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

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## **Chapter Four. How to dress up a code. The politics of developing approaches to private labour regulation**

*Ben sits in his office, turns off his computer screen and starts packing his suitcase. This afternoon he is again going to meet with some competing firms and groups of activists to talk about a compliance programme for labour standards in supply chains. The talks have been a rough ride so far. Perspectives on solutions are often miles apart, while he is also struggling to get by on the language used to denote labour issues. Due to the negative attention his company has suffered through activists' campaigns, his superiors feel that he needs to negotiate this common approach to labour standards with them. But he is in doubt as to whether the meetings are going to get them anywhere.*

*A couple of miles from Ben, Sophie sits in the common room of the NGO she works for and studies a memo Ben has sent out as a preparation for the meeting, in which he describes in general terms the structure of his company's value chain. Sophie is shocked by the complexity of the picture. For a minute she wonders whether she can negotiate a common approach with this company. Where to start with so many suppliers, so far apart from each other? What regulatory tool can ever reach so far?*

### **1. Introduction**

The previous chapter has shown that private regulatory organizations address the regulation of labour conditions in different ways. Having established the significance of these differences with respect to overall *stringency*, this chapter seeks to explain why some regulatory approaches have turned out to be more stringent than others. It will do so through a comparative historical analysis of the development of these initiatives, focusing on different groups developing different policies to negotiate different regulation. Few accounts so far have concerned themselves systematically with the question of why these differences are there in the first place, and when they do, they confine themselves to limited sets of cases for comparison (Hughes et al, 2007; Bartley, 2003; Esbenschade, 2004).

The regulation to be analyzed is specifically private, voluntary, and international in scope. The private character of regulation implies that those setting the rules can also be subject to them, and furthermore, be the ones implementing them. In addition, the voluntary character of private regulation means that actors can pick and choose between involvement in a certain process of regulation, they can leave it for others to do, or can start a new one with like-minded actors. This makes the field of international regulatory development very dynamic, and the events in initiatives

themselves interdependent. Interdependencies become manifest between groups who are, at different points, involved in different processes of regulatory development, but also through contacts between groups in separate trajectories (through NGO networks or business networks), and through intermediary actors (CSR consultants). Policies that are part of proposals for a private regulatory organization therefore cannot be studied as the exclusive product of closed negotiations between a fixed group of actors.

A logical step would then be to treat the negotiations over private regulation as belonging to some form of political organizational field (Powell & Dimaggio, 1991) in which predominant patterns of action and interaction that explain specific outcomes are identified. But that would not be completely correct. Instead, this chapter argues that *negotiations over new forms of private labour regulation take place while such an organizational field slowly emerges*. Actors' actions are *constitutive*, and *enactive* of this field: in creating new types of private regulation they are also helping to create a field of political interaction over regulation.

Studying the development of private labour regulation then means focusing on processes and outcomes on both the micro (negotiations between people in specific settings or time) and macro (interactions between different negotiations and outcomes) level of interaction. In addition, it is important to take into account the exact time at which specific regulation has come into being, in order to understand how specific negotiations over private regulation have fared. Different negotiation dynamics can be expected earlier on (when it is possible to speak of a so-called *institutional void*, Hajer, 2003) compared with a later time (when dynamics more closely resembling an *organizational field* can be expected). As much as the void stimulates predominant patterns of interaction, it does not structure specific outcomes to these patterns due to the increased agency on the organizational and sometimes personal level. By contrast, in later stages predominant patterns may be identified that structure outcomes and make the development of new forms of private labour regulation more predictable.

The implication of this approach is that the question of why organizations turn out differently in terms of stringency cannot be considered separately from the issue of why the regulatory field has become fragmented into different organizations. This chapter argues that three general factors have encouraged this fragmentation: first, the fact that in Europe the negotiations leading to international private regulation between international firms and international societal groups were in the first stages orchestrated in national settings, and alongside private regulatory development in the US, reflecting a local context to negotiation between groups in so-called stakeholder dialogues. Second, during the first generation of negotiations over private regulation, differences arose in perspectives through internal negotiation dynamics between groups on what the right course of action should be. And third, the second generation of negotiations brought together

likeminded groups to flesh out specific approaches that were different from the ones already in existence. This explains why specific societal and business groups have ended up in different regulatory initiatives.

The text will be organized as follows: first, the development of a field of private regulatory political activity is elaborated; second, the relevant groups of actors involved in negotiating private labour regulation are introduced; third, the emergence and fragmentation of the private regulatory effort in eight organizations is discussed.

## **2. Welcome to the institutional void**

Maarten Hajer (2003) argues that the politics taking place in new forms of governance that include non-state actors happen in what can be called an institutional void: no clear rules and norms according to which politics is to be conducted and policy measures can be agreed upon. This means that rules and norms of participants are also challenged. These new forms of governance emerge in so-called 'backstage sites of politics' (Van Tatenhove, 2003) where actor agree on new rules of conducting politics and may develop new policies, as opposed to 'frontstage politics' that may be characterized by the formal institutionalized types of governmental and intergovernmental rule.

In literature so far, the institutional void is mainly used to satisfy the curiosity of policy scholars in the emergence of new styles of governance, rather than to question how the void affects actor positions with regard to specific content of policies. However, the understanding of institutional void can be extended to apply to these actor perspectives and dynamics, using the situated agentic understanding of structuration elaborated in the theoretical chapter. In these backstage institutional voids, many actors cannot concretely answer the question 'what is in it for me' at every step of the process, and have an indeterminate view of both the process and the actual outcome of the process. Cost-benefit analyses are difficult to make. Actor preferences can be understood as plagued by uncertainty. Because of this, political interactions become more fluid, as they rely less on calculations about fixed organizational agendas (compare Young, 1991). The process of development of private regulation may move parallel to the development of private regulatory preferences of actors involved in negotiation. The institutional void thus functions as a structural context of action enabling and constraining certain patterns of action and interaction, instead of patterns of outcomes. This means that it can be discussed as a general context of political action, identifying common patterns among the negotiations under study.

But has there ever been an institutional void with regard to the development of specifically the private regulation of labour standards? This is an empirical question deserving some elaboration. Analytically, Hajer proposed that the void would be most likely to occur when actors were dealing with new political themes: 'After all, if political institutions emerge as a historical

product of particular struggles, it is only natural that these institutions are designed to help resolve precisely those conflicts' (2003: 177). In this line of reasoning, global labour standards does not emerge as an appropriate topic for institutional void-like interactions. After all, many political institutions and established forms of labour advocacy already exist to promote the enforcement of labour standards across borders: ILO conventions, Framework Agreements, trade clauses (for an overview, see Van Roozendaal, 2002; Burgoon & Jacoby, 2004).<sup>41</sup> And yet, the backstage type of private regulatory politics evolves and displays the fluid characteristics described above. This is because of two procedural and three policy-substantial consequences of uncertainty and ignorance among negotiating actors.

First, most actors, when meeting to develop private regulation, have little experience with each other as negotiation or discussion partners. Granted, all of them to some degree have routines, repertoires and agendas for political action: firms, NGOs, trade union organizations. However, now they are faced with new actors as partners\opponents and therefore cannot always rely on their established practices and thoughts in engaging with them. Firms have only recently started bargaining with other non-state actors as *stakeholders* and may not know what to expect from NGOs and activist networks (Van Tulder et al, 2004). Parts of the NGO community only recently have taken the turn to approach the (former?) ideological enemy and engage with firms and may also be insecure about what to ask for, what to propose and whom to approach in what way. As one of the negotiating activists recollects

We were constantly asking for all kinds of things from companies, we proposed all kinds of things that they should do, tried out all sorts of ideas. And it was sort of surprising for us that every time they kept returning to the table and come back with something and say "OK, let's think of this in the following way"<sup>42</sup>

Trade union organizations are also only slowly developing their role working with advocacy organizations such as those in NGOs and labour activist networks and may doubt whether they are dealing with rivals or partners (for illustrations see Eade & Leather, 2005; Justice, 2002).

Second, there is relative ignorance about the way these different types of actors should interact with each other in the process of negotiating new rules. The reason these groups come together has to do with "frontstage actors" (in the form of governments) inviting them to discuss and take responsibility for global issues. Enforcement limits and negotiation deadlocks within international public institutions and the lack of efficient scope, capacity or willingness of governments to enforce certain standards led to strategies of engaging non-state actors with each other. Authors most often refer to the Rio United Nations Conference on the Environment and

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<sup>41</sup> I thank Bas Arts for emphasizing this point in discussion.

<sup>42</sup> Interview N4.

Development in 1992 as the mainstream breakthrough of a *stakeholder* based thinking of global governance (Van Tulder & Van der Zwart, 2006: 232). This invitation to engage backstage is supported by three related policy innovations on the rise in the 1990s. First, the discourse of sustainable development, which in the course of the 1980s acquires a new meaning, implicitly reconciling economic, environmental and social concerns in thinking about solutions for a better world and thereby paving the way for interaction between actors representing these concerns in the creation of global solutions (as proposed by the Brundtland commission). Second, there is the creation of public-private partnerships as practices to deal with specific problems (Boerzel & Risse, 2002). Third, there is the conceptual language of Corporate Social Responsibility management theory, which emphasizes the importance for corporations to take into account stakeholders as representatives of relevant societal concerns (for an overview see Carroll, 1999). Key point here is that all these innovations at first of course lack practical operationalization that actors actually engaged in discussion with each other can use. It is no surprise then that a large knowledge industry emerges that aims to provide more specific lessons and models assisting companies as well as NGOs in elaborating strategies (for illustrations of the lessons of these commercial experts, see for example Bendell, 2000). However, the organizations sitting together for negotiation for the first time cannot yet profit so much from the products of this industry. For this reason, as CSR consultants in their case studies are apt to show, terms of interaction between the interest groups are quite unclear and actors have to muddle through.

