

The rapprochement of ILO standards and CSR mechanisms: towards a positive understanding of ‘privatization’

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1. Introduction

According to *The Body Shop* founder Anita Roddick, “The business of business should not just be about money, it should be about responsibility. It should be about public good, not private greed.”¹ One of the central questions in the debate about corporate social responsibility (CSR) is whether the ‘public good’ is defined by private or public actors and processes. Most definitions of CSR appear to support the former position. According to the International Labour Organization (ILO), “CSR is a voluntary, enterprise-driven initiative and refers to activities that are considered to exceed compliance with the law.”²

Still, private and public regulation intersect in various ways. Critics of CSR raise two concerns in this regard. First, there is the ‘displacement hypothesis,’ which holds that CSR crowds out public regulatory initiatives.³ By taking the initiative to codify their social commitments companies pre-empt legislation. Although this might be the motive behind some CSR policies, history shows many examples of CSR norms that subsequently became law. In 1914, for example, the Ford Motor Company introduced the eight-hour working day at a time when no federal regulation of working hours existed in the United States. The introduction of legislation created a level playing field for (companies like) Ford and was one of the major improvements of working conditions in the 20th century. Likewise, the rise of trade unions led to a practice of collective bargaining, after which it took several decades for states to draft legislation of the issue or to protect it as a fundamental labour right.

Secondly, there is—what we call—a ‘convenience hypothesis’ with regard to the content of the normative commitments in CSR codes. Instead of private standards becoming public, as the example of Ford shows, this point is concerned with the opposite situation. The convenience hypothesis holds that companies appropriate public norms in their CSR policies, but are subsequently free to define and interpret them as they please. An ILO study in 1998 concluded that in corporate codes of conduct “[s]elf-definition appeared to be the leading method of establishing labour practice goals [...]”⁴

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¹ The Body Shop, ‘Our Company’, available at:

http://www.thebodyshop.com/services/aboutus_company.aspx [Last visited, 23 January 2013].

² International Labour Office, Governing Body 295th Session: Subcommittee on Multinational Enterprises, InFocus Initiative on Corporate Social Responsibility (CSR), GB.295/MNE/2/1, March 2006.

³ Tim Bartley, “Corporate Accountability and the Privatization of Labor Standards: Struggles over Codes of Conduct in the Apparel Industry,” 14 *Research in Political Sociology* (2005), p. 212. See also: Susan Strange, *The retreat of the state: the diffusion of power in the world economy* (Cambridge: Cambridge University Press, 1996).

⁴ International Labour Organization, Governing Body: Working Party on the Social Dimensions of the Liberalization of International Trade, Overview of global developments and Office activities concerning

Diller, when referring to this study, argued that: “Most self-definitions differ from, and even contradict, international labour principles.”⁵ She cites the International Operating Principles of Sara Lee Knit Products (SLKP), which at the time stated that:

“SLKP believes in a union-free environment, except where laws and cultures require us to do otherwise. The company treats people with equity and fairness, and believes that employees themselves are best able to voice their concerns directly to management. SLKP is committed to the strict observance of laws and regulations related to union activity and encourages individual freedom and direct dealing between employees and management while actively discouraging union representation of employees where the law allows.”⁶

Appropriation here only takes place at the ‘issue-level’. Freedom of association is an issue that is regulated by international law, but SLKP clearly does not intend to adhere to the norms contained in the relevant ILO Conventions. But even with less hostile references to freedom of association it is often unclear what the normative commitments of the company are. What does it mean when The Carlsberg Group states that it “shall respect employees’ rights to form, join or not join a labour union or other organisation of their choice, and to bargain collectively in support of their mutual interests [...]” without a reference to the ILO?⁷ To what extent is this different from SABMiller, which states that the company “is committed to conducting its business with due observation of the principles of [...] the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, and ILO Core Conventions on Labour Standards.”⁸ Should labour rights activists (who are of course not influenced by taste, prize, marketing or other superficial concerns) order a Carlsberg or a Peroni Nastro Azzurro?

The convenience-hypothesis is not restricted to CSR. The inclusion of labour standards in human rights law, and more recently in reciprocal and unilateral trade arrangements, has led to parallel systems of international rights enforcement. The ILO itself, as Philip Alston has argued, has enabled this process. The 1998 Declaration on Fundamental Principles and Rights at Work (1998 Declaration) has introduced a voluntarist system in the organization itself, and “has laid the groundwork for a decentralized system of labor standards implementation which significantly reduces the emphasis on governmental responsibilities and encourages a diverse range of actors [...] to take the lead in defining, promoting, and even enforcing these standards.”⁹ Amongst these actors, companies are certainly the most suspicious, as CSR is often perceived as

codes of conduct, social labelling and other private sector initiatives addressing labour issues, G.273/WP/SDL/1 (Rev.1), November 1998.

⁵ Janelle Diller, “A social conscience in the global marketplace? Labour dimensions of codes of conduct, social labeling and investor initiatives,” 138(2) *International Labour Review* (1999), p. 116.

⁶ Sara Lee Knit Products - International Operating Principles, (2000). available at: <http://actrav.ilo.org/actrav-english/telearn/global/ilo/code/saralee.htm> [last visited 23 January 2014].

⁷ The Group, Labour & Human Rights Policy, (1 April 2009), p. 3. Available at: http://www.carlsberggroup.com/csr/ourfocusareas/LabourandHumanRights/Documents/Carlsberg_Policy_LHR_group.pdf. [last visited 24 January 2014].

⁸ SABMiller Position Paper – Human Rights, *Having Respect for Human Rights*, (June 2012), p. 1. Available at: http://www.sabmiller.com/files/pdf/positionpaper_humanrights.pdf. [last visited 24 January 2014].

⁹ Philip Alston, “Core labour standards and the transformation of the international labour rights regime,” 15(3) *European Journal of International Law* (2004), p. 460.

merely an exercise in public relations, and no clear frameworks exists to determine the relationship between private and public regulation.

The purpose of this paper is to examine the relevance of international labour law in the context of corporate social responsibility. Alston’s trinity of ‘defining, promoting and enforcing’ implies that a plethora of (procedural) promotion and enforcement mechanisms leads to a plethora of (normatively convenient) interpretations and definitions. Our central research question is thus: To what extent do ILO standards mitigate self-definition and interpretation in CSR? Part 2 first looks at the normative development of labour standards within the ILO. It subsequently examines the convenience-hypothesis within other fields of international law that have appropriated labour standards. Part 3 deals with the relationship between international labour law and CSR. Part 4 turns to the perceived dichotomy between CSR and enforcement. Part 5 concludes.

2. From an ILO monopoly to parallel systems of labour rights enforcement

2.1 The International Labour Organization

The ILO is the methuselah of international organizations. Since 1919 it has produced an impressive body of 189 Conventions and 202 Recommendations containing labour standards on a wide range of issues. Conventions are treaties and become binding upon ratification, while Recommendations are merely "communicated to all Members for their consideration with a view to effect being given to it by national legislation or otherwise."¹⁰ Recommendations may complement Conventions containing additional or more detailed rules, or deal with subjects that are not (yet) suited or appropriate for a Convention.¹¹ In the former capacity, Recommendations serve an interpretative function as they “indicate to members of the underlying Convention their minimum obligations if they are seeking to comply with treaty obligations that are otherwise extremely vague.”¹² The Committee of Experts on the Application of Conventions and Recommendations (CEACR) monitors compliance with ratified Conventions. Every year, about twenty cases are discussed at the International Labour Conference by the Conference Committee on the Application of Standards (CAS), where states face public scrutiny over (alleged) instances of non-compliance. In addition to this ‘regular’ form of supervision, the ILO has three complaint procedures. First, employers’ or workers’ organizations may file a ‘representation’ against a member state. A Tripartite Committee of the Governing Body will investigate the matter, and may adopt recommendations to bring state practice in line with international obligations. Secondly, the ILO Constitution provides for a more severe procedure of ‘complaints’. These may be brought by a member state, ILC delegates or the Governing Body, and will be investigated by a Commission of Inquiry. Ultimately, this may lead to the invocation of Article 33 of the

¹⁰ Article 19(6)(a), ILO Constitution.

¹¹ Article 19(1), ILO Constitution.

¹² José E. Alvarez, *International Organizations as Law-makers* (Oxford: Oxford University Press, 2005), p. 229.

ILO Constitution, which states that: "In the event of any Member failing to carry out within the time specified the recommendations, [...] the Governing Body may recommend to the Conference such action as it may deem wise and expedient to secure compliance therewith." Thus far the article has only been applied in the case of Myanmar, after which the EU, US and other countries adopted economic sanctions in response to the egregious forced labour situation. The Article 33 procedure is often regarded as the 'teeth' of a system that otherwise relies on naming and shaming. Thirdly, the ILO has a tripartite Committee on Freedom of Association (CFA) dealing specifically with complaints on this issue. The CFA is by far the most productive complaints mechanism, and has dealt with 3045 cases since it was founded in 1954. Its most important findings are published in the 'Digest of decisions and principles'.¹³ The CFA is unique in international law, as its jurisdiction to handle complaints is based on membership of the organization, rather than ratification of Conventions 87 and 98. Under all ILO's complaint procedures, the right of action is reserved to trade unions and employer organizations. Individuals and non-governmental organizations cannot use these procedures. Although this narrows the potential group of claimants, the procedures do not require the exhaustion of local remedies, which is an admissibility requirement in most international mechanisms.

