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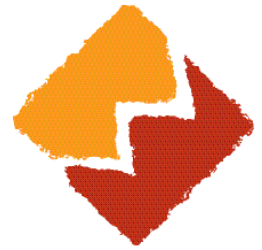
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The Interaction of Labour Inspection and Private Compliance Initiatives: A Case Study of Better Work Indonesia

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June 2016



BETTER WORK DISCUSSION PAPER NO. 21

THE INTERACTION OF LABOUR INSPECTION AND PRIVATE COMPLIANCE

INITIATIVES:

A CASE STUDY OF BETTER WORK INDONESIA

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FOREWORD

Achieving conditions of decent work in global supply chains requires effective workplace governance. In addition to sound industrial relations and social dialogue, labour inspectorates play a vital role in this governance to protect the safety and promote the welfare of workers. The ILO's Labour Inspection Convention, 1947 (No. 81) requires ratifying states to maintain a labour inspectorate to secure the enforcement of legal provisions related to the conditions of work, including hours, wages, industrial relations, non-discrimination, and safety and health, among others. Inspectorates operate not only to ensure proper application of labour legislation, but also to provide technical expertise to employers on how to comply with regulations and to alert relevant authorities to issues of non-compliance.

The ILO's Labour Administration, Labour Inspection and Occupational Safety and Health Branch strengthens labour inspectorates by providing technical assistance on legislation, assessing inspection systems, and promoting best practices worldwide. This work is essential, particularly as national labour inspectorates continue to face myriad challenges from shifts in the nature of labour markets. Technological disruption, globalisation, new business and production models, and labour migration combine with an often low level of investment in inspectorates to impede their ability to implement inspections at scale.

As businesses have increasingly utilized subcontracting as a business model they have realized that there are significant risks, particularly reputational risks, associated with that model when their subcontractors fail to comply with minimum labour standards including child labour, forced labour, wages and hours, freedom of association, and occupational safety and health. Consequently they have developed various strategies to respond to these risks including engagement of third parties to monitor, assess, and assist their subcontractors to improve their compliance with labour standards. Businesses have further recognized that risks of noncompliance with labour standards are significantly greater in producing countries where laws and regulations, labour inspectorates, judicial systems, labour unions, and capacity building assistance for their contractors are weak or non-existent, resulting in a growing interest to find ways to support improvement in those conditions.

Better Work, a joint programme of the ILO and the International Finance Corporation, seeks to achieve safe and decent working conditions in global supply chains while also improving the competitiveness of firms. In addition to advisory and training services, Better Work conducts unannounced compliance assessments among enrolled factories to detect areas of non-compliance with international standards and national law. This service provides a benchmark for continuous engagement with firms on compliance improvement. Better Work also encourages policy and practice among business,

government, and development institutions that drive sustained improvements in job quality, and promotes research to build the evidence base for such policy shifts.

This paper represents an example of such research, using a case study approach to examine the interaction between Better Work's programme in Indonesia and the Indonesian labour inspectorate. The analysis, based on desk research and empirical fieldwork involving extensive interviews, demonstrates that the public labour inspectorate in Indonesia has been strengthened and complemented through its interactions with the programme, and that Better Work does not pose a displacement risk to the national labour inspectorate. The results suggest that progress toward ensuring the safety and well-being of workers can be achieved through varied and collaborative strategies. We look forward to further understanding how our efforts can continue to reinforce and complement each other to promote decent work for all.

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ABSTRACT

This paper explores the interaction of Better Work Indonesia (BWI) with the public labour inspectorate in that country. We consider the programmes and mechanisms of interaction, and also how Better Work's contributions are implemented. We present here the preliminary findings of our field work, using the analytic model presented in Kolben's study of the interaction between Better Work Jordan and the Jordanian labour inspectorate. His concept of "dialogic regulation" captures and distinguishes between the degree of institutional formality in which interaction takes place, and the degree of subjective intentionality of the parties in their interaction. We find that the interaction between BWI and the Ministry has altered and shaped how labour inspection in Indonesia is conceptualised and managed in practice. The BWI model seems to have contributed to a recent initiative to require that enterprises have "Labour Norms Cadres". BWI also appears to have influenced the interaction between the central and district levels of the Indonesian inspectorate. Although it has never been an explicit programmatic objective of Better Work, our findings suggest that in Indonesia, the public labour inspectorate has been strengthened as a result of its interactions with BWI, even if that has come about largely in an ad hoc fashion. Our findings tend to reinforce those of other empirical studies of the interaction of private and public compliance. Prior studies have shown that the empirical reality is far more complex than some of the policy or theoretical arguments would accommodate. It transpires that displacement, for example, may not be a risk, even if only because of limited resources – at least in the case of Indonesia. Our findings also tend to suggest that complementarity in regulatory regimes may be feasible, even if the mechanisms and mechanics by which that can be achieved are likely to vary significantly according to the country and the context, and may often only be discovered through trial and error, and through persistence of interaction.

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1. INTRODUCTION

This paper is about how Better Work Indonesia (BWI) interacts with the public labour inspectorate in that country, and the potential impact of this interaction. The question is of particular interest to the International Labour Organisation (ILO), not least because Better Work is a joint programme of the ILO and the International Finance Corporation (IFC).² Notwithstanding this, to date the ILO has taken no official position on the operation of private institutions that are engaged in similar activities to labour inspectorates, or on how they relate to each other. The ILO's International Labour Conference did consider "private compliance initiatives" (PCIs) during its General Discussion on Labour Administration in 2011.³ The ILO then convened a Tripartite Meeting of Experts in 2013,⁴ the results of which were considered by the ILO Governing Body in 2014.⁵ The Tripartite meeting agreed that "the ILO should seize opportunities to examine ... the relationship between labour administration and PCIs through research, empirical studies and collection of good practices".⁶

Better Work Indonesia (BWI) is our chosen case study for a number of reasons. First, BWI has embarked on an explicit strategy of working closely with the labour inspectorate. Secondly, the ILO has been working intensively over a number of years with the labour inspectorate, and indeed

² As the state is represented in the governing structure of all Better Work country programmes, arguably Better Work cannot strictly speaking be classified as a "private compliance initiative" within the meaning ascribed to that term by the ILO. For the ILO, "PCIs are defined by their status as private, voluntary mechanisms for monitoring compliance with established public (law or regulations) or private (codes of conduct, etc.) standards"; see International Labour Office (ILO). 2013. *Labour inspection and private compliance initiatives: Trends and issues, Background paper for the Meeting of Experts on Labour Inspection and the Role of Private Compliance Initiatives, Geneva, 10–12 December 2013* (Geneva), p. ix. This means that a study of Better Work may not be perfectly comparable to empirical studies of purely private supply chain governance regimes. Nevertheless, despite its hybrid nature, it is clear that Better Work remains very distinct from the state and the public labour inspectorate, which makes it a fruitful case study for how state and non-state actors interact.

³ ILO. 2011. *Labour administration and labour inspection*, Report V, International Labour Conference, 100th Session, Geneva, 2011 (Geneva).

⁴ ILO. 2013. *Labour inspection and private compliance initiatives: Trends and issues, Background paper for the Meeting of Experts on Labour Inspection and the Role of Private Compliance Initiatives, Geneva, 10–12 December 2013* (Geneva). See also ILO. 2013. *Final report: Meeting of experts on labour inspection and the role of private compliance initiatives* (Geneva).

⁵ ILO. 2014. *Follow-up to the Meeting of Experts on Labour Inspection and the Role of Private Compliance Initiatives, Geneva, 10-12 December 2013*, Governing Body, 322nd Session, Geneva, 30 October–13 November 2014 (Geneva: ILO document GB.322/POL/5).

⁶ *Ibid.*, para 13.

has carried out joint activities with Better Work: this provides the opportunity to consider the two forms of labour regulation both jointly *and* separately. Thirdly, Indonesia has a decentralized labour administration and inspection system, which opens up the possibility for comparisons within the country.⁷ And fourthly, Better Work Global (BWG) has already begun to develop a research programme in collaboration with BWI and external researchers, which has strong connections to our project.⁸

We explore the programmes and mechanisms through which BWI interacts with the state labour inspectorate, and also how Better Work's actions are translated into action by the inspectorate. To capture the empirical reality of how private and public regimes interact on the ground, we draw on the analytical model developed by Kolben in his study of the interaction between Better Work Jordan and the Jordanian public labour inspectorate.⁹ Entitled "dialogic regulation", the model focuses on two descriptive categories to describe a given interaction: the first takes into account the degree of institutional *formality* in which the interaction takes place, and the second examines the degree of subjective *intentionality* of the parties in engaging in that transaction.

The model captures: (a) who and what is interacting; (b) the drivers of those interactions; (c) the mechanisms and pathways; and (d) the character of the interactions. Using this model helps in thinking about a regulatory regime that can optimally profit from the presence of both private and public regulation. Among other things, this may in turn serve as a model for BW in both its current and possible future projects.

The study used a mixture of research methods. Apart from traditional desktop research involving primary and secondary sources, it also included empirical research through field work. During the field research, the authors met individually and collectively with over 40 people, including staff from the ILO Jakarta Office, BWI staff (current and past), representatives from the Ministry of Manpower¹⁰ (hereafter Ministry), the Serikat Pekerja Nasional (SPN) trade union in North Jakarta, and senior labour inspectors in the North Jakarta provincial office of the Ministry.

⁷ This will change because a Ministerial decree has been issued to recentralize labour inspection services. However, it is expected to only come into effect in two years since it is part of a larger program to reverse the decentralization program introduced in 2001. See World Bank. 2003. *Decentralizing Indonesia: A Regional Public Expenditure Review Overview Report* (Washington, DC.), p.i.

⁸ This research will be led by Professor Matthew Amengual, MIT.

⁹ Kolben, K. 2015. "Dialogic Labor Regulation in the Global Supply Chain", in *Michigan Journal of International Law*, Vol. 36, No. 3, pp. 425 - 465.

¹⁰ Formerly known as the Ministry of Manpower and Transmigration.

The paper is structured as follows; In part 2, we place the study in its proper theoretical context with a brief overview of regulatory theory. Here we focus in particular on the theoretical paradigm of “decentred” regulation, which implicitly underlies PCIs in general, and also Better Work. We supplement this with some consideration of how decentred regulation operates in practice. This includes a discussion of the range of ways in which scholars have analysed the modes or practice of interaction between public and private regimes. Against this background we consider the suitability of Kolbens’s “regulatory dialogism” analytical framework for the analysis of the data gathered during our field research in Indonesia. Part 3 provides background information on the two main actors in our study, namely Better Work – in particular BWI – and the public labour inspectorate in Indonesia. In part 4, we apply the analytical framework of regulatory dialogism to Indonesia. Part 5 briefly concludes.

2. THEORETICAL FRAMEWORK

Private compliance initiatives (and Better Work) can be considered practical applications of the theoretical paradigm of “decentred” regulation. Decentred regulation is “distinct from (or perhaps rather subsumes within it) the ‘regulatory state’”.¹¹ Kolben explains that a decentred analysis is premised on:

a shift away from command-and-control regulation towards forms that are more decentralized, dynamic, interactive and responsive. In this notion, sovereignty and rule-making authority are layered and complex, allowing a more pluralistic range of legal orders to exist that are equal, or equivalent to that of the state. Traditional dichotomies between hard and soft law, informal and formal, public and private, and even law and non-law begin to break down leading to a form of legal hybridity. Law-making and enforcement are created by a diverse range of private and public actors including governments, NGOs, corporations, and private regulatory bodies that sometimes work together to formulate policies and regulate themselves, and each other, both within and without the framework of the state.¹²

¹¹ Black, J. 2001. “Decentering regulation: understanding the role of regulation and self regulation in a “post-regulatory” world”, in *Current Legal Problems*, Vol. 54, No. 1, pp. 103 - 146.

¹² Kolben, K. 2007. “Integrative Linkage: Combining Public and Private Regulatory Approaches in the Design of Trade and Labor Regimes”, In *Harvard International Law Journal*, Vol. 48, No. 1, pp. 203- 256.

Indeed, much of the contemporary scholarship on transnational regulation¹³ and international governance¹⁴ suggests that a state-centric approach is ‘misguided’¹⁵ given that many developing countries have weak legislative protections and dysfunctional labour inspectorates. In what follows, we expand on some of the key elements of decentred regulation, and the regulatory strategies that have emerged on the basis of this broader understanding of regulation and governance. While our work reflects many key aspects of decentred theories of regulation, it also challenges one core element. Many (albeit not all) of these theories continue to privilege the role of the state in so far as they envisage that the state will play a ‘steering’ role in coordinating the various interactions between different non-state actors. However, in the case of BWI (as we will show), it is arguable that it is Better Work (a non-state actor) that has assumed the role of facilitator and the state labour inspectorate is one of many other actors – along with trade unions, enterprises, lead firms etc. – that BWI seeks to harness or coordinate in order to pursue the relevant regulatory aims.

2.1 A brief exposition of theories of regulation

In traditional debates concerned with regulatory enforcement, there has been a sharp division drawn between the deterrence or punishment model, and on the other hand, the compliance or accommodative model.¹⁶ In light of the limitations of both compliance and deterrence as ‘stand-alone’ strategies,¹⁷ and in order to respond more sensitively to the ‘motivational diversity’ of firms,

¹³ “Transnational Legal Regulation [is] a notion that attempts to capture the hybrid nature of international rule-making and enforcement in which a range of public and private actors are engaged.”; see *Ibid.*, p. 244.

¹⁴ See, e.g., Arthurs, H. 1996. “*Labor Law Without the State*”, in *University of Toronto Law Journal*, Vol. 46, pp. 1 – 45; Arthurs, H. 2002. “*Private Ordering and Workers’ Rights in the Global Economy: Corporate Codes of Conduct as a Regime of Labour Market Regulation*”, in Conaghan, J; Fischl, R.; Klare, K (eds): *Labour Law in an Era of Globalisation*, p. 471; Blackett, A. 2004. “*Codes of Corporate Conduct and the Labour Regulatory State in Developing Countries*”, in Kirton, J; Trebilcock, M (eds): *Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment and Social Governance*, p. 121; and Zumbansen, P. 2006. “*The Parallel Worlds of Corporate Governance and Labor Law*”, in *Indiana Journal of Global Legal Studies*, Vol. 13, No. 1, pp. 261-312.