Then, with regard to the specific issue of labour standards, three further sources of uncertainty can be identified. First, this is ignorance among some parties at the table about the specific labour conditions to be regulated. Companies that are pressured to contribute to private labour regulation have mostly outsourced their production process to supplier factories, most of the times aiming to reduce costs. This, in Anna Pollert's (1988) terms, stimulates 'dual labour markets'. The company can only be expected at first to take responsibility and be knowledgeable of its in-house labour circumstances. When companies do start to engage on the issue of labour conditions with suppliers, they have to catch up on the circumstances within their supply chain.<sup>43</sup> Paradoxically, some union organizations may face this challenge too. The clothing industry in many developing countries has low levels of unionization and therefore unions may lack direct contacts with the circumstances of production. Moreover, Western European or Northern American unions asked at the discussion table may predominantly have knowledge about industrial relations regarding their members in developed countries.

Second, ignorance of global labour standards can be expected as an issue, at least among companies. Intricacies of formulations like 'living wage' and 'freedom of association' may be

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<sup>43</sup> Interview P6.

unclear to some as basis for implementation. Certain NGOs may not be too familiar with this body of policy and regulation either.

Third, the question of how specifically *private* rules for labour issues may function and how implementation and enforcement may be organized. Who is going to do what? Who has what information? How are decisions taken? To some extent all parties will be ignorant here, although some companies may be able to translate their experience with quality standards and certification into certain policy frames with regard to private regulation.<sup>44</sup>

All these uncertainties thus create the institutional void-like conditions of political interaction that policy scholars were inclined to reserve for new policy fields. As a response to these uncertainties, particular forms of interaction that are similar across different negotiations within the void can be expected. Because of this it can be argued theoretically that the institutional void is a specific structural context of action constraining and enabling the activities of actors. It does however not structure patterns of action towards specific policy outcomes. Rather the institutional peculiarities of the void stimulate the significance of agentic orientations and inter-agent dynamics in the making of specific outcomes. Information, frames of discussion and personal characteristics all contribute to a quite fluid type of political interaction.

However, this is likely to shift somewhat moving in time towards the moment that these fluid forms of politics have led to the emergence of the first generation of private regulatory organizations. The void fills up as regulation is put into practice, knowledge spreads, and strategies are advanced, copied and countered. Accordingly, there is a different situation as a next generation of efforts tries to build new private regulatory approaches. Here tactical and strategic considerations towards a certain policy outcome may come into play much earlier, even at the point of selecting prospective partners in the making of private regulation, as will be shown below. This is because the five uncertainties steering the institutional void-like qualities of rulemaking have all decreased to some extent.

Finally, as elaborated in the theoretical chapter, some of the ambiguity or ambivalence surrounding actor's perspectives on policies may not go away as the field becomes increasingly institutionalized, because it stems, to use the language of social theory, not so much from temporal-relational as from social-relational aspects of action. This means that it is still difficult to predict specific actions for certain actors, also when private labour regulation, practices of negotiation and strategic routines are in place. This is because in terms of purposes certain organizations are at a crossroads. Due to the characteristics of their organization and the problem structure of the topic of private labour regulation, choosing a strategy is never going to be a straightforward thing for their representatives. Their organization may continuously display some ambivalence or ambiguity

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<sup>44</sup> Interviews F6; P8.

towards the topic that representatives may have to solve on their own, or with a small group of people surrounding them.

There is another reason why the increased closing of the institutional void may not mean that CSR managers revert to the simple objectives of their corporate organizations (profit, shareholder value). Because the issues of the CSR agenda are quite alien to many of the daily proceedings within a corporate organization, CSR managers may more or less permanently be in a relatively isolated position from their colleagues at other departments, causing them to rely also on the outside interactions within the emerging field of CSR practitioners. Andrew Crane (2000) has proposed that this field may be as significant as a social sphere that structures actions of CSR managers as the internal corporate organization is. It may increasingly function as a professional sphere in which norms and expectations about appropriate CSR management are further shaped. This of course does not mean that the people in this sphere share similar ideas about private regulation. The relevance of this dynamic for CSR managers will be elaborated in more detail in the next chapter.

In this understanding of organizational action it is therefore important to recognize the moment that the person acts rather than the organization, or the person acts as a manifestation of a social circle across organizations, rather than the organization it formally belongs to. Below, in the discussion of different policy positions of groups involved in negotiating, this will be taken into account.

### **3. Groups, representatives and development of policy positions**

The implication of the logic of the institutional void is that empirically developments can be seen over time in the policy positions of different groups. In addition, different policy positions can be predicted to emerge as preferences of representatives within one category of interest groups (like firms or unions). This then reflects the ambiguity or ambivalence of this interest group's approach to private labour regulation, meaning that an individual (the negotiator) or a group of individuals will in the end make a mark on preference formation within that group.

The following sections will group the actors that are in some way involved in discussing regulation: business groups, societal groups, government and service intermediaries. It will shortly discuss their organization, the ways in which they are linked to the debate on private regulation, their power capabilities and their possible policy positions, bearing in mind ambiguity and ambivalence in stated preferences.

#### *a. Business representatives*

Global value chains scholars have analyzed the dynamics in global clothing production and trade.



Gereffi and Memedovic (2004) and Dicken (2006) hold that the concentration of market power in the hands of large retail chains in US and EU is rising and more retailers are developing strong ties with producers overseas, in order to secure constant supply in stores. Moreover, many retailers have developed private label or brand-store clothing lines which they source directly from manufacturing suppliers in developing countries. This means that retailers are no longer only in a buying relationship to manufacturers or former manufacturers such as brands; they are now also competing with them. Clothing manufacturers in the EU seem to respond to this in various ways. Either they fail to compete and they disappear or their position in the chain decreases to that of an importer. Alternatively, manufacturers shift their competitive edge by outsourcing and focusing on marketing and branding, copying the strategy of firms such as Nike that were 'born global' and have had their sourcing strategies embedded in their original core business strategy. An added or an alternative strategy is to push the development of own retail outlets.

The market for clothing in the EU nowadays consists of various forms of businesses, many of them combining different functions in the value chain to different degrees: buying, marketing, designing and retailing. Because of this economic power relations between these players are becoming more complex. Gereffi (1994) distinguishes three types of lead firms within the industry, according to their insertion in commodity chains: branded marketers (purely outsourcing companies such as Nike, Liz Claiborne), retailers and branded manufacturers (which used to produce themselves but increasingly rely on sourcing, see Levi's). McCormick and Schmitz (2001: 24-29) break the industry up in smaller parts and distinguish ordering from high street to low street profiled products: Fashion-Oriented Companies (Prada, Armani), Department Stores\Branded Merchandisers\Specialty Chains (Marks & Spencer, Liz Claiborne), Mass Merchandisers (C & A) and Discount Stores (Asda, Scapino).

The horizontal organization of the industry is also fragmented across countries and regions, and often within countries as well, with different business associations tailoring to the needs of different types of companies. As a source of further complexity, clothing is also a key field for companies originally engaged in other lines of commerce (for example sporting shoes and goods and multi-product retailing) (compare Underhill, 1998: 211-221).

Firms engaging with the clothing production chain can make two significant decisions in the matter of private regulation for labour conditions: adopting a certain established form of private regulation (or not) once it is there; and (co-)developing a new form of private regulation. The former is subject of the next chapter, which maps the development of corporate CSR policies and the development of strategies of business support for private regulation and as such addresses the activities of a mass of over one hundred companies engaging with private regulation. The latter is discussed here and deals with only two dozens of firms engaging in original rulemaking (called

CSR norm entrepreneurs by Flohr et al, 2007). Firms that become involved in private regulatory development seek cooperative solutions with other firms and/or societal groups in an effort to tackle the potential problem of being held accountable by critics for labour circumstances in their supply chain, either individually or as an industry. Dealing with this issue is the main responsibility of Corporate Social Responsibility managers in these firms. Firms that become involved in the making of new private regulatory approaches predominantly are dominant players within the sectors of sportswear, clothing branding and retail and mass multi-product retail. Most if not all of these firms have been subject more than once to public scrutiny by campaigners and media on their labour circumstances at the moment they enter the phase of negotiation (Bartley, 2003; Frenkel, 2001; Esbenshade, 2004). Most firms are asked to join by other prospective negotiators or the organization hosting the negotiation. Often, their selection reflects their degree of involvement with the issue, meaning that in the past they to some extent have made a beginning in dealing with the issue of ethical supply chain policies: they have hired staff responsible for a code of conduct and created some policy to promote compliance with the code. In most instances, these policies are in an infant stage and companies seek collaborations to further progress. Firms can therefore not try to 'upload' their elaborated and preferred policies to the common approach they are negotiating. Different firms shop around, getting a feel for different discussions.<sup>45</sup> Many opinions that corporate representatives have on policy particularities cannot be predicted on the basis of fixed company attributes. As said, it is largely in the dynamic of negotiation and in deliberation within the corporate organization, corporate representatives are going to determine whether they want to adhere to a living wage labour standard or not, or what specific type of division of regulatory responsibilities is going to work to manage compliance with standards.