In the 1998 Declaration, which was alluded to above, the International Labour Conference defined four 'core' labour standards, and obliges all member states:

"[to] respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely: (a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation."¹⁴

The Declaration was complemented by a follow-up mechanism that, *inter alia*, composes an annual report composed of reports from states that have not ratified the underlying conventions, on the steps they have taken towards realization of the Declaration. These statements are often very general. The United States, which has not ratified the Conventions on non-discrimination, reports that: "The United States pursues the elimination of discrimination in respect of employment and occupation through a combination of law enforcement, administrative action and public outreach."¹⁵ The reports contain few references to the work of the CEACR and the CFA, or statements on how the 'principles' of the Declaration relate to the 'rights and obligations' of the Conventions. There is no mechanism to shame states that, in the opinion of the

¹³ International Labour Office, *Freedom of Association: Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, (Geneva: 2006, fifth revised edition). Available at: http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_090632.pdf.

¹⁴ ILO Declaration on Fundamental Principles and Rights at Work, International Labour Conference, 86th Session, Geneva, June 1998. para 2.

¹⁵ International Labour Organization, Review of annual reports under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, Governing Body 317th Session, Geneva, 6-28 March 2013, GB.317/INS/3, para. 121.

Governing Body, provide too little detail in their reports. Yet within this 'ratify or explain' system states do not always choose the (easy) latter option. Since 1998 the underlying conventions, two on each core labour right, have seen a huge surge in ratifications, which as a consequence has strengthened the role of CEACR supervision. In 2013, the CEACR published a 947-page report on the observations concerning particular countries and a 256-page thematic report on collective bargaining in the public sector. In comparison, the last report on the 1998 Declaration's follow-up consisted of only 26 pages.

Curiously, the CEACR, CFA, Commissions of Inquiry and Tripartite Committees are tasked with the application, but not with the interpretation of ILO Conventions. Article 37(1) of the ILO Constitution provides that "Any question or dispute relating to the interpretation of [the Constitution and Conventions] shall be referred for decision to the International Court of Justice." The subsequent paragraph provides for the possibility to establish an *ad hoc* tribunal to resolve issues of interpretation. Only the predecessor of the ICJ, the Permanent Court of International Justice, has dealt with cases regarding the ILO. In 1932 it was asked to determine whether the Convention concerning Employment of Women during the Night also applied to women in managerial positions. In its advisory opinion the Court confirmed that it did.¹⁶ After the Second World War the idea to request an advisory opinion or establish an *ad hoc* tribunal has been entertained several times, but was never put into practice.¹⁷

At the request of member states, the International Labour Office issues opinions on a regular basis concerning, for example, the question whether reservations to Conventions are allowed or to what extent labour standards apply during armed conflict.¹⁸ Its opinions do not deal with questions of compliance by member states and have no official status.¹⁹ Yet through acquiescence Office opinions have gained an important place in the body of international labour law.²⁰ According to McMahon: "Paradoxically, it is precisely because the International Labour Office has claimed so little that it has achieved so much. By making such modest claims for its opinions, the Labour Office deflects any possible challenges of its constitutional power to give them at all."²¹ Similarly, the supervisory bodies have never questioned their restrictive mandate. Their 'observations' (CEACR) and 'recommendations' (CFA) are of a non-binding character. Although the CEACR tends to downplay their authority to interpret Conventions,²² Alvarez is correct when he points out that "[...] assessment of a government's response

¹⁶ Interpretation of the Convention of 1919 concerning Employment of Women during the Night, Advisory Opinion, 1932 P.C.I.J. (ser. A./B.) No. 50 (Nov. 15).

¹⁷ Justin Fraterman, "Article 37(2) of the ILO Constitution: Can an ILO Interpretive Tribunal end the Hegemony of International Trade Law?" 42 *Georgetown Journal of International Law* 879, pp. 889-890.

¹⁸ Alvarez, *supra* n12, pp. 225-226.

¹⁹ J.F. McMahon, "The Legislative Techniques of the International Labour Organization," 1965-66 *Brooklyn Yearbook of International Law* 1, pp. 73-77.

²⁰ Alvarez, *supra* n12, p. 226.

²¹ McMahon, *supra* n19, p. 100.

²² International Labour Conference 102nd Session, Report of the Committee of Experts on the Application of Conventions and Recommendations, General Report and observations concerning particular countries, ILC.102/III(1A), paras. 13-33 where the CEACR discusses in-depth the issue of interpretation. It should be noted that the recommendations of the experts of the CEACR and the tripartite CFA are 'legitimized' by their subsequent adoption by the International Labour Conference and the Governing Body, respectively.

in light of the requirements of an ILO convention inevitably interprets the convention at issue, with potential wider normative ripples for all parties to such conventions.”²³

At the International Labour Conference in 2012, the employer members of the Conference Committee on the Application of Standards expressed their concerns regarding these ‘normative ripples’. The most contentious issue in international labour law undoubtedly is the right to strike, which is not mentioned in the texts of the Freedom of Association Convention, 1948 (No. 87) nor in the Right to Organize and Collective Bargaining Convention, 1949 (No. 98). The CEACR and the CFA nevertheless maintain that the right to strike is incorporated in Convention No. 87. In their examination of state reports and complaints, both committees actively monitor compliance with this right, and have set clear parameters which can be found in the Digest on Freedom of Association. The employer members contended that although a right to strike may indeed exist, the CEACR was not tasked to make this determination. Their main concern, however, was not so much that the CEACR and CFA supervision procedures as such are flawed, but the influence of their interpretative work “outside of the ILO.”²⁴ The employer members held that:

“The eight fundamental Conventions were important not only within the ILO, but also because other international institutions regularly used them in their activities. The fundamental Conventions were embedded in the UN Global Compact, the OECD Guidelines for Multinational Enterprises, and the UN Human Rights Council’s “Protect, Respect and Remedy” framework. The ILO’s supervisory machinery related to member States only, not to businesses, so it was vital that, when other international institutions used the fundamental Conventions, such use was correct. A correct understanding of the fundamental Conventions was imperative for businesses because they were used in international framework agreements, transnational company agreements and in European framework agreements with global trade unions, where they were often not defined.”²⁵

Only through one of the Article 37 procedures can, according to the employers, a ‘correct understanding of the fundamental Conventions’ be provided. As long as they have not proclaimed the existence of a right to strike, it cannot be part of the normative expectations of companies in the CSR context.

Notably, the assumptions of the employers are antipodal to the concerns that Alston raised in his critique of the 1998 Declaration. Both recognize that the consensus on four core labour standards accelerated the appropriation of ILO references in soft-law instruments outside the ILO. But whereas Alston was concerned that this would create normative diffusion, the employers feared the authority of the Committee of Experts in shaping the expectations about the behaviour of companies in the context of CSR. Before turning to this issue, we first discuss the use of ILO standards and the work of the ILO supervisory bodies in other domains of international law.

2.2 Non-ILO sources of international labour law

²³ Alvarez, *supra* n12, p. 453.

²⁴ International Labour Conference, *Report of the Committee on the Application of Standards: General Report*, ILC 101st Session, Geneva, May-June 2012, PR No. 19(Rev.), Part I/13, para. 145.

²⁵ ILC (2012), *supra* n24, para 146.

Soon after the Second World War the ILO lost its monopoly on international labour law. The Universal Declaration of Human Rights (1948), and the two subsequent treaties: the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (ICCPR and ICESCR, 1966) all contain a subset of rights that can be found in ILO Conventions. This is also true for other international human rights treaties such as the Convention on the Rights of the Child and International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. In addition to these international treaties, the various regional human rights mechanisms in Europe, Central and South America, Africa and Asia all contain labour standards.²⁶ Like the ICCPR and the ICESCR at the international level, the European system consists of two treaties, dealing with economic and social (European Social Charter, ESC) and civil and political rights (European Convention on Human Rights, ECHR). The articles on freedom of association in the ICCPR and the ICESCR both state that they shall not prejudice the guarantees provided for in ILO Convention No. 87 when a state party has ratified both conventions.²⁷ Ewing has argued that because the ICESCR expressly provides the right to strike, and Convention No. 87 serves as a minimum benchmark for the application of the ICESCR rules on freedom of association, it follows that the right to strike is part of Convention No. 87 as well.²⁸ The ICCPR provision appears to have less practical relevance.²⁹

The second wave of parallel labour rights mechanisms emerged after U.S. Presidential candidate Ross Perot eloquently described the potential effect of the combination of trade liberalization and Mexico's comparative advantage in labour costs as "a giant sucking sound from the south." The Clinton administration subsequently added a labour-side agreement to NAFTA, becoming the first social clause contained in a reciprocal trade agreement. Although efforts to amend the legal texts of the World Trade Organization in a similar vein were stalled indefinitely at its Ministerial Conference in 1996, the proliferation of social clauses in trade agreements continued. When we apply a broad understanding of social clauses, ranging from reference in a preamble to a comprehensive labour chapter, 158 states are party to one or more reciprocal trade or investment agreements containing labour standards.³⁰ Many social clauses contain references to the ILO. In US FTAs, parties typically "reaffirm their obligations as members of the [ILO] and their commitments under the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up."³¹ The specific labour commitments are often tied to current levels of domestic labour regulation, from which states may not derogate. If currently domestic labour standards do not comply with international obligations, there is usually only an hortatory obligation "to strive" to raise domestic standard to that level.

