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Literature Review on the Governance of Work

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Foreword

Governance is central to the world of work. At the national level, it has traditionally been pursued through a combination of laws and regulations; voluntary agreements; labour market institutions; and the interaction of governments with employers' and workers' organizations. At the global level, international labour standards are indispensable instruments for the governance of work. Recent decades have seen these instruments and modes of governance supplemented by, in particular, voluntary codes of conduct and other corporate social responsibility initiatives.

Constant change puts significant pressure on established modes of governance of work. Informality, labour migration and the proliferation of non-standard employment all constrain the effective legal regulation of the employment relationship. Effective state regulation can be challenged by weakening support for labour administration and inspection, and effective labour dispute resolution. The challenges are exacerbated by competition between States, including on labour conditions, driven by global market integration. The result is that the governance of work is under strain at the national, transnational and global levels.

The ILO has naturally always had a central focus on effective governance in the world of work. Its tripartite structure illustrates the ILO's commitment to the role of employers' and workers' organizations in the governance of work, together with governments, through processes of social dialogue. In the context described above, and in light of the ILO's Centenary Initiative on the Future of Work, a renewed focus on how the governance of work can be most effective is timely. It is in keeping with other developments at the global level. These include the emphasis in the UN Sustainable Development Goals on promotion of the rule of law and access to justice (Indicator 16.3), and the World Bank's attention to governance and law as drivers of development (World Development Report 2017).

In this context, the Office commissioned this literature review from Dr Tess Hardy and Ms Sayomi Ariyawansa. It builds on two previous (unpublished) reviews, and focuses on work done in the last five years.

As the authors observe, in recent decades there have been fundamental shifts in governance both within the nation state and beyond, in the world of work and many other areas of policy. With clarity, and in detail, they present in particular key findings from the literature on innovative governance of work in practice. They survey a wide range of theoretical perspectives on regulation and governance; challenges to governance and responses to those challenges; and the interaction of public and private governance. The last of these is of particular significance in view of both the proliferation of private governance initiatives, and also the challenges that the ILO has experienced in defining its own role in respect of corporate social responsibility.

On behalf of the Office, I thank Dr Hardy and Ms Ariyawansa for this important contribution to understanding the operation and the potential for governance in the world of work.

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1. Introduction

1.1 Background, aims and methodology

This literature review focuses on the most influential and relevant developments in regulation and governance scholarship. In addition, it also draws on work undertaken in a range of complementary disciplines and areas, including industrial relations, political economy, labour economics, labour law and global labour studies. Among other things, we were asked to attempt to address the following questions:

- How can progress be made toward normative consistency across regimes of governance: international, regional and national; or, private and public?
- How can private and public governance best be combined so as to reinforce each other?
- What new institutions and modes of governance might be needed?

1.2 Defining key concepts

The changing world of work "poses unprecedented challenges for established institutions and modes of the governance of work".[1] Over the past few decades, there have been fundamental shifts in regulation and governance within the nation state and beyond. To better understand and explore the literature concerned with these challenges, it is first necessary to canvass some of key debates around core concepts, such as "regulation" and "governance".[2]

In 2007, Braithwaite, Coglianese and Levi-Faur distinguished the two concepts as follows: "Governments and governance are about providing, distributing and regulating. Regulation can be conceived as that large subset of governance that is about steering the flow of events and behaviour, as opposed to providing and distributing."[3]

[1] International Labour Organization, "The Future of Work Issue Brief (No. 11): New Directions for the Governance of Work" (20 February 2018) 1.

[2] We note that there are substantial and interrelated debates regarding the conceptualization of labour rights as human rights. These issues have come to the fore in the wake of various legislative developments concerned with addressing "modern slavery" (discussed further in section 3.5). While these debates are important, they have not been fully canvassed in this literature review. But see: Graciela Bensusàn, "Can Human Rights Based Labour Policy Improve the Labour Rights Situation in Developing Countries? A Look at Mexico and the Countries of Central America" in Anne Trebilcock and Adelle Blackett (eds), *Research Handbook on Transnational Labour Law* (Edward Elgar, 2015); Colin Fenwick and Tonia Novitz (eds), *Human Rights at Work: Perspectives on Law and Regulation* (Hart, 2010); Ingrid Landau, "Game Changer? Human Rights Due Diligence and Corporate Respect for Workers' Rights in a Global Economy" in John Howe, Anna Chapman and Ingrid Landau (eds), *The Evolving Project of Labour Law: Foundations, Developments and Future Research Directions* (Federation Press, 2017); Anne Trebilcock, "Due Diligence on Labour Issues – Opportunities and Limits of the UN Guiding Principles on Business and Human Rights" in Anne Trebilcock and Adelle Blackett (eds), *Research Handbook on Transnational Labour Law* (Edward Elgar, 2015).

[3] John Braithwaite, Cary Coglianese and David Levi-Faur, "Can Regulation and Governance Make a Difference?" (2007) 1 *Regulation and Governance* 1, 3.

The meaning ascribed to regulation and governance remains contested: both can be conceived of in a broad and narrow sense.[4] Even in its widest sense (for example, conceiving of regulation as "influencing the flow of events"[5] or "mechanisms of control"[6]), regulation was often assumed to be carried out by states using law. Similar assumptions were made about governance – that "the state was the primary governor and good governance was about the rule of rules …".[7]

However, the rise of theories, variously referred to as polycentric, networked, nodal, decentred, new, plural or collaborative governance or regulation, have started to chip away at such assumptions (that is, that the nation state is the primary governor).[8] Drahos and Krygier contend that once regulation and governance are perceived as processes, the distinction between the two concepts "becomes blurred and perhaps collapses altogether".[9] They further argue that if a distinction is necessary, then one should view them as being part of a continuum: regulation focuses on actors and their modes of intervention or influence, while governance focuses on normative aspects of relevant institutions (for example, accountability, authority, legitimacy).[10] A similar idea was expressed by Braithwaite, namely that regulation is a "large subset of governance that is about steering the flow of events, as opposed to providing and distributing".[11] Haines takes a slightly different tack again arguing that the phenomenon of regulation is "better conceptualised as governance, where control originates from various public and private actors and is given effect not only

[4] Baldwin et al. provided one of the more comprehensive definitions of "regulation" as comprising all mechanisms of social control of influence affecting behaviour, from whatever source, whether intentional or not (see Robert Baldwin, Colin Scott and Christopher Hood (eds), *A Reader on Regulation* (Oxford University Press, 1998), 4). In contrast, regulation may be defined in a narrower sense as "a legal mandate backed by the possibility of sanctions" (Christel Koop and Martin Lodge, "What is Regulation? An Interdisciplinary Concept Analysis" (2015) 11 *Regulation & Governance* 95, 99). One of the most well-known definitions remains that of Black who defines regulation as "the sustained and focused attempt to alter the behaviour of others according to defined standards and purposes with the intention of producing a broadly identified outcome or outcomes" (Julia Black, "Critical Reflections on Regulation" (2002) 27 *Australian Journal of Legal Philosophy* 1, 25).

[5] Christine Parker and John Braithwaite, "Regulation" in Peter Cane and Mark Tushnet (eds), *The Oxford Handbook of Legal Studies* (Oxford University Press, 2003), 119–45.

[6] David Levi-Faur, "Foreword" in John Braithwaite, *Regulatory Capitalism: How it Works, Ideas for Making it Work Better* (Edward Elgar, 2008), vii.

[7] Peter Drahos and Martin Krygier, "Regulation, Institutions and Networks" in Peter Drahos (ed.), *Regulatory Theory: Foundations and Applications* (ANU Press, 2017), 12–13.

[8] Drahos and Krygier group many of these theories together. They note: "[a]t the risk of offending proponents of these labels, the differences among these approaches are more of nuance than of kind, with all recognising that regulation no longer has one exclusive command centre and that rising interconnectedness characterises the relationship among the many centres and sources of regulation in the modern world" (Drahos and Krygier (2017), above n. 7, 12).

[9] Drahos and Krygier (2017), above n. 7, 18.

[10] Ibid.

[11] John Braithwaite, *Regulatory Capitalism: How it Works, Ideas for Making it Work Better* (Edward Elgar, 2008), 1.

through law, but also by private agreements, the implementation of non-government standards, accreditation schemes and a multitude of other potential control mechanisms".[12]

The reframing of debates on regulation and governance has been further perpetuated by concepts, such as "regulatory capitalism",[13] which were designed to capture the scale and dynamics of change occurring at the global level.[14] In particular, Levi-Faur sees this concept as shifting regulatory analysis away from state-centred modes of rule-making and enforcement and towards a more decentred, multi-faceted understanding of regulatory systems. He argues that "regulatory capitalism" essentially:

> denotes a world where regulation is increasingly a hybrid of different systems of control, where statist regulation coevolves with civil regulation, national regulation expands with international and global regulation, private regulation coevolves and expands with public regulation, business regulation coevolves with social regulation, voluntary regulations expand with coercive ones and the market itself is used or mobilised as a regulatory mechanism.[15]

Similarly, Drahos and Krygier believe that recognizing that regulation is multi-sourced is a positive development in the context of globalization and transnational regulation. They argue that:

> The network concept is highly relevant for regulatory studies because it offers a better description of how regulation is changing, as well as allowing researchers to focus on both the structure of regulation and the strategic behaviour of actors within regulatory domains. It is also useful since it allows us to track connections that exist both within and without the boundaries of states, without needing to make some conceptual leap or contortion, in the face of empirical links that are often seamless and borderless.[16]

Others, such as Piore and Schrank, are more circumspect. Indeed, they believe that the collapse of global labour standards, including in developed economies, has been justified partly on the basis of the idea that "government regulation … has been rendered anachronistic by innovation, globalization, and the transformation of domestic and international markets".[17]

There are at least three further distinctions which are commonly drawn in the scholarship, and which are particularly relevant to a review of the governance of work. The first notable distinction is between "public" and "private" regulation. Bartley explains that while public regulation is implicitly associated with the activities of the state, private regulation "refers to a structure of oversight in which non-state actors – whether for-profit companies, non-

[12] Fiona Haines, *The Paradox of Regulation: What Regulation Can Achieve and What it Cannot* (Edward Elgar, 2011), 8.

[13] Braithwaite (2008), above n. 11; John Braithwaite and Peter Drahos, *Global Business Regulation* (Cambridge University Press, 2000); David Levi-Faur, "Regulatory Capitalism and the Reassertion of the Public Interest" (2009) 27 *Politics and Society* 181.

[14] Drahos and Krygier (2017), above n. 7, 3.

[15] David Levi-Faur, "Regulatory Capitalism" in Peter Drahos (ed.), *Regulatory Theory: Foundations and Applications* (ANU Press, 2017), 289.

[16] Drahos and Krygier (2017), above n. 7, 15.

[17] Michael Piore and Andrew Schrank, *Root-cause Regulation: Protecting Work and Workers in the 21st Century* (Harvard University Press, 2018), 5.

profit organizations, or a mix of the two – adopt and to some degree enforce rules for other organizations, such as their suppliers or clients".[18]

A second distinction relates to the geographical location of the regulatory activity. Again, Bartley asserts that if any of the relevant activity spans national borders, then it becomes transnational private regulation, as opposed to national or domestic forms of regulation.[19] This may also have implications for the role assigned to the state. Indeed, Ruggie notes that while "governance" broadly refers to "the systems of authoritative norms, rules, institutions, and practices by means of which any collectivity, from the local to the global, manages its common affairs", the term "global governance" is generally defined as an instance of governance in the absence of government.[20] In a recent edited collection exploring "theories of governance", Ansell and Torfing observe that governance "is a popular but notoriously slippery term".[21] They underline this point by noting that governance is often used in conjunction with a qualifying prefix. "Global governance" is one example (which has just been mentioned). In addition, terms such as "good governance",[22] "corporate governance",[23]"multi-level governance"[24] and "new governance" are also commonly used.

Third, a distinction is also frequently identified in relation to the type of private regulation. Traditional forms of self-regulation, which are devised by the firm to create standards and oversight for their own conduct, are often viewed as "soft" norms. In contrast, many initiatives centre on private regulatory rules that are intended to apply to other organizations. In these circumstances, the rules are often more specific and coercive than the broader norms that characterize self-regulation.[25] The type of regulation involved can have implications for the actors which have oversight and authority to implement the relevant standards, and the efficacy (or otherwise) of those standards. We expand further on the definitional debates around, among others, private versus public, national versus transnational, in section 4.

[18] Tim Bartley, *Rules without Rights: Land, Labour and Private Authority in the Global Economy* (Oxford University Press, 2018), 7.

[19] Ibid.

[20] John Ruggie, "Global Governance and 'New Governance Theory': Lessons from Business and Human Rights" (2014) 20 *Global Governance* 5, 5.

[21] Christopher Ansell and Jacob Torfing, "Introduction: Theories of Governance" in Christopher Ansell and Jacob Torfing (eds), *Handbook on Theories of Governance* (Edward Elgar, 2016), 2.

[22] Ansell and Torfing argue that this "tends to refer to the endeavour of international organizations … to assess and measure the quality of governing institutions in developing countries in terms of their stability, interaction, transparency, responsiveness, procedural fairness, effectiveness and adherence to the rule of law" (Ansell and Torfing (2016), above n. 21, 2).

[23] For the purposes of their edited collection, Ansell and Torfing define "corporate governance" as "the institutionalized interaction among the many players – including shareholders, management, boards of directors, employees, customers, financial institutions, regulators and the community at large – involved in the process of directing and controlling private firms" (Ansell and Torfing (2016), above n. 21, 2).

[24] "Multi-level governance" is used to refer "to a system of continuous negotiation among nested governments at the local, regional, national and supranational levels" (Ansell and Torfing (2016), above n. 21, 2).

[25] Bartley (2018), above n. 18, 7–8.

1.3 Outline of sections

This report is divided into four main sections which largely reflect the key aims listed above. In particular:

- Section 2 charts the dominant debates regarding regulatory compliance and enforcement and explores how a number of well-known theories of regulation and governance have been critiqued and refined in the past four years or so.
- Section 3 explores some of the key practical concerns influencing labour administration and inspection, including legal frameworks and regulatory culture, inspector discretion, administrative and bureaucratic organization and controls, and evaluation and performance measures.
- Section 4 provides an overview of a number of prominent public–private compliance initiatives operating both within the domestic sphere, as well as in a transnational or global context. As part of this discussion, we consider how these initiatives interact with state-based regulatory action, as well as research which has sought to measure the influence or impact of these initiatives on compliance behaviour.
- Section 5 seeks to draw together the various strands of literature that have been explored in the review and respond, in a preliminary way, to the questions set out above.

2. Theories of regulation and governance

For the purposes of this section, and in the context of this literature review, we have assumed that theories of regulation and governance are partly descriptive and partly aspirational.[26] In practice, these strategies often intersect. It is still the case that there is no one theory or model that has been unequivocally identified as representing "best practice".[27] More specifically, Gunningham argues that "different duty holders confront different external pressures, and have different skills, capabilities, and motivations, what constitutes a best-practice intervention strategy will vary with the context".[28] In light of this, Gunningham contends that "combinations of strategies often provide better outcomes than single strategies".[29]

This section begins with a review of key regulatory approaches of general application, such as the models of responsive regulation, meta-regulation, risk-based regulation and nudging or choice architecture. These theories have all been revised and refined over the past five years or more. This is followed by an overview of a number of theories which have been developed in the context of, and directed towards, labour standards regulation, namely strategic enforcement, root-cause regulation and co-enforcement. This section finishes by touching on a number of theories of transnational labour regulation and governance, including the interactions model, the intermediaries model and "place-conscious transnational governance".

2.1 General theories of regulation and governance – Recent critiques and refinements

2.1.1 Responsive regulation (and its variants)

Responsive regulation is one of the classical models of regulation and governance and arguably "remains unrivalled in its applicability to multiple regulatory contexts, in both a descriptive and normative sense".[30] Indeed, more than 25 years since it was first articulated by Ayres and Braithwaite, it continues to be actively debated and developed.[31]

Much has been written on pyramidal enforcement, as well as some inherent limitations of this model.[32] For example, Braithwaite, Gunningham and others have argued that while the

[26] Arie Freiberg, *Regulation in Australia* (Federation Press, 2017), 442.

[27] Neil Gunningham, "Compliance, Enforcement and Regulatory Excellence" in Cary Coglianese (ed.), *Achieving Regulatory Excellence* (Brookings Institution Press, 2017), 188–9.

[28] Ibid. 188.

[29] Ibid. 188–9.

[30] Jonathan Kolieb, "When to Punish, When to Persuade and When to Reward: Strengthening Responsive Regulation with the Regulatory Diamond" (2015) 41(1) *Monash University Law Review* 136, 136.

[31] For example, Braithwaite – one of the architects of the original model – recently argued there are a number of distinct types of responsiveness which can be identified: pyramidal responsiveness; micro-responsiveness; networked, nodal responsiveness; and meta-regulatory and socialist responsiveness (John Braithwaite, "Types of Responsiveness" in Peter Drahos (ed.), *Regulatory Theory: Foundations and Applications* (ANU Press, 2017), 117–30).

[32] Robert Baldwin and Julia Black, "Really Responsive Regulation" (2008) 72 *Modern Law Review* 59; Salo Coslovsky, "Relational Regulation in the Brazilian Ministério Publico: The Organizational Basis of Regulatory Responsiveness" (2011) 5 *Regulation and Governance* 70.

"tit-for-tat" approach to compliance and enforcement is best suited to organizations with which the regulator has regular interactions, a game theory approach is ill-equipped to deal with situations where inspections are less intense or less frequent.[33] While Braithwaite and Hong acknowledge that it is hard to make responsive regulation work without iterated encounters, it is not impossible. Rather, it is necessary to make the "most crucial encounters iterated to secure an evolution toward cooperative reform".[34] To address reciprocity deficits, they put forward a novel argument involving "regulatory ambassadors" and regulatory blitzes.[35]

Another prominent criticism is that a graduated response may not be suitable or effective in all situations. For example, Ford and Kingsford-Smith have raised questions about whether responsive regulation can be effectively "scaled up" to contexts which are more diffuse, pluralistic or complex.[36] In particular, Baldwin and Black have noted that what is viewed as the most appropriate response in any given situation should not depend on the future actions of the wrongdoer.[37] They have also argued that "tit-for-tat strategies may not be effective where regulatees' behaviour is not driven by the regulator's interventions but by corporate cultures or economic pressures".[38] Vosko, Grundy and Thomas similarly contend that a pyramidal response which prioritizes "soft" or "self" regulation tends to "downplay social antagonisms and inequities, much less the specific power dynamics of capitalist production that undermine incentives for cooperation on the part of employers/firms".[39] Along similar lines, others have noted that some risks may be of such magnitude that rather than reserving coercive measures as a last resort, the polity or the public demands that the risk requires an immediate and severe response in the form of criminal sanctions, injunctions and/or licence revocation.[40]

Braithwaite himself has acknowledged that moving up and down the pyramid may not be viable in practice. For example, it can be particularly awkward for a regulator to seek to soften its regulatory response after a particularly severe sanction has previously been

[33] See generally John Braithwaite, "Relational Republican Regulation" (2013) 7 Regulation & *Governance* 124, 124; Gunningham (2017), above n. 27, 191; Neil Gunningham and Richard Johnstone, *Regulating Workplace Safety: System and Sanctions* (Oxford University Press, 1999), 123–9.

[34] John Braithwaite and Seung-Hun Hong, "The Iteration Deficit in Responsive Regulation: Are Regulatory Ambassadors the Answer?" (2015) 9 *Regulation & Governance* 16, 17.

[35] Ibid.

[36] Cristie Ford, "Prospects for Scalability: Relationships and Uncertainty in Responsive Regulation" (2013) 7 *Regulation & Governance* 14, 15. See also Dimity Kingsford-Smith, "A Harder Nut to Crack? Responsive Regulation in the Financial Services Sector" (2011) 44 *University of British Columbia Law Review* 695.

[37] Robert Baldwin and Julia Black, "Really Responsive Regulation" (2008) 72 *Modern Law Review* 59.

[38] Ibid. 62–3.

[39] Leah Vosko, John Grundy and Mark Thomas, "Challenging New Governance: Evaluating New Approaches to Employment Standards Enforcement in Common Law Jurisdictions" (2016) 37(2) *Economic and Industrial Democracy* 373, 379, citing Eric Tucker, "Old Lessons for New Governance: Safety or Profit and the New Conventional Wisdom" in Theo Nichols and David Walters (eds), *Safety or Profit? International Studies in Governance, Change and the Work Environment* (Baywood Press, 2013).

[40] See also Haines (2011), above n. 12.

imposed on the regulatee. In these circumstances, voluntary compliance may not be forthcoming because any trust between the parties has evaporated as a result of prior interactions. This can give rise to the risk of regulatory defiance or resistance.[41]

In defence of the pyramidal response, however, Braithwaite argues that ordering strategies in a hierarchical way "is not just about putting the less costly, less coercive, more respectful options lower down to preserve freedom as nondomination".[42] Rather, he contends that the initial deployment of "softer" forms of social control later legitimizes the regulator's use of more coercive sanctions. This has positive compliance effects in that regulation which is perceived as more procedurally fair has the tendency to strengthen commitments to comply.[43]

Others have pointed out that, notwithstanding some of the limitations of hierarchical regulatory conceptions, the theory of responsive regulation remains momentous. Drahos and Krygier note that responsive regulation "is an important part of a conceptual evolution in which the narrow view of regulation as a subordinate species of law is replaced by a broader view in which law becomes part of a regulatory world in which regulation has multiple levels and sources".[44]

A wide view of regulation and a pluralistic notion of regulatory power has been pivotal in subsequent theories – such as smart regulation and really responsive regulation – which built upon the original concept of responsive regulation. Indeed, Braithwaite himself now believes that a critical mode of responsiveness is networked, nodal responsiveness. In this respect, Braithwaite further observed that "[r]esponsive regulation is not something only governments do; civil society actors can also regulate responsively – indeed, they can even regulate governments responsively".[45] The extent to which regulatory pluralism is now embedded within the refined model of responsive regulation is captured by Drahos and Krygier where they observe that "network thinking … has become part of the attitude of responsiveness".[46] By way of illustration, Braithwaite uses a networked approach to explain the way in which "weak actors, wielding only puny sanctions, can escalate to enrolling more and more actors of increasingly greater clout to a project of network confrontation with the strong".[47]

It appears that networked responsiveness is especially critical in developing countries where state regulators are generally weak and under-resourced – a theme we will return to in section 4 below. In such circumstances, there are no resources or capacity to fully implement the

[41] John Braithwaite, "Restorative Justice and Responsive Regulation: The Question of Evidence" (RegNet Research Papers No. 51, Regulatory Institutions Network, 2016).

[42] Braithwaite (2017), above n. 31, 120.

[43] Valerie Braithwaite, *Defiance in Taxation and Governance: Resisting and Dismissing Authority in a Democracy* (Edward Elgar, 2009); Kristina Murphy, "Turning Defiance into Compliance with Procedural Justice: Understanding Reactions to Regulatory Encounters Through Motivational Posturing" (2014) 10 *Regulation & Governance* 93; Tom Tyler, "Procedural Justice, Legitimacy, and the Effective Rule of Law" (2003) 30 *Crime and Justice* 283.

[44] Drahos and Krygier (2017), above n. 7, 5–6.

[45] Braithwaite (2017), above n. 31, 117.

[46] Drahos and Krygier (2017), above n. 7, 15.

[47] John Braithwaite, "Methods of Power for Development: Weapons of the Weak, Weapons of the Strong" (2004) 26 *Michigan Journal of International Law* 297, 330.

pyramidal strategy of enforcement (at least as originally conceived). The idea of networked responsiveness seeks to draw together somewhat separate theoretical strands. Braithwaite explains:

> The idea of the pyramid of networked escalation … is that a state regulator escalates by networking regulatory pressure from other actors – which can include other states …, international regulators, industry associations, hybrid industry–non-governmental organisation (NGO) certification organisations …, competitors, upstream and downstream corporate players in the supply chain of the problem actor and, most importantly, different media and civil society actors such as trade unions.[48]

However, Braithwaite is also quick to point out that civil society actors may also enrol a range of actors with different regulatory resources at their disposal, and this enrolment can occur independently of the state. Indeed, in light of criticisms made by Jennifer Wood and Clifford Shearing, Braithwaite agrees that a pyramidal strategy can encourage unnecessary escalation in the face of regulatory resistance and tends to ignore the regulatory resources available at horizontal levels.[49] To address this limitation, Braithwaite proposed a set of corrective principles that include "never escalating to hard options without considering all available softer and horizontal interventions" and "scanning creatively and optimistically for potential network partners with fresh resources".[50]

While networked responsiveness or nodal governance has its advantages, it is not without some significant limitations. One potential weakness – which has been flagged by Vosko, Grundy and Thomas – is that enforcement approaches which are based on the principles of "regulatory new governance" display an over-reliance on "soft law" mechanisms and run the risk of exacerbating rather than mitigating the enforcement crisis in employment standards regulation. More specifically, they contend that

> while the enforcement models envisioned by [regulatory new governance] proponents aim to extend social protections to workers, we argue that those failing to retain a sufficient role for state institutions and "hard law" mechanisms neglect to adequately account for the power dynamics of the employment relationship, and thereby threaten to entrench regulatory degradation.[51]

Another issue – of much debate and concern – is the problem of coordination. In addition, a number of scholars have pointed out that a nodal framework tends to neglect vertical relations in favour of horizontal ones.[52] For example, some have argued that proponents of nodal governance tend to see states as "idiots" and have unfairly dismissed the critical role that states play in overseeing and moderating governance processes.[53] Holling and Shearing

[48] Braithwaite (2017), above n. 31, 121.

[49] Jennifer Wood and Clifford Shearing, *Imagining Security* (Willan Publishing, 2007).

[50] Braithwaite (2017), above n. 31, 124.

[51] It is arguable that this is an extreme reading of the bulk of the literature on new governance (which generally acknowledges the critical and essential role to be played by the state and coercive sanctions) (Vosko, Grundy and Thomas (2016), above n. 39, 375).

[52] Cameron Holley and Clifford Shearing, "A Nodal Perspective of Governance: Advances in Nodal Governance Thinking" in Peter Drahos (ed.), *Regulatory Theory: Foundations and Applications* (ANU Press, 2017), 171, citing John Kerr, *The Securitization and Policing of Art Theft: The Case of London* (Ashgate, 2015), 159.

[53] Hans Boutellier and Ronald van Steden, "Governing Nodal Governance: The 'Anchoring' of Local Security Networks" in Adam Crawford (ed.), *International and Comparative Criminal Justice and Urban Governance: Convergences and Divergence in Global, National and Local Settings*

have also argued that the state is not just another node among many, rather it "remains pivotal in respect of both symbolic power and its regulatory capacity".[54]

In this respect, Braithwaite acknowledges the work of Gunningham, Grabosky and Sinclair and their model of "smart regulation". In short, the concept of smart regulation is intended to refer to "a form of regulatory pluralism that embraces flexible, imaginative and innovative forms of social control"[55] and explicitly harnesses the resources of governments, business and third parties. The rationale of this model is that, in most cases, "the use of multiple rather than single policy instruments, and a broader range of regulatory actors, will produce better regulation".[56] Under an idealized model of smart regulation, the state acts principally as a "catalyst or facilitator".[57] It seeks to build possible synergies between disparate actors, and avoid contradictions or contest, which can have counterproductive consequences for regulatory effectiveness.

In particular, it argues that markets, civil society and other institutions can sometimes act as surrogate regulators and accomplish public policy goals more effectively, with greater social acceptance and at less cost to the state. This approach resonates with the broader transition in the role of governments internationally: from "rowing the boat to steering it"[58] or choosing to "regulate at a distance" by acting as facilitators of self-and co-regulation rather than regulating directly.[59]

However, playing this coordination role has proved to be difficult in practice. In this respect, Scott has recently noted that while regulatory pluralism presents great potential, a "fundamental problem within this decentred world is how to address key problems of ordering, not only for the state, but also for communities and markets".[60] But the question of "how plurality needs to be managed and whether, in fact, it needs to be"[61] remains contested in the broader debate on nodal governance.[62]

(Cambridge University Press, 2011), 461–82; Ian Loader and Neil Walker, "Necessary Virtues: The Legitimate Place of the State in the Production of Security" in Jennifer Wood and Benoit Dupont (eds), *Democracy, Society and the Governance of Security* (Cambridge University Press, 2006), 165–95.

[54] Holley and Shearing (2017), above n. 52, 171.

[55] Neil Gunningham and Darren Sinclair, "Smart Regulation" in Peter Drahos (ed.), *Regulatory Theory: Foundations and Applications* (ANU Press, 2017), 133.

[56] Ibid.

[57] Ibid. 139.

[58] David Osborne and Ted Gaebler, *Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector* (Addison-Wesley Publishing Company, 1992).

[59] Neil Gunningham, "Compliance, Deterrence and Beyond" in Michael Faure (ed.), *Encyclopedia of Environmental Law: Volume IV* (Edward Elgar, 2018), 71.

[60] Colin Scott, "The Regulatory State and Beyond" in Peter Drahos (ed.), *Regulatory Theory: Foundations and Applications* (ANU Press, 2017), 280.

[61] Holley and Shearing (2017), above n. 52, 166, citing John Kerr, *The Securitization and Policing of Art Theft: The Case of London* (Ashgate, 2015), 26.

[62] Holley and Shearing (2017), above n. 52, 166, citing David H. Bayley and Clifford D. Shearing, *The New Structure of Policing: Description, Conceptualization, and Research Agenda* (National Institute of Justice, 2001) and Julie Ayling, Peter Grabosky and Clifford Shearing, *Lengthening the*

Indeed, even those credited with creating the concept of "smart regulation" also recognize a number of inherent limitations of this model. First, Gunningham and Sinclair note that an escalating regulatory response is not appropriate in situations where there is a serious risk of imminent irreversible loss or catastrophic damage. Second, they argue that a graduated response is only effective where the parties have a continuing relationship and the potential to engage in a "tit for tat" interaction. They caution that "where there is only one chance to influence the behaviour in question (for example, because small employers can only very rarely be inspected), a more interventionist first response may be justified, particularly if the risk involved is high".[63]

Third, Gunningham and Sinclair note that while the concept of "smart regulation" has apparently been embraced by politicians and policy-makers it often bears only a "loose resemblance"[64] to the original idea. By way of example, they note that, many regulators have been: (a) reluctant to escalate up the sanction pyramid for fear that they would put businesses offside; (b) unwilling to engage in genuine collaborations with civil society actors in case they lose control of the process; (c) inclined to invoke a "grab bag" of tools rather than seeking to use such tools in a judicious and complementary manner. In their view "what passes for smart regulation in policy circles is more akin to a regulatory stew from which policymakers have selected particularly juicy morsels that appeal to the political rhetoric of their masters, largely irrespective of their likely effectiveness or efficiency".[65]

Separately, Gunningham has conceded that empirical research on smart regulation is supportive, but not conclusive.[66] The most fundamental challenge in seeking to implement this approach is effective coordination of government and third party pressure.[67] In light of the identified limitations of responsive regulation and smart regulation (among other possible approaches), a number of scholars have placed increasing emphasis on experimentation, adaptive learning and resilience. Indeed, Gunningham has argued that given the "pervasiveness and inevitability of changing circumstances, part of the challenge might be to build resilience into an implementation strategy".[68]

In comparison, scholars focusing on nodal or networked governance take a less critical view. For example, Johnston and Shearing have argued that networks are the mechanism for coordinating nodes and there is no necessity for a single locus of control. However, they acknowledge that networks are often fluid, rarely fixed and may come into conflict (that is, because nodes within networks do not necessarily work together to produce shared outcomes).[69] Indeed, it is true that the shift to new governance approaches has been driven,

Arm of the Law: Enhancing Police Resources in the Twenty-first Century (Cambridge University Press, 2009).

[63] Gunningham and Sinclair (2017), above n. 55, 139.

[64] Ibid. 142.

[65] Ibid. 144.

[66] Neil Gunningham, "Enforcing Environmental Regulation" (2011) 23(2) *Journal of Environmental Law* 169, 190, citing Judith van Erp and Wim Huisman, "Smart Regulation and Enforcement of Illegal Disposal of Electronic Waste" (2010) 9(3) *Criminology & Public Policy* 579.

[67] Gunningham (2017), above n. 27, 193.

[68] Gunningham (2017), above n. 27, 201. See also Ahjond S. Garmestani and Craig R. Allen (eds), *Social-Ecological Resilience and the Law* (Columbia University Press, 2014).

