in David Levi-Faur (ed), *The Oxford Handbook of Governance* (Oxford: OUP, 2012) 3, 11–12.

<sup>43</sup> Jon Pierre and B. Guy Peters, *Governance, Politics and the State* (Basingstoke: Macmillan 2000) 12.

<sup>44</sup> Simon Deakin and Richard Hobbs, ‘False Dawn for CSR? Shifts in Regulatory Policy and the Response of the Corporate and Financial Sectors in Britain’ (2007) 15 *Corporate Governance: An International Review* 68, 69–70.

<sup>45</sup> See, generally, Walter Mattli and Ngaire Woods, ‘In Whose Benefit? Explaining Regulatory Change in Global Politics’ in Walter Mattli and Ngaire Woods (eds), *The Politics of Global Regulation* (Princeton, NJ: Princeton University Press, 2009) 1, 13–17.

<sup>46</sup> *ibid* 10–11.

<sup>47</sup> Joshua Cohen and Charles Sabel, ‘Directly-Deliberative Polyarchy’ (1997) 3 *European Law Journal* 313, 323–324.

<sup>48</sup> Abbott and Snidal (n 9) 534.

<sup>49</sup> Meidinger (n 35) 528.

In response to these shortcomings of state regulation, the broad participation of non-state actors in transnational regulatory initiatives<sup>50</sup> can potentially contribute to better reflecting the wide public interest.<sup>51</sup> On the other hand, the reality at the global level is that TPLR measures still reach only partial participation and do not truly represent the wide public. Unlike states, these initiatives are not subject to public choice mechanisms.<sup>52</sup> Moreover, due to the power asymmetries between private groups at the global level, and with more complex regulatory processes, this situation is particularly vulnerable to regulatory captures by special interest groups.<sup>53</sup> In these circumstances, states may still hold an important role at the global level in reflecting the public interest.

Overall, this literature suggests that TPLR processes could result in the production of norms that reflect the composition of the private stakeholders participating in the regulatory process, as well as their special interests. At the same time, state-centred regulatory approaches are expected to better reflect the public interest. Accordingly, this study will examine this third question: can we identify in the texts of TPLR instruments negative influences on the content of international labour law norms?

#### **D. The Nature of the Norm-Generating Process in the Workplace**

The literature suggests that private actors potentially influence norm-generating processes, but how would such influence come into play in the context of workplace regulations? Moreover, the discussion thus far does not reveal which private actors will influence workplace norms, and how and in what circumstances they are expected to influence these norms? In order to shed light on these questions, the current section will delve into theories that attempt to explain how the workplace is regulated and how workplace norms are being created.

When considering the influence of actors on workplace regulations, the literature on industrial relations (IR) offers a useful perspective, as the ‘study of the rules governing employment, together with the ways in which the rules are made and changed, interpreted and administered’.<sup>54</sup> Indeed, such literature could ‘assist us in identifying whose voice (or

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<sup>50</sup> *ibid* 517, 526.

<sup>51</sup> Abbott and Snidal (n 9) 529.

<sup>52</sup> *ibid* 556; Meidinger (n 35) 527–528.

<sup>53</sup> Mattli and Woods (n 45) 14–16, 21, 29; Abbott and Snidal (n 9) 556–557.

<sup>54</sup> H. A. Clegg, *The Changing System of Industrial Relations in Britain* (Oxford: Blackwell, 1979) 1.

voices) we are talking about, the contexts in which such voice could viably be manifested and through what legal mechanisms'.<sup>55</sup>

The first relevant perspective that IR literature offers on workplace rules is the pluralist approach. According to this view, the enterprise is described as 'a coalition of interests, a miniature democratic state composed of sectional groups with divergent interests over which the government tries to maintain some kind of dynamic equilibrium'.<sup>56</sup> The mediation of these conflicting interests is achieved through a network of rules regulating the negotiations between the different groups.<sup>57</sup> This results in voluntary, relatively autonomous norm-creating mechanisms, including those related to freedom of association.<sup>58</sup> Overall, the pluralistic perspective emphasises meaningful workers' participation, where decision making is shared alongside management.<sup>59</sup>

A second possible perspective is the unitary approach. Such an approach focuses on the functionality of the workplace to achieve the goals of the enterprise. According to the unitary perspective, the presumption is of a functionally integrated and harmonious system.<sup>60</sup> The role of workers' participation will thus be geared towards organising work more effectively, not influencing the goals themselves.<sup>61</sup> Within this broad classification, the managerial or organisational perspective holds that profit goals should be achieved through the effective control of the management, with only minimal intervention from shareholders.<sup>62</sup> Accordingly, we would expect that in managerial regulatory measures, namely those who assume managerial power in achieving workplace objectives, the norms that are produced will tend to focus on promoting workplace efficiency.<sup>63</sup>

Alternatively, a second deviation of the unitary approach is reflected in the financial perspective of regulation. This perspective focuses on the role of the shareholders of the

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<sup>55</sup> Alan Bogg and Tonia Novitz, 'Investigating Voice at Work' (2012) 33 *Comparative Labor Law & Policy Journal* 323, 324.

<sup>56</sup> Alan Fox, *Industrial Sociology and Industrial Relations* (London: HMSO, 1966) 2.

<sup>57</sup> H. A. Clegg, 'Pluralism in Industrial Relations' (1975) 13 *British Journal of Industrial Relations* 309, 310–311.

<sup>58</sup> Allan Flanders and Alan Fox, 'The Reform of Collective Bargaining: From Donovan to Durkheim' (1969) 7 *British Journal of Industrial Relations* 151, 158.

<sup>59</sup> J. D. Tomlinson, 'Economic and Sociological Theories of the Enterprise and Industrial Democracy' (1984) 35 *British Journal of Sociology* 591, 595.

<sup>60</sup> *ibid* 594.

<sup>61</sup> *ibid* 595.

<sup>62</sup> *ibid* 592–593; Paul Edwards, 'The Employment Relationship and the Field of Industrial Relations' in Paul Edwards (ed), *Industrial Relations: Theory and Practice* (2nd edn, Oxford: Blackwell, 2003) 1, 10, 25.

<sup>63</sup> Deakin and Hobbs (n 44) 69.

enterprise and their ability to influence managerial strategies.<sup>64</sup> Regulatory measures can be categorised within the financial perspective when they assume shareholder power in achieving workplace purposes. An example of such measures is the socially responsible investment (SRI) movement, which attempts to recruit institutional investors to pressure corporations to improve workplace policies for the pursuance of social and environmental goals. Overall, in light of shareholders' interests in long-term profitability and their incentives to internalise certain externalities of a given workplace,<sup>65</sup> we would expect that in financial regulatory measures the norms produced will tend to focus on issues related to the sustainable profitability of the workplace.

Accordingly, this gives rise to my fourth question: can we identify in the texts of TPLR instruments the influence of private actors on the content of international labour law norms, correlating with the IR characterisation of the regulatory measures?

### **3. CASE STUDY: FREEDOM OF ASSOCIATION UNDER TPLR INITIATIVES**

#### **A. Methodology**

This article will evaluate the research questions regarding the expected influences of private actors on norms of international labour law by focusing on freedom of association as a case study. Freedom of association was chosen for this examination as it is a right that seems to be particularly vulnerable under a TPLR regime. As TPLR instruments are based upon voluntary adoption of norms on behalf of employers, the employers obtain a degree of influence and discretion on the regulations they adopt. In the case of freedom of association, employers may prefer to undermine this right, due to its potential of weakening managerial prerogative and in light of a common perception that this right hinders business profitability.<sup>66</sup> The ability of employers to influence the private regulations that are in use today may therefore have a special adverse impact on the content of freedom of association norms. In these circumstances, examining the effects of private regulations on norms of freedom of association is of particular importance. While previous research supports this

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<sup>64</sup> *ibid* 69.