²⁶ In Asia there is no regional human rights treaty. However, the Member States of ASEAN adopted a Human Rights Declaration in 2012, which is a non-binding instrument.

²⁷ Article 22(3) ICCPR and article 8(3) ICESCR.

²⁸ Keith D. Ewing, "Myth and Reality of the Right to Strike as a 'Fundamental Labour Right'" 29 *International Journal of Comparative Labour Law* (2013) 145, p. 146.

²⁹ Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary*, 3rd edition (Oxford: Oxford University Press, 2013), p. 658.

³⁰ See in general: International Institute for Labour Studies, *Social Dimensions of Free Trade Agreements* (Geneva: ILO, 2013).

³¹ For example, Article 6 US-Jordan FTA.

Table 1 illustrates how states have piled-up treaty commitments regarding freedom of association. It shows whether states have ratified (1) the relevant ILO Conventions,³² (2) UN instruments,³³ (3) regional instruments,³⁴ and (4) economic agreements with a social clause. Multiple ratifications at the same level, such as the European Social Charter and the European Convention on Human Rights, are thus not reflected in this overview.

Table 1 - Treaty obligations in the field of freedom of association in four ‘levels’ of international law

	4 Levels	3 Levels³⁵	2 Levels³⁶	1 Level	No obligations³⁷
Countries	111	37	27	14	4
ILO	111	34	18	1	-
UN	111	34	18	4	-
Regional	111	15	6	2	-
Social Clause	111	28	12	7	-

The existence of parallel systems has pros and cons. The advantages are mainly related to coverage and enforceability. If ILO Conventions had been the sole source of international labour law, 25 countries would not have had any obligations to respect the rights of trade unions. For seven countries, the social clause in an economic agreement is the only source of obligations.³⁸ Furthermore, these parallel mechanisms provide for ways to enforce obligations that do not exist within the ILO. Access to the complaints mechanisms of the UN and regional mechanisms is open to all individuals whose rights have been violated, unlike at the ILO, where this prerogative belongs to the employers' and workers' organizations. The European, American and African human rights systems have courts that issue binding decisions, instead of the non-binding 'observations,' 'recommendations,' or 'views' of the ILO and the UN treaty bodies. Economic agreements provide for even more convincing compliance mechanisms. Although this differs per treaty, the violation of social commitments in trade agreements can lead to monetary fines or the suspension of trade benefits. It is difficult to determine to what extent international labour law has become more ‘effective’ because of the parallel systems of enforcement. There are various studies on the impact of the ILO, but it is difficult to draw general conclusions on why states fail to comply with their obligations.³⁹

³² ILO Conventions Nos. 87 and 98.

³³ The ICCPR and the ICESCR.

³⁴ The European Social Charter, European Convention on Human Rights, American Convention on Human Rights, African Charter on Human and Peoples’ Rights and the ASEAN Human Rights Declaration.

³⁵ These states have no obligations under: ILO (3), UN (3), Regional Human Rights (22) and Social Clauses (9).

³⁶ These consist of the following combinations: 9 ILO+UN, 7 ILO+SC, 5 UN+SC, 4 UN+RHR, 2 ILO+RHR.

³⁷ These are: the United Arab Emirates, Qatar, Saudi Arabia and Bhutan.

³⁸ These are: the Marshall Islands, Micronesia, Nauru, Oman, Palau, Tonga and Tuvalu.

³⁹ Alvarez, *supra* n12, p 377 who cites: Walter Galenson, *The International Labor Organization: An American View* (Madison: University of Wisconsin Press, 1981), p. 208-251, and: Virginia A. Leary, “Labor,” in C.J. Joynes (ed.) *The United Nations and International Law* (Cambridge: Cambridge University Press, 1997) 208, p. 222.

The broader coverage and the diversification of compliance incentives that the parallel systems provide, however, suggest that they are complementary to the ILO.⁴⁰

2.3 The role of ILO standards in the interpretation and application of non-ILO sources of international labour law

The normative relationship between different treaties on the same issue may be more problematic. Wilfred Jenks, who held various positions within the ILO including that of Director-General, wrote as early as 1953 about the overlap between the (detailed) international labour code and the (more ambiguous) drafts of the ICCPR and ICESCR. Jenks argues: “The difficulty of avoiding inconsistencies and conflict between statements of general principle which cannot, by their very nature, contain the qualifications and exceptions necessary to make them workable in practice and the detailed instruments on the subject which embody such reservations and exceptions is considerable.”⁴¹ Although ILO Conventions also contain ‘statements of general principle,’ these rules are further instantiated by the work of the CEACR, CFA, the Governing Body and the ILC. The expansion of international law over the last sixty years has invoked interesting and important debates about the fragmentation, coherence and pluralism.⁴² Our purpose here is merely to provide some examples of how the ‘new’ systems of labour rights enforcement relate to the ‘old’ ILO.

2.3.1 International human rights mechanisms

Cooperation between the ILO and the treaty-bodies that supervise compliance with the international human rights instruments comes in many forms. The UN Migrant Workers Convention includes a lengthy article on the role of the ILO in ‘assisting’ the Migrant Workers Committee.⁴³ In addition to this formalized cooperation, other methods of institutional cooperation have been established. This includes confidential briefings of the UN Committees by ILO officials as well as annual dinners and other work-related meetings.⁴⁴

The normative influence of ILO standards differs per committee. The Human Rights Committee (HRC) has long been reluctant to read a right to strike in the ICCPR’s provision on freedom of association. In the individual communication of *JB et al v. Canada* (118/82), the HRC dismissed the applicant’s claim that the interpretation by the ILO CEACR could be transposed to the ICCPR. It held that the right to strike did not follow from the ordinary meaning, the object and purpose nor the *travaux préparatoires* of

⁴⁰ Franz Ebert and Martin Oelz, Bridging the gap between labour rights and human rights: The role of ILO law in regional human rights courts, International Institute for Labour Studies Discussion Paper, DP/212/2012 (2012), p. 3.

⁴¹ Wilfred Jenks, “The Conflict of Law-Making Treaties,” 30 *British Yearbook of International Law* 401, pp. 409-410.

⁴² International Law Commission, Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, A/CN.4/L.702 (2006).

⁴³ Article 74, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

⁴⁴ Marco Odello and Francesco Seatzu, *The UN Committee on Economic, Social and Cultural Rights: The Law, Process and Practice* (Abingdon: Routledge, 2013), p. 122.

the Covenant.⁴⁵ Also, it held that the fact that the ICESCR explicitly provides for a right to strike in addition to freedom of association, so that it could not be read implicitly into the ICCPR.⁴⁶ In later cases the HRC abandoned the distinction between freedom of association as a civil right (ICCPR) and a social right (ICESCR).⁴⁷ In recent years therefore, the HRC seems to have accepted the right to strike. It noted in its Concluding Observations on Chile that: “The general prohibition imposed on the right of civil servants to organize a trade union and bargain collectively, as well as their right to strike, raises serious concerns, under article 22 of the Covenant.”⁴⁸ Similar observations were made regarding Estonia, where the HRC held that: “The State party should ensure in its legislation that only the most limited number of public servants is denied the right to strike.”⁴⁹ It further denounced the new Lithuanian Labour Code, which required a two-thirds majority to call a strike, as an impermissible restriction on the right to strike in non-essential services.⁵⁰

Because of the considerable overlap between ILO standards and the ICESCR, the Committee on Economic, Social and Cultural Rights (CESCR) is rather deferential to the ILO. In its review of state parties’ reports it has asked questions about the compatibility of domestic legislation with ILO standards, rather than framing it purely as an issue of compliance with the ICESCR.⁵¹ It has also reiterated recommendations of the ILO CEACR,⁵² relied on ILO definitions, and clarified that states may (with respect to some ICESCR provisions) refer to the reports that were submitted to the ILO instead of providing detailed information.⁵³ In its concluding observations, the CESCR has urged states to ratify ILO Conventions,⁵⁴ and relied on them in the interpretation of ICESCR provisions.⁵⁵ The notion of ‘progressive implementation’ of the ICESCR obligations also contributes to the use of ILO standards, which can provide guidance on the “minimum core obligations” of the Covenant.⁵⁶

2.3.2 Regional human rights mechanisms

The Inter-American Court of Human Rights (IACHR) and the European Court of Human Rights (ECHR) are the main examples of regional human rights courts that have

⁴⁵ Human Rights Committee, *JB et al v. Canada* (118/82), para 6.3.

⁴⁶ HRC (118/82), *supra* n45, para 6.4.

⁴⁷ *Josphe and Castan*, *supra* n29, p. 661.

⁴⁸ Concluding Observations on Chile (1999) UN doc CCPR/C/79/Add.104, para. 25.

⁴⁹ Concluding Observations on and Estonia (2010) UN doc CCPR/C/EST/CO/3, para 15.

⁵⁰ Concluding Observations on Lithuania (2004) UN doc CCPR/CO/80/LTU, para 18.

⁵¹ Committee on Economic, Social and Cultural Rights, Report on the Third Session, E/1989/22/E/C.12/1989/5, para 108.

⁵² Committee on Economic, Social and Cultural Rights, The Right to Work, General comment No. 18, E/C.12/GC/18, 6 February 2006.