Similarly, through the experience with negotiating in multi-stakeholder settings, firms are developing preferences to continue regulation of labour standards in multi-stakeholder settings or not. Once again, personal experiences, orientations and the consequences of the development of specific interpersonal relations within negotiation may contribute decisively to corporate perspectives on this matter.

However, one group of companies that in practice is going to choose the development of multi-stakeholder types over other forms of private regulation, regardless of how representatives personally assess the proceedings in negotiations. These are the largest, most visible brand and high street companies within the sectors: sport brands such as Nike and Reebok, and clothing brands

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<sup>45</sup> However, in the rare occasion a firm is already wedded to some form of ethical supply chain policy, it may be a problem to have it work towards a common solution with other parties that bring in different ideas. One may hypothesize that this is the reason why Levi Strauss, as an early adopter, was such a "promiscuous" party, shopping around several negotiation tables. It has also become one of the rare examples of a company switching participation in private regulatory organizations. For Europe, C & A with its SOCAM monitoring system is a good example of a difficult discussion partner for collaborative approaches to private regulation.

such as Levi's and Liz Claiborne. These companies are believed to be in most frequent interaction with activists and are most likely to be prominent targets of campaigns (Bullert, 2000; Knight & Greenberg, 2002; Merk & Fransen, 2008). Cooperation for solutions may appease critique and diminish risk of media scandal, reputation scandal, and loss of consumer and/or shareholder confidence.<sup>46</sup> Note that for both policymakers as well as researchers the jury is still out on the question whether unethical supply chain policies can have such a negative economic effect. But companies tend to manage their risk according to scenarios, and this is one that frequently surfaces and stimulates company action.

High street and prominent brand firms are also not opposed to taking a degree of responsibility for compliance with labour standards in their supply chains. After all, if they are the ones who will be receiving the heat for misdoings, they might just as well promote systems that allow them to review and influence progress as much as possible, and possibly receive some degree of reward for their efforts. Note that this does not mean that these companies resist setups that allow for some peer-review of their performance by stakeholder groups. They need that in order to guard off public societal critique. Rather, these companies are less likely to support approaches that lend more choice to suppliers (as Chapter Five will show).

Not all companies within the industry promote such a 'hands-on' approach. Some might consider it a too costly affair, requiring a too high degree of managerial commitment. Instead, companies with smaller budgets and larger distances to their supplier are going to be in favour of looking for some form of solution that is cheaper and easier. For this reason, these companies may be better off in negotiating different private regulatory organizations than the big brands. And given the possibility that these companies may feel relatively less pressured by societal critique than the big brands do, they may be less frightened to pursue this regulatory approach without consent of stakeholder groups, if needed. On the other hand, not all smaller brands or retailers shun the perspective of larger brands, reason why personal perspectives and interpersonal dynamics are going to influence in certain cases whether the one or the other perspective arises.

The main source of corporate power is of course the fact that without company participation, most private regulatory initiative set-ups are useless. This means that activists may sometimes have to accommodate company demands. This power increases if the firm is larger and better known. On the other hand some of these firms might need to accommodate societal critics in order to keep them at the table, if they want to achieve multi-stakeholder regulation. In addition, groups negotiating with firms may also expect firms to be able to invest more resources into negotiation than societal groups.

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<sup>46</sup> Interviews F13; U2.

Representatives of business associations form a specific category of business negotiators. As with firms, the CSR topic is also inside business associations a new topic on which the experts can work with some degree of autonomy, perhaps more so due to further detachment from direct economic incentives when compared to company managers. These associations may to some extent mimic specific preferences of member firms, depending of course on their relation to specific firms, internal decision-making procedures, and position and prominence in the sector. Two routes for some deviation from company preferences may occur for these associations. First, associations may aim to play a role as a frontrunner for the industry and push for higher standards and more elaborate policies than their members at that moment do. Second, the association may act as the voice of the lowest common denominator, only promoting policies that act as the baseline all members reasonably can agree on. Accordingly, its positioning in the regulatory discussion may turn out different. Frontrunner associations are more likely to become involved with early discussions on private regulation. Lowest common denominator will either stay out of discussion or aim to act as a brake on too ambitious schemes affecting its industry members.

#### *b. Activists*

In the field of private regulation on labour conditions, NGOs and trade unions function as promoters of certain forms of private regulation, critics of others (or: of all forms of private regulation), and general advocates of labour issues in supply chains, often putting direct pressure on companies. Here their policy positions are summarized under the label of *activists*.<sup>47</sup> Empirically this concept allow for an analysis of both trade unions and so-called NGOs as they are, in fact, intertwined in activist networks. The usage of this term also solves the problem that CSR professionals themselves sometimes distinguish between NGOs and unions, and sometimes not, depending on the role of organizations that they address, in any case without clarifying what it is exactly they mean by an “NGO”. “Activism” and “activist” as words stress objective and role over organizational membership and characteristics and therefore are suited for the purpose.<sup>48</sup> The term “interest group”

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<sup>47</sup> This study takes as a definition the Oxford Dictionary description of activism as “intentional action to bring about social or political change. This action is in support of, or opposition to, one side of a controversial argument.”]

<sup>48</sup> In this sense, the analysis is also in line with the expectation of O’Brien (2002) who both politically and analytically argues for a conception of trade unions as functioning like a social movement when it comes to global solidarity issues, while acknowledging that unions are different organisations than other activist units. Arguably the next step would be to also include activities *inside* corporate organisations for advocacy goals into the conception of the social movement for CSR, following Davis and Zald (2004). This conceptual step is however fraught with so many additional analytical and political problems that it is not attempted here. Using ‘activism’ as a term does raise a problem however: it is usually applied to less-institutionalised forms of politics for marginalised groups and many observers would add to that a degree of militancy in the objectives and actions of actors (compare “contentious politics” in Tarrow, 1998). And here some would argue that there is a difficulty regarding the strategic repertoire of movements and unions in influencing companies, since it involves activist engagements with representatives of companies that, first, one could argue to become institutionalised and, second, are not that militant. Does rubbing shoulders with big business still count as activism? Does building regulation with big business still count as activism? One can argue that it does, first, since it still embodies the important element of working on behalf of marginalized and disenfranchised minorities with no voice

will be used as the label for NGOs, unions *and* business support groups as a category of political actors representing different stakes.

Union and NGO activists are caught in a particular dilemma regarding their preference for private labour regulation, one that is most likely to be solved through personal preferences and interpersonal interactions in both negotiations and intra-organizational deliberation. This dilemma concerns their view of private regulation in comparison to (public) institutional alternatives of promoting global labour standards, and in relation to both their broad advocacy goals and their organizational interests.

First, unions are basically the core private organization that addresses worker circumstances and are as such expected to play a key role in any of the schemes to address global labour standards that are currently proposed or in existence. This includes multi-stakeholder private labour regulation, where trade unions are perceived to be a key stakeholder group to be engaged in governance.

From the crude perspective of organizational interest, promoting all or any of the policy instruments available will be beneficial for unions, whether that be International Framework Agreements with individual companies, trade clauses or enforcement of ILO core conventions and national regulatory frameworks of labour law.<sup>49</sup> However, in multi-stakeholder private labour regulation, unions are likely to have to share power and responsibilities with NGOs. Alternatively, they are in danger of being out-competed by NGOs as key stakeholders, in case companies prefer to broker a deal with NGOs and without unions. By contrast, in Framework Agreements and in national forms of labour law and corporatist negotiation, unions are monopolist players as organizations advocating societal concerns.

From a policy perspective, union representatives debate the merits of these different political instruments in comparison. International Framework Agreements politically speaking are considered as strong instruments in promoting worker organizations and the respect for labour standards globally. As an implementation instrument, however, they are only ‘as strong as their weakest tie’, meaning that it is dependent on the scope of the agreement, the degree of commitment

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in the policy process (i. e. workers in export-oriented industries of the developing world). Second, given the new status and experimental character of CSR policies and their private regulation, there is still a difference with the understanding of “institutionalised politics” by contemporary social movement research, namely the politics of national government(s).

<sup>49</sup> International Framework Agreements (IFAs) are negotiated between an international firm and a global union. These agreements concern the international activities of that company. The purpose of this framework is to establish an ongoing relationship between the firm and the union organization which can solve problems and work in the interest of both parties. These agreements can, but do not always include, a code of conduct. International Framework Agreements have always received substantial support on the part of trade unionists worried about the consequences of globalization, because of the central role for ongoing bipartite negotiation with the ITS. In any event, the beneficial effect for workers in factories depends on a set of factors. At best, IFAs are indeed a tool for improvement of worker rights. At worst, they are as much a dead letter as corporate codes of conduct that are never put into action. See also Justice (2002).

from the signatory firm and, finally, the qualities of unions and the links between unions whether advances in working conditions can be made. This may be a problematic issue in industries and countries with low unionization levels.<sup>50</sup> Advocating a labour clause in international trade agreements is an explosive topic as it threatens the solidarity between Northern and Southern worker organizations. Politically speaking, it is presently resisted by a too large coalition to stand a reasonable chance, at least within the arena of multilateral negotiations. Implementation of ILO conventions meanwhile has to rely on national government enforcement, given the lack of resources the ILO has to monitor proceedings in developing countries. This means that private labour regulation emerges as at least a possible tool to deal with labour crises fast and effectively. Trouble is here, that many of the private approaches may lack teeth as well. In addition, unionists fear that support for private labour regulation may still undercut efforts at promoting public regulation.

