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### Minding their own business? Firms and activists in the making of private labour regulation

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## **Chapter Three. Labour standards, implementation, and degrees of control. A power based analysis of private regulatory approaches**

*'Sure, we receive papers from our buyers with codes of conduct on how to treat workers,' says the manager of a factory to a consultant. The consultant is visiting some South Asian and Northern African production sites to investigate clothing producer practices regarding labour standards on behalf of a European business association. 'What do you do about these codes?' asks the consultant. 'Very little. We have never received additional questions on this, nor have buyers visited us to check proceedings. I do not take them seriously, also because these firms ask us to deliver the products so quickly at such a low price. You cannot expect us to abide by these standards under such buying conditions.'*

*A couple of miles down the road the consultant visits another group of factory plants. The owner there is much more appreciative of labour codes of conduct. 'We had managers from a buyer visit us and they had all kinds of comments about our factories. We noticed that among our group of buyers more and more wanted to visit us and check up on our working conditions. We took that into account when we built a new factory hall, making sure that it was in line with the requirements in the standards regarding health and safety. Generally, we now seek to abide by the highest standard asked from us, so that we are in agreement with all the buyer codes on labour standards submitted to us. I cannot prove this yet, but I like to believe that our reputation is growing because of this, and we are attracting more orders from buyers engaging with working conditions.'*

### **1. Introduction**

For over a decade, private regulatory instruments have received attention as a way of achieving Corporate Social Responsibility (CSR) in social and environmental matters related to production. That business could have a positive contribution in these matters through private regulation has, since the beginning of the debate in the 1990s about the potentially adverse consequences of globalization, consistently been defended and celebrated by enthusiasts of private initiatives as a way to humanize production processes. This claim, meanwhile, has been fiercely challenged by those who believe these private efforts to be a cheap trick on the part of big business.

Looking back at the developments in the past decade, it is now possible to counter these critics on at least two points. First, the private regulation phenomenon has been criticized for being a hype that would quickly pass over. Speaking from 2009, with activities still proliferating, it is reasonable to conclude that this is not the case. Second, private regulatory instruments have been seen as an empty business fad, destined to remain a public relations trick on the part of companies. While the PR-effect is arguably a strong catalyzing factor for CSR activities, a category of activities

can be distinguished that does seem to make some difference to aspects of the social and environmental issues they address.<sup>19</sup>

However, private regulation on many accounts can still be said to be far from delivering the goods which the enthusiasts envisioned. The promise of CSR company policy has always been that it could complement insufficient public governance and that it could lead to new political synergies between state and non-state actors in the solving of global issues, where regular established arrangements were failing (see for instance Rischard, 2003). While efforts have certainly been presented with such aims, one can doubt whether real progress has been made.<sup>20</sup> Meanwhile, for a substantial field of activities under the 'private regulation' banner, it is becoming harder to clearly assess progress. For concerned citizens, activists, employees, consumers, investors, or otherwise, discussions over these CSR policies are becoming very confusing because of the proliferation of different activities and policies, the uncertain relations between them, as well as the difficult terminology used to qualify and quantify the issues at hand.

This chapter aims to alleviate some of the confusion over the state of CSR by analyzing the private regulatory instruments that regulate labour conditions in clothing production chains. Specifically, the eight collaborative private regulatory organizations applying codes of conduct and which aim to raise labour conditions in the clothing production chain will be assessed. These are the Fair Labour Association (FLA), Worker Rights Consortium (WRC), Social Accountability International (SAI), Ethical Trading Initiative (ETI), Fair Wear Foundation (FWF), Initiative Clause Sociale (ICS), Worldwide Responsible Apparel Production (WRAP), and Business Social Compliance Initiative (BSCI). Firms involved in the clothing production chain have been among the long-time targets for societal pressure and critique, and the initiatives for this industry belong to the group of most advanced private regulatory organizations in the global arena of voluntary business efforts. These initiatives can be understood as litmus tests for what is currently possible and not possible in the field of private regulation.<sup>21</sup>

With only a cursory glance, substantial differences can be found in the programmes put forward by these organizations, but it is not clear what these differences exactly amount to. Some of these organizations have been described in scholarly work (O'Rourke, 2003; Esbenshade, 2004; Rodriguez-Garavito, 2005; Hughes et al, 2007; Merk, 2007a), but never has a systematic comparison been put forward of all of these organizations. This chapter will propose and apply a

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<sup>19</sup> For discussion and concrete examples see Van Tulder and Van der Zwart (2006).

<sup>20</sup> For the chocolate industry, for instance, initiatives have come to a halt (<http://www.cocoainitiative.org>). It is also hard to see any progress in the initiatives for working conditions for tobacco growers.

<sup>21</sup> These have progressed relatively further than 'second-in line' initiatives aimed at progressing labour conditions in agricultural chains (see for instance ETI, Eurepgap, and SASA). Of the eight analyzed initiatives named above, four focus exclusively on clothing (FLA, WRC, FWF, WRAP), while the other four have clothing as their most important focus.

specific approach towards assessment of these CSR instruments. The focus will be *power based*, arguing for a measure of *stringency*.

By focusing on stringency on the basis of considerations about power, this study aims to cover a middle ground between liberal CSR enthusiasm and critical political economy cynicism. In agreement with critical political economists (Brühl, 2005; Nölke & Graz, 2007), this study starts with the assumption that the spread of private business governance in itself is a manifestation of neo-liberalism on a global scale, signalling the rising power of transnational business, escaping binding and enforced public regulation. Two further assumptions are then often implied in critical thinking: neo-liberalism in private business governance means that business, first, will dominate or control governance procedures and decision making; second, through that control or domination, business will advance its own agenda, which is directed towards the commodification and exploitation of labour and natural resources. These two assumptions, however, may likely but not *necessarily* follow from the first one, and therefore require separate empirical assessment. After all, in private regulation business may be the actor holding most power, but it does not necessarily have to be the only, nor the dominant, *private* party at work, as other non-state actors representing societal concerns are engaged in private governance as well. Moreover, business engagement with private regulation does not automatically mean that in all cases companies pursue a hardcore neo-liberal agenda. Stringency analysis of private regulation can serve as an appropriate tool to establish this. This is because it illuminates the characteristics of regulation, bearing in mind how regulation and the domain of regulation are in many ways related. Therefore, contrary to most existing critical approaches, this work opens up the possibility for the empirical identification of private regulation not dominated by business agendas. And contrary to liberal approaches to CSR, it warns against the uncritical promotion of every form of CSR private regulation in which businesses engage (see for instance Cramer, 2006).

Stringency analysis reveals that most of these eight private regulatory organizations are similar in the setting of their standards but differ in their efforts to build systems to implement and enforce standards. The initiatives are distinct in the ways that they organize the potential for different types of actors to control the procedure of implementation and enforcement. Specifically, the extent to which businesses or societal groups control regulatory procedures is revealed.

A brief review of policy discussions within the CSR professional field will then show that the control issue has become a dominant factor within the political debate between activist and business representatives about the most appropriate form of private regulation.

For purposes of clarity it should be emphasized that all measures of private regulation discussed in this chapter are based on the policy information provided *at the time of the establishment of the analyzed private regulatory organizations*. This means that some of the scores

for specific private regulation may not be up to date. However, given this study's interest in policy shifts and possible patterns of convergence and divergence, Chapter Six covers the most significant changes to private regulatory approaches. Where these shifts have repercussions for the degree of stringency, these will be elaborated further there.