⁵³ Committee on Economic, Social and Cultural Rights, Report on the Fifth Session, E/1991/23/E/C.12/1990/8 (1991), p. 90.

⁵⁴ For example, Committee on Economic, Social and Cultural Rights, Concluding observations of the Committee on Economic, Social and Cultural Rights: Guatemala, E/C.12/1/Add.93, 12 December 2003, para. 31.

⁵⁵ Committee on Economic, Social and Cultural Rights, General Comment No. 19 – The right to social security (art. 9), E/C.12/GC/19, 4 February 2008.

⁵⁶ The notion of progressive implementation is contained in Article 2(1) ICESCR. On the minimum core, see CESCR (1990), *supra* n53, pp. 85-86.

drawn extensively on the work of the ILO.⁵⁷ The courts are open to individual petitions (unlike the ILO) and issue legally binding judgments (unlike the ILO and the UN committees).

The IACHR has applied ILO standards a number of ways. In *Ituango Massacres v. Colombia*, the Court relied on the definition of forced labour in ILO Convention No. 29 to interpret the meaning of the term in the American Convention.⁵⁸ To determine the scope of the element ‘under the menace of any penalty,’ it (indirectly) relied on the work of the ILO supervisory bodies.⁵⁹ In a similar vein, the IACHR has used ILO Conventions on child labour and indigenous peoples’ rights to shape the legal obligations of the American human rights regime.⁶⁰ In the cases of *Baena-Ricardo et al. v. Panama* and *Cantoral-Huamani and García-Santa Cruz v. Peru* the Court not only used the reports of the ILO CEACR and CFA in its interpretative work, but also relied on them as evidence regarding the factual situations of the case.⁶¹

The European Court of Human Rights (ECtHR) has referred to the ILO mainly in cases concerning forced labour and freedom of association.⁶² Similar to its Inter-American counterpart, it has used the definition of forced labour of ILO Convention No. 29, as “a starting-point for interpretation” in a case concerning the professional obligations of legal trainees, and draw on the ILO CEACR interpretations of the specific elements of that definition. The case-law on freedom of association shows a wide-range of references to ILO Conventions,⁶³ the factual determinations of its supervisory bodies,⁶⁴ as well as their legal interpretations.⁶⁵

As Ebert and Oelz note, the most profound development at the ECtHR has been the acceptance of the rights to collective bargaining and strike being implicit in Article 11. Before 2008 the Court had never examined the ILO Conventions or the work of its supervisory bodies when a claimant argued (unsuccessfully) the existence the right to strike.⁶⁶ In *Demir and Baykara v. Turkey* the ECtHR reversed its position. In this case the Turkish Supreme Court had denied municipal civil servants the right to negotiate a

⁵⁷ Ebert and Oelz, *supra* n40.

⁵⁸ Inter-American Court of Human Rights, Case of the Ituango Massacres *v.* Colombia, Judgment of July 1, 2006, paras. 157-164.

⁵⁹ The document cited by the IACHR is: Global report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, “A Global Alliance against Forced Labour,” International Labour Conference, 93rd session, 2005. On page 5, the Director-General states: “The work of the ILO supervisory bodies over some 75 years has served to clarify both of these elements. The penalty does not need to be in the form of penal sanctions, but may also take the form of a loss of rights and privileges. Moreover, the menace of a penalty can take multiple different forms. Arguably, its most extreme form involves physical violence or restraint, or even death threats addressed to the victim or relatives.”

⁶⁰ Inter-American Court of Human Rights, Case of the Yakyé Axa Indigenous Community *v.* Paraguay, Judgment of June 17, 2005.

⁶¹ Inter-American Court of Human Rights, Case of Cantoral Huamani and García-Santa Cruz *v.* Peru, Judgment of July 10, 2007. The use of CFA reports to determine both law and fact also in: Inter-American Court of Human Rights, Case of Baena-Ricardo *et al.* *v.* Panama, Judgment of February 20, 2001.

⁶² Ebert and Oelz, *supra* n40, pp 8-12.

⁶³ ECtHR, *Gustafsson v. Sweden* (Application No. 15573/89), Judgment of 30 June 1998.

⁶⁴ ECtHR, *Danilenkov and Others v. Russia* (Application no 8919/80), judgment of 23 November 1983, paras. 108 and 130.

⁶⁵ ECtHR, *Wilson, National Union of Journalists and Others* (Application nos. 30668/96, 30671/96 and 30678/96), judgment of 2 July 2002, para. 48.

⁶⁶ Ebert pp. 9-10.

collective agreement with their employer.⁶⁷ Although the ILO Convention on the Right to Organize and Collective Bargaining states in Article 6 that it “does not deal with the position of public servants engaged in the administration of the State [...],” the ILO CEACR has held that this does not mean that all public servants are excluded from protection under the Convention.⁶⁸ The CFA’s Digest of Decisions provides the more detailed rule that “Local public service employees should be able effectively to establish organizations of their own choosing, and these organizations should enjoy the full right to further and defend the interests of the workers whom they represent.”⁶⁹ On the basis of these interpretations, as well as various other international human rights documents, the ECtHR found a violation of the right to freedom of association.⁷⁰ *Demir and Baykara v. Turkey* is also exemplary of the changing approach of the European court towards international law in general. It stated that it “can and must take into account elements of international law other than the Convention [and] the interpretation of such elements by competent organs [...]”⁷¹ Furthermore, the ECtHR found that it is not necessary that the respondent State has ratified the treaties used in the interpretation of ECHR norms, as long as “the relevant international instruments denote a continuous evolution in the norms and principles applied in international law [...]”⁷² After *Demir*, the ECHR has found more violations of the right to strike, which is now fully accepted as part of the right guaranteed in Article 11.

2.3.3 Social clauses in trade and investment agreements

The enforcement of social clauses in trade and investment agreements is, to a large extent, uncharted territory. Many social clauses are exempted from dispute settlement, and their realization instead relies on cooperation mechanisms.⁷³ Before the United States enters into a trade agreement, the US Department of Labor conducts studies on the labor rights situation of the other party. In these reports frequent references are made to the work of the ILO, including the observations and recommendations of the CEACR and CFA. US FTAs also establish cooperation mechanisms post-ratification, such as ministerial coordination and technical assistance programs. As a last resort, however, US FTAs provide for the enforcement of the social clause through arbitration. This process is highly dependent upon petitions by NGO and trade unions. Thus far, however, none of their submissions have ever led to arbitration procedures. There may be various reasons for this, including insufficient substantiation in fact or law or unwillingness of the U.S. to bring a claim against a trade partner. More positively, petitions can also lead to improvements of labour standards before the arbitration stage is reached. One study

⁶⁷ European Court of Human Rights, Grand Chamber, *Demir and Baykara v. Turkey*, 12 November 2008, Application No. 34503/97

⁶⁸ International Labour Conference, General Survey of the Reports on the Freedom of Association and the Right to Organize Convention (No. 87), 1948 and the Right to Organize and Collective Bargaining Convention (No. 98), 1949, Report III (Part 4B), ILC 81th Session 1994, para. 200.

⁶⁹ CFA Digest of Decisions, *supra* n13, para. 230.

⁷⁰ European Court of Human Rights, Grand Chamber, *Demir and Baykara v. Turkey*, 12 November 2008, Application No. 34503/97.

⁷¹ ECtHR (*Demir*), *supra* n70, para 85.

⁷² ECtHR (*Demir*), *supra* n70, para. 86.

⁷³ Vid Prislán and Ruben Zandvliet, “Labor Provisions in International Investment Agreements: Prospects for Sustainable Development,” Grotius Centre Working Paper 2013/003-IEL (2013), pp. 34-57.

found on the petitions against Guatemala, Bahrain and Peru that social clause petitions draw heavily upon the work of the ILO.⁷⁴ Ebert and Oelz have argued that “[...] the chances of success of a complaint filed [...] are likely to increase where the plaintiffs make references to ILO instruments and jurisprudence in their submissions and argue in favour of an interpretation [...] in light of the relevant international labour law instruments.”⁷⁵ Although their statement was made in the context of the regional human rights courts, it appears that trade unions and NGOs filing social clause petitions share this proposition.

2.4 Remaining governance gaps

The analysis above only provides a broad overview of the way ILO standards and the work of the supervisory bodies has been used in other fields of international law. The appropriation of ILO standards by other mechanisms that all aim to ensure compliance with these standards confirms the existence of ‘governance gaps’. If the ILO was able to ensure full compliance with the entire international labour code there would be no need to look for alternative enforcement mechanisms. Through international and regional human rights treaties and social clauses in trade arrangements, more countries have assumed treaty obligations on international labour standards and have stronger incentives to comply with these standards. At the normative level, we see that the diversification of enforcement mechanisms does not lead to a diversification of interpretations. Ascribing this to the infallible application of ‘systemic interpretation’ as prescribed by the VCLT does not capture the trend of an increasing reliance on the ILO supervisory bodies by the HRC and the ECHR, most importantly with regard to the right to strike. Bodies that apply different sources of law are not bound by interpretations of other bodies in comparable cases, yet they would want “to know what others in similar situations have done,” as “[i]t is difficult to conceive of a legal system in which precedent plays no part at all.”⁷⁶ Importantly, the interpretation of ILO standards by the CEACR and the CFA plays an important role in this process. Furthermore, it should be noted that the work of the ILO supervisory bodies is also highly relevant when petitioners determine whether or not a claim is likely to succeed. If the ECtHR has never dealt with a specific fact-pattern regarding restrictions on the right to strike, but the ILO Committee of Experts has consistently held that such restrictions are incompatible with the relevant ILO Conventions, one would be more confident to bring a claim than if the ILO Experts would have held otherwise.