¹⁵ Kolben, K. 2007. “*Integrative Linkage: Combining Public and Private Regulatory Approaches in the Design of Trade and Labor Regimes*”, In *Harvard International Law Journal*, Vol. 48, No. 1, p. 204.

¹⁶ Gunningham, N. 2011. “*Strategising Compliance and Enforcement: Responsive Regulation and Beyond*”, in Christine Parker and Vibeke Nielsen (eds): *Explaining Compliance: Business Responses to Regulation* (Cheltenham and Northampton, Edward Elgar), pp. 199 and 201.

¹⁷ For example, while the compliance model may be successful in building normative, and even social motivations to comply, there is also a risk that this model can be exploited by those who are driven by economic concerns and not disposed to voluntary compliance. Further, the regulator may be ‘captured’ by

regulatory theorists increasingly advocated for a form of engagement which has been variously described as 'flexible',¹⁸ 'tit-for-tat'¹⁹ and 'creative'.²⁰ One of the most influential conceptualisations was that of 'responsive regulation'. This economic model of regulation – developed by Ayres and Braithwaite – advocates that 'the most credible and optimal enforcement strategy is achieved by a judicious mix of deterrence and persuasive approaches being applied in a regulatory enforcement pyramid.'²¹ In addition to the enforcement pyramid, the original formulation of responsive regulation envisioned that enforcement processes would be supplemented and strengthened through 'tripartism'.²²

Ayres and Braithwaite argue that tripartism – the involvement and empowerment of public interest groups (PIGs) – could effectively maintain the 'advantages of the evolution of cooperation',²³ whilst simultaneously guarding against both regulatory cheating (by purportedly compliant firms) and regulatory capture (by overtly powerful firms). They also defend tripartism, which pushes for increased participatory governance, as important 'not only in terms of outcome but also in terms of process'.²⁴ While these are powerful ideas, the popularity of the enforcement pyramid frequently meant that the tripartite elements of responsive regulation theory were often overlooked by many policymakers and scholars.²⁵

strong interest groups who know they can contravene the law with little consequence. This can have the effect of undermining the credibility of the regulator and weakening the normative motivations of others in the same industry or regulatory sphere.

¹⁸ Bardach, E.; Kagan, R. 1982. *Going by the Book: The Problem of Regulatory Unreasonableness* (Philadelphia, Temple University Press).

¹⁹ Scholz, J. 1991. "Cooperative Regulatory Enforcement and the Politics of Administrative Effectiveness", in *American Political Science Review*, Vol. 85, No. 1, pp. 115-136.

²⁰ May, P.; Burby, R. 1998. "Making Sense of Regulatory Enforcement", in *Law and Policy*, Vol. 20, No. 2, pp. 157-182.

²¹ Bluff, E; Johnstone, R. 2003. "Infringement Notices: Stimulus for Prevention or Trivialising Offences?", in *Journal of Occupational Health and Safety*, Vol. 19, No. 4, pp. 337-338.

²² It should be noted that the concept of 'tripartism' in the context of responsive regulation is broader than the way this term is used in international arenas (where it is often used to refer to three-way collaborations between government, employer and employee representatives); see e.g. Fashoyin, T. 2005. "Tripartism and Other Actors in Social Dialogue", in *International Journal of Comparative Labour Law and Industrial Relations*, Vol. 21, No. 1, pp. 37-58. In particular, tripartism – as used by Ayres and Braithwaite – is intended to encompass a wide range of public interest groups from firms to civil society organisations. See Ayres, I.; Braithwaite, J. 1992. *Responsive Regulation: Transcending the Deregulation Debate* (New York, Oxford University Press).

²³ *Ibid.*, p. 56.

²⁴ *Ibid.*, p. 82.

²⁵ Mascini, P. 2013. "Why was the Enforcement Pyramid So Influential? And What Price was Paid?", in *Regulation and Governance*, Vol. 7, No. 1, pp. 48-60.

However, the tripartist elements of the responsive regulation model have received renewed attention over the past decade or so and has subsequently been refined and fleshed out through scholarship concerned with decentred regulation. In particular, in the past 15 years, a whole range of ‘new’²⁶ theoretical models has emerged, including, amongst others, ‘smart’ regulation,²⁷ ‘strategic enforcement’,²⁸ ‘ratcheting labour standards’,²⁹ ‘new governance’,³⁰ and ‘relational regulation’.³¹

While these theories are all unique, they also share a number of common features. First, they all address the challenge of managing inadequate state resources and weak political will. Second, they are all founded on a broad idea of ‘regulation’:³² one which recognises the complexity and plurality of social problems, interests and interactions and the dispersion and fragmentation of knowledge, information, and regulatory power. These theories all suggest that relying on state

Braithwaite himself has recently emphasised this element; Braithwaite, J. 2013. “*Relational Republican Regulation*”, in *Regulation and Governance*, Vol. 7, No. 1, pp. 124-144.

²⁶ Murray has pointed out that at least some of the characteristics of these so-called ‘new’ techniques of regulation have been exhibited in the regulation of labour relations for more than 100 years. See Murray, J. 2001. “*The Sound of One Hand Clapping? The “Ratcheting Labour Standards” and International Labour Law*”, in *Australian Journal of Labour Law*, Vol. 14, pp. 1 and 5.

²⁷ Gunningham, N; Grabosky, P. 1998. *Smart Regulation: Designing Environmental Policy* (Oxford, Clarendon Press).

²⁸ Weil, D. 2010. *Improving workplace conditions through strategic enforcement, A Report to the Wage and Hour Division*, U.S. Department of Labor (Washington, D.C.).

²⁹ Fung, A; O’Rourke, D.; Sabel, C. 2001. “*Realizing Labor Standards: How Transparency, Competition and Sanctions Could Improve Working Conditions Worldwide*”, in *Boston Review*, February/March.

³⁰ For a useful overview of the various developments and debates surrounding ‘new governance’, see Lobel, O. 2004, “*The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*”, in *Minnesota Law Review*, Vol. 89, No. 2, p. 342; De Búrca G, Scott, J (red.). 2006. *Law and new governance in the EU and the US* (Oxford, Hart Publishing)). For an interesting and recent analysis in the workplace context, see Estlund, C. 2010. *Regoverning the Workplace: From Self-Regulation to Co-Regulation* (New Haven, Yale University Press).

³¹ See, e.g., Colovsky, S. 2011. “*Relational regulation in the Brazilian Ministério Público: The organizational basis of regulatory responsiveness*”, in *Regulation & Governance*, Vol. 5, No. 1, pp. 70-89; and Huising, R.; Silbey, S.S. 2011. “*Governing the Gap: Forging Safe Science through Relational Regulation*”, in *Regulation & Governance*, Vol. 5, No. 1, pp. 14-42.

³² Levi-Faur has recently canvassed the diversity of meanings that have previously been ascribed to ‘regulation’ from functionalist, to essentialist to conventionalist, amongst others. See Levi-Faur, D. (red.). 2011. *Handbook on the politics of regulation* (Cheltenham, Edward Elgar Publishing), pp. 3-6. For the purposes of this report, we adopt what could be described as a pluralist definition of ‘regulation’ which is: ‘the sustained and focused attempt to alter the behaviour of others according to defined standards or purposes with the intention of producing a broadly identified outcome or outcomes, and which may involve mechanisms of standard-setting, information-gathering and behaviour modification.’; see Black, J. 2001. “*Decentering regulation: understanding the role of regulation and self regulation in a “post regulatory” world*”, in *Current Legal Problems*, Vol. 54, No. 1, pp. 103 - 146.

inspection alone will not be enough to combat the pluralistic, dynamic, and complex factors which underlie decisions about compliance. Finally, on the basis of this broad and decentred understanding of regulation, these theories all encourage, to varying degrees, a regulatory approach which harnesses and exploits the resources and capacities of non-state actors.³³

Harnessing non-state actors in regulatory enforcement is seen as beneficial in a variety of ways – for example, it is seen to strengthen employers’ compliance motivations, assist in identifying the unintended effects of regulatory action, reduce the costs associated with adversarialism, and enhance the efficiency and legitimacy of regulatory solutions through participation and collaboration.³⁴ Participatory and deliberative processes are also seen to help devise tailored and innovative regulatory solutions and encourage internalisation of public norms – both of which lead to more sustainable compliance. Indeed, the principle of sustainability is another unifying theme of many theories of decentred regulation, such as strategic enforcement. Estlund argues that the sustainability of regulatory solutions is critical:

Unless regulators’ sights are to remain permanently fixed on the targeted sectors and employers, they need to come up with strategies to secure compliance that do not depend on intensive continuing oversight – something to leave behind as they move on to a different set of targets. Those structures will need to draw on nongovernmental regulatory resources, both within and outside regulated firms.³⁵

Indeed, there is a broad underlying assumption that private compliance initiatives may lead the way to long-term improvements in the public labour law regime.³⁶ This assumption is based on the idea that private compliance initiatives may recognise and facilitate the regulatory role played by civil society and trade unions. By helping empower these actors, private compliance initiatives

³³ Hutter, B.M. 2011. *Managing Food Safety and Hygiene: Governance and Regulation as Risk Management* (Edward Elgar), p. 307.

³⁴ Grabosky, P. 1995. “Using Non-Governmental Resources to Foster Regulatory Compliance”, in *Governance*, Vol. 8, No. 4, pp. 527-550.

³⁵ Estlund, C. 2010. *Regoverning the Workplace: From Self-Regulation to Co-Regulation* (New Haven, Yale University Press); Kingsford-Smith, D. 2011. “A Harder Nut to Crack? Responsive Regulation in the Financial Services Sector”, in *University of British Columbia Law Review*, Vol. 44, No. 3, pp. 695-741.

³⁶ Kolben, K. 2007. “Integrative Linkage: Combining Public and Private Regulatory Approaches in the Design of Trade and Labor Regimes”, In *Harvard International Law Journal*, Vol. 48, No. 1, p. 233. Kolben acknowledges that this is conjectural, and that the interplay of private regulatory regimes and regulatory capacity in developing states ought to be the subject of further study.

implicitly pressure democratic (and even non-democratic) governments to enact and enforce labour regulation.³⁷

2.2 Decentred Regulation in Practice: How do Private Compliance Initiatives Interact with State-based Regulatory Action?

Another common thread of many theories of decentred regulation discussed above is that they prompt a ‘rethinking of the role of formal authority in governance and regulation.’³⁸ Indeed, the growth in private compliance initiatives over the past 15 years is one response to the perception that transnational corporations have more incentive and capacity to improve working conditions in supplier factories than the state in which the supplier is based.³⁹ However, as Toffel, Short and Ouellet point out: ‘the shift from the state is far from complete.’⁴⁰ A number of empirical studies have similarly confirmed that “neither state regulation nor private voluntary regulation function effectively in isolation, and thus a combination of private and public interventions is necessary to promote labor standards in globally dispersed supply chains”.⁴¹

A number of models have been developed to help guide empirical research on the interaction of public and private regulation. Eberlein et al. developed an analytical framework to study interactions in transnational business governance (TBG). TBG schemes, such as fair trade labels, forestry certification schemes, labour right monitoring (to name but a few), interact in highly diverse ways with one another, and with other normative regimes, both state-based and non-

³⁷ Ibid., p. 234.

³⁸ Black, J. 2001. “Decentring regulation: understanding the role of regulation and self regulation in a “post-regulatory” world”, in *Current Legal Problems*, Vol. 54, No. 1, p. 110.

³⁹ O’Rourke, D. 2003. “Outsourcing Regulation: Analysing Nongovernmental Systems of Labor Standards and Monitoring”, in *The Policy Studies Journal*, Vol. 31, No. 1, pp. 1-29.

⁴⁰ Toffel, M. W.; Short, J.L; Ouellet, M. 2012. “Reinforcing Regulatory Regimes: How States, Civil Society, and Codes of Conduct Promote Adherence to Global Labor Standards”, in *Harvard Business School Working Paper*, No. 13-045, November 2012. Available at: <https://dash.harvard.edu/handle/1/10018987> [June 2016].

⁴¹ Coslovsky, S; Locke, R. 2013. “Parallel Paths to Enforcement: Private Compliance, Public Regulation, and Labor Standards in the Brazilian Sugar Sector”, in *Politics & Society*, Vol. 41, No. 3, p. 497- 526; citing, amongst others, Bartley, T. 2011. “Transnational Governance as the Layering of Rules: Intersections of Public and Private Standards”, in *Theoretical Inquiries in Law*, Vol. 12. No. 2, p. 517- 542; Kolben, K. 2007. “Integrative Linkage: Combining Public and Private Regulatory Approaches in the Design of Trade and Labor Regimes”, in *Harvard International Law Journal*, Vol. 48, No. 1, pp. 203- 256; and Weil, D. 2005. “Public Enforcement/Private Monitoring: Evaluating a New Approach to Regulating the Minimum Wage”, in *Industrial and Labor Relations Review*, Vol. 58. No. 1, pp. 238-257.

state.⁴² The authors propose an analytical framework “to facilitate investigation of the drivers, forms, causal mechanisms and pathways of TBG interaction, and their effects on regulatory capacity, performance and outcomes”.⁴³ The model takes regulatory governance as its starting point. In the first place, scholars should identify the points in the regulatory process at which interactions occur, and should then address six central questions for each such point: (1) who or what is interacting; (2) what drives and shapes interaction; (3) what are the mechanisms and pathways of interaction; (4) what is the character of the interaction; (5) what are the effects of interaction; and (6) how do interactions change over time.⁴⁴ The questions are not exhaustive, and no single study needs to address them all.