## 2. Private regulation: variation

Codes of conduct come in different forms. Having been described as 'encompassing guidelines, recommendations or rules issued by entities within society with the intent to affect the behaviour of business entities within society...' (Kolk *et al*, 1999: 151), they have been drawn up by firms individually; by NGOs, trade unions, governments or international organizations that aim to stimulate firms towards actions; by groups of firms; or by groups of different societal and economic actors.

Codes of conduct that are drafted as a collaboration of a range of different parties are considered to be attractive, since they can facilitate the pooling of resources and knowledge for firms. In fields of CSR activities, most firms have to figure out which options they have for *effective* and possibly *credible* ways of action. Organizations with collaborative code approaches in principle can facilitate interaction, and as a consequence, these organizations can prevent firms *going it alone*, and industries ending up with hundreds of different individual firm standards and implementation programmes. From a production chain perspective, buying firms adhering to a collaborative code of conduct can furthermore more easily exercise pressure on suppliers to adhere with a common standard.

The literature speaks of a *multi-stakeholder code* as a specific category of such collaborative codes once the group of code-makers represents different economic and societal interests. Multi-stakeholder codes are most often part of a *Multi-Stakeholder Initiative (MSI)*, a concerted effort at interaction between different private groups to address societal issues.<sup>22</sup> The term *stakeholder* has become the regular way of addressing those groups that want to pressure firms toward action and can do so on the basis of a claim to a certain stake in the activities of the firm: trade unions and a range of different NGOs and interest groups (compare Van Tulder *et al*, 2004).

Codes of conduct can be understood narrowly to only consist of the (labour) standards firms should apply. This chapter follows the broader approach, understanding the code also to involve the policies to implement and enforce such standards. Code of conduct analysts consider MSI-codes as belonging to the group of more promising efforts at aligning business towards social goals (Jenkins, 2002; World Bank, 2003). Individual firm codes of conduct have for long been dubbed 'PR-tools',

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<sup>22</sup> Many multi-stakeholder initiatives are initiatives without codes of conduct, aiming for consultation, discussion and perhaps negotiation between different parties.

because they have often lacked substantiation and clear statements on implementation and enforcement. Codes written up by business groups often reflect a lowest common denominator for the rules presented (Kolk *et al*, 1999), while the codes for business written by international organizations, governments and NGOs can, for their current lack of direct implementation possibilities, be seen at the most as *models*: sources of inspiration for business codes and practice, delivering frames of reference or benchmarks.

Most MSIs, on the other hand, offer a code of conduct that is an integrated set of standards, implementation systems and private forms of enforcement mechanisms. Three lines of reasoning are used to argue that multi-stakeholder codes of conduct might have a specific quality other types of codes of conduct lack. These refer to normative, cognitive and interest-based aspects of the arrangement of groups coming together to develop the code.

In the normative line of reasoning, Boström (2006) for instance argues that when standards are developed in multi-stakeholder settings with involvement of various interest groups, this has the benefit of ‘inclusiveness’, meaning that all parties relevant to a specific issue have a say in matters, thus increasing authority of decision making and establishing good governance (see also Ruggie and Kell, 1999). In a view focusing on cognitive aspects, meetings with groups of various backgrounds can be justified with reference to notions of ‘learning’ between, among and inside different organizational actors (Zadek, 2001). Stakeholders and companies have different sorts of expertise, which, when brought together, can lead to synergies and change organizational behaviour for the good with respect to the issue at hand. Including different parties then implies higher credibility and better quality of the rules. From a political interest-based perspective, the reasoning is that if companies get together with NGO (and/or trade union) representatives, they engage critics of business behaviour in their attempts at improvements, thus letting them perform the function of watchdog. The basic idea is if company adversaries can agree with companies on rules, there may be a strong basis and broad support that satisfies a larger critical mass in and around the company. In addition, the fact that societal representatives participate in these organizations arguably adds a ring of credibility to the MSI phenomenon, since groups representing relevant societal interests can be expected to act as guards against firm leniency towards actual implementation and enforcement (Fransen & Kolk, 2007; compare Cashore, 2002).

It should be noted that the boundaries of what constitutes the *multi-stakeholder*ness of a regulatory organization have not been completely delineated in regular CSR lingo by participants in organizations. Moreover, some private regulatory organizations and their supporters might have an interest in applying the term *MSI* to their code effort, or imply the *stakeholder*ness of their initiative because of the benevolent credible ring to it. For the sake of clarity, this study describes an organization as a *multi-stakeholder* initiative if it has participants from both business and society

interest groups as initiators and members, and if its governance structure allows for an equal possibility of input among the different partners in steering the organization (compare Utting, 2001; Oldenzel, 2003). This chapter therefore focuses on both business and multi-stakeholder governed private regulatory organizations.

### **3. Problems and pitfalls of assessing private labour regulation**

How does one assess whether codes of conduct live up to expectations? Intuitively, the easiest way to go about this would be to study the impact of policies in factories and see whether improvements can be found in worker rights. This would be a test of private regulatory effectiveness. However, the inside of supplier factories are a politically very sensitive area for researchers to roam and buying as well as supplying firms have not been keen to let outsiders in, or if admitted, to let them report on what was found. Given the culture of distrust between supplier managers, buying firm agents, auditors, CSR managers, and workers, one should furthermore question whether the empirical analysis produced from such a study would be valid, and provide the basis for solid inference. For instance, many examples exist of suppliers hosting 'showroom factories' among their productive facilities for outside visitors, or adopting multi-tier chain strategies, only admitting outsiders to the first-tier of factories, that are, it goes without saying, more or less compliant with regulations and standards set by buying firms. Finally, there is the problem of workers not opening up to outside researchers out of fear of repercussions by management. In short, there is a system of fraud and uncertainty surrounding the actual improvement of labour conditions in clothing factories, and there is a high risk of the researcher becoming caught up in it, or if not, being stopped from further enquiry into specifics (see also Kocer & Franssen, 2009). Despite these challenges a small group of scholars has nevertheless succeeded remarkably well in studying private regulatory implementation inside factories, often making use of the institutional support from buying firms (Frenkel, 2001; ETI, 2006; Locke et al, 2007). But these efforts predominantly remain confined to assessments of one specific regulatory approach, begging the question of how to systematically compare findings across different efforts by different private regulatory organizations.

Most assessments of private labour regulation are therefore directed at their content as policy instruments. This means that the analysis moves away from the everyday experiences of workers to policy analysis. With this move, a research strategy towards thick description is traded in for a strategy leading to more abstract predictions. However, by doing so, the scope for wider inference is gained, as the private regulatory approaches apply to thousands of factory sites.

Parallel to the reasons for differing expectations of multi-stakeholder initiative performance, three lines of enquiry can be distinguished to compare and assess private regulation, focused on legitimacy, learning, or power issues. After discussing the first two, the decision to choose the third

as the most fruitful starting point for an assessment will be elaborated.

*a. Why legitimacy is a problematic criterion for assessing private labour regulation*

Some scholars pursue an assessment of private labour regulation which proposes an analysis of the legitimacy of private regulatory organizations. Following Scharpf (1999), Wolf (2004) for instance reviews the input (who decides?), output (does the code do what it purports to do, and are there specific qualities to decisions made?), and *throughput* (legitimate operation subject to transparency) legitimacy of a regulatory organization.

Through the concept of output legitimacy, this approach is faced with similar problems as the measure of effectiveness of private regulation, discussed above. Studying output legitimacy amounts to studying impacts, for which in the final instance factory-level research of worker conditions is needed. Without it, legitimacy assessments *à la* Scharpf are incomplete. Output legitimacy is difficult to establish unless one wants to make intermediate judgements on the basis of other people's policy evaluations about progress, which is of course a slippery road to go down.