Still, the existence of public parallel systems does not seem sufficient to close existing governance gaps. Although different from the ILO these systems are still part of international labour law, which has structural deficiencies because it is international, (necessity of state consent), because it deals with labour (trade-offs between economics

⁷⁴ Eric Gravel and Quentin Delpuch, The comments of the ILO’s Supervisory bodies: Usefulness in the context of the sanction-based dimension of labour provisions in US free trade agreements, ILO Research Paper No. 4 (March 2013).

⁷⁵ Ebert and Oelz, *supra* n40, p. 13.

⁷⁶ Michael Zander, *The Law Making Process* (Cambridge: Cambridge University Press, 6th ed. 2004), p. 215. Klaus Peter Berger, *The International Arbitrators’ Application of Precedents*, 9 *Journal of International Arbitration* (1992), p. 18. Cited in: Jeffrey P. Commission, *Precedent in Investment Treaty Arbitration: A Citation Analysis of a Developing Jurisprudence*, 24(2) *Journal of International Arbitration* 129-158 (2007).

and morality; the material object being the regulation of private relationships) and because it is law (in a domain where contract and collective agreement are of fundamental importance). As a result thereof, multinational enterprises have become the focal point of campaigns to improve the situation of workers. Others have fiercely contested the usefulness of CSR, arguing that it is merely an exercise in public relations, or that it undermines public systems of labour regulation. In his critique on the 1998 Declaration, Philip Alston warned that (1) the 1998 Declaration could reduce the emphasis on governmental responsibilities, which (2) encourages multinational corporations “to take the lead in defining, promoting and even enforcing” labour standards, but that this decentralized approach could (3) liberate these standards “from the legalism of ILO Conventions.”⁷⁷ The following parts will cover the main assumptions of Alston’s statement. Part 3 examines the use of ILO standards in CSR. Part 4 discusses the procedural possibilities and normative virtues of CSR enforcement.

3. International labour law and corporate social responsibility

3.1 From voluntarism to the voluntary appropriation of public norms

CSR was put on the international agenda during the late 1960s, when newly independent developing states expressed their concerns about the influence of Western corporations. The UN, ILO and OECD all embarked upon the quest to determine a set of guidelines on the relationship between multinational corporations and host states. In 1976 the OECD was the first to publish its Guidelines for Multinational Enterprises (OECD Guidelines).⁷⁸ The intention of the original OECD Guidelines was to grease the wheels of international investment. They were mainly intended to solve economic and social problems, such as concentrations of power taxation, and to recognize the sovereign right to regulate of host states. The part on ‘employment and industrial relations’ was limited, and mainly concerned with trade union rights, reasonable notice dismissals and non-discrimination. No references to the ILO were made. Shortly after the OECD Guidelines the ILO adopted its Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (ILO MNE Declaration).⁷⁹ This document dealt with a much broader range of issues, such as employment promotion, non-discrimination, security of employment, training, wages, health and safety, trade union rights, collective bargaining, and grievance procedures. The OECD Guidelines and the ILO MNE Declaration have been amended several times. For the ILO this meant that more recent developments in the international labour code could be included in the

⁷⁷ Alston, *supra* n9, p. 460.

⁷⁸ OECD Declaration on Decisions on International Investment and Multinational Enterprises, with the following annexes (1) OECD Guidelines for Multinational Enterprises; Recommendations for Responsible Business Conduct in a Global Context; and (2) Decision of the Council on OECD Guidelines and Procedural Guidance, Adopted by the 42 adhering governments at the OECD’s 50th Anniversary Ministerial Meeting of 25 May 2011.

⁷⁹ ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, Adopted by the Governing Body of the International Labour Office at its 204th Session (Geneva, November 1977), as amended at its 279th (November 2000) and 295th Session (March 2006); including Procedure for the examination of disputes concerning the application of the Tripartite Declaration by means of interpretation of its Provisions, adopted by the Governing Body of the International Labour Office at its 232nd Session (Geneva, March 1986).

Declaration. The OECD Guidelines gradually became more deferential to the ILO. The 2000 version, the first revision after the ILO’s 1998 Declaration, states that “[the] provisions of the [OECD Guidelines] chapter echo the relevant provisions of the 1998 Declaration, as well as the [ILO MNE Declaration].”⁸⁰ In its description of the core labour standards, the OECD commentary extensively refers to the underlying Conventions. The latest version, which was finalized in 2011, also contains direct references to ILO Conventions and Recommendations for definition and interpretation purposes. The United Nations’ efforts were less fruitful. Several efforts to adopt binding codes of conduct died in vain. In 1999, Kofi Annan announced the UN Global Compact, a set of business principles that companies may endorse. It includes references to the four core labour standards, but does not provide guidance on what companies ought to do after they have signed up.

During the 1970s also the first corporate codes of conduct emerged. Similar to the OECD and ILO instruments their content gradually shifted from the relationship of company with the host state towards the relationship with its ‘stakeholders’. CSR codes thus evolved from proclamations not to interfere with domestic law in the host state, to commitments to complement that law. In other words: CSR fills the gap between the level of (enforcement of) labour standards in the host state, and what the company itself deems morally adequate and economically viable. This determination may be influenced by consumers, NGOs, trade unions, international organizations, home state governments and peer-pressure. Various studies have examined the content of private sector initiatives. Table 2 compares the result of five studies on the references to specific labour issues. The ILO study (1998) consisted of 215 codes of conduct,⁸¹ the OECD study (1999) collected 246 codes,⁸² the most recent ILO study (2001) 258,⁸³ and Schömann (2004) 50.⁸⁴ They do not indicated which companies were investigated. The OECD study recognizes that “the set of codes is not random, and may not be representative.”⁸⁵ It does, however, provides a breakdown of country of origin and sector. All studies coded the documents themselves. The results of Ruggie (2006), however, are based upon online questionnaires to the 500 largest firms by revenue, from which he received 102 responses.⁸⁶ Schömann’s study only included unilateral codes of conduct, and no sectoral or other broader initiatives. In spite of the methodological complications, a comparison of their results indicates that in recent years the core labour standards have received much broader recognition in CSR codes.

⁸⁰ OECD Guidelines for Multinational Enterprises, 2000 version, para 20. Available at: <http://www.oecd.org/investment/mne/1922428.pdf>.

⁸¹ International Labour Organization, Overview of global developments and Office activities concerning codes of conduct, social labelling and other private sector initiatives addressing labour issues, GB.273/WP/SDL/1, (Geneva: ILO, 1998).

⁸² Kathryn Gordon and Maiko Miyake, ‘Deciphering Codes of Conduct: a Review of their Contents’, OECD Working Papers on International Investment, No. 1992/2, 1999.

⁸³ Michael Urminsky (ed.), Self-regulation in the workplace: Codes of conduct, social labeling and socially responsible investment, MCC Working Paper No. 1 (Geneva: International Labour Office, 2001).

⁸⁴ Isabelle Schömann(ed.), Corporate social responsibility: a threat or an opportunity for the trade union movement in Europe? *Transfer* 3/2004, Brussels, 2004.

⁸⁵ Grodon and Miyake, *supra* n82, p. 8.

⁸⁶ John G. Ruggie, Human Rights Policies and Management Practices of Fortune Global 500 Firms: Results of a Survey, Working Paper No. 28, October 2006.

Table 2 – Reference to labour practices in CSR codes

	Health & Safety	Wages	Child Labour	Forced Labour	Discrimination	Freedom of Association
2006 - Ruggie	95.7%	42.6%	80.9%	80.9% ⁸⁷	100%	87.2%
2004 - Schömann	88%	34%	62%	52%	90%	54%
2001 - ILO	72%	51%	47%	42%	70%	33%
1999 - OECD	75.5%	45.3%	43.2%	38.5%	60.8%	29.7%
1998 - ILO	75%	40%	45%	25%	25%	15%

There is a wide range of divergence both within codes of conduct, as well as between the various types of CSR documents. Of the International Framework Agreements (IFA) that were also examined in Schömann’s study, 72% referred to wages and 60% to working hours, while unilateral codes mentioned these issues in 34% and 22% of the time respectively.⁸⁸ The level of commitment also differs per CSR code. The CSR policy of IKEA Services AB held that: “Employees are not prevented from associating freely with any lawful organization that represents the best interests of such.”⁸⁹ Such statements appear to be meaningless. If IKEA would prevent employees from associating with a lawful organization, it not only breaches its CSR commitments but *ipso facto* also domestic law, which is impossible if CSR is understood to “exceed compliance with the law.”⁹⁰ It is of course possible that a country severely restricts freedom of association, so that it is difficult to implement a progressive CSR policy. The Ethical Trading Initiative (ETI) Base Code obliges companies that find themselves in such situations to facilitate “the development of parallel means for independent and free association and bargaining.”⁹¹

The ETI is only one example of CSR codes and initiatives that developed by, or in cooperation with, third-parties. This category also includes IFAs, the Fair Labour Association, the Worker Rights Consortium, the Rainforest Alliance, etc. Also the agreements that were adopted in the aftermath of the Rana Plaza disaster, the ‘Accord on Fire and Building Safety’ and the ‘Alliance for Bangladesh Worker Safety,’ are examples of initiatives that transcend a single corporation. Like the documents adopted by international organizations, these multistakeholder initiatives help to achieve consistency with the ILO framework. This also applies to the SA8000 standard, which provides auditable certification standards, and the ISO26000 standard, which contains ‘guidance’ to standardize codes of conduct. The International Organization for Standardization has been a cooperative partner to the ILO. Before the ISO began the drafting of the

⁸⁷ The study by John Ruggie did not distinguish between forced labour and child labour.