[69] Les Johnston and Clifford Shearing, *Governing Security: Explorations in Policing and Justice* (Routledge, 2003), cited in Holley and Shearing (2017), above n. 52, 167.

at least in part, by a perception that more collaborative and adaptive approaches may deliver benefits in circumstances where traditional approaches cannot.[70] While new governance theories are said to offer a host of benefits, including problem solving that is inclusive of local circumstances and the ability to capitalize on the unique local and other knowledge and capacities of multiple public and private actors,[71] there is a growing sense that not all these benefits may be realized in practice. In the last five years, criticisms of new governance theories have been growing. Such criticisms include the difficulty of sustaining participation of initial bursts of enthusiasm and the way in which the adaptive and flexible approach magnifies gaps in accountability.[72] The few empirical studies that have sought to assess the performance of new governance on the ground generally suggest that much depends on the context, from the nature of the problem to the types of firms involved and the level of engagement on the part of civil society. For instance, Toffel et al. found that state, civil society and market institutions play a critical role in supplier-factory compliance with private codes of conduct – by way of example, they found greater adherence to private codes of conduct in factories embedded in states that have "highly protective labour laws and high levels of press freedom".[73] Their findings are discussed in more detail in section 4 below. As Gunningham and Holley wryly observe, the theory of new governance is unlikely to prove the panacea to the world's economic, environmental and social problems (as perhaps it was once thought to be).[74]

Before concluding this discussion of responsive regulation, and its evolution, it is necessary to touch on a separate and recent refinement of this theory through the prism of the "regulatory diamond". Building on the work of Braithwaite and others,[75] Kolieb argues that the diamond concept "provides an enhanced model of responsive regulation; one that clarifies the role of law within it, and that better reflects the broad, contemporary conception of regulation".[76] In particular, Kolieb argues that the original formulation of responsive regulation was "excessively focussed on compliance with behavioural standards".[77] Further, the source of those standards was often ill-defined, but frequently assumed to be the law.[78]

[70] Neil Gunningham and Cameron Holley, "Next-generation Environmental Regulation: Law, Regulation and Governance" (2016) 12 *Annual Review of Law and Social Science* 273, 284.

[71] Ibid.

[72] Ibid.

[73] Michael Toffel, Jodi Short and Melissa Ouellet, "Codes in Context: How States, Markets, and Civil Society Shape Adherence to Global Labor Standards" (2015) 9(3) *Regulation & Governance* 205.

[74] Ibid. See also Grainne De Burca, Robert Keohane and Charles Sabel, "New Modes of Pluralist Global Governance" (2013) 45 *NYU Journal of International Law & Politics* 723; Cameron Holley, Neil Gunningham and Clifford Shearing, *The New Environmental Governance* (Abingdon, 2012); Jeroen Van der Heijden, "Regulatory Failures, Split-incentives, Conflicting Interests and a Vicious Circle of Blame: The New Environmental Governance to the Rescue?" (2015) 58(6) *Journal of Environmental Planning and Management* 1034.

[75] John Braithwaite, Toni Makkai and Valerie Braithwaite, *Regulating Aged Care: Ritualism and the New Pyramid* (Edward Elgar, 2007), 318. In this book, Braithwaite, Makkai and Braithwaite supplemented the original "regulatory pyramid" with a "strengths-based pyramid" (which contained a suite of escalating strategies designed to support and encourage desirable conduct of the part of the regulated firm or individual).

[76] Kolieb (2015), above n. 30, 150.

[77] Ibid. 137.

[78] Ibid.

Instead, Kolieb asserts that "[r]egulation, appropriately conceived, should not be synonymous with compliance mechanisms or enforcement of rules *only*, but rather should also encompass methods and mechanisms that encourage regulatees to go *beyond* compliance with legal rules to satisfy regulatory goals".[79]

The regulatory diamond is consciously designed to capture two types of regulatory activities: first, compliance regulation (being those mechanisms which are used to encourage or ensure obedience with specified behavioural standards); and second, aspirational regulation (which refers to those mechanisms employed to persuade and support regulatees to improve their behaviour beyond mere adherence to minimum standards).[80] Another critical feature of the regulatory diamond concept is that law is explicitly identified as the source of the behavioural standards with which compliance is being sought.[81]

2.1.2 Meta-regulation

The concept of meta-regulation (or its so-called "siblings", including enforced self-regulation, systems-based regulation, management-based regulation and principles-based regulation) arguably lies at the very heart of reconceptualizing the change in the distribution of regulatory tasks in the modern state.[82] In this vein, Scott notes that "[m]eta-regulation offers a way to acknowledge the importance and potential of private and self-regulation, whilst assigning to the meta-regulator, such as a public agency, the duty or power to monitor the private actions [taken by the regulated party]".[83]

In broad terms, meta-regulation is intended to "alleviate regulators" limited access to information and expertise, enlist corporate commitment, enhance firms' self-regulatory capacity, and overcome the inherent limitations of prescriptive rules".[84] In theory, the role of the state is reframed as one which is primarily focused on overseeing "the effective development, implementation, and monitoring of risk or other corporate management plans by the regulated organization itself".[85] Although others, such as Scott, have pointed out that while meta-regulation involves the delegation of regulatory tasks from the state to business, the state assumes a different role, namely to actively monitor and verify the activities of self-regulating firms.[86] Meta-regulation is often associated with a learning-orientated approach to regulation – that is, private actors are encouraged by the steering activities of the state "to learn about the needs of the regime and shape their behaviour accordingly rather than to

[79] Ibid. See also Jonathan C. Borck and Cary Coglianese, "Beyond Compliance: Explaining Business Participation in Voluntary Environmental Programs" in Christine Parker and Vibeke Lehmann Nielsen (eds), *Explaining Compliance: Business Responses to Regulation* (Edward Elgar, 2011), 139.

[80] Kolieb (2015), above n. 30, 151.

[81] Ibid.

[82] Sharon Gilad, "It Runs in the Family: Meta-regulation and its Siblings" (2010) 4 *Regulation & Governance* 485, 485.

[83] Colin Scott, "From Welfare State to Regulatory State: Meta-regulation and Beyond" (2014) 11 *University of Tokyo Journal of Law and Politics* 159, 168.

[84] Gilad (2010), above n. 82, 486.

[85] Gunningham (2017), above n. 27, 193. See also Scott (2017), above n. 60, 275.

[86] Scott (2014), above n. 83, 168.

simply comply".[87] In this respect, meta-regulation has often been associated with so-called "beyond compliance" initiatives – that is, firms are selected as suitable to "regulate at a distance" and encouraged to improve their performance so as to exceed minimum standards.[88]

In a broad-ranging review of meta-regulation strategies, Gilad observed that meta-regulation may be particularly valuable in circumstances of high regulatory uncertainty and/or in contexts of entrenched and prevalent non-compliance. However, Gilad cautions that to realize the regulatory potential of meta-regulation "requires a rare combination of high regulatory capacity, a stable regulatory agenda, and a supportive political environment".[89] She found that many of the empirical studies which had examined meta-regulation strategies revealed mixed results.[90] Indeed, in their review of the Environmental Protection Authority's "Flagship" voluntary programme in the US, Coglianese and Nash found that a meta-regulation approach made only marginal differences to regulatory outcomes.[91] Further, concerns have been raised about substantive and procedural issues raised by programmes which seek to distinguish between firms which are genuinely willing to go beyond compliance and organizations which only appear to do so – that is, they make empty compliance commitments for the sake of appearance and reputation.[92] Gunningham argues that the application of a meta-regulation strategy is only appropriate in confined contexts, such as major hazard facilities. In his view, to be effective, a meta-regulation intervention

> requires specialist, high-quality regulators to oversee the risk management strategies of the regulated organization, and sophisticated and motivated regulated organizations to develop and implement such strategies successfully and to regulate themselves effectively. At the very least, a receptive corporate culture is a necessary, though not sufficient, condition for its success.[93]

Similarly, Estlund – who is a proponent of "monitored self-regulation"[94] – has pointed out that a meta-regulation approach may break down where there is a lack of meaningful stakeholder participation. Indeed, Estlund argues that the frequent absence of third-party participants raises the risk that meta-regulation devolves into self-deregulation.[95]

[87] Ibid.

[88] Neil Gunningham and Darren Sinclair, *Leaders and Laggards: Next Generation Environmental Regulation* (Greenleaf Press, 2002). See also Orly Lobel, "New Governance as Regulatory Governance" in David Levi-Faur (ed.), *The Oxford Handbook of Governance* (Oxford University Press, 2012), 72.

[89] Gilad (2010), above n. 82, 485.

[90] Ibid. 492.

[91] Cary Coglianese and Jennifer Nash, "Performance Track's Postmortem: Lessons from the Rise and Fall of EPA's 'Flagship' Voluntary Program" (2014) 38 *Harvard Environmental Law Review* 1.

[92] Ibid.

[93] Gunningham (2017), above n. 27, 193.

[94] A key aspect of this model involves employers signing onto a code of conduct that guarantees their compliance both with employment standards and the external monitoring process.

[95] Cynthia Estlund, "A Return to Governance in the Law of the Workplace" in David Levi-Faur (ed.), *The Oxford Handbook of Governance* (Oxford University Press, 2012), 541.

While there are many critics of meta-regulation, it remains of interest to scholars and policy-makers. Grabosky believes that there are three general, interrelated trends, which have perpetuated the steady rise of meta-regulation strategies. First, he notes that the nation state has weakened, or has symbolically withdrawn from, regulatory activities. The shedding of core regulatory activities has been observable in both developed and developing countries. Devolution of these functions has been driven by a combination of neoliberal ideology, voter resistance, a focus on productivity and a push for government austerity.[96] In this respect, Black has observed that meta-regulation may be inevitable due to the burgeoning gap between regulatory resources and the sheer number, size and complexity of regulated firms in the modern economy.[97]

Second, Grabosky contends that the shrinkage of state activity has prompted an increase in non-governmental actors actively participating in regulatory processes. Similarly, Bartley has argued that non-state initiatives are often triggered by state inaction.[98] For example, the growth in private certification schemes, which is particularly prominent in environmental circles, may be attributed to the failures of governments and intergovernmental organizations (IGOs) to stem illegal behaviour.

A third trend identified by Grabosky – and another reason why he believes meta-regulation has grown in influence – relates to the rise and diffusion of digital technology. He argues that many of these tools – such as digital or remote surveillance via mobile phones, GPS tracking, satellite remote sensing or drones, information transfer and storage, including through social media channels and mobile phone apps, and retrieval and product testing, including by way of DNA or chemical analysis – are no longer the exclusive instruments of the state. Instead, they are now within the reach of ordinary citizens. In his view, this information revolution is likely to enhance the regulatory capacity of citizens so as to allow them to "exercise vigilance directly over the performance of regulatory agencies or over the behavior of corporate actors".[99] Technology may not only facilitate the mobilization and sustainability of mass action, but may also allow citizens to assist in labour-intensive investigation of non-compliance.[100] Similarly, Gunningham and Holley argue that new technologies "promise to reconcile the political realities of funding constraints with the long-held desire to achieve efficient command and control for both leaders and laggards".[101] Enhanced data collection, along with better data sharing, are likely to make regulators' core business cheaper and faster, particularly when compared with deploying additional inspectoral "boots on the ground".[102] Further, these same developments "can also contribute

[96] Peter Grabosky, "Meta-regulation" in Peter Drahos (ed.), *Regulatory Theory: Foundations and Applications* (ANU Press, 2017), 155.

[97] Julia Black, "Paradoxes and Failures: 'New Governance' Techniques and the Financial Crisis" (2012) 75(6) *The Modern Law Review* 1037.

[98] Tim Bartley, "Institutional Emergence in an Era of Globalization: The Rise of Transnational Private Regulation of Labor and Environmental Conditions" (2007) 113(2) *American Journal of Sociology* 297.

[99] Grabosky (2017), above n. 96, 156.

[100] Ibid.

[101] Gunningham and Holley (2016), above n. 70, 282.

[102] Ibid., citing David Hindin, "Using Next Generation Compliance Drivers in Permits and Rules: Advanced Monitoring, Remote Sensing, and Data Gathering, Analysis and Disclosure in Compliance and Enforcement Symposium" (paper presented at J. B. and Maurice C. Shapiro Environmental Law Symposium, Washington DC, 27 March 2015).

to the adoption of more efficient regulation, planning, and permitting, which in turn can enhance the extent of compliance and therefore reduce the need for traditional enforcement".[103] That said, novel monitoring and data surveillance tools inevitably lead to concerns around data privacy and security, as well as regulatory reach. These concerns may lead to anxiety and resistance on the part of regulated actors.[104]

2.1.3 Risk-based regulation

While there is no firm definition, risk-based regulation is broadly understood to be a governance model under which regulators commit to target their resources, as well as their inspection and enforcement activities, on the basis of a systematic assessment of the relevant risk posed by the regulated entity or person.[105] It is a model which has been readily embraced by regulators in the UK, and remains a key element of the better regulation agenda of the OECD and many of its member States.[106] Part of the appeal of risk-based regulation is that it tends to reinforce an "understanding of ourselves as rational and risks in the world as calculable".[107] This technocratic and probabilistic thinking potentially generates an impression that regulation is more efficient, objective and fair for business.

Another attraction of risk-based regulation is that it provides an overarching governance framework, and this is viewed by some as superior to risk management tools which are used in an ad hoc, piecemeal fashion.[108] Responsive regulation is distinctive from risk-based regulation in a number of important respects. While both provide a strategy for regulators to determine their response to particular regulated entities, the former does so on the basis of the regulatee's degree of cooperation or resistance to the regulator, while the latter does so on the basis of risk to the regulator's objectives.[109]

There are several limitations to risk-based regulation, including the tendency to focus on large, known risks at the expense of novel or lower-level risks; the difficulties of obtaining reliable data to undertake an accurate risk assessment; and the failure to take into account

[103] Cameron Holley and Darren Sinclair, "Regulation, Technology, and Water: 'Buy-in' as a Precondition for Effective Real-time Advanced Monitoring, Compliance and Enforcement" (2016) 7 *George Washington Journal of Energy & Environmental Law* 52, 52, citing David L. Markell and Robert L. Glicksman, "A Holistic Look at Agency Enforcement" (2014) 93 *North Carolina Law Review* 1, 69–70.

[104] Gunningham and Holley (2016), above n. 70, 282, citing Mark P. McHenry, "Technical and Governance Considerations for Advanced Metering Infrastructure/Smart Meters: Technology, Security, Uncertainty, Costs, Benefits, and Risks" (2013) 59 *Energy Policy* 834.

[105] Julia Black, "The Emergence of Risk-Based Regulation and the New Public Risk Management in the United Kingdom" (2005) *Public Law* 512; Bridget Hutter, *Anticipating Risks and Organising Risk Regulation* (Cambridge University Press, 2010).

[106] Philip Hampton, *Reducing Administrative Burdens: Effective Inspection and Enforcement* (HMSO, 2005). See generally Christopher Hood and Ruth Dixon, *A Government That Worked Better and Cost Less? Evaluating Three Decades of Reform and Change in U.K. Central Government* (Oxford University Press, 2015).

[107] Fiona Haines, "Regulation and Risk" in Peter Drahos (ed.), *Regulatory Theory: Foundations and Applications* (ANU Press, 2017), 187.

[108] Bridget Hutter, "A Risk Regulation Perspective on Regulatory Excellence" in Cary Coglianese (ed.), *Achieving Regulatory Excellence* (Brookings Institution Press, 2017), 104.

[109] Gunningham (2017), above n. 27, 192.

the overall costs associated with compliance and enforcement when analysing the relevant risk profile of an individual firm or person.[110] For example, Black and Baldwin have argued that while "risk scoring may provide a very ready basis for detecting high-risk actors … it may offer far less assistance in identifying the modes of intervention that are best attuned to securing compliance".[111] Braithwaite also notes that while risk-based regulation is important, "responsiveness to opportunities is more important than responsiveness to risk".[112]

More recently, a number of scholars have extended their critique of risk-based and problem-centred regulatory techniques. For example, Gunningham has noted that there is a lack of convincing empirical evidence which supports a risk-based approach. He contends that although a risk-based intervention strategy may be perceived as legitimate and efficient (in so far that it seems to provide a rational, cost-effective justification for a regulatory response), there is little to show that such a strategy is effective.[113]

Hutter also acknowledges that the regulatory challenges we face in contemporary society have necessitated a change in the way we conceive of and construct problems in terms of risk. In particular, she notes that "[r]isk narratives imply that we are able to anticipate and control the risks that are threatening us".[114] However, the premise of this social project has been eroded by growing levels of uncertainty and contestation which characterize debates about core social and environmental problems and how to tackle them.[115]

In addition, Baldwin and Black argue that identifying, selecting and prioritizing risks and problems inevitably involves normative and political choices.[116] Along similar lines, Haines has argued that once one accepts that risk and regulation are embedded within a particular political narrative, it is easier to discern the relevant differences between jurisdictions. Distinct conceptions and sensitivities to risk, including the extent to which regulation is viewed as a solution to a political problem, also explains why nation states respond in such disparate ways.[117] To make sense of the paradoxical relationship between risk and regulation, Haines suggests that we need to unpick the concept of risk. By doing so, we gain a better understanding of the nature of the relevant risk and a deeper insight into the way in which different risks influence the imperative to increase or reduce regulation.[118]

[110] Robert Baldwin and Julia Black, "Really Responsive Regulation" (2008) 72 *Modern Law Review* 59; Julia Black and Robert Baldwin, "Really Responsive Risk-Based Regulation" (2010) 32 *Law & Policy* 181.

[111] Black and Baldwin (2010), above n. 110, 189–90.

[112] John Braithwaite, "Responsive Excellence" in Cary Coglianese (ed.), *Achieving Regulatory Excellence* (Brookings Institution Press, 2017), 23.

[113] Gunningham (2017), above n. 27, 192.

[114] Bridget Hutter, "Risk, Resilience and Inequality: Current Dilemmas in Environmental Regulation" in Bridget Hutter (ed.), *Risk, Resilience, Inequality and Environmental Law* (Edward Elgar, 2017), 3.

[115] Ibid.

[116] Robert Baldwin and Julia Black, "Driving Priorities in Risk-Based Regulation: What's the Problem?" (2016) 43 *Journal of Law & Society* 565. See also Hutter (2017), above n. 108, 103.

[117] Haines (2017), above n. 107, 180, 182.

[118] Ibid. 183.

In exploring the complex relationship between risk, risk assessment and uncertainty, Haines argues that it is clear that "the basic *assessment* of a particular risk can be partial, distorted or virtually non-existent".[119] As a result of imperfect information and inherent biases, particular risk events tend to attract more attention (that is, where the impact of the event is severe or visceral). Regulatory responses then tend to "cluster" around such events, even when the probability of them coming to pass is relatively remote.[120]

2.1.4 "Nudging" and behavioural change

Behaviour change strategies have increasingly taken hold in various administrations.[121] In particular, the concept of "nudging" people into compliance – by structuring people's choices so as to lead them towards certain outcomes – continues to gain prominence.[122] In short, "nudging" strategies are principally designed to alter "people's behaviour in a predictable way without forbidding any options or significantly changing their economic incentives".[123] More specifically, nudging is said to be a form of "libertarian paternalism". The paternalistic element relates to the fact that nudging is intended to stimulate choices that are perceived as welfare-enhancing for the individual or firm. However, this is tempered by the libertarian dimension which holds that the target person or firm should remain free to choose any option, including a course of action which is not necessarily desirable from a policy perspective.

This theory is built on principles and insights derived from cognitive psychology and behavioural economics and is commonly perceived as offering a less restrictive and lower cost alternative to more traditional forms of regulation, including command and control. The theory of nudge was based on a series of laboratory experiments that highlighted substantial divergence between assumptions made in microeconomic analysis regarding the rational actor and how individuals actually make decisions due to their inherent use of cognitive shortcuts and other decision-making devices.[124] The seven so-called "nudge tools" were developed to harness these findings by those with a stake in influencing the behaviour of others. These tools are: defaults; persuasive campaigning and counselling; design; commitments; transactional shortcuts; information mechanisms; and warning and reminders.[125] But note that Amir and Lobel believe that a nudging strategy should not be

[119] Ibid. 186.

[120] Ibid.

[121] In 2013, the US government established a "Behavioural Insights Team", with a similar "Nudge Unit" having already been formed in the UK in 2010. These developments have been echoed in the EU. See generally Alberto Alemanno and Anne-Lise Sibony (eds), *Nudge and the Law: A European Perspective* (Hart, 2015).

[122] The idea of "nudge" was first laid out in a book by Richard Thaler and Cass Sunstein of the same name: Richard Thaler and Cass Sunstein, *Nudge* (Penguin, 2009). See also Martin Lodge and Kai Wegrich, "Rational Tools of Government in a World of Bounded Rationality" (Discussion Paper No. 75, Centre for Analysis of Risk and Regulation, The London School of Economics and Political Science, December 2014); Cass Sunstein, *Simpler: The Future of Government* (Simon and Shuster, 2013).

[123] Thaler and Sunstein (2009), above n. 122, 6.

[124] Karen Yeung, "The Forms and Limits of Choice Architecture as a Tool of Government" (2016) 38(3) *Law & Policy* 186, 186.

[125] Thaler and Sunstein (2009), above n. 122, 233–4.

limited to a discrete set of classical choice architecture modules.[126] Instead, they contend that insights drawn from behavioural economics should be used to aid the regulator in expanding the regulatory toolbox, which may include a range of mechanisms from command-and-control through to collaborative regulation and self-regulation.[127] Similarly, Bubb and Pildes observe that the non-interventionist bent of behavioural economics and its focus on choice architecture has the effect of cutting off a range of viable and effective options.[128]

However, there have been some important critiques of the idea of "nudge".[129] For example, Baldwin argues that the widespread uptake of "nudging" overlooks some of the more subtle regulatory issues, such as the different degrees of nudge that can, or should, be applied to targets. More generally, Baldwin questions the overall effectiveness of a nudging strategy in producing desired outcomes. He notes that a nudging strategy tends to focus on the decision-making of the individual (and this comes at the expense of a more nuanced view of the range of factors which may be leading to the relevant outcome). By way of illustration, Baldwin argues that "[n]udges that are aimed at individuals … will not always prove effective when the undesirable behaviour at issue is the product of collective processes and policies (for example, where competing interests and pressures within an enterprise produce a corporate decision that harms the environment)".[130]

Baldwin further contends that a nudging strategy may suffer from the same limitations of traditional regulatory methods. First, a nudge approach tends "to vary in effectiveness when targeted at different types of regulatory concern and at people with different characteristics".[131] Second, it is possible that nudges, just like more conventional regulatory strategies, may be prone to triggering unintended consequences. Moreover, Baldwin posits that a nudging strategy may introduce some risks – such as representational and ethical concerns – that are not necessarily present with respect to command and control regulation. There is often a lack of transparency associated with nudging.[132] Separately, Yeung also raises concerns regarding "stealth" nudges, which may be premised on deception and may lead to a non-voluntary response which interferes with individual liberty and freedom.[133]

[126] Yuval Feldman and Orly Lobel, "Behavioural Tradeoffs: Beyond the Land of Nudges Spans the World of Law and Psychology" in Alberto Alemanno and Anne-Lise Sibony (eds), *What Can EU Law Learn from Behavioural Sciences* (Hart Publishing, 2015), 306–7. See also Omar Amir and Orly Lobel, "Stumble, Predict, Nudge: How Behavioural Economics Informs Law and Policy" (2008) 118 *Columbia Law Review* 2098; Omar Amir and Orly Lobel, "Liberalism and Lifestyle: Informing Regulatory Governance with Behavioural Research" (2012) 3 *European Journal of Risk Regulation* 17.

[127] Feldman and Lobel (2015), above n. 126, 306–7.

[128] Ryan Bubb and Richard H. Pildes, "How Behavioural Economics Trims Its Sails and Why" (2014) 127 *Harvard Law Review* 1593.

[129] See generally Gregory Mitchell, "Libertarian Paternalism is an Oxymoron" (2005) 99 *Northwestern Law Review* 1033; Riccardo Rebonato, *Taking Liberties: A Critical Examination of Libertarian Paternalism* (Palgrave Macmillan, 2012).

[130] Robert Baldwin, "From Regulation to Behaviour Change: Giving Nudge the Third Degree" (2014) 77(6) *Modern Law Review* 831, 839.

[131] Ibid.

[132] Luc Bovens, "The Ethics of Nudge" in Till Grune-Yanoff and Sven Hansson (eds), *Preference Change: Approaches from Philosophy, Economics and Psychology* (Springer, 2008).

[133] Karen Yeung, "The Forms and Limits of Choice Architecture as a Tool of Government" (2016) 38(3) *Law & Policy* 186, 198.

While she notes that this does not necessarily imply that nudges are illegitimate, it does demonstrate that a nudging strategy can be problematic and prone to abuse.[134] Separately, Yeung argues that the rise of "Big Data" or use of algorithms to control behaviour is an emerging, and underappreciated, mode of design-based regulation. She believes that choice architecture based on analysis of Big Data are "hypernudges" in that they are "extremely powerful and potent due to their networked, continuously updated, dynamic and pervasive nature".[135] However, in a similar vein to her earlier work, Yeung cautions that there are privacy and legitimacy concerns that surround their use.[136]

2.2 Theories specific to labour regulation and governance

2.2.1 Strategic enforcement

One of the most influential approaches to regulatory enforcement in the context of labour standards regulation is Weil's model of strategic enforcement. In a recent article, Weil summarizes the essence of strategic enforcement as seeking "to use the limited enforcement resources available to a regulatory agency to protect workers as proscribed by laws by changing employer behavior in a sustainable way".[137]

This model was originally conceived as consisting of four pillars: prioritization; deterrence; sustainability; and systemic effects. Since Weil first developed this model, and following his time as head of the Wages and Hours Division (WHD) of the United States Department of Labor (DOL), Weil has further refined the model of strategic enforcement. In particular, Weil recently identified eight major elements that the agency adopted in order "to undertake a more proactive and impactful approach to improving compliance with labor standards".[138] These core elements were as follows:

(1) moving from a reactive to a proactive approach;[139]

(2) setting industry priorities;[140]

[134] Ibid. 199.

[135] Karen Yeung, "'Hypernudge': Big Data as a Mode of Regulation by Design" (2017) 20(1) *Information, Communication and Society* 118, 118.

[136] Ibid.

[137] David Weil, "Creating a Strategic Enforcement Approach to Address Wage Theft: One Academic's Journey in Organizational Change" (2018) 60(3) *Journal of Industrial Relations* 437, 437.

[138] Ibid. 450.

[139] This entailed a shift away from complaints and towards proactive investigations based on agreed agency priorities. Further, and at the same time, the agency refined its methods for triaging complaints so as to more effectively and efficiently identify those complaints which raised serious concerns, related to broader investigation priorities and/or involved workers who would be unable to pursue private claims for back wages (Weil (2018), above n. 137, 442).

[140] Industry prioritization generally involved an analysis of two criteria. First, an assessment of the prevalence of violations (i.e. the number of minimum wage violations per 100 workers) and the severity of those violations (i.e. the total amount of back wages owed per underpaid worker) in the relevant sector. Second, drawing on internal administrative data collected by WHD, the agency

(3) using all enforcement tools;[141]

(4) outreach with employers;[142]

(5) outreach with workers;[143]

(6) strategic communications;[144]

(7) regulatory agreements;[145]

(8) evaluation, performance monitoring and continuing improvement.[146]

To some extent, these eight elements echo the four original pillars of strategic enforcement – for example, "using all enforcement tools" is arguably a modified manifestation of the deterrence pillar. "Strategic communications" appears to be one aspect of the systemic effects principle. Further, the outreach activities, and regulatory agreements that Weil describes in his more recent work seem to be inherently linked to the sustainability of the regulatory intervention (which was a core focus of his earlier research).

Key elements of the strategic enforcement model – in both its original and revised form – reflect features of some of the more general theories of regulation and governance discussed above. For example, the task of setting industry priorities seems to be a manifestation of a risk-based approach. The focus on negotiating "regulatory agreements" with lead firms

estimated the likelihood that the worker would (or would not) exercise their basic rights. Combining these two data sets enabled the WHD to prioritize those sectors where violations were significant and workers were unlikely to institute individual claims.

[141] This involved using all the sanctions at the WHD's disposal, including civil monetary penalties, liquidated damages and the "hot goods" provision of the FLSA. Investigative tools – such as stakeouts, forensic analysis of employment records, worker interviews – were also enhanced to support more stringent enforcement activities (Weil (2018), above n. 137, 443–4).

[142] These outreach activities went beyond the provision of educational and informational tools. Rather, the agency actively collaborated with employer groups in developing guidance material and holding employer-orientated events to make employers more aware of their responsibilities and of the approach of the agency. It also actively used, and publicized, "Administrator Interpretation" which was designed to provide comprehensive guidance for all employers in relation to issues requiring greater clarity, such as those relating to misclassification and joint employment (Weil (2018), above n. 137, 444–5).

[143] The WHD prepared a range of communication tools, in a variety of languages and media, to better equip workers with basic information about their rights, and how to exercise them. The WHD also sought to collaborate with unions, worker centres, community organizations, immigrant rights groups and others to tap into the trusting relationships that these groups had built up with vulnerable workers. Sometimes, these organizations acted as intermediaries between the worker and the agency (Weil (2018), above n. 137, 446–7).

[144] Strategic communication about what the agency is doing, why and how was seen as complementary to some of the other elements of the model, including robust enforcement and outreach.

[145] The WHD developed a form of settlement known as "enhanced compliance agreements" which are designed to not only ensure that back wages are fully recovered for affected workers, but created a platform for future compliance within the business network (Weil (2018), above n. 137, 448–9).

[146] According to Weil, the model of strategic enforcement is not just about achieving the agency's policy objectives, but it also "represents a mindset for organisational management" (Weil (2018), above n. 137, 449). The performance measures that were developed and implemented by the agency are discussed in more detail below.

seems to reflect key features of meta-regulation and responsive regulation. For example, in refining his thinking on responsiveness, Braithwaite has recently argued that an effective regulator is one that "scans for cases that offer strategic macro-opportunities to create public value, potentially transforming an entire industry, even an entire economy, or a crucial aspect of freedom in a society".[147] In light of these parallels, it is also possible, although not yet clear, whether the limitations of some of the idealized models of regulation identified earlier in this review may also apply to the model of strategic enforcement. So far, there have been limited empirical studies of the application of this model (particularly outside of the US). That said, the following model developed by Piore and Schrank – root-cause regulation – proposes an approach which is markedly different from that put forward by Weil.

2.2.2 Root-cause regulation

For some years, Piore and Schrank have undertaken comparative research on labour inspection styles in a range of jurisdictions.[148] On the basis of this body of work, and drawing on insights from political economy and social sciences, they have recently put forward an alternative model of labour regulation and governance that they call "root-cause regulation".[149] This approach is consciously designed to acknowledge, address and potentially respond to the pressing questions raised by the changing world of work.[150] Piore and Schrank are careful to distinguish this model from others based on mainstream economic theory – on the basis that such an approach tends to provide "a limited view of the motivations and behaviours of economic actors and thus offers little insight into the ways in which alternative regulatory frameworks might operate, affect business operations, or be influenced by globalisation and innovation".[151]

A starting point for their model of root-cause regulation rests on the contrast between two distinct approaches to workplace regulation – that is, the US model and the Franco-Latin model.

In short, the US model is said to be built upon a regulatory framework that specifies a series of precise rules to address specific risks. Responsibility for enforcement of those rules is split between different specialist agencies operating at multiple levels of government. Contravention of these rules generally gives rise to a sanction, which is typically in the form of a fine, and more rarely, a criminal penalty. Deterrence is a principal focus. Payment of the relevant penalty discharges the duty holder's responsibility.[152] In separate research, Estlund has similarly observed that US regulators typically treat the enterprise as a "black

[147] Braithwaite (2017), above n. 112, 23.

[148] See, e.g. Michael J. Piore and Andrew Schrank, "Norms, Regulations and Labour Standards in Central America" (Report No. 77, Economic Commission for Latin America and the Caribbean, February 2007).

[149] Michael Piore and Andrew Schrank, *Root-cause Regulation: Protecting Work and Workers in the 21st Century* (Harvard University Press, 2018), 4.