Input and throughput legitimacy assessment raise a different set of problems. As they are based on ideas of the appropriate groups obtaining access to decision making and being able to review the progress of these decisions, it is important to establish which groups should be involved in this form of politics. Most commonly, the idea of *stakeholdership* is used to identify such groups. A broad review, however, shows that most private regulatory organizations that have come into existence in the past decade allow for stakeholder input predominantly from Northern groups, whereas the problems addressed have a distinct Southern impact (Fransen & Kolk, 2007; Utting, 2001). In other words, it seems as though most stakeholder groups involved are related to stakeholders of the lead firms under scrutiny, rather than stakeholders to the specific problem at hand. Intuitively, one would meanwhile expect input and throughput legitimacy of private labour regulation to hinge on the possibilities of stakeholder input 'on the ground', most notably workers. Several reasons can be put forward why input in private regulation is a predominantly Northern affair, all having to do with asymmetries in power resources: availability of money, institutional contacts and expertise in Northern countries, and the absence of these in Southern countries.

It is therefore no exaggeration to state that what is equal from the perspective of throughput legitimacy in terms of dividing tasks among the presently *available* stakeholder groups does not necessarily constitute an equitable form of regulation. This is because the subject field of regulation is already fraught with inequalities, which are related to the problem to be solved. Regulation that is procedurally equitable, in the sense of allowing for different checks and balances among groups that govern regulation, is unlikely to remedy this. In other words, any reasonable assessment of the input and throughput legitimacy of private labour regulation can only describe relatively marginal

differences between regulatory instruments that all fail when it comes to involving intuitively identified key stakeholder groups (from the perspective of the problem at hand). While this is a significant finding in itself, it fails to catch the qualitative nature of observable policy differences between existing private regulatory approaches.

Second and related, private labour regulation applied to mass consumer goods production chains is caught up in a tautology of some sort. Equal participation and high levels of input and/or throughput legitimacy for private governance instruments would, in the case of labour standards, require what can only be seen as the end state of the aims of private labour regulation: the fully fledged organization of workers. Workers in export-oriented industries currently face an impressive amount of obstacles when it comes to organizing themselves. One can think of, amongst many other factors, political and cultural opposition to unions, anti-union legal frameworks, spatial fragmentation of production, and the footloose nature of sourcing practices. Private labour regulation is a tool to counter some of these very tendencies (Merk, 2007b; Kocer & Franssen, 2009). Higher levels of input and throughput legitimacy through local group involvement in these tools would therefore only be possible, if at all, after the event.

An alternative route towards legitimacy is to follow the descriptive empirical assessment of how organizations seek legitimacy for their operations, for instance in the work of DiMaggio (1988). Scholars such as Cashore (2002), following Suchman (1995), hold that external audiences may attribute different forms of legitimacy to private regulatory organizations. It is very interesting to analyze empirically the dynamics of legitimacy seeking, awarding, and receiving among private regulatory organizations, their stakeholder groups, and a wider audience. Serious problems arise, however, when this operational legitimacy is proposed as an evaluative tool directly for the scholar (see for instance Scherer et al, 2006). Operational legitimacy in the end depends on stakeholder appreciation of what an organization does. The understanding of legitimacy is therefore contextual, relational, and interactive. How the scholar as an outside assessor is supposed to account for the order in which different tokens of appreciation by different relevant stakeholder groups matter, or how to deal with the fact that organizations can actively manipulate stakeholder perceptions and expectation, is unclear (Cashore, 2002; Kolk & Pinkse, 2006).

Summing up, establishing legitimacy as a way of assessing private labour regulation, both through input/output\throughput legitimacy approaches as well as through analyses of operational legitimacy, probably obscures more than it reveals. Due to asymmetries of power and the political dynamics between groups, it cannot provide reliable assessments, and if it does, it cannot in any way make sense of observable differences between private regulatory approaches. For these reasons, the analysis of legitimacy is not pursued further here as a tool.

*Legitimacy* is rarely used by practitioners in the field with reference to characteristics of private regulation. When asked about this, activists hold that they consider legitimacy to be a word exclusively belonging to the domain of enforced democratically established state regulation. Most CSR managers also seem to subscribe to this point.<sup>23</sup>

*b. Why learning is not an appropriate criterion for assessing private labour regulation*

The term learning, by contrast, is used quite often in the CSR field when discussing interaction between groups on labour standards and regulation. It is also emphasized by scholars of CSR as a key process in company adaptation to a CSR agenda (Zadek, 2001). Private regulatory organizations are understood as institutions that facilitate learning processes (Utting, 2001; Bostrom, 2006). They may therefore also be assessed as such.

Practitioners use the term *learning* to denote two different things: first, becoming informed on a specific topic, acquiring knowledge (for instance on labour issues, legislation, circumstances of outsourced production); second, adapting a certain strategy on the basis of insights. The second aspect is also the dominant point of focus for the learning literature in policy sciences. What is striking about this literature (see for example Hall, 1993; James & Lodge, 2003) is that its descriptions of different elements within a process of learning fit so easily with theoretical descriptions of rational calculation, coercion, consequences of structural power, and the influence of expert communities—in short, various mechanisms that have been studied in policy processes for decades already.

This begs the question of why these mechanisms are now called *learning*. What is the added value? While that question awaits answering, the regular reservations that are voiced against the conceptual implications of the term learning can be summed up, namely that it portrays policy change as a fundamentally good thing and emphasizes progress from the point of departure; it seems to imply that this progress is irreversible (or can you *unlearn*? Is there an Alzheimer theory of policy change?); and it overstates rational-cognitive aspects of policy change and understates rational-opportunism, insincerity, or chance (compare Hendriks, 2007).

It could be hypothesized here that these ideological overtones are actually the reason why the term learning is popular within the particular field of CSR policymaking in the first place, for practitioners in the CSR field may have an interest in portraying policy adaptation as first, policy *adjustment*; second, a change that is lasting; third, one not based on political bargaining; and fourth, well thought through and sincere.

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<sup>23</sup> Meanwhile, one may expect differences of opinion between these groups on what the scope of state regulation should be.

In any case, in assessing learning as a decisive characteristic of private regulation, what is needed is examples of policy adaptation on the part of participants that does or does not go in the direction of the stated regulatory aims, on the basis of the interaction that is going on inside private regulatory organizations (for an example of the use of learning as a signifier for company CSR policy change, see Westerwinter, 2007). With regard to private labour regulation, what results is a similar problem as in the case of an assessment based on output legitimacy and effectiveness: in the final instance, evaluations of improvements in factories are needed, which, as already noted, is difficult for academics to do reliably and on a wide scale. Or, alternatively, studies should identify forms of policy adaptation that rely solely on the company policy level, in other words, focusing on plans as expressed in policy documents and put into internal company instruments, without knowing about the impact of these on the issue at hand. The obvious thing that most people are interested in with regard to an assessment of CSR is whether it is either ‘substantial’ or ‘cosmetic’, in other words, seeing the plan into action. To quote an activist in this matter: ‘Sometimes I go a little crazy about all this ‘learning’ talk. It’s all very good that as a company you are learning by doing. But when are you going to do what you have learned?’<sup>24</sup>

An illustration of the difficulties that learning assessment runs into when it looks only at the level of company policy plans is the famous application of learning on CSR by Simon Zadek (2001). Some of the steps he identifies on the learning ladder of companies are distinguished through differences in the intentions of the company (*strategic* or *defensive* or *civil*). How one is to operationalize, empirically measure, and distinguish these stages while preventing outright wishful thinking is not clear. And in the case of an assessment of different private regulatory organizations there is of course the additional challenge of proving that this shifting in the intentions of policies is somehow a product of the interaction inside the organization.