Union representatives thus face ambivalence in their organization about the preference for either higher stringency private regulation or lower stringency private regulation. Generally, if unions are to engage with private labour regulation they can try to create private labour regulation that most closely resembles labour law, and push for high labour standards and involvement of worker organizations on different levels of implementation and enforcement. By contrast, if they prefer alternative instruments to global labour standards, they might push for a private approach that emphasizes flexibility, functions as an exemplary model and a source of inspiration, while leading to some incremental improvements— nothing more. By avoiding advocacy of elements within a private approach that would grant it too much of a ‘regulatory’ quality, they re-confirm the status of national law and international conventions, together with the desirability of alternative policy instruments.

As a result, union presence at the negotiation table is a necessary but not a sufficient condition for the creation of high stringency private regulation for the clothing production chain. Two regulatory organizations (FWF and WRC) that engage with trade unions in negotiation and governance are in the “higher” segment of stringency measurements and the other two (SAI and ETI) are in the middle and lower range.

The situation with NGOs and labour activist networks is slightly different, but also creates a dilemma. Unlike unions, there is no formal institutional role for NGOs and activist networks in the enforcement of labour standards through available public regulatory and corporatist policy instruments. By contrast, private approaches to labour standards may award NGOs and networks roles as rule-makers, governors and monitors. From an organizational interest perspective, this means that private solutions are preferable for NGOs, offering more for avenues for influence and in the process also possibilities for funding and organizational growth.

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<sup>50</sup> Interviews U1; U2.

However, from the perspective of policy preferences, NGO stated aims are mostly towards enforcement of binding public regulation. Some NGOs, while endorsing private regulation, also devote resources to lobbying binding rules for multinational corporate behaviour (for instance Oxfam). Meanwhile, private labour regulation is a policy solution for improvement of labour conditions as long as public enforcement is absent. Their engagement with it is a sign of their lack of trust in quick and substantial advancements in the public regulatory domain.<sup>51</sup> Both from an organizational and a policy perspective, NGOs would like to push for a robust approach to private regulation. Private regulation needs to have teeth, if it is to make a change for workers on the ground and if it is going to suit the NGO reputation of serving a common good. NGO affiliation with a weak private regulatory model may threaten its reputation, arguably one of the core sources of its organization's power. Of course there can be all kinds of interpretations of what constitutes private regulation "with teeth".

Most activists within unions, NGOs and activist networks discussed here work across borders of different countries, or have solidarity ties with like-minded groups in other countries, most importantly those groups in clothing-exporting regions. The depth and width of these transnational ties vary across different groups. To point out more specific differences in organization and outlook between these groups, it can be illuminating to discuss them in the order of groups with closest proximity to worker conditions in exporting regions as a pure advocacy and representation issue to groups with further distance from it, so from global unions and labour activists-union networks to developmental NGOs and consumer movements.

"Global unions" is the new name for the former International Trade Secretariats (ITS) established around globalizing industries. They deal with transnational industry specific labour issues and claim representation of millions of workers in different countries who are aligned through their own national union organizations. In addition they advocate issues for those workers who are not unionized (which is the predominant share of the workforce in export mass consumer goods manufacturing industries in developing countries, see Merk, 2007b; on workers in informal workspaces see Chen, Sebstad and O'Connell, 1999). Representatives of global unions are involved in private regulatory development and governance since it can be a tool for improving labour conditions and raising workers rights awareness. Concurrent with the strategic dilemma described above, inside global union organizations one finds both enthusiasm and skepticism on the private regulatory option. In private regulation, global unions prefer at least high labour standards. Their power capabilities are based on their expertise on labour conditions, often very specific about the industry at hand. In addition, they can bring negotiation skills to the table, as well as claim authority due to their indirect representation of workers.

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<sup>51</sup> Interviews N1; N13.

Labour activist-union networks bring together both labour advocates and unions from Europe and US with unions and other forms of workers organizations and NGOs in exporting regions. Networks like the Clean Clothes Campaign and the Maquila Solidarity Network use research and campaigns to inform the public in Europe and North America and to mobilize it around pressure campaigns towards companies. The strength of these networks lies firstly in their relatively close ties to workers on the ground, and the high degree of expertise on topics of working conditions that they build on because of that. Secondly, these networks very swiftly can turn an advocacy issue into a public campaign specifically targeted against companies on a certain issue of worker mistreatment. For this reason, many companies are wary of their actions. Like the global unions, these networks demand high labour standards. In addition they strongly advocate worker and union participation in private regulatory implementation, while in the long run preferring binding and enforced public regulation.

National trade unions in Europe and US only have indirect links with workers in exporting regions through global unions and the unions from developing regions in the International Confederation of Free Trade Unions. Depending on their organization's history of maintaining solidarity ties with Southern groups, some unions may have more expertise on global labour topics than others, illustrated by the size of their global justice department. They can enter discussions on private regulation with stakeholders as general labour advocates because of their expertise and possibly the common ties they have on the national bargaining level with companies or business associations involved in the initiative. Their standpoint will be inspired predominantly by a broader political view on workers rights in general, but could in some cases be subject to issue linkage with on-going national debates about labour conditions.<sup>52</sup> Their policy preference is similar to that of global unions. The work of national trade union leaders on global issues, however, is not so strongly attached to representation structures or tight advocacy networks, granting them the possibility of more freedom in negotiating policies.

Developmental NGOs in Europe, the US and Australia have a broad agenda of advocacy, focusing on the plight of developing countries in general, plus that of indigenous communities,

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<sup>52</sup> One consideration could be maintaining or enhancing good relations with business negotiators in national or sectoral settings of labour negotiations. It can also be asked whether protectionism is a motivation for specific policies towards private labour regulation, where stringent private labour regulation might save jobs at home. Obviously, union respondents would never concede on the record to such motivations for supporting private labour regulation. In the case of Western-European unions, there are increasingly less jobs left to save, given the small share of national clothing production in their countries (with the exception of haute couture powerhouse Italy, Saviolo & Ravasi, 2007: 19-21). Furthermore, a background check of textile and garment production levels in Western-European countries did not lead to a significant connection between diverging union strategies and concern for different sizes of the national clothing manufacturing workforce. In the American case, one may be more tempted to see a connection between protectionist concerns and stringent private regulatory preferences, given, first, the mainstream status of calls for protectionism as an instrument for social purposes (see Burgoon & Jacoby, 2004); and, second, compared to Europe, a larger remaining clothing workforce. Ironically, some of this workforce is now subject to similar private monitoring of American labour law, specifically targeting the problem of informal workspaces (Weil & Mallo, 2007).



farmers, workers, women and children. They advocate policy change for governments, international organizations and corporations while managing all kinds of private developmental projects themselves. Whether they have strong ties with the labour issue and the theme of worker organization in exporting regions differs, and is very much dependent on the existence of expertise inside the organization and past decisions about specific advocacy goals. This then could influence either a more labour-emancipatory focus on private regulation, akin to labour activists, or a more general fairness-based approach focusing on embeddedness of regulation in local communities and possibly accommodation of different preferences around the table. Apart from possible degrees of expertise on the topic, developmental NGOs can have their specific brand (think of Oxfam) as a source of power because of the trust that consumers attribute to it.

Consumer and shareholder movements such as the Council on Economic Priorities advocate global justice issues through market mechanisms. Of all societal groups discussed here these NGOs tend to be most enthusiastic about the private and voluntary form of dealing with social and environmental agendas. Instead of focusing on the issue of working conditions as such, they are more committed to transparent and accountable forms of corporate policy for consumers and shareholders. This is also what they advocate in private regulation keeping an eye on what companies could bring to and get out of the process as well. Their power capabilities are mainly based on different degrees of expertise, and the claim to represent consumer interests.

### *c. Governmental representatives*

Governments do not have a direct role in bargaining for private regulation, but they are important in establishing a political climate in which private regulation is seen as a beneficial solution for certain political issues. The new policy line on development assistance in Europe (and the US) is focused on insertion of the developing country in the global economy and restriction of all kinds of barriers to international trade with developing countries (for an overview see Simon & Dodds, 1998). Private regulation of environment and labour conditions fits well with this policy because it addresses these problems in such a way that they are less likely to become stumbling blocks to trade liberalization and the globalization of production.

In the case of labour conditions in supply chains, government bodies such as development agencies and ministries in amongst others the UK and Germany work as donors of research projects and NGOs, as convenor of discussions and conferences and, most importantly, as the chair bringing stakeholders round the table for actual negotiation of an approach to private regulation. The specificities of the discussion over private regulation are left to the non-state negotiators. Government representatives only bear responsibility for the process and sometimes a part of the funding. They do not push for specific solutions. Focusing on an impartial role 'above parties',

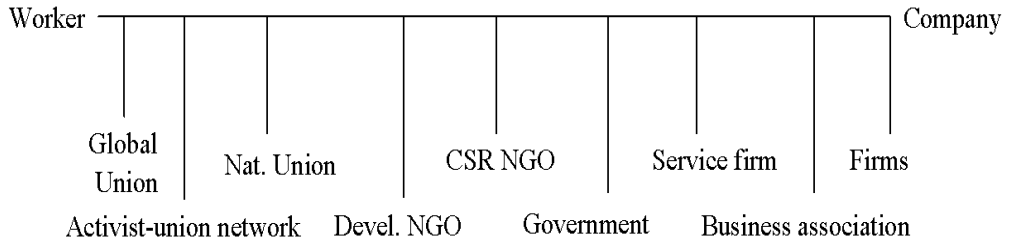
they play key roles in bringing different groups with different views around the table to negotiate. By doing so, they also establish a national character of negotiation, and indirectly contribute to fragmentation of private regulatory efforts in general.