Bartley developed an analytical model to examine the phenomenon of rule layering, namely the interaction of private and public rules in the context of transnational governance.⁴⁵ Private standards, like standards for fair labour conditions in export-oriented apparel factories, do not simply add new rules for previously ungoverned phenomena. Instead, as Bartley points out, “they add an additional layer of rules for phenomena that are already embedded in complex political, legal, and regulatory orders”.⁴⁶ For example, private standards regarding working conditions of workers in global supply chains are layered on top of existing laws governing minimum wages, hours of work, and union representation, some of which are quite strong on paper (though often flouted in practice).⁴⁷ In order to examine this intersection of private – and public rules, Bartley develops a two-step approach. In the first instance, scholars should examine the content of standards “on the books,” which “can highlight topics where the substantive meanings of various rules are consistent, conflicting, or ambiguous”.⁴⁸ The next step is to use this analysis of the content of standards to identify focal points for studying implementation in the field. While this is by no means the only way in which to analyse the intersections of public and private rules, “it has the virtues of being straightforward, empirically tractable, and amenable to mapping configurations in a variety of national and sectoral settings”.⁴⁹

⁴² Eberlein, B, Abbott, K. W; Black, J.; Meidinger, E. 2012. “*Transnational Business Governance Interactions: Conceptualization and Framework for Analysis*”, Comparative Research in Law & Political Economy, Research Paper, No. 29, p. 3. Available at: <http://digitalcommons.osgoode.yorku.ca/clpe/33> [June 2016].

⁴³ *Ibid.*, pp. 4-5.

⁴⁴ *Ibid.*, p. 13.

⁴⁵ Bartley, T. 2011. “*Transnational governance as the layering of rules: Intersections of public and private standards*”, in *Theoretical inquiries in law*, Vol. 12, No. 2, p. 525.

⁴⁶ *Ibid.*, p. 518.

⁴⁷ *Ibid.*, p. 518.

⁴⁸ *Ibid.*, p. 525.

⁴⁹ *Ibid.*

Private rules can either subsume themselves to national law, require practices that are substantially different from those required by national law (potentially leading to “beyond compliance” activities), or requiring practices that are substantially similar to those required by national law.⁵⁰ With these (most common) relationships between the content of rules in mind, the analysis then moves on to the next phase, namely examining how they play out in practice. Bartley offers the following examples of some of the possibilities: in cases where the rules conflict, do actors involved in assessing compliance defer to one set or the other? Do they develop alternative measures that attempt to resolve the differences? In cases where rules endorse the same practices, does this lead to stronger, more robust implementation? Do circumstances arise that disrupt the apparent compatibility of rules?⁵¹

Finally, Kolben developed a model to help empirical research that is specifically focused on the area of transnational labour governance. Called regulatory dialogism, it calls for a “dialogic” approach to understanding private and public labour regulatory regimes. For reasons explained in more detail in Part 2.2.2 below, this is the model adopted in this study.

There are at least two ways in which the modes or practices of interaction between public and private regimes can be analysed. The first is to analyse the *character or quality* of the interaction, and the second the actual *mechanisms and mechanics* of the interaction.⁵² We discuss these in turn.

2.2.1 *Character and qualities of interaction*

A key question considered by a number of empirical studies is whether labour inspection and private compliance initiatives operate *in parallel*, on a *complementary* basis (i.e. intense, institutionalized interaction between state and private actors can work to leverage comparative advantages) or by way of *substitution* (i.e. private compliance initiatives serve to threaten or undermine existing state regulatory institutions through the creation of their own self-regulatory

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Kolben, K. 2015. “*Dialogic Labor Regulation in the Global Supply Chain*”, in *Michigan Journal of International Law*, Vol. 36, No. 3, pp. 425 - 465.

regimes).⁵³ In other words, scholars have hypothesized that international or transnational institutions can complement, substitute, reinforce, or have no effect on domestic ones.⁵⁴

A number of studies have highlighted the complementary effect that private regimes may have on state regulation. For example, a recent study undertaken by Locke, Rissing and Pal showed that in states such as the Czech Republic, with more active government enforcement of labour regulation, private compliance initiatives *complemented* government regulation and enforcement.⁵⁵ In this instance, an electronic firm's private monitoring of working hours and compensation of agency employees complemented active regulatory efforts and national legislation regarding the working conditions of agency workers. Amengual's study of private and public interactions in the Dominican Republic found that rather than displacing or weakening state institutions, private compliance complemented state regulation in two ways. Firstly, it freed up state resources to allow public regulators to focus on sectors of the economy with potentially more vulnerable workers and little private regulatory pressure (i.e. in the non-export market), thereby facilitating an unintentional form of coordination whereby each actor could focus its resources more strategically.⁵⁶ Secondly, public and private regulators combined their efforts within EPZ factories in ways that drew on the comparative advantage of each.⁵⁷ For example, private auditors often undertook routine inspections which uncovered certain types of contraventions (i.e. minimum pay, overtime, OHS etc.), while public inspectors relied heavily on complaints from workers, requests from management, or referrals from NGOs and unions, which dealt with

⁵³ For further explanation of these concepts and the relevant literature, see Amengual, M. 2010.

"Complementary Labor Regulation: The Uncoordinated Combination of State and Private Regulators in the Dominican Republic", in *World Development*, Vol. 38, No. 3, pp. 405-414.

⁵⁴ Amengual, M; Chirot, Laura. Forthcoming (current version March, 2016). *"Reinforcing the State: Transnational and State Labor Regulation in Indonesia"*, in *Industrial and Labour Relations Review* (forthcoming). Available at: http://web.mit.edu/amengual/www/Amengual_Chivot_20150730.pdf [June 2016].

⁵⁵ Locke, R. M.; Rissing, B. A; Pal, T. 2013. *"Complements or Substitutes? Private Codes, State Regulation and the Improvement of Labor Standards in Global Supply Chains"*, in *British Journal of Industrial Relations*, Vol. 51. No. 3, pp. 519-552.

⁵⁶ Amengual, M. 2010. *"Complementary Labor Regulation: The Uncoordinated Combination of State and Private Regulators in the Dominican Republic"*, in *World Development*, Vol. 38, No. 3, p. 408; Kolben, K. 2015. *"Dialogic Labor Regulation in the Global Supply Chain"*, in *Michigan Journal of International Law*, Vol. 36, No. 3, pp. 425 - 465.

⁵⁷ Amengual, M. 2010. *"Complementary Labor Regulation: The Uncoordinated Combination of State and Private Regulators in the Dominican Republic"*, in *World Development*, Vol. 38, No. 3, p. 404.

violations that cannot be discovered in relatively short audits, or that required investigations beyond the factory walls (i.e. freedom of association).⁵⁸

While there is a far reaching concern in the literature for “displacement” of public regulation by privatized regimes,⁵⁹ there is little empirical evidence of such displacement actually occurring.⁶⁰ Even where there is some evidence of displacement, this by no means leads to a complete retreat of state authority and a vacuum of regulation. In their study of the interaction of private and public regimes in the electronics sector in Mexico, Locke et al. found that in countries with a weak regulatory system, private compliance initiatives could *substitute* for the state enforcement of domestic labour laws. In this instance, an electronic firm, working in collaboration with Mexican NGOs, ensured more effective enforcement of outdated and poorly enforced labour regulation concerning agency work.⁶¹ While the private dispute resolution system operated with minimal engagement of the Mexican legal system, workers still had to register a labour complaint to the courts within two months of its occurrence in order not to forfeit the right to initiate a labour dispute. In addition, the parties also relied on national labour regulations (albeit outdated and poorly enforced) as the basis for all claims. In this case, therefore, substitution did not mean total displacement of the state, undermining some accounts that argue that private voluntary regulation necessarily crowds out state regulation.⁶² This confirms the view that “governance institutions are not fungible substitutes for one another, but rather they interact in complex ways, sometimes amplifying one another’s effects on [transnational corporations] and their global suppliers”.⁶³

Kolben points out that even if displacement effects are not occurring, the interaction between privatized regimes and state-based regulatory functions may take the forms of *rivalry* or

⁵⁸ Ibid., p. 409.

⁵⁹ See *ibid.*, p. 406.

⁶⁰ Ibid., p. 406; Kolben, K. 2015. “*Dialogic Labor Regulation in the Global Supply Chain*”, in *Michigan Journal of International Law*, Vol. 36, No. 3, pp. 425 - 465.

⁶¹ Locke, R. M.; Rissing, B. A.; Pal, T. 2013. “*Complements or Substitutes? Private Codes, State Regulation and the Improvement of Labor Standards in Global Supply Chains*”, in *British Journal of Industrial Relations*, Vol. 51, No. 3, pp. 519-552.

⁶² Ibid., p. 538.

⁶³ Toffel, M. W.; Short, J.L; Ouellet, M. 2012. “*Reinforcing Regulatory Regimes: How States, Civil Society, and Codes of Conduct Promote Adherence to Global Labor Standards*”, in *Harvard Business School Working Paper*, No. 13-045, November 2012. Available at: <https://dash.harvard.edu/handle/1/10018987> [June 2016].

competition.⁶⁴ However, this need not necessarily be destructive if there are opportunities for mutual learning and ratcheting up of standards:

In the case of labor regulation, state labor regulators and inspectors might feel competitive with their private regime counterparts and try to outcompete each other through more rigorous enforcement. In this case, we might have beneficial outcomes despite the fact that the parties are in a non-cooperative relationship.⁶⁵

Finally, in a recent empirical study of public and private regulatory interactions in the sugar sector in Brazil, Coslovsky and Locke found that the parallel actions of private auditors and public agents worked to *reinforce* each other notwithstanding the fact that they did not necessarily communicate or coordinate directly. By way of example, the authors pointed to the fact that public inspectors were using their legal authority and sanctioning powers to address the most concerning cases of outsourcing. However, these agents were not embedded within the sector, “so they possessed limited understanding of business practices or the reforms that might help targeted firms comply with labour standards without damaging their ability to compete”. This is where the private auditors came in. While they possessed neither the autonomous power nor the authority to coerce firms to comply with labour standards, they exploited their positions as company insiders “to educate top managers and persuade them that introducing modern production, work, and personnel practices will contribute to the bottom line”, thereby helping to build a process of workplace transformation that facilitates compliance”.⁶⁶

2.2.2 *Mechanisms and mechanics of the interaction*

In addition to examining the character or quality of the interaction between private and public regulation, another mode of interaction that can be analysed is the actual *mechanisms* and *mechanics* of interaction.⁶⁷ Kolben points out that a major gap exists in the regulatory literature

⁶⁴ Kolben, K. 2015. “*Dialogic Labor Regulation in the Global Supply Chain*”, in *Michigan Journal of International Law*, Vol. 36, No. 3, pp. 425 - 465.

⁶⁵ *Ibid.*

⁶⁶ Coslovsky, S. V.; Locke, R. 2013. “*Parallel Paths to Enforcement Private Compliance, Public Regulation, and Labor Standards in the Brazilian Sugar Sector*”, in *Politics & Science*, Vol. 41, No. 4, pp. 497-526.

⁶⁷ See Kolben, K. 2015. “*Dialogic Labor Regulation in the Global Supply Chain*”, in *Michigan Journal of International Law*, Vol. 36, No. 3, pp. 425 – 465; and Eberlein, B, Abbott, K. W; Black, J.; Meidinger, E. 2012. “*Transnational Business Governance Interactions: Conceptualization and Framework for Analysis*”,

about *how*, not only theoretically but especially empirically, public and private regulatory regimes interact with each other.⁶⁸ This is important to analyse, he continues, because “(i)t is only by understanding the how of interaction that policymakers can then design systems that will enable constructive interactions to take place, or to better anticipate what kind of interactions might be anticipated”.⁶⁹

Kolben’s model of regulatory dialogism was designed to help empirical research that is specifically focused on the area of transnational labour governance. The model has a number of distinct features that make it particularly suitable for this study. In the first place, it is specifically designed for the area of transnational labour governance, which has unique traits that arguably deserve a distinct model.⁷⁰ Secondly, it has the benefit of capturing not only the *qualities* of the interaction and communication (complementarity, displacement, reinforcement, rule layering, etc.), but also the *mechanics* of the interaction.⁷¹ In that sense it captures important elements from both the Eberlein et al. and Bartley models. Finally, Kolben has already applied the model to one of Better Work’s other programmes, Better Work Jordan, which creates the potential for cross-country comparisons within the same transnational labour governance programme.⁷²

Kolben’s model has two axes.⁷³ The Y-axis is meant to capture the institutional framework that the actors are working within, and gauges the *formality* of the institutions (ranging from formal, to semi-formal, to informal). The X-axis captures *intentionality*, which is the subjectivity and practice of the private and public individuals as they interact. In addition to capturing intentionality, it is here that other dynamics such as complementarity and rule-layering, for example, will be illuminated.⁷⁴

Comparative Research in Law & Political Economy, Research Paper, No. 29, p. 2. Available at: <http://digitalcommons.osgoode.yorku.ca/clpe/33> [June 2016].

⁶⁸ Kolben, K. 2015. “*Dialogic Labor Regulation in the Global Supply Chain*”, in *Michigan Journal of International Law*, Vol. 36, No. 3, pp. 425 - 465.

⁶⁹ Ibid.