In sum, using *learning* as an assessment of private regulation causes conceptual confusion and leads to measurement problems, ending up with an undesirable focus on intentions.

### *c. Towards a power based assessment of private labour regulation*

Like the approaches focusing on learning and legitimacy, this current assessment focuses on the significance of interaction between groups, and its implication for established policies in private regulatory organizations. Contrary to the abovementioned approaches, it does not look at particular qualities of interaction on the basis of notions of democracy or ideas exchange. Instead, it embeds interaction in a political view of the relationship between rules, the purpose of rules, and the relevant actors in the domain of regulation. This perspective is in line with previous efforts at describing private regulatory approaches (Esbenshade, 2004; Rodriguez-Garavito, 2005; Merk

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<sup>24</sup> Interview N4.

2007a), but arguably the first to be explicit, systematic, and comprehensive in its assessment of the existing private regulatory organizations for the clothing production chain.

The previous chapter discussed the understanding of the relationship between rules and the market, and posited first that rules are often used to correct power inequalities in the market, and second that powerful parties seek to influence rules to their own advantage. It was concluded that a power based analysis of regulation should not only ask what standards are put forward in private labour regulation and what systems are provided; it should also ask who does what in regulation—similar to input legitimacy analyses—but for different reasons. From the perspective of law as the corrector of inequality, it is necessary to identify those elements that compensate the power asymmetry between the actors regulated; second, because of the tendency for the powerful to control regulation, it is necessary to identify those elements in regulation where regulatory capture leaves the powerful with the possibility to advance an agenda not in line with the object of regulation, as reflected by common norms of justice.

This leads us to two questions: which actors are ‘the powerful’ in this specific domain of regulatory action? And what could be their agenda?

In the context of clothing production chains as the domain of regulation, the literature on production networks and value chains offers a decisive answer to the first question: buying companies or so-called lead firms are the most powerful actors. Lead firms are governors of the value chain, to a large extent setting prices, volumes, and designs of products as well as influencing productive practices in factories and shaping the structure of cross border trade between different supplying firms (Gereffi & Memedovic, 2004; McCormick & Schmitz, 2001). Gereffi et al (1995) therefore even coin the term *buyer driven chains* to denote the influence of lead firms. Some also hold that lead firm chain governance affects labour conditions and the position of workers, as purchasing practices can substantially strengthen or weaken the suppressive character of supplier management’s labour regimes (ACONA, 2004; Maignan, 2003). Finally, these firms also exercise structural power as the constant relocation (or, more precisely, re-sourcing) threat stimulates local governments to lead ‘firm-friendly’ public regulation exercises.<sup>25</sup> Societal actors then emerge as weaker parties in the equation.

It was already noted that manufacturing workers are in a vulnerable position, in terms of the obstacles they face in organizing for the purpose of pressuring and bargaining. In the structural sense, the position of workers is further weakened by the situation of large labour supply in many

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<sup>25</sup> One should note that buying power is at its height if lead firm performance is taken together as a group within the organization of a chain and the aggregate impact of their individual decisions is reviewed. Seen separately, some lead firms, especially if they control a smaller segment of the market, may find themselves in a more constrained relationship to other parties in the chain than others. It is therefore important to recognize that private regulation treats lead firms purposively as groups acting in concert to extend the impact of regulation in an attempt to turn buying power towards a just goal.

countries. Union organizations in producer countries, if existent, therefore suffer from weak bargaining positions and few resources. Northern NGOs and international trade union organizations such as the global unions suffer less from these constraints and therefore organize transnational networks with local groups to use resources and political opportunities to pressure companies on behalf of workers. This undoubtedly makes them significant actors holding power (see Keck & Sikkink, 1998). But it is important to note that their power is completely relationally dependent on lead firms. For lead firms in the end have to respond to pressure from activists by taking the action desired by activists in the supply chain. At least, this is the case as long as Northern governments and regional and international organizations stick to their policy of stimulating CSR and treating global labour standards as a domain for private regulatory solutions, instead of pursuing binding and enforced public regulation.

In between lead firms and societal groups sit the supplier firms whose factories are subject to the private regulation. Towards lead firms (acting in concert, as in the case of the collaborative private regulatory efforts analyzed here) they exercise very little power.<sup>26</sup> Towards single buying firms their influence may rise substantially. But towards societal groups on the ground they form the actual manifestation of coercive power towards workers, since factory management employs the labour regimes that lead to worker abuse.

What could be the agenda of the most powerful actor in the domain of regulation, and who might become dominant unless institutionally kept in check? Most studies of regulatory capture quite easily identify the regulatory preferences of business on the basis of their market strategies (Stigler, 1988; Ayres & Braithwaite, 1991). For CSR regulation this is a more difficult thing to do, since companies involved are pursuing issues where the implications for the ordering of the market are less clear. The consequences of private voluntary CSR standards for the competitive position of firms within an industry, or the industry as a whole, are less straightforward than the consequences of taxes or competition laws. However, this study identifies a CSR agenda consistent with assumptions in the regulatory capture literature. This is the *aesthetical* or *cosmetic* version of Corporate Social Responsibility. In this version companies do not have to change anything about their sourcing policies and can devote only very small resources to resolving labour issues in their supply chain, which is then enough to release them from the risk of reputation damage through public campaigns by activists, and hands them opportunities to publish positively about their accomplishments. Put simply: this is maximum positive exposure for minimal effort. Or put cynically: all talk, no action. This may be viewed as quite a rational business strategy since it

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<sup>26</sup> Does industrial upgrading take place inside the clothing production chain? Can suppliers somehow pull themselves up, acquire a larger mass of supply horizontally or vertically and therefore a better strategic position towards lead firms, as the large MNC Yue Yuen has done for footwear (Merk, 2008a)? Current value chain research has not found such companies yet, but one could expect them in the future. See also Chapter Seven, section 4b.

combines a decrease of reputational risk and an increase in the positive effects on reputation, while keeping in check costs and not requiring major organizational change. Some critics actually fear that this is an accurate portrayal of what CSR policy currently amounts to (see for instance Sum, 2005; Bruno & Karliner, 2002).

Particular emphasis when analyzing private labour regulation should therefore be put on how strict an approach is towards the participating actors, most notably the powerful. *Stringency* is a measure that is sometimes used in private regulation literature (see for instance Rodriguez-Garavito, 2005) to determine the weight of obligations which regulations put on the regulated. While most of these studies only focus on the scope of the rules themselves, this endeavour extends the approach to the implementation and enforcement mechanisms of the rules. To what extent can the powerful party determine what happens in a private regulatory instrument and steer that organization towards its own agenda? Different institutional setups of implementation and enforcement may, to differing degrees, make it easier or more difficult for powerful groups to capture private regulation. More stringent regulation may institutionalize and externalize self-restraint on the part of lead firms, as implementation mechanisms allow for the critical scrutiny of implementation processes by societal groups (the *watchdog* function). Less stringent regulation sees lead firms dominating implementation procedures to the extent that critical scrutiny and outside review become impossible.