⁸⁸ Isabelle Schömann et al., *Codes of conduct and international framework agreements: New forms of governance at company level*, European Foundation for the Improvement of Living and Working Conditions, 2008, p. 22.

⁸⁹ The World Bank Group, *Company Codes of Conduct and International Standards: An Analytical Comparison* (October 2003), p. 59.

⁹⁰ ILO, *supra* n2.

⁹¹ Ethical Trade Initiative Base Code, available at:

http://www.ethicaltrade.org/sites/default/files/resources/ETI%20Base%20Code%20-%20English_0.pdf

ISO26000 standard, it signed a Memorandum of Understanding with the ILO stating, *inter alia*, that:

“The Parties agree that any guidance or other ISO International Standard to be developed in the area of social responsibility, which implicates ILO issues will be fully consistent with the object and purpose of the provisions of international labour standards incorporated in ILO instruments, and their interpretation by the competent bodies of the ILO and in no way detract from the provisions of those standards [...]”⁹²

In addition to documents that prescribe the normative framework the company adheres to, reporting templates have become increasingly important. The Global Reporting Initiative (GRI) provides the most used standardized template to report on CSR issues. The use of the GRI template further adds to the internal coherence of CSR commitments, and consistency with the ILO framework. Reporting templates bear influence on the normative commitments, as its lists specific categories and aspects that companies should report on when they seek GRI verification. These include a range of labour issues, from occupational safety and health to freedom of association. Companies that do not have a policy on freedom of association are thus nonetheless required to disclose information on it if they use the GRI template. The GRI Reporting Guidelines contain many references to legal standards as the source of inspiration for the CSR indicators. Table 3 summarizes the various ways in which ILO standards are used.

Table 3 – Usage of ILO standards and concepts in the GRI Implementation Manual

Issue	GRI mechanism	Use of ILO standards and concepts
Discrimination, forced labour	Definition – Obligation to identify incidents of discrimination “as defined by the ILO.” / Direct citation of forced labour definition in the glossary	Definition – ILO Convention 111 defines discrimination, ILO Convention 29 defines forced labour
Freedom of association, child labour, forced labour	Risk analysis – Report on operations in countries where labour rights may be at risk	State compliance – “The process of identification can draw from recognized international data sources such as the ILO [CEACR reports and the CFA Digest].”
General implementation, health and safety	Social dialogue – “Provide a list of stakeholder groups engaged by the organization.” / “Report whether formal agreements (either local or global) with trade unions cover health and safety”	Tripartism – The ILO standard setting system is based on tripartism and social dialogue.
Various labour standards	Proxy compliance indicators – “Ratio of basic salary and remuneration of	Issues – The GRI has developed indicators on ILO Conventions and

⁹² Memorandum of Understanding between the International Labour Organization and the International Organization for Standardization in the Field of Social Responsibility, 4 March 2005, Article 2(1).

	women to men by employee category.” / “Report the percentage of total employees covered by collective bargaining agreements.”	Recommendations that do not carry direct obligations for companies.
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The GRI indicates that it is too narrow to (try to) deduce corporate obligations from ILO Conventions. Instead, the ILO framework is used in a variety of ways. Of particular importance is the country risk analysis, which makes host country compliance part of the CSR framework. When a GRI-reporting company has “operations or suppliers” in, for instance, Belarus, it should note that the freedom of association of the workers on site is at risk. The UN Guiding Principles on Business and Human Rights, developed by John Ruggie in his capacity as UN Special Representative, also stresses the importance of ‘due diligence’ to determine the context in which a business operates.⁹³

In addition to normative documents and reporting templates, the efforts to impose direct international obligations upon corporations provide further examples of how ILO standards can be used in the CSR context.

3.2 International binding norms

Although the issue has proved to be divisive, it is possible to impose direct obligations upon corporations. In 2003, a working group of the UN Sub-Commission on the Promotion and Protection of Human Rights, consisting of academics instead of diplomats, published their draft “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights (Draft Norms).⁹⁴ The UN Commission on Human Rights, which was replaced in 2006 by the Human Rights Council, did not adopt the Draft Norms. Instead it was noted that they were not requested by the Commission and do not have legal standing.⁹⁵ They nonetheless remain illustrative of the way in which ILO standards could be used in the CSR context. The Draft Norms contain, *inter alia*, rules on freedom of association and collective bargaining, non-discrimination, forced labour, child labour, occupational health and safety and adequate remuneration.⁹⁶ According to Ruggie, the Draft Norms “sought to impose on companies, directly under international law, essentially the same range of human rights duties that States have adopted for themselves[...].”⁹⁷ Article 7, for example, provides that: “Transnational corporations and other business enterprises shall provide a safe and healthy working environment as set forth in relevant international instruments and national legislation as well as international human rights and

⁹³ Human Rights Council, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie; Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, A/HRC/17/31, 21 March 2011.

⁹⁴ UN Sub-Commission on the Promotion and Protection of Human Rights, Fifty-fifth session, Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights, E/CN.4/Sub.2/2003/12/Rev.2, 26 August 2003.

⁹⁵ UN Commission on Human Rights, Dec. 2004/116, UN Doc. E/CN.4/DEC/2004/116 (22 April 2004).

⁹⁶ The provision on non-discrimination is not put under Part D on ‘Rights of Workers’ as it has a more general application in the UN Draft Norms.

⁹⁷ John Ruggie, Remarks by SRSG John Ruggie “The Protect, Respect and Remedy Framework: Implications for the ILO,” International Labour Conference, Geneva, 3 June 2010, p. 1.

humanitarian law.” Although the material object of most ILO Conventions is to impose obligations on private actors,⁹⁸ it is questionable whether obligations “as set forth in” in these Conventions can be transposed to corporate obligations. The main obligation when a state ratifies the ILO Occupational Safety and Health Convention is to “formulate, implement and periodically review a coherent national policy on occupational safety, occupational health and the working environment.”⁹⁹

At a closer look at the text and its interpretative commentary however,¹⁰⁰ it is possible to distinguish seven ways in which ILO standards or concepts are appropriated to shape corporate obligations:

Table 4 - Usage of ILO standards and concepts in UN Draft Norms

Issue	Corporate obligation	Use of ILO standards and concepts
Forced labour	“Transnational corporations and other business enterprises shall not engage in nor benefit from [...] forced or compulsory labour as defined by international law.”	Definition – Definitions of forced labour are contained in the Forced Labour Convention (Art. 2) and the Abolition of Forced Labour Convention (Art.1).
Wages	“Wages are a contractual obligation of employers that are to be honoured even into insolvency, in accordance with the Protection of Workers’ Claims (Employer’s Insolvency) Convention, 1992 (No. 173).”	Rule – “In the event of an employer’s insolvency, workers’ claims arising out of their employment shall be protected by a privilege so that they are paid out of the assets of the insolvent employer before non-privileged creditors can be paid their share.” (Art. 5 Protection of Workers’ Claims Convention)
Freedom of association & collective bargaining	“[Transnational corporations] shall respect the right of workers to strike.”	ILO interpretation – “The right to strike is an intrinsic corollary to the right to organize protected by Convention No. 87.” (CFA Digest of Decisions, para. 523.)
Child labour	“Transnational corporations and other business enterprises using child labour shall create and implement a plan to eliminate child labour.”	Analogy – “Each Member shall design and implement programmes of action to eliminate the worst forms of child labour.” (Art. 6 Worst Forms of Child Labour Convention)
Child labour	“Transnational corporations and other business enterprises may employ persons aged 13 to 15 years in light work if national laws or regulations permit.”	Confirmation – “National laws or regulations may permit the employment or work of persons 13 to 15 years of age on light work.” (Art. 7(1) Minimum Age Convention)
Occupational safety and health	“Transnational corporations and other business enterprises bear responsibility for the occupational health and safety of their workers and shall provide a working	General reference – Listed documents do not contain direct obligations for companies.

⁹⁸ Olivier de Schutter, “The Challenge of Imposing Human Rights Norms on Corporate Actors,” in: O. de Schutter (ed.) *Transnational Corporations and Human Rights* (Portland: Hart Publishing, 2006) 1, p. 19.

⁹⁹ Article 4, ILO Convention No. 155.