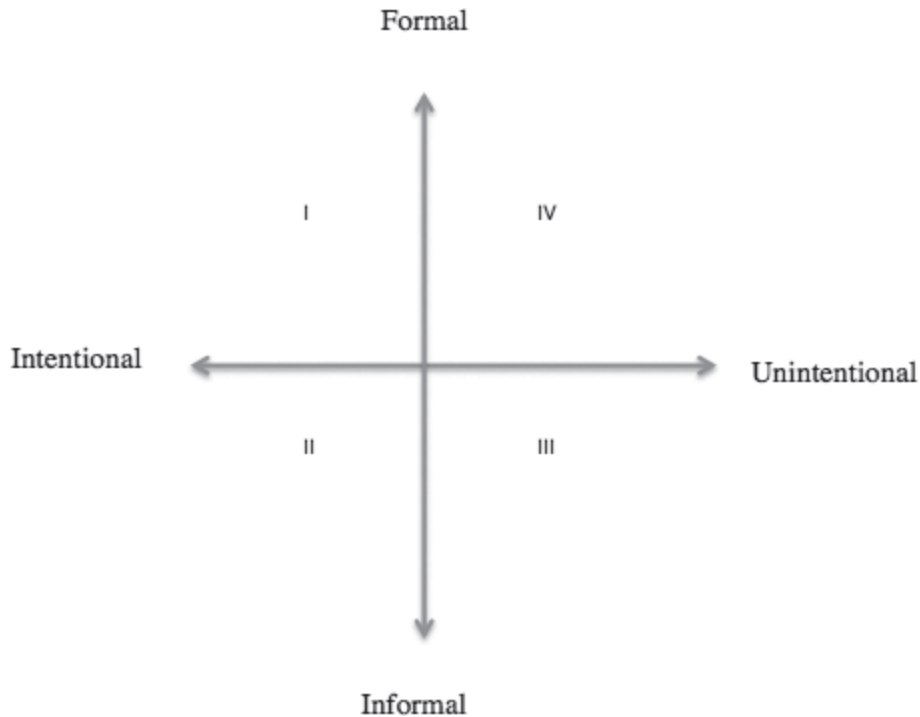
⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Ibid.

⁷³ The visual representation of the model is taken from *ibid.*, p. 447.

⁷⁴ Ibid.



Quadrant 1 reflects the most *formal and intentional* mechanisms of interaction, such as an annual or semi-annual formalized meetings between a private entity and the state. **Quadrant 2**, *informal and intentional*, refers to situations in which private and state actors intend to interact with each other “in a spirit of cooperation”, but such interaction takes place through informal mechanisms. Examples are encounters on the factory floor, through social and professional events or, as is the case in our study, through informal contact to discuss particular issues that come up in the field. A third form of interaction (**Quadrant 3** – *informal and unintentional*) captures situations in which the parties interact in their regulatory activities without any intention of doing so. As Kolben points out, this is where “many dynamics of public/private complementarity in rule generation and enforcement, including rule layering and implicit or ‘uncoordinated’ complementarity, as well as tacit rivalry and competition dynamics” are captured.⁷⁵ While much of the activity in this quadrant occurs “under the radar”, and is more difficult to capture than formal and/or intentional interaction, “it is in these interstices of interaction where many of the most interesting dynamics take place”.⁷⁶ **Quadrant 4**, *formal but unintentional* interactions, is probably the least likely scenario, because it would capture situations in which private and public engage in a formal institutional structure despite a lack of intention to coordinate or cooperate. One could envisage a situation in which a third party like the ILO organises an event to facilitate interaction between

⁷⁵ Ibid.

⁷⁶ Ibid.

the public labour inspectorate and private regulatory actors (brands, MSIs), who have had a history of animosity and distrust.⁷⁷

Before applying Kolben's model to Indonesia, we briefly provide some background on the two main actors in this study, namely BWI and the Indonesian labour inspectorate.

3. BACKGROUND on BWI and the INDONESIAN LABOUR INSPECTORATE

Better Work Indonesia

The Better Work program is a partnership between the ILO and the International Finance Corporation (IFC) which aims to improve working conditions in the global garment industry.⁷⁸ BW is headquartered in the ILO's Geneva headquarters, but its governance is shared between the ILO, and the IFC in Washington D.C. The BW Advisory Committee includes representatives from global union federations (such as the IndustriALL Global Union), employers, and governments.⁷⁹ The program currently operates in eight countries around the world, including Indonesia.⁸⁰

The apparel sector in Indonesia has a long history of poor working conditions and rampant exploitation of predominantly female workers.⁸¹ A key objective of BWI – which was established in July 2011 as a five year program – is to improve working conditions and productivity in apparel-exporting factories by enhancing compliance with international core labour standards and Indonesian labour law. BWI seeks to address problems of non-compliance through three main mechanisms: assessments, advisory services, and training.

BW has recently adapted its service model. Up until now, a baseline assessment kicked off the cycle of each participating enterprise. The purpose of the assessment is to identify to what extent the enterprise is out of compliance with international and domestic labour law, and to indicate

⁷⁷ Ibid.

⁷⁸ For a useful history of BW, see *ibid.*

⁷⁹ For a full list of the representatives on the Advisory Committee; see http://betterwork.org/global/?page_id=352 [June 2016].

⁸⁰ The other seven countries are Bangladesh, Cambodia, Haiti, Jordan, Lesotho, Nicaragua, and Vietnam; see http://betterwork.org/global/?page_id=314 [June 2016].

⁸¹ Bartley, T. 2010. "Transnational Private Regulation in Practice: The Limits of Forest and Labor Standards Certification in Indonesia", in *Business and Politics*, Vol. 12. No. 3.

what it could do to bring itself into compliance. In its assessment of factories, BW use a Compliance Assessment Tool (CAT) to assess enterprise compliance with international core labour standards, as well as national labour law. Each CAT consists of questions that are generic as well as specific to each country, reflecting differences in national laws.

Following the assessment, the BW Enterprise Advisors (EAs) used the assessments to create improvement plans for each factory, which the EAs then helped the factories to implement in order to improve their performance by the next assessment. The vehicle for these advisory services is so-called Performance Improvement Consultative Committees (PICC), which are worker-management committees charged with discussing work-related issues through social dialogue. In some countries, like Indonesia, bipartite dialogue committees are mandated by law, which obviates the need for BW to establish them. In Indonesia, these committees are called *Lembaga Kerja Sama Bipartit* (LKSB), and are mandatory in every enterprise that employs more than 50 employees.⁸²

The new service model, rolled out on 1 April 2015, de-emphasises assessments (or audits) and prioritises advisory and training services.⁸³ Instead of starting with a baseline assessment, BW in-factory work begins with a series of visits over a period of approximately 100 days. The objective of the initial advisory period is to set up necessary social dialogue structures and to provide factory management and worker representatives with an opportunity to set targets and make improvements before the initial assessment is conducted. During this period, the factory will also complete a self-diagnosis which, together with the assessment report, will form the basis for the improvement process.⁸⁴ The self-diagnosis is designed to identify or highlight where the factory needs support to meet legal requirements and standards. These needed improvements and follow-up actions are then included in the improvement plan.⁸⁵ As one Better Work official stated, “one of the key things about the new model is that assessment, including the self-diagnosis, now

⁸² International Labour Office; International Finance Corporation. 2012. *Better Work Indonesia: garment industry 1st compliance synthesis report* (Geneva). Available at: <http://betterwork.org/global/wp-content/uploads/Better-Work-Indonesia-Synthesis-Report-EN.pdf> [June 2016].

⁸³ The International Labour Office; International Finance Corporation. 2015. *Better Work: the Better Work service model, April 2015*, p. 2. Available at: http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-dhaka/documents/projectdocumentation/wcms_404161.pdf [June 2016].

⁸⁴ The assessment report and the results of self-diagnosis are released to factories and buyers one month after the assessment. At this time, factories are expected to report to buyers on planned improvements. After the assessment, the advisory process continues, focusing on and addressing the issues identified in the self-diagnosis and the assessment. See *ibid.*

⁸⁵ *Ibid.*

becomes part of the advisory process". New factories will receive approximately 3 advisory visits before the first assessment is conducted.⁸⁶ Factories will be supported in the process through tailored factory visits, issue-specific seminars (on topics relevant to the country/industry), and training appropriate to the factory's specific needs. Factories can register for up to 25 participant days of training per cycle.⁸⁷ As at April 2016, there were 155 Participating Enterprises and 29 Participating Buyers in the BWI Program.⁸⁸

BWI also works closely with a number of other stakeholders, including governments, business associations, workers and their representative unions, and global apparel buyers.⁸⁹ In Indonesia, these include the Indonesian Ministry of Manpower (Ministry), the Indonesian Employers' Association (APINDO), the Indonesian Textile Association (API), the Korean Garment Association (KOGA) and the four main union federations of the garment industry: Garteks, TSK Kalibata, TSK Pasar Minggu, and SPN.⁹⁰

The Indonesian labour inspectorate

As we show in part 4, below, BWI has close relations with the Ministry, and in particular with the Directorate-General of Labour Inspection Development (*Ditjen Binwasnaker*), which is the technical unit responsible for labour inspection.⁹¹ The central role of the Ministry is to ensure compliance with the relevant labour laws in every economic sector and in respect of enterprises of all sizes. In addition to its enforcement function, the labour inspectorate is also responsible for formulating policies, standards, norms, guidelines, and mechanisms, and providing technical guidance and evaluation services in all the areas falling within its mandate. The mandate of

⁸⁶ Ibid, p. 5.

⁸⁷ Ibid, p. 3.

⁸⁸ See http://betterwork.org/indonesia/?page_id=25 [June 2016].

⁸⁹ Brands include, amongst others, Adidas Group, GAP Inc., H&M, Nike, Target and Walmart. See http://betterwork.org/indonesia/?page_id=93 [June 2016].

⁹⁰ International Labour Office; International Finance Corporation. 2014. *Better Work Indonesia: Garment Industry 4th Compliance Synthesis Report, July 2014* (Geneva), p. 7. Available at: <http://betterwork.org/global/?m=201407> [June 2016].

⁹¹ See part 4 below for more detail on the development and content of this relationship. The Ministry consists of seven divisions, of which Labour Inspection development is one. See International Labour Office. 2009. *Freedom of association and collective bargaining: Indonesian experience 2003-2008*, ILO Working Paper, p. 15. Available at: http://www.ilo.org/jakarta/whatwedo/publications/WCMS_116126/lang--en/index.htm [June 2016].

Ministry is relatively wide – it is responsible for the enforcement of laws and regulations relating to working conditions,⁹² occupational safety and health, women workers, and child workers.⁹³

The labour inspectorate in Indonesia is highly decentralized. The decentralization occurred as part of a much larger programme of fiscal, administrative, and political decentralization that started in the late 1990s, which, “mov[ed] the country from one of the most centralized systems in the world to one of the most decentralized”.⁹⁴ The “radical and rapid” decentralization programme (dubbed the “Big Bang” by the World Bank⁹⁵) transferred broad autonomy to the regions in all but the few tasks that are explicitly assigned to the centre—namely national defence, international relations, justice, security, religion, and monetary and fiscal policies.⁹⁶ In this decentralized system, the central government legislates, sets standards, monitors, and provides fiscal incentives to the regions to pursue national policy goals.⁹⁷ The 34 provinces – as autonomous regions – have a relatively minor role. It coordinates among the local governments (cities or regencies),⁹⁸ with the latter performing all functions except those assigned to the centre and the province.⁹⁹ This means that the enforcement of national labour relations regulations is the responsibility of local government.¹⁰⁰

One of the most significant problems facing the Indonesian labour inspectorate is a severe lack of financial and human resources. The budget is extremely constrained and there is a dearth of

⁹² ‘Working conditions’ includes laws and regulations relating to the employment relationship, social security, working conditions, placement and training.

⁹³ Ibid. See also ILO. 2011. *Factsheet on Labour Inspection in Indonesia*. Available at: http://www.ilo.org/wcmsp5/groups/public/@ed_dialogue/@lab_admin/documents/genericdocument/wcms_166317.pdf [June 2016].

⁹⁴ World Bank. 2003. *Decentralizing Indonesia: A Regional Public Expenditure Review Overview Report*, Report No. 26191-IND (Washington, DC), p. 1. Available at: <http://siteresources.worldbank.org/INTINDONESIA/Resources/Decentralization/RPR-DecInd-June03.pdf> [June 2016].

⁹⁵ Ibid.

⁹⁶ Ibid., p. 7.

⁹⁷ Ibid., p. 23.

⁹⁸ There are currently 508 local districts. See ILO. 2011. *Factsheet on Labour Inspection in Indonesia*.

Available at:

http://www.ilo.org/wcmsp5/groups/public/@ed_dialogue/@lab_admin/documents/genericdocument/wcms_166317.pdf [June 2016].

⁹⁹ Ibid.

¹⁰⁰ Revisions to Act 22/1999 under the auspices of Act 32/2004. See Warnecke, T.; De Ruyter, A. 2012. *The Enforcement of Decent Work in India and Indonesia: Developing Sustainable Institutions*, in *Journal of Economic Issues*, Vol. XLVI, No. 2, pp. 393-401.

inspectors,¹⁰¹ particularly in some areas.¹⁰² It was reported in 2013 that labour inspection services could only reach between 200,000 and 250,000 firms per year out of a total of 22.7 million micro and small enterprises, and 3.8 million medium and large enterprises in Indonesia. This, the ILO notes, “leaves a large gap in provision of services, with it [being] estimated that less than 1 per cent of enterprises are serviced by labour inspectors each year”.¹⁰³

In addition to inadequate resourcing, there is defective coordination on labour inspection between the central and regional governments and within and between regions.¹⁰⁴ It has also been found that district-level inspectors have poor levels of motivation and high turnover,¹⁰⁵ limited

¹⁰¹ It has been reported that the ratio of inspectors to workers in Indonesia is 1/47,000, which falls below even the ratio in less-developed countries as recommended by the ILO. In its 2006 benchmarking survey, the ILO suggested that the ideal ratio between labor inspectors and workers was 1/10,000 in industrial market economies; 1/15,000 in industrializing economies; 1/20,000 in transition economies; and 1/40,000 in less-developed countries. See Supiarso, F. 2013. “Labor auditing in certified palm oil industry”, in *Jakarta Post*, 14 November 2013. Available at: <http://www.thejakartapost.com/news/2013/11/14/labor-auditing-certified-palm-oil-industry.html> [May 2015]. See also ILO. 2006. *Strategies and Practice for labour inspection*, Governing Body, 297th Session, Geneva, November 2006 (Geneva: ILO document GB.297/ESP/3). Available at: <http://www.ilo.org/public/english/standards/relm/gb/docs/gb297/pdf/esp-3.pdf> [June 2016].