[150] They argue that the regulatory and economic impacts of globalization and innovation are "ambiguous". These developments give rise to a set of competing questions, including the following: Is trade a threat to working-class bargaining power or perhaps an opportunity in disguise? Does information technology heighten the possibility of evasion or lower the cost of enforcement? And where do new business models fit into an old regulatory structure? (See Piore and Schrank (2018), above n. 149, 4.)

[151] Piore and Schrank (2018), above n. 149, 5.

[152] Ibid. 5–6.

box" – that is, they tend to focus on the regulatory outcomes and ignore internal organizational dynamics. She argues that this "black box" approach "may induce firms to take precautions that reduce the risk of detection or punishment without reducing bad outcomes".[153]

In comparison, the Franco-Latin model is generalist and compliance-orientated. All regulation relating to the workplace is set out in a single labour code and this code is administered by a single government agency. Inspectors are trained and encouraged to bring regulated enterprises into compliance and they are provided with extensive discretion in order to achieve that objective. While the suite of sanctions available to the inspectors falling within the Franco-Latin category is similar to those available to their US counterparts, coercive and deterrent-based sanctions are used as a last resort. Paying a fine in these jurisdictions is not viewed as discharging the relevant obligations, rather there is an ongoing expectation that the firm will continue to take active steps to ensure full compliance in the future.[154]

It is this latter approach which has largely influenced Piore and Shrank's thinking on effective forms of regulation and governance in relation to labour standards. They argue that there are numerous advantages of arming inspectors with a wide regulatory mandate and broad discretion, particularly in a world which is characterized by vertical disintegration and volatility.[155] First, under the Franco-Latin model, street-level bureaucrats are able to address more violations with fewer inspectors by substituting *economies of scope* for *economies of scale*.[156] A second benefit of the Franco-Latin approach, at least according to Piore and Shrank, is that it allows regulatory agencies to prioritize different violations at different points in the business cycle.[157] In making these choices, "they are all but forced to consider the peculiarities of the enterprises and their environments, as well as the various goals the society is trying to achieve through workplace regulation and the different weights they are assigned at different moments in history".[158] A third comparative advantage of this model is that not only do inspectors have high levels of discretion; they are supported in their work by a range of experts (such as engineers, lawyers and accountants). As distinct from the deterrence orientation of the US model, the Franco-Latin approach to wrongdoing "is designed to foster compliance through a broader array of tools and tactics, and it therefore allows inspectors to develop plans with which to bring enterprises into compliance over time – in part by treating violations as mere symptoms and looking for their root causes in underlying technological or business practices".[159]

[153] Jennifer Arlen and Reinier Kraakman, "Controlling Corporate Misconduct: An Analysis of Corporate Liability" (1997) 72(4) *New York University Law Review* 687; Estlund (2012), above n. 95, 541, citing Jennifer Arlen, "The Potentially Perverse Effects of Corporate Criminal Liability" (1994) 23(2) *The Journal of Legal Studies* 833; Vikramaditya S. Khanna, "Corporate Liability Standards: When Should Corporations be Held Criminally Liable?" (2000) 37 *American Criminal Law Review* 1239.

[154] Piore and Schrank (2018), above n. 149, 6.

[155] Ibid. 11.

[156] Ibid.

[157] Ibid.

[158] Ibid. 153.

[159] Ibid. 12.

Piore and Schrank note, however, that whether inspectors are practically able to engage in this form of "root-cause regulation" generally depends on how their discretion is managed – a theme we will return to in section 3.2 below.[160]

2.2.3 Co-enforcement

Amengual and Fine argue that there have been two main responses to the enforcement gap in employment standards regulation. First, there has been a push to increase the number of inspectors, ensure a greater level of professionalization among the inspectorate and adopt strategies which are orientated towards deterrence. This proposal is said to "derive from the theory that enforcement intensity is directly related to capacity within state regulatory bureaucracies, commonly understood as Weberian organization and sheer heft".[161] A second set of proposals – which are typified by Weil's model of "strategic enforcement" and Piore and Schrank's advocacy of "root-cause regulation" – seek to redirect focus towards the enforcement mandate and strategy adopted by the inspectorate, rather than the quantum of inspectors per se.

However, in their view, many of the idealized regulatory models in the labour domain had failed to "systematically incorporate the potential contributions of worker organisations and, as a result, overlook[ed] opportunities for co-enforcing labour standards".[162] In support of a "co-enforcement" model, they assert that workers are much more than "passive victims", and worker organizations have much more to contribute beyond providing "arm's length political support for enforcement".[163] In addition, they contend that worker organizations can do more than what is proposed under the archetypal tripartism model posited by Ayres and Braithwaite, which largely focuses on the capacity of public interest groups to prevent regulatory capture on the part of the state. Instead, Amengual and Fine argue that including societal groups in the regulatory process is critical and goes far beyond "guarding the guardians". Rather, such groups can play political *and* operational roles that are "non-substitutable". In their critique of "new governance" approaches,[164] Vosko, Grundy and Thomas have also called for a greater emphasis on worker-orientated enforcement and a

[160] Ibid. 154.

[161] Matthew Amengual and Janice Fine, "Co-enforcing Labour Standards: The Unique Contributions of State and Worker Organisations in Argentina and the United States" (2016) 11(2) *Regulation & Governance* 129, 130, citing Daniel Berliner et al., "Building Capacity, Building Rights? State Capacity and Labor Rights in Developing Countries" (2015) 72 *World Development* 127.

[162] Amengual and Fine (2016), above n. 161, 129. See also Janice Fine and Gregory Lyon, "Segmentation and the Role of Labour Standards Enforcement in Immigration Reform" (2017) 5(2) *Journal on Migration and Human Security* 431. However, it is arguable that this assumption about previous regulatory models is somewhat misplaced. For example, one of the eight principles that are said to characterize the revised model of strategic enforcement outlined in section 2.2.1 above is "outreach with workers". Nonetheless, it is evident that the "co-enforcement" model proposed by Amengual and Fine places a much greater weight on the role and resources of workers and their representatives.

[163] Amengual and Fine (2016), above n. 161, 131.

[164] While they acknowledge that there are various strands of regulatory new governance, they argue that the proponents of this model "call for participatory arrangements in which responsibility is dispersed among the state, employers, employees and civil society actors, and thus is at least partially privatised". However, this critique of the new governance literature is arguably misplaced in light of the fact that they later argue that the apparent weaknesses of regulatory new governance (e.g. the over-reliance on soft law mechanisms) can be rectified through greater involvement of workers and their representatives (see Vosko, Grundy and Thomas (2016), above n. 39).

stronger focus on participatory approaches to enforcement.[165] This is very much in line with the core pillars of the co-enforcement model.

While Amengual and Fine acknowledge that the position and power of worker organizations may augment the state's resources, there are certain resources that worker organizations possess that "can only be partially substituted by the state and only at very high cost".[166] An obvious illustration of this argument is that workers are uniquely positioned to identify violations and worker organizations are specially placed to tap into this pool of information. Further, unlike state bodies which must "appear neutral to multiple principals",[167] worker organizations are not constrained by such pressures and can therefore vigorously advocate on behalf of their constituents. In a similar vein, Amengual and Fine note that:

> Recognizing non-substitutable elements reveals aspects of labor inspection otherwise obscured, and can allow enforcement efforts that take advantage of such capabilities. In contrast to government contracting with a third party to deliver a service previously in their purview, co-enforcement is intended to complement rather than replace government enforcement capacity.[168]

In putting forward a model of "co-enforcement", Amengual and Fine acknowledge that there is a set of boundary conditions – for example, for co-enforcement to take place there needs to be some worker organizations and some state regulators.[169] However, this set of conditions is not necessarily present in every jurisdiction.

2.3 Theories of transnational labour regulation and governance

The vast majority of the regulatory and governance literature, and many of the models just discussed, are concerned with the administrative operation of the state within developed countries. Historically, the regulatory literature – and that concerned with transnational or global governance – were somewhat out of step.[170] However, in the last five years, there have been a number of distinct attempts to develop specific frameworks for analysing transnational governance through a regulation and governance lens.[171] This review will expand on three such theories: the "interactions" model which lies at the centre of various

[165] Vosko, Grundy and Thomas (2016), above n. 39.

[166] Ibid.

[167] Ibid. 4.

[168] Ibid.

[169] Ibid. 10.

[170] Kenneth Abbott and Duncan Snidal, "Taking Responsive Regulation Transnational: Strategies for International Organisations" (2013) 7 *Regulation & Governance* 95, 95. See also Kenneth Abbott et al., *International Organisations as Orchestrators* (Cambridge University Press, 2015).

[171] See, e.g. Adelle Blackett and Anne Trebilcock, "Conceptualising Transnational Labour Law" in Adelle Blackett and Anne Trebilcock (eds), *Research Handbook on Transnational Labour Law* (Edward Elgar, 2015), 3; Tim Buthe and Walter Mattli, *The New Global Rulers: The Privatisation of Regulation in the World Economy* (Princeton University Press, 2011); Matthew Potoski and Aseem Prakash (eds), *Voluntary Programs: A Club Theory Approach* (MIT Press, 2009); Sigrid Quack, "Law, Expertise and Legitimacy in Transnational Economic Governance: An Introduction" (2010) 8(1) *Socio-Economic Review* 3.

theoretical approaches;[172] Abbott, Levi-Faur and Snidal's theory of regulatory intermediaries and orchestration;[173] and Bartley's theory of "place-conscious transnational governance".

2.3.1 Interactions model

The analytical framework developed by Eberlein et al. is focused on the "interactions" in transnational business governance,[174] including the "myriad ways in which governance actors and institutions engage with and react to one another".[175] This group of scholars noted that existing research often examined isolated examples of transnational business governance initiatives, but that overall there was a lack of comprehensive knowledge of the interactions and their role in regulatory systems. In their view, we still "know too little about these interplays to know what configurations are stable or potent", or how regulatory forms "co-evolve, hybridize, compete, and reshape organizational behaviour".[176] The "interactions" model was developed to fill this conceptual gap.[177] Building on this work, Karassin and Perez have similarly and more recently observed that studying "the interactions that define and delineate the boundaries and overlaps between private and public environmental law is a necessary step in developing a better understanding of the new hybrid system of global environmental governance".[178]

Much of the past research on hybrid governance distinguishes between two main forms of interaction between public and private regimes: complementarity and competition. However, more recent research suggests that this binary classification is too simplistic in its portrayal of complex interactions between public and private forms of regulation.[179] Indeed, Eberlein et al. acknowledge that the diversity of transnational business governance initiatives means that no single theoretical approach can accommodate all of the possible permutations. They acknowledge that transnational business governance not only involves heterogeneous

[172] Burkard Eberlein et al., "Transnational Business Governance Interactions: Conceptualisation and Framework for Analysis" (2014) 8 *Regulation & Governance* 1. See also Orr Karassin and Oren Perez, "Shifting Between Public and Private: The Reconfiguration of Global Environmental Regulation" (2018) 25(1) *Indiana Journal of Global Legal Studies* 97; Kevin Kolben, "Dialogic Labor Regulation in the Global Supply Chain" (2015) 36 *Michigan Journal of International Law* 425.

[173] Kenneth Abbott, David Levi-Faur and Duncan Snidal, "Theorizing Regulatory Intermediaries: The RIT Model" (2017) 670(1) *The Annals of the American Academy of Political and Social Science* 14. See also Kenneth Abbott and Duncan Snidal, "Strengthening International Regulation Through Transnational New Governance: Overcoming the Orchestration Deficit" (2009) 42 *Vanderbilt Journal of Transnational Law* 501.

[174] Eberlein et al. define "transnational business governance" as "systematic efforts to regulate business conduct that involve a significant degree of non-state authority in the performance of regulatory functions across national borders" (Eberlein et al. (2014), above n. 172, 3).

[175] Eberlein et al. (2014), above n. 172, 2.

[176] Eberlein et al., above n. 172, 5, citing Marc Schneiberg and Tim Bartley, "Organizations, Regulation, and Economic Behavior: Regulatory Dynamics and Forms from the 19th to 21st Century" (2008) 4(1) *Annual Review Law & Social Sciences* 31, 51–2.

[177] They set out in tabular form a summary of this analytical model (and critical factors/questions for inquiry) (see Eberlein et al. (2014), above n. 172, 15).

[178] Karassin and Perez (2018), above n. 172, 99.

[179] Ibid. 100.

actors with diverse interests and agendas, but that the interactions between these various actors "may be symmetrical or asymmetrical, antagonistic or synergistic, intentional or unintentional".[180] They further note that the interactions themselves: may take place at multiple levels of analysis; may be analysed as outcomes and as causal factors; and are dynamic and may change with time.[181]

Notwithstanding these challenges, the interactions framework aims to disaggregate the regulatory process so as to identify potential points of interaction and to explore the drivers, mechanisms and pathways of interaction. Through a series of pointed questions, the model also seeks to uncover the outputs, outcomes and impacts of these interactions. The framework is analytical in focus, rather than normative. Given the inherent complexity of transnational business governance interactions, the authors caution against seeking to "pick a winner" and identify the most valuable feature of the relevant interaction or the most potent theoretical perspective. They specifically shy away from an approach which tends "to focus on broad explanatory variables, such as institutions, interests and ideas to account for regulatory developments and outcomes".[182] Rather, this framework is principally designed to guide and enhance future research into transnational business governance.

As a starting point, the authors break down regulatory governance into six core components, namely:

(1) framing the regulatory agenda and setting objectives;

(2) formulating rules or norms;

(3) implementing rules within targets;

(4) gathering information and monitoring behaviour;

(5) responding to non-compliance via sanctions and other forms of enforcement;

(6) evaluating policy and providing feedback, including review of rules.

Each component is said to demand "a different portfolio of resources or capacities, including financial resources, organizational capacity, expertise, legitimacy, and strategic position".[183]

Then, for each component of the regulatory process, the model sets out six questions that are vital in analysing the relevant interaction. These questions are:

(1) Who or what is interacting (is the interaction occurring at a micro, meso or macro level)?

(2) What drives and shapes the interactions?

(3) What are the mechanisms and pathways of interaction?

(4) What is the character of these interactions?

(5) What are the effects of interaction?

[180] Eberlein et al. (2014), above n. 172, 3.

[181] Ibid. 6.

[182] Ibid. 8.

[183] Ibid. 6.

(6) How do interactions change over time?

Here, we expand briefly on three central questions, which have been widely interrogated in separate research: factors driving and shaping interactions; mechanisms or pathways of interaction; and the character of interactions.

First, in terms of the *factors driving and shaping interactions*, Eberlein et al. identify a host of possible drivers, including the problem structure, the actors' interests, values, knowledge, resources and the legal and operational limits of their jurisdictions. Similar to some of the conclusions drawn by Locke et al., they note that some research suggests that "interest and value alignment enables cooperation, while misalignment produces conflict",[184] while other research from the legal pluralist tradition suggests that "overlap and inconsistency can be productive".[185] They also argue that industry characteristics, such as ownership concentration, value chain integration, average firm size, and vulnerability to reputational pressures and maturity, can be critical in shaping the relevant interaction.

Second, in terms of the *mechanisms or pathways of interaction*, Eberlein et al. note that "communication by individuals or organizations acting as norm entrepreneurs or mediators constitutes an important pathway".[186] More specifically, they argue that transnational business governance (TBG) schemes "use evidence from other institutions in defining and performing their own roles, pushing issues onto policy agendas, mollifying group pressures, identifying policy solutions, and creating legitimacy. The information TBG schemes produce is, thus, crucial to interactions."[187]

Another mechanism or pathway of interaction – which has been frequently overlooked in the existing literature – is the collection of tools and techniques of regulatory governance. In this respect, Eberlein et al. explicitly draw upon some of the more general theories of regulation and enforcement described above. For example, they point to "meta-regulatory standards" which have been promulgated by various international organizations and have been used in relation to standard-setting, auditing, accreditation and certification. In their view, another critical mechanism is known as "conditional referencing": "if you comply with X's rule, that will constitute compliance with mine". They argue that referencing of this kind is particularly relevant in relation to the interaction between private transnational schemes and state regimes which create interdependencies that can enhance the capacity of each: "TBG schemes gain the state's enforcement capacity; the state gains the schemes' norm-generating capacity; and each gains symbolic resources from the other".[188] In separate work, Karassin and Perez argue that some of the weaknesses of private regulation, such as the potential for regulatory capture, legitimacy problems and weak enforcement mechanisms, may be mitigated through Black's model of "regulatory enrolment", meta-regulatory techniques and other forms of collaborative governance.

Third, in terms of the *character of the interaction*, Eberlein and his co-authors identify four broad categories:

[184] Ibid. 9, citing Christine Overdevest and Jonathan Zeitlin, "Assembling an Experimentalist Regime: Transnational Governance Interactions in the Forest Sector" (2014) 8(1) *Regulation & Governance* 22.

[185] Ibid.

[186] Ibid. 10.

[187] Ibid.

[188] Ibid. 11.

(1) **Competition**: actors may compete on the basis of revenue, reputation, legitimacy, adherents, or other benefits.

(2) **Coordination**: this may take a range of different forms from emulation and mimesis, to deliberate collaboration, to conscious division of labour.

(3) **Cooptation**: there may be a convergence on norms and activities at one end of the spectrum, to hegemony or dominance at the other end (that is, where certain initiatives achieve a quasi-monopolistic position).

(4) **Chaos**: unpredictable, undirected interactions, which display no obvious pattern.

More recently, attempts have been made to analyse the character of interactions in distinct ways. For example, Karassin and Perez developed a typology which describes the interactions from the vantage point of the state – that is, it considers "the degree to which public law supports or opposes the adoption of private law standards, and the legal mechanisms used in support of those ends".[189] Under this typology, Karassin and Perez identify five different types of interaction:

(1) **Incorporation**: where public law adopts requirements that actively support the use of private standards (for example, where the state adopts stricter rules than those that previously existed).

(2) **Facilitation**: where public law provides enabling conditions for private regulation to be adopted by private firms, but does not prescribe or mandate the form of implementation.

(3) **Abstention**: where public law is silent about issues covered by private regulation. This can be perceived as a weak form of facilitation in that it enables growth and innovation in private regulation. Conversely, it can compromise private regulatory efforts, especially where there is limited demand for private standards.

(4) **Substitution**: where public law takes over the regulation of issues that were previously governed by private law.

(5) **Suppression**: where public law prohibits certain forms of private regulation and takes active steps to prevent or curb these initiatives. This is more likely when the credibility, legitimacy or overall effectiveness of private regulation comes under a cloud.

Both Eberlein et al. and Karassin and Perez acknowledge that interactions may not fall neatly into the identified categories. Interactions may simultaneously take multiple forms – for example, there may be interdependence and strategic uncertainty when it comes to transnational private initiatives and state authorities.[190] Similarly, the character of interactions may change over time (for example, coordination might devolve into competition or chaos).

The model of "diaologic regulation"[191] developed by Kolben arguably captures the spectrum of interactions in a more nuanced way by placing them on a four-point axis. This descriptive and normative framework pivots on two particular features of any given interaction: the first

[189] Karassin and Perez (2018), above n. 172, 100–1.

[190] Eberlein et al. (2014), above n. 172, 12, citing Overdevest and Zeitlin (2014), above n. 184.

[191] Note that "dialogic regulation" has been used in other ways. For example, de Chazournes considers the way in which the ILO may act as a "contributor to the construction of dialogic spaces" (Laurence Boisson de Chazournes, "A 'Dialogic' Approach in Perspective" in Adelle Blackett and Anne Trebilcock (eds), *Research Handbook on Transnational Labour Law* (Edward Elgar, 2015), 65).

is the degree of institutional *formality* in which the interaction takes place; the second is the degree of subjective *intentionality* of the parties who are engaging in that transaction. This framework is designed to capture both the qualities and the mechanisms of interaction and communication between private and public regulatory regimes. The principal idea underlying the dialogical regulatory framework is that by mapping the dialogic interactions between public and private regimes, one may better identify ways to harness the relevant capacities of each.[192]

2.3.2 Intermediaries model

An alternative model for assessing and harnessing the capacities of actors in transnational private regulation is that relating to "regulatory intermediaries", which has been an enduring theme in the research undertaken by Abbott, Levi-Faur and Snidal (either separately or together). Indeed, Ruggie has observed that Abbott and Snidal were among the first scholars to systematically map patterns of private and multi-stakeholder initiatives operating in the regulatory grey zone "between globally integrated economic forces and actors on the one hand, and fragmented state-based authority structures on the other".[193]

This model – which has some parallels with smart regulation – explicitly seeks to address some of the shortcomings of binary models of regulation,[194] such as the regulators' limited access to targets, restricted means for influencing the target's behaviour, and a lack of adequate channels for information gathering.[195] Drawing on general theories of decentred regulation, including networked and nodal governance and regulatory capitalism, Abbott, Levi-Faur and Snidal set out an agenda for the study of regulation as a three- (or more) party relationship, with intermediaries at the centre of this analytical framework.[196] They argue that:

> Focusing attention on intermediaries expands the scope of regulatory analysis beyond regulators and their targets to include other key agents in the regulatory process, whether that process is governmental or private, domestic or transnational. This analytical move allows us to characterize and analyze changes in the nature of regulation that are often expressed in terms of the shift from government to governance, the rise of transnational actors and institutions, the growing importance of certification procedures, or the move toward process- or performance-based regulation.[197]

Abbott, Levi-Faur and Snidal define an intermediary as "any actor that acts directly or indirectly in conjunction with the regulator to affect the behaviour of a target".[198] This may include any actor operating in the public or private sphere, or in the domestic or international domain. For example, intermediaries may include: private sector actors, such as certification companies, auditors, advisors, management consultants, accounting firms, or credit ratings agencies; civil society groups, such as NGOs, unions or worker groups; or governmental

[192] Kolben (2015), above n. 172, 142.

[193] Ruggie (2014), above n. 20, 10, citing Abbott and Snidal (2013), above n. 170.

[194] Which assumes that there are only two actors of relevance, namely the regulator and the target.

[195] Abbott, Levi-Faur and Snidal (2017), above n. 173, 18.

[196] For more on regulatory intermediaries, see the special issue of *The Annals of the American Academy* (2017) 670.

[197] Abbott, Levi-Faur and Snidal (2017), above n. 173, 31.

[198] Ibid. 19.

bodies, such as transgovernmental agency networks or international organizations. Even states can act as intermediaries by encouraging other states to comply with international standards or norms.[199]

The intermediary is essentially a "go-between", "whose presence necessarily makes some aspects of regulation *indirect*, as the intermediary stands between the regulator and its target".[200] Its role may be central or peripheral, formal or informal, and can serve public or private interests. The capacities that intermediaries bring to regulatory governance are also diverse: it may include one or more of the following: (1) operational capacity;[201] (2) expertise;[202] (3) independence;[203] and (4) legitimacy.[204] In practical terms, intermediaries may undertake a range of regulatory tasks "from providing expertise and feedback to facilitating implementation, from monitoring the behavior of regulatory targets to building communities of assurance and trust".[205] Intermediation may be the singular function of an actor, or one of many functions that the actor performs. It may involve "hard" rules (such as domestic regulation) or "soft" forms of regulation (such as international norms).

While Abbott, Levi-Faur and Snidal identify a range of regulatory benefits associated with harnessing or enrolling intermediaries, they also acknowledge that it raises at least two potential problems: (1) the risk of regulatory capture;[206] and (2) the challenge of coordination.

In relation to this second issue, Abbot, Levi-Faur and Snidal observe that the goals of intermediaries are diverse: some intermediaries may pay little heed to the underlying policy objective (for example, for-profit auditing firms or credit rating agencies), while others may act without payment on the basis that their interests are aligned with that of the regulator (for example, NGOs and other civil society groups). The organizational missions, interests and

[199] Ibid. 15.

[200] David Levi-Faur, "Regulation and Regulatory Governance" in David Levi-Faur (ed.), *Handbook on the Politics of Regulation* (Edward Elgar, 2011).

[201] Operational capacity includes the ability to "deliver services, provide advice and support to facilitate targets' implementation, monitor target behaviour, and sometimes enforce regulations" (Abbott, Levi-Faur and Snidal (2017), above n. 173, 20).

[202] Expertise is related to operational capacity, but more specifically refers to the specialized knowledge of intermediaries – that is, intermediaries are often seen as having a deeper understanding of the regulatory norms and how to most effectively implement them. This may because they have knowledge of target behaviour (e.g. management and accounting procedures or production and distribution practices) or they are familiar with local conditions.

[203] Independence from the regulator and target is seen as a critical element. For example, intermediary independence is essential for undertaking monitoring tasks (but may be compromised if it depends on the target for resources) (Abbott, Levi-Faur and Snidal (2017), above n. 173, 20).

[204] Legitimacy of the intermediary may be derived from various sources (e.g. the intermediary's expertise or independence). In addition, membership, structures, and procedures of intermediaries may further enhance their perceived legitimacy (e.g. because they are seen as more representative of relevant stakeholders than the regulator) (Abbott, Levi-Faur and Snidal (2017), above n. 173, 21).

[205] Abbott, Levi-Faur and Snidal (2017), above n. 173, 15.

[206] They broadly define capture as "the domination of one regulatory actor by another, restricting the autonomy of the captured actor in performing its regulatory functions" (Abbott, Levi-Faur and Snidal (2017), above n. 173, 28). Cf. Daniel Carpenter and David Moss (eds), *Preventing Regulatory Capture: Special Interest Influence and How to Limit it* (Cambridge University Press, 2014).

cultures of the relevant actor may make them "more or less suitable as intermediaries in specific situations; they may also produce conflicts of interest among regulators, intermediaries, and targets that make regulation difficult".[207] Similar to the issues identified with respect to smart regulation (and other forms of decentred regulation), fragmentation and competition may lead to a range of positive outcomes, including flexibility, innovation, and the ability to refine regulation to suit the specific circumstances of each case. However, rivalry between competing schemes and/or actors can also lead to forum shopping, inconsistent regulatory efforts and dysfunctionality.[208]

Drawing on theories of responsive regulation, Abbott and Snidal contend that IGOs should play a role as "transnational responsive regulators" as they are the only actor that has "the global scope, legitimacy, and focality to play this central role".[209] Indeed, in a recent volume on transnational labour regulation, Blackett and Trebilcock note that the majority of contributors believe that while the ILO has limitations, it still "holds significant potential to foster global, counter-hegemonic transformation".[210]

Abbott and Snidal argue that two regulatory strategies are critical for IGOs seeking to play this regulatory role: collaboration and orchestration. In particular, they argue that through "regulatory collaboration", IGOs can promote business self-regulation and build trust in the regulatory process. While the IGO may not have any coercive sanctions at its disposal (which inevitably weakens direct application of the responsive regulation model), Abbott and Snidal contend that harnessing international public interest groups or "iPIGs", as well as national or local public interest groups which are classically involved in idealized forms of responsive regulation, may allow the IGO to respond to defection by deploying reputational and market sanctions. Further, involving multiple intermediaries not only enhances sanctioning power, it increases protection against capture by monitoring and offsetting business influence.[211] In the context of transnational labour regulation, Ewing has observed that the application of international labour standards in national systems remains a challenge and this is partly due to weak enforcement mechanisms – both at the state and international level. In a sense, Ewing appears to implicitly support the collaboration argument put forward by Abbott and Snidal where he observes that "[t]he problems of the ILO are such, however, that its future role may have to be one in which it continues to work in what is an emerging and complex set of informal relationships with other political, judicial and non-governmental actors to implement and develop the standards it creates".[212]

In terms of "orchestration", they argue that IGOs should seek to coordinate, support, and steer the universe of transnational standard-setting schemes within particular issue areas.[213] They argue that orchestration is a particularly valuable strategy for IGOs. By enrolling

[207] Abbott, Levi-Faur and Snidal (2017), above n. 173, 19–20.

[208] Abbott and Snidal (2013), above n. 170, 102.

[209] Ibid. 103.

[210] Adelle Blackett and Anne Trebilock, *Research Handbook on Transnational Labour Law* (Edward Elgar, 2015), 18.

[211] Abbott and Snidal (2013), above n. 170, 106.

[212] Keith Ewing, "Foreword" in Colin Fenwick and Tonia Novitz (eds), *Human Rights at Work: Perspectives on Law and Regulation* (Hart, 2010), i, xii.

[213] Abbott and Snidal (2013), above n. 170, 102.

intermediaries in the regulatory project, IGOs can fix structural defects and tap into regulatory capabilities that they otherwise lack. Abbott and Snidal explain that:

> By orchestrating private organizations operating within an issue area, IGOs can enhance their own focality. By cooperating with well-regarded intermediaries, IGOs can enhance their own legitimacy and authority. In addition, states that might oppose direct IGO regulatory efforts are less sensitive to IGOs' indirect role as orchestrators. Indeed, the involvement of private intermediaries may provide domestic support for IGO action, increasing state support.[214]

However, catalysing aggressive intermediaries carries some risk – contrary to the wishes of the IGO, iPIGs may engage in regulatory zealotry – that is, they are willing "to impose strong sanctions [which] may enhance the regulatory threat, but may also decrease business trust".[215]

Work in the area of intermediaries has developed over time and there has been a growing call for more research on the mechanisms and processes through which rule intermediaries interpret, implement and construct legal rules.[216] For example, Talesh has observed that much of the existing scholarship focuses on "how rule-intermediaries affect, control, and monitor relations between rule-takers and rule-makers".[217] In comparison, his research reveals that where legal provisions are ambiguous, rule intermediaries often filter law's meaning through competing logics and, in this capacity, intermediaries act as rule-makers.[218] He argues that more research is needed to explore the ways in which stakeholders participating in public–private partnerships shape the way in which actors understand public legal rights and compliance with these obligations.[219]

Similarly, Gilad's research draws on the regulatory intermediaries model to consider the process by which the meanings of regulation and compliance are constructed by business and regulators. She argues that this focus is particularly critical in light of the rise in meta-regulation strategies which shift the responsibility for interpreting what compliance means onto the regulated corporation. On the basis of an empirical case study, Gilad found that:

> meanings of regulation and compliance are shaped by regulators' *and* business professionals' interactive and iterative framing of regulatory problems and solutions. Regulators' and business professionals' frames may be (partially) aligned or misaligned with significant consequences for the extent to which firms' enactment of regulation accords with regulatory intentions. When misalignments occur and are recognized by

[214] Ibid. 106.

[215] Ibid. 107.

[216] Shauhin Talesh, "Rule-Intermediaries in Action: How State and Business Stakeholders Influence the Meaning of Consumer Rights in Regulatory Governance Arrangements" (2015) 37(1) *Law & Policy* 1, 5.

[217] Talesh (2015), above n. 216, 4, citing David Levi-Faur and Shana Starobin, "Transnational Politics and Policy: From Two-way to Three-way Interactions" (Working Paper No. 62, The Hebrew University, 2014).

[218] Talesh (2015), above n. 216, 4.

[219] Ibid. 26.

> regulators, they need to choose between challenging the reframing of their messages and deferring to firms' interpretations.[220]

In light of these findings, and similar to the conclusion reached by Talesh, Gilad also calls for a "more complete model regarding the role that regulators *and* business professionals play in interactively framing what is entailed in compliance with ambiguous laws".[221]

2.3.3 Place-conscious transnational governance

In a recent and extensive volume, Bartley summarizes and theorizes his research of transnational regulation in respect of land and labour rights in Indonesia and China. On the basis of this research, he argues that the dominant models of transnational regulation that we have just described – the interactions model and the intermediaries model – are limited in certain respects.[222] He is especially critical of scholars of transnational governance which have assumed that corruption, weak institutions and low rule of law render many poor and middle-income countries as little more than "empty spaces" or "regulatory voids" to be filled by globalizing norms.[223] By focusing on issues such as agenda-setting by international NGOs, the design of voluntary initiatives, and the legitimacy of private authority as a form of global governance, Bartley argues that theorists have downplayed the importance of the *places* of implementation. Rather, these theories tend to be animated by what Bartley calls the "hope of transcendence": "the idea that pushing standards through supply chains can transform markets by, in effect, pulling factories, forests, and farms out of their local contexts and up to global best practices".[224]

More generally, Bartley identifies at least three major problems inherent within current forms of transnational regulation. These include the absence of countervailing pressures at the location of production,[225] the voluntary nature of standards[226] and the private nature of

[220] Sharon Gilad, "Beyond Endogeneity: How Firms and Regulators Co-construct the Meaning of Regulation" (2014) 36(2) *Law & Policy* 134, 155–6.

[221] Ibid. 135.

[222] In particular, Bartley argues that the "interactions" agenda is distant from points of implementation and does not easily account for the regulatory intersections between transnational and state governance (which is at the core of Bartley's work). He further notes that the intermediaries model (or RIT theory) more fully addresses issues arising in implementation, but is overly focused on the role of auditors (Bartley (2018), above n. 18, 37).