<sup>65</sup> *ibid* 69, 73–75.

<sup>66</sup> David Charny, 'Regulatory Competition and the Global Coordination of Labor Standards' (2000) 3 *Journal of International Economic Law* 281, 291–294.

concern by noting, in general terms, that corporate-influenced programmes tend to focus less on the right to freedom of association,<sup>67</sup> this study will expand the discussion by providing an in-depth examination of the content of their specific norms.

In order to assess the influence of TPLR processes over international norms of freedom of association, this study conducts a textual analysis of several TPLR initiatives. Based on a careful reading of their provisions on freedom of association, in parallel to the internationally accepted public norms, the research will ascertain whether divergences are present and scrutinise the nature of any divergences.

A total of five TPLR initiatives are analysed. In order to ensure that a wide set of TPLR arrangements are represented, different types of instruments are investigated: a multi-stakeholder social certification initiative, the SA8000 Standards; a global regulatory framework initiative, the UN Global Compact; a unilateral CSR code of conduct, H&M's Sustainability Commitment; and two international framework agreements, adopted by H&M. The selection of these regulatory initiatives aims to reflect the various forms of stakeholder participation characterising contemporary international labour regulation. As such, the analysis includes an example of a unilateral initiative, run solely by a private multinational corporation, as well as multi-stakeholder initiatives, which include public bodies, global union federations and civil society organisations.

While the selected regulatory initiatives are not necessarily representative of TPLR, they do cover a particularly large scope of contemporary regulations. The norms of these regulations are applied in a relatively high number of workplace environments and on a relatively high number of workers. The UN Global Compact, for example, is the world's largest corporate sustainability initiative, with more than 9,000 participating companies from 159 countries.<sup>68</sup> Similarly, H&M is the second-biggest fashion retailer in the world, with approximately 177,000 employees globally.<sup>69</sup> Taking into consideration the entire supply

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<sup>67</sup> See, eg, Mark Anner, 'Corporate Social Responsibility and Freedom of Association Rights: The Precarious Quest for Legitimacy and Control in Global Supply Chains' (2012) 40 *Politics and Society* 609, 633–634; Ivanka Mamic, *Implementing Codes of Conduct: How Businesses Manage Social Performance in Global Supply Chains* (Austin, TX: Greenleaf Publishing, 2004) 306–308.

<sup>68</sup> 'United Nations Global Compact' (*UN Global Compact*) <<https://www.unglobalcompact.org/>> accessed 30 April 2019; 'Our Participants' (*UN Global Compact*) <<https://www.unglobalcompact.org/what-is-gc/participants>> accessed 30 April 2019.

<sup>69</sup> 'H&M Group at a Glance' (*H&M*) <<https://about.hm.com/en/about-us/h-m-group-at-a-glance.html>> accessed 30 April 2019; 'Investors' (*H&M*) <<https://about.hm.com/en/investors.html>> accessed 30 April 2019.

chain, H&M's policies affect around 1.6 million workers worldwide.<sup>70</sup> The conclusions drawn from these specific case studies are thus relevant and important.<sup>71</sup>

Moreover, the H&M example is of particular interest, as it is a company which in recent years has committed both to a code of conduct and to two international framework agreements. While the former commitment was drafted unilaterally, the latter were negotiated with global union federations. It therefore serves as a valuable case study, which can shed light on the possible influences that different stakeholders have on the norms that are generated.<sup>72</sup> Such examination is especially relevant when comparing H&M's Sustainability Commitment to its 2015 IFA, which were issued only two months apart. Moreover, as these two documents are also relatively recent, January 2016 and November 2015, respectively, their examination offers a timely insight.

## **B. Introduction to the Examined TPLR Initiatives**

### **(i) SA8000 Standards**

The SA8000 are auditable social certification standards for labour and working conditions. The adopted standards are proclaimed to reflect labour provisions contained within the Universal Declaration of Human Rights as well as ILO conventions, while also compatible with national laws.<sup>73</sup> These standards are issued by SAI, an international non-governmental organisation. Its advisory board includes representatives of businesses, trade unions, NGOs, socially responsible investors and government.<sup>74</sup> Joining companies are subject to audits, and if found to be compliant they are certified.<sup>75</sup> By emphasising on the reputational benefits

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<sup>70</sup> 'IndustriALL Global Union and H&M Sign Global Framework Agreement' (*IndustriALL Global Union*, 3 November 2015) <<http://www.industriall-union.org/industriall-global-union-and-hm-sign-global-framework-agreement>> accessed 30 April 2019.

<sup>71</sup> It was acknowledged in this regard that when a specific case study has an important real-life impact, it may justify concentrating on the internal complexity of the case, instead of the attempt to reach generalisations. It was also acknowledged that the level of influence of a specific case study, statistically, may also serve as a justification for choosing the case. See Lisa M. Given, *The Sage Encyclopaedia of Qualitative Research Methods* (Sage Publications 2008) 69.

<sup>72</sup> It was acknowledged in this regard that when choosing a case study in qualitative research, 'cases can be selected on the basis of their similarity or difference, making it possible to draw causal inferences through cross-case comparisons'. See Given (n 71) 70.

<sup>73</sup> 'SA8000 Standards' (*Social Accountability International*) <<http://www.sa-intl.org/index.cfm?fuseaction=Page.ViewPage&pageId=1689>> accessed 30 April 2019.

<sup>74</sup> 'Advisory Board' (*Social Accountability International*) <<http://www.sa-intl.org/index.cfm?fuseaction=Page.ViewPage&pageId=593>> accessed 30 April 2019.

<sup>75</sup> 'SA8000 Certification Process' (*Social Accountability International*) <<http://www.sa-intl.org/index.cfm?fuseaction=Page.ViewPage&pageId=1791>> accessed 30 April 2019.

derived from such certification<sup>76</sup> and on managerial advantages, such as improved control over the supply chain,<sup>77</sup> this initiative can be characterised, *prima facie*, as expressing a managerial or organisational perspective of regulation.

(ii) UN Global Compact

The UN Global Compact promotes the adherence of companies to ten principles, four of them categorised under the topic of ‘labour’.<sup>78</sup> According to the initiative, these principles are derived from several international law sources, including the UN Universal Declaration of Human Rights and the ILO Declaration on Fundamental Principles and Rights at Work.<sup>79</sup> The UN Global Compact is of public-private and multi-stakeholder character, and is run by the office of the UN Secretary-General with the cooperation of governments, civil society, labour organisations, academia, businesses and UN agencies.<sup>80</sup> Companies that join this initiative report annually on implementation actions and levels of compliance.<sup>81</sup>

With regards to the incentives of companies to join the UN Global Compact, it is stated that ‘sustainable companies experience increased brand trust and investor support’. By focusing on the benefits deriving from ‘stable economies’ in a broad manner<sup>82</sup> and, in the specific context of freedom of association, also on ‘sustainable growth and secure investment returns’,<sup>83</sup> this initiative expresses characteristics of the financial perspective of regulation, and the SRI movement. In addition, the prominent role of public international bodies, and especially the office of the UN Secretary-General,<sup>84</sup> renders this initiative as reflecting, to some extent, a state-centred regulatory approach. The latter characterisation corresponds

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<sup>76</sup> *ibid.*

<sup>77</sup> Social Accountability International, ‘Distinguish Your Company’ <[http://www.sa-intl.org/\\_data/global/files/SA8000ataGlance\\_web\(1\).pdf](http://www.sa-intl.org/_data/global/files/SA8000ataGlance_web(1).pdf)> accessed 30 April 2019.