¹⁰² Warnecke, T.; De Ruyter, A. 2012. “The Enforcement of Decent Work in India and Indonesia: Developing Sustainable Institutions”, in *Journal of Economic Issues*, Vol. XLVI, No. 2, pp. 393-401. See also Tjandra, S. 2010. “Disputing Labour Dispute Settlement: Indonesian Workers’ Access to Justice”, in *Social Justice & Global Development Journal*, Vol. 2010, No. 1. Available at: http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2010_1/ [June 2016].

While all provinces have labour inspectors, the ILO reports that only 300 out of 504 districts/cities have labour inspectors, with the most inspectors concentrated in Java. See ILO. 2011. *Factsheet on Labour Inspection in Indonesia*, p. 2. Available at: http://www.ilo.org/wcmsp5/groups/public/@ed_dialogue/@lab_admin/documents/genericdocument/wcms_166317.pdf [June 2016]

¹⁰³ ILO. 2013. *Labour and Social Trends in Indonesia 2013: reinforcing the role of decent work in equitable growth* (Jakarta), p. 49. Available at: http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-jakarta/documents/publication/wcms_233249.pdf [June 2016].

¹⁰⁴ *Ibid.*, p. 49.

¹⁰⁵ Tjandra has argued that poor motivation can be linked to limited prospects for promotion and career progression following the devolution of responsibility to the district agencies. See Tjandra, S. 2010. “Disputing Labour Dispute Settlement: Indonesian Workers’ Access to Justice”, in *Social Justice & Global Development Journal*, Vol. 2010, No. 1. Available at: http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2010_1/ [June 2016].

accountability and problems with corruption,¹⁰⁶ and inadequate training and technical capacity.¹⁰⁷ Finally, in this regard, labour inspectors have been found to turn a “blind eye” to businesses that openly violate labour laws and to side with employers rather than workers when interpreting or applying the relevant labour laws.¹⁰⁸ For example, in a recent study, Amengual and Chirot point out that in respect of payment of minimum wages in Indonesia, inspectors either turned a blind eye to violations, or went as far as approving illegal worker-management agreements to postpone payment of the minimum wage.¹⁰⁹

Currently, the central office of the Ministry has no authority over the district inspectors because they fall under the authority of the local government. As a result, the Ministry is often powerless to ensure uniform interpretation of the law,¹¹⁰ or to address instances of corruption or adverse influence. During our field visit, we heard from a number of interviewees that inspectors often get

¹⁰⁶ Warnecke, T.; De Ruyter, A. 2012. “*The Enforcement of Decent Work in India and Indonesia: Developing Sustainable Institutions*”, in *Journal of Economic Issues*, Vol. XLVI, No. 2, p. 398. In some cases, political considerations of patronage appear to have influenced the appointment of the head of the agency with little regard for the knowledge and expertise of the relevant government official. See Tjandra, S. 2010. “*Disputing Labour Dispute Settlement: Indonesian Workers ‘Access to Justice’*”, in *Social Justice & Global Development Journal*, Vol. 2010, No. 1, p. 12. Available at: http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2010_1/ [June 2016]. During our field visit, claims of corruption amongst inspectors at the district level were frequently made, alluding to the fact that inspectors at district level often do favours for businesses (like approving the use of fixed-term contracts) in return for cash. A 2008 survey conducted by the Corruption Eradication Commission confirmed the general public perception that the Ministry is prone to corruption. Of the 30 ministries surveyed by the Commission, Ministry placed 26th in respect of the quality of their services and their susceptibility to corruption. See Jakarta Post. 2008. “Shamed ministries pledge to provide better public service”, in *Jakarta Post*, 31 March 2008. Available at: <http://m.thejakartapost.com/news/2008/03/31/shamed-ministries-pledge-provide-better-public-service.html>, [May 2015].

¹⁰⁷ Inspector training was previously provided by the central government authority. As a result of decentralisation, the technical training provided to inspectors is dependent on the inclination (and budget) of the relevant district agency. Tjandra, S. 2010. “*Disputing Labour Dispute Settlement: Indonesian Workers ‘Access to Justice’*”, in *Social Justice & Global Development Journal*, Vol. 2010, No. 1. Available at: http://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2010_1/ [June 2016], p. 12; and Warnecke, T.; De Ruyter, A. 2012. *The Enforcement of Decent Work in India and Indonesia: Developing Sustainable Institutions*, in *Journal of Economic Issues*, Vol. XLVI, No. 2, p. 398.

¹⁰⁸ Warnecke, T.; De Ruyter, A. 2012. *The Enforcement of Decent Work in India and Indonesia: Developing Sustainable Institutions*, in *Journal of Economic Issues*, Vol. XLVI, No. 2, p. 398.

¹⁰⁹ While corruption and personal enrichment often lay at the basis of these actions, the authors also point out that many inspectors were motivated by a desire to reduce local unemployment and attract investment, hence their reluctance to enforce minimum wage determinations. See Amengual, M; Chirot, L. Forthcoming (current version March, 2016). “Reinforcing the State: Transnational and State Labor Regulation in Indonesia”, in *Industrial and Labour Relations Review* (forthcoming). Available at: http://web.mit.edu/amengual/www/Amengual_Chirot_20150730.pdf [June 2016].

¹¹⁰ In part 4, below, we will consider the extent to which BW has been able to play an important a mediating role in this regard.

rotated to other duties or transferred out of labour inspection by the mayor if they happen to inspect business with close relationships to the mayor. As one interviewee pointed out:

“The majority of inspectors at district level are dedicated, but they often face conflict of interest. They go into enterprises and find many non-compliances. If the factory owner is close to the mayor, he will call up the mayor and say the inspector is making a fuss. The mayor would then just call the *dinas*¹¹¹ and say forget about this company. They are close to me”.

Another interviewee confirmed this, and mentioned that inspectors are often transferred to other departments if they happen to inspect a company with close ties to the mayor:

“The performance of inspectors is often hampered because they are influenced at the district level. Even though they conduct their inspections well, many companies are close to the mayor, which often results in the inspectors being rotated or transferred”.

A 2005 joint study by the ILO and ASEAN noted that almost 60 per cent of registered labour inspectors had been transferred to other positions outside their expertise since decentralization and a large number of regencies are operating without labour inspectors.¹¹² In 2008, the central labour inspectorate agency claimed that it had not received any reports from the regional inspectorates since regional autonomy was introduced in 2001.¹¹³ By 2010, this had only improved slightly, when it was reported that only five provinces out of 33 regularly submitted inspection reports during that year.¹¹⁴ In 2011, the ILO found that was no evidence of any inspection plans or programs at the district/province level.¹¹⁵

¹¹¹ The local offices of the Ministry are called the *Dinas Tenaga Kerja dan Transmigrasi*, or *Dinas* for short. In colloquial speech, the word *dinas* is used to refer to both the office and the people (inspectors in this case) who work there.

¹¹² ILO-ASEAN. 2005. *ILO/ASEAN Joint Study on: Social Implications of ASEAN Free Trade Agreement (AFTA) on Labour and Employment: the case of Indonesia* (Jakarta), p. 34. Available at: http://www.ilo.org/wcmsp5/groups/public/@asia/@ro-bangkok/@ilo-jakarta/documents/publication/wcms_117238.pdf [June 2016].

¹¹³ ILO. 2009. *Freedom of association and collective bargaining: Indonesian experience 2003-2008*, ILO Working Paper, pp. 5-6. Available at: http://www.ilo.org/jakarta/whatwedo/publications/WCMS_116126/lang--en/index.htm [June 2016].

¹¹⁴ Warnecke, T.; De Ruyter, A. 2012. “The Enforcement of Decent Work in India and Indonesia: Developing Sustainable Institutions”, in *Journal of Economic Issues*, Vol. XLVI, No. 2, pp. 393-401.

¹¹⁵ Ibid.

In 2014, the Indonesian government enacted legislation¹¹⁶ to curb the autonomy of local governments and restore some power to the central – and provincial governments.¹¹⁷ This broader recentralization-process will also affect labour inspection. Under this new system, which is expected to take two years to implement, labour inspectors will no longer fall under the authority of the local government but will instead report to the governor as head of the provincial government.¹¹⁸ This, we were informed, is primarily to secure the independence of the inspectorate and to avoid undue political interference from the district leadership.

In addition to recentralisation, there have been two other initiatives designed to improve the compliance and enforcement activities and processes of the Indonesian labour inspectorate. In April 2012, a tripartite Labour Inspection Committee was established. This Committee – which is made up of representatives from government, employer associations, trade unions and other civil society organisations – is designed to act as an advisory and consultative body.¹¹⁹ A second initiative is designed to place a so-called ‘Labour Norms Expert/Cadre’¹²⁰ (LNC) in each participating enterprise in Indonesia. These ‘experts’ are employees of the factories who have been specifically trained on Indonesian labour norms, and are expected to assist the enterprises in completing an annual self-assessment. According to the recent Ministerial decree, LNCs will “become the partner of [the] labor inspector in enhancing the company’s compliance toward ... labor norms implementation”.¹²¹ BWI has been involved in the establishment of this initiative – an aspect to which we return in part 4, below.

¹¹⁶ *Law on Regional Government No. 23/2014*.

¹¹⁷ Jaweng, R. E. 2014. “Overcoming problems in new autonomy era”, in *Jakarta Post*, 22 December 2014. Available at: <http://www.thejakartapost.com/news/2014/12/22/overcoming-problems-new-autonomy-era.html> [June 2016].

¹¹⁸ Some officials pointed out to us that labour inspection is a form of law enforcement, which in their view means that it should be treated like the police and immigration authorities, who fall directly under the authority of the central government. One official mentioned that there was some support for placing the labour inspectorate directly under the authority of the central government, and that this was still one of the options on the table.

¹¹⁹ To date, the committee has met twice.

¹²⁰ Translation of ‘Kader Norma Katernagakerjaan (KNK)’, see the Ministerial Decree on *Labor Norm Cadre Formation and Training* (No. 257/2014).

¹²¹ Attachment I to Ministerial Decree on *Labor Norm Cadre Formation and Training* (No. 257/2014), p. 2.

4. APPLICATION OF THE ANALYTICAL MODEL to BWI

4.1 Formal and intentional

While there is no formal cooperation agreement between BWI and the Ministry,¹²² there are a number of examples of formal and intentional interaction between BWI and the Ministry. Arguably the best example of this type of interaction is the Project Advisory Committee (PAC). Others include the bipartite ad hoc committee, and collaboration on enforcement and training, among others.¹²³

Each country programme in Better Work is advised by a tripartite PAC that includes representatives from the national government (usually the Ministry of Labour) and national-level employers' and workers' organizations/trade unions, representing the sector or industry. The presence of the government in the governance structure of all BW country programmes sets it apart from other, more private regimes, where such formalized interaction is often absent. In Indonesia, the PAC includes representatives of the Ministries of Trade, Industry, and Manpower and Transmigration, APINDO (employers' organization) and four key national and sectoral trade unions. BWI is represented by three senior staff members, including the BWI programme manager.

The PAC guides the implementation of BWI programming while also helping to monitor and evaluate BWI's implementation against its work plan.¹²⁴ The first meeting of the PAC took place in June 2012, and while meetings are normally held twice a year in other BW countries, the Ministry has requested quarterly PAC meetings. This could be viewed as evidence of the Ministry's "particular interest in overseeing the BWI programme".¹²⁵

As the name suggests, the PAC primarily plays an advisory and not decision-making role. As one BWI staff member put it: "We listen to them but in the end we implement; their role is only advisory". However, the PAC's role is not limited to an advisory one. In practice, it is often tasked with endorsing new policies and procedures adopted by BWI, although final approval in most cases still rests with the Ministry. For example, the PAC endorsed an extensive Zero Tolerance Protocol (listing the non-compliances that BWI need to report to the labour inspectorate), but the Protocol

¹²² There are such agreements in other BW countries like Jordan and Lesotho.

¹²³ See part 4, below.

¹²⁴ The International Labour Office; International Finance Corporation. 2013. *Better Work Indonesia Newsletter, 4th edition, 2013*. Available at: http://betterwork.org/indonesia/wp-content/uploads/4th-Edition_FINAL-DIGITAL-ENG-LOW.pdf [June 2016].

¹²⁵ See Tajgman, D. 2013. *Better Work/Public Labour Inspection Service Interactions: A review of literature and experience in Cambodia, Vietnam, and Indonesia* (prepared for the World Bank for internal use), p. 9.

still awaits formal approval by the Ministry. One issue that is currently under discussion in the Indonesian PAC is that of public reporting (or transparency). BW already implements public reporting on non-compliances in Haiti and Cambodia, and, based on the positive results there, intends to implement public reporting in all of its country programmes from 2016 onwards.¹²⁶ As in the case of the Protocol, it is envisaged that PAC endorsement of public reporting will still require formal government approval. This means that in some sense, the PAC represents a cooperation agreement with the government, even if its role is mainly advisory.¹²⁷

As we discuss subsequently, the entry of BW into Indonesia was not an easy one, and it took at least one year of discussion between BW and the Ministry before BWI was allowed to operate officially in the country. Currently, the relationship between BWI and the Ministry is a very strong one, with both parties viewing it as “very positive” and mutually supportive. In our view, there are at least two reasons for this, which present us with two additional instances of formal and intentional interaction between BWI and the Ministry. First, BWI arranged for the secondment of two Ministry officials to the ILO in Geneva in 2012. Funded by BWI and the ILO, the two senior Ministry officials were hosted partially by Better Work Global in Geneva, and by the ILO’s technical department responsible for labour inspection, LABADMIN/OSH.¹²⁸ This study tour increased the Ministry’s understanding of the role and functions of BWI, and opened up the space for closer cooperation.¹²⁹ The secondment has been so successful that it has since become an annual event.¹³⁰ Since 2014, the Ministry has taken over financial responsibility for the secondment because – as one BW staff member noted – “they saw the benefit of the tours”.

Secondly, BWI and the Ministry created a so-called bipartite *ad-hoc committee* in 2011. The significance of the ad-hoc committee cannot be overstated. As we will discuss in the next part, the committee has – in addition to *the formal and intentional* contact – also engendered significant *informal and intentional* interaction between BWI and the Ministry. The committee consists of a number of representatives from BWI and fifteen officials from the Ministry. Formal meetings

¹²⁶ The International Labour Office; International Finance Corporation. 2015. *Better Work: the Better Work service model*, April 2015, p.11. Available at: http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-dhaka/documents/projectdocumentation/wcms_404161.pdf [June 2016].