A degree of stringency therefore says three things about power relations in the articulation of private labour regulation and the clothing production chain as a domain of regulation. First, the extent to which the influence of the most powerful category of actors towards societal groups is *kept in check* to prevent regulatory capture. Second, the extent to which the influence of the most powerful category of actors in value chains is *used* to promote the aim of regulation. Third, the extent to which available regulatory mechanisms can *empower* weaker societal groups in relation to the most powerful business actors (compare Esbenshade, 2004; Merk, 2007b).<sup>27</sup>

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<sup>27</sup> An important aspect of power is that it may corrupt. In that sense critics may argue that those critical watchdogs that join in private labour groups to keep companies in check may not remain critical watchdogs for long. As a process of cooptation evolves, the vested interest of societal groups may become to keep the peace with companies, and this may make them more lenient when it comes to assessing company behaviour. In the presented approach, this can become empirically observable if it leads to adjusted policies. This would then affect the stringency scores, for instance in the case of changes in information dissemination and verification procedures. Cooptation may also become manifest through outright fraud, i.e. all groups involved collectively not following the rules as they are set out in private regulation. Of course this is something stringency cannot measure or predict. In the final instance, the likelihood of such a practice occurring is dependent on an available audience behind the interest groups keeping regulatory groups involved in check. Higher stringency makes this check more likely as it leads to more transparency in decision making.

#### **4. Operationalizing stringency of private regulatory organizations for the clothing production chain**

It is possible to operationalize the *stringency* of private labour regulation in degrees for three different aspects. First, the scope of the labour standards needs to be established; second, the degree of elaboration of available regulatory mechanisms; third, the degree of control that can be exercised by any type of actor in establishing, governing or managing these mechanisms is determined.

Below the eight private regulatory organizations are examined that aim to regulate labour circumstances in the clothing production chain, and integrate standards, implementation systems and private forms of enforcement mechanisms. In fact, only four of these organizations (Ethical Trading Initiative (ETI), Fair Labour Association (FLA), Social Accountability International (SAI), and Fair Wear Foundation (FWF)) do actually deserve the term multi-stakeholder initiative, if applied as proposed, although all eight organizations discursively flirt with *multi-stakeholderness* as an aspect of their effort. Apart from many similarities, these initiatives offer very different views on the right way of action. The next sections elaborate on these differences by explaining and then applying the operationalization of degrees of labour standards, implementation procedures and control. Then the overall degree of stringency will be elaborated for the mentioned private regulatory organizations.

##### *a. Labour standards*

Starting off with an assessment of the labour standards to be applied, which relies also on previous comparative work (O' Rourke, 2003; Rodriguez-Garavito, 2005, JO-IN, 2006), a measure of rules is created that includes four components: the comprehensiveness of the standard, the degree to which a standard is discretionary, the specificity of the standard and the degree of reference to existing labour standards.

The comprehensiveness of the standard is measured by the degree to which the standard covers worker rights in five categories: employment, training, working conditions, industrial relations and force (following Kolk *et al*, 1999). Coverage of these issue is scored as 1 point per category, except the industrial relations one, which is measured as 2 points. Reason is that this category, following Rodriguez-Garavito (2005: 214-220) arguably forms the core enabling right to worker organization and may be the basis for the advance of the other mentioned rights.

The degree to which a standard is discretionary reveals how much leeway regulated actors are granted in applying a standard: can they, should they try to or must they abide by a standard (compare McDermott *et al* 2007; McDermott and Cashore, 2008)? This is scored from 1 (most discretionary) to 5 (least discretionary and therefore most strict).

The specificity of the standard is measured as the degree to which it delivers precise information requiring minimal interpretation on the part of the regulated actor, i. e. through threshold conditions and quantification (McDermott and Cashore, 2008; Kolk *et al*, 1999). This is scored from 1 (least specific) to 3 (most specific). Under 3, actors are offered most clear information about what they have to adhere to. Under 1, standard formulation may lead to insecurity, flexibility or opportunism on the part of the regulated actor.

The degree of reference of existing labour standards measures to what level of standards the described standard adheres in its coverage of particular categories of worker rights: below national standards (1 point), on the national law (2 points), on the industry level if it exceeds national law (3) or on the level of ILO conventions (4 points). Large differences may ensue because of the reference used in the standard, since descriptions of for instance working hours and Freedom of Association may vary considerably.

In the overall measurement of the standard, adding up these four assessments, proportionally extra emphasis is laid on levels of standards, specificity and worker organization, with scores possible from 0 up until 33 (see table 1). This is in line with the stringency notion based on considerations of power asymmetries, as elaborated above.

	ICS	WRAP	BSCI	FLA	ETI	WRC	FWF	SAI	
MIN	18	21	30	31	33	33	33	33	MAX

**Table 1. Degree of labour standards of private regulatory organizations from low to high.**

The scope of the different labour standards applied is quite similar: directed at issues such as freedom of association and right to collective bargaining, health and safety, forced labour and child labour, and discrimination. There is little disagreement as to which issues the standards should cover. Two major differences however distinguish the private regulatory organizations. First, they differ in terms of the public arrangements to which the standards relate as a reference for the substance of worker rights. Most analyzed organizations use ILO core conventions and UN conventions as the standards to adhere to. But WRAP uses standards referring to national and local laws. For most of the labour laws of developing countries in which clothing-supplying factories are active goes that it leads to less protection of worker’s positions than in the case of actual implementation of international standards. Second, to what extent do the standards apply the issue of a ‘living wage’: the possibility for the workers to receive wages for their working hours that enable subsistence. Initiatives like ETI, WRC, SAI and FWF include the promise of a ‘living wage’, FLA and WRAP do not, while BSCI’s mentioning of it has more discretionary prose as to the

required action on the part of firms.<sup>28</sup> Generally, six out of eight regulatory organizations score quite similarly on their labour standards, and four organizations even score equally high.

*b. Implementation specificity*

Specificity of implementation and enforcement rules of private regulatory organizations are key in addressing the critique that private labour regulation is ‘mere words and no action’. A transparent elaboration of what firms should be doing to put the standards into actual effect can make clear to outsiders and insiders what can be expected. The assessment of the degree of implementation specificity is made up of four parts. Firstly, the appearance of ten categories of policy tools guiding implementation are reviewed: a standing organization with governance structure; a management implementation system that companies can use; a monitoring programme; a system for selection of monitoring parties; a system for evaluating performance of monitoring parties; a procedure for deciding on admittance of companies; a procedure for deciding on discontinuation of company membership; a procedure for evaluation of membership company performance; a complaints process; a system for remediation and corrective action.

Secondly, the scope of requirements is investigated, as applicable to only the factory level (1 point), a specific supplier (2 points) or up to the whole supply chain (3 points). In case an organization offers both supplier and buying firm membership, the scope is understood to consist of the whole chain.

Similar to labour standards measurement, the degree to which implementation requirements are discretionary are reviewed, scored from 1 (most discretionary) to 5 (least discretionary and therefore most strict).

And finally also here the specificity of implementation is scored, measured as the degree to which organizations deliver precise information requiring minimal interpretation on the part of the regulated actor, in this case also looking at the existence of time horizons, specific deadlines for achieving certain requirements (McDermott and Cashore, 2008; Kolk *et al*, 1999). This is scored from 1 (least specific) to 3 (most specific).

The overall measurement of these four indicators leads to the degree of implementation specificity, with relative proportional weight for the degree of elaboratedness of implementation policy tools, with scores possible from 0 up until 21 (see table 2). This is considered a justifiable form of weighing from the perspective of the elaborated understanding of stringency, given the expectation that more institutionalized and codified implementation policies shape the behaviour of regulated actors to a higher degree than less specific policies.