¹⁰⁰ UN Sub-Commission on the Promotion and Protection of Human Rights, Fifty-fifth session, Commentary on the Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights, E/CN4./Sub.2/2003/38/Rev.2, 26 August 2003.

	environment in accordance with [...] international standards [...].” ¹⁰¹	
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To our knowledge, the only international source of direct obligations for MNEs are the Community Rules on Investment that were adopted by the Economic Community of West African States (ECOWAS) in 2008.¹⁰² They require that investors, once established in a host State:

“shall uphold human rights in the workplace and the community in which they are located. Investors shall not undertake or cause to be undertaken, acts that breach such human rights. Investors shall not manage or operate the investments in a manner that circumvents human rights obligations, labour standards as well as regional environmental and social obligations, to which the host State and/or home State are Parties”¹⁰³

and furthermore, that

“[i]nvestors and investments shall act in accordance with fundamental labour standards as stipulated in the ILO Declaration on Fundamental Principles and Rights of Work, 1998”¹⁰⁴

The ECOWAS rules contain four interesting elements. First, investors are bound to observe labour standards on the basis of ratification by their home state. It is unclear, however, whether the investor should comply with detailed home state legislation implementing the right to freedom of association, or if they have an unspecified obligation to observe ‘the principles’ of that right. The former would essentially entail the extraterritorial application of home state legislation, while the latter is merely a hortatory commitment. Secondly, if the host state is party to an international convention, but nonetheless fails to comply with its obligations, investors are still bound by those obligations. It is unclear what is meant by non-compliance, as it can refer to situations in which a state has not implemented legislation to comply with a given Convention, but also when it fails to enforce the legislation it has implemented. In other words: does the

¹⁰¹ International Covenant on Economic, Social and Cultural Rights; the ILO Plantations Convention, 1958 (No. 110), the Radiation Protection Convention, 1950 (No. 115), the Guarding of Machinery Convention, 1963 (No. 119), the Hygiene (Commerce and Offices) Convention, 1964 (No. 120), the Maximum Weight Convention, 1967 (No. 127), the Benzene Convention, 1971 (No. 136), the Occupational Cancer Convention, 1974 (No. 139), the Merchant Shipping (Minimum Standards) Convention, 1976 (No. 147), the Working Environment (Air Pollution, Noise and Vibration) Convention, 1977 (No. 148), the Occupational Safety and Health Convention, 1981 (No. 155), the Occupational Health Services Convention, 1985 (No. 161), the Asbestos Convention, 1986 (No. 162), the Safety and Health in Construction Convention, 1988 (No. 167), the Chemicals Convention, 1990 (No. 170), the Prevention of Major Industrial Accidents Convention, 1993 (No. 174), the Safety and Health in Mines Convention, 1995 (No. 176), the Maternity Protection Convention, 2000 (No. 183) and relevant recommendations, as well as ensuring their application under the Labour Inspection Convention, 1947 (No. 81), the Labour Inspection (Agriculture) Convention, 1969 (No. 129), the Workers’ Representatives Convention, 1971 (No. 135) and their successor conventions.

¹⁰² Supplementary Act A/SA.3/12/08 Adopting Community Rules on Investment and the Modalities for their Implementation with ECOWAS, adopted on 19 December 2008, available at: http://www.privatesector.ecowas.int/en/III/Supplementary_Act_Investment.pdf.

¹⁰³ Ibid., Article 14(2), emphasis added.

¹⁰⁴ Ibid., Article 14(4).

state lack a national non-discrimination policy, or is this policy not implemented? In the latter scenario, an investor may not benefit from the fact that the host country is unable or unwilling to enforce the legislation it has passed. However, as in the case of non-ratification by the host state the investor also has obligations, it appears that the former type of the non-implementation scenario could already invoke obligations for the investor. Thirdly, the separate reference to the 1998 Declaration seems to imply that investors are bound by the four core labour standards even if both the home and host states have not ratified the underlying conventions. Also here, the precise obligations are unclear. Fourthly, the effect of direct obligations that solely apply to foreign investors is that labour rights of workers at foreign-owned companies are better protected than the rights of workers in domestically owned industries.

A second example of direct international obligations can be found in the Model BIT of the Southern African Development Community (SADC) Model, which has not yet been adopted in a binding BIT.¹⁰⁵ Regarding home and host state treaty-obligations it provides that: "Investors and their investments shall not [establish,] manage or operate Investments in a manner inconsistent with international environmental, labour, and human rights obligations binding on the Host State or the Home State, whichever obligations are higher."¹⁰⁶ It further provides that: "Investors and their investments shall act in accordance with core labour standards as required by the ILO Declaration on Fundamental Principles and Rights of Work, 1998."¹⁰⁷

The ECOWAS and SADC examples are reflective of a trend in international investment law to emphasise the responsibilities of investors. This trend is grounded in concerns about the policy space of host states.¹⁰⁸ More common ways to address this problem is to circumscribe investors' rights more precisely, or to include provisions that oblige states to "encourage" investors to adopt CSR policies.¹⁰⁹ Such provisions do not contain any specific references to labour standards. It remains to be seen whether the ECOWAS example will be replicated. Currently the idea to revamp the UN Draft Norms is being entertained by various members of the UN Human Rights Council, which will convene an expert workshop in March 2014.¹¹⁰

4. Judicial and non-judicial enforcement of CSR commitments

Writing in 2001, the European Commission found that: "Most definitions of corporate social responsibility describe it as a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis."¹¹¹ Also the ILO definition that was alluded to in the introduction supports this position. In recent years, however, the 'voluntary' versus

¹⁰⁵ Article 15(1) Southern African Development Community Model BIT (2012), available at: <http://www.iisd.org/itn/wp-content/uploads/2012/10/SADC-Model-BIT-Template-Final.pdf>.

¹⁰⁶ Ibid., Article 15(3).

¹⁰⁷ Ibid., Article 15(2).

¹⁰⁸ Human Rights Council (2011), *supra* n93, p. 12.

¹⁰⁹ Prislán and Zandvliet, *supra* n73, pp. 43-47.

¹¹⁰ John G. Ruggie, A UN Business and Human Rights Treaty? An Issues Brief, 28 January 2014, p1. Available at: <http://business-humanrights.org/media/documents/ruggie-on-un-business-human-rights-treaty-jan-2014.pdf>.

¹¹¹ Commission of the European Communities, Green Paper - Promoting a European framework for Corporate Social Responsibility, Brussels, 18.7.2001, COM(2001) 366 final, para 20.

‘mandatory’ debate has lost its relevance.¹¹² This is especially visible with regard to the enforcement of CSR commitments. The original draft of the OECD Guidelines captured an important distinction where it states that: "Observance of the guidelines is voluntary *and* not legally enforceable."¹¹³ In other words, when a company makes a CSR commitment it is possible to distinguish between the pre-adoption and post-adoption phase. The former may be voluntary in the sense that no legal impetus exists that requires the company to adhere to a CSR policy in the first place. But once the decision has been made to adhere to one, there may be legal consequences when the policy is not observed in practice.

Enforcement covers a broad spectrum of procedural mechanisms, such as external verification, non-judicial grievance mechanisms, international arbitration and domestic legal procedures. There are many differences between these enforcement mechanisms, but what connects them is the fact that an external authority is called upon to assess compliance with CSR commitments. Here, the same logic applies as in the context of the ILO or the parallel systems of labour rights, namely that application inevitably involves interpretation. Various different actors can perform this role. It can even be the company itself, when it makes a determination whether a supplier has complied with a contractual CSR provision to respect the right to freedom of association. External verification is also done by independent auditors, and by governments that make observance of CSR policies—such as the OECD Guidelines—mandatory for companies in the context of public procurement, export finance, participation in trade missions, etc. The OECD Guidelines themselves are implemented through National Contact Points (NCPs), which provides good offices and mediation services on alleged issues of non-compliance, called ‘specific instances’. Questions whether a NCP has correctly interpreted the Guidelines are considered by the OECD Investment Committee. A similar, but less popular grievance mechanism exists to deal with a disagreement on the “meaning” of the 1977 ILO MNE Declaration, “arising from an actual situation, between Parties to whom the Declaration is commended.”¹¹⁴ Also NGO or multistakeholder initiatives are often complemented by grievance mechanisms.¹¹⁵ The confidential nature of most of these procedures makes it difficult to ascertain the extent to which they rely on ILO standards, however.

On the other end of the spectrum, CSR commitments may be the object of judicial procedures before a court or arbitral tribunal. One early example of the use of codes of conduct in tort law is the decision in *Kasky v. Nike*. In this case it was argued that Nike had made “false statements and/or material omissions of fact” regarding the labour conditions at its foreign suppliers. The Supreme Court of California held that CSR commitments should be regarded as commercial speech, which is subjected to an increased level of scrutiny.¹¹⁶ Since 2003, large companies the European Union have an

¹¹² Jennifer A. Zerk, *Multinationals and Corporate Social Responsibility: Limitations and Opportunities in International Law* (Cambridge: Cambridge University Press, 2006), pp 32-36.

¹¹³ OECD Guidelines, 1976 version, para 6 (emphasis added).

¹¹⁴ ILO, *supra* n. 79.

¹¹⁵ Erik V. Koppe, Corporate Social Responsibility and Labor Dispute Remedies: An overview of existing non-judicial and non-governmental grievance mechanisms in relation to labor standards, 28 December 2011.