¹²⁷ We thank one of the anonymous reviewers for this insight.

¹²⁸ Tajgman, D. 2013. *Better Work/Public Labour Inspection Service Interactions: A review of literature and experience in Cambodia, Vietnam, and Indonesia* (prepared for the World Bank for internal use), p. 11.

¹²⁹ One of the two seconded Ministry officials indicated that after the visit to Geneva, he started to work tirelessly to “convince colleagues in the inspectorate to accept BW”.

¹³⁰ We were also informed that the Ministry has recently taken over financial responsibility for the study tours from BWI and the ILO, which reflects the value they attach to the initiative.

usually take place once a year but after the first two years, they have been organised largely on an ad hoc basis when the need arises.¹³¹ However, as we will point out in the next part, *informal* contact between the committee and BWI takes place at least monthly.

The idea for the ad hoc committee came from the then Director-General of Inspection Services, who wanted to create a forum in which BWI and the Ministry could interact to “reduce the tension” that existed in respect of their respective roles. As one ex-senior official in BWI told us, “this was a great recommendation to address a delicate problem”. Formally, the first two meetings of the committee were devoted to an evaluation of the Better Work Compliance Assessment Tool (CAT).¹³² The Ministry used the meetings to ensure that “BW was following the existing [labour] regulations”. This is not unusual since Better Work works closely with the relevant ministries in all the countries in which it operates to receive guidance on how the national law should be interpreted and applied to the garment industry.¹³³

More recently, the Ministry has consulted BWI on a new initiative to improve labour compliance in Indonesia. To date, three formal meetings have taken place. Indonesia’s labour inspectorate – like the majority of labour inspectorates around the world – experience severe capacity constraints.¹³⁴ In order to address these constraints, the Ministry is developing a system to introduce the so-called “Labour Norm Expert/Cadre” (LNC) into Indonesian workplaces.¹³⁵ The ‘cadres’ will be employees of the enterprises, and after certification by the government, will assist the enterprise in improving labour compliance in a number of ways, including assisting with the completion of an annual self-assessment. It is hoped that the cadres will “become ... partner(s) of [the] labor inspector ... [by] enhancing the company’s compliance toward ... labor norms implementation”.¹³⁶ One senior Ministry official and ad hoc committee member confirmed that

¹³¹ As one senior BWI staff member pointed out: “The ad hoc committee is convened “whenever there is a need from BWI to discuss certain issues that needs the approval of Ministry or to ensure that our work is aligned or supports Ministry policies or work plan”.

¹³² See part 3, above. See also Amengual, M; Chirot, L. Forthcoming (current version March, 2016). “Reinforcing the State: Transnational and State Labor Regulation in Indonesia”, in *Industrial and Labour Relations Review* (forthcoming), p. 12. Available at: http://web.mit.edu/amengual/www/Amengual_Chirot_20150730.pdf [June 2016].

¹³³ See ILO/Better Work. “Assessments”. Available at: <http://betterwork.org/global/?faq-category=ii-assessments> [June 2016].

¹³⁴ See part 3 above. In a meeting with the Ministry, we were informed that there are 240 000 companies in Indonesia, and only 1900 inspectors. Out of the more than 500 districts in Indonesia, 190 have no labour inspectors.

¹³⁵ See Ministerial Decree on Labor Norm Cadre Formation and Training (No. 257/2014).

¹³⁶ See Attachment I to Ministerial Decree No. 257/2014, Chapter 1.

BWI was a “source of inspiration” for the initiative.¹³⁷ The Ministry believes that one of the reasons that BWI factories are generally more compliant than non-BWI factories is the fact that BW factories are more familiar with labour norms and do not “learn about labour standards from Google”.¹³⁸

Since the initiative involves a self-assessment component, the Ministry is particularly interested in self-diagnostic tools developed by international buyers to assess their own suppliers. In this regard, BWI has facilitated contact between international buyers and the Ministry, and also provided input on the feasibility of using the BW CAT as the basis for the planned self-assessment. In addition, BWI has invited international buyers and BW factories to the LNE meetings with the Ministry. This has directly increased brand support for the initiative. For example, one major international brand is sending all their compliance staff in the country to be trained as LNCs, and is encouraging their factories (suppliers) to participate. Finally, BWI has used their access to the district inspectors (*dinas*) to encourage them to attend information sessions presented by the Ministry.¹³⁹ As one BWI staff member said, “we are helping the Ministry to socialize the idea of the Labour Norm Cadres in the provinces where we operate”.

There are also several additional instances of *formal and intentional* interaction between the Ministry and BWI in the areas of enforcement and training. First, an extensive *Zero Tolerance Protocol* has been discussed between the Ministry and BWI. The protocol provides that when EAs discover instances of child labour, forced labour, sexual violence and issues that pose an imminent threat to worker health and safety, they will report the issue to the BWI Programme Manager, who in turn will inform the Ministry and the district or provincial labour inspectors in writing of the violation within 24 hours.¹⁴⁰ However, since the protocol has not yet been formally approved

¹³⁷ It also appears that the discussions of PCIs – especially the tripartite committee of experts in Geneva and the background paper – prompted the Ministry to investigate the use of internal company resources for compliance purposes. The influence of the ILO therefore goes beyond BWI.

¹³⁸ This appears to assume that the key driver of employer non-compliance is ignorance of the law and regulations and not economic concerns. This does not appear to be consistent with other findings – particularly those emerging from recent studies which suggests that employers in Indonesia are very concerned to ensure that costs remain low in order to maintain profit margins. See Amengual, M; Chirot, L. Forthcoming (current version March, 2016). “*Reinforcing the State: Transnational and State Labor Regulation in Indonesia*”, in *Industrial and Labour Relations Review* (forthcoming). Available at: http://web.mit.edu/amengual/www/Amengual_Chirot_20150730.pdf [June 2016].

¹³⁹ Apparently, attendance of provincial inspectors at the first event was very poor, which promoted BWI staff to reach out to the district level inspectors in the areas in which BW operates to encourage them to attend the subsequent events, which had a positive effect on attendance.

¹⁴⁰ See *Zero Tolerance Protocol between the Indonesian Ministry of Manpower and Transmigration and Better Work Indonesia*, 8 July 2013.

by the Ministry, ¹⁴¹BW's general zero tolerance protocol is applicable, it covers the same issues, albeit in slightly less detail.¹⁴²

Important interchanges have also taken place in the area of training. The two labour inspectors who were seconded to the Better Work team in Geneva helped to review and adapt Better Work's training modules on occupational safety and health and fire safety.¹⁴³ On their return to Indonesia, they were involved in training workers and managers in Better Work participating factories.¹⁴⁴ Ministry officials have also been working with Better Work to train labour inspectors to better understand the law and industrial relations, with a view to harmonizing interpretations of national labour law provisions.¹⁴⁵ The topics for these so-called "refresher trainings" are decided by BWI, but the delivery of the training is usually done by a member of the ad hoc committee "because they know BW and the way we think". In order to ensure convergence, the training material is developed jointly by BWI and the Ministry, and is often based on case studies developed from the factory experiences of EAs.¹⁴⁶ In 2012, during a refresher training offered to district inspectors presented by BWI, the need for convergence came into sharp relief when a BWI case study evoked widely divergent solutions from the district inspectors. This prompted BWI to bring in national level inspectors to deliver the training since the national level inspectors could use its authority to "impose" a uniform interpretation by the district level inspectors. Combining transnational labour regulation with state regulation in this way has indirectly strengthened the public labour inspectorate in Indonesia. As we will see in the next section, this is a tactic that has served BW well.

¹⁴¹ Although the protocol has received the endorsement of the PAC, we were informed that the Ministry would like to expand the list of "zero tolerance issues" beyond the list currently contained in the draft protocol before they would consider signing it.

¹⁴² See ILO/Better work. *Appendix two: Generic Global Zero Tolerance Protocol*. Available at: <http://betterwork.org/global/?faq=appendix-two-generic-global-zero-tolerance-protocol> [June 2016].

¹⁴³ See ILO. 2014. *Update on the Better Work programme, 4 February 2014*, Governing Body, 320th Session, Geneva, 13-27 March 2014 (Geneva: ILO document GB.322/POL/6), p. 5, para. 22; and Tajgman, D. 2013. *Better Work/Public Labour Inspection Service Interactions: A review of literature and experience in Cambodia, Vietnam, and Indonesia* (prepared for the World Bank for internal use), p. 11.

¹⁴⁴ ILO. 2014. *Update on the Better Work programme, 4 February 2014*, Governing Body, 320th Session, Geneva, 13-27 March 2014 (Geneva: ILO document GB.322/POL/6), p. 5, para. 22.

¹⁴⁵ Tajgman, D. 2013. *Better Work/Public Labour Inspection Service Interactions: A review of literature and experience in Cambodia, Vietnam, and Indonesia* (prepared for the World Bank for internal use), p. 10.

¹⁴⁶ *Ibid.*, p. 11.

4.2 Intentional and informal

Given Indonesia's decentralised system of labour inspection, BWI works in highly varying contexts. Inspectors in the various regions often differ in their interpretation and application of the law, especially in instances where the central government is either not aware of the problem or their decisions do not cascade down to the provinces and districts. These divergent views often complicate the work of BW EAs because the difference in interpretation prevents them from taking any clear action in the factories. As one senior BW staff member remarked: "(W)e don't want to go to a factory and identify a NC [non-compliance] when the local *dinas* [district inspectors] consider it a compliance. That's not good".

In order to address this, BWI has adopted an interesting tactic. Instead of engaging directly with the district inspectors, BWI officials approach members of the ad hoc committee informally for a definitive interpretation, which they hope will filter down to the provinces and the local districts. However, given the fact that district level inspectors are under the control of local politicians, and therefore have no direct contact with the Ministry, policy decisions taken at national level "do not always cascade down to the regional level".¹⁴⁷ As we will show, this *intentional and informal* interaction between BWI and the Ministry overshadows the *formal and intentional* interaction both in frequency and potential significance.¹⁴⁸ As far as frequency is concerned: the formal meetings of the ad hoc committee – apart from the first two years when it met annually – takes place whenever "the need arises". However, the informal contact between BWI staff and members of the ad hoc committee takes place on a regular basis – at least monthly.¹⁴⁹ These informal interactions usually occur between one or two BWI staff members responsible for

¹⁴⁷ During a meeting with the ad hoc committee, one member of the committee lamented the fact that they had no direct contact with the local inspectors, and suggested that BW should create the equivalent of an ad hoc committee in every district in which it operates in order to ensure that national level decisions cascade down to the local *dinas*. This indicates that in many ways, the Ministry recognises the important "brokering" role that BWI plays to facilitate contact between the Ministry and the *dinas*.

¹⁴⁸ It bears pointing out that the informal interaction between BWI and members of the ad hoc committee is enabled by the existence of the formal ad-hoc committee. The trust that has been engendered between the members of the ad hoc committee and BWI during the formal meetings has allowed senior BWI staff members to contact individual ad hoc committee members informally whenever the need arises.

¹⁴⁹ This is in stark contrast with the situation in Jordan, where there is very little informal interaction between BW Jordan and the public labour inspectorate. See Kolben, K. 2015. "Dialogic Labor Regulation in the Global Supply Chain", in *Michigan Journal of International Law*, Vol. 36, No. 3, pp. 425 - 465.

assessments or advisory services, and one current (or even, in one instance, retired)¹⁵⁰ member of the ad hoc committee.¹⁵¹

These exchanges are potentially significant because through the process of clarifying the law with the Ministry, BWI indirectly strengthens the authority of the Ministry, which otherwise has little direct contact with the *dinas* or much influence over the manner in which they interpret labour regulations. One example pertains to the issue of minimum wage postponements. Minimum wages in Indonesia are locally determined, and have increased significantly in recent years. In order to smooth the process of increasing wages, Indonesian law allows for factories to delay part of the wage increase after consultation with workers, an audit from regulators to determine the factory's profitability, and approval from the provincial governor.¹⁵² However, it was reported that in many instances factory managers were able to circumvent the formal process for postponement with tacit or explicit support from local government officials, including local labour inspectors. BWI refused to honour wage postponement increases that did not meet the formal legal procedural and substantive requirements for postponement, which is a position that was supported by the central Ministry. In a recent paper, Amengual and Chirot show that as a result of the approach BWI adopted towards the issue (ensuring that its position converged with that of the central Ministry and then applying that interpretation in its factories, facilitating meetings between BW factory management and the Ministry, and issuing a series of legal updates on the matter), BWI factories were more likely to go through proper wage setting procedures than other factories.¹⁵³

BWI also consults regularly with ad hoc committee members in developing training material. We have pointed out that BWI often organises refresher training on industrial relations topics for local

¹⁵⁰ One of the persons that BWI regularly consults with is a former member of the ad hoc committee, and former Director of Inspection Services.

¹⁵¹ As one senior BWI staff member explained: "Any questions that buyers and factories have on interpretation [of labour regulations] come to me. I am the one who will contact the Ministry and discuss the issue (with them) and then I will either issue a legal update on the issue or communicate directly with the brand or factory via e-mail to say that this [official] interpretation is BWs compliance decision".

¹⁵² See Ministry of Manpower and Transmigration Decree concerning Procedures for Postponing the Application of Minimum Wage (No. 231/2003).