<sup>78</sup> ‘Our Mission’ (*UN Global Compact*) <<https://www.unglobalcompact.org/what-is-gc/mission>> accessed 30 April 2019.

<sup>79</sup> Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR); ILO Declaration on Fundamental Principles and Rights at Work (86<sup>th</sup> Session Geneva 18 June 1998). See: ‘The Ten Principles of the UN Global Compact’ (*UN Global Compact*) <<https://www.unglobalcompact.org/what-is-gc/mission/principles>> accessed 30 April 2019.

<sup>80</sup> ‘Our Governance’ (*UN Global Compact*) <<https://www.unglobalcompact.org/about/governance>> accessed 30 April 2019.

<sup>81</sup> UN Global Compact, ‘Basic Guide Communication on Progress’ (2012) 2, 5 <[https://www.unglobalcompact.org/docs/communication\\_on\\_progress/Tools\\_and\\_Publications/COP\\_Basic\\_Guide.pdf](https://www.unglobalcompact.org/docs/communication_on_progress/Tools_and_Publications/COP_Basic_Guide.pdf)> accessed 30 April 2019.

<sup>82</sup> ‘How Will I Benefit?’ (*UN Global Compact*) <<https://www.unglobalcompact.org/participation/join/benefits>> accessed 30 April 2019.

<sup>83</sup> ‘Principle Three: Labour’ (*UN Global Compact*) <<https://www.unglobalcompact.org/what-is-gc/mission/principles/principle-3>> accessed 30 April 2019.

<sup>84</sup> See: ‘Our Governance’ (n 80).

with the initiative's declared purpose, which reflects public interests. Referring to the right to freedom of association, the initiative emphasises its ability to not only benefit the management and the workers, but to also promote 'peace and stability which benefits society more generally'.<sup>85</sup>

### (iii) H&M's Sustainability Commitment

H&M, the multinational garment corporation, has been involved in CSR efforts in recent years, with its latest code of conduct, the Sustainability Commitment document, coming into force in February 2016. Suppliers and business partners are required to commit to this Sustainability Commitment as a pre-condition for entering into contractual agreements with H&M. These commitments focus on several issues, including working conditions. The Sustainability Commitment is comprised of two levels of performance: a 'fundamental' level, which according to the company outlines the basic requirements of the law, and an 'aspirational' level, which intends to include provisions beyond basic legal compliance. The company requires contractors to comply with the former and encourages them to comply with the latter.<sup>86</sup> Compliance with these principles is assessed according to the company's Sustainability Index, which is largely based on the Higg Index of the Sustainable Apparel Coalition,<sup>87</sup> a coalition of businesses, academia, governments and NGOs.<sup>88</sup>

H&M explains that its motives behind the Sustainability Commitment is the logic that 'sustainability is a natural part of being a successful business'.<sup>89</sup> Referring to its 'aspirational' level of compliance, the company states that 'to be successful in the future we must continuously strive beyond compliance'.<sup>90</sup> Furthermore, when justifying its efforts to promote freedom of association, the company refers to the advantages in creating 'stable

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<sup>85</sup> ILO, *The Labour Principles of the United Nations Global Compact: A Guide to Business* (International Labour Office 2008) 18  
<[https://www.unglobalcompact.org/docs/issues\\_doc/labour/the\\_labour\\_principles\\_a\\_guide\\_for\\_business.pdf](https://www.unglobalcompact.org/docs/issues_doc/labour/the_labour_principles_a_guide_for_business.pdf)> accessed 30 April 2019.

<sup>86</sup> 'Sustainability Commitment' (H&M) <<https://sustainability.hm.com/en/sustainability/downloads-resources/policies/sustainability-commitment.html>> accessed 30 April 2019.

<sup>87</sup> H&M, 'H&M Group Sustainability Report 2017' (2017) 23, 84  
<[https://about.hm.com/content/dam/hmgroup/groupsite/documents/masterlanguage/CSR/reports/2017%20Sustainability%20report/HM\\_group\\_SustainabilityReport\\_2017\\_FullReport.pdf](https://about.hm.com/content/dam/hmgroup/groupsite/documents/masterlanguage/CSR/reports/2017%20Sustainability%20report/HM_group_SustainabilityReport_2017_FullReport.pdf)> accessed 30 April 2019.

<sup>88</sup> 'Our Members' (*Sustainable Apparel Coalition*) <<http://apparelcoalition.org/members/>> accessed 30 April 2019.

<sup>89</sup> 'Sustainability Commitment' (n 86).

<sup>90</sup> *ibid.*

sourcing markets and sustainable economic growth in these countries'.<sup>91</sup> Such narrative can thus characterise the initiative as part of the financial perspective of regulation and the SRI movement.

#### (iv) H&M's International Framework Agreements

H&M has signed two IFAs in recent years. The first agreement was signed in 2004 with UNI Global Union, a global union federation representing more than 20 million workers from over 150 different countries in the skills and services sectors.<sup>92</sup> The second agreement was signed in 2015 with IndustriALL Global Union and Industrifacket Metall. The former represents 50 million workers in 140 countries in the mining, energy and manufacturing sectors,<sup>93</sup> and the latter represents about 313,000 members in Sweden in several industry sectors.<sup>94</sup>

The 2004 IFA, was signed in a ceremony at the ILO headquarters in Geneva with two of the Organisation's senior officials in attendance.<sup>95</sup> We can assume that this symbolic involvement of the ILO indicates a certain level of endorsement of the agreement, and thus the expectation would be that the agreement meets basic ILO standards and overall promotes public interests. The agreement therefore expresses some characteristics of a state-centred regulatory approach. The statements provided by the parties to the agreement point to two additional regulatory approaches. UNI's statement can be seen as an expression of a pluralist perspective, as it emphasises the importance of social dialogue and the role of IFAs in setting workplace standards.<sup>96</sup> On the other hand, from H&M's perspective, the agreement is part of 'the ongoing effort to make H&M's fundamental principles well-known within as well as

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<sup>91</sup> H&M, 'Conscious Actions: Sustainability Report 2015' (2015) 51 <[http://sustainability.hm.com/content/dam/hm/about/documents/en/CSR/2015%20Sustainability%20report/HM\\_SustainabilityReport\\_2015\\_final\\_FullReport\\_en.pdf](http://sustainability.hm.com/content/dam/hm/about/documents/en/CSR/2015%20Sustainability%20report/HM_SustainabilityReport_2015_final_FullReport_en.pdf)> accessed 30 April 2019.

<sup>92</sup> 'About Us' (*Union Network International Global Union*) <<https://www.uniglobalunion.org/about-us-0>> accessed 30 April 2019.

<sup>93</sup> 'Who We Are' (*IndustriALL Global Union*) <<http://industriall-union.org/who-we-are>> accessed 30 April 2019.

<sup>94</sup> 'Fakta om Förbundet' (*IF Metall*) <<https://www.ifmetall.se/om-oss/vart-uppdrag-och-var-verksamhet/fakta-om-forbundet/>> accessed 30 April 2019.

<sup>95</sup> H&M, 'Press Release' (14 January 2004) <<http://about.hm.com/content/dam/hmgroup/groupsite/documents/masterlanguage/cision/573481.pdf>> accessed 30 April 2019.

<sup>96</sup> H&M, 'Press Release' (18 December 2003) <<http://about.hm.com/content/dam/hmgroup/groupsite/documents/masterlanguage/cision/573409.pdf>> accessed 30 April 2019.

outside the company’.<sup>97</sup> This focus on the reputation of the company can be seen as an expression of the managerial or organisational approach.