*d. Professional service intermediaries*

Many professionals involved in CSR issues earn their money by advising, researching or assisting in implementation issues. As in many areas of the global economy nowadays, the service industry is a presence not to be neglected. For the CSR field, the most important categories of service workers are consultants and auditors/quality controllers (see also Fransen and Merk, 2007). Consultants advise companies, NGOs and private regulatory organizations on policies and strategies, and make wider contributions to professional CSR knowledge, offering both evidence and proposals for framing CSR inside companies and communities. Auditors and controllers offer their services as professional 'external' checks to private regulatory implementation systems. Neither of these groups is significantly involved in negotiating and developing specific regulations or policies. But their existence is of indirect significance for the discussion on private regulation. First, because consultants serve as sources of inspiration and agents of diffusion of thought and experience on CSR issues and regulatory models in general; second, because the auditors and controllers form a policy option to be included when discussing monitoring systems. To the best of their ability, audit and quality controllers from firms such as Intertek and SGS use their lobbying skills to keep that option on the table. They can do so through political rather than economic reasoning with firm representatives, arguing that private regulatory implementation can only be done fairly and effectively with the use of outside expertise, i. e. them. But rarely has one of these firms developed or actively put forward a strategic vision on the specific place and scope of their activities inside private regulatory models.

*e. Overview*

The groups actually involved in negotiating private regulation can now be depicted as in table 1. The specific dynamics in negotiation between the groups on the left end of the scale, the right end of the scale and the middle groups will now be discussed below. Emphasis on phases of negotiation will be necessary to understand why, given the dynamic and volatile nature of private voluntary regulation, societal groups committed to worker empowerment have agreed on systems with lower levels of stringency. And why some businesses committed to business-friendly regulatory solutions have subscribed to a more stringent version of private regulation.



*Table 1. A scale of representation and advocacy of groups negotiating private regulation on labour conditions*

#### **4. Negotiating private regulation**

Following the process of institutionalization described in section 2, the different private regulatory organizations and their approaches are put on a scale depicting both stringency and the time of their conception. Notable is that the next generation (presented here as starting from 1998 onwards) shows a much greater disparity of stringency levels than the first ones (1995 to 1996). This probably has something to do with the set of groups committed to negotiations, which, in the first generation were more diverse and may have worked towards a common consensus, while in the second generation were more likeminded and committing to a more pronounced higher or lower approach. Again, this “like-mindedness” in itself is a result of institutionalization, in the sense that strategizing became possible because groups in this phase actually knew roughly on forehand what they wanted to get out of private regulation and with whom they could get it. In any case, what is required is an explanation for the differences in policy outcomes as a result of the negotiations in both generations of rulemaking. This will be done below in four steps: one for both generations of rulemaking, an intermediate step devoted to failed attempts at developing private regulation and a single step focusing on an outlier case.

## Timing negotiations for private labour regulation

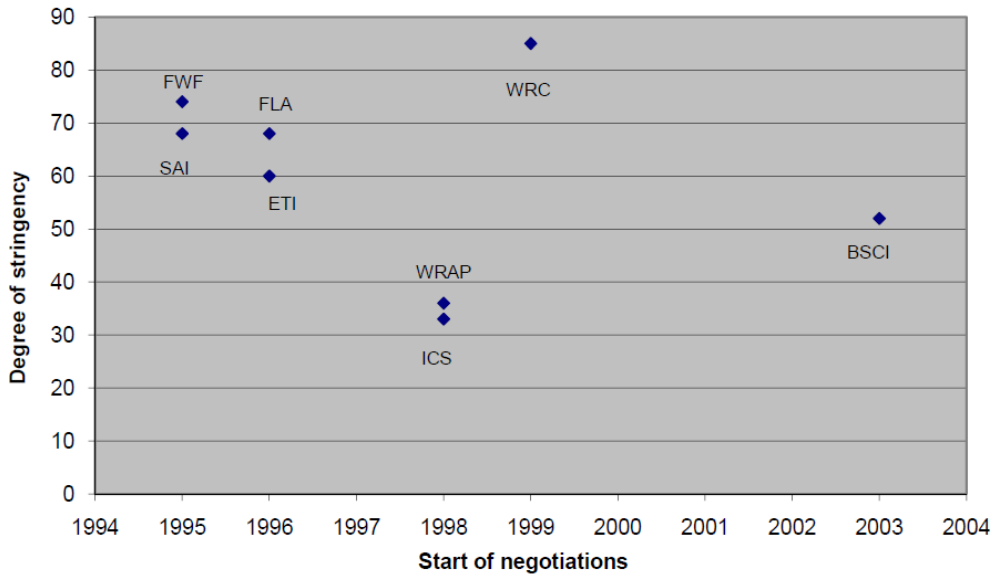


Figure 1. Timing negotiations.

### a. The first generation of rulemakers: experimenting in the void

The following initiatives were developed in the first generation:

- The *Fair Labour Association (FLA, [www.fairlabor.org](http://www.fairlabor.org))* started as the Apparel Industry Partnership (AIP) in 1996, including at first American apparel and sporting goods firms including Nike, Reebok and Liz Claiborne, trade unions and NGOs in the discussion on development of a code of conduct and an implementation scheme;
- *Social Accountability 8000* by the Council on Economic Priorities Accreditation Agency (CEPAA, later renamed *Social Accountability International, SAI, [www.sa-intl.org](http://www.sa-intl.org)*), which was established by the US social research institute Council on Economic Priorities and included brand and retail firms, as well as NGOs and unions in development, from 1996 onward;
- The *Ethical Trading Initiative (ETI, [www.ethicaltrade.org](http://www.ethicaltrade.org))* was negotiated in the UK from 1996 onwards, as a result of the engagement of NGOs and trade unions with company representatives, of mainly multi-product retailers, which are the biggest players in the UK market for consumer products;
- The *Fair Wear Foundation (FWF, [www.fairwear.nl](http://www.fairwear.nl))* was the result of negotiations starting 1995 in the Netherlands. FWF is a collaboration of two clothing industry related trade associations, Modint and Mitex, Dutch trade unions, and Dutch labour and developmental NGOs.

Section 2 elaborated the uncertainties plaguing actors who have to negotiate under conditions of an institutional void. In general, five specific traits of interaction between negotiators can be identified that arise as a response to these uncertainties, as long as the institutional void is not yet filled up: public institutional support at the moment of initiation, phases of experimentation and information, broad negotiations and shifts in negotiation membership, personal orientations and interpersonal dynamics, and finally frames of discussion. The different ways in which negotiation dynamics then play out determines the particular institutional outcome, namely the approach to private labour regulation that is adopted.

All four private labour regulatory organizations of the first generation have been pushed forward as a result of governmental or intergovernmental activity. The groups developing ETI in the UK were supported by the British Department of International Development, then occupied by the freshly instated New Labour government, eager to develop *Third Way* approaches to social issues.<sup>53</sup> The groups developing FLA were drawn together through the intervention of the Clinton administration's labour department (Esbenshade, 2004). Development of SAI resulted from an ILO initiated study into the child labour issue (Leipziger, 2000). And the groups initiating FWF too were supported by Dutch government to start looking for a private approach to the labour conditions issue in the Netherlands.<sup>54</sup> Governments were all responding to a period of public discussion of labour issues in clothing supply chains in their countries, often inspired by campaign activities from NGOs and activist networks.<sup>55</sup> Arguably government intervention, as the legitimate rulemaking body, allowed for engagement of a much wider realm of interest groups, compared to a situation where one of the private groups would make a call for negotiation of a private standard.

Broad invitations to engage in discussion in all instances led to a sizable group of discussion partners at some time involved with negotiations. However, in all negotiations groups appear and disappear from the negotiation table, after they have had the chance to have a feel of the discussion and the people involved in them. In the process of negotiation, a minimum consensus emerges among negotiators that are willing to continue the development of private regulation with each other. This consensus should at least include business and activist members, as a result of the broad, inclusive set-up of the project through governmental intervention.

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<sup>53</sup> Interview P1.

<sup>54</sup> Interviews U2; B1.

<sup>55</sup> In Britain for instance the most famous campaign was initiated by Christian Aid campaigners, who encouraged consumers to collect their receipts and offer them symbolically to supermarkets, asking for ethical consideration of the production of the goods that were sold (Interview P1; F6). In the US, media coverage of labour misdoings in Wal-Mart's supply chain, exemplified by a crying Kathie Lee Gifford, who had promoted her own clothing line in the Wal-Mart Stores, led to public debate (Klein, 2000; Bartley, 2003).