¹⁵³ Amengual, M; Chirot, Laura. Forthcoming (current version March, 2016). "*Reinforcing the State: Transnational and State Labor Regulation in Indonesia*", in *Industrial and Labour Relations Review* (forthcoming). Available at: http://web.mit.edu/amengual/www/Amengual_Chirot_20150730.pdf [June 2016]. Recently, BWI convened a meeting with the Ministry and local inspectors (*dinas*) from Jakarta, Tangerang, Bogor and West Java to urge convergence in how the matter of postponement would be handled during 2015. As one BWI staff member explained: "We did not want the same thing to happen in 2015 because ... you have disputes, allegations and all of this can be avoided if we have convergence on how we approach postponement".

inspectors, and that in developing the material, BWI consults with ad hoc committee members, who would also deliver the training. However, there is an instance where BWI consulted directly with *dinas* in developing training material for training that Better Work offers to its factories. This occurred in Semarang, where the EAs consulted with the *dinas* in developing training material on chemical handling management, an experience the EAs described as “valuable”, “beneficial” and “helpful”.¹⁵⁴

In addition to the interaction with the members of the ad hoc committee to receive clarification on the interpretation of labour regulations, BWI staff also act as brokers to facilitate contact between Ministry staff and local inspectors. In addition to the formal training sessions where BWI invites Ministry officials to provide “refresher training” to local inspectors,¹⁵⁵ BWI has also facilitated “informal” knowledge-sharing sessions between Ministry officials and local inspectors. For example, after a discussion with the Ministry on the issue of chemical safety, BWI facilitated a visit by a Ministry official and a number of local inspectors to one of BWI’s factories, which the Ministry official used as an opportunity to mentor the *dinas* on how chemical risk levels should be assessed. This also represents an instance where the Ministry adopted one of BWI’s practices – in this case the manner in which BW EAs assess chemical risk.

It is clear that the *informal (intentional)* interaction between BWI and individual members of the ad hoc committee has benefited both parties. A senior BWI staff member commented as follows in this regard: “We [BWI] need help from the national level [Ministry] for the interpretation of the law, but we [BWI] also help them by providing information from the ground because the people at the national level don’t have any direct contact to the district inspectors.” In other words, BWI uses its unique position in factories to discover what is going on inside these factories, and also to ascertain how labour laws are being interpreted at the local (district) level, and sharing this information with the Ministry. Instead of imposing their own interpretation of the law, BWI depends on the Ministry (via the ad-hoc committee) to provide a definitive interpretation, which is then meant to cascade down to the districts. This, in our view, constitutes an important and innovative way of combining transnational private labour regulation with state regulation to *indirectly* strengthen state institutions.

¹⁵⁴ We were unable to find other examples of direct interaction between BWI and the local inspectorate, which raises the possibility that this may be an isolated incident.

¹⁵⁵ See above.

4.3 Informal and unintentional

Kolben points out that this category is where “some of the most interesting and difficult dynamics to analyze are found”¹⁵⁶ and where interactions take place without intentionality or explicit awareness that such interaction is occurring.¹⁵⁷ It is here where dynamics such as “rule layering”, competition and rivalry as well as complementarity can be identified.

Competition / rivalry / displacement

Currently, the Ministry and BWI consider their relationship to be “very good”, “positive” and “mutually beneficial”. This stands in stark contrast to the Ministry’s attitude towards BWI when it attempted to establish BW’s presence in Indonesia in 2011. While BWI began conducting assessments in apparel factories in July 2011, it took almost one year before the project document was signed and for the first formal interactions between the Ministry and BWI to take place. According to BWI staff, the main reason for this initial antagonism was the concern on the part of the Ministry that BWI constituted *competition* or a potential *rival*. As one senior BWI staff member observed: “The key tension within the Ministry at the time was to determine what the role of BW is if we have a labour inspectorate”. It took a year for the project document to be approved and signed “because it took that long to convince them [Ministry] that we weren’t a threat and that there was a space [in Indonesia] for a group like us”. A least one BW staff member believed that the Ministry was concerned about being *displaced* by BWI: “At the beginning the relationship was difficult because they [Ministry] thought we would take their jobs”.

However, this perception of competition or rivalry was not shared by the Ministry. In an interview with the Ministry official who was instrumental in helping BWI establish itself in the country, another potential reason emerged. Instead of citing rivalry, competition, or displacement as reasons, he mentioned that the main concern within the Ministry was the fear that BWI, through its work with factories, would create increased “rights consciousness” among workers, and thereby contribute to more “unrest” and “demonstrations”. As he said: “The Ministry thought that BWI would create problems and then these problems would become the Ministry’s problems”.

The displacement thesis seems hard to sustain in light of the relative scope of influence of the respective actors. While the labour inspectorate in Indonesia is responsible for all sectors of the

¹⁵⁶ Kolben, K. 2015. “Dialogic Labor Regulation in the Global Supply Chain”, in *Michigan Journal of International Law*, Vol. 36, No. 3, p. 461.

¹⁵⁷ *Ibid.*

Indonesian economy and operates – in theory¹⁵⁸ - across all of Indonesia, BWI operates in the Indonesian textile industry only, and only in areas that produce for the export market. Almost 90 per cent of the textile industry is located in Java, and 55 per cent of these enterprises are concentrated in West Java alone.¹⁵⁹ As a result, BWI has a presence in only 15 of the over 500 districts in Indonesia.¹⁶⁰ Tajgman reports that the Ministry views BWI as just one of many sector initiatives designed to promote improved and safer work conditions for Indonesian workers, and while the interactions appear to be welcomed and beneficial for the inspectorate, “they appear not to be potential game changers for PLIS (public labour inspection service) operations”.¹⁶¹

In addition, the two actors have distinctly different methodologies. As pointed out earlier, BWI has always placed an emphasis on continued improvement through its advisory services and has recently decreased the significance of assessments even further.¹⁶² The public labour inspectorate, on the other hand, focuses on the inspections of enterprises – primarily by means of routine inspections.¹⁶³ While BWI’s assessments are two-person, two-day assessments, and involve interviews with a wide range of people – including management and workers, labour inspectors spend far less time in each enterprise (“an hour or two”) and their interviews are more limited (“they only talk to management”).¹⁶⁴ Finally, BWI’s sanctions are primarily economic (poorly performing factories might be “dropped” by international buyers)¹⁶⁵, whereas the public labour

¹⁵⁸ Even though a sizeable number of regions have no labour inspectors, see part 3 above.

¹⁵⁹ ILO/Better Work. *Indonesian Garment Industry Fact Sheet*. Available at: http://betterwork.org/indonesia/?page_id=45 [June 2016].

¹⁶⁰ As Tajgman observes: “BWI’s influence on broader public labour inspection issues is commensurate to the size of the sector in which it operates.” See Tajgman, D. 2013. *Better Work/Public Labour Inspection Service Interactions: A review of literature and experience in Cambodia, Vietnam, and Indonesia* (prepared for the World Bank for internal use), p. 9.

¹⁶¹ *Ibid.*, p. 13.

¹⁶² See the discussion of the new revised BW model in part 3 above.

¹⁶³ In a meeting with North Jakarta district inspectors, we were informed that each inspector is expected to visit 10 companies per month. Out of approximately 100 inspections conducted each month, approximately 15-17 are in response to complaints, which are lodged mostly by trade unions.

¹⁶⁴ As mentioned earlier, the labour inspectorate in Indonesia faces severe resource constraints. In North Jakarta, there are 12 inspectors, and 7000 registered companies. At most, inspectors will be able to visit 120 companies a month (12 inspectors each visiting 10 companies per month).

¹⁶⁵ Although, brands rarely drop factories in practice, see Amengual, M; Chirot, Laura. Forthcoming (current version March, 2016). “*Reinforcing the State: Transnational and State Labor Regulation in Indonesia*”, in *Industrial and Labour Relations Review* (forthcoming). Available at: http://web.mit.edu/amengual/www/Amengual_Chirot_20150730.pdf [June 2016]. Interestingly, the labour inspectorate seems to favour a “softer” approach to sanctions that will stop short of brands dropping factories. As one Ministry official remarked: “We need the approach of a hard warning, but we don’t want buyers to cut off orders. This would bring unemployment, which is the new problem [in Indonesia]”.

inspectorate has the leverage of state sanctions. As one senior Ministry official remarked: “There are some things that only labour inspectors can ask people to do. BW can only report to Geneva. Labour inspectors have the right to enter, inspect, take note, and impose penalties. BW has no right of punishment”. As Tajgman points out, “the framework in which BW operates – tripartite oversight, compliance benchmarked by international standards where national standards do not conform, no sanction authority in law, a focus on correction of causes, regular periodic assessments, etc. – is significantly different from a PLIS (public labour inspection service)”.¹⁶⁶

Complementarity

Complementarity occurs “when the private and public regimes work compatibly to achieve desirable regulatory goals”.¹⁶⁷ In this study, we have identified a number of ways in which the two actors complement or strengthen one other, which includes both obvious ways (such as training and diffusion of practices) and ways that occur “under the radar” – in particular the way in which BWI’s informal interaction with the ad hoc committee indirectly strengthens the PLIS in Indonesia. In his seminal study on the interaction between state and private regulators in the Dominican Republic, Amengual shows that uncoordinated complementarity¹⁶⁸ can occur when state and non-state regimes are able to strategically focus resources on issue areas in which they have a comparative advantage. In the first place, it freed up state resources to allow public regulators to focus on sectors of the economy with potentially more vulnerable workers and little private regulatory pressure (i.e. in the non-export market). Secondly, public and private regulators combined their efforts within EPZ factories in ways that drew on the comparative advantage of each, with private auditors uncovering certain types of contraventions (e.g. minimum pay, overtime, OHS etc.), while public inspectors relied heavily on complaints, which meant they uncovered violations that could not be discovered in relatively short audits, or that required investigations beyond the factory walls (e.g. freedom of association).

¹⁶⁶ Tajgman, D. 2013. *Better Work/Public Labour Inspection Service Interactions: A review of literature and experience in Cambodia, Vietnam, and Indonesia* (prepared for the World Bank for internal use), pp. 30-31.

¹⁶⁷ Kolben, K. 2015. “*Dialogic Labor Regulation in the Global Supply Chain*”, in *Michigan Journal of International Law*, Vol. 36, No. 3, p. 462.

¹⁶⁸ “(The) driver of complementary regulation is comparative advantage, not coordination.

Complementary regulation occurs when the actions of state and private regulators are mutually supportive of one another’s efforts and, because of the different pressures on these actors, they bring different tools to the task of regulating”, see Amengual, M. 2010. “*Complementary Labor Regulation: The Uncoordinated Combination of State and Private Regulators in the Dominican Republic*”, in *World Development*, Vol. 38, No. 3, p. 412.

There is no evidence in Indonesia of complementarity of the first kind (PLIS focusing energy on sectors not covered by non-state actors). While the Ministry recognises the important role that BWI plays in addressing some of the resource constraints of the PLIS,¹⁶⁹ a senior official confirmed that BWI factories are not exempt from inspections: “Labour inspectors still do inspections ... in BW factories – there is no special privilege for a BW factory”.¹⁷⁰ However, senior officials in the Ministry stated that the inspectorate currently focuses its resources on the manufacturing, mining, fishing and maritime sectors. It may well be that these sectors represent the sectors with the greatest risk, but it may also (in part) be because the garment industry is already under intense scrutiny from international brands, MSIs, and organizations like BWI, which enables the public labour inspectorate to focus its limited resources elsewhere. It is worth pointing out that one of the goals of the public reporting that BW will introduce in all countries in 2016 is to allow the inspectorate to prioritise poor performing factories for regulatory attention.¹⁷¹ If successful, such a system may allow BWI factories with higher compliance levels to escape public inspections, and assist the PLIS to focus its limited resources on workplaces that perform poorly.

In respect of complementarity of the second kind, there is some evidence that BWI and the PLIS have comparative advantages in specific areas. For example, officials from the Ministry acknowledged that they had learnt a lot from BWI in the domain of freedom of association – in particular the manner in which EAs identify and investigate freedom of association violations in factories.¹⁷² Given the fact that freedom of association violations are particularly difficult to

¹⁶⁹ “BW helps our labour inspectors in the field – where we have too few [because] (they) help us by the way they find non-compliances and they help factories to comply with the regulations”.

¹⁷⁰ This was confirmed during an interview with senior labour inspectors in North Jakarta, who said that they are unlikely to know if a factory they are inspecting is in the BWI programme [2 April 2015].

¹⁷¹ “(Public reporting) ... enables buyers to reward factories with good compliance levels and allows governments to use their resources more effectively to target those with poor performance”, see ILO/Better Work. 2015. *Buyer Guidance: Our Factory Service Model*, p. 13. Available at: http://betterwork.org/global/wp-content/uploads/2016/04/Buyer_Guidance_Service_Model_Low_Res.pdf [June 2016].

¹⁷² As evidence, BWI provided training to labour inspectors on investigation skills related to freedom of association. These trainings were requested and paid for by the Indonesian labour inspectorate. It followed numerous cases before the Freedom of Association Committee of the Governing Body of the ILO involving freedom of association violations in that country (discrimination against union activities, the use of criminal sanctions against labour activists and failure by Indonesian employers to comply with provisions in collective agreements). See ILO. 2009. *Freedom of association and collective bargaining: Indonesian experience 2003-2008*, ILO Working Paper. Available at: http://www.ilo.org/jakarta/whatwedo/publications/WCMS_116126/lang--en/index.htm [June 2016].

In 2013, the International Commission of Jurists (ICJ) found that “(l)ack of effective enforcement [of violations of freedom of association provisions by the police and labour inspectorate] coupled with undue delays in investigating those practices foster a climate of impunity for perpetrators”. The ICJ reported that

uncover, and often require in-depth investigations and triangulation of evidence, it makes sense that BWI EAs are better placed to uncover those.¹⁷³ BWI EAs confirmed that the fact that they have continuous contact with a factory in the form of advisory services allow them to follow-up on freedom of association violations discovered (or even suspected)¹⁷⁴ during assessments. This is a luxury that a resource-strapped PLIS – whose visits are usually limited to a few hours and primarily involve interviews with management – does not have.¹⁷⁵ On the other hand, BWI acknowledges and often relies on the expertise of the Ministry in the field of occupational health and safety by using Ministry officials as training service providers,¹⁷⁶ or by relying on the expertise and experience of district inspectors to develop BWI training material.¹⁷⁷

since the introduction of the Trade Unions Act of 2000, “only one case has resulted in a conviction on union busting charges in 2009”. See United Nations Committee on Economic, Social and Cultural Rights. 2013. *International Commission of Jurists (ICJ) Submission for the Preparation by the Committee on Economic, Social, and Cultural Rights of a List of Issues for the Examination of the Initial Report of Indonesia*, 52nd Session (Pre-Sessional Working Group), 2-6 December 2013. Available at: http://tbinternet.ohchr.org/Treaties/CESCR/Shared%20Documents/IDN/INT_CESCR_NGO_IDN_15646_E.pdf [June 2016].