As for the 2015 IFA, the narrative provided by H&M was on the benefits of the agreement not only to the working conditions of textile workers, but also to ‘a stable and growing textile industry in our sourcing markets’.<sup>98</sup> This explanation can reflect the characteristics of a financial regulatory approach and the SRI movement. IndustriALL’s statement similarly refers to ‘a sustainable garment industry’ and to the improvements in working conditions, but also reflects a pluralist approach by emphasising ‘well-functioning industrial relations’.<sup>99</sup>

#### **4. THE DIVERGENCE OF TPLR NORMS OF FREEDOM OF ASSOCIATION FROM INTERNATIONAL LABOUR LAW**

In general, all of the examined TPLR initiatives express the duty of the employer to respect workers’ rights to freedom of association and collective bargaining.<sup>100</sup> The more common provisions found in these agreements (excluding H&M’s 2004 IFA) were the prohibition of discrimination of workers due to union activities<sup>101</sup> and the requirement to provide union representatives with access to the workplace.<sup>102</sup> The remaining provisions concerning

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<sup>97</sup> *ibid.*

<sup>98</sup> ‘Conscious Actions: Sustainability Report 2015’ (n 91) 52.

<sup>99</sup> ‘IndustriALL Global Union and H&M Sign Global Framework Agreement’ (n 70).

<sup>100</sup> Social Accountability International, ‘Social Accountability 8000 International Standard’ (2014) art 4.1 <[http://sa-intl.org/\\_data/n\\_0001/resources/live/SA8000%20Standard%202014.pdf](http://sa-intl.org/_data/n_0001/resources/live/SA8000%20Standard%202014.pdf)> accessed 30 April 2019; ‘The Ten Principles of the UN Global Compact’ (n 79), at Principle 3; H&M, ‘Sustainability Commitment: H&M Business Partner’ (2016) art 1F <[http://sustainability.hm.com/content/dam/hm/about/documents/en/CSR/Sustainability%20Commitment/Sustainability%20Commitment\\_en.pdf](http://sustainability.hm.com/content/dam/hm/about/documents/en/CSR/Sustainability%20Commitment/Sustainability%20Commitment_en.pdf)> accessed 30 April 2019; ‘Agreement Between H&M Hennes & Mauritz AB (H&M) and Union Network International (UNI) on Cooperation in Order to Secure and Promote Fundamental Worker’s Rights at H&M’s Workplaces Worldwide’ (14 January 2004) [1] (on file with author); ‘Global Framework Agreement (GFA) between H&M Hennes & Mauritz GBC AB and IndustriALL Global Union and Industriefacket Metall’, 1, 2 <[http://www.industrialunion.org/sites/default/files/uploads/documents/GFAs/HM/hm\\_gfa2016\\_eng.pdf](http://www.industrialunion.org/sites/default/files/uploads/documents/GFAs/HM/hm_gfa2016_eng.pdf)> accessed 30 April 2019.

<sup>101</sup> ‘Social Accountability 8000 International Standard’ (n 100) art 4.3; *The Labour Principles of the United Nations Global Compact: A Guide to Business* (n 85) 15; ‘Sustainability Commitment: H&M Business Partner’ (n 100) art 1F; ‘Global Framework Agreement (GFA) between H&M Hennes & Mauritz GBC AB and IndustriALL Global Union and Industriefacket Metall’ (n 100) 2.

<sup>102</sup> ‘Social Accountability 8000 International Standard’ (n 100) art 4.3; Social Accountability International, ‘Performance Indicator Annex’ (2014) arts 4.3, 4.4, 4.6 <[http://www.sa-intl.org/\\_data/n\\_0001/resources/live/Performance%20Indicator%20Annex\\_11\\_17\\_2014.pdf](http://www.sa-intl.org/_data/n_0001/resources/live/Performance%20Indicator%20Annex_11_17_2014.pdf)> accessed 30 April 2019; ‘Principle Three: Labour’ (n 83); ‘Sustainability Commitment: H&M Business Partner’ (n 100) art 1F; ‘Global Framework Agreement (GFA) between H&M Hennes & Mauritz GBC AB and IndustriALL Global Union and Industriefacket Metall’ (n 100) 2.

freedom of association reflect wide divergences between the different initiatives. The current section will analyse these private freedom of association norms, while comparing the different approaches that have been adopted in light of norms of international labour law.

### **A. Positive Influences of TPLR Texts**

A close look at the norms adopted by TPLR initiatives reveal that these private regulations had in several instances an innovative influence when compared to international labour law.

#### **(i) Countries Restricting the Right to Freedom of Association**

One of the challenges facing multinational corporations is when they operate in countries that restrict the right to freedom of association and collective bargaining. According to provisions of international labour law, it is prohibited to restrict freedom of association by national laws.<sup>103</sup> However, the question of how corporations should react, when operating in countries where these laws prohibiting freedom of association are a given fact, remains unsolved.

When it comes to the TPLR initiatives examined in the study, nearly all of them offer guidance on these circumstances. As such, the SA8000 Standards states that ‘in situations where the right to freedom of association and collective bargaining are restricted under law, the organisation shall allow workers to freely elect their own representatives’.<sup>104</sup> According to SAI, in circumstances where workers’ representation is restricted, this solution nevertheless promotes ‘incremental change, encourages communication between workers and managers, and creates space for workers to protect their rights and interests’.<sup>105</sup>

H&M’s Sustainability Commitment addresses this problem, also by suggesting a weaker form of representation, by requiring that that ‘the employer encourages and does not hinder the development of parallel means for independent and free association and

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<sup>103</sup> Freedom of Association and Protection of the Right to Organise Convention (adopted 9 July 1948, entered into force 4 July 1950) No. 87, arts 3(2), 8(2); International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) art 22; International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) art 8.

<sup>104</sup> ‘Social Accountability 8000 International Standard’ (n 100) art 4.2.

<sup>105</sup> ‘Frequently Asked Questions’ (*Social Accountability International*) <<http://sa-intl.org/index.cfm?fuseaction=Page.viewPage&pageID=488&parentID=472#faq11>> accessed 6 December 2016. This text has since been removed from SAI’s website but can be viewed online at: ‘FAQs on SA8000’ (*Ally Information Service*) <<http://www.allyservice.com/en/News.asp?vid=2855>> accessed 30 April 2019.

bargaining’.<sup>106</sup> The company explains that the intention of this solution is to ‘empower workers with awareness about their rights at work’ and to promote ‘democratically-elected workplace representation’, with the aim that such forms of representation ‘will develop into mature collective bargaining systems’.<sup>107</sup> Likewise, H&M’s 2015 IFA adopts a very similar wording, requiring in such circumstances that ‘the employer encourages and does not hinder the development of mechanisms for independent and free association and bargaining’.<sup>108</sup>

Finally, the UN Global Compact also offers guidance for circumstances where freedom of association is restricted by individual countries. In such cases, the initiative’s implementation guide suggests to businesses to ‘preserve the confidentiality of trade unions and leaders’.<sup>109</sup> It is difficult to draw conclusions on the precise meaning of this provision, as the proposed solution is not explicitly spelled out. However, it seems to suggest that the right to freedom of association should be respected despite the governments’ prohibition, and that this would be achieved by not disclosing incidents of disobedience.