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<sup>28</sup> For a discussion see Clean Clothes Campaign (2005) ‘The Business Social Compliance Initiative: a critical perspective’

	ICS	WRAP	ETI	WRC	BSCI	SAI	FLA	FWF	
UNSPECIFIC	11	11	11	12	18	19	21	21	SPECIFIC

*Table 2. Degree of implementation specificity.*

Contrary to many company codes of conduct, all the organizations analyzed here have explicitly stated implementation measures in place. Some, however, more than others. There is a definitive break between more dressed up and more dressed down versions of private regulation. FLA, FWF (and to a lesser extent SAI and BSCI) supply the full works. Marginal differences here are largely due to the degree to which the organization is more or less discretionary towards the performance of business members. In the group of more dressed down versions of private regulation, WRAP and ICS do not have a management implementation system, nor a complaints system or a system for corrective action; WRC excludes business membership from its organization, which leads to a much smaller scale of implementation policies; and ETI adopts an ‘experimental approach’ to implementation which means that it does not choose for certain specific types of implementation or implementation policy tools. The background of these policy differences will be discussed in more detail in the next chapter.

*c. Control*

The third measure of stringency is the degree to which parties can control the regulatory effort. This is an indicator less frequently used than the two previous ones. It is also the one most directly related to the discussion of power asymmetries in the development and practice of regulation. Here, the assessment focuses on four fields of regulatory design: decision making and governance; monitoring of performance; review and revision and information dissemination.<sup>29</sup>

Participation in decision-making and governance refers to the structure of decision making and planning inside the private regulatory organization. It is scored as 1 if only businesses participate, 5 if tasks are divided equally between business and societal interest groups and 10 if only societal interest groups are participating.

Monitoring of performance refers to the division of labour in the operation of compliance checks at factories. It is scored as 1 if only business groups participate, 5 if tasks are divided between business and societal interest groups and 10 if only societal interest groups perform monitoring.

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<sup>29</sup> Note that the control procedure encompasses and goes beyond the governing board of an initiative, where the *meta*-discussion takes place on what procedure is developed and what types of actors do what.

Review and revision is understood as the policies dealing with complaints and remediation as a result of compliance checks at factories. If only business groups perform these tasks, it is scored as 1; if societal interests group are engaged too it is scored as 5; and finally if only societal groups deal with these issues it is scored as 10.

Finally, information dissemination refers to what groups get to view what information regarding the actual performance of members of private regulatory organizations. If this information stays with business groups, it is scored as 1; if societal groups receive it too it is scored as 5; finally if it is publicly disseminated, it is scored as 10.

Combined measurement of these four indicators leads to the degree of control, with relative proportional weight on all four indicators for the role of societal actors. Possible scores range from 4 up until 40 (see table 3). The primacy of societal actor engagement, in this operationalization, as elaborated in section 4, is based on both the notion of regulation as a corrector of inequality and the notion of critical review of regulated actors by stakeholders.

	WRAP	BSCI	ICS	ETI	FLA	SAI	FWF	WRC	
BUSINESS	4	4	4	16	16	16	20	40	SOCIETAL

*Table 3. Degree of control of regulation by actors.*

For instance for the Worker Rights Consortium (WRC) the process is controlled solely by societal interest groups: complaints and grievances are largely dealt with by NGO and trade union representatives; monitoring is conducted by trade unionists, involving workers and communities; and information is widely shared. On the other side of the scale the Worldwide Responsible Apparel Production (WRAP), the Business Social Compliance Initiative (BSCI) and Initiative Clause Sociale (ICS) are predominantly business controlled, in the sense that primarily profit-seeking professionally run organizations decide and operate: businesses select the auditors; auditing is performed by professional auditing firms; information on factories and workers stays with firms; and in BSCI, complaints and grievances are largely dealt with by firm representatives. The actual multi-stakeholder governed organizations are in between these two poles, with differences between ETI, FLA, SAI and FWF in the control of amongst others factory information, selecting targets for audits and selecting auditors. Accordingly, FWF scores higher on this count since it engages societal actors in these processes, contrary to the other organizations.

*d. Stringency*

As a final step of assessment, the three mentioned degrees of labour standards, implementation specificity and control are added up to settle the degree of overall stringency of the private regulatory organizations. Sceptics may wonder whether this is a good idea. The different elements at first sight seem to relate to each other like apples and oranges. What is the point of blending them? Some scholars applying similar assessments of private policies explicitly shy away from lumping together the different components of their assessment (see for instance Kolk et al, 1999; McDermott & Cashore, 2008).

It is argued that no matter how different measured degrees may be, it is in their combined working that stringency becomes apparent. The specific quality of regulation thus measured may, following the literature, be called its configurational design (f. i. Marx, 2008b). Examples of this logic can be viewed pairing two elements of the stringency measure together.



**Figure 1. Pairing labour standards and implementation.**

Figure 1 depicts pairs of organizations with high standards and varying implementation specificity. No matter how high the labour standards employed by a private regulatory organization may be, without the implementation requirements and the review of performance it does not yet constitute strict private regulation before knowing to what degree and through what trajectory firms will keep their commitment with these standards. The private regulatory organizations scored in the middle-

right quadrant therefore are less stringent than those in the upper right quadrant. Conversely, a private regulatory organization may exist with very specific implementation policies but lower labour standards (an example not existing in this group of cases) that would end up in the higher quadrant to the left. Here as well regulation is less strict, because despite its specificity of policies the applied standards are lower.



**Figure 2. Pairing labour standards and degree of control.**

Similar considerations apply when high labour standards and degree of control of regulation are paired. Also here high variation can be seen on the second indicator compared to the first. For the private regulatory organizations placed in the lower right quadrant the critical review necessary to speak of strict regulation is missing, despite their commitment to high labour standards. Again, the converse imaginary example of high degree of societal control with low labour standards (upper left quadrant) would also be less strict, since it means lower standards.

The notion of configurational design does not yet inform us how the different elements should be weighed relatively in the final measurement of stringency. The decision to add extra proportional weight to one or more of the three elements of stringency ideally has a basis in theoretical views of the performance of private labour regulation. This leads to a conundrum. For it was established that, first, comparative work on the performance of private regulation so far is scarce; second, that if this research were more evolved we probably would have less use for a policy-based stringency assessment anyway. Lending insights from public regulation measures of

stringency is also of little use here since the whole point of the assessment of private labour regulation relies on the essential difference between private and public regulation with regard to the notion of strictness. This study therefore follows the pragmatic option and chooses to weigh all three degrees equally in its assessment, underscoring that all three measured elements are of equal importance for an understanding of stringency. The logical basis for this operationalization is already implied in the different examples just described and illustrated. The results are presented in table 4, with possible scores ranging from 4 (least strict) to 94 (most strict).

	ICS	WRAP	BSCI	ETI	FLA	SAI	FWF	WRC	
MIN	33	36	52	60	68	68	74	85	MAX

*Table 4. Degree of stringency*

In this measurement, main differences between multi-stakeholder governed organizations versus business-governed organizations arise because of differences in labour standards and control. Differences within the cohort of multi-stakeholder governed organizations stem from different degrees of implementation specificity and the control issue regarding monitoring. Table 5 one more time summarizes some key characteristics of the organizations measured as they relate to the degree of stringency and also for the purposes of clarity identifies the governance of private regulatory organizations to show the variation of policies across this category. The next section then relates these findings to the emerging policy debate on appropriate private labour regulation.