[223] Bartley (2018), above n. 18, 5, citing Abbott and Snidal (2009), above n. 173; John Meyer et al., "World Society and the Nation State" (1997) 103 *American Journal of Sociology* 144; Charles Sabel, Dara O'Rourke and Archon Fung, "Ratcheting Labor Standards: Regulation for Continuous Improvement in the Global Workplace" (Working Paper No. 185, Columbia Law School, 2 May 2000).

[224] Bartley (2018), above n. 18, 5.

[225] Bartley explains that the absence of powerful or organized unions or NGOs means that there is a lack of countervailing forces fighting against the brands' and retailers' quest for low-cost and rapidly adaptable supply chains (Bartley (2018), above n. 18, 259).

[226] Bartley argues that voluntarism has two major weaknesses. First, as brands and retailers are not legally required to push standards through their supply chains, their incentives for rigorous enforcement have been weak (particularly vis-à-vis their interests in expanding markets, pleasing shareholders and maximizing autonomy). Second, even the most credible private regulatory initiatives are structurally dependent on transnational corporations. This partly explains why private regulators

transnational regulation.[227] Building on his critique of the myth of "empty spaces", Bartley argues that it is "better to start from the opposite premise and look closely at the intersections of domestic governance, global production networks, and transnational fields".[228]

Abstracting from the case studies set out in his book, Bartley puts forward a series of theoretical propositions that "specify the likely outcomes of private regulation, the influence of domestic governance, the special significance of territory and rights, and several ways in which the content of rules shapes their implementation".[229] These eight propositions – summarized below – are intended to provide a substantive and generalizable theory of transnational governance.

(1) **Process over performance**: Transnational private regulation most often leads to additional policies and systems, record-keeping, or other forms of documentation, even if the rules appear to require more substantive changes in performance. Bartley explains that "auditing requires the world to be auditable – that is, it seizes on issues for which documentation is available and downplays issues that are illegible".[230]

(2) **Network conditions for improvement**: The likelihood of more substantive changes in performance is related to (a) the "network distance" between the demander and ultimate target of the rules and (b) the durability of the relationship. The greater the network distance, the weaker the flow of rules. Similarly, if the relationship between the demander and target of the rules is fleeting and market-based, resistance or evasion of rules is more likely.[231]

(3) **The political construction of compliance**: Compliance tends to be constructed in more demanding terms in locations where domestic civil society is active and autonomous.

tend to construct compliance (and potentially water down rules) in ways that align with domestic governance and existing cultures of production (Bartley (2018), above n. 18, 260–1).

[227] Bartley explains that "private regulation's sphere of influence is limited to conditions within a particular site of production. It has little bearing on the surrounding labor markets, commodity trading systems, legal norms, or industry-wide cultures of production" (Bartley (2018), above n. 18, 261).

[228] Bartley (2018), above n. 18, 35–36.

[229] Ibid.

[230] Bartley (2018), above n. 18, 56. Bartley refers to the work of Sum and Pun who found that private regulation has mostly brought the "institutionalisation of paperwork" as factory managers create increasingly more records to produce to auditors (Ngai Lin Sum and Ngai Pun, "Globalisation and Paradoxes of Ethical Transnational Production: Code of Conduct in a Chinese Workplace" (2005) 9(2) *Competition and Change* 181).

[231] Bartley (2018), above n. 18, 57–59. This proposition points to the importance of the structure of production processes in influencing outcomes. For example, Bartley observed that while large first-tier suppliers to leading brands cleaned up working conditions at their sites – becoming so-called "window factories" – far worse conditions continued to persist in subcontracted factories. Brands and retailers often sought to shift the enforcement burden to first-tier suppliers, but Bartley notes that these attempts were not necessarily successful. See also Richard Locke, Matthew Amengual and Akshay Mangla, "Virtue Out of Necessity? Compliance, Commitment and the Improvement of Labour Conditions in Global Supply Chains" (2009) 37 *Politics & Society* 319; Khalid Nadvi and Gale Raj-Reichert, "Governing Health and Safety at Lower Tiers of the Computer Industry Global Value Chain" (2015) 9(3) *Regulation & Governance* 243.

Where civil society is weak or repressed, auditors are likely to accept more minimalistic definitions of compliance.[232]

(1) **The clash of rules**: When transnational standards clash with domestic governance, the latter will usually retain primacy. Bartley explains that typically "this involves transnational rules that call for companies to take actions that cut strongly against domestic law and cultures of production".[233] Where private regulation and domestic governance is contradictory, it is often the case that auditors will "ignore, dampen, or redefine transnational standards to allow them to be implementable in that domestic context".[234]

(2) **Territories, rights and decentred authority**: Domestic governance is especially likely to retain primacy when a transnational rule focuses on territory or rights (for example, workers' rights to unionize or be treated equally in hiring). A private regulator may have the tacit authority to enforce a range of rules through their supply chains – such as the level at which workers should be paid. This can be achieved through a change in business practice. However, if private regulators want to protect rights – such as collective rights to form a trade union – they often depend on legal and judicial systems provided by the nation state.[235] In the face of resistance, the only option available to a lead firm is to cease the business relationship.[236]

(3) **Beyond land and labour: a typology of rules**: Private rules that coordinate markets or regulate product characteristics will be more vigorously enforced than rules that restrict suppliers' production processes and methods (for example, most labour and environmental standards). More specifically, Bartley believes that the focus or target of the rules (quality/safety of products versus quality/safety of production process and methods) is an important dimension for the study of private regulation "because it highlights where the risks of non-compliance are most directly felt".[237]

(4) **Land over labour**: Among market-restricting, production process-focused rules, those focused on land and environmental standards tend to be more vigorously enforced than

[232] By way of example, Bartley notes that auditors of labour standards in China "knew that it was nearly impossible for factories to meet the widely flouted legal limit on working hours, so they pushed at most for compliance with the sixty hour standard set by many brands – in spite of the fact that most codes of conduct also call for legal compliance" (Bartley (2018), above n. 18, 60).

[233] For example, "while most labour codes of conduct and factory certification initiatives ask companies to respect workers' freedom of association and collective bargaining rights, these rights are heavily restricted by law in China" (Bartley (2018), above n. 18, 61).

[234] Bartley (2018), above n. 18, 62.

[235] Ibid. 63–4.

[236] Although Bartley suggests that protection of collective rights is very weakly enforced by many private regulators, as this potentially increases the threat of disruption and decreases managerial flexibility of their suppliers (Bartley (2018), above n. 18, 64). See also Niklas Egels-Zanden and Jeroen Merk, "Private Regulation and Trade Union Rights: Why Codes of Conduct Have Limited Impact on Trade Union Rights" (2014) 123(3) *Journal of Business Ethics* 461.

[237] Product-based rules are directed at minimizing hazards or risks that travel with the product to the end-user (e.g. retailer or consumer brand), whereas process-based rules are aimed at reducing the hazards of non-compliance at the point of production. Production workers, not distant consumers or transnational corporations, bear most of the risks of hazardous workplaces (Bartley (2018), above n. 18, 66–7).

those for labour.[238] While there have been some small exceptions, Bartley found that on the whole, there is little evidence of rigorous monitoring or substantive change in the fair labour standards field. Instead, it seems that private regulatory regimes have led only to modest improvements (if any). The case of Rana Plaza is cited as the most clear example of regulatory failure in this respect.

(5) **Making sense of the differences between land and labour**: Private rules tend to be more rigorously enforced to the extent that (a) non-industry groups occupy powerful positions in multi-stakeholder initiatives; (b) industrial operations are immobile and visible;[239] and (c) the content of rules resonates with the main constituents and watchdogs in the field. In relation to this last factor, Bartley explains that while land and labour share important similarities as fictitious commodities, they have been framed in policy-making and advocacy communities in distinct ways, especially in relation to the global common good. While it is broadly accepted that environmental problems "affect us all", there is much more reluctance to see labour standards as a global common good (which is often discredited as attempts at protectionism).[240]

Bartley argues that his theory of transnational governance is "substantive" in three senses. First, rather than assuming that global norms will have a transcendent effect on empty spaces of un-governance, the theory focuses on the peculiarities of the places of implementation. Second, taking into account a range of contextual factors, the theory makes claims about the likely outcomes that may flow from transnational private regulation. Third, and by way of a related point, the theory argues that "the content of rules, the ideas that animate transnational fields, and even features of the relevant products can shape the outcomes of private regulation".[241]

In seeking to improve the outcomes of transnational private regulation, and taking these various theoretical propositions into account, Bartley puts forward an idealized model of "place-conscious transnational governance", which focuses on the spatial and temporal dimensions of corporate responsibility and sustainability and calls for "recentreing the state".[242] First, Bartley makes the point that bypassing domestic governance is nearly impossible in practice. In light of this, Bartley argues:

> practitioners of transnational private regulation should look for opportunities to connect with local reformers who are seeking stronger enforcement of the law on the books or political changes that expand the relevant rights and protections. Although the assumption of empty spaces obscures it, the law on the books often includes provisions that are congruent with transnational rules, including minimum wage and maximum hour requirements [and] restrictions on child labor and forced labor... Domestic laws of course vary, and they rarely align perfectly with international norms, but stronger enforcement of

[238] Bartley (2018), above n. 18, 68–70.

[239] For example, Bartley notes that while forestry is tied to a particular geographical location, consumer products – such as apparel and footwear – that can be made essentially the same way in a variety of places are "more prone to globetrotting orders, 'hit and run' rule implementation efforts, intense price competition, and hard-fought gains that are quickly nullified" (Bartley (2018), above n. 18, 75).

[240] Bartley (2018), above n. 18, 77.

[241] Ibid. 55.

[242] By way of example, Bartley points to the new, binding transnational timber legality regime and the ILO–IFC Better Work programmes (Bartley (2018), above n. 18, 37).

> existing law would clearly improve labor and environmental conditions in global industries.[243]

A second proposal, and one that qualifies the first, is to use the existing infrastructures for transnational governance in more effective ways. More specifically, he argues that there is a need to move past voluntarism and address half-hearted enforcement by crafting "policies that require companies in large consumer markets to ensure compliance in their supply chains – and hold them legally responsible when lapses occur".[244]

A third critical element of Bartley's model is to revise the expectations for corporate responsibility in public and private sectors so as to take greater account of the spatial and temporal dimensions of decent work, rather than simply assuming that by adopting best practices for certification, auditing and reporting, transnational corporations can create responsible and sustainable conditions wherever their suppliers are located. Instead, Bartley argues that the location of a transnational corporation's suppliers inevitably shapes the baseline conditions of production and the possibilities for improvement. Further, the speed at which companies move their orders from one place to another can have the effect of undermining hard-fought and gradual improvement at the initial location of production. In other words, Bartley argues that "[i]f judgments of responsibility and sustainability instead incentivized transnational corporations to prioritize locations where compliance is more feasible and to be patient – that is, to keep orders there as struggles and reforms occur – the impact of private regulation could increase".[245]

[243] Bartley (2018), above n. 18, 262.

[244] Ibid.

[245] Ibid. 263.

3. Regulation and governance in practice – Challenges and opportunities

While the power and influence of the nation state is under threat in an increasingly globalized environment, it remains a central actor in the governance of work. This section will focus on the literature which is concerned with the mechanics of labour administration and inspection largely within the domestic sphere.

3.1 Drivers of compliance (and non-compliance)

There is mounting evidence of the scale and depth of non-compliance with employment standards regulation – both in developed[246] and developing economies.[247] However, there is arguably less consensus (and less empirical research) on the factors which influence and shape the compliance behaviour of employers, lead firms and other third party stakeholders.[248] This is a critical gap. Parker and Neilsen argue that research on compliance (as opposed to regulation) is essential because the impact of regulation ultimately depends on the responses of individual businesses and citizens.[249] Put simply, "[g]ood regulatory practice requires that a regulator have a deep understanding of the factors that influence a regulatee's behaviour".[250]

[246] In Australia, there has been a raft of recent government reports and scholarly research which explores the problem of "wage theft" (see, e.g. Laurie Berg and Bassina Farbenblum, "Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey" (Research Report, November 2017); Fiona Macdonald, Eleanor Bentham and Jenny Malone, "Wage Theft, Underpayment and Unpaid Work in Marketised Social Care" (2018) 29(1) *Economic and Labour Relations Review* 80); Unions NSW, "Lighting Up the Black Market: Enforcing Minimum Wages" (Report, 2017)). There have been similar attempts to quantify the extent of the problem in Ontario, Canada (see, e.g. Andrea Noack, Leah Vosko and John Grundy, "Measuring Employment Standards Violations, Evasion and Erosion – Using a Telephone Survey" (2015) 70(1) *Relations Industrielles/Industrial Relations* 86); Leah Vosko, Andrea Noack and Eric Tucker, "Employment Standards Enforcement: A Scan of Employment Standards Complaints and Workplace Inspections and Their Resolution Under the Employment Standards Act, 2000" (Working Paper No. 265, All Papers, 2016)); in the UK (see Catherine Barnard and Amy Ludlow, "Enforcement of Employment Rights by EU-8 Migrant Workers in Employment Tribunals" (2016) 45(1) *Industrial Law Journal* 1); Nick Clark and Eva Herman, "Unpaid Britain: Wage Default in the British Labour Market" (Report, Middlesex University, November 2017)); and in Chile (Ravi Kanbur, Lucas Ronconi and Leigh Wedenoja, "Labour Law Violations in Chile" (2013) 152(3–4) *International Labour Review* 431).

[247] Urmila Chatterjee and Ravi Kanbur, "Non-Compliance with India's Factories Act: Magnitude and Patterns" (2015) 154 *International Labour Review* 393; Muhammod Shaheen Chowdhury, "Compliance with Core International Labor Standards in National Jurisdiction: Evidence from Bangladesh" (2017) *Labor Law Journal* 78; Sunwook Chung, "Explaining Compliance: A Multi-actor Framework for Understanding Labour Law Compliance in China" (2015) 68(2) *Human Relations* 237; Andres Ham, "Minimum Wage Violations in Honduras" (2015) 22 *IZA Journal of Labor & Development* 1; Linxiang Ye, T. H. Gindling and Shi Li, "Compliance with Legal Minimum Wages and Overtime Pay Regulations in China" (2015) 16 *IZA Journal of Labor and Development* 1.

[248] But see Tess Hardy and John Howe, "Creating Ripples, Making Waves? Assessing the General Deterrence Effects of Enforcement Activities of the Fair Work Ombudsman" (2018) 39 *Sydney Law Review* 471.

[249] Christine Parker and Vibeke Nielsen, "Compliance: 14 Questions" in Peter Drahos (ed.), *Regulatory Theory: Foundations and Applications* (ANU Press, 2017), 217.

[250] Freiberg (2017), above n. 26, 146, citing New Zealand Productivity Commission, "Regulatory Institutions and Practices" (Report, New Zealand Productivity Commission, June 2014).

Parker and Nielsen define "compliance" as the "panoply of behavioural and attitudinal responses that individuals and firms make to regulation".[251] In seeking to define compliance, they draw a distinction between two different approaches. First, *objectivist* approaches to compliance are used to identify and explain behaviour that is obedient to a regulatory obligation and explore how and why this behaviour occurred, and under what circumstances.[252] Objectivist studies of compliance often assert that rule adherence turns on a commitment of the duty-holder to the underlying principles and values of the rule, as well as the fairness and legitimacy of the rule-making process.[253] In comparison, *interpretivist* approaches to compliance "understand compliance to be a complex, ambiguous process in which the meaning of regulation is transformed as it is interpreted, implemented and negotiated in everyday life by those to whom it is addressed".[254]

Broadly speaking, many of the same categories of compliance motivations that were identified in both of the previous literature reviews remain relevant, and central to, much of the general literature on regulation and governance. Winter and May identified three general types of motivations for compliance which are labelled "economic", "normative" and "social" respectively.[255] Other factors – such as the economic resources, managerial experience, know-how and oversight, and the size and structure of firms being regulated – also influence the capacity and willingness to comply.[256]

More specifically, in the labour regulation context, Bernhardt has argued that non-compliance with employment standards has become a common cost control strategy for a growing number of employers. Johnstone has made similar observations with respect to work health and safety obligations.[257] Indeed, this idea is embedded in the concept of "fissured employment" – the term originally coined by Professor David Weil[258] – which has become an increasingly accepted way of understanding the prevalence of poor compliance

[251] Parker and Nielsen (2017), above n. 249, 217.

[252] See, e.g. Sally Simpson, *Corporate Crime, Law and Social Control* (Cambridge University Press, 2002).

[253] Valerie Braithwaite, *Defiance in Taxation and Governance: Resisting and Dismissing Authority in a Democracy* (Edward Elgar, 2009); Neil Gunningham, Robert Kagan and Dorothy Thornton, *Shades of Green: Business, Regulation and Environment* (Stanford University Press, 2003); Tom Tyler, *Why People Obey the Law* (Princeton University Press, 1990).

[254] Parker and Nielsen (2017), above n. 249, 218. See also Lauren Edelman, Christopher Uggen and Howard Erlanger, "The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth" (1999) 105(2) *American Journal of Sociology* 40; Susan Silbey, "The Sociological Citizen: Pragmatic and Relational Regulation in Law and Organizations" (2011) 5(1) *Regulation & Governance* 1.

[255] See, e.g. Soren Winter and Peter May, "Motivation for Compliance with Environmental Regulations" (2001) 20(4) *Journal of Policy Analysis and Management* 675.

[256] See generally Robert Kagan, Neil Gunningham and Dorothy Thornton, "Fear, Duty, and Regulatory Compliance: Lessons from Three Research Projects" in Christine Parker and Vibeke Nielsen (eds), *Explaining Compliance: Business Responses to Regulation* (Edward Elgar, 2011), 37.

[257] Richard Johnstone, "The Changing Nature of Work and the Regulation of Health and Safety" in Douglas Brodie, Nicole Busby and Rebecca Zahn (eds), *The Future Regulation of Work: New Concepts, New Paradigms* (Palgrave Macmillan, 2016).

[258] See David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* (Harvard University Press, 2014).

behaviour across a range of jurisdictions,[259] including in the US,[260] Canada,[261] the UK[262] and Australia,[263] among others.[264] In essence, the concept of fissuring has been used to capture the general tendency for major businesses in private and public capital markets to increasingly focus on core competencies, while shedding many direct employees. They achieve this reorganization through a variety of methods, including subcontracting, third party management and franchising. Weil explains that:

> This "fissuring" of employment increases incentives for noncompliance, for example, at the bottom of several levels of subcontractors or between small franchisees whose margins are typically thin and competition fierce. The fissured workplace also creates greater complexity in defining who is responsible for that compliance, given the multiple organizations with a hand in setting working conditions.[265]

In a transnational context, Martin similarly observes that "[t]he lack of any legally required connection between the boundaries of the firm and those of the corporation has serious social consequences. The practice of corporate fragmentation allows corporations to enjoy all the

[259] See International Labour Organization, "Non-Standard Employment Around the World: Understanding Challenges, Shaping Prospects" (Research Report, 16 November 2016).

[260] Lawrence F. Katz and Alan B. Krueger, "The Rise and Nature of Alternative Work Arrangements in the United states, 1995–2015" (Working Paper No. 22667, National Bureau of Economic Research, 2016).

[261] Kevin Banks, "Employment Standards Complaint Resolution, Compliance and Enforcement: A Review of the Literature on Access and Effectiveness" (paper prepared for the Ontario Ministry of Labour, October 2015); Michael Mitchell and John Murray, "Changing Workplaces Review: Special Advisors' Interim Report" (Report, Ontario Ministry of Labor, July 2016); Michael Mitchell and John Murray, "The Changing Workplaces Review: An Agenda for Workplace Rights – Final Report" (Report, Ontario Ministry of Labor, May 2017); Vosko, Noack and Tucker (2016), above n. 246.

[262] See David Metcalf, *Labour Market Enforcement Strategy 2018 to 2019* (May 2018), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/705503/labour-market-enforcement-strategy-2018-2019-full-report.pdf; Wanjiru Njoya, "Corporate Governance and the Employment Relationship: The Fissured Workplace in Canada and the United Kingdom" (2015) 37 *Comparative Labor Law & Policy Journal* 121.

[263] Richard Johnstone and Andrew Stewart, "Swimming Against the Tide? Australian Labor Regulation and the Fissured Workplace" (2015) 37 *Comparative Labor Law & Policy Journal* 55.

[264] There has been a special issue of *Comparative Labour Law & Policy Journal* ((2015) 37(1)) focusing on "fissured" employment, which includes articles in relation to Israel (Guy Davidov, "Indirect Employment: Should Lead Companies be Liable?" (2015) 37 *Comparative Labor Law & Policy Journal* 5); Brazil (Roberto Fragale Filho, "Brazilian's Fissured Workplace: David Weil's Vignettes in the New World" (2015) 37 *Comparative Labor Law & Policy Journal* 37); Italy (Emanuele Meneghatti, "Mending the Fissured Workplace: The Solutions Provided by Italian Law" (2015) 37 *Comparative Labor Law & Policy Journal* 91); Sweden (Petra Herzfeld Olsson and Erik Sjodin, "The Fissured Workplace: Some Responses to Contemporary Challenges in Sweden" (2015) 37 *Comparative Labor Law & Policy Journal* 143); France (Ray Jean-Emmanuel and Jacques Rojot, "The Fissured Workplace in France" (2015) 37 *Comparative Labor Law & Policy Journal* 163); and Japan (Qi Zhong, "The Fissured Workplace in Japan: A Legal Anatomy" (2015) 37 *Comparative Labor Law & Policy Journal* 181).

[265] Weil (2018), above n. 137, 441. See also Minwoong Ji and David Weil, "The Impact of Franchising on Labor Standards Compliance" (2015) 68(5) *ILR Review* 977.

rights conferred by their legal status, while minimizing their legal responsibility for the consequences of their economic activities."[266]

Piore and Schrank agree with the proposition that structural changes in the US economy (and the global economy more generally) are widespread and profound.[267] However, they argue that there are competing narratives on the effect of these changes. For example, they argue that:

> outsourcing is conducive to both efficiency *and* evasion; that independent contractors come in a *variety* of shapes and sizes … and that non-compliance is a product of ignorance – including not only ignorance of the law but ignorance of modern production techniques that would allow employers to compete and comply with the law at the same time – as well as opportunism.[268]

Piore and Schrank go on to observe that the existing regulatory system does not have the capacity to distinguish between these conflicting motivations, in part because the regulators (at least in the US) suffer from "tunnel vision".[269]

Braithwaite has noted that frequently business regulators find that a graduated regulatory response fails to achieve the desired objectives of either restorative justice (which is deemed appropriate for the so-called "virtuous actor") or deterrence (which is invoked in relation to the "rational actor"). Braithwaite hypothesizes that "the most common reason in business regulation for successive failure of restorative justice and deterrence is that noncompliance is neither about a lack of goodwill to comply nor about rational calculation to cheat. It is about management not having the competence to comply." In such circumstances, incapacitation is viewed as the most viable response.[270]

On the flipside, there is research that examines the reasons why firms seek to comply (and even go beyond compliance). In a transnational context, Bartley has argued that there are four main demands that can create incentives for firms to generate and disseminate rules through their supply chains, these are: naming and shaming campaigns; demands from "conscientious consumers";[271] socially responsible investors; and government procurement. These factors not only prompt firms to take steps to raise standards in their supply chain, but to develop methods for providing the necessary assurance that the rules are being

[266] Isabelle Martin, "Corporate Governance Structures and Practices: From Ordeal to Opportunities and Challenges in Transnational Labour Law" in Anne Trebilcock and Adelle Blackett (eds), *Research Handbook on Transnational Labour Law* (Edward Elgar, 2015), 53.

[267] However, the extent of these structural changes (and their effect on employment standards regulation) has been questioned by some. See, e.g. Annette Bernhardt, "Labor Standards and the Reorganisation of Work: Gaps in Data and Research" (Institute for Research on Labor and Employment, Working Paper #100–14, January 2014).

[268] Piore and Schrank (2018), above n. 149, 10.

[269] Ibid. 10–11.

[270] Braithwaite (2017), above n. 31, 119.

[271] Although Bartley notes that the influence of this factor varies significantly across products and countries. For further discussion, see Tim Bartley et al., *Looking Behind the Label: Global Industries and the Conscientious Consumer* (Indiana University Press, 2015).

enforced.[272] However, he also notes that the structure of global production networks is often complex and variable. Bartley observes that:

> Research on labor standards has argued that improvement is more likely when buyers and suppliers have long-term, collaborative relationships, which allow for joint problem-solving over time, whereas "hit-and run" demands for compliance tend to provoke evasion.[273] On the other hand, as these same scholars recognize, long-term relationships are scarce in many global industries, and it is the growth of highly competitive, rapidly changing, and "fissured" supply chains that has generated the demand for new forms of regulation.[274]

In addition to these elements, Martin argues that contemporary corporate governance is an important explanatory factor which has contributed both to greater financial concentration, as well as increased decentralization of production in firms.[275] In separate and novel research, Amengual, Coslovsky and Yang sought to explore the way in which employers in developing countries perceive labour regulation.[276] Using survey data from employers in 19,000 manufacturing firms in 82 developing countries, Amengual et al. found that, contrary to the predictions of some theories of globalization,[277] firms that export are more likely to have negative opinions towards labour regulation than those who sell their products domestically. Further, firms that receive foreign direct investment have similar views to those that rely on domestic capital. Instead, they found that the diversity in employers' opinions of labour regulations largely hinged on the competitive pressures they faced, and their use of skilled workers.[278]

While historical accounts of compliance conceive of the regulated organization as a single entity, a number of recent studies have focused on the way in which "action within the organization is coordinated to produce, ignore, or resist compliance with legal regulations".[279] In this respect, Freiberg has noted that:

> Regulatees are heterogeneous not only in legal form but in their motivations, personal and institutional environments, interactions with others and with regulators. Regulatees may be part of professional, ethical, legal and religious cultures with their own norms, values and

[272] Bartley (2018), above n. 18, 50.

[273] Ibid., citing Locke, Amengual and Mangla (2009), above n. 231; Stephen Frenkel and Duncan Scott, "Compliance, Collaboration and Codes of Labor Practice: The Adidas Connection" (2002) 45(1) *California Management Review* 295; Charles Sabel, "Rolling Rule Labor Standards: Why Their Time Has Come, and Why We Should be Glad of It" in George Politakis (ed.), *Protecting Labour Rights as Human Rights: Present and Future of International Supervision* (ILO, 2007).

[274] Bartley (2018), above n. 18, 50, citing Weil (2014), above n. 258.

[275] Martin (2015), above n. 266, 61.

[276] Matthew Amengual, Salo Coslovsky and Duanyi Yang, "Who Opposes Labor Regulation? Explaining Variation in Employers' Opinions" (2017) 11 *Regulation & Governance* 404.

[277] See, e.g. Layna Mosley, "Workers' Rights in Global Value Chains: Possibilities for Protection and for Peril" (2017) 22(2) *New Political Economy* 153.

[278] Amengual, Coslovsky and Yang (2017), above n. 276.

[279] Garry Gray and Susan Silbey, "Governing Inside the Organisation: Interpreting Regulation and Compliance" (2014) 120(1) *American Journal of Sociology* 96, 98.

> beliefs, leaders and networks, each of which may either support or undermine the efforts of regulators to change their behaviours.[280]

Moreover, in a recent study, Gray and Silbey do not seek to categorize actors as moral, immoral or amoral calculators, a practice that has defined much of the preceding research. Rather, they consider how "variations in the occupational position of actors within organisations – distinguished by autonomy, expertise, and frequency of interaction with regulators – influence how these workers understand, negotiate and enact compliance with regulations".[281] Drawing on three case studies of organizations occupying distinct sectors, Gray and Silbey put forward a typology of constructions of the regulator by the regulated population, namely: (1) regulator as threat; (2) regulator as ally; and (3) regulator as obstacle.[282] They argue that occupational variation and stratification play as large a role in organizational governance and compliance posture as do rules and norms. For example, Gray and Silbey observe that the construction of the regulator as a threat leads to cosmetic compliance (that is, efforts to "look compliant") as opposed to taking active steps to ensure and sustain substantive compliance with the relevant regulation. In comparison, where a regulator is perceived as an ally, regulators are treated as "resources available for internal management of uncertainty and risk".[283] This perception is most common among more senior managers and those that have regular interactions with the inspectorate. These findings are very much aligned with, and support, Piore and Schrank's model of root-cause regulation, discussed in section 2.2 above.

3.2 The relevance of legal mandates and regulatory culture

Despite challenges to the effective operation of the contract of employment as a regulatory device, it remains the "conceptual touchstone"[284] of much employment regulation. Together with the unitary notion of the employer, this has brought issues of regulation and governance into sharper focus.[285] Along similar lines, Martin has observed that the transformation of the firm – and the dual movement towards financial concentration on the one hand and decentralization of production on the other – has posed a critical regulatory challenge in that lead firms have grown "both more powerful and practically beyond the reach of positive labour law".[286]

There is a growing body of scholarship which has sought to explore a range of novel regulatory alternatives to the binary model of employment. While many of these proposals tend to focus on expanding the category of "worker", a number of models are specifically directed towards addressing the compliance and enforcement problems posed by "fissured" employment and multi-party arrangements more generally. A number of scholars have been

[280] Freiberg (2017), above n. 26, 144–5.

[281] Gray and Silbey (2014), above n. 279, 99.

[282] Ibid. 99–100.

[283] Ibid. 120.

[284] International Labour Organization (2018), above n. 1, 2.

[285] These issues have also been observed at the level of the nation state. See, e.g. Xiangmin Liu, "How Institutional and Organisational Characteristics Explain the Growth of Contingent Work in China" (2014) 68(2) *ILR Review* 373.

[286] Martin (2015), above n. 266, 51.

pushing for a reframing of regulatory frameworks – some modest, others more radical – so as to allow for ascription of liability beyond the direct employer.[287]

Increasingly, the regulatory response – both at a statutory and administrative level – seeks to assign obligations to multiple parties in certain business networks, such as franchise systems, labour hire or temporary work arrangements, and/or supply chains. These responses take a range of different forms from voluntary, self-regulatory measures to legal mechanisms designed to sanction key stakeholders.[288] In a number of developed economies, the legal frameworks regulating labour standards and their enforcement have undergone extensive review, and varying levels of reform.[289] Perhaps the most far-reaching are the recent reforms to the Fair Work Act 2009 (Cth), which holds franchisors and holding companies liable for prescribed contraventions committed by their franchisees and subsidiaries respectively.[290] These changes were prompted by perceived shortcomings in the previous regulatory framework and the challenges of achieving effective enforcement outcomes in fragmented business networks.

As Marshall has pointed out, the reconceptualization of the "employer" is important not just in domestic regimes, but is equally critical for transnational and developing contexts. This raises related questions of how to expand the reach of labour law beyond national boundaries and how to achieve a greater level of coordination between a wide range of regulatory actors.[291] These issues were well-canvassed in section 2 above.

The scope and structure of the relevant legal framework is not only likely to affect compliance behaviours and attitudes of employers, intermediaries and lead firms, but the

[287] See, e.g. Bryan Arbeit, "A Franchisor's FLSA Liability for its Franchisee's Workers: Why Operational Control over Employment Conditions Should Make a Franchisor a Joint Employer" (2015) 32 *Hofstra Labor & Employment Law Journal* 253; Steven Carvell and David Sherwyn, "It Is Time for Something New: A 21st Century Joint-Employer Doctrine for 21st Century Franchising" (2015) 5(1) *American University Business Law Review* 5; Guy Davidov, "Indirect Employment: Should Lead Companies be Liable?" (2015) 37 *Comparative Labour Law & Policy Journal* 5; Andrew Elmore, "Franchised Regulation for the Fissured Economy" (2018) 86(4) *George Washington Law Review* 101; Timothy Glynn, "Taking the Employer Out of Employment Law? Accountability for Wage and Hour Violations in an Age of Enterprise Disaggregation" (2011) 5 *Employment Rights and Employment Policy Journal* 101; Alan Hyde, "Nonemployer Responsibility for Labor Conditions" in Kati Griffith and Samuel Estreicher, *Who is an Employee and Who is the Employer? Proceedings of the New York University 68th Annual Conference on Labor* (LexisNexis, 2016); Kellie Mildren, "Towards a Model of Third-party Liability for Wage Theft: Lessons from Other Regulatory Regimes" (2017) 20 *Canadian Labour and Employment Law Journal* 69; Jeremias Prassl, *The Concept of the Employer* (Oxford University Press, 2015); Brishen Rogers, "Toward Third-party Liability for Wage Theft" (2010) 31 *Berkeley Journal of Employment & Labor Law* 1.