Overall, these private regulations managed to address a practical problem that companies were facing in their daily operation and that has been lacking a proper response. As will be further discussed below, the different solutions provided are not optimal, and do not all equally fulfil workers’ right to freedom of association, and as such one can question their desirability. Nevertheless, this does not detract from the fact that this situation required guidance. Moreover, both from the standpoint of the business and of the workers and their representatives, even the less favourable solutions do in fact possess some merits. From the employers’ perspective, they provide them with an answer to their dilemma as to which of the conflicting laws they should follow. From the workers’ perspective, they all provide them with a certain degree of voice and at least some form of representation, in an environment that otherwise would have prevented any type of collective cooperation.<sup>110</sup>

## (ii) Non-Interference with Freedom of Association

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<sup>106</sup> ‘Sustainability Commitment: H&M Business Partner’ (n 100) art 1F.

<sup>107</sup> ‘Conscious Actions: Sustainability Report 2015’ (n 91) 51.

<sup>108</sup> ‘Global Framework Agreement (GFA) between H&M Hennes & Mauritz GBC AB and IndustriALL Global Union and Industriefacket Metall’ (n 100) 2.

<sup>109</sup> UN Global Compact, ‘After the Signature: A Guide to Engagement in the United Nations Global Compact’ (2012) 14 <[https://www.unglobalcompact.org/docs/news\\_events/8.1/after\\_the\\_signature.pdf](https://www.unglobalcompact.org/docs/news_events/8.1/after_the_signature.pdf)> accessed 30 April 2019.

<sup>110</sup> Bartley, ‘Transnational Governance as the Layering of Rules: Intersections of Public and Private Standards’ (n 8) 536-537.

The ability of TPLR measures to address problems arising from practice, is also evidenced in the specification of the norm on the ‘protection against any acts of interference’ with freedom of association.<sup>111</sup> Besides several examples of particular instances that were explicitly acknowledged as constituting ‘acts of interference’ with workers’ freedom of association,<sup>112</sup> it remains open the question of which employers’ actions will meet this threshold and be considered as such an ‘interference’. This uncertainty can be abused by employers by finding new and creative ways to influence workers’ choice regarding unionisation. Moreover, the inherent power differences between workers and employers render the implementation of this rule as very challenging in practice. Employers can, for example, circumvent this prohibition and deliver their dissatisfaction of unionisation activities with a mere hint.<sup>113</sup> Indeed, jurisdictions around the world struggle with the need to find an adequate form of regulation to prevent employers’ interference, without excessively limiting their rights or ability to manage the workplace.<sup>114</sup> An example of one possible solution that has been put forward is to prohibit any form of employers’ expression on the topic of workers unionisation.<sup>115</sup>

Against this backdrop, the SA8000 Standards offer an interesting response to the problem described. This initiative not only requires the organisation to not interfere with issues related to workers’ organisation or collective bargaining, but it also requires the organisation to ‘effectively inform personnel that they are free to join a worker organisation of their choosing without any negative consequences or retaliation from the organisation’.<sup>116</sup> This provision is unique because it goes beyond prohibiting employers’ speech that infringes

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<sup>111</sup> Right to Organise and Collective Bargaining Convention (adopted 1 July 1949, entered into force 18 July 1951) No. 98, art 2.

<sup>112</sup> See, eg: Right to Organise and Collective Bargaining Convention (n 111) art 2(2); ILO, *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* (5<sup>th</sup> rev edn, International Labour Office 2006) [856]–[859], [863], [868].

<sup>113</sup> On the effects of implicit and explicit employers’ expression against unionisation efforts, see Kate Bronfenbrenner, ‘We’ll Close! Plant Closings, Plant-Closing Threats, Union Organizing and NAFTA’ (1997) 18 *Multinational Monitor* 8; Kate Bronfenbrenner, ‘No Holds Barred: The Intensification of Employer Opposition to Organizing’ (2009) Economic Policy Institute Briefing Paper No. 235, 24–25 <<http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1037&context=reports>> accessed 30 April 2019.

<sup>114</sup> For a review on different regulations on employers’ speech during the period of initial labour organisation, see Pnina Alon-Shenker and Guy Davidov, ‘Organizing: Should the Employer Have a Say?’ (2016) 17 *Theoretical Inquiries in Law* 63, 80–94.

<sup>115</sup> For example, in Israel this principle of non-interference has been interpreted as completely prohibiting employers’ speech regarding workers’ unionisation, during the initial period of labour organisation: Appeal Case File No. 25476-09-12 *Histadrut – Pelephone Communications LTD* (2 January 2013). For the decision of the High Court of Justice, affirming the decision, see H CJ 4179/13 *Coordinating Chamber of Economic Organizations v National Labour Court* (7 July 2014).

<sup>116</sup> ‘Social Accountability 8000 International Standard’ (n 100) art 4.1. However, the organisation shall not propose or initiate worker election: ‘Performance Indicator Annex’ (n 102) art 4.1.

the non-interference principle; a prohibition that is hard to define and relatively easy to bypass. Instead, it avoids this problem by ‘recruiting’ the employers’ speech in favour of this principle. The merit of this provision is that by requiring employers to positively inform workers that they will not interfere with their freedom of association, it de facto prevents altogether expressions by employers that interfere with such freedom. This creative method can possibly reduce employers’ negative influence over workers’ free will regarding unionisation activities.

### (iii) Realisation of the Right to Collective Bargaining

International labour law establishes the requirement to encourage and promote machinery for a voluntary process of collective bargaining.<sup>117</sup> A question that has been asked is whether such provision entails a duty to enter into negotiations for signing a collective agreement. A decision of the ILO’s Freedom of Association Committee addressed this issue, clarifying that there is no duty on governments to enforce collective bargaining. The Committee added in this regard, that this does not mean that governments do not have the right to oblige social partners to enter into negotiations for such purpose, as long as there is no undue interference in the negotiation process itself.<sup>118</sup> Therefore, although the ILO proposes in a non-binding recommendation the establishment of machineries to negotiate collective agreements,<sup>119</sup> there is still no obligation under international labour law to enter into such negotiations. The absence of any duty to negotiate opens up a way for employers to disregard workers’ right to collective bargaining and de facto to empty it of its substance.<sup>120</sup>

H&M’s Sustainability Commitment offers, as part of its ‘aspirational’ provisions, a useful technique that can respond to this concern, promoting the realisation of the right to

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<sup>117</sup> Right to Organise and Collective Bargaining Convention (n 111) art 4. See also: Collective Bargaining Convention (adopted 3 June 1981, entered into force 11 August 1983) No. 154, art 5.

<sup>118</sup> *Romania (Case No 2149)* (1 August 2001) Report of the Committee on Freedom of Association No 328 (June 2002) [579], [581]. See also *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* (n 112) [928].

<sup>119</sup> ILO Recommendation R91: Collective Agreements Recommendation (Recommendation Concerning Collective Agreements) (34th Conference Session Geneva 29 June 1951) art 1(1).

<sup>120</sup> In the United States, for example, research has shown that employers avoid negotiations with elected unions in various ways in an attempt to thwart union attempts to signing a first collective agreement. See Kate Bronfenbrenner, ‘Employer Behavior in Certification Elections and First-Contract Campaigns: Implications for Labor Law Reform’ in S. Friedman, R. Hurd, R. Oswald, & R. Seeber (eds), *Restoring the Promise of American Labor Law* (Cornell University Press 1994) 75, 83–86. It has also been shown that refusal to bargain had substantial negative effects on the probability that a first contract will be reached. See William N. Cooke, ‘The Failure to Negotiate First Contracts: Determinants and Policy Implications’ (1985) 38 *Industrial and Labor Relations Review* 163, 176.

collective bargaining. The encouraged expectation is that the employer will engage ‘on a regular basis with employee representatives to facilitate and promote social dialogue’. It further encourages employers to engage ‘directly with local and regional trade unions to proactively address issues of concern to the workforce’.<sup>121</sup> By establishing these procedural recommendations, this initiative addresses the need for employers to sit at the negotiating table. It structures a process that naturally leads to a collective agreement, while at the same time refraining from forcing any outcome on the employer, and is thus not inconsistent with the principle of free and voluntary negotiations.