¹¹⁶ *Kasky v. Nike*, 45 P.3d 243 (Cal. 2002).

obligation to report on “non-financial key performance indicators relevant to the particular business, including information relating to environmental and employee matters.”¹¹⁷ Last year, the European Commission proposed an amendment to substantiate this obligation. Under this new legislation, large companies will be required to include in its annual report: “[...] a non-financial statement containing information relating to at least environmental, social and employee matters, respect for human rights, anti-corruption and bribery matters, including: (i) a description of the policy pursued by the company in relation to these matters; (ii) the results of these policies; (iii) the risks related to these matters and how the company manages those risks. Where a company does not pursue policies in relation to one or more of these matters, it shall provide an explanation for not doing so.”¹¹⁸ Similar to deceptive advertisement, providing false information, or concealing information, may lead to legal actions. Dutch law, for instance, provides several possibilities to enforce deceptive CSR claims contained in annual reports.¹¹⁹

Lastly, the (indirect) horizontal application of international labour standards can also assist in determining the extent to which these standards can carry obligations for companies. The Netherlands has no domestic legislation on the right to strike. But because courts have recognized the direct effect of Article 6(4) of the European Social Charter, employees can rely on the protection offered therein. It is possible to imagine more fact-patterns in which rights can be derived from international obligations that have not yet been implemented, or are not enforced. The extent to which this is possible would depend upon domestic legal systems. This is also the case in the context of foreign direct liability claims against corporations. In the United States, however, the Alien Tort Statute grants jurisdiction for torts committed “in violation of the law of nations,”¹²⁰ which arguably covers customary rules of international labour law. Together with the ECOWAS investment rules which provide for arbitration procedures in case of a violation, the ATS could be used to test the direct applicability of ILO standards for companies.

The norms with which these judicial and non-judicial mechanisms assess compliance are all different, and range from unilateral CSR codes to customary international law. In all these situations, however, ILO standards can be used to interpret the ‘primary’ set of rules. This may be influenced by the extent to which these primary rules refer to the ILO, as well as the precision of the commitments and their internal

¹¹⁷ Parliament and Council Directive L 178/16, Amending Directives 78/660/EEC, 83/349/EEC, 86/635/EEC and 91/674/EEC on the annual and consolidated accounts of certain types of companies, banks and other financial institutions and insurance undertakings, 2003 O.J. (L 178) 16 (EC).

¹¹⁸ European Commission, Proposal for a Directive of the European Parliament and of the Council, amending Council Directives 78/660/EEC and 83/349/EEC as regards disclosure of nonfinancial and diversity information by certain large companies and groups, Strasbourg, 16.4.2013, COM(2013) 207 final, 2013/0110 (COD).

¹¹⁹ Tineke Lambooy, *Corporate Social Responsibility: Legal and Semi-Legal Frameworks Supporting CSR* (Uitgaven vanwege het Instituut voor Ondernemingsrecht, Rijksuniversiteit Groningen en de Erasmus Universiteit, No.77, 2010), pp 158-159.

¹²⁰ 28 United States Code §1350.

coherence.¹²¹ It could matter that the commitments of SABMiller refer more directly to ILO standards than The Carlsberg Group. Detailed CSR codes, on the other hand, could limit the use of ILO standards in their interpretation. Other factors include the international obligations of the host country (lack of ratification or lack of implementation; unable or unwilling), the corporate structure (ownership of subsidiaries or contractual arrangements with suppliers), and the status of CSR statements (*ex ante* commitments or *ex post* reports). Regarding the ILO standards that are used to interpret the primary rules, there are also important distinctions to be made. These relate to the source of the norm (Convention, Recommendation or supervisory body interpretation) and the content of the norm (worker rights or government obligations). Similar to the ILO Convention on Occupational Health and Safety that was cited above, the Discrimination Convention does not contain a right not to be discriminated against, but merely requires State parties to “declare and pursue a national policy.”¹²² The starting point of the Freedom of Association Convention, on the other hand, is to define a set of rights. Article 2, for example, provides that: “Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation.”¹²³ It is arguably more difficult to transform state obligations into corporate obligations than it is to derive corporate obligations from worker rights.

Domestic legal systems provide a rich resource on the use of ILO authorities. On the one hand, there are countries such as Japan who essentially echo the position of the ILO Employers group alluded to above. In one case regarding freedom of association, the Fukuoka High Court stated that:

“[Views] of various ILO organs ... are nothing but calls to the governments to make arrangements in domestic laws in accordance with the object of the ILO Conventions. One cannot conclude that they have become sources of law as legally binding standards in interpreting and applying the Conventions, unlike a final decision of the International Court of Justice rendered in cases of doubt or disputes over the interpretation of a Convention (article 37(1)&(2) of the Constitution of the ILO.”¹²⁴

On the other side of the spectrum there are courts that recognize the non-binding nature of pronouncements by the ILO committees, but have taken them into account as ‘persuasive authority’. In the Netherlands, this formula allows courts to rely upon the work of the committees of the UN, ILO and the Council of Europe in the interpretation of treaty provisions.

¹²¹ M. Antonio Garcíá-Munoz, Beryl ter Haar and Attila Kun, “Soft on the Inside: Hard on the Outside: An Analysis of the Legal Nature of New Forms of International Labour Law, 27(4) *The International Journal of Comparative Labour Law and Industrial Relations* (2011) 337, p 343.

¹²² Article 2, ILO Convention No. 111.

¹²³ Article 2, ILO Convention No. 87.

¹²⁴ Judgment of 26 December 1985, Fukuoka High Court, *Shomu geppo*, 32, pp. 2179-80, quoted in: Yuji Iwasawa, “The domestic impact of international human rights standards: The Japanese experience,” in: P. Alston and J. Crawford (eds.) *The Future of UN Human Rights Treaty Monitoring* (Cambridge: Cambridge University Press, 2000) 245-269, p. 256

5. Conclusions

In this article we asked to what extent international labour law, including the work of the ILO supervisory bodies, is relevant in the context of corporate social responsibility. We first looked at the use of ILO standards by other fields of public international law. International and regional human rights instruments, as well as social clauses in trade and investment agreements are all separate sources of obligations and have separate enforcement mechanisms. Our analysis showed two things. First, there is a trend towards more reliance on ILO standards in the interpretation of non-ILO (labour) standards. The recognition of the right to strike by the Human Rights Committee and the European Court of Human Rights is the clearest example thereof. Secondly, the work of the ILO is used in a variety of ways. Potential appellants rely on the ILO to assess whether their claim has merit. Once the adjudication phase is reached, the work of the ILO is used to provide definitions, interpretations and factual determinations.

We subsequently turned to the interaction between international labour law and CSR. This relationship is often perceived as binary. One can either support legal obligations, which can be copy-pasted from existing international agreements and subjected to judicial enforcement, or moral responsibilities, which can be shaped, interpreted and enforced (or violated) at the discretion of the company. Whereas Alston mourned the (potential) decline in the “legalism of ILO Conventions” as the result of corporations taking the lead in defining their labour commitments, Ruggie warned that: “Imposing on corporations the same range of duties as states for all rights they may affect conflates the two spheres and renders effective rule making itself highly problematic.”¹²⁵

We tried to demonstrate that without “imposing” duties upon corporations, and relying on private initiatives to shape CSR, the normative framework of the ILO does not lose its relevance. The term ‘privatization’ of international labour law is often used in a pejorative sense. According to Hepple, we have “witnessed the galloping privatization, and lowering of public labour standards. This is a different kind of ‘race to the bottom’, not a genuine ‘race to the top’.”¹²⁶ Although we agree with some of his analysis, we propose an alternative understanding of the term privatization. First, privatization of public standards is not the same as having private standards. Contemporary CSR practice shows a trend towards more complete and more specific references to international labour law. If there is any cause-effect relationship of the 1998 Declaration, it would be that most CSR initiatives do now recognize all core labour standards. Other factors that foster consistency with ILO norms are the use of international or multistakeholder codes, the work of the ISO and the GRI reporting template. The enforcement of CSR commitments can also contribute, according to the same logic as in the public parallel systems, to a more important role for the ILO in interpreting non-ILO labour standards. Secondly, while private standards are indeed undesirable, privatization of public norms is

¹²⁵ John Ruggie, “Business and Human Rights: The Evolving International Agenda,” 101(4) *American Journal of International Law* 819, p. 827.

¹²⁶ Bob Hepple, *Labour Laws and Global Trade* (Oxford and Portland: Hart Publishing, 2005), p. 86. See also: Tony Royle, “The ILO’s Shift to Promotional Principles and the “Privatization” of Labour Rights: An Analysis of Labour Standards, Voluntary Self-regulation and Social Clauses,” 26(3) *The International Journal of Comparative Labour Law and Industrial Relations* (2010) 249-271.

necessary. Although most ILO instruments are intended to regulate the relationship between employers and workers, it is the State that assumes international responsibilities. This is also what distinguishes CSR from the application of labour standards in public and state-oriented parallel systems as described in Part 2. Often ILO Conventions and Recommendations have to be transposed into domestic law before the precise rights of workers and duties of employers become clear. This process may also lead to divergence between states, but if they deviate too far from the purpose of the Convention the ILO supervisory bodies come into play. Similarly, if a state does not have international obligations but companies nonetheless maintain that as a matter of CSR they "observe the principles of non-discrimination" they could have some leniency in substantiating their commitments, as long as this does not conflict with the benchmarks provided by international law. Thirdly, privatization is usually accompanied by public regulation. Privatized sectors like finance, telecommunications and utilities are still the most regulated ones. Similarly, states and international organizations can and should (remain to) play a role in the 'privatization' of international labour law, in order to shape, clarify and systemize the applications of public labour standards in CSR. This will help to use CSR to close governance gaps that cannot be closed by public international law, without yielding to a form of normativity that is guided by public relations and economic efficacy.