[288] For an overview of some of these initiatives, see Tess Hardy, "Who Should be Held Liable for Workplace Contraventions and on What Basis?" (2016) 29 *Australian Journal of Labour Law* 78.

[289] See, e.g. Mitchell and Murray (2016), above n. 261; Matthew Taylor, "Good Work: The Taylor Review of Modern Working Practices" (UK Department of Business, Energy and Industrial Strategy, 11 July 2017).

[290] For further discussion of these reforms, see Tess Hardy, "Big Brands, Big Responsibilities? An Examination of Franchisor Accountability for Employment Contraventions in the United States, Canada and Australia" (2018) *Comparative Labor Law & Policy Journal* (forthcoming). See also Michael Rawling and Eugene Schofield-Georgeson, "Industrial Legislation in Australia in 2017" (2018) 60(3) *Journal of Industrial Relations* 378.

[291] Shelley Marshall, "Revitalising Labour Market Regulation for the Economic South: New Forms and Tools" in Shelley Marshall and Colin Fenwick (eds), *Labour Regulation and Development: Socio-Legal Perspectives* (Edward Elgar, 2016), 289, 291.

way in which the labour inspectorate carries out their functions, the protections which are available to those who raise grievances and the sanctions which are accessible where wrongdoing is identified.[292] This can have direct implications for the levels of compliance and the likelihood of redress.[293]

In a wide-ranging empirical study of over 100 jurisdictions, Kanbur and Ronconi have observed that countries which tend to have the most stringent laws on paper may have the highest levels of non-compliance in practice.[294] The findings of a separate study into minimum wage coverage and compliance in 11 developing countries revealed some further insights into the relationship between regulation and compliance. In the latter case, Rani et al. found that countries with a national minimum wage "set at a meaningful level" typically achieve higher compliance rates than countries with occupational or industry-specific minimum wage systems.[295] In a distinctive regulatory setting, a study of the implementation of Japanese equal opportunity law found that increased legal pressures did not necessarily generate desired outcomes and may have led to unintended consequences (that is, negative compliance).[296] Similarly, an empirical study of labour regulation and enforcement in India found that firms prefer to employ excessive numbers of temporary or contract workers to circumvent restrictions on termination rights and reduce overall compliance costs.[297] In comparison, conflicting labour regulation in Brazil appears to have opened up opportunities for inspectors – who enjoy relatively high levels of discretion – to "enforce good laws, extend weak ones, and undermine detrimental ones in ways that significantly improve labor practices on the ground".[298]

Barnard, Ludlow and Butlin have also considered the relationship between the relevant institutional frameworks and the enforcement of employment rights by EU-8 migrants in the UK.[299] Their research revealed that there was a significant underuse by migrant workers of

[292] See generally Janelle Diller, "Pluralism and Privatization in Transnational Labour Regulation: Experience of the International Labour Organization" in Adelle Blackett and Anne Trebilcock (eds), *Research Handbook on Transnational Labour Law* (Edward Elgar, 2015), 329.

[293] In seeking to unpick some of these factors, Markell and Glicksman have proposed a three-layered conceptual framework for considering options for structuring compliance and enforcement functions within an enforcement agency. As part of this framework, they argue that there are at least five components of effective enforcement and compliance, namely: norm clarity, norm achievability, verifiability, an appropriate mix of sanctions and rewards, and indicia of legitimacy (David Markell and Robert Glicksman, "A Holistic Look at Agency Enforcement" (2014) 93 *North Carolina Law Review* 1).

[294] Ravi Kanbur and Lucas Ronconi, "Enforcement Matters: The Effective Regulation of Labour" (2018) 157(3) *International Labour Review* 331.

[295] Uma Rani et al., "Minimum Wage Coverage and Compliance in Developing Countries" (2013) 152 *International Labour Review* 381.

[296] Eunmi Mun, "Negative Compliance as an Organisational Response to Legal Pressures: The Case of Japanese Equal Employment Opportunity Law" (2016) 94(4) *Social Forces* 1409.

[297] Rahul Suresh Sapkal, "Labour Law, Enforcement and the Rise of Temporary Contract Workers: Empirical Evidence from India's Organised Manufacturing Sector" (2016) 42 *European Journal of Law and Economics* 157.

[298] Salo Coslovsky, Roberto Pires and Renato Bignami, "Resilience and Renewal: The Enforcement of Labor Laws in Brazil" (2017) 59(2) *Latin American Politics and Society* 77.

[299] Wagner and Berntsen have undertaken a similar review of the obstacles facing mobile EU workers in enforcing their labour rights (albeit in distinct jurisdictions). See Ines Wagner and Lisa Berntsen,

employment tribunals and private channels of enforcement. To address this institutional deficit, they call for the establishment of a "Pay and Work Rights Ombudsman".[300] The weaknesses associated with private enforcement of employment rights have also been identified in the US context.[301] However, research undertaken in other jurisdictions with a more established tradition of public enforcement shows that there is a range of other factors that influence the effectiveness of labour inspection and the viability of certain regulatory models, such as responsive regulation and new governance, root-cause regulation or co-enforcement.

Vosko, Grundy and Thomas, for example, observe that "regulatory new governance" has taken hold, in part, because of the limited resources allocated to enforcement agencies and the "adverse effects of neoliberal deregulation".[302] In exploring the differences between Argentina and the US, and the openness to co-enforcement strategies, Amengual and Fine pointed to the "vastly different institutional contexts".[303] They observed that in Argentina, collaboration between the state labour inspectorate and unions (which have the legal right to accompany inspectors on field visits) was an entrenched feature of their legal system, albeit they also noted that in some provinces, state inspectorates were more reluctant to actively involve unions in their activities. In their view, the Argentinian case showed that "even with formal institutional support … political struggles are necessary to foster real partnership".[304] In contrast, the US labour inspectorate tended to be inherently "uncomfortable with formal partnerships with worker organizations, worrying that formalizing a relationship with a worker organization would jeopardize the perception of neutrality".[305] They argue that:

> These differences shine a spotlight on the centrality of institutional design to co-enforcement in both countries, albeit in different ways. As the broader literature has suggested, clear role definition, ground rules, protocols, direct engagement in decisionmaking, and process transparency can ensure all parties of the ongoing procedural legitimacy of the partnership.[306]

As noted in section 2.3.3 above, Bartley's theory of place-conscious transnational governance suggests that while transnational private regulation often assumes the domestic governance regimes are largely irrelevant to private regulatory regimes, his case studies reveal the opposite – that is, "domestic governance is far more than an empty space; it

"Restricted Rights: Obstacles in Enforcing the Labour Rights of Mobile EU Workers in the German and Dutch Construction Sector" (2016) 22(2) *European Review of Labour and Research* 193.

[300] Catherine Barnard, Amy Ludlow and Sarah Fraser Butlin, "Beyond Employment Tribunals: Enforcement of Employment Rights by EU-8 Migrant Workers" (2017) 47(2) *Industrial Law Journal* 226.

[301] Joseph Schremmer and Sean McGivern, "Private Enforcement of the Kansas Wage Payment Act" (2014) 62 *Kansas Law Review* 1227.

[302] Vosko, Grundy and Thomas (2016), above n. 39, 376. See also Eric Tucker, "Old Lessons for New Governance: Safety or Profit and the New Conventional Wisdom" in Todd Nichols and David Walters (eds), *Safety or Profit? International Studies in Governance Change and the Work Environment* (Baywood Press, 2013).

[303] Amengual and Fine (2016), above n. 161, 138.

[304] Ibid.

[305] Ibid.

[306] Ibid.

channels and reconfigures transnational private regulation in distinctive ways. The hope of transcending domestic governance and bypassing the state is illusory".[307]

By way of example, Bartley observes that in Indonesia, democratization allowed civil society actors, including unions and labour rights NGOs, to push for "maximalist" constructions of compliance with private rules. In comparison, the authoritarian regime operating in China meant that countervailing forces were non-existent or weak. The absence of independent unions and other external actors ultimately led to transnational corporations, suppliers and auditors adopting minimalistic constructions of compliance.[308] In comparison to Bartley's findings, Chung has found that differential interests of multiple stakeholders lead to a variation in compliance across different labour law provisions. More specifically, he argues that:

> There is "thick" compliance when stakeholders' interests converge, as observed in the case of written contract requirements. There is "thin" compliance when there is less convergence in stakeholder interests, as observed in the case of compliance with social insurance provisions. Finally, there is no compliance when there is convergence toward non-compliance in stakeholder interests, as observed in the case of overtime hour limits.[309]

Similarly, Marshall notes that "if we accept … that different countries have developed different regulatory styles, then we also have to accept that a range of institutions and institutional forms might contribute to economic development".[310] In light of this, she argues that "[p]roposals for law reform and institutional redesign should be compatible with local regulatory styles, as well as being politically viable: in other words they should take into account the *systemic* interaction of proposed labour law reforms with other regulation and institutions".[311]

3.3 Administrative organization and regulatory discretion

A regulator's approach to a particular problem will be partly shaped by its authorizing legislation (which we have just touched on) and partly by its culture, which may be influenced by its administrative organization, as well as the "implicit rules, beliefs, and expectations of behaviour under which regulatory officers operate".[312] A recent report of the Australian Productivity Commission identified three general approaches to regulation:

(1) **proactive versus reactive** (proactive approaches seek to encourage or persuade regulatees to comply before a breach occurs, whereas reactive regulators generally only act after a complaint has been made or a breach has been identified);

[307] Bartley (2018), above n. 18, 32.

[308] Bartley (2018), above n. 18, 33.

[309] Chung (2015), above n. 247, 237.

[310] Marshall (2016), above n. 291, 299.

[311] Marshall (2016), above n. 291, 300. See also Michael Gillan and Htwe Htwe Thein, "Employment Relations, the State and Transitions in Governance in Myanmar" (2016) 58(2) *Journal of Industrial Relations* 273.

[312] Australian Productivity Commission, Regulator Engagement with Small Business (Research Report, Canberra, 2013).

(2) **combative versus cooperative** (the former approach involves the threat of severe penalties and a low tolerance of non-compliance, whereas the latter approach involves education, advice, appeals to self-interest and mutual interdependence);

(3) **prescriptive versus discretionary** (prescriptive approaches entail strict interpretation and enforcement of precise rules, whereas discretionary approaches are more flexible and may involve a range of different strategies and tools to achieve compliance).[313]

Other critical factors which may affect regulatory cultures or styles include the level of inspectorate resourcing, as well as the political and social sensitivity to non-compliance. In addition, the behaviour of individual inspectors, and their exercise of regulatory discretion, may be shaped by the training they receive, internal organizational policies, principles and guidelines, service charters, ministerial statements of expectation and other soft law instruments.[314] Garcia and Aspinwall's research of labour administration in Mexico found that "both autonomy from the executive and professionalization are necessary to improve compliance with labour law over time".[315] More generally, Scott has also pointed out that the stringency of enforcement, and the approach of an individual inspector, may be shaped by a combination of instrumental considerations and cultural factors, such as the degree of shared social history and engagement between enforcer and enforcee (expressed and measured in terms of "relational distance").[316]

Further, it is important to recognize that regulatory styles are not frozen, but may change over time. This may be due to a change in the composition of the governing board or the senior management, may be prompted by pressures from government following adverse events or may reflect a growing awareness of emerging theories or idealized models of regulation and enforcement.[317] However, the extent to which individual inspectors are willing to embrace regulatory strategies may be variable. By way of example, Amengual and Fine observe:

> Investigators, as street level bureaucrats, will always have the discretionary power to resist collaboration and cannot therefore solely be commanded but must also be persuaded and incentivized to participate in co-enforcement. As regulators and worker organizations collaborate in the process of enforcement, they necessarily cede some control over tasks and decisions that were once entirely within their purview. More broadly, regulators face the risk of being branded "anti-business" or biased, acting in the interest of worker organizations instead of the public good. These possibilities make collaborations especially politically sensitive, requiring support both externally and internally.[318]

In a similar vein, Weil noted that in order for the model of strategic enforcement to be implemented by the US WHD, it first needed to be embraced internally. This precipitated a

[313] Ibid. 43.

[314] New Zealand Productivity Commission, "Regulatory Institutions and Practices" (Report, New Zealand Productivity Commission, June 2014) 84.

[315] Professionalization was said to occur in several ways, including through training, merit hiring, and introducing experienced external administrators. See Kimberley Nolan Garcia and Mark Aspinwall, "Retraining Gulliver: Institutional Reform and the Strengthening of State Capacity and Compliance" (2017) *Regulation and Governance* 1.

[316] Colin Scott, "The Regulatory State and Beyond" in Peter Drahos (ed.), *Regulatory Theory: Foundations and Applications* (ANU Press, 2017) 265, 270.

[317] Freiberg (2017), above n. 26, 81.

[318] Amengual and Fine (2016), above n. 161, 132.

change in the level of accountability of key leaders and a shift in traditional forms of budget allocation. These changes were accompanied by measures designed to enhance transparency around decision-making which ultimately "allowed for more informed discussion about key resources choices necessary to make strategic enforcement effective".[319] In addition to the organizational changes that took place at the senior executive level, the agency also

> sought to find ways to give investigators, technicians, and staff the tools they needed to successfully undertake strategic enforcement. As is the case in other parts of organizational structure, this was an iterative process. The agency devoted significant resources to training investigators in the underlying ideas of strategic enforcement. The curriculum for incoming investigators and for the follow-up training that investigators later took – both fabled parts of WHD culture – were altered to include materials about strategic enforcement and its use.[320]

Perhaps the most extensive analysis of regulatory styles comes from Piore and Schrank. Indeed, their research on this issue ultimately formed the basis for their theory of "root-cause regulation" discussed in section 2.2.2 above. The distinction between dominant styles of labour inspection in Anglo-American jurisdictions, compared with Franco-Latin countries, has recently been the subject of separate research undertaken by a number of labour scholars from various jurisdictions.[321] For example, in a Brazilian context, Coslovsky has argued that the coverage of Brazilian labour law, combined with the discretion afforded to inspectors, has positive effects (even beyond those identified by Piore and Schrank). More specifically, he finds:

> enforcement agents often do more than just impose fines or teach infringers about the law. Rather, they use their discretion and legal powers to realign incentives, reshape interests and redistribute the risks, costs and benefits of compliance across a tailor-made assemblage of public, private and non-profit enterprises in a way that makes compliance easier for all involved. On a broader canvas, regulatory enforcement agents who perform this role can be characterized as the foot soldiers of a post-neoliberal or neo-developmental state.[322]

While Fine acknowledges the value in the idealized types of inspection identified by Piore and Schrank, she argues that actual cases do not neatly fall within these established categories. Fine notes that the inspection systems in Brazil, Argentina and France largely conform to the general or unified type associated with the Franco-Latin model.[323] However, she notes that the systems in Spain, Italy and Quebec do not necessarily reflect all aspects of the idealized

[319] Weil (2018), above n. 137, 450.

[320] Ibid.

[321] See, e.g. Renato Bignami and Maria Barbosa, "Labor Inspection and Wage Theft in Brazil: Justice at the Street Level, Social Peace and Development" (2016) 37 *Comparative Labor Law & Policy Journal* 267; Janice Fine, "Afterword: The Franco-Iberian Model from the US Perspective" (2016) 37 *Comparative Labor Law & Policy Journal* 397; Dalia Gesualdi-Fecteau and Guylaine Vallee, "Labor Inspection and Labor Standards Enforcement in Quebec: Contingencies and Intervention Strategies" (2016) 37 *Comparative Labor Law & Policy Journal* 339; Joaquin Murcia, Maria Arguelles and Diego Alonso, "The Labour Inspection in Spain and its Renewed Legal Framework" (2016) 37 *Comparative Labor Law & Policy Journal* 377; Julio Navarro Marcelo, "Wage Reduction and Labour Inspection in Argentina" (2016) 37 *Comparative Labor Law & Policy Journal* 251; Marco Novella, "Labour Inspections on Wages in Italy" (2016) 37 *Comparative Labor Law & Policy Journal* 327; Marc Vericel, "The Labour Inspectorate in France and the Protection of Wages" (2016) 37 *Comparative Labor Law & Policy Journal* 299.

[322] Salo Coslovsky, "Flying Under the Radar? The State and the Enforcement of Labour Laws in Brazil" (2014) 42(2) *Oxford Development Studies* 169, 169.

[323] Renato Bignami and Maria Barbosa (2016) above n. 321.

model. For example, in Spain, there are dedicated inspectors for work health and safety and employment law respectively. Fine also challenges the assumption that the US system is focused on deterrence and sanctioning rather than education and compliance approaches. That said, she acknowledges that, in line with Piore and Schrank's theory, for inspectors within the US DOL an "extremely high value is placed on uniformity and confidentiality, which is enacted through strict hierarchical organization, tight supervision, very limited information-sharing outside of the agency, and strict limits on the discretion of line investigators".[324]

There have also been a number of studies which examine regulatory styles and inspector discretion outside of the jurisdictions analysed by Piore and Schrank. For example, Zhuang and Ngok have looked at labour inspection in China and found that it displays many features of the "Anglo-Saxon" model (that is, fragmented and reactive regulatory practices and limited involvement of worker representatives).[325] In Ontario, Tucker et al. took an interdisciplinary approach to analyse decision-making by front-line labour inspectors. They find that rather than simply acknowledging that the level of discretion of decision-making power granted to inspectors, it is necessary to consider the quality, depth and reach of inspectors' decision-making (that is, which takes into account the range of options available to an inspector and the significance of the decision based on available options). Tucker et al. argue that previous research on inspector discretion is somewhat limited by the diversity of meanings given to discretion. They note that "[f]or some analysts, discretion encompasses virtually every decision or action that front-line officials make, whereas for others it is more narrowly defined, entailing powers granted specifically in the applicable statutes".[326] Based on their analysis, they develop a conceptual framework for analysing decision-making, which pivots on mapping the power, duties, discretion and judgment which influence inspectors at various stages of the claims and inspection process.[327] This allowed the researchers to pinpoint when "decisions and actions were within or outside the parameters of duties and powers – that is, to reconcile and distinguish discretionary decisions that are granted under law and legally mandated policy from decisions which 'stretch' or even ignore the rules".[328]

3.4 Detection strategies

There is an inherent tension between the two main methods of detection employed by domestic labour inspectorates, namely: responding to individual complaints; and undertaking targeted inspections. The debate on the most effective and legitimate detection method continues to rage, particularly in the wake of high-profile "wage theft" scandals. For

[324] Fine (2016), above n. 321, 402.

[325] Wenjia Zhuang and Kinglun Ngok, "Labour Inspection in Contemporary China: Like the Anglo-Saxon Model, but Different" (2014) 153 *International Labour Review* 561.

[326] Eric Tucker et al., "Making or Administering Law and Policy: Discretion and Judgment in Employment Standards Enforcement in Ontario" (2016) 31(1) *Canadian Journal of Law & Society* 65, 68, citing Barbara Wake Carroll and David Siegel, *Service in the Field: The World of Front-Line Public Servants* (McGill-Queen's University Press, 1999) and Mark Bovens and Stavros Zouridis, "From Street-Level to System-level Bureaucracies: How Information and Communication Technology is Transforming Administrative Discretion and Constitutional Control" (2002) 62(2) *Public Administration Review* 174.

[327] Tucker et al. distinguish the concepts of "discretion" and "judgment" as follows: "by discretion we mean the power to choose between legally available alternatives and by judgment we mean the power to decide questions of fact and law" (Tucker et al. (2016), above n. 326, 71).

[328] Tucker et al. (2016), above n. 326, 83, citing Shannon Portillo and Danielle Rudes, "Construction of Justice at the Street Level" (2014) 10 *Annual Review of Law and Social Science* 321.

example, in Australia, Berg and Farberblum, along with Clibborn and Wright, have advocated for greater support for migrant workers, including individualized investigations.[329] In Ontario, Canada, the research team led by Vosko, has broadly adopted a similar position.[330] Others, such as Hardy and Howe, have cautioned that directing inspectorate resources towards individual complaints may not necessarily overcome some of the inherent barriers to redress, and may ultimately come at the expense of more targeted and strategic initiatives.[331]

Weil reflected that the traditional approach adopted by the WHD of the DOL was essentially reactive – responding to complaints with the aim of bringing individual employers into compliance as quickly as possible. This approach was further entrenched by virtue of the evaluative measures that were applied to assess the WHD's performance (that is, quantitative metrics linked to the number of cases processed and the time taken to do so). However, as Weil's research has highlighted, a complaints-based approach was problematic given the budgetary restrictions facing the WHD. Further, he has saliently observed that while responding to complaints may succeed in providing redress for the underpaid worker, it "risks leaving the forces driving non-compliance unaddressed and results in an unending game of whack-a-mole".[332]

Ultimately, the practical difficulties of keeping on top of the complaint backlog, combined with a growing awareness of regulatory alternatives, led the US federal labour inspectorate to shift a "larger proportion of investigations to a proactive approach, chosen on the basis of agency priorities and undertaken as part of a plan to improve compliance".[333] In 2008, proactive investigations constituted 24 per cent of all investigations, and by 2017 (and during Weil's tenure as head of the WHD) the proportion of proactive investigations had grown to 50 per cent.[334] Fine observes that "[t]hese numbers are unprecedented in the history of the WHD and the ascendance of strategic enforcement into a co-equal position to complaint-based enforcement is a major step forward" for improving conditions in low-wage sectors of the US economy.[335]

Weil acknowledges that a drawback of funnelling resources towards a more proactive approach has meant that some complainants may not receive government assistance in

[329] Laurie Berg and Bassina Farbenblum, "Remedies for Migrant Worker Exploitation in Australia: Lessons from the 7-Eleven Wage Repayment Program" (2018) 41(3) *Melbourne University Law Review* (forthcoming); Stephen Clibborn and Chris Wright, "Employer Theft of Temporary Migrant Workers' Wages in Australia: Why Has the State Failed to Act?" (2018) 29(2) *The Economic and Labour Relations Review* 207; Bassina Farbenblum and Laurie Berg, "Migrant Workers' Access to Remedy for Exploitation in Australia: The Role of the National Fair Work Ombudsman" (2017) 23(3) *Australian Journal of Human Rights* 310.

[330] Leah Vosko et al., "The Compliance Model of Employment Standards Enforcement: An Evidence-Based Assessment of its Efficacy in Instances of Wage Theft" (2017) 48(3) *Industrial Relations Journal* 256.

[331] Tess Hardy and John Howe, "Out of the Shadows and into the Spotlight: The Sweeping Evolution of Employment Standards Enforcement in Australia" in Leah Vosko et al. (eds), *Closing the Employment Standards Enforcement Gap: Improving Protections for People in Precarious Jobs* (University of Toronto Press, forthcoming).

[332] Weil (2018), above n. 137, 442.

[333] Ibid.

[334] Ibid.

[335] Fine (2016), above n. 321, 406.

recovering their back-pay. However, Weil believes this can be justified in circumstances where such workers retained private rights of action to seek redress.[336] As discussed in section 4 below, targeted auditing by private firms is one of the main methods of detecting contraventions in the transnational context. However, there is growing recognition of the weaknesses and problems raised by this approach (for example, superficial compliance checks lead to cosmetic compliance without prompting or sustaining genuine compliance commitment).

Problems of detection are magnified in developing countries, which is partly due to corruption on the part of labour inspectors. Marshall and Fenwick observe:

> when inequality is high, and the wages of the majority of workers are low, rich companies can more easily pay off labour inspectors … Breaches of core labour standards remain unchecked in larger companies and labour inspectors unable to visit smaller enterprises due to fuel costs and the lack of bribes to augment low wages. This contributes to distrust in the institution of labour inspection. Workers perceive that the labour inspectorate is "not for them". This reduces the number of complaints to the labour inspectorate, and thus the effectiveness of the inspectorate. This regulatory failure results in the labour inspectorate acting as a conduit for reproducing inequality instead of reducing it.[337]

In addition, and similar to issues confronting vulnerable workers in developed economies, it is clear that there are a number of individual characteristics – including gender, caste and ethnicity – which may affect the capacity and willingness of workers in developing economies to raise and pursue their grievances.[338] Indeed, recent research emerging from North America confirms much of the earlier research on the problems of relying on employee complaints. For example, based on data from a landmark survey of over 4,000 low-wage workers in three large US cities, Alexander and Prasad found that relying on worker complaints and private rights of action ultimately fails to "protect the workers who are most vulnerable to workplace rights violations, as they often lack the legal knowledge and incentives to complain that are prerequisites for enforcement activity".[339] Similarly, Vosko et al. have found, in their analysis of employment standards regulation enforcement in Ontario, that "complaint data suggest that imbalances in workplace power constrain the exercise of employee voice and make seeking legal redress a risky venture for employees".[340] A separate and related point made by Gordon – based on her research of undocumented workers in the US – is that immigration regulation is a central factor impeding the capacity of migrant workers from enforcing the law.[341] In a European context, Etienne has found that differences in the capacity and tendency for employees to monitor and report illegalities within organizations can be explained by reference to the relationship between unions, regulators and managers, and the history and institutions of industrial relations in the relevant

[336] Weil (2018), above n. 137, 442.

[337] Shelley Marshall and Colin Fenwick (eds), *Labour Regulation and Development: Socio-Legal Perspectives* (Edward Elgar, 2016), 8.

[338] Ibid. 9.

[339] Charlotte Alexander and Arhti Prasad, "Bottom-up Workplace Law Enforcement" (2014) 89(3) *Indiana Law Journal* 1069, 1069.

[340] Vosko et al. (2017), above n. 330, 257. See also John Grundy et al., "Enforcement of Ontario's *Employment Standards Act:* The Impact of Reforms" (2017) *Canadian Public Policy* 190.

[341] Jennifer Gordon, "Holding the Line on Workplace Standards: What Works for Immigrant Workers (and What Doesn't)?" in Stephanie Luce et al. (eds), *What Works for Workers? Public Policies and Innovative Strategies for Low-wage Workers* (Russell Sage Foundation, 2014).

country. In comparison, Etienne finds that the relevant whistleblower protections appear to have little bearing on whether employees are inclined to voice their concerns or not.[342]

The way in which inspections are carried out – and the sectors and workers which are prioritized by the state – were the subject of a recent cross-jurisdictional study by Almeida and Ronconi. They empirically explored the incidence of labour inspections across registered firms in 72 developing countries. Consistent with earlier research carried out by Weil and others, they found that larger firms are more likely to be inspected than smaller firms. Further, their data suggested that exporting firms, members of a business association, firms that have a larger share of high-skilled and unionized workers, and that operate in sectors of activity with more compliance are more likely to be inspected. Their data did not reveal any correlation between the intensity of inspections and factors such as firm location, foreign ownership, market power, share of sales to the government, imports, and recent changes in employment laws.[343]

Gindling, Mossaad and Trejos undertook a separate study of a comprehensive compliance campaign rolled out by the Costa Rican government in 2010/2011 which was designed to increase compliance with the legal minimum wage. Their analysis revealed that an increase in targeted inspections, combined with a well-funded publicity campaign, led to an overall increase in compliance with minimum wage laws. Women workers, younger workers and less-educated workers were found to have enjoyed the largest increases as a result of increased inspectorate efforts. There was also evidence to suggest that while inspections mainly targeted minimum wage violations, there was an increase in compliance with a broader set of labour standards and a positive spill-over effect relative to other violations of labour laws.[344] However, in a similar study, Viollaz generated some distinctive findings. She found that when enforcement efforts increase, compliance with formal regulation of wages increases among men, while informal wages decline. Among women, the compliance level declines jointly with informal wages. She argues that these "heterogenous impacts are explained by labor regulations that make formal and informal men more substitutable in the production process than formal and informal women".[345]

3.5 Regulatory methods, enforcement practices and sanctions

There is a range of tools and mechanisms that can be used by labour inspectorates (and others) to influence, prompt or compel behaviour change. This includes court-ordered remedies, administrative tools (such as enforceable undertakings) and softer strategies, such as "naming and shaming" or procurement techniques.[346] As noted earlier, the research team

[342] Julien Etienne, "Different Ways of Blowing the Whistle: Explaining Variations in Decentralised Enforcement in the UK and France" (2015) 9 *Regulation & Governance* 309.

[343] Rita Almeida and Lucas Ronconi, "Labor Inspections in the Developing World: Stylised Facts from the Enterprise Survey" (2016) 55 *Industrial Relations* 468.

[344] T. H. Gindling, Nadwa Mossaad and Juan Diego Trejos, "The Consequences of Increased Enforcement of Legal Minimum Wages in a Developing Country: An Evaluation of the Impact of the Campana Nacional de Salarios Minimos in Costa Rica" (2015) 68(3) *ILR Review: The Journal of Work and Policy* 666.

[345] Mariana Viollaz, "Enforcement of Labour Market Regulations: Heterogeneous Compliance and Adjustment Across Gender" (2018) 7(2) *IZA Journal of Labour Policy* 1.

[346] Sasha Holley, "The Monitoring and Enforcement of Labour Standards when Services are Contracted Out" (2014) 56(5) *Journal of Industrial Relations* 672; Sasha Holley, Glenda Maconachie and Miles Goodwin, "Government Procurement Contracts and Minimum Labour Standards

led by Vosko has been highly critical of what she terms the "compliance model" in employment standards enforcement. Vosko and her co-authors argue that the labour inspectorate in Ontario relies too heavily on information and education-based strategies and places too much emphasis on self-help remedies and dispute resolution methods. While this approach has been justified on resourcing grounds, they argue that any model which is premised on "empowered and cooperative self-regulation" is fundamentally ill-suited to employment standards regulation and enforcement. More specifically, they argue that in circumstances "where changes to the organisation of work deepen insecurity for employees and augment employer power, models of enforcement that emphasise compliance over deterrence are unlikely to effectively prevent or remedy ES violations and can exacerbate regulatory degradation".[347]

In their view, a better alternative model would "start from a dual recognition of workplace power imbalances and the likelihood that many violations are intentional".[348] The critique of Vosko et al. stands in some contrast to the position of other scholars working in the area who are more open to particular tenets of responsive regulation. For example, Bensusàn positively notes that Argentina, Brazil and Uruguay all have policies which promote the use of graduated regulatory responses in line with the pyramidal model of enforcement.[349] In addition, Reinecke's research affirms one of the basic elements of Piore and Schrank's model of "root-cause regulation" – that is, under the Chilean Labour Code, an employer who is found to be in breach of their labour law obligations may be required to attend an educational programme on labour standards and decent work instead of paying a fine.[350]

In addition to those just mentioned, there has been a plethora of new or novel enforcement practices and sanctions emerging as a result of the emerging crisis in employment standards regulation. For example, in Australia, economic-based sanctions have been a focus. More specifically, the maximum penalty for serious contraventions of the Fair Work Act 2009 (Cth) has been increased to unprecedented levels. In addition, at a state level, there have been moves to introduce labour hire licensing schemes, and a separate push to criminalize "wage theft". In Ontario and the UK, there has been active consideration of expanding the tools available in the middle of the pyramid (for example, by introducing a statutory enforceable undertaking or a common law equivalent). Although there is increasing concern about the extent to which enforceable undertakings can be used to build and sustain compliance commitment in the face of deliberate and systematic non-compliance, particularly where vulnerable workers or small firms are involved.[351]

In comparison, the modern slavery legislations, which have been implemented in the UK and proposed in Australia, position information disclosure and transparency as the regulatory

Enforcement: Rhetoric, Duplication and Distraction?" (2015) 26(1) *The Economic and Labour Relations Review* 43.

[347] Vosko et al. (2017), above n. 330, 257.

[348] Ibid.

[349] Graciela Bensusàn, "Labour Law, Inclusive Development and Equality in Latin America" in Shelley Marshall and Colin Fenwick (eds), *Labour Regulation and Development: Socio-Legal Perspectives* (Edward Elgar, 2016).

[350] Marshall (2016), above n. 291, 309, citing Gerhard Reinecke, "Labour and Labour-related Laws in Micro and Small Enterprises: Cases from Latin America" (ILO, draft document).