#### (iv) Measurement of Successful Outcomes of Unionisation Efforts

It is clear that compliance of a given employer with the rights to freedom of association and collective bargaining does not necessarily mean that there must be active industrial relations in that specific workplace. These rights are merely an instrument for ensuring that workers will be able to organise collectively, if so they wish. However, practice shows that the different regulations which give the practical substance to these rights are relatively easy to circumvent. Indeed, employers tend to oppose unionisation, taking different measures as obstacles to such processes.<sup>122</sup> These measures as a whole have a role to play in failures of unionisation efforts.<sup>123</sup> The result is that workers might not be able in practice to make a free choice regarding unionisation, even when it seems, on the surface, that employers comply with freedom of association obligations.

The approach adopted in H&M’s Sustainability Commitment can effectively address this impediment. In the company’s Sustainability Index, according to which suppliers’ compliance is evaluated, two performance indicators examine the actual outcome of unionisation efforts. As such, a positive score is given to companies that have a trade union represented in the factory as well as to factories that are covered by a collective agreement.<sup>124</sup>

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<sup>121</sup> ‘Sustainability Commitment: H&M Business Partner’ (n 100) art 1F.

<sup>122</sup> Benjamin I. Sachs, ‘Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing’ (2010) 123 Harvard Law Review 655, 680–681.

<sup>123</sup> In the United States, for example, it has been shown that employer tactics play a primary role in explaining the difference between the success rates in the public sector compared to the private sector. See Kate Bronfenbrenner and Tom Juravich, ‘The Impact of Employer Opposition on Union Certification Win Rates: A Private/Public Sector Comparison’ (1994) Economic Policy Institute Working Paper No. 113, 23  
<<http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1018&context=articles>> accessed 30 April 2019.

<sup>124</sup> ‘Supplier Compliance’ (H&M) <<http://sustainability.hm.com/en/sustainability/downloads-resources/resources/supplier-compliance.html>> accessed 30 April 2019.

This norm serves as a valuable means to ensure employers' respect of freedom of association and collective bargaining. It reflects a more consequential and objective approach. The weight given to the actual fulfilment of these rights diverts the focus from the assessment of the estimated behaviour of employers. By doing so, it avoids situations where the detailed rules fail to prevent employers' interference: because they were not followed, because they were not effective, or simply because the violations were not exposed.

## **B. Negative Influences of TPLR Texts**

The analysis of the TPLR norms on freedom of association also reveal their vulnerability to the interests of the stakeholders, reflecting the composition of the actors involved in the regulatory process.

### **(i) The Right to Strike**

The right to strike has no explicit provision in the Convention concerning Freedom of Association and Protection of the Right to Organise, nor in any other ILO conventions or recommendations.<sup>125</sup> In addition, as of today there are disagreements as to whether a right to strike can be recognised as arising out of this convention, and accordingly if there is a binding obligation on a right to strike, and if it can be regulated in detail on an international level.<sup>126</sup> At the same time, ILO supervisory bodies 'have frequently stated that the right to strike is a fundamental right of workers and of their organizations'.<sup>127</sup>

The examination of the TPLR instruments reveals that out of all private initiatives at the focus of this study, only the UN Global Compact included a provision in support of the right to strike. The initiative states in this regard, as part of its explanatory guidelines, that freedom of association and collective bargaining 'also allow for industrial action to be taken by workers and organizations in defence of their economic and social interests'.<sup>128</sup>

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<sup>125</sup> It is however recognised in other international legal sources, such as article 8 of the International Covenant on Economic, Social and Cultural Rights (n 103).

<sup>126</sup> Claire La Hovary, 'Showdown at the ILO? A Historical Perspective on the Employers' Group's 2012 Challenge to the Right to Strike' (2013) 42 *Industrial Law Journal* 338; K.D. Ewing and John Hendy QC, 'The Trade Union Act 2016 and the Failure of Human Rights' (2016) 45 *Industrial Law Journal* 391, 403–405.

<sup>127</sup> Bernard Gernigon, Alberto Odero and Horacio Guido, 'ILO Principles concerning the Right to Strike' (1998) 137 *International Labour Review* 441, 442.

<sup>128</sup> 'Principle Three: Labour' (n 83).

This difference between the examined regulatory instruments illustrates the characteristics of a state-centred regulatory approach in comparison to a unitary approach of the enterprise. The right to strike helps to create a more balanced relationship between workers and employers.<sup>129</sup> As such, it is an essential component of a functioning system of industrial relations. By acknowledging this right, the UN Global Compact promotes these wide objectives, and, as expected from a rather state-centred regulatory approach, reflects the public interest in this regard. On the other hand, strikes are intended to create an economic pressure on employers. It is thus understood why the unitary regulatory models have preferred not to explicitly endorse a right to strike. It is reasonable to assume that their tendency to focus on profit maximization has influenced their decision to avoid the economic costs associated with strikes.<sup>130</sup> Moreover, these unitary models, that is, the SA8000 and H&M's Sustainability Commitment, were also characterised, respectively, as a managerial and a financial perspectives of regulation. In this sense, a right to strike could be seen, according to the former, as threatening the companies' managerial prerogative in the workplace;<sup>131</sup> and according to the latter, as exposing the organisation to operational instability and losses.<sup>132</sup>

A rather unexpected outcome of the analysis is the absence of a reference to a right to strike from both of the IFAs that were examined. Due to the centrality of strikes in empowering workers in negotiation processes on workplace regulations, it could have been expected that a right to strike will be included in regulatory instruments with elements of a pluralist approach. Moreover, H&M's 2015 IFA also promotes an elaborated dispute resolution mechanism, which can be seen as instrument for the prevention of strikes. According to the 2015 IFA, 'any disagreement on the interpretation and implementation of the agreement shall be... solved within the provisions... of the agreement'.<sup>133</sup> The IFA further stresses that industrial disputes should be resolved through the dispute resolution procedures set in the agreement, and with the failure of these mechanisms, the parties may

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<sup>129</sup> Bob Hepple, 'The Right to Strike in an International Context' (2009) 15 *Canadian Labour and Employment Law Journal* 133, 139–140.

<sup>130</sup> In support of this assertion, see: Peter Nolan and Kathy O'Donnell, 'Industrial Relations, HRM and Performance' in Paul Edwards (ed), *Industrial Relations: Theory and Practice* (2nd edn, Oxford: Blackwell, 2003) 489, 491.

<sup>131</sup> In support of this assertion, see: Anner (n 67) 609.

<sup>132</sup> In support of this assertion, see, eg: Brian E. Becker and Craig A. Olson, 'The Impact of Strikes on Shareholder Equity' (1986) 39 *Industrial and Labor Relations Review* 425.

<sup>133</sup> 'Global Framework Agreement (GFA) between H&M Hennes & Mauritz GBC AB and IndustriALL Global Union and Industriefacket Metall' (n 100) 4.

resort to an independent mediator.<sup>134</sup> Overall, this tendency to avoid strikes indicates that in these two IFA instruments the unitary and financial perspectives of the organisation were more significant than the pluralist perspective. These findings might reflect the power balance between the stakeholders involved in H&M's IFA processes, suggesting the dominance of the company compared to the global union federations.<sup>135</sup>

## (ii) Countries Restricting the Right to Freedom of Association

The provisions concerning countries that restrict freedom of association are also relevant to the current discussion on the influence of stakeholders' interests on TPLR norms. While all regulatory initiatives that were examined offer some kind of a solution to this problem, the UN Global Compact was the only initiative that fully respects the right to freedom of association in such circumstances.