But they need not include *all* groups at some point engaged in negotiation. After all, the regulation to be negotiated is private and voluntary, meaning that groups do not exclusively need to deal with the approach presently on the table. They can choose to not adopt it or try to create a different one. In the AIP process leading to FLA, the company representatives of Karen Kane and Warnaco left feeling that they did not want NGO involvement in regulation. And in a later phase, two trade unions, among which the US garment and textile union UNITE, and a group of NGOs, including the Interfaith Centre on Corporate Responsibility (ICCR), also turned their backs on the initiative. These groups thought that the FLA would be too lax on public disclosure and transparency of monitoring and complaints and have a too lenient labour standard excluding demands on living wage. In the case of FWF, big Dutch retail representatives organized in the VGT (*Vereniging Grootbedrijf Textiel*) business organization left, declaring that the effort at stringent private regulation did not fit with their perspective on the weight of the problem.<sup>56</sup> In the case of SAI, brand companies such as Levi's and Liz Claiborne felt their perspective was not in sync with the plans that were on the table and left.<sup>57</sup> The forging of such a minimal consensus, causing these parties to drop out, arguably takes place through three specific processes.

First, the negotiators rely heavily on strategies of information as ways to push the discussion forward. This means that outside expertise (from consultants, or representatives of specific interests) may be used as a way of moving forward. Negotiations leading to SAI and FWF made use of this, in particular with regard to the question of the possible merits of certification.<sup>58</sup> In addition, different forms of experimentation and research projects are used to create clearer understandings of specific perspectives on problems under discussion. Most significantly the discussion leading up to ETI pursued such a structure of discussion.<sup>59</sup> At the negotiations leading to FWF, test audits of factories were also used as an illustration of policy possibilities.<sup>60</sup>

In the process, interpersonal relations may become a stronger factor in the emergence of consensus. For in absence of experience with the topic of discussion, the way to discuss it and the organizational perspectives of actors round the table, negotiators may lack established reference points for the creation of a common ground. Personal aspects and interactions then can act as the focus of mutual commitment necessary for the development of policies (compare McDermott, 2003). Charisma, social skill and even the intangible, fuzzy factor of interpersonal *chemistry* are noted as relevant by actors involved as factors contributing to a commonly supported outcome.<sup>61</sup>

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<sup>56</sup> Interview B1.

<sup>57</sup> Interview P8.

<sup>58</sup> Interviews U2; P8.

<sup>59</sup> Interview P1.

<sup>60</sup> Interview N4.

<sup>61</sup> Interviews N1; N11; N14.

This especially goes for the creation of commitment across the divide between businesses and activists. In the words of a CSR manager reflecting on this issue:

If you do not know that much about a certain topic such as labour conditions, you are as a corporate manager inclined to rely on your experience with a group or a person who claims to represent this cause, such as an NGO. You use that experience then to weigh the importance of certain issues, and if you feel that the conduct of the persons you are interacting with is not up to certain standards, for instance, in terms of clear and timely communication, then this might just as well be the reason why you defect from taking responsibility for a certain policy.<sup>62</sup>

Take for interest the respect of a company representative for a trade union representative:

A very smart man, we all admire him for his expertise. We were very glad to have him with us and discuss issues with him.<sup>63</sup>

And of a trade union representative praising a business association representative in negotiation:

He made a difference for his organization because he is so much personally engaged with this topic...he approaches people one on one to talk about these topics and promote specific policies.<sup>64</sup>

Implication of the relative importance of personal traits and information politics is that persons having a higher command and an earlier grasp of or a clearer perspective on a topic amongst the negotiators are very likely to strongly influence the negotiating proceedings and may act as *leaders* (Young, 1991) towards the bringing about of a specific outcome. CEPAA for instance entered the discussion with other groups with already a clear philosophy of certification and supplier responsibility as a system conforming to International Standard Organization (ISO) requirements for certification, which then steered the discussion.<sup>65</sup> Negotiators inside the FWF also recount how the commitment of CCC negotiators within the FWF towards the philosophy of verification, an outside review of business performance, influenced the discussion, as the CCC was the first to elaborate on its approach to certification:

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<sup>62</sup> Interview N5.

<sup>63</sup> Interview F10.

<sup>64</sup> Interview U2. The FLA negotiations on the other hand show how lack of bridging led to a divide. Jill Esbenshade (2004: 177-183) recounts how the garments union UNITE, while in a process of organizational restructuring, became stuck between a rock and a hard place, as it had doubts about the direction of negotiations towards business-controlled monitoring systems, but was pressured by the US Department of Labor to stay on board. After negotiations between all present parties were dropped, a group of companies and NGOs proceeded to reach a final agreement without the unions and two other NGOs. The negotiations themselves were described as a "long, tortured process" by a business representative up until that point.

<sup>65</sup> Interviews F10; P8.

We negotiated the labour standard, how it should be reviewed, how transparent it should be. CCC was most knowledgeable on all these things, although we as the union had a specific view about what labour standards should look like. But CCC had most specific views about certification issues.<sup>66</sup>

Within FLA, the strongest push for a brand certification system that would allow for business controlled monitoring came from the companies, who pointed to their positive experience with ISO quality standards and managed to take along some of the present NGOs in that view (compare Esbenshade, 2004; Hughes et al, 2007).<sup>67</sup>

The result of these four negotiation processes, with all their similarities in dynamics, are four different multi-stakeholder approaches to private regulation with four different degrees of stringency. Three of them (FLA, SAI and FWF) result from the emergence of minimal consensus after experimentation, development of interpersonal relations and influence of the frame of discussion by a leading party.

The AIP negotiations led to FLA, an organization issuing certificates to brands that manage labour conditions in their supply chain according to the FLA standard. This would mean brands taking responsibility for implementation costs, and in return, communication to consumers about the fair status of the company's supply chain policies. It is also involved in university-branded logos clothing. The conflict in the AIP negotiations had as a consequence that to this day no unions are involved in FLA. The FLA standard excluded provisions on living wage and kept the monitoring process and review of supplier performance under tight business control.<sup>68</sup> Accordingly, FLA's approach had a medium degree of stringency.

FWF made the strongest demands on its member firms of all mentioned multi-stakeholder initiatives and developed a high stringency approach: social actor involvement in complaints and remediation, monitoring and public reporting of progress, with specific emphasis on the concept of *verification*, introduced by the Clean Clothes Campaign. Verification means that societal actors should be involved in checking for the firm's performance in managing the supply chain according to labour standards, in order to credibly assess the firm's progress (see Ascoly and Zeldenrust, 2003).<sup>69</sup>

CEPAA developed its approach into SAI, an ILO standards based system of supplier certification, aiming at efficient integration of different standard concerns for suppliers. Suppliers in this scheme would pay for implementation costs and be checked by accredited audit firms. CEPAA initiated an advisory board involving NGOs and the global union ITGLWF. Later on, SAI also

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<sup>66</sup> Interview U2.

<sup>67</sup> Interview P6.

<sup>68</sup> Interview P6.

<sup>69</sup> Interviews P2; B1.



developed a larger Corporate Involvement Programme in which brand and retailer firms could participate that aimed to manage their supply chain according to the SAI standards.<sup>70</sup> SAI, because of its commitment to ILO inspired labour standards with a reliance on business-controlled implementation, is posited in between FLA and FWF in terms of degree of stringency.

Which leaves the fourth initiative, ETI, whose route of development arguably diverges from the other three after the stage of experimentation and whose approach to private regulation is also much less specific than the other three. Compared to FLA, FWF and SAI, fewer fluctuations of or decrease in discussion partners take place in ETI negotiations, and it is difficult to point to a particular perspective emerging out of the negotiation process. Nor is it possible to see evidence of a group or a set of individuals decisively shaping a frame of discussion towards a particular outcome.

It is therefore argued that the absence of a specific perspective proposed by a specific person taking the lead may cause negotiations to continue along the set lines. In the case of ETI, the choice for a learning and experimentation perspective in negotiation then spilled over to become a path dependent trajectory towards a learning and experimentation approach to private regulation. ETI thus stuck to the philosophy that as long as there is no evidence of what is the best way of implementation and enforcement, ETI should not force a specific kind of programme (including a division of tasks, control and cost) on its members, but let firms and social groups pursue their own paths, studying the outcomes. This means that ETI left the issue of the degree of control of the initiative by either business or societal groups unanswered. Spoken more coldly from a regulatory perspective: ETI leaves both decisions on implementation and implementation itself in the hands of business actors. Firms are expected to discuss their experiences with societal groups in ETI forums, but nothing forces them to actively engage in discussions, nor adjust their approach to labour standards implementation according to certain lessons.<sup>71</sup> The ETI experimental approach was later on copied by the Norwegian roundtable of unions, retailers and NGOs into ETI Norway, and by the same Danish groups into ETI Denmark.

#### *b. Interlude: rulemaking gone wrong*

Not all attempts at creating private labour regulation were successful. This section shortly summarizes specifically two attempts at creating multi-stakeholder regulation that failed. Their failure informed the development of the next generation of private labour regulation arguably as much as the first generation of successful development of regulation did.

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<sup>70</sup> Interviews F10; U1; P8.

<sup>71</sup> Interviews F6; U3; P1.