[351] See, e.g. Rosemary Owens, "Temporary Labour Migration and Workplace Rights in Australia: Is Effective Enforcement Possible?" in Joanna Howe and Rosemary Owens (eds), *Temporary Labour Migration in the Global Era: The Regulatory Challenges* (Hart, 2016).

tool of choice.[352] But there is some reservation about the effectiveness of these strategies in shaping firm behaviour given that there is little repercussion for those that fail to produce adequate or accurate disclosure statements. In light of observations of the UK modern slavery regime, and California's Transparency in Supply Chains Act, Landau and Marshall argue that there is a real risk that firms will interpret the reporting requirements to suit their own interests, resulting in superficial or cosmetic forms of compliance.[353] This mirrors some of the concerns that were raised by Bartley in relation to transparency and reporting requirements implemented under the auspices of private transnational regulation.[354] Landau and Marshall argue that to ensure that transparency-based regulation has its intended effect on company behaviour, a number of critical conditions must first be met. For example, there must be a legal requirement that a company discloses detailed and material information on the specific issue in question. This is important for a few reasons, not least of "to ensure accountability and to provide information that allows stakeholders such as civil society, potential business partners, investors and the public to evaluate company performance and identify best practice".[355]

3.6 Accountability, performance metrics and evaluations of impact

In a 2017 book on regulatory excellence, Cary Coglianese sought to expand, synthesize and innovate thinking on regulation with the aim of providing novel insights into what it means (and what it takes) for a regulator to excel.[356] But in undertaking this task, Coglianese also acknowledged that "[v]ariation in the design of regulatory institutions and in the problems they are charged with addressing means that no single, simple formula for success can apply across the board to all regulators".[357]

Broadly speaking, there are two levels at which to assess the quality of the regulatory system. At the most general level, quality issues can be assessed with respect to the entire regulatory

[352] Janie A. Chuang, "Exploitation Creep and the Unmaking of Human Trafficking Law" (2014) 108(4) *American Journal of International Law* 609; Judy Fudge, "Modern Slavery and Migrant Domestic Workers The Politics of Legal Characterization" (Policy Brief, The Foundation for Law, Justice and Society, 24 October 2016); Judy Fudge, "Modern Slavery, Unfree Labour and the Labour Market: The Social Dynamics of Legal Characterization" (2017) *Social & Legal Studies* 1; Ingrid Landau and Shelley Marshall, "Should Australia be Embracing the Modern Slavery Model of Regulation?" (2018) 46 *Federal Law Review* 313; Genevieve LeBaron and Andreas Rühmkorf, "Steering CSR Through Home State Regulation: A Comparison of the Impact of the UK Bribery Act and Modern Slavery Act on Global Supply Chain Governance" (2017) 8(S3) *Global Policy* 15; Genevieve LeBaron and Andreas Rühmkorf, "The Domestic Politics of Corporate Accountability Legislation: Struggles Over the 2015 UK Modern Slavery Act" (2017) *Socio-Economic Review*; Virginia Mantouvalou, "The Modern Slavery Act Three Years On" (2018) *Modern Law Review* (forthcoming).

[353] Landau and Marshall (2018), above n. 352, citing Shuangge Wen, "The Cogs and Wheels of Reflexive Law-Business Disclosure Under the Modern Slavery Act" (2016) 43 *Journal of Law and Society* 327, 355. See also Jonathan Todres, "The Private Sector's Pivotal Role in Combating Human Trafficking" (2012) 3 *California Law Review Circuit* 80, 95.

[354] See also Galit A. Safarty, "Shining Light on Global Supply Chains" (2015) 56(2) *Harvard International Law Journal* 419, 423.

[355] Landau and Marshall (2018), above n. 352, 329.

[356] Cary Coglianese, "The Challenge of Regulatory Excellence" in Cary Coglianese (ed.), *Achieving Regulatory Excellence* (Brookings Institution Press, 2017).

[357] Ibid. 6.

process, which is the responsibility not just of regulatory agencies (but of the legislature, the executive and the judiciary). At a more specific level, regulatory quality can be judged with reference to the operation of regulatory agencies in isolation. At this level, Coglianese has developed a comprehensive framework for achieving "regulatory excellence", which consists of three core elements. Under this framework, an excellent regulator must:

(1) have utmost integrity;[358]

(2) be emphatically engaged;[359]

(3) have stellar competence in delivering its outcomes.[360]

In the same volume, Gunningham observes that in the absence of any consensus as to what criteria should be used to assess whether a compliance and enforcement strategy is "excellent", it is conventional to apply three broad principles, namely is the regulatory intervention "effective",[361] "efficient"[362] and "legitimate".[363]

Recent attempts to implement models of strategic enforcement have been hindered by performance goals which were misaligned with the sectoral focus of this model. Fine argues that this disconnect "can have a negative impact on investigators" interest and willingness to embrace strategic enforcement because complicated cases, in which an investigator has to figure out a firm's business model and strategy and engage in extensive payroll reconstruction, take more time".[364] In order to address this issue, during Weil's tenure as head of the WHD, the relevant performance measures were adjusted. More specifically, Weil notes that "[r]ather than measuring success by inputs, like the number of investigations or the hours devoted to them, measures related to outcomes were developed. In order to measure the efficacy of our targeting approaches, for example, we focused on the percentage of investigations undertaken where violations were detected."[365]

[358] This integrity must be manifest in serving the public interest, respecting the law and being democratically accountable. In practice, this requires a regulator to avoid corruption, adhere to the rule of law and uphold concepts of fairness and impartiality. Cary Coglianese, "Listening: Learning: Leading: A Framework for Regulatory Excellence" (Penn Program on Regulation, University of Pennsylvania Law School, 2015), iii.

[359] This requires the regulator to be transparent and consultative in its dealings with the public, regulated entities and other parties affected by its actions. Ibid.

[360] This means that the regulator is able to show that it has a strong analytical capacity, highly trained staff, a supportive organizational culture and suitable regulatory tools at its disposal (Coglianese (2015), above n. 358, iii).

[361] Gunningham explains that, in most cases, the effectiveness of a particular intervention is ordinarily judged by whether it achieves the relevant social or economic target (Gunningham (2017), above n. 27, 188).

[362] The principle of "efficiency" is assessed by the reduction of social and economic harm at the least cost (Gunningham (2017), above n. 27, 188).

[363] That is, the regulatory intervention is deemed politically acceptable and the regulator is publicly perceived in a positive light (Gunningham (2017), above n. 27, 188).

[364] Fine (2016), above n. 321, 406.

[365] Weil (2018), above n. 137, 449.

In order to achieve this objective, there was a need to enhance data analysis and programme evaluation, which were largely informed by social scientific research methods.[366]

Raising a separate point, Vosko et al. note that models of regulatory new governance represent a fundamental shift in assessing and securing the accountability of enforcement agencies. More generally, they argue:

> Clear chains of accountability and answerability can be lost in networked, multi-actor enforcement regimes. The accountability of state enforcement agencies can also suffer if narrow measures of administrative performance (i.e. efficiency) take precedence over their accountability to the public for upholding the objectives and terms of [employment standards] legislation.[367]

[366] Alison Morantz, "Putting Data to Work for Workers: The Role of Information Technology in US Worker Protection Agencies" (2014) 67 *ILR Review* 675.

[367] Vosko, Grundy and Thomas (2016), above n. 39, 381.

4. Public–private compliance initiatives: A review of recent developments and empirical findings

4.1 Introduction

This section of the literature review focuses on "public–private compliance initiatives". This term is not widely used outside the ILO, nor does there appear to be a commonly understood definition of what it encompasses. Relevantly, several recent ILO publications refer variously to "private compliance initiatives",[368] "private regulation"[369] and "private governance",[370] in the context of private initiatives (such as corporate social responsibility initiatives or codes of conduct) that aim to improve labour conditions within supply chains.[371] However, there appears to be greater diversity in the structure of compliance initiatives involving "private" non-state actors. Recent scholarship on wholly private compliance initiatives has focused on the interaction that occurs between "state" and "non-state" actors. Given the diversity in structure of compliance initiatives involving non-state actors and interest in the interaction between state and non-state actors, this literature review adopts the term "public–private compliance initiatives", which is to be understood as a broad and inclusive concept.

On one hand, "public–private compliance initiatives" are understood to mean state-led compliance initiatives that engage non-state business actors by giving them an active role in ensuring compliance with labour standards (as well as such initiatives led by IGOs, such as the ILO). [372] On the other, public–private compliance initiatives also include compliance initiatives that are initiated by non-state actors (such as multinational corporations or industry associations) in so far as these initiatives engage or interact with state regulatory

[368] International Labour Organization, "Inception Report for the Global Commission on the Future of Work" (Report, 2017), 31.

[369] International Labour Organization, "The Future of Work Issue Brief (No. 11): New Directions for the Governance of Work" (20 February 2018) 4.

[370] Ibid. 4.

[371] Note, "private compliance initiatives" are defined "as private, voluntary mechanisms for monitoring compliance with established public (law or regulation) or private (codes of conduct, etc.) standards": International Labour Organization, "Labour Inspection and Private Compliance Initiatives: Trends and Issues" (Paper presented at the Meeting of Experts on Labour Inspection and the Role of Private Compliance Initiatives, Geneva, 10–12 December 2013) ix.

[372] See International Labour Office, "Final Report: Meeting of Experts on Labour Inspection and the Role of Private Compliance Initiatives" (paper presented at the Meeting of Experts on Labour Inspection and the Role of Private Compliance Initiatives, Geneva, 10–12 December 2013), http://ilo.ch/wcmsp5/groups/public/---ed_dialogue/---lab_admin/documents/meetingdocument/wcms_235948.pdf.

activities.[373] An emerging area of literature focuses closely on this intersection between private rules and public regulation.[374]

Public–private compliance initiatives may be framed as bipartite, tripartite or, increasingly, as multi-partite arrangements. These initiatives may be informal or prescribed by legislation. Participants may be drawn from different levels of government within a nation state (for example, federal, state or local), or involve inter-governmental actors (for example, the ILO), public interest groups (for example, community organizations, trade unions, worker centres), industry associations (for example, employer associations) or entities within the supply chain (for example, suppliers, wholesalers, retailers and consumers). Monitoring and reporting mechanisms may take many forms, including: self-assessment, auditing (internal or external), certification, labelling, and public reporting. Compliance standards may include international labour standards, and/or derive from domestic labour laws. Given the variation found in how public–private compliance initiatives are structured, enforcement mechanisms and sanctions also take many forms. As discussed in more detail below, both "hard and "soft" mechanisms and sanctions are used – from the imposition of criminal liability for non-compliance, to the loss of certification or "naming and shaming" if standards are not met.

From the outset, it is important to acknowledge that the distinctions made in the discussion that follows – that is, between "public" and "private" compliance initiatives, and between "domestic and "transnational" compliance initiatives – are porous. The boundaries between what compliance initiatives may be considered "public" or "private", "domestic" or "transnational" is not always clear in practice. Indeed, some of the examples raised below demonstrate this complexity. As Zumbansen noted, in the context of corporate governance generally:

> a regulatory field such as [this] is, on the one hand, neither exclusively national (domestic) nor international, while, on the other, this does not imply the elimination or overcoming of the nation state. In addition, such an area cannot adequately be grasped through a separation of public and private as long as that distinction seeks to demarcate two distinct and autonomous norm-creating actors. Instead, the evolving regulatory regimes … are constituted through persistent local activity and interpretation, comprised of human, institutional, and technological elements …[375]

In this vein, while the key distinctions between "public or "private", "domestic" or "transnational" derives, in this section, from the *type* of actor (that is, whether it is a state, IGO or non-state actor) that has introduced or initiated the compliance initiative, in the analysis that follows, the complexities concerning these regulatory regimes are acknowledged. Despite the slippage between types of compliance initiatives, the authors consider the distinctions between "public" and "private", and between "domestic" or "transnational" to be helpful for the purposes of this analysis.

[373] See, e.g. Greg Distelhorst et al., "Production Goes Global, Compliance Stays Local: Private Regulation in the Global Electronics Industry" (2015) 9(3) *Regulation & Governance* 224; Jennifer Gordon, "Regulating the Human Supply Chain" (2017) 102 *Iowa Law Review* 445; Juliane Reinecke and Jimmy Donaghey, "The 'Accord for Fire and Building Safety in Bangladesh' in Response to the Rana Plaza Disaster" in Axel Marx et al. (eds), *Global Governance of Labor Rights* (Edward Elgar, 2015), 257.

[374] See Luc Fransen and Brian Burgood, "Introduction to the Special Issue: Public and Private Labor Standards Policy in the Global Economy" (2017) 8(3) *Global Policy* 5.

[375] Peer Zumbansen, "Neither 'Public' Nor 'Private', 'National' Nor 'International': Transnational Corporate Governance" (2011) 28(1) *Journal of Law and Society* 50, 57.

4.2 An overview of domestic public–private compliance initiatives

This section focuses on domestic public–private compliance initiatives. These initiatives may be state-driven, or geographically confined in operation to one state, and concern initiatives that are intended to engage non-state actors to enhance compliance with domestic labour laws. Clearly, therefore, the concept of domestic public–private compliance initiatives is broad in nature and encompasses a number of initiatives that vary greatly in their nature and structure. For example, this section concerns initiatives that are wholly driven by the state (such as the labour hire licensing scheme implemented by the United Kingdom, discussed below), as well as initiatives that are wholly driven by private actors (including, for example, workers' organizations and industry associations).

4.2.1 Domestic public–private compliance initiatives in practice

As discussed above in section 2, there is a level of theoretical consensus that the state should harness the capacity and resources of non-state actors in compliance initiatives. There continues, however, to be a lack of consensus or certainty in the literature regarding how best to go about this in practice. There are still relatively few empirical studies of how regulatory functions are and should be distributed between the state and other actors in a regulatory system – especially in the context of domestic public–private compliance initiatives.[376] The existing empirical research reveals that the effects of domestic public–private compliance initiatives in improving adherence to labour standards have been uneven. Specifically, it appears that the effects of these initiatives are heavily dependent on other factors such as, for example, the strength of government institutions and the degree to which trade unions and other worker representatives are formally involved in enforcing standards.[377]

Given the variety of domestic public–private compliance initiatives, the types of initiatives discussed below are categorized in accordance with the *type* of actor that instigated the initiative, and the type of *relationship* between the state and the non-state actors involved with the initiative (for example, whether the state and non-state actors act in partnership or not). Accordingly, this section surveys the following categories of compliance initiatives: co-enforcement models (initiatives involving coordinated efforts between state regulators and worker organizations); multi-stakeholder compliance initiatives (that is, initiatives introduced in partnership between civil society, worker organizations and/or industry groups); industry-led compliance initiatives (that is, initiatives that are wholly industry-led or privatized); state-led compliance initiatives (that is, initiatives that are wholly state-led but seek to involve non-state actors in compliance efforts); and finally, worker-led initiatives.

[376] See Andrew Crane et al., "Governance Gaps in Eradicating Forced Labor: From Global to Domestic Supply Chains" (2017) *Regulation & Governance* 1, 11, 15–6 (in context of forced labour in supply chains).

[377] See, e.g. Amengual and Fine (2016), above n. 161; Janice Fine, "New Approaches to Enforcing Labor Standards: How Co-enforcement drop Partnerships Between Government and Civil Society are Showing the Way Forward" (2017) *University Of Chicago Legal Forum* 143 ("New Approaches to Enforcing Labor Standards"); Jennifer Gordon, *Suburban Sweatshops: The Fight for Immigrant Rights* (Harvard University Press, 2005); Anne Posthuma and Renato Bignami, "'Bridging the Gap'? Public and Private Regulation of Labour Standards in Apparel Value Chains in Brazil" (2014) 18(4) *Competition & Change* 345.

(a) Co-enforcement models[378]

As set out in section 2.2.3 above, Amengual and Fine (among others), have discussed how "co-enforcement" may enhance domestic labour standards enforcement. Below we summarize some of the initiatives that inspired this concept, and illustrate the way it works on the ground.

Regulation of health and safety in Córdoba, Argentina

In the wake of a commodity boom that resulted in a surge in construction projects and an increase in on-site accidents, a health and safety division regulating the construction industry (*Condiciones y Medico Ambiente del Trabajo*, or CYMAT) was created.[379] CYMAT worked with the labour inspectorate and the construction workers' union (*Unión Obrera de la Construcción de la Republica Argentina*, or UOCRA) and eventually formed a formal consultative committee.[380] The flow of resources and information between CYMAT and UOCRA enabled regulators to create "programmed inspection campaigns that were both preventative and responsive to immediate risks".[381]

CYMAT took "both punitive and pedagogical actions".[382] As CYMAT recognized that penalties would not be sufficient to prompt behaviour change, it exercised its power to "unilaterally shut down or suspend operations" or, where less serious matters were identified, played an advisory role and offered training.[383] Even union leaders found "these in situ training sessions were a 'valuable' way of reducing accidents in the long run and addressing the root causes of violations".[384]

Amengual and Fine observe that the use of penalties, suspension or shut-downs and training made Córdoba "an example of best practices in regulation, unmatched elsewhere in Argentina".[385] It is notable that the number of accidents in the construction sector did not

[378] See, for further examples of co-enforcement models: Fine (2017), above n. 377; Catherine L. Fisk and Seema N. Patel, "California Co-enforcement Initiatives that Facilitate Worker Organizing" (paper prepared for the Harvard Law School Symposium "Could Experiments at the State and Local Levels Expand Collective Bargaining and Workers' Collective Action?", 2017); Gabrielle Hetland, "Organizing the Precariat: Overcoming the Obstacles Facing Union-Worker Center Collaborations" (American Sociological Association, 2015).

[379] Ibid. 5.

[380] Ibid. 5, citing La Voz del Interior, La Seguridad Laboral se Relajó (9 March 2004, Córdoba, Argentina).

[381] Ibid. 6.

[382] Ibid.

[383] Ibid.

[384] Ibid.

[385] Ibid., citing Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (OUP, 1992); Roberto Pires, "Promoting Sustainable Compliance: Styles of Labour Inspection and Compliance Outcomes in Brazil" (2008) 147(2–3) *International Labour Review* 199.

increase over time, even with a "substantial" increase in the number of workers on-site – "which union leaders and officials view as an indicator of successful enforcement".[386]

Moreover, "the relative level of enforcement in construction was high when compared with the same industry in other provinces of Argentina".[387] Accordingly, Amengual and Fine draw four conclusions: first, it is important to acknowledge the different capabilities as between the state and worker organizations; second, "thick ties" enable each partner's "capabilities to be combined in productive ways through information sharing and on-site training"; third, it is important the worker organization understands the regulator's needs and thus allows the regulator to utlize its own expertise and facilitate "greater diversity of targeting techniques"; and finally, in this case "the politics of enforcement extended beyond general support for action by the bureaucracy and included support for the collaboration itself".[388]

***Enforcing local labour standards in San Francisco, United States*[389]**

Trade unions in San Francisco lobbied for the establishment of a municipal labour standards enforcement agency – and in large part due to these efforts, the Office of Labor Standards Enforcement (OLSE) was established in 2001.[390] The OLSE is responsible for the implementation of local labour laws and is empowered to "conduct investigations, initiative civic actions, involve the city attorney in pursing criminal cases, conduct joint investigations with the state, and request that city departments suspend or revoke licenses".[391] In 2006, the Board of Supervisors of the OLSE "mandated the establishment of a community-based program to 'conduct education and outreach to employees'",[392] which became known as "the Collaborative".

Under the Collaborative model, certain worker organizations enter into contracts requiring them to engage in outreach, provide training to workers regarding labour laws, provide consultation and referral services, assist with filing and screening complaints, and attempt to informally resolve matters between employees and employers.[393] Amengual and Fine discuss the involvement of the Chinese Progressive Association (CPA) in the Collaborative. They note that the CPA "was instrumental in uncovering a major wage theft case" at a chain restaurant.[394] The CPA and OLSE, through the Collaborative, found that employees had been significantly underpaid and that the chain restaurant had systematically falsified payroll

[386] Ibid. 6.

[387] Ibid. 7.

[388] Ibid. 7.

[389] This case example is also discussed in Janice Fine, "Enforcing Labor Standards in Partnership with Civil Society: Can Co-enforcement Succeed Where the State Alone Has Failed?" (2017) 45(3) *Politics & Society* 359.

[390] Amengual and Fine (2016), above n. 161, 7.

[391] Ibid.

[392] Ibid.

[393] Ibid.

[394] Ibid.

records during the investigation period.[395] The CPA was praised for its "unique capacity to build trust and gain information".[396] The company was sued for more than $440,000 in lost wages and interest with $525,000 being recovered.[397]

However, Amengual and Fine observe that there were some tensions between worker organizations and the OLSE. For example, a few OLSE investigators argued that the Collaborative model risked "compromising the agency's neutrality", and resented a perceived lack of consultation.[398] However, OLSE representatives also acknowledged the importance of the Collaborative in mobilizing support to increase the OLSE's budget.[399] Perhaps underscoring these tensions, Amengual and Fine observe that there was no formal agreement or protocol concerning partnerships under the Collaborative, and no staffing resources were dedicated to managing partnerships in the Collaborative.[400]

In terms of evaluating the impact of the Collaborative, Fine notes that while worker organizations are contractually required to meet some performance requirements (for example, engaging in certain types of activities), the Collaborative or OLSE is yet to implement any evaluation criteria concerning impact or key performance indicators.[401] While the OLSE is of the view that the number of complaints could be a metric used to evaluate the effectiveness of the Collaborative (the idea being that the number of complaints could increase with increased community and worker engagement), worker organizations disagree.[402] As Fine observes, worker organizations "argue that the number of cases or complaints should not be the sole measure of their impact; they point to the very large settlements they have won in high-profile cases … and the deterrence effect this work has on other local restaurants".[403]

The Workers Defense Project in Austin, Texas

Fine analyses two separate partnerships between the Workers Defense Project (WDP) and, respectively, the Austin Police Department (ADP) and Occupational Safety and Health Administration (OSHA) in Austin, Texas.[404] The WDP "has emerged as the preeminent voice of low-wage Latino workers in Austin"[405] and, notably, initiated these partnerships.[406]

[395] Ibid.

[396] Ibid. 8.

[397] Ibid.

[398] Ibid. 8–9.

[399] Ibid.

[400] Ibid.

[401] Fine (2017), above n. 389, 381–2.

[402] Ibid.

[403] Ibid.

[404] Ibid.

[405] Ibid. 368.

[406] Ibid. 371.

The WDP and ADP work together on "theft of services" cases.[407] When the "intent not to pay" element of this offence is considered to be satisfied, the WDP or APD attempts to resolve the matter with the employer directly, and negotiate payment. If unsuccessful, the WDP is empowered to send a certified letter of demand to the employer, together with an ADP memo that explains the law concerning theft of service and its commitment to enforcing the law.[408] If the employer does not respond to the letter of demand, an arrest warrant may be filed and the matter is then heard by a judge.[409]

According to Fine, "[t]he partnership has worked so well that the two organizations have continued to deepen their engagement".[410] Trust between the WPD and APD was so high that the ADP "routinely" referred workers to the WDP at first instance – a practice which Fine describes as a "strong example of information and resources flowing across the state/society divide".[411]

Additionally, the WDP works in partnership with the OSHA. The OSHA has recognized the WPD's unique capability to gather information largely due to the trust it has built with workers.[412] The WDP and OSHA worked together on a campaign targeting health and safety concerns on residential construction work sites, which also involved information sharing between organizations to enable the OSHA to initiate complaints on behalf of the workers.[413] One critical feature to the success of this partnership was the fact that the WDP understood it needed to be selective regarding the cases it referred to the OSHA, to enable the OSHA to target its resources towards the "most serious problems".[414] This level of adaptability and understanding from the WDP contributed to the cooperative nature of the partnership.[415]

In both cases, Fine observes that the ADP and OSHA "recognized the unique capabilities of WDP and established protocols for collaboration".[416]

(b) Multi-stakeholder compliance initiatives

[407] Ibid. 369. Under § 31.04 of the Texas Penal Code, a person commits "theft of service" if "with the intent to avoid payment for service that the [person] knows is provided only for compensation", the person "intentionally or knowingly secures performance of the service by deception, threat, or false token" or "intentionally or knowingly secures the performance of the service by agreeing to provide compensation and, after the service is rendered, fails to make full payment after receiving notice demanding payment". Intent not to pay is presumed in certain circumstances, including where the person "failed to make payment under a service agreement within 10 days after receiving notice demanding payment": Tes Penal Code Ann § 31.04(b)(2) (West 2015) (See Code for other types of conduct that would amount to "theft of services").

[408] Fine (2017), above n. 389, 368.

[409] Ibid.

[410] Ibid. 369.

[411] Ibid. 371.

[412] Ibid. 370.

[413] Ibid.

[414] Ibid.

[415] Ibid.

[416] Ibid. 371.

In the Netherlands, Stichting Normering Arbeid (SNA) (a foundation) worked in partnership with unions and industry to launch a voluntary private certification scheme for recruitment agencies.[417] This scheme requires certified agencies to comply with twice-yearly inspections – and these inspections, according to Gordon, "regularly result in probation and suspension".[418] In 2013, for example, 530 recruitment agencies lost their certification (amounting to 15 per cent of the total registered agencies) and 654 agencies were temporarily suspended.[419]

There is also a public element to this certification scheme. All inspection results are made publicly available online, and results can also be sent to the lead firms that contract with these entities.[420] While the scheme is voluntary, it has become mandatory "as a function of the market".[421] This results from the fact that if a lead firm is involved in a lawsuit based on joint liability (as Dutch law imposes joint liability in subcontracting chains),[422] the lead firm is released from liability under Dutch law if its workers have been procured through a certified recruitment or staffing agency.[423] As Gordon observes, "[l]ead firms, eager to avoid responsibility for their contractors' violations, have increasingly demanded that their recruitment and staffing agencies participate in the SNA certification program".[424]

The "hallmark" of Dutch regulation of recruitment agencies is this "criss-crossing" of public and private regulation. As Gordon observed, certification is "voluntary and private, rather than mandatory and government-run".[425] However, the Dutch legal system provides a clear incentive for businesses to demand that their subcontractors have certified status.[426] Taking Karassin and Perez's typology describing the character of interactions between state and non-state actors in the context of similar compliance initiatives into account, as outlined above in section 2.3.1, this initiative bears the hallmark of "incorporation" in that the Dutch law has adopted requirements that actively support the use of private standards – in this case, by incentivizing the use of private certification.

(c) Industry-led compliance initiatives

Brazilian Association of Apparel Retailers

Members of the Brazilian Association of Textile Retailers (ABVTEX) introduced codes of conduct and social audits (conducted either internally or externally) of their supply chains,

[417] Gordon (2017), above n. 373, 501.

[418] Ibid.

[419] Ibid.; Jennifer Gordon, "Global Labour Recruitment in a Supply Chain Context" (Working Paper, International Labour Organization, 2015), 28.

[420] Ibid. 501.

[421] Ibid.

[422] Ibid.; Gordon (2015), above n. 419, 28.

[423] Ibid. 501.

[424] Ibid.

[425] Ibid.; Gordon (2015), above n. 419, 28.

[426] Ibid.

known as the Supplier Qualification Programme (SQP).[427] According to Posthuma and Bignami, this example of a "home-grown" corporate social responsibility (CSR) initiative subverts the assumption of a "North-South transfer of CSR practices to suppliers in developing countries".[428] That is, it is not always the case that the Global North introduces CSR practices to, or imposes them on, the Global South. In this case, "endogenous historical and socio-political processes … played a decisive role … showing that socially responsible value chain governance can be developed among lead firms in the Global South".[429]

The SQP aimed to audit all suppliers of ABVTEX members (including within their respective supply chains) by 2015, with the goal of ensuring that no uncertified supplier would exist in any ABVTEX member's supply chain.[430] To maintain certification, both suppliers and subcontractors are required to comply with the rules of the SQP, as well as undertake authorized audits of their workplace and invest resources to ensure they met the requirements to comply with the SQP.[431]

Akin to the case study provided above, refusal of registration and the issue of improvement notices regularly occur. For example, in 2013, 73 per cent of registrations were approved; however, the SQP also issued 1,292 workplace improvement orders and 6.6 per cent of audited firms were rejected.[432] Importantly, the Brazilian labour inspectorate continues to inspect the apparel sector in parallel with the SQP. Indeed, despite the operation of the SQP, in 2013 the labour inspectorate identified three instances of forced labour in an SQP-certified firm (within its supply chain).[433] According to Posthuma and Bignami, this "illustrates the genuine challenges that exist in the promotion of labour standards in the complex tiered structure of value chains, as seen in the garment industry".[434]

(d) State-led compliance initiatives

***Gangmasters Licensing Authority*[435]**

The Gangmasters Licensing Authority (GLA) is an example of a state-led compliance initiative in the United Kingdom that was introduced in 2004. The GLA's mandate was to

[427] Posthuma and Bignami (2014), above n. 377, 349–50.

[428] Ibid.

[429] Ibid.

[430] Ibid.

[431] Ibid.

[432] Ibid. 356–7.

[433] Ibid. 357.

[434] Ibid.

[435] Some of the analysis that follows was first published in Sayomi Ariyawansa, "A Red-tape Band-aid or a Solution? Lessons for the United Kingdom's Gangmasters (Licensing) Act 2004 for Temporary Migrant Workers in the Australian Horticulture Industry" (2017) 30(2) *Australian Journal of Labour Law* 158. This section refers to evaluations of the GLA as well as the GLAA, where relevant, as many characteristics of the GLA have not changed in the new GLAA (and, moreover, there are still relatively few empirical studies of the GLAA).

establish a licensing scheme for gangmasters[436] who operated in certain specified sectors. Based on some initial successes, its remit and enforcement powers were extended, and it was renamed the Gangmasters and Labour Abuse Authority (GLAA).[437]

Under the Gangmasters (Licensing) Act 2004 (GLA Act), the GLAA is authorized to grant a licence to gangmasters, and the GLA Act creates several criminal offences, including: operating as an unlicensed gangmaster;[438] and entering into arrangements with an unlicensed gangmaster.[439]

What is significant about the GLAA as an example of a state-driven licensing model is that it attempts to engage certain non-state actors who are *not* the direct employer of the workers. In targeting both gangmasters and their immediate clients, the GLAA model provides a degree of supply chain regulation. In creating the offence of entering into arrangements with an unlicensed labour hire provider, the GLA Act provides an incentive for due diligence regarding contracting arrangements. A significant result of this has been the "levelling of the playing field" observed by several stakeholders interviewed in evaluations of the GLA model, which led to the expansion of its remit.[440]

However, the GLAA does not regulate the arrangements further up the supply chain. That is, the retailer is under no obligation to make sure that entities in the supply chain comply with the GLA Act. The GLA appeared to be aware that it was with the symptoms of a highly competitive environment rather than its structural causes,[441] and established a Supplier/Retailer Protocol (Protocol) which "seeks to establish a voluntary information sharing agreement".[442] The Protocol is not legally binding, and there are no consequences for retailers who do not comply with it. In 2014, building upon the Protocol, the GLA also entered into a partnership with Sainsbury's to provide training to its suppliers regarding how

[436] Section 4 of the Gangmasters (Licensing) Act 2004 (UK) exhaustively defines was is meant by "acting as a gangmaster". There are several ways in which a person may act as a gangmaster for the purpose of the Act. Broadly speaking, however: "[a] person ('A') acts as a gangmaster if he supplies a worker to do work to which this Act applies for another person ('B')": see subsection 4(2).

[437] Gangmasters and Labour Abuse Authority, *New Powers for Law Enforcement to Combat Slavery and Labour Exploitation* (1 July 2017), http://www.gla.gov.uk/whats-new/press-release-archive/01072017-new-powers-for-law-enforcement-to-combat-slavery-and-labour-exploitation/.

[438] Gangmasters (Licensing) Act 2004 (UK), subsections 6(1), 12(1).

[439] Ibid. subsection 13(1).

[440] See, e.g. Department for Environment Food & Rural Affairs, *Report of the Triennial Review of the Gangmasters Licensing Authority*, Report (2014), 43–4; Krishna Poinasamy and Antonia Bance, "Turning the Tide: How to Best Protect Workers Employed by Gangmasters, Five Years After Morecambe Bay" (Briefing Paper, Oxfam, 31 July 2009) 2, 11–13, 27, http://policy-practice.oxfam.org.uk/publications/turning-the-tide-how-best-to-protect-workers-employed-by-gangmasters-five-years-114054; Mick Wilkinson, Gary Craig and Aline Gaus, *Forced Labour in the UK and the Gangmasters Licensing Authority* (University of Hull, Wilberforce Institute for the Study of Slavery, 2010), 8.

[441] Andrew Geddes, Sam Scott and Katrine Nielsen, *Gangmasters Licensing Authority Evaluation Study: Baseline Report* (Gangmasters Licensing Authority, Nottingham, 2007) 112.