These differences between the regulatory initiatives reflect, again, the divide between a state-centred regulatory perspective and regulations that hold a unitary perception of the enterprise. As discussed earlier in this section, the UN Global Compact, an initiative with dominant participation of public actors, has managed to reflect the public interest and to not compromise on the compliance with international labour law. By suggesting to 'preserve the confidentiality of trade unions and leaders', it represents an ambitious solution to this problem.<sup>136</sup> On the other hand, the initiatives of the unitary perspective offered solutions that reflect a compromise in this regard. Although each initiative adopts a slightly different wording, essentially all promote only alternative means to union representation, avoiding the full observance of freedom of association.<sup>137</sup> Understandably, initiatives that focus on the functionality of the enterprise may tend to refrain from tension with authorities in host

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<sup>134</sup> *ibid* 6.

<sup>135</sup> It has been previously suggested that global union federations face inequality in bargaining power compared to multinational corporations when negotiating IFAs due to the lack of legal obligations and enforcement mechanisms to support these agreements: Veronika Dehnen, 'Transnational Alliances for Negotiating International Framework Agreements: Power Relations and Bargaining Processes between Global Union Federations and European Works Councils' (2013) 51 *British Journal of Industrial Relations* 577, 579; Niklas Egels-Zandén and Peter Hyllman, 'Evaluating Strategies for Negotiating Workers' Rights in Transnational Corporations: The Effects of Codes of Conduct and Global Agreements on Workplace Democracy' (2007) 76 *Journal of Business Ethics* 207, 216. See in this regard also: Renée-Claude Drouin, 'Promoting Fundamental Labor Rights through International Framework Agreements: Practical Outcomes and Present Challenges' (2010) 31 *Comparative Labor Law & Policy Journal* 591, 601.

<sup>136</sup> See discussion accompanying note 109.

<sup>137</sup> See discussion accompanying notes 104–108.

countries. Interestingly, this unsatisfactory approach was apparent, again, even in the IFAs; an issue that will be further discussed below.

(iii) The Similarity between H&M's Sustainability Commitment and its 2015 IFA

In terms of the provisions on freedom of association, H&M's Sustainability Commitment and the company's 2015 IFA are almost identical, with the exception of two narrow differences. Due to the overall similarity of their wording, the particular differences can reveal the extent of the influence of the actors participating in each initiative. In this case, while the Sustainability Commitment was drafted unilaterally by H&M, in the 2015 IFA the company negotiated the agreement with global union federations.

The first difference between these documents is that the 2015 IFA contains a provision against acts of interference with workers' freedom of association; which is absent from the Sustainability Commitment.<sup>138</sup> Such form of protection is essential for the proper operation of trade unions, and indeed reflects the interests of trade unions that have negotiated to include this wording. By supporting industrial relations, this provision is an expression of a pluralist regulatory model. At the same time, this provision does not go as far as the SA8000 Standards and does not require employers to 'effectively inform' workers that they will not interfere with their freedom of association.<sup>139</sup> Therefore, compared to the SA8000 Standards, we learn that H&M's 2015 IFA could have offered better protection from interference with workers' freedom of association.

The second difference between the Sustainability Commitment and the 2015 IFA refers to the course of action of a company operating in countries that restrict the right to freedom of association. As discussed, both documents suggest as a solution the pursuance of alternative procedures to freedom of association and collective bargaining. The wording of these solutions is almost identical, except that the Sustainability Commitment relates in this regard to the development of 'parallel means' for independent and free association and bargaining,<sup>140</sup> while the 2015 IFA refers instead to 'mechanisms' for independent and free association and bargaining.<sup>141</sup> This difference correlates again with the involvement of

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<sup>138</sup> Stating that 'the employer shall respect trade union rights and remain strictly neutral regarding workers' right to organize'. See: 'Global Framework Agreement (GFA) between H&M Hennes & Mauritz GBC AB and IndustriALL Global Union and Industriefacket Metall' (n 100) 2.

<sup>139</sup> See discussion accompanying note 116.

<sup>140</sup> 'Sustainability Commitment: H&M Business Partner' (n 100) art 1F.

<sup>141</sup> 'Global Framework Agreement (GFA) between H&M Hennes & Mauritz GBC AB and IndustriALL Global Union and Industriefacket Metall' (n 100) 2.

global union federations in the drafting of one document and not in the other, in a way that reflects their particular interests as well as a pluralist regulatory model. That is, the decision not to use the term ‘parallel means’ to freedom of association, and instead to refer to the more vague term of ‘mechanisms’, could be perceived as a way to avoid a wording that explicitly rejects unions and implies they will be substituted with a ‘parallel’ solution. On the other hand, even the term ‘mechanism’ fails to guaranty full respect of freedom of association, and therefore does not fully reflect the public interest as well as the interest of workers. Compared to the UN Global Compact that manages to offer a creative solution that guarantees freedom of association,<sup>142</sup> we learn that, again, this IFA could have better fulfilled this right.

Overall, the close similarity in the wording and content of H&M’s Sustainability Commitment and its 2015 IFA, suggests, once again, a greater influence of shareholders’ interests on the outcome of the 2015 IFA, compared to the influence of the global union federations involved. Both of these documents were issued around the same time, with the 2015 IFA slightly preceding the Sustainability Commitment.<sup>143</sup> Hence, when H&M had the opportunity to decide unilaterally on a set of commitments without any influence from global union federations, the result did not deviate much from the agreement with the global union federations. This indicates that the negotiations with the global union federations did not manage to gain substantial changes from the already existing state of affairs within the company. Due to the drawbacks observed in these two documents, more achievements at the bargaining table could have resulted in a better promotion of international labour rights.

#### (iv) The Level of Specification of Norms

The level of specification of general norms of international labour law is one feature that can indicate on the general commitment to these norms. This is because an explicit reference to interpretations on how to fulfil international labour law commitments can serve as a useful guide on workplace conduct on which workers can rely. Greater uncertainty, on the other hand, will give more discretion to employers on how they should uphold their

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<sup>142</sup> See discussion accompanying note 109.

<sup>143</sup> H&M’s Sustainability Commitment was issued in January 2016, shortly after the company signed the 2015 IFA, in November 2015. See: ‘Sustainability Commitment: H&M Business Partner’ (n 100) 1; ‘Agreement with H&M Proves Instrumental in Resolving Conflicts’ (*IndustriALL Global Union*, 7 January 2016) <<http://www.industriall-union.org/agreement-with-hm-proves-instrumental-in-resolving-conflicts-0>> accessed 30 April 2019.

commitments.<sup>144</sup> Moreover, the greater these interpretations are embedded in various workplaces, the stronger their normative value becomes. Therefore, the specification of broad labour law provisions seems to reflect the interests of workers as well as the general public.