	<i>Labour standards</i>	<i>Implementation</i>	<i>Governance</i>	<i>Control</i>
ICS	ILO Conventions, unspecified about content	Less specific: audit & report	Business	Business controlled
WRAP	Local laws, except discrimination, forced and child labour	Less specific: audit & report	Business	Business controlled
BSCI	ILO conventions, discretion on living Wage	More specific: management implementation; audit; complaints; remediation	Business	Business controlled
ETI	ILO conventions, including living wage issue	Less specific: complaints; experimental on monitor; verification; remediation	Multi-stakeholder	Business > Societal
FLA	ILO conventions, excluding living wage issue	More specific: management implementation; monitor; verification; complaints; remediation	Multi-stakeholder	Business > Societal
SAI	ILO conventions, including living wage issue	More specific: management implementation; auditing; complaints	Multi-stakeholder	Business > Societal
FWF	ILO conventions, including living wage issue	More specific: management implementation; monitor; verification; complaint; remediation	Multi-stakeholder	Business - Societal
WRC	ILO conventions, including living wage issue	Less specific: external monitor and report	Societal	Societally controlled

**Table 5. An overview of eight private regulatory organizations.**

## 5. Stringency, control and policy debates

Especially the indicators of the degree of labour standards and the degree of control in the measurement of stringency figure prominently in policy debates on the credibility of different types of private labour regulation.

Generally, most specific policy discussion with regard to labour standards is on the issue of including the provision for a *living wage* in a private regulatory approach. This discussion has received ample attention elsewhere (MSN, 2008; Esbenshade, 2004; Rodriguez-Garavito, 2005) and can be summarized shortly as follows. The provision of a living wage for workers in clothing manufacturing is a major precondition for the credibility of private regulation for both unionists and labour activists. According to an opinion poll among readers of the authoritative Maquila Solidarity Network (2007) private labour regulation news review, the living wage nowadays is still nr.1 concern with regard to private labour regulation. The main reason why some companies state that they hesitate to abide by private regulation with this clause, is what they see as the seeming inoperability of the concept.<sup>30</sup> What constitutes a living wage, for whom and under what conditions? These companies and private regulatory organizations do not adopt the living wage in their standards as long as they find that these questions cannot be answered satisfactorily. Proponents of inclusion of the living wage acknowledge the difficulties in the operationalization of the concept but insist on corporate commitment to it. In their view, the problem of understanding what a living wage is and applying it can be solved practically with some effort. In recent discussion for instance, the tool of comparative wage ladders has been proposed to make the application more specific (JO-IN, 2007). Sceptics however hold that the ladder itself if applied laxly may be a step back from the commitment to a living wage (Bulut, 2008).

Arguably most remaining controversies revolve around the idea of control in the measurement. The following sections will illustrate shortly how the issue of control becomes manifest in contemporary debates about the virtues and vices of different private regulatory organizations. First, it summarizes the contrasting views on predominantly business controlled and societally controlled regulatory organizations. Second, it analyzes two key issues of implementation for which the control issue runs through discussions for all organizations concerned: audits and supply chain responsibility.

### *a. Business controlled organizations versus societally controlled organizations*

The predominantly business controlled organizations in the analysis are the American WRAP (promoted by Wal-Mart), the French ICS (promoted by the big French retailers such as Carrefour

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<sup>30</sup> Interview P6.

and Casino) and the pan-European BSCI (which has amongst others Metro, Otto and Esprit as members). Proponents of a business-controlled approach to private labour regulation dismiss the idea that businesses need to be kept in check by societal groups in private regulation. The problem of labour abuse is seen as something that can be effectively managed by business using the help of commercial experts, without the assistance of unions or NGOs. Business controlled private regulation limits unnecessary debates and increases the potential for swift progressive action.<sup>31</sup> An additional advantage mentioned is that in the experience of some companies, suppliers are happier to comply with business-controlled private regulation when compared to other private regulatory organizations.<sup>32</sup>

Critics from advocacy groups meanwhile hold that business controlled regulation is *not credible*. It has limited entrance points for outsiders to judge the progress of companies, or what has been done to improve circumstances in factories. It excludes closer scrutiny of the implementation process by critical groups. And it leaves out possibilities for more inclusion of marginalized groups through business control of such functions as verification and complaints procedures (see MSN, 2004; Merk & Zeldenrust, 2005):

All these new business initiatives... They are a sham, in no way a real effort towards improving the lives of workers. We should stop them.<sup>33</sup>

Some of these critics instead advocate societally controlled approaches to private labour regulation, such as, most prominently, the Dutch Fair Wear Foundation (which has amongst others O'Neill, Gsus and MEXX as its members). The advantage of societal control according to these advocates, by contrast, would be closer public scrutiny of progress, more information on circumstances of production and more room for the voice of marginalized groups.<sup>34</sup>

Critics of the societally controlled approach come from business backgrounds and question the credibility of these forms of regulation. The key issue here is one of trust: critics do not believe that societal groups have appropriate intentions in scrutinizing companies or involving marginalized groups in implementation. As a company representative notes:

Of course we want our suppliers to abide by labour standards. Managers need to treat their workers well. But that is something different from going out there and encouraging worker organization. Because that is what such an initiative essentially does. They act as a Trojan Horse for local unions. That is not fair. I can't do that to my suppliers.<sup>35</sup>

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<sup>31</sup> Interviews F3; F7.

<sup>32</sup> Interviews F9; P11.

<sup>33</sup> Neil Kearney, representative Global Union ITGLWF during speech in Brussels for CSR business community, November 2006.

<sup>34</sup> Interviews P2; P3; B1.

<sup>35</sup> Interview F17.

*b. Monitoring, auditing and control*

When private labour regulation came into fashion in the 1990s, attention first focused on how implementation efforts by companies might be checked. Quickly, the idea spread that a degree of outside review would be necessary to judge whether suppliers were really abiding by codes of conduct. CSR managers of lead firms, who performed review in the first instance, were not seen as credible for the task, due to role conflicts. Gradually, the role of outside reporters for increasing amount of lead firms was taken up by commercial service firms such as accountants and quality standard firms, who performed so-called social audits in factories. Audits for labour standards in supplier factories in that sense resembled financial audits, with a first, second and third party logic of verification (Esbenshade, 2004).<sup>36</sup>

However, activists and academics soon questioned whether auditors could be viewed as real outsiders. The debate kicked off as an enquiry into a possible lack of quality of social audits. Dara O'Rourke (2002) in an empirical study criticized the capacities of accountancy audits on labour. Others questioned how suitable quality standards and environmental standard auditors might be for the analysis of labour standards, since they did not have any experience with analysis of social phenomena. Methods such as pre-announced audits and short on-site inspections were deemed insufficient or ineffective (see also Esbenshade, 2004). The discussion touched on a deeper political dimension with the publication of the Clean Clothes Campaign report on audit practices, *Looking for a quick fix* (2005). This report questioned the credibility of business audits in itself. Commercial interest ties business audit companies too closely to either lead or supplying firms and their respective agendas. First, since it encourages too lenient audits of factories, out of a desire on the part of the auditor to gain a stable group of clients (see also Mamic, 2004: 54). Second, because it inhibits sharing of information on worker and factory conditions across business and societal groups, complicating efforts towards redeeming of crises situations. Third, because workers tend to view commercial auditors in the factories as an extension of management, which is a reason for them not to trust them and not to be open about labour issues. The researchers therefore conclude that

[u]ntil audits are used intelligently...they will achieve little more than superficial change for workers. And until workers, the intended beneficiaries in the process, are placed at the centre of the efforts to improve workplace conditions—from conception to implementation of those efforts—they will continue to be the losers (Clean Clothes Campaign 2005: 74).

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<sup>36</sup> Originally, this means first party is someone from the firm that is to be audited, second party meaning a firm hired by the firm to be audited, and third party meaning an actor outside, often an auditor hired by an association looking over the industry.