The Clean Clothes Campaign, as a European activist network with its coordination office in the Netherlands, wanted FWF to have a European scope. It however adopted the point of view that national bargaining in different national settings between activists and businesses was preferable over creating a common approach based on the Dutch discussions, given differences in viewpoints among European civil society groups and different circumstances of industry across countries. Up until now, the Dutch FWF is the only operational regulatory organization in existence as a consequence of these negotiations. Bargaining, experimentation and pilot tests also took place but failed to produce lasting commitments between activists and companies in among others Germany and France (SOMO, 2001).<sup>72</sup> Some of the German companies preferred other private regulatory organizations already in existence, or in the process of development, and kept the German CCC on a distance.<sup>73</sup> From 1996 onwards the French CCC pursued a pilot project with Auchan that did not lead to any concrete further steps, while most other French clothing retailers tried to pursue a business-only approach to private labour regulation.<sup>74</sup>

The Swiss CCC found a committed partner in the retail market leader Migros, and developed the ISCOM system together with it, which was very similar to the Dutch FWF system, due to its similar basis in the CCC philosophy of *verification*. Swiss unions were initially interested in supporting ISCOM, but a change in staff also meant a change of hearts, causing them to withdraw and prefer alternative instruments to global labour standards instead.<sup>75</sup>

The future of ISCOM is now quite uncertain, since Migros, as the single member, all through the inception and first steps of implementation of the ISCOM system kept its eye on developments in private regulation by its peers in the mass retail sector, and in the end decided to join a different rival regulatory organization with them (see below).<sup>76</sup>

Without a doubt the private regulatory failure most traumatic to all parties concerned, is the Swedish sister-to-be to the FWF, *Dresscode*. Negotiations within Dresscode took place between the Swedish unions, consumer movements, the Swedish CCC and the Swedish clothing retail sector, most prominently H & M, Lindex and Kappahl. The CCC perspective on *verification* also influenced discussions here. Research pilots fleshed out the approach, and all parties were in agreement to create the private regulatory organization, which would, in comparison to FWF, emphasize certification as a feasible end goal, also for suppliers. In the last phase of negotiation, however, the Swedish unions withdrew support because of late second thoughts about the desirability of private labour regulation. Here, as in the Swiss case, personal orientations

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<sup>72</sup> Interviews N4; N10.

<sup>73</sup> Interview N10.

<sup>74</sup> Interview N15.

<sup>75</sup> Interview N11.

<sup>76</sup> Interview F9.

notoriously influenced a bad ending of union commitment, as, witnesses hold, nothing in the further development of policy itself could have caused union representatives to change their mind:

So this is how Dresscode ran into the wall, you can say, and we are still picking up the pieces, and I think it takes a few years to do that. Because Swedish stakeholder dialogue from NGO and trade union side is about small organizations with only a couple of individuals active in the field. And individual conflicts can make things run badly.<sup>77</sup>

Instead, the unions now offered the retailers the possibility of bi-partite negotiation towards a global framework agreement with global unions. The retailers declined the offer. H & M joined FLA instead. Lindex and Kappahl stayed on the look out for alternatives, which were soon to arise. The Swedish CCC and the consumer movements did not want to pursue Dresscode without union support and the initiative collapsed (SOMO, 2001).<sup>78</sup>

Perhaps not so much an outright failure in achieving private regulatory organization, but nonetheless another example of a multi-stakeholder gathering not fulfilling its promise, is the Code of Conduct roundtable in Germany. The German government development technology agency GTZ had started it up in 2001 as a pilot project on monitoring codes of conduct together with the German retail association AVE and a set of German NGOs and unions. Discussions took place among interest groups at the table about findings, and attempts were made to learn about desirable private regulatory approaches. The German CCC's position in the Roundtable became increasingly difficult. Its dedication to its own pilot projects intervened with the interactions at the Roundtable and its elaborated perspective on what appropriate private labour regulation should look like clashed with the more relaxed approach of in particular the mass retail representatives. GTZ meanwhile was in the process of succeeding to get actors together in developing an international Common Code for the Coffee Industry through a similar set-up. However the efforts towards clothing and mass retail regulation did not continue in a similar fashion within the German context, since the Roundtable formally kept meeting over the next years only as a discussion and consultation venue. The German CCC representatives left and mass retailers focused their efforts at private regulation elsewhere.<sup>79</sup>

Of course, this section does not aspire to present a fully convincing diagnosis of why these initiatives failed where others succeeded in developing private regulation. Specifically, because recollections of actors present in negotiations are prone to tautological reasoning. Nonetheless, in the narratives offered, two generalizable elements stand out across cases, in comparison to the four successfully established initiatives that inform failure to achieve a minimal consensus among

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<sup>77</sup> Interview N14.

<sup>78</sup> Interviews N14; F3.

<sup>79</sup> Interviews F8; N13; N10; N9.

interest groups: first, increasing strategic behaviour of actors that in negotiation are also taking explicit note of outside alternatives to private regulation; second, a mixture of personal orientations and organizational ambivalence as well as interpersonal dynamics undercutting efforts at consensus.

*c. The next generation of rulemaking: strategic choices in an institutional field*

The next generation of private regulatory development consists of three private regulatory organizations:

- *Worker Rights Consortium (WRC [www.workersrights.org](http://www.workersrights.org))* was developed from 1999 onwards as an initiative by the US United Students Against Sweatshops, the American trade union federation AFL-CIO, together with a group of American NGOs as well as garments union UNITE
- *Worldwide Responsible Apparel Production programme (WRAP, [www.wrapapparel.org](http://www.wrapapparel.org))* initiated by the American Apparel Manufacturers Association (nowadays American Apparel and Footwear Association, AAFA) from 1998 onwards, with input from consultants and US university staff.
- *Business Social Compliance Initiative (BSCI, [www.bsci-eu.org](http://www.bsci-eu.org))*, negotiated from 2003 onwards in the European business association for retailers, the Foreign Trade Association (FTA).

This generation benefits from knowledge on and some experience with established competing regulatory organizations and their development trajectory, and in some cases takes with it experiences from failed attempts at private regulatory development. This implies that for these later organizations, discussions can earlier on be more focused on the possible models already in existence, offering directions of thought. And with the field of private regulatory development running for already some years, interest group positions and repertoires on CSR are further developed and more concrete.

This creates different dynamics from the first generation of negotiation. No large groups of negotiators, few changes in discussion partners, less experimentation and research. Instead, a faster process of private regulatory development, focused on, first the selection of a limited set of partners believed to share a common approach, and second the elaboration of an approach in the face of existing approaches.

The selection of likeminded partners is a key characteristic of all three organizations: none of these three is multi-stakeholder developed, in the sense of having both businesses and societal actors at the table. WRC excluded business members in its approach, instead focusing on labour experts, as well as unionists and NGO members. This has great repercussions for the kind of private

regulatory approach WRC would be able to develop. Without business members, brand certification, mutual learning, or gradual compliance improvement processes were out of the question. Likewise, business associations bringing together likeminded companies were at the basis of BSCI and WRAP, also creating a path dependent trajectory towards business control of governance and procedures.

It might be tempting to attribute the “one-sidedness” of these attempts in terms of participants to fixed ideological perspectives. WRC would then be a left-wing labour community with its established mistrust of corporations, and BSCI and WRAP typical of corporate approaches excluding hated anti-corporate critics as well as unions. However the preference of like-minded partners at least to some extent was informed by recent historical experience and in that sense, if there was an ideological perspective, it was at least partially informed by experience. Some of WRC’s members had been involved in the AIP negotiations leading to FLA and had been greatly disappointed in the stance and performance of American corporate representatives, which had effectively excluded them from key moments in negotiation (Esbenshade, 2004). Similarly, BSCI members, meeting under the umbrella of their European business association, had loads of stories to share about their bad feelings about NGOs as discussion partners, or the unreliability of trade unions as members of private labour regulation: the Dutch retailers could draw from their experience with the stringency committed Dutch CCC; the German retailers had their share in the GTZ Roundtable; the Swiss could relate on the basis of the ISCOM negotiations; and the Swedish had their bad memories of the Dresscode drama. Although some of the parties within the discussion leading to BSCI were not averse to a multi-stakeholder set up of negotiating a new private regulatory approach (including Otto), majority consensus soon decided for a business-only approach:

This happened once we broadened the scope from the German discussants connected to AVE to the wider group of FTA members. I personally would have preferred the multi-stakeholder set up, but it was clear that the non-German companies did not want that, so we went along with that.<sup>80</sup>

The negotiators then drew inspiration from existing approaches to dress up their particular approach, as something similar, or something decidedly different. BSCI for instance used the experience of Otto (and WE) with SAI compliance as a model in setting up a business controlled supplier certification approach that would be based on ILO conventions, albeit under business-only governance, with indefinite prose on the living wage issue and a lower baseline level of company requirements as a first hurdle towards compliance.<sup>81</sup> BSCI’s approach accordingly has a lower

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<sup>80</sup> Interview F8.

<sup>81</sup> Interviews F7; F8.

degree of stringency than SAI, but has the highest degree of the business governed regulatory organizations in the field.

Because WRAP, inspired by consultancy research on the private regulatory field from PriceWaterhouseCoopers, and informed by the distaste of some companies licensing university apparel and university staff for the AIP proceedings also used business controlled supplier certification as a model towards labour standards compliance that looked just like SAI.<sup>82</sup> Its labour standards however were predominantly formulated on the level of local laws. WRAP now strives to be the private regulatory organization most favourable to supplier business, reason why supplier business associations also got to formally endorse WRAP as a labour solution on its website.<sup>83</sup> WRAP, unsurprisingly, scores a lower degree of stringency.