This discussion is relevant to the comparison between the examined TPLR norms on the topic of collective bargaining. The SA8000 Standards include in their Performance Indicator Annex a requirement according to which the ‘organisation is open to dialogue with trade unions and demonstrates good faith in bargaining with trade unions’.<sup>145</sup> The UN Global Compact also refers to this requirement to negotiate in good faith, but provides a much more elaborated set of guidelines that clarify the different expectations arising from this obligation. It states in this regard, among others, the need of making efforts to reach an agreement; carrying out genuine and constructive negotiations; avoiding unjustified delays; respecting the agreements concluded and applying them in good faith; giving sufficient time for the parties to discuss and settle collective disputes; providing trade union representatives with access to real decision-makers for collective bargaining; and providing information needed for meaningful bargaining.<sup>146</sup>

Interestingly, these detailed requirements of the UN Global Compact are not spelled out in ILO conventions, but their sources are ILO recommendations and the decisions and principles of the ILO’s Committee on Freedom of Association.<sup>147</sup> Unlike ratified conventions, countries are not under a legal obligation to apply the provisions of these sources. That is, recommendations ‘cannot be ratified and remain, as their name clearly suggests, non-binding’.<sup>148</sup> Likewise, the decisions and principles of the Freedom of Association Committee, ‘cannot be deemed to be “case law” in the sense of an interpretation of the standards laid down in Conventions.’<sup>149</sup> In these circumstances, the inclusion of these norms in the UN Global Compact is thus not the result of a strict legal requirement, but

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<sup>144</sup> See discussion in Anner (n 67) 616.

<sup>145</sup> ‘Performance Indicator Annex’ (n 102) art 4.9.

<sup>146</sup> *The Labour Principles of the United Nations Global Compact: A Guide to Business* (n 85) 16, 19.

<sup>147</sup> Compare these requirements, respectively, to: *Freedom of Association: Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* (n 112) [935]–[937], [940], [943], [1071]; ILO Recommendation R143: Workers’ Representatives Recommendation (Recommendation concerning Protection and Facilities to be Afforded to Workers’ Representatives in the Undertaking) (56th Conference Session Geneva 23 June 1971), art 13; ILO Recommendation R163: Collective Bargaining Recommendation (Recommendation Concerning the Promotion of Collective Bargaining) (67th Conference Session Geneva 19 June 1981), art 7.

<sup>148</sup> Alfred Wisskirchen, ‘The Standard-Setting and Monitoring Activity of the ILO: Legal Questions and Practical Experience’ (2005) 144 *International Labour Review* 253, 258.

<sup>149</sup> *ibid* 287.

reflects the confidence of this initiative in the expertise and the legitimacy of the bodies that have developed these norms. Such acceptance of the normative authority of the work of these public bodies can be seen to some extent as an expression of a state-centred regulatory approach.

On the other hand, H&M's Sustainability Commitment and both of its IFAs do not elaborate on the operational requirements stemming from the right to collective bargaining. Such lack of guidance can be seen as a reflection of a unitary perception of the enterprise; one that prefers to preserve some extent of discretion and managerial flexibility to the corporation on how to exactly fulfil the right to collective bargaining.

This observation regarding the lack of specification, applies not only to the provisions regarding collective bargaining within these three H&M initiatives, but it applies also to the other provisions of these initiatives. H&M's 2004 IFA goes even further and does not contain any substantial provisions, merely stating the company's commitment to other regulatory sources.<sup>150</sup> Due to the advantages of specified commitments to the empowerment of workers and upholding their labour rights, it could have been expected that IFAs, which have elements of a pluralist regulatory approach, would be more elaborated.<sup>151</sup> This example serves as another indication of the seemingly greater negotiation power the company had in comparison to the global union federations when drafting these agreements.

## 5. CONCLUSION

Against the backdrop of the growing reliance on private methods of transnational labour regulation, this article has sought to assess the consequences of these regulations on the nature of the legal norms they apply. More specifically, this article has examined whether modifications to the content of international labour law norms can be identified in the texts of TPLR instruments; whether these modifications reflect a positive influence on the content of international labour law norms; and whether these modifications reflect a negative influence on the content of these norms. In order to determine whether such modifications exist within TPLR norms, examining their content using a textual analysis is a necessary

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<sup>150</sup> 'Agreement Between H&M Hennes & Mauritz AB (H&M) and Union Network International (UNI) on Cooperation in Order to Secure and Promote Fundamental Worker's Rights at H&M's Workplaces Worldwide' (n 100).

<sup>151</sup> On the interests of workers' organizations in detailed norms regulating freedom of association, see discussion in Anner (n 67) 616.

approach. Indeed, the assumption behind such an analysis is that the content of TPLR norms matter: either as a basis for enforcement efforts, or due to their potential of forming into ‘hard’ law.

Through the case study of freedom of association, as regulated in five major TPLR initiatives, this research aimed to delve into this ever-important issue and provide some preliminary conclusions. As we have seen, the preambles of the TPLR initiatives examined in this research give the impression that they merely constitute a plain adoption of international labour law. The findings nevertheless reveal that these regulatory instruments hold a substantial norm-generating role, actively shaping the content of the norms they apply.

To begin with, the analysis of the TPLR initiatives corresponds with the expectation that regulatory measures classified as models of ‘new governance’ can contribute to the design of innovative norms and offer valuable guidance to current labour related challenges. This may be attributed, at least to some extent, to the involvement of private actors in TPLR processes, representing a variety of specializations and different practical experiences. These actors’ understanding of the nuances of the workplace environment has the potential to be reflected in the norms they produce. ‘New governance’ theories further emphasise the advantages of decentralised processes, through the multitude of actors as well as through different regulatory measures. By examining five separate TPLR initiatives, this study’s findings corroborate the value of decentralisation. Indeed, different valuable norms were found spread across various regulatory instruments, as opposed to confined to one.

Alongside the positive influence of TPLR processes, the results of this study also reveal a risk of undermining international labour law norms in the adopted initiatives. Indeed, different TPLR instruments offered various levels of compliance with freedom of association norms – and not always providing a sufficient level of compliance with these norms. In several instances, these divergences from norms of international labour law seemed to correlate with the interests of the stakeholders involved in the regulatory process. As such, while H&M’s unilateral code of conduct on occasion reflected the corporation’s interests and did not sufficiently fulfil freedom of association and collective bargaining rights, other initiatives, reflecting the interests of workers, civil society and the general public, seemed to offer in these occasions a better fulfilment of these rights. Overall, the composition of the actors involved in each regulatory instrument was shown to have an impact on the norms that were produced.

The results also highlight the role of public actors in preventing the undermining of international labour law norms in TPLR instruments. The examination of the TPLR texts supports the notion that meaningful participation of public regulatory bodies can contribute to better compliance with international labour law norms, and, as a result, to the promotion of workers' rights. This was demonstrated through the norms found in the UN Global Compact, which was initiated and is run by an intergovernmental organisation, in comparison to the norms of other initiatives, which are predominantly private. In addition, the meaningful involvement of the UN in the UN Global Compact can be contrasted to the limited, and rather symbolic, involvement of the ILO in H&M's 2004 IFA. While the UN Global Compact provided norms that effectively fulfil the rights to freedom of association and collective bargaining, the norms in H&M's 2004 IFA were found to be disappointing. The findings of this study further demonstrate that the lack of strong public participation in the regulatory process might not be compensated by the involvement of global union federations. These actors were found to be unable to serve as a counterweight to the corporation in ensuring sufficient compliance with workers' rights.

'New governance' theories acknowledge the importance of 'state orchestration' of public-private regulatory activities. Yet, this research reveals that these theories may have undervalued the role the State should actively play in the norm-generating process of international labour regulation. In light of the findings of this research, it can be suggested that while the involvement of private actors has certain positive effects on the content of the norms – this should not come at the expense of meaningful public participation in the norm-generating process itself. Indeed, such public participation has been found essential in ensuring the public interest.

These findings on the content of TPLR norms have the potential to launch further empirical research that will examine whether such private influences are also apparent when these norms are applied in practice. Moreover, by improving our understanding of the influence of private actors on workplace regulations, this research offers valuable insights for policy-making on the design and management of public-private partnerships in global labour governance.