[442] Gangmasters Licensing Authority, *Supplier/Retailer Protocol* (2013) 2, http://www.gla.gov.uk/media/2735/supplier-retailer-protocol-final.pdf.

to identify whether exploitative practices exist in their supply chain.[443] However, there do not appear to be any empirical studies concerning the effectiveness of the Protocol or training initiative.

(e) Worker-led compliance initiatives[444]

Gordon discusses worker-led efforts to improve compliance with labour standards focusing, relevantly, on the examples of the Farm Labor Organizing Committee, United Farm Workers and the Coalition of Immokalee Workers.[445] The Farm Labor Organizing Committee, in 2004, negotiated with the North Carolina Growers Association to establish the "first-ever" collective bargaining agreement for H-2 migrant workers in the United states.[446] The United Farm Workers union, in 2013, helped launch the Equitable Food Initiative.[447] The Equitable Food Initiative currently applies, for example, to lettuce and strawberry suppliers to Costco.[448] Pursuant to this initiative, no-fee recruitment is required and it has established its own recruitment organization in Mexico that replaces the private recruiters previously used by suppliers under this initiative.[449] The Coalition of Immokalee workers has, since 2005, persuaded large brands (such as McDonalds, Whole Foods, Sodexo and Wal-Mart) to join the Fair Food Program it has established.[450] Pursuant to this programme, for example, direct hire is required for all growers who supply tomatoes to buyers who have joined the Fair Food Program.[451]

The Coalition of Immokalee workers has specifically termed its approach "Worker-Driven Social Responsibility".[452] As Gordon explains, worker-led initiatives "emphasize collective action by workers and consumers … reaching an agreement; meaningful enforcement of the … agreement through intensive and independent inspection regimes; the imposition of market consequences for noncompliance; and worker engagement in all aspects of the process, from setting the standards to educating peers to monitoring compliance".[453]

[443] Gangmasters and Labour Abuse Authority, *GLA and Sainsbury's – Working to Keep Exploitation out of Supply Chain* (15 December 2014), http://www.gla.gov.uk/whats-new/press-release-archive/151214-gla-and-sainsburys-working-to-keep-exploitation-out-of-supply-chain/.

[444] Linda Delp and Kevin Riley, "Worker Engagement in the Health and Safety Regulatory Arena under Changing Models of Worker Representation" (2015) 40(1) *Labor Studies Journal* 54.

[445] Gordon (2017), above n. 373.

[446] Ibid. 502.

[447] Ibid.

[448] Ibid.

[449] Ibid.

[450] Ibid.

[451] Ibid.

[452] Ibid.

[453] Ibid. 502–3.

4.3 An overview of transnational public–private compliance initiatives

In examining transnational public–private compliance initiatives, it remains the case that detailed empirical studies of such compliance initiatives remain relatively scarce. Alois, in the context of "global multi-stakeholder initiatives" – which, relevantly, include transnational public–private compliance initiatives – notes: "despite their importance, have not been adequately researched".[454] While there are a few studies that look at individual transnational public–private compliance initiatives, very few examine these initiatives and analyse them as a group or type of compliance initiative.[455]

4.3.1 Transnational public–private compliance initiatives in practice

This section focuses on public–private compliance initiatives that are "transnational" in nature. Transnational public–private compliance initiatives, as we use the term, include compliance initiatives that are driven by an IGO (such as the ILO), or compliance initiatives that are driven by multinational non-state business actors (such as a multinational corporation or industry group). As noted above, there is some ambiguity in the concept of what is meant by "transnational" – and even what is meant by "multinational". Bartley and Engels observe that the concept of "global production networks" is inherently transnational, yet they are "simultaneously both transnational structures and 'grounded in specific locations': they have particular physical and institutional characteristics that shape production practices and the relationships between nodes in a production network".[456] Transnational public–private compliance initiatives are the same in this sense – they are nevertheless, grounded in place.

Yet, the distinguishing characteristic of transnational public–private compliance initiatives is clear. These initiatives reflect – and seek to address the consequences of – two major global trends: first, that "the world of work is changing and globalization has become its key feature" and second, "that traditional sovereign-state-based labour laws and labour systems are confronted with increasingly powerful transnational non-state actors, which means that legal intervention at supra-state level is becoming increasingly relevant".[457]Another characteristic one might consider is the impact of new technologies on complex global supply chains. Anner et al. for example, note that in the context of the global apparel supply chain "[t]echnological advancements … further facilitate the expression of buyer power among retailers".[458] In this way, technological advances may also enhance the power of transnational non-state actors.

As noted above in section 4.2.1, there is a lack of consensus or certainty in the literature regarding how best to design transnational public–private compliance initiatives, and how

[454] Paul Alois, "Lessons for Effective Governance: An Examination of the Better Work Program" (2018) 24(1) *Global Governance* 139, 139.

[455] Ibid.

[456] Tim Bartley and Niklas Egels-Zanden, "Responsibility and Neglect in Global Production Networks: The Uneven Significance of Codes of Conduct in Indonesian Factories" (2016) 15 *Global Networks* 21, 24.

[457] Frank Hendrickx et al., "The Architecture of Global Labour Governance" (2016) 155(3) *International Labour Review* 339.

[458] Mark Anner, Jennifer Bair and Jeremy Blasi, "Toward Joint Liability in Global Supply Chains Addressing the Root Causes of Labor Violations in International Subcontracting Networks" (2013) 35(1) *Comparative Labor Law & Policy Journal* 1, 8.

regulatory functions are and should be distributed between actors in a regulatory system. The existing empirical research again reveals that the effects of transnational public–private compliance initiatives in improving adherence to labour standards have been patchy. As discussed further below, the impact of these initiatives is heavily dependent on factors such as: the power and influence of local state institutions,[459] the presence of civil society actors, market forces within the relevant industries,[460] the engagement of key actors within a labour supply chain,[461] the approach of the auditor,[462] and consequences for breach of compliance standards,[463] among other issues identified below.

Given the breadth of the definition of transnational public–private compliance initiatives, the types of initiatives considered in this section occur across a spectrum. At one end are transnational public–private compliance initiatives that are instigated and/or driven by IGOs (such as the ILO–IFC Better Work programme), and involve non-state business actors. At the other are transnational public–private compliance initiatives that are instigated and/or driven by transnational non-state business actors, such as multinational corporations or international industry associations. At this end of the spectrum, the nexus between the "private" and the "public" is nonetheless clear: as noted by Dehnen and Pries, "[a]ny form of transnational agreement … is linked (implicitly or explicitly) to existing local, national and transnational agreements".[464] Moreover, as will be discussed further below, the power and influence of state institutions are often critical to the success or impact of these types of compliance initiatives. Unsurprisingly, this diversity is reflected in the operation – and outcomes – of transnational public–private compliance initiatives in practice.

(a) "Hybrid" compliance initiatives

The Better Work programme[465] is considered a "hybrid" compliance initiative, due to the role of the ILO and host state in its inception and governance.[466] However, as Bair observes: "Better Work straddles the conventional distinctions that organise most discussions of governance – private versus public, and national/domestic verses transnational/global".[467] The Better Work programme exemplifies one of the more expansive transnational public–

[459] Toffel, Short and Ouellet (2015), above n. 73, 218.

[460] Jaako Salminen, "Contract-Boundary-Spanning Governance Mechanisms: Conceptualising Fragmented and Globalised Production as Collectively Governed Entities" (2016) 23(2) *Indiana Journal of Global Legal Studies* 709, 721.

[461] Toffel, Short and Ouellet (2015), above n. 73, 218. See also Axel Marx and Jan Wouters, "Rule Intermediaries in Global Labor Governance" (2017) 670(1) *The Annals of the American Academy of Political and Social Science* 189; Axel Marx and Jan Wouters, "Explaining New Models of Global Voluntary Regulation: What Can Organisational Studies Contribute?" (2018) 9(1) *Global Policy* 121.

[462] Genevieve LeBaron, Jane Lister and Peter Dauvergne, "Governing Global Supply Chain Sustainability Through the Ethical Audit Regime" (2017) 14(6) *Globalizations* 958.

[463] Marx and Wouters (2017), above n. 461, 200.

[464] Veronika Dehnen and Ludger Pries, "International Framework Agreements: A Thread in the Web of Transnational Labour Regulation" (2014) 20(4) *European Journal of Industrial Relations* 335, 346.

[465] See, e.g. Alois (2018), above n. 454.

[466] Jennifer Bair, "Contextualising Compliance: Hybrid Governance in Global Value Chains, New Political Economy" (2017) 22(2) *New Political Economy* 169, 170.

[467] Ibid.

private compliance initiatives – both in terms of geographic reach and in scope.[468] The Better Work programme conducts two types of activities: factory operations, and partnerships.[469] One key development in the Better Work programme as it has matured in recent years is the shift from emphasizing its monitoring activities to placing more resources in its advising and training operations.[470] As Alois has noted, this is consistent with the move towards a more cooperative approach – that is, viewing factory owners as partners in the Better Work programme – and reflects the reality that factory owners often fail to make improvements because "they do not understand the regulations, do not know how to comply, and are unable to find assistance".[471] However, the corollary to utilizing a more cooperative approach – and its fundamental weakness – "is that Better Work cannot readily address problems with zero-sum solutions": namely, "solutions that benefit workers at the expense of owners".[472]

As discussed further below, Amengual and Chirot's research demonstrates the importance of local context in the implementation of the Better Work programme in practice. For example, the presence of worker mobilization was critical to support enforcement in Indonesia.[473] Bair's recent research reinforces the conclusion that "outcomes associated with this governance initiative are largely contingent on the institutional characteristics and political dynamics of the local contexts in which the programme operates".[474] However, Bair identifies the need to contextualize the local context "within the transnational field in which [it is] embedded".[475] Specifically, Bair demonstrates how, in the case of Better Work Nicaragua, "the dynamics of the global value chain for apparel articulate with developments in the Nicaraguan political economy in ways that make it difficult to separate the 'domestic' political context from the 'transnational' field of a highly competitive industry".[476]

(b) Multilateral compliance initiatives

Transnational Framework Agreements

Transnational Framework Agreements (TFAs) include International Framework Agreements (IFAs), European Framework Agreements, and Transnational Company Agreements.[477] This analysis focuses on the operation of IFAs. IFAs typically draw from the ILO core conventions as their minimum standards.[478] In this sense, IFAs act "as nondelegated rule intermediaries which link the targets (employers) to the rules developed

[468] Alois (2018), above n. 454, 139–49.

[469] Ibid. 145.

[470] Ibid. 146.

[471] Ibid. 151.

[472] Ibid. 150.

[473] Matthew Amengual and Laura Chirot, "Reinforcing the State: Transnational and State Labor Regulation in Indonesia" (2016) 69(5) *Industrial and Labor Relations Review* 1056.

[474] Bair (2017), above n. 466, 171.

[475] Ibid.

[476] Ibid.

[477] Dehnen and Pries (2014), above n. 464, 335–6.

[478] Ibid.

by the regulator (ILO)".[479] That is to say, as outlined above in section 2.3.2 regarding the intermediaries model, IFAs act "indirectly in conjunction with the regulator [i.e. the ILO] to affect the behaviour of a target [i.e. the employer]".[480] The exact number of IFAs is not known, as these agreements are not required to be registered.[481] At the content level, while "[t]he ILO conventions are the main point of reference … [IFAs] do not always include them all", and some IFAs include issues that are grounded in domestic law, such as health and safety standards.[482] It is crucial to note, however, that IFAs sit outside national and transnational legislation, and therefore conflicts are resolved "if at all, by company-level bodies and individual actors".[483] Notably, some IFAs do not contain any provisions regarding conflict resolution at all.[484] This raises questions regarding whether and how conflicts regarding the operation of an IFA are resolved in practice.

Dehnen and Pries argue that the effectiveness of an IFA depends "on the specific *interaction with other regulatory mechanisms*".[485] They posit: "[a]ny form of transnational agreement is … linked (implicitly or explicitly) to existing local, national and transnational regulations and involves specific dominant actor groups and strategies as well as different modes of regulation and bargaining".[486] While IFAs lack "legal enforcement mechanisms for implementation", other key barriers to implementation are: intra- or inter-organization (that is, opposition between labour representatives at the company level, or between Global Union Federations (GUFs) and other employee representative bodies), and the fact that "the entire value chain of the company has to be integrated into the agreement" for an IFA to lead to improved labour conditions.[487] In this way, "national institutional settings and company-specific norms, actor constellations and conflict regulation modes can strongly influence both the negotiation and implementation of IFAs".[488] Dehnen and Pries' analysis of TFAs and IFAs illustrates the complexity of "the *emerging web of transnational labour regulation*".[489]

OECD Guidelines for Multinational Enterprises

Pursuant to the OECD Guidelines for Multinational Enterprises (OECD Guidelines), participating governments are required to establish National Contact Points (NCPs) to monitor and enforce compliance.[490] NCPs are to promote the OECD Guidelines and resolve

[479] Marx and Wouters (2017), above n. 461, 190.

[480] Abbott, Levi-Faur and Snidal (2017), above n. 173, 19.

[481] Dehnen and Pries (2014), above n. 464, 338.

[482] Ibid.

[483] Ibid. 339.

[484] Ibid.

[485] Ibid. 336 (emphasis in original).

[486] Ibid. 346.

[487] Ibid. 347.

[488] Ibid.

[489] Ibid. 336 (emphasis in original).

[490] Ibid. 18, 68.

issues involving non-compliance. Under the OECD Guidelines, an interested party can file a "specific instance" with an NCP if it has evidence of non-compliance.[491] Where an NCP determines further examination is warranted, the NCP can act as a mediator with the aim of achieving a non-adversarial resolution between the parties.[492] The NCP can then make the results publicly available – that is, issue a report stating that resolution was reached, or "name and shame" if resolution was not reached (or the party refused to participate) and the NCP concludes that non-compliance occurred.[493] This is the only mechanism for sanction under the OECD Guidelines.

Marx and Wouters posit that the effectiveness of this regime can be assessed on the basis of the number of "specific instances" filed with NCPs.[494] At the time of writing, Marx and Wouters found that on average, NCPs received "less than one complaint per year for each adhering country".[495] They note that most NCPs interpreted their role as serving as "mediation platforms between antagonistic parties" – and very few actually used the sanction of "naming and shaming" in the event that a party breached the OECD Guidelines.[496] Ruggie and Nelson note that while a few NCPs examined conduct, but it remains unclear "what actual remedy complainants receive or what changes in company policies and practices result from NCP findings and mediation".[497] Marx and Wouters conclude that there are two main reasons for the limited effectiveness of the OECD Guidelines: first, firms only become involved with the OECD Guidelines (and to a limited extent) if a "specific instance" is filed against them; and second, NCPs have no sanctioning mechanism and do little to encourage compliance.[498]

Fair Wear Foundation

The Fair Wear Foundation (FWF) is a private sustainability standards organization, a multi-stakeholder initiative that emerged from consultation between non-state business actors and other stakeholders, such as labour rights NGOs.[499] The aim of the FWF is to implement and enforce the FWF Code of Labor Practices (FWF Code), which contains standards for supply chain management.[500] A key feature of the FWF is the shift from relying on private audits.[501]

[491] Ibid. 72.

[492] Ibid.

[493] Ibid. 73.

[494] Marx and Wouters (2017), above n. 461, 195.

[495] Ibid.

[496] Ibid.

[497] John Ruggie and Tamaryn Nelson, "Human Rights and the OECD Guidelines for Multinational Enterprises: Normative Innovations and Implementation Challenges" (2015) 12(1) *Brown Journal of World Affairs* 99, cited in Marx and Wouters (2017), above n. 461, 195.

[498] Marx and Wouters (2017), above n. 461, 195.

[499] Ibid. 196.

[500] Fair Wear Foundation, Code of Labor Practices, https://www.fairwear.org/wp-content/uploads/2016/06/fwfcodeoflabourpractices.pdf.

[501] Marx and Wouters (2017), above n. 461, 196.

As a result of concerns raised by founding members such as the Clean Clothes Campaign, who strongly criticized private auditing practices, the FWF uses a "multi-level verification process" involving: (1) factory audits; (2) complaints procedures; and (3) a "brand performance check".[502] Marx observes that a "focal actor" is the FWF verification department.[503] Membership is limited, as the FWF's focus "is not to involve as many firms as possible, but to work intensively with (the best or most interested) member firms".[504]

Marx and Wouters observe, however, that assessing the effectiveness of FWF is difficult, and that data is limited.[505] Egels-Zandén and Lindholm, in their study of the effectiveness of FWF audits, note that while the FWF has been partly successful in improving some labour rights protections over time, this improvement has not occurred across the board, particularly in relation to the protection of freedom of association.[506] Moreover, they found that "suppliers 'move in and out of compliance,' suggesting that the FWF is not always effective in sustaining compliance over time due to supply chain dynamics within the garment industry, which is characterized by highly flexible product and labor markets".[507]

There have been a number of other initiatives, such as Social Accountability International's SA8000 standard, and the UK-based Ethical Trading Initiative, which reflect key tenets of the FWF model.[508]

The Accord on Fire and Building Safety in Bangladesh[509]

The Accord on Fire and Building Safety in Bangladesh (Accord) is centred on "the establishment of a system of private workplace inspections".[510] While the Accord is geographically bound, it is included in this section because it is an agreement – legally enforceable – between multinational corporations and GUFs.[511] According to Anner, the Accord is a "step up from traditional corporate codes of conduct, which are either unilateral

[502] Marx and Wouters (2018), above n. 461, 124.

[503] Ibid.

[504] Marx and Wouters (2017), above n. 461, 199.

[505] Ibid.

[506] Niklas Egels-Zandén and Henrik Lindholm, "Do Codes of Conduct Improve Worker Rights in Supply Chains? A Study of Fair Wear Foundation" (2014) 107 *Journal of Cleaner Production* 31, cited in Marx and Wouters (2017), above n. 461, 199.

[507] Marx and Wouters (2017), above n. 461, 199, citing Egels-Zandén and Lindholm (2014), above n. 506.

[508] For an overview of these initiatives, see Bartley (2018), above n. 18, 9–10.

[509] For further information about the events leading to the Rana Plaza fire, see Larry Cata Backer, "Are Supply Chains Transnational Legal Orders? What We Can Learn from the Rana Plaza Factory Building Collapse" (2016) 1 *UC Irvine Journal of International, Transnational, and Comparative Law* 11.

[510] Phillip James et al., "Regulating Factory Safety in the Bangladeshi Garment Industry" (2018) *Regulation & Governance* 2, 5.

[511] For further information regarding the establishment of the Accord and the roles played by key stakeholders, see Reinecke and Donaghey, "The 'Accord for Fire and Building Safety in Bangladesh' in Response to the Rana Plaza Disaster", above n. 373.

or the result of partnerships with NGOs but not labor".[512] That the Accord is legally enforceable is a defining feature of this compliance initiative: "[i]n effect, the [Accord] creates a direct contractual relationship between lead firms and their suppliers' workers and worker representatives".[513] However, one could query the feasibility of a worker issuing proceedings against a global brand. As Bhadily observes, workers are unlikely to be able to afford to take legal action and, critically, "unions … suffer from Bangladesh reprisals and suppression and are not able to take such action unless the government changes its policy by providing more freedom for worker representation".[514]

Another distinct feature of the Accord is that it attempts to harness and mitigate the impact of market forces within the regulated industry. The Accord requires factories to maintain certain standards with respect to fire and building safety.[515] Critically, the Accord "takes into account the collateral effects of enforcing fire and construction standards".[516] For example, global brands who are part of the Accord commit to paying suppliers a sufficient amount for their goods to enable the suppliers to pay for required repairs and operate at the required safety standard.[517] If a factory closes for renovation, parties to the Accord must require the factory to keep its workers employed with their regular pay during the renovation period for up to six months.[518]

However, on the point of worker compensation, Donaghey notes that "the Accord heavily relied on workers to raise the issue and put pressure on employers and brands".[519] Accordingly, "in the context of low-paid, female migrant workers with low literacy from rural areas, the Accord's negotiation process was perceived as cumbersome" – moreover, "[d]elays in compensation payments were seen as inadequate help to low paid workers who needed the money immediately to sustain their livelihoods".[520] In general, assessments of the impact of the Accord are mixed. James et al. note, primarily based on statistics concerning initial improvements arising from initial inspections, that "there would seem little doubt that the Accord is having a widespread and significant impact on factory safety regarding fire, electrical, and structural matters".[521] Yet, progress appears to be hamstrung

[512] Mark Anner, "Labor Control Regimes and Worker Resistence in Global Supply Chains" (2015) 56(3) *Labour History* 292, 301.

[513] Salminen (2016), above n. 460, 724.

[514] Mohammed Al Bhadily, "Does the Bangladesh Accord on Building and Fire Safety Provides a Sustainable Protection to Ready-made Garment Workers" (2015) 4(4) *Review of Integrative Business and Economics Research* 158, 167.

[515] Bangladesh Accord Foundation, "2018 Accord on Fire and Building Safety in Bangladesh: May 2018" (21 June 2017), https://admin.bangladeshaccord.org/wp-content/uploads/2018/08/2018-Accord.pdf.

[516] Salminen (2016), above n. 460, 723.

[517] Bangladesh Accord Foundation, "2018 Accord on Fire and Building Safety in Bangladesh: May 2018", above n. 515, 6–7.

[518] Ibid. 7; Salminen (2016), above n. 460, 723.

[519] Jimmy Donaghey and Juliane Reinecke, "When Industrial Democracy Meets Corporate Social Responsibility – A Comparison of the Bangladesh Accord and Alliance as Responses to the Rana Plaza Disaster" (2018) 56(1) *British Journal of Industrial Relations* 14, 30.

[520] Ibid. 31.

[521] James et al., above n. 510, 6.

by the "reticence" of global brands to comply with the Accord and pay a sufficient contract price to fund safety improvements.[522] This lays bare the fact that, despite the "agreement to take co-responsibility" the "main burden remains with the supplier [i.e. factory owner]".[523] As Scheper observes, "[i]n effect the implementation hinges on the supplier's ability to change local conditions while transnational criteria for sourcing decisions remain unchanged".[524]

The Accord has also been criticized on the basis of its narrow scope – that is, "[i]t only takes into account the issues or interests specifically mentioned in the agreement, leaving out others that have not received similar levels of media attention".[525] Indeed, the Accord "has not even touched upon" pressing issues such as wages and working conditions.[526] However, Reinecke and Donaghey observe that while the Accord "is focused on … highly specific and highly defined issues … [IFAs] and private labour standards often cover a wide variety of industrial relations issues but may be less able to deliver in terms of expertise required and monitoring involved".[527] Moreover, they posit that the Accord "could have meaningful effect in terms of spillover to other areas of employment relations".[528]

Nonetheless, Berliner et al. conclude that "very little has changed in practice".[529] Even after the advent of the Accord, "the balance between the clusters of actors in Bangladesh … is tilted heavily towards favouring an alliance between government and business rather than government and workers".[530] The Accord may "alleviate *concerns* about fire and building safety while doing nothing to prevent the continued exploitation of workers in other ways".[531]

Zajak analyses the Accord's impact on trade unions in Bangladesh and concludes:

> [unions] can realize the institutional power through the Accord, sometimes even beyond the narrowly defined mandate of the Accord. They can also use the information and the shadow of protection provided by the Accord to organize workers and build their organizational strength. Yet, given the increasingly effective counter-strategies of

[522] Ibid. 7.

[523] Christian Scheper, "Labour Networks Under Supply Chain Capitalism: The Politics of the Bangladesh Accord" (2017) 48(5) *Development and Change* 1069, 1082.

[524] Ibid.

[525] Salminen (2016), above n. 460, 725.

[526] Scheper (2017), above n. 523, 1070, citing John Smith, "Rana Plaza and the Crack in Economic Theory" (paper presented at the Third SPERI Annual Conference, "The Global Contours of Growth & Development Beyond the Crisis", Sheffield, 30 June–2 July 2014).

[527] Juliane Reinecke and Jimmy Donaghey, "After Rana Plaza: Building Coalitional Power for Labour Rights Between Unions and (Consumption-Based) Social Movement Organisations" (2015) 22(5) *Organization* 720, 736 ("After Rana Plaza").

[528] Ibid.

[529] Daniel Berliner et al., *Labor Standards in International Supply Chains: Aligning Rights and Incentives* (Edward Elgar Publishing, 2015), 140.

[530] Ibid.

[531] Ibid. 142, citing Colin Long, "After Rana Plaza", *Jacobin Magazine* (2014), https://www.jacobinmag.com/2014/06/after-rana-plaza (emphasis added).

> management, the involvement of third parties can also be a source of additional repression and can even delegitimize unions in front of workers, thereby reducing rather than enhancing the organizational strength of unions.[532]

This, as Zajak explains in detail, is related to the fact that the Accord "is severely criticized and not regarded as a legitimate actor" and the "BGMEA [Bangladesh Garment Manufacturers and Exporters Association] and other domestic elites increasingly blame the Accord for problems in the garment industry".[533] Additionally, James et al. observe that "[u]nions … continue to operate in a very hostile environment" with reports that "government ministers have personally intimidated labor activists".[534]

Finally, the Accord expressly "provides for less stringent measures" for Tier 2 and Tier 3 factories as compared with Tier 1.[535] While Blecher notes that this "gradation of prioritizing … is common among voluntary efforts stemming from codes of conduct in the manufacturing industry", it nonetheless exposes the key limitations of auditing mechanisms in complex supply chains.[536]

(c) Industry-led compliance initiatives

The Electronics Industry Citizenship Coalition Code of Conduct (EICC) provides an example of a transnational industry-led code of conduct. The EICC code contains 53 items and, relevantly, incorporates local labour standards in certain instances – for example, in relation to freedom of association, the code states: "The rights of workers to associate freely, join or not join labour unions, seek representation, and join worker's councils, and bargain collectively in accordance with local laws shall be respected".[537] As noted by Distelhorst et al., this deference to local laws is concerning in countries where local laws do not conform to the standard set by the ILO, such as in China. Hewlett-Packard uses third-party auditors to audit its supply chain. In 2011, Hewlett-Packard noted in its corporate citizenship report that its supply chain was "far from fully compliant with the EICC code", though it is worth noting that "[a] majority of supplier facilities comply with the code in 13 of 20 key categories".[538]

Distelhorst et al., in their analysis of the impact of auditing pursuant to the EICC code in the Hewlett-Packard supply chain, found that "key areas of social performance remained unchanged after repeated audits".[539] Indeed, "[w]age practices showed no improvement at all". According to Distelhorst et al. "[t]his finding is consistent with previous research showing that … auditing regimes show uneven performance and buyers appear willing to

[532] Sabrina Zajak, "International Allies, Institutional Layering and Power in the Making of Labour in Bangladesh" (2017) 48(5) *Development and Change* 1007, 1023.

[533] Ibid. 1025.

[534] James et al., above n. 510, 8.

[535] Lara Blecher, "Code of Conduct: The Trojan Horse of International Human Rights Law" (2017) 38 *Comparative Labor Law & Policy Journal* 437, 453.

[536] Ibid.

[537] Electronics Industry Citizenship Coalition, *Electronics Industry Citizenship Coalition Code of Conduct* (2014).

[538] Greg Distelhorst et al., above n. 373, 228.

[539] Ibid. 229.

source from non-compliant factories".[540] This reinforces criticisms of the private social auditing regime raised by authors such as LeBaron et al. and discussed further below.

However, Distelhorst et al. also observed significant variation in country practice; this reinforces the analysis below in section 4.4.2, that emphasizes the importance of the national context in achieving greater compliance.[541] For example, it was found that in the Czech Republic "information gathered by [Hewlett-Packard] auditors combined with growing stringency in the regulation of workplace standards to improve conditions for vulnerable agency workers".[542] Whereas in China, "[t]he disconnect between private standards, which demand adherence to local law, and the priorities of local regulatory agencies gave these factories little incentive to comply with private regulatory demands".[543]

Nadvi and Raj-Reichert also observe the importance of public regulation – in particular, market access regulation. They compare the impact of the EICC, for example, with the impact of the European Union Directive on the Restriction of Hazardous Substances (HS Directive).[544] The HS Directive is enforced by its member States pursuant to their domestic laws implementing the HS Directive, and it sets the acceptable thresholds for certain hazardous chemicals including lead and mercury.[545] Most commonly, the HS Directive is enforced by a customs agency and importation may be denied as the penalty for non-compliance – with brands and distributors responsible for compliance.[546] Nadvi and Raj-Reichert found that while "the EICC is weakly implemented further down the value chain", the HS Directive "given its mandatory legal stipulation and associated regulatory mechanisms, has been effectively pushed down the [global value chain] to second tier suppliers".[547] In this way, Nadvi and Raj-Reichert suggest that a public regulation mechanism may be more coercive.

Indeed, Nadvi and Raj-Reichert conclude:

> Market access legislation … may improve compliance through the "stick" of public regulation. Our findings support arguments for complementary public-private governance … but go further by stressing the importance of public *over* private regulation. This does not imply that private standards and initiatives or public inspection are unimportant, but that achieving public-private "complementarity" may require greater emphasis on the regulation of market access.[548]

[540] Ibid.

[541] Ibid.

[542] Ibid. 235.

[543] Ibid. 235.

[544] Khalid Nadvi and Gale Raj-Reichert, "Governing Health and Safety at Lower Tiers of the Computer Industry Global Value Chain" (2015) 9(3) *Regulation & Governance* 243.

[545] Ibid. 247.

[546] Ibid.

[547] Ibid. 254.

[548] Ibid. 255.

4.3.2 Interaction between "private" and "public" regulation

This section of the literature review seeks to analyse the interaction between "private" and "public" regulation (that is, between state and non-state actors) in the context of domestic and transnational public–private compliance initiatives. Much of the recent literature concerning the question of how both domestic and transnational initiatives interact with state regulations focuses on three key concerns: whether these initiatives *reinforce* state institutions, whether these initiatives have a *complementary* role given the "governance deficit"[549] that may exist (particularly in respect of state institutions in the context of global supply chains), or whether these initiatives *compete* with state institutions and undermine standards.

As Zenker observes:

> Neither public nor private labor regulations operate in a vacuum. Both exist alongside one another, purporting to regulate the same factories and monitor compliance with the same laws. But each regime has proven that it cannot operate alone to remedy gaps in transnational labor regulation. When actors in the two regimes refuse to work together to complement the others' weakness, their efforts are rudderless and duplicative. Interactions between stakeholders in the private and regulatory regimes can be asymmetrical and antagonistic, but they need not be.[550]

However, as outlined above in section 2.3.1, some recent research suggests that the binary classification between "complementarity" and "competition" is too simplistic in its portrayal of complex interactions between public and private forms of regulation and governance. As noted above, Eberlein et al. identify four broad categories to describe the character of the interaction between actors: competition; coordination; co-optation; and chaos. By contrast, Karassin and Perez identify five separate different categories: incorporation; facilitation; abstention; substitution; and suppression.

Nevertheless, the literature canvassed in this section – which concerns public–private compliance initiatives in practice, including the question of their efficacy in practice – largely frames the question of interaction in terms of the following categories: reinforcement of state institutions; complementarity between state and non-state actors; and competition.

(a) Reinforcement of state institutions

Amengual and Chirot argue that two conditions make reinforcement of state institutions more likely.[551] First, where worker mobilization is present.[552] Second, where "transnational regulators have authoritative support from their governing bodies to interpret contested rules in a way that forces firms into constraining state structures instead of allowing them to remain disengaged".[553] That is, there is "support for interpretations of rules that go against the status quo of institutional weakness and force employers to engage with constraining institutions".[554] This flows from Amengual and Chirot's analysis of the respective failure

[549] See, e.g. Bair (2017), above n. 466, 169.

[550] Julia Zenker, "Made in Misery: Mandating Supply Chain Labor Compliance" (2018) 51(1) *Vanderbilt Journal of Transnational Law* 297, 318–19.

[551] Amengual and Chirot (2016), above n. 473, 1059.

[552] Ibid.

[553] Ibid. 1060.