WRC's approach became an oppositional model to FLA (with which it then started competing for university apparel licensee membership) and the other existing approaches. It does not organize implementation and enforcement together with corporate representatives, nor does it seek to reward a certificate to brands, labels or suppliers. Instead, it opted for the function of independent assistant in implementation and enforcement through a 'fire-alarm system': in case of a breach suspected or found in the standards applied by member universities, WRC would go out and investigate together with labour representatives on the site, and suggest corrective action and remediation that should be followed up by the university, if it wants to remain a WRC-affiliate. WRC is thereby the regulatory organization with highest degrees of stringency.<sup>84</sup>

#### *d. The outlier*

At first sight, the development of *Initiative Clause Sociale (ICS)* by a group of French retailers, including Carrefour and Casino, from 1998 onwards, fits with the characteristics of the previously mentioned next generation of regulatory development. ICS is a product of negotiations among one type of interest groups, its inception date corresponds with the dates that discussions about WRAP and WRC began and thus follows the first generation of rule-making in multi-stakeholder settings. Its development was also a relatively quick affair compared to the first generation, lasting a year. And among its initiators were companies who in the past had been engaging in dialogue with activists on possible cooperation, most prominently Auchan, the representatives of which had set up a pilot with French CCC affiliate *L'ethique sur de l'etiquette*.<sup>85</sup> But the information on ICS's development also shows that the businesses negotiating the approach were quite ignorant about what was happening elsewhere in European and American private regulatory organizations. Their

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<sup>82</sup> Interview P6.

<sup>83</sup> Interview P11.

<sup>84</sup> Interviews N7; N8; P4.

<sup>85</sup> Interview N15

behaviour cannot be attributed to knowledge about policies and perspectives of a wider field of private labour regulation efforts. It may perhaps even be argued that ICS and its business members were not engaging in this field, particularly also since most representatives of the other private regulatory organizations and their supporters interviewed for this study hardly seem to recognize the existence, content and impact of the ICS effort. While it is difficult to judge on a single case basis why something like contact with likeminded efforts across borders does not occur, it is posed here that the crucial factor probably is the French language and the delimitation of the regulatory effort to the French market that impaired links to the predominantly English-spoken debates in other places of the world. Two interesting policy deviations compared to other cases of private regulation may arguably result from this situation of isolation: ICS is the only organization that has never explicitly published its labour standard policy. It only broadly describes its content and the references to ILO Conventions and labour law on the website. Second, it is the only business governed organization that requires buying firms to pay for the costs of audits, contrary to BSCI and WRAP. This requirement may in the end prove to be not too costly, since requirements for monitoring of a set amount of suppliers (or a percentage of the supplier base) are absent. Apart from this it is a system pretty much similar to BSCI, focusing on sharing audits performed by service firms.

## 5. Final reflections

This chapter has shown how different approaches to private labour regulation emerge, and has paid attention to circumstances, actor attributes and perspectives, as well as patterns of interaction to explain emerging differences between private regulatory organizations. From the analysis it has become clear that it is not easy to predict specific regulatory approaches on the basis of the groups initiating them and their prior objectives (in Palan & Abbot's terms "Agency + Power = Outcome", 1996). It however is possible to create formulaic descriptions for the likelihood of the emergence of specific types of private labour regulation, while remaining sensitive to the historical dynamics discussed in this chapter. Below, seven statements that have the status of propositions are presented as the result of the empirical story.

First, *labour activist movements' leadership in establishing private regulation leads to higher degrees of stringency for regulation.* Leadership is understood here as the activity of initiating a specific perspective on private regulation and pushing for it in discussion with other negotiating actors. This has been the case for FWF and WRC.

Second, *achieving higher degrees of stringency in a multi-stakeholder setting of negotiation is more likely in earlier phases of regulatory development than in later phases.* The history of the clothing production chain shows that in later phases of private regulatory negotiation businesses are

not so easily led into a multi-stakeholder setting. The latest generation of private regulatory organizations does not include societal interest groups.

Third, *consumer focused activist leadership in establishing private regulation leads to a medium degree of stringency*, as the example of SAI and CEPAA shows.

Fourth, *business-only private regulation development leads to lower degrees of stringency due to business controlled supplier certification systems*. This is evident in the cases of WRAP and BSCI.

Fifth, *union participation in private governance leads to labour standards conforming to ILO conventions*, as the standards of ETI, SAI, FWF, and WRC conform to this norm, while the non-union backed FLA, BSCI, and WRAP do not.

However, sixth, *trade union participation is not a sufficient condition for higher degrees of stringency because of variation in perspectives on implementation and compliance*. ETI and SAI are supported by trade unions and score medium levels of stringency, particularly due to the business controlled nature of implementation and enforcement.

Seventh, and finally, *multi-stakeholder negotiation of private labour regulation is neither a necessary nor a sufficient condition for high stringency for private labour regulation*. WRC as a non-multi-stakeholder organization promotes high stringency regulation, while SAI, FLA, and ETI offer medium levels of regulatory stringency.

If these claims have the status of propositions for other industrial fields in which private labour regulation evolves, how likely is it that in these industries actors will go through the same phase of relative innocence regarding the knowledge and experience of actors when they first start negotiating private labour regulation? In principle, one could expect some form of institutional void in other industries as well, as long as the inexperience of the actors involved creates a similar situation of uncertainty. After all, as this chapter has shown, the debate on global labour standards had been ongoing for some time before 1995, and yet many of the actors engaging in discussion were still new to the topic of private labour regulation. Granted, knowledge from outside the void, for instance about ISO certification and ILO conventions, was used to structure the discussion, but this is something other than a full policy repertoire at their disposal to help develop clear prior preferences for negotiators.

However, there are also some grounds for scepticism about a replication of the situation where an institutional void has such an influence on private labour regulation. It is likely that in newly emerging discussions about private labour regulation in other industries, routines and repertoires will be available that structure preferences and negotiations. This is because diversification strategies, mergers, buyouts, and the concentration and expansion of retail in many consumer markets lead to a spread of knowledge on CSR and private regulation across companies



and industries. Further, the development of CSR management as a job market in itself has led to a diffusion of CSR managers across companies and industries, many of them taking their experience from one field with them to another.<sup>86</sup> The growth of the CSR service firm market also gives a strong push to the spread (and harmonization) of knowledge and skills in CSR management of different industries, and moreover, nowadays a set of NGOs and unions work on several industries at the same time, and use lessons from several campaign fields to inform their strategies.

This chapter has argued that how and what type of private regulatory approach evolves is dependent on the temporal embedding of negotiations, together with negotiation dynamics and actor perspectives. This in particular reveals why variation in different multi-stakeholder negotiation settings arises, and why the presence of NGOs and unions in some settings leads to pressures towards higher stringency, but not in others. One may meanwhile wonder why differences in regulatory outcomes are not attributed to the local, geographic embedding of different negotiations. Does nationality matter for the development of private labour regulation? Some suggest that it does (Hughes et al, 2007; Christopherson & Lillie, 2005). This study, however, is agnostic in this matter. In the current case selection, offered to us because of the specific historical development of regulation, arguments for a 'nationality' factor would have the shaky basis of single case representations of a national approach through ETI (for the UK) and FWF (for the Netherlands); second, there would be strikingly different approaches coming from one nation, in the American case of WRC, FLA, WRAP, and SAI; and, third, there would be the analytical difficulty of SAI and BSCI being regulatory approaches agreed upon by cross-national groups of actors.

What is more, attempts at reasoning from national institutional variables leads to as many intuitive as counter-intuitive empirical patterns. Granted, WRC and FLA are typical of the adversarial type of industrial relations in the US. And FWF might be the representation of Dutch *polder* corporatism leading to worker-friendly policies. But why do Dutch retailers not join in on this corporatism? And why do Nordic countries such as Sweden and Finland, whose version of the welfare state is as consensual and generous as the Dutch case, not breed such types of regulation, instead having companies predominantly support business controlled regulation? Similarly, the drive for certification inside FLA, SAI, and WRAP may be viewed as a typical result of an American emphasis on consumer sovereignty. But consumer sovereignty is not alien to Europe, as the UK and Switzerland amongst others show (reflected in the success of Fair Trade movements and products in these countries as well as the continuing presence of the cooperative business form, Reynolds & Long, 2007: 15-24). Why then have these countries bred explicit non-certification private regulatory approaches (ETI and ISCOM)?

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<sup>86</sup> In this research, five out of twenty one CSR management respondents were either former CSR managers for another product field or became CSR managers for a new product field sometime after the interview.

In sum, there is ample reason to leave country generalizations for this particular phase of policy making aside and emphasize the importance of the mentioned dynamic factors, in combination with the organizational agendas and institutional differences of fundamentally cross-border civil society and business organizations—at least in the making of private regulation. Empirical material supports these interpretations.

Overseeing the institutionalization of the field, it is striking to see how interest groups have ‘gone it alone’ in the creation of next generation regulatory organizations, after an initial phase of multi-stakeholder discussion, experimentation, and negotiation. It seems almost as though businesses and activists are ‘learning’ not to work with each other. This does not mean, however, that multi-stakeholder forms of negotiation have run their course (for discussion see Egels-Zanden & Wahlqvist, 2007). As later chapters will show, paradoxically, multi-stakeholder qualities of negotiation and interaction are becoming a dominant criterion to judge the legitimacy of private regulatory approaches within this field of political action. But before elaborating on this, it is important to understand how businesses responded to the supply of different regulatory approaches to labour standards in supply chains. Which approaches were businesses willing to support, and why? This is a question as crucial to the understanding of how private labour regulation is evolving for the clothing production chain as is the issue of private regulatory design. It will be the subject of the next chapter.