The CCC report alluded to monitoring and verification processes that would involve marginalized groups as a necessary step towards improved code implementation. Proponents of these so-called participatory approaches to social audits hold that these are not so much preferable because these groups are real outsiders (Barrientos & Auret, 2005). Rather, these groups are real but unheard *insiders* with regard to the issue at hand, holding *opposite* stakes from the company under audit. A credible audit procedure therefore would not so much be structured by measures of impartiality (compare Bendell, 2004: 25), but rather by acknowledging that conflicts of interests tie observations to particular political positions, therefore aiming for an inclusion of underrepresented voices of those for which regulation is meant.

Business audits, nonetheless, are nowadays still the predominant tool of verification in current private labour regulation (even across industries, see Fransen & Kolk, 2007). Both business governed and multi-stakeholder governed regulatory organizations like SAI, BSCI, ICS, WRAP and company participants inside ETI make use of it. As far as business auditors and their clients are willing to take up the critique of opponents to business audits, they shun the deeper ‘control’ aspect to business audits, which, after all, would require a search for alternative modes of implementation and undercut their business. Instead they emphasize efforts to improve the quality of business audits.<sup>37</sup>

### *c. Supply chain responsibility and control*

The supply chain responsibility debate is closely linked up with the business audit debate but adds a different spin on the issue of control with respect to power inequalities between different actors in the domain of regulation.

In the beginning of anti-sweatshop activism, supply chain responsibility was mostly a matter of discussing moral and political responsibility: should Nike be held responsible for wrongdoings in factories that it only has a trading relationship with, or not? Many companies held that this was not their concern, since it was not a matter of wrongdoing inside their corporate organization. Next up, the issue became whether there was a legal responsibility for companies as to working circumstances in supply chains. Could companies be sued for labour abuse at suppliers? The OECD Guidelines for Multinational Corporations for instance for long has not included the situation at supplier factories as something the multinationals could be held responsible for. Since then, various CSR regulatory instruments have been designed that deal differently with this issue.

Taking a formal approach to the issue, all eight private regulatory organizations in the clothing industry have some degree of *supply chain responsibility*, in the sense that they bring together companies that admit problems with labour conditions in their supply chains and commit

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<sup>37</sup> Interviews P9; C2; C3.

to doing something about it. But there is a difference in *what* that something is that they want to do about it. And it is at the level of implementation of regulation that an important difference between the organizations can be identified in their understanding of taking responsibility. Companies involved in brand certification schemes like Fair Labour Association and Fair Wear Foundation are responsible for monitoring, monitoring costs and costs of reviewing progress through audits and/or verification by societal groups. Meanwhile companies involved in supplier certification schemes like Social Accountability International, Business Social Compliance Initiative and Worldwide Responsible Apparel Production are not required to monitor suppliers. Instead they are asked to let audit firms monitor suppliers. These buying companies then leave the selection of and cost for external professional audits and compliance programmes with the suppliers themselves.<sup>38</sup>

Supplier certification and responsibility is often defended as a method to actively involve the supplier in labour standards. The philosophy is that ‘ownership’ of the issue will lead the supplier management to care for the issue and handle it seriously. If a solution is merely pushed from buyers implementing and paying for it, supplier response will be evasive.<sup>39</sup> Activist and corporate opponents of this philosophy hold that this account is hypocritical:

I am not aware of suppliers choosing for supplier certification [on labour] out of free will. They do it because their buyer wants them to and if they don't, they lose the orders. This thing is only about supplier choice and ownership in the formal sense, not if you look at it from a perspective of buying power.<sup>40</sup>

Labour advocates hold that supplier certification is a too easy way out for lead firms: neglecting responsibility, pushing cost down the chain, yet remaining in control of the procedure. By pursuing it, from a value chain perspective they leave the problem to a weaker party in the equation. From the perspective of the factory and management-worker relations, responsibility is however with the stronger party in the equation, the one most openly and visibly exercising power over the labour regime.

What is more, all supplier certification schemes are embedded in implementation on the basis of business audits, excluding the option of societal group involvement. This is not surprising, first, since it relies on business-to-business information flows regarding standards implementation: from supplier to buyer. Second, supplier certification means that workers are faced with what is from a functional and cultural perspective probably the most societal group-hostile actor in the value chain as the formally responsible party in private regulation. This means there are no direct

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<sup>38</sup> ICS is an interesting anomaly in this regard. It also forces business supporters to pay for audits, while otherwise being business-controlled and retailer focused, like BSCI and WRAP.

<sup>39</sup> Interviews P8; F1.

<sup>40</sup> Interview F19.

incentives to involve these groups in implementation there, as buying firms may also easily recognize. Supplier certification is therefore prone to the same types of criticisms as business audits.

## 6. Final note

The observant reader may have noticed that the measurement results for degrees of stringency sit comfortably with labour advocates' emphasis on participatory approaches as the right way to pursue private regulatory implementation (see for instance Merk & Zeldenrust, 2005). This is not surprising since in the first place these advocates are themselves trained analysts of power, and their reasoning may therefore overlap in some ways with the present one. Secondly, it is undeniable that outcomes of the stringency approach can act as a justification for contemporary NGOs and unions to play a more prominent role in private regulatory instruments. This of course suits the organizational interest of these groups.

However, it is not the aim of this study to directly validate this political agenda, and the way this is currently being advanced through advocacy and private regulation. After all, there are many different ways we can think of stringent regulation being put into practice. Current private regulatory organizations that score high on degrees of stringency may not necessarily be the most effective, efficient, or equitable forms. This study is therefore not a direct policy evaluation.

In addition, some readers may wonder whether it is indeed preferable to have very stringent private regulatory organizations. Some policy analysts emphasize how less prescriptive regulation may improve performance, given the space that participants have to act innovatively or with regard for contextual understandings of rules (for discussion see McDermott & Cashore, 2008: 22-23). The present analysis in principle allows these readers to identify the organizations scoring 'medium levels' of stringency as *best practice*. Meanwhile, these readers should recognize that the implications of a power-based approach to private regulation are at odds with a desire for flexibility in regulation, given the elements on which the assessment of private regulation is based. In line with the philosophy of labour law, the study holds that private regulatory frameworks *assist in the creation of* instead of *settling an already existing* balance of power between economic actors. This means that workers have a better chance of furthering their position under conditions of *stringent rules* applied to multinational corporations. Flexible, less prescriptive regulation in this view may leave too much room for discretion in the hands of the powerful. They may use this power to the advantage of weaker parties, but if they do not then this will sustain a relationship of dependence.

With regard to the different degrees of stringency already some preliminary inferences about the political implications of existing private regulatory approaches can be made, before proceeding with analyses of further political interactions in the field of private labour regulation. First, the majority of organizations seem to conform or come close to conforming with ILO Core

Conventions in the elaboration of their labour standards. This may be seen as a boost for these Conventions from the realm of private and voluntary efforts. Second, the majority of private regulatory organizations offer a role for service firms in their implementation process, which means that the service industry is also a political presence to be dealt with in the field of regulation. Third and related, a minority of private regulatory organizations include societal interest groups in the monitoring or verification processes. This is a policy tool that may in principle help to strengthen worker organization and stimulate deliberation between factory management and societal interest groups in developing countries. Arguably, most private regulatory organizations do not contribute in direct ways to this option because of their reliance on business audits in the review process.

The following chapters will proceed to explain how and why these private regulatory organizations have developed, and following that, how and why, once in existence, businesses choose to participate in them. Finally, it will explain how and why competition and convergence evolves between the competing models of private labour regulation, and what consequences this has for the stringency of private regulation.