[554] Ibid.

and success of Better Work Indonesia in relation to fixed-term contracting and wage setting. In the latter instance, a key government stakeholder in the Project Advisory Committee interpreted state rules as requiring the factories to engage in a state-structured process of wage negotiation, which enabled Better Work Indonesia to "take reinforcing actions".[555] In drawing these two conditions for reinforcement of state institutions together, Amengual and Chirot identify three ways in which Better Work Indonesia might enhance the likelihood of reinforcement of state institutions: (1) by tying penalties or incentives associated with the programme to following state-prescribed processes; (2) by disseminating information about formal legal process; (3) by working with managers to enable them to understand how to engage with state institutions and reduce their information costs.[556]

What Amengual and Chirot suggest "is that positive regulatory interactions are possible if transnational regulators require engagement with state processes, but that for such reinforcement to occur these processes must impose a real constraint on actors' behaviour, an outcome that depends largely on domestic politics".[557] This is reflected in the conclusions of Distelhorst et al. in their analysis of the EICC. According to their research: "[p]rivate regulation can increase the power of existing regulatory institutions by drawing attention to violations and incentivising management to address them to avoid state regulatory actions … However, in the absence of both effective regulatory institutions and independent civil society … the efficacy of private regulation is severely limited."[558]

***(b) Complementary role of public–private initiatives*[559]**

Bartley and Egels-Zandén propose that public and private regulation may play complementary roles in enhancing the enforcement of labour standards. In their analysis of corporate codes in Indonesia, Bartley and Egels-Zandén suggest that public and private regulation fulfil "different niches" and address different types of labour standards.[560] They found that the significance and impact of corporate codes "depends on the issue at hand".[561] For example, codes "appear to matter little when it comes to process rights"[562] (such as freedom of association), but "factories subject to codes of conduct are distinctive on several measures of health and safety".[563] Critically, however, their findings suggest that when it comes to general employment practices "government labour inspection appears to be much more consequential than codes" – with the caveat that "codes are positively related to permanent workers receiving legally required written contracts".[564] They conclude that their

[555] Ibid. 1064.

[556] Ibid. 1062.

[557] Ibid. 1077.

[558] Distelhorst et al., above n. 373, 235.

[559] This section focuses on the complementary role played by state and non-state actors in transnational initiatives. For a discussion on the complementary roles of non-state actors acting in coalition, see Reinecke and Donaghey, "After Rana Plaza", above n. 527.

[560] Bartley and Egels-Zanden (2016), above n. 456, 23.

[561] Ibid. 37.

[562] Ibid.

[563] Ibid. 38.

[564] Ibid.

results suggest there may be "uncoordinated complementarity in which standards are prioritized" as between private and public regulation of labour standards.

Cotton, in her discussion of transnational private compliance initiatives, notes that one role of transnational private labour regulations is to address "the 'temporal asymmetry' of the slow process of international regulation of a fast developing form of externalised labour" by "potentially secur[ing] minimum standards within a relatively short time frame".[565] Again, Cotton suggests that transnational private compliance initiatives may play a complementary role by addressing the limitations of state institutions. Notably, in the context of the Accord, James et al. conclude that the presence of support from state institutions for compliance initiatives driven by non-state actors is "not necessarily crucial".[566] Indeed, "a striking feature of the outcomes of the Accord's inspection program is that they were achieved against the backcloth of a very mixed and qualified degree of support from the Bangladesh government and with no direct involvement of government inspectors". However, as Bartley and Egels-Zandén acknowledge, "[o]ne should remember … private and public regulation of labour conditions have rarely been compared directly, so many questions remain about their relative impacts and the conditions under which they make a difference".[567]

In the context of domestic public–private initiatives, Fine has described how co-enforcement may enhance or extend the resources of state regulators: "worker organizations can provide inspectors with material resources; their staff may go out to worksites and homes, interview workers, and help them to fill out complaints or reconstruct payroll records for use by investigators. Those resources can make a tremendous difference for labor inspectorates carrying large caseloads on tight budgets."[568]

On the other side, it has been further observed that when "financial resources flow from state to society, the ability of worker organizations to support enforcement is strengthened".[569] State regulators have access to coercive sanctions and the "unique power to legitimize the claims of workers and worker organizations to broader society".[570] Accordingly, Amengual and Fine conclude: "[r]ecognizing non-substitutable elements reveals aspects of labor inspection otherwise obscured, and can allow enforcement efforts that take advantage of such capabilities … [as] co-enforcement is intended to complement rather than replace government capacity".[571]

(c) Competition with state institutions

In the analysis of LaBaron et al. regarding the ethical audit regime, there is the suggestion that the private ethical auditing regime supplants public regulation, as multinational corporations "make their own rules" by implementing private audit regimes that ostensibly

[565] Elizabeth Cotton, "Transnational Regulation of Temporary Agency Work Compromised Partnership Between Private Employment Agencies and Global Union Federations" (2015) 29(1) *Work, Employment and Society* 137, 149.

[566] James et al., above n. 510, 9.

[567] Bartley and Egels-Zanden (2016), above n. 456, 39.

[568] Fine (2017), above n. 389, 378.

[569] Ibid.

[570] Ibid., citing Gordon (2005), above n. 377.

[571] Ibid.

manage and resolve labour concerns.[572] This is the effect of a shift towards non-state business actors taking on roles "as regulators, setting and enforcing standards in supply chains",[573] and it has enabled corporations to "legitimate and protect their business model".[574] This shift is justified on the basis of the inability of national institutions and regulations to deal with "rapidly growing cross-border movements of capital, labor, goods, and services"[575] and "the embrace of neoliberal ideas by governments [which] has translated into deregulatory initiatives that have weakened the capacity of national institutions to regulate labor markets".[576]

As LaBaron et al. explain in detail, the literature on private auditing has:

> identified critical shortcomings with efforts to monitor and change supplier practices through private auditing, including: financial relationships between auditors and their clients that create conflicts of interest and skew audit processes, reporting, and corrective action; the tendency of corporations to commission lenient audits; the limited power of auditors compared to state-based inspectors; and the confidentiality of audit results, which creates a lack of transparency and accountability.[577]

Corporations – both retail and brand – use the social auditing regime to protect their business interests rather than to "detect and address" social problems in their supply chain.[578] This conduct flourishes in contexts "where there is a lack of political will to require transparency in business".[579] Indeed, it occurs in the context of multinational corporations engaging in "regime shopping" being "significantly less likely to locate in countries where employment protections are robust, unions are strong, collective bargaining is centralized at the industry or sectoral level".[580] Moreover, countries and regions compete to secure investment from multinational corporations by offering "different forms of labor flexibility, lower labor costs, and qualified labor rights".[581] Thus, private auditing often occurs against the backdrop where state institutions, local labour inspectorates, *and* political will is weak.

Moreover, during fieldwork conducted by LaBaron et al., "company representatives described the deepening need for auditing in the face of governance gaps in many parts of the world".[582] In this way, "the growth of the audit regime has increased the role and power of non-state actors in *determining and enforcing an accepted framework* for supply chain

[572] LeBaron, Lister and Dauvergne (2017), above n. 462, 959.

[573] Ibid.

[574] Ibid. 964.

[575] Paul Marginson, "Governing Work and Employment Relations in an Internationalized Economy: The Institutional Challenge" (2016) 69(5) *ILR Review* 1033, 1035.

[576] Ibid. 1035, citing Colin Crouch, *The Strange Non-death of Neo-liberalism* (Polity, 2011).

[577] LeBaron, Lister and Dauvergne (2017), above n. 462, 960.

[578] Ibid. 961.

[579] Ibid. 971.

[580] Marginson (2016), above n. 575, 1036.

[581] Ibid.

[582] LeBaron, Lister and Dauvergne (2017), above n. 462, 971.

compliance".[583] Indeed, the pervasiveness of this regime "deflect[s] pressure for stricter, state-based regulation" and therefore "legitimizes intrinsically unsustainable models of … production".[584]

In separate research on Cambodian garment factories, Salmivaara has found that a technocratic focus of many private initiatives has meant that many governance initiatives ignore the economic conflict between labour and capital, but also the possible political conflict between labour and government. She argues:

> By ignoring trade union rights, power-blind initiatives might end up weakening both the labour movement and democratic accountability, instead of complementing state's regulatory roles [sic]. This might serve the overlapping interests of the powerful actors both in Cambodia and internationally.[585]

4.4 Additional themes emerging from research on public–private compliance initiatives

Drawing on the some of the specific case studies that were surveyed in the preceding section, as well as other empirical research of compliance activities in the field, this section summarizes some of the key themes, including opportunities and challenges, presented by public–private compliance initiatives. Many of these issues – auditing, stewardship, resourcing and the role of the state – are also relevant to the effectiveness, efficiency and legitimacy of regulatory initiatives more generally.

4.4.1 Auditing

There has been sustained criticism of the growing "ethical audit regime" over the past two decades.[586] LaBaron et al. observe that the existing literature is "preoccupied with ways to improve the effectiveness of audits … [and] has neglected the fundamental governance question of *who* the audit regime is effective *for*".[587] As noted above, they argue: the "audit regime is itself a mechanism to enhance the legitimacy of industry-led privatized forms of global governance, whose deficiencies are well-known".[588] Indeed, the barriers to effective ethical auditing are significant. The key barriers lie in "the disproportionate power and control that companies yield over the pathway, timing and implementation of audits".[589]

For example, companies can direct how far "down" the supply chain an audit will reach (and many companies only audit "Tier 1" suppliers).[590] Even where bona fide attempts to audit

[583] Ibid. 971 (emphasis added).

[584] Ibid. 972.

[585] Anna Salmivaara, "New Governance of Labour Rights: The Perspective of Cambodian Garment Workers' Struggles" (2018) 15(3) *Globalizations* 329.

[586] LeBaron, Lister and Dauvergne (2017), above n. 462, 960.

[587] Ibid.

[588] Ibid. 962.

[589] Ibid. 968.

[590] Ibid.

are made, it may be difficult to trace through a complex supply chain.[591] Moreover, given the "business value" of these audits, many Tier 1 suppliers may choose to either subcontract further[592] or devise "strategies to falsify and misrepresent audit results and certifications to prospective customers".[593] Zenker identifies instances where sweatshop labour practices have been reported in factories that had been audited and inspected, and found to have met the applicable standards.[594] For example, fires in Bangladesh and Pakistan occurred in factories that had been certified as meeting safety standards.[595]

Additionally, "auditors may be implicitly or even explicitly encouraged not to detect incidents of forced labor".[596] Moreover, as Crane et al. observe, as auditors report directly to the commissioning client, potentially unlawful or criminal activity is not reported to the appropriate authorities if and when it is identified and disclosed during the auditing process.[597] Crane et al. conclude that, even where practices as serious as forced labour have occurred, it has been found in businesses that have passed social auditing processes.[598] They note how a raid by police in the UK found 60 migrants in the harvesting industry subjected to forced labour, even though the labour hire provider had passed two private audits conducted by its client (that is, the grower to whom the labour was supplied), as well as an audit by the GLA.[599] All three audits – by private and public regulators – failed to detect forced labour.[600] Finally, even where falsification is not in issue, auditing relies on a "checklist" approach that "can hardly be regarded as effective monitoring".[601]

4.4.2 Stewardship

It is important to ensure that, where an IGO is driving the transnational public–private compliance initiative, it acts as an anchor for the initiative "preventing its capture by powerful stakeholders".[602] As Alois notes, multinational corporations "are publicly traded companies that are intensely focused on maximizing profit for shareholders. They are not

[591] Crane et al., above n. 376, 14.

[592] LeBaron, Lister and Dauvergne (2017), above n. 462, 968.

[593] Ibid. 970.

[594] Zenker (2018), above n. 550, 308–9, 320.

[595] Axel Marx and Jan Wouters, "Redesigning Enforcement in Private Labour Regulation: Will it Work?" (2016) 155(3) *International Labour Organization 2016 International Labour Review* 435, 440.

[596] Ibid.

[597] Ibid.

[598] Ibid., citing Martin Shankleman, "Migrant's Work Stocked Supermarkets", BBC News (Online, 19 November 2008), news.bbc.co.uk/2/hi/uk_news/england/7738293.stm.

[599] Ibid.

[600] Ibid.

[601] Marx and Wouters, above n. 595, 442.

[602] Ibid. 153.

structured to address the public good and will not invest resources in doing so."[603] This analysis reflects the criticisms of the Accord and the EICC, as outlined above, where multinational corporations prioritized maximizing profit over strict adherence with the Accord and EICC, respectively. In a context where multinational corporations have long determined and dominated the many compliance initiatives in the apparel industry, the impartiality associated with the Better Work programme – which has largely been due to the ILO and IFC overseeing the programme – is seen as integral to the overall success of this initiative.[604]

4.4.3 Resourcing

Adequate resourcing is critical. As noted by James et al. in relation to the Accord, to the extent that this initiative has had a positive impact, this "cannot logically be divorced from the fact that its resourcing has been sufficient to support the appointment of an international consultancy to conduct initial inspections of all factories and to carry out regular follow-up inspections, with a current complement of over 100 engineering inspection staff".[605] The Accord thus "draws attention to the point that the impact of regulatory initiatives is likely to be tied up with the issue of the resources devoted to their implementation". [606]

4.4.4 State context

Toffel et al. conducted a large-scale[607] study of supplier-factory compliance with private codes of conduct. This study examined institutional conditions in both the "supplying" country (that is, where the supplier or factory is located) and the "buying" country (that is, the developed market where the product is purchased).[608] Their findings both demonstrate the critical role of state, civil society and market institutions – but also advances our understanding of how these institutions shape adherence to private codes of conduct.[609] Relevantly, Toffel et al. found there was "greater adherence to global standards embodied in codes of conduct among supplier factories that are embedded in states that actively participate in the ILO treaty regime and that have highly protective labour laws and high levels of press freedom".[610] They also found "greater adherence among supplier factories that serve buyers located in countries where consumers are wealthy and socially conscious".[611]

Relevantly, Bair, in her analysis of the Better Work programme in Nicaragua, discusses the difficulty of separating the "state" or local context from the transnational context within

[603] Ibid.

[604] Ibid.

[605] James et al., above n. 510, 9.

[606] Ibid.

[607] Their data set included "44,383 social audits of 21,836 establishments in 12 industries and 47 countries": Toffel, Short and Ouellet (2015), above n. 73, 205.

[608] Ibid.

[609] Ibid. 206.

[610] Ibid.

[611] Ibid.

which it is situated. For example, the employer association in the garment manufacturing sector supported the so-called "4×4" work week, where employees would work four consecutive 12-hour days and then have four days off.[612] The Ministry of Labour determined that this violated Nicaraguan labour law regarding the maximum length of a work day.[613] Better Work also considered this practice to be non-compliant, and had marked it as such in factory reports.[614] The Supreme Court of Justice held that the employers' interpretation was permitted as long as there was worker consent.[615] This decision was seen as permitting further deviations from labour law, as long as there was worker consent.[616] According to Bair, there was an internal conflict "between factions within the domestic political economy" triggered by "broader concern about the possible implications of negative compliance findings", and the judicial response was to introduce a "more flexible interpretation of labour law" to reclassify otherwise non-compliant practices as compliant.[617] This example perhaps typifies the primacy of domestic governance when transnational rules diverge from the legal and judicial systems provided by the nation state, as identified by Bartley in his discussion of place-conscious transnational governance (outlined above in section 2.3.3).

Bair argues that this highlights the need to situate local contexts within the broader dynamics of the global supply chain – that is: "national contexts and local politics are themselves, at least in part, a product of domestic actors' interpretations of external pressures, and the opportunities and constraints these pressures are understood to represent".[618]

Press freedom was identified in the literature as another particularly important factor.[619] In this sense, the state within the "supplying" country is not only important because it exercises "traditional government functions like lawmaking", but also because of the state's role in "enabling civil society actors, such as the press, to exert their own regulatory efforts".[620] Toffel, Short and Ouellet argue that their findings "strongly suggest that corporate codes of conduct should not be viewed as "single-actor schemes" … but rather as dependent on these other regulatory institutions".[621] However, they note that their methodology could not identify the "precise mechanisms by which these institutional factors influence private actors or interact with one another".[622]

[612] Bair (2017), above n. 466, 179.

[613] Ibid.

[614] Ibid. 180.

[615] Ibid. 179.

[616] Ibid.

[617] Ibid. 180.

[618] Ibid. 182.

[619] Ibid. 218.

[620] Ibid.

[621] Ibid. 219, citing Kenneth W. Abbott and Duncan Snidal, "The Governance Triangle: Regulatory Standards Institutions and the Shadow of the State" in Walter Mattli and Ngaire Woods (eds), *The Politics of Global Regulation* (Princeton University Press, 2009), 44, 47.

[622] Ibid.

Finally, Anner floats the possibility that in many cases in the context of public–private compliance initiatives, we may be left in an "impossible quandry".[623] This is because "[s]ocial compliance programs lack power and legitimacy, and apparel production [for example] is concentrating where states lack power and legitimacy".[624] He posits, however, that one possible solution to this problem is "external pressure for state reform, be it through trade deals or other forms of state and inter-state influence".[625] Thus, it appears to remain the case that the state context has a significant role in the enforcement of labour standards. This aligns with Bartley's call to "recentre" the state when engaging in transnational private regulation,[626] and not succumbing to the myth of "empty spaces".[627]

4.4.5 Market considerations

Mayer and Gereffi observe that the "success of the 'classic' forms of private governance in the apparel industry – codes of conduct adopted by lead firms such as Levi-Strauss, Nike, and Gap and imposed on their suppliers – depended on the power of those lead firms in their global value chains".[628] However, the power that these firms wield can also undermine the impact of these codes of conduct or other multi-stakeholder initiatives on improving labour standards in lower tiers of the supply chain. Indeed, in the context of the Accord and as discussed above, Scheper noted that while it creates a level of "co-responsibility" as between the buyer and supplier, ultimately the burden rests with the supplier and "[t]he economic bottom line of the buying company remains untouched".[629]

One of the successes of FWF is said to lie in the fact that it engages in "embeddedness" and "encourages vertical integration" thus engaging "in a form of 'business engineering' which goes far beyond the typical monitoring of labor conditions and implementation of labor rights".[630] This occurs because the FWF programme rewards participating firms who develop long-standing relationships with their suppliers, and who concentrate on working with a limited number of suppliers "rather than fragmenting their supply chains".[631] The FWF also rewards "firms that source from suppliers they own".[632]

In the context of the Accord, Anner et al. note that many the world's global brands and retailers have signed onto the Accord.[633] This is considered important because "[a] high level of density … means that increased costs resulting from the agreement will not put any

[623] Anner, "Monitoring Workers' Rights", above n. 512, 64.

[624] Ibid.

[625] Ibid.

[626] Bartley (2018), above n. 18, 37.

[627] Ibid. 5.

[628] Frederick Mayer and Gary Gereffi, "Regulation and Economic Globalization: Prospects and Limits of Private Governance" (2010) 12(3) *Business and Politics* 1, 9.

[629] Scheper (2017), above n. 523, 1082–3.

[630] Marx and Wouters (2017), above n. 461, 202.

[631] Ibid.

[632] Ibid.

[633] Anner, Bair and Blasi (2013), above n. 458, 29.

participating company at a competitive disadvantage relative to any other signatory, thereby easing implementation".[634] However, Anner et al. observe that several large retailers and brands have instead decided to sign onto the weaker Alliance for Bangladesh Worker Safety, which does not require its participants to contribute funds for factory renovations and repairs;[635] nor is it legally binding.[636] Thus, it may be that competitive disadvantages are felt by brands and retailers that have signed onto the Accord.

On the point of market influences, Locke and Samel similarly discuss the impact of "upstream" business practices and argue that "the policies and practices implemented *upstream* in response to highly dynamic and retail markets shape *downstream* in the factories manufacturing these goods".[637] In their view, "[l]abor standards problems, exemplified by excessive working hours, are not only (or even primarily) the result of poor managerial practices and behavior in the plants, but rather stem from the series of supply-chain responses to these dynamic market conditions that have become routinized and optimized by global buyers in an effort to mitigate their financial and reputational risks and meet demand for their products in a timely manner".[638]

Finally, as noted above, Toffel et al. found greater compliance with corporate codes of conduct "among supplier factories that serve buyers located in countries where consumers are wealthy and socially conscious".[639] This was in line with the researchers' hypothesis. Toffel et al. argued that the consumers in the buyer market may influence supply chain management practices because their attitudes "reflect the potential for political mobilization".[640] Toffel et al. note that multinational corporations "are highly sensitive to negative publicity that might damage their brand reputation with consumers, the public, and government regulators"[641] and that "[t]he latent threat of political mobilization may induce image-sensitive [multinational corporations] not only to adopt [corporate social responsibility] measures, but also to implement them effectively".[642] Kolben also discusses the notion of "consumer-citizenship" and discusses how, increasingly, "despite the legitimate questions about the degree to which consumers care or will act on their beliefs … a substantial number are indeed motivated by specific commitments to improving the plight of workers".[643]

[634] Ibid.

[635] Ibid.; for more details on Alliance see Backer (2016), above n. 509.

[636] Bhadily (2015), above n. 514, 166.

[637] Richard Locke and Hiram Samel, "Beyond the Workplace: 'Upstream' Business Practices and Labor Standards in the Global Electronics Industry" (2018) 53(1) *Studies in Comparative International Development* 1, 6.

[638] Ibid.

[639] Toffel, Short and Ouellet (2015), above n. 73, 206.

[640] Ibid.

[641] Ibid. 209, citing David Vogel, "Private Global Business Regulation" (2008) 11 *Annual Review of Political Science* 261, and Sarah Soule, *Contention and Corporate Social Responsibility* (CUP, 2009).

[642] Ibid.

[643] Kevin Kolben, "Transnational Private Labour Regulation, Consumer-citizenship and the Consumer Imaginary" in Adelle Blackett and Anne Trebilcock (eds), *Research Handbook on Transnational Labour Law* (Edward Elgar, 2015), 361, 367.

However, the findings of Toffel et al. regarding buyer-country market institutions should not be overstated. There are many firms, for example, that "have less incentive to manage their reputation and brand recognition" and therefore, "are less likely to participate" in forms of private governance such as codes of conduct.[644] Indeed, as Crane et al. observe:

> Simply put, forced labor in garments designed for consumption in developed country markets tends to receive much more attention than say, bricks designed for domestic consumption. If governance initiatives to address forced labor are to do more than make consumers in developed countries feel good about the products they buy, there is a need to focus closer attention on forced labor occurring in domestic supply chains, and especially those that are not led by branded multi-national retail companies.[645]

Knudsen also observes that certain sectors face more pressure to be socially responsible, and examines how both the extractive and apparel sector face more market pressure – which then translates to government pressure, in developed countries in particular – on this issue.[646] Bartley has made similar observations about the distinctive ways in which land and labour rights are perceived and governed.[647]

[644] Marx and Wouters (2016), above n. 601, 435.

[645] Crane et al., above n. 376, 16.

[646] Jette Steen Knudsen, "How Do Domestic Regulatory Traditions Shape CSR in Large International US and UK Firms?" (2015) 8(3) *Global Policy* 29, 30.

[647] See section 2.3.3.

5. Analysis

As noted in section 1, a final objective of the current review is to address these questions:

(1) How can progress be made toward normative consistency across regimes of governance: international, regional and national; or, private and public?

(2) How can private and public governance best be combined so as to reinforce each other?

(3) What new institutions and modes of governance might be needed?

In relation to the first question, it is first necessary to unpick what is meant by "normative consistency" in the context of this particular literature review. We agree that there is value in ensuring that all relevant governance regimes – whether enacted at an international, regional or domestic level, or via public or private channels – should at least comply with, and at best reinforce, relevant international standards. However, some of the regulatory literature raises doubt about the value of ensuring and maintaining normative consistency in all contexts. For example, there are a number of theories, such as Kolieb's notion of the regulatory diamond and meta-regulation more generally, which are geared towards recognizing and encouraging actors to go beyond compliance with set rules. Other theories, including many of those falling under the "new governance" banner, underline the importance of experimentation and learning, which does not directly align with the idea of normative consistency (at least when it comes to compliance and enforcement strategies). For example, Coslovsky, Pires and Bignami found that conflicting labour regulation in Brazil appears to have opened up opportunities for inspectors – who enjoy relatively high levels of discretion – to "enforce good laws, extend weak ones, and undermine detrimental ones in ways that significantly improve labor practices on the ground".[648] More generally, recent empirical studies have revealed that the relationship between standard-setting and compliance is not straightforward. As discussed in section 3.2 above, those countries which appear to have the most stringent laws on paper may have the most concerning levels of non-compliance.[649] This research tends to support Bartley's thesis, namely that higher standards do not necessarily or automatically lead to higher levels of compliance (rather the opposite may be true).

Gunningham has argued that ultimately what constitutes the most effective, efficient and legitimate strategy will depend on the particular context in which it is being implemented, including the distinct characteristics and motivations of the specific regulation and the relevant regulators. Similarly, while Abbott and Snidal note that responsive regulation has forged a new path in thinking about regulation, they caution against a wholesale application of this model (which was largely designed for domestic settings) to transnational arenas. In short, they conclude that responsive regulation "holds important lessons for transnational regulation, but it must be adapted to these challenging conditions".[650] Moreover, it is arguable that Bartley is somewhat opposed to the idea of striving towards normative consistency given his strong critique of theories which have assumed that many poor and middle-income countries are little more than "empty spaces" or "regulatory voids" to be filled by globalizing norms.[651]

[648] Coslovsky, Pires and Bignami (2017), above n. 298.

[649] See, e.g. Kanbur and Ronconi (2018), above n. 294; Mun (2016), above n. 296; Rani (2013), above n. 295; Sapkal (2016), above n. 297.

[650] Abbott and Snidal (2013), above n. 170, 95.

[651] Bartley (2018), above n. 18, 5.

While there are vital differences between domestic and transnational regulation, or public and private compliance initiatives, there does appear to be a set of shared concerns and common features that emerge from the pool of research that we have reviewed. Indeed, as Fine and Bartley have observed, research on state-based enforcement initiatives and private regulation have largely "proceeded on separate tracks", however, bringing them together "helps to clarify the distinctive strengths and weaknesses of each approach, their points of overlap, and some possible paths to combination and cross-fertilisation".[652]

Many theories of governance – both of general application or those specific to labour standards – recognize the pluralistic nature of regulation. However, there is also increasing appreciation of the complexity and challenges raised by these models in practice. Chief among the concerns is the difficulty of seeking to coordinate the various actors and align the disparate interests. At a domestic level, it is clear that the labour inspectorate (and the state more broadly) has a critical orchestration role to play, although in a recent article comparing public and private enforcement initiatives in the US, Fine and Bartley note that the expected role of the state differs, even within the same domestic setting.[653] The relevant orchestrator is far less apparent when it comes to transnational initiatives – and there is a level of debate about the proper role of international organizations and the need to actively collaborate with government institutions at the level of the nation state.

In particular, there appears to be some tension between Abbott and Snidal's regulatory intermediaries model (which seeks to elevate the role of IGOs and potentially bypass domestic government) and Bartley's model of place-conscious transnational governance (which seeks to "re-centre" the nation state). More specifically, Abbott and Snidal support the idea that IGOs, such as the ILO, should play a role as "transnational responsive regulators" as they are seen as the only actor that has "the global scope, legitimacy, and focality to play this central role".[654] In comparison, Bartley puts forward an idealized model of "place-conscious transnational governance", which focuses on the spatial and temporal dimensions of corporate responsibility and sustainability and calls for "recentreing the state". That said, the differences may not be so stark given that Bartley ultimately identifies the ILO–IFC Better Work programmes as an illustrative example of place conscious transnational governance.[655]

These two theories, along with many others that were reviewed including strategic enforcement,[656] co-enforcement[657] and smart regulation,[658] call for greater involvement of non-state actors. However, the span of possible actors tends to differ between these theories. For example, the theory of co-enforcement tends to focus on the involvement and contributions of worker representatives present within the nation state. In comparison, the regulatory intermediary framework is far more expansive and includes any actor operating

[652] Janice Fine and Tim Bartley, "Raising the Floor: New Directions in Public and Private Enforcement of Labour Standards in the United States" (2018) *Journal of Industrial Relations* (forthcoming).

[653] Ibid.

[654] Abbott and Snidal (2013), above n. 170, 103.

[655] Bartley (2018), above n. 18, 37.

[656] See section 2.2.1.

[657] See section 2.2.3.

[658] See section 2.2.1.

in the public or private sphere, or in the domestic or international domain.[659] Whether the collaboration is initiated by the state, or by a private party, also appears to be an important distinguishing factor. For example, Fine and Bartley observe that there are often "crucial differences between a model in which governments use civil society to enforce labor and employment law and one in which private actors seek to enforce codes that have been voluntarily agreed to by retailers and brands".[660] They point to the fact that these initiatives often emerge in distinct political circumstances (for example, progressive political coalitions versus corporate-targeted market campaigns). Furthermore, they have different bases of authority and enforcement power. Fine and Bartley also argue that while "[r]obust co-enforcement and worker-driven social responsibility are not impossible in other settings … they will certainly be more challenging in [locations] with weaker progressive coalitions and industries with greater complexity and mobility".[661]

While resourcing issues are magnified in developing economies, many developed countries are seeking to echo elements of private or self-regulation (which has been more prominent in transnational arenas). For example, there has been a push in a number of countries – such as the US and Australia – to strike compliance agreements with lead firms in order to ease the state's enforcement burden in the short term and build a stronger commitment to compliance into the future. In our review of the recent literature, we did not find any discussion of these types of agreements being widely used by labour inspectorates in poor or middle-income countries (but this is not to say that these activities are not occurring – under the auspices of the ILO's strategic compliance programme or otherwise). There has also been a push to embrace technology in order to address some of the perceived weaknesses of monitoring and auditing via more traditional mediums and through conventional actors.[662]

One of the most significant points of contention in the literature appears to revolve around the proper place of deterrence and sanctions, as opposed to compliance initiatives and educational efforts. For example, the theory of root-cause regulation suggests that the latter approach is a more constructive way to deal with employer non-compliance in the longer term.[663] This has been disputed by Weil and Vosko, who are critical of inspectorates that emphasize compliance and advice over deterrence and punishment.[664] That said, Weil's revised model of strategic enforcement appears to recognize the reality facing labour inspectorates – that an integrated strategy is necessary (if only to ensure that there are sufficient resources still available to pursue more proactive and deterrent-based initiatives).[665] Indeed, the latest iteration of strategic enforcement encourages the labour inspectorate to use "all enforcement tools". In doing so, Weil appears to implicitly reinforce

[659] See section 2.3.2.

[660] Fine and Bartley (2018), above n. 652, 11.

[661] Ibid. 19.

[662] There was some discussion of the use of technology in the context of meta-regulation in section 2.1.2 (and sources referred to therein). For a recent review of these issues, see Bassina Farbenblum, Laurie Berg and Angela Kintominas, "Transformative Technology for Migrant Workers: Opportunities, Challenges, and Risks" (Research Report, 2018).

[663] See section 2.2.2.

[664] See, e.g. Vosko, Grundy and Thomas (2016), above n. 39; Weil (2014), above n. 258.

[665] See section 2.2.1.

the ongoing relevance of the sanctions pyramid – a defining, albeit much maligned feature, of the classical theory of responsive regulation.

Another point of convergence which is emerging in the domestic and transnational literature is a concern with the target of the relevant sanction. In particular, there is a growing body of scholarship which underlines the necessity and importance of extending liability for contraventions beyond the direct employer.[666] At the same time, transnational scholars, such as Marshall and Bartley, recognize the inevitable challenges of trying to extend the reach of labour law beyond national boundaries.

In a transnational setting, Bartley has argued for increased emphasis on formal accountability and sanctioning mechanisms in order to strengthen private monitoring and enforcement efforts on the part of the firm. At the same time, Bartley recognizes that "hit-and-run" demands for compliance may not necessarily lead to long-term compliance, but may instead prompt avoidance efforts. This supports much of the earlier literature (and the model of responsive regulation more generally) – that is, an overly aggressive regulatory response may lead to regulatory resistance or defiance. At the same time, Bartley draws attention to the fact that more collaborative initiatives – while desirable in theory – are difficult to sustain in many global industries as lead firms have been known to relocate to less accountable jurisdictions (if compliance becomes too costly or too hard).[667] However, on the basis of recent comparative research of public and private initiatives in the US context, Fine and Bartley ultimately seek to take the middle ground – arguing that "attempts to raise the bar for low-wage workers are more likely to be effective if they can engage in strategic targeting of high violation sectors, leverage the power of buyers or clients, and develop intensive on-the-ground monitoring capacities, penalties that can drive deterrence, and partnerships with organisations that are trusted by vulnerable workers".[668]

[666] See section 3.2.

[667] Bartley (2018), above n. 18, 50, citing Weil (2014), above n. 258.

[668] Fine and Bartley (2018), above n. 652, 19.

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