¹⁷³ An additional reason may be the fact that most of the BWI EAs have a background in compliance auditing, which means that they have experience in dealing with freedom of association-issues in factories. While Better Work may be better placed to uncover freedom of association violations than the public labour inspectorate, it must be pointed out that the average number of non-compliance findings for freedom of association and collective bargaining by BW Enterprise Advisors are still significantly below those for compensation, contracts and human resources, working time, and occupational safety and health. See International Labour Office; International Finance Corporation. 2014. *Better Work Indonesia: Garment Industry 4th Compliance Synthesis Report, July 2014* (Geneva), p. 12. Available at: <http://betterwork.org/global/?m=201407> [June 2016].

¹⁷⁴ EAs informed us that they may have a *hunch* or *gut feeling* during an assessment that a FOA violation has occurred, but due to a lack of direct evidence, do not cite it as a non-compliance. However, in such a case, the EA responsible for the assessment would inform the EA responsible for advisory services in the factory (they are always different EAs in order to avoid conflict of interest) of their suspicions, and leave it to that EA to raise and investigate it further during advisory services.

¹⁷⁵ In his study of the interaction of public and private regulators in the Dominican Republic, Amengual found the opposite dynamic, namely that the private regulators were more adept at discovering health and safety violations while the public inspectorate had a comparative advantage to prosecute freedom of association violations. See Amengual, M. 2010. “*Complementary Labor Regulation: The Uncoordinated Combination of State and Private Regulators in the Dominican Republic*”, in *World Development*, Vol. 38, No. 3, p. 412. It is likely that this dynamic is somewhat unique to Better Work Indonesia as opposed to other private non-state actors that, unlike Better Work, are not connected to international organizations like the ILO. We thank one of the anonymous reviewers for bringing this point to our attention.

¹⁷⁶ Tajman, D. 2013. *Better Work/Public Labour Inspection Service Interactions: A review of literature and experience in Cambodia, Vietnam, and Indonesia* (prepared for the World Bank for internal use), p. 11.

¹⁷⁷ This recently happened in Semarang, where EAs consulted with district inspectors in preparing training material on chemical handling management – a process described as “valuable”, “helpful” and “beneficial” for BWI.

In our view, the most significant instance of complementarity occurs as a result of the intentional and informal contact between BWI and individual members of the ad hoc committee. What is most striking to us is the way in which BWI uses its unique access to the factories to uncover how Indonesian labour law and regulations are being interpreted and applied locally, and then to use their equally unique access to ad hoc committee members to obtain the “authoritative” interpretation of the law or regulation, which is then filtered back down to the district level.¹⁷⁸ This, in our view, is an important and innovative way of combining a private regulatory actor with state regulation to strengthen state institutions indirectly. Not only does BWI assist in converging conflicting interpretation of laws and regulations in the different districts and provinces in Indonesia, but it also helps to enhance and shape the influence of the Ministry with district inspectors over whom they have very limited authority or control. In our view, BWI has been able to achieve this as a result of their strong integration within the Ministry. This arguably sets BWI apart from other non-state actors in the transnational labour regulatory field, where it is highly unusual to find robust relationships between private and public regulatory actors. As has been noted:

“In practice, public institutions (including labour inspection) tend not to be involved directly in PCI activities. The exceptions to this are cases where the public authorities have been instrumental in making the PCIs operational, or where the PCI has, on its own initiative, brought public institutions in to play essential functions in the compliance scheme”.¹⁷⁹

4.4 Formal and unintentional

The relationship between BWI and the Ministry – apart from the initial interactions – is described as positive and mutually beneficial by both parties. Even at the beginning, when the Ministry viewed BWI with some scepticism, there was a common desire to meet and to interact. In other words, none of the interactions between BWI and the Ministry has required the intervention of an independent third party to bring together two parties who were reluctant to meet. However, there may be incidences of the formal/unintentional interaction at work when broadening the analysis to the interaction between BWI and the *dinas*. It appears that the interaction between BWI and

¹⁷⁸ This is done either through conveying the Ministry’s interpretation directly to the district inspectors, implementing the Ministry’s interpretation in the factories in defiance of the interpretation of the district inspectors, or using regular “legal updates” to publicise and entrench the Ministry’s interpretation.

¹⁷⁹ ILO. 2013. *Labour inspection and private compliance initiatives: Trends and issues, Background paper for the Meeting of Experts on Labour Inspection and the Role of Private Compliance Initiatives, Geneva, 10–12 December 2013* (Geneva), p. 21.

district inspectors have been mostly informal and ad hoc, and largely based on the personal relationships that the EAs have with individual inspectors.¹⁸⁰ However, in some instances in which BWI and the district inspectors have *formally* interacted, the Ministry has been instrumental in facilitating the interaction. For example, in a meeting that we had with the district inspectors in North Jakarta, we were told that the instruction to the district inspectors to attend had come directly from the Ministry, and we were left with the clear impression that the meeting would not have occurred in the absence of the Ministry directive.

Finally, as we pointed out in 4.1 above, one of the ways in which BWI and the Ministry has built trust is through secondment of Ministry officials to the ILO in Geneva. This is instructive, given the potentially widespread suspicion of or reticence towards private regulatory initiatives on the part of governments, and the unique positioning of the ILO to overcome some of that scepticism.¹⁸¹ Kolben specifically refers to the potential role that intergovernmental organisations such as the ILO can play in bring in facilitating interaction between distrusting state and private actors.¹⁸² In Indonesia, at least during the initial period when BWI was being established and trust was still lacking, the secondment allowed BWI and the Ministry to interact in the formal institutional structure of the ILO and build support for the role of BW in Indonesia.¹⁸³ This facilitating role that the ILO played and continues to play between BWI and the Ministry can therefore be characterised as an example of formal but unintentional interaction.

¹⁸⁰ For example, in Semarang, one of the EA's who has good relations with the local *dinas* indicated that this is due to the fact that he worked in one of the BWI factories before joining BW, and that he has known the *dinas* since then. It must be noted that there are on-going discussions within BWI to designating one EA in each region as the point-person for interaction with the local government /district inspectors. While some EA's have indicated to us that interaction with district inspectors is required of each EA and is part of their job description, other EA's have contradicted this, and indicated that they have either had no contact with local inspectors, or that the contact they have had has been entirely accidental and ad hoc.

¹⁸¹ We thank one of the anonymous reviewers for bringing this point to our attention.

¹⁸² See Kolben, K. 2015. "Dialogic Labor Regulation in the Global Supply Chain", in *Michigan Journal of International Law*, Vol. 36, No. 3, p. 451.

¹⁸³ The Better Work programme in Indonesia is housed in the ILO Office in Jakarta, as is the case with the global staff of Better Work, who are located in the International Labour Office in Geneva. This not only facilitates closer interaction between BW(I) and the ILO, but also improves the legitimacy of BW in the eyes of outside observers. This is another way in which the BW programme can be set apart from other purely private compliance initiatives.

5. CONCLUSION

The proliferation of private compliance initiatives has provoked a wide range of assessments and views, from both policy and theoretical perspectives. Kolben, for example, views private regimes as a helpful and necessary means of addressing labour governance deficits in global supply chains. He nevertheless believes that these regimes “should ideally be utilized in ways that aim to enhance state capacity through implicit and explicit discursive and dialogic engagement”.¹⁸⁴ He points to the well-known limits of transnational private regulation (such as lack of effectiveness, lack of sustainability, limitation in scope, and lack of democratic legitimacy) to argue that increased attention should be paid to the state, “especially the ones that are currently weak or politically unwilling to enforce domestic and international labor law”.¹⁸⁵ Private regimes in the transnational labour sphere, he argues, should be “designed and oriented towards strategically developing state regulatory capacity, especially in the specific areas of comparative advantage”.¹⁸⁶

It remains largely unclear, however, under what conditions collaborations between private compliance initiatives and public enforcement activities are most likely to ‘work’, and how these conditions may be adjusted in order to maximise the benefits and limit the risks. In this sense, it remains unclear – in the abstract – to what extent the interaction of private and public regulation in any context is likely to satisfy the goals that Kolben (for example) would like to see pursued.¹⁸⁷

¹⁸⁴ Kolben, K. 2015. “*Dialogic Labor Regulation in the Global Supply Chain*”, in *Michigan Journal of International Law*, Vol. 36, No. 3, pp. 425 - 465.

¹⁸⁵ For an analysis of the limitations of transnational private labour regulation, see *ibid.*

¹⁸⁶ *Ibid.* In a recent paper, Berliner et.al. tested empirically the common assumption that weak administrative state capacity is one of the fundamental barriers to improved labour rights and standards, and found that under certain circumstances (in particular in countries where workers are better represented in the political system), building state capacity can indeed result in improvements in labour rights. See Berliner, D.; Greenleaf, A.; Lake, M.; Noveck, J. 2015. *Building Capacity, Building Rights? State Capacity and Labor Rights in Developing Countries*, in *World Development*, Vol. 72, pp. 127-139.

¹⁸⁷ Kolben points to the well-known limits of transnational private regulation (such as lack of effectiveness, lack of sustainability, limitation in scope, and lack of democratic legitimacy) to argue that increased attention should be paid to the state, “especially the ones that are currently weak or politically unwilling to enforce domestic and international labor law”. See Kolben, K. 2015. “*Dialogic Labor Regulation in the Global Supply Chain*”, in *Michigan Journal of International Law*, Vol. 36, No. 3, p. 440. Private regimes in the transnational labour sphere, he argues, “ought to be designed and oriented towards strategically developing state regulatory capacity, particularly in specific areas where they possess comparative advantage... Private regulatory regimes can potentially play an important role in the governance of labor supply chains and, if properly constructed, help improve and focus public regulatory performance through various mechanisms of communication and coordination. By identifying points of dialogic interaction and non-interaction, program designers and policy makers can better identify strategic areas where private regimes can help improve public labor law enforcement, and where the state might help improve private

In the end, these are first matters for empirical research. It is vital to map the specific ways in which private and state actors interact. More than this, though, the mapping should be geared towards identifying ways in which regulatory institutions can be shaped to optimize efficiencies and to “take full advantage of complementary relations”.¹⁸⁸

In this study, we have drawn on Kolben’s analytical framework of “regulatory dialogism” to identify the ways in which BWI and the public labour inspectorate in Indonesia interact. Through an empirical analysis of regulation in practice, the paper has attempted to highlight both the *mechanisms* and the *qualities* as well as the character and of interaction between BWI and the labour inspectorate. What the paper has *not* tried to do is to capture the *effect* of the interaction on labour conditions in Indonesia,¹⁸⁹ or to look at how rules and norms develop and change over time based on the interactions.¹⁹⁰ While these are useful questions to consider, our study has a more limited scope, namely to examine who or what interacts, what drives and shapes the interaction, what are the mechanisms or pathways of interaction, and what is the character or quality of the interaction (rivalry, displacement, complementarity).

As noted in Part 4 above, BWI and the Ministry have interacted in ways – formal and informal, intentional and unintentional – that have had the effect of altering and shaping how labour inspection in Indonesia is conceptualised and managed in practice. BWI seems to have been the source for the Ministry initiative to introduce the requirement to install Labour Norms Cadres in enterprises. Through the ad hoc committee and interactions between EAs and Indonesian labour inspectors, BWI has also influenced the interaction between the central and district levels of the Indonesian public labour inspectorate. While it has never been an explicit programmatic objective of the Better Work country programmes, our finding suggest that in Indonesia, the public labour inspectorate has been strengthened as a result of its interactions with BWI,¹⁹¹ even if that has

regimes and better steer them to areas in which they might have a comparative advantage”. See *Ibid*, p. 446.

¹⁸⁸ Amengual, M. 2010. “Complementary Labor Regulation: The Uncoordinated Combination of State and Private Regulators in the Dominican Republic”, in *World Development*, Vol. 38, No. 3, p. 413.

¹⁸⁹ Eberlein, B, Abbott, K. W; Black, J.; Meidinger, E. 2012. “Transnational Business Governance Interactions: Conceptualization and Framework for Analysis”, *Comparative Research in Law & Political Economy*, Research Paper, No. 29, p. 13. Available at: <http://digitalcommons.osgoode.yorku.ca/clpe/33> [June 2016].

¹⁹⁰ Bartley develops a model for doing. See Bartley, T. 2011. “Transnational Governance as the Layering of Rules: Intersections of Public and Private Standards”, in *Theoretical Inquiries in Law*, Vol. 12. No. 2, p. 525.

¹⁹¹ See Tajgman, D. 2013. *Better Work/Public Labour Inspection Service Interactions: A review of literature and experience in Cambodia, Vietnam, and Indonesia* (prepared for the World Bank for internal use), p. 31.

come about largely in an *ad hoc* and informal fashion.¹⁹² One of the benefits of categorising the interactions between BWI and the public labour inspectorate along the formal / informal and intentional / unintentional axes is that it highlights that the establishment of formal relationships and structures (such as the PAC, the ad hoc committee, and the secondment of Ministry officials to the ILO) create the conditions for the more productive and potentially more impactful informal interactions to flourish.¹⁹³

Our findings tend to reinforce those of other empirical studies of the interaction of private and public compliance. Prior studies by Amengual, and by Locke (writing alone and with co-authors) have shown that the empirical reality is far more complex than some of the policy or theoretical arguments would accommodate. It transpires that displacement, for example, may not be a risk, even if only because of limited resources – at least in the case of Indonesia. In a much smaller country, the findings in this respect might be quite different. Our findings also tend to suggest that Kolben's goal (for example) of complementarity in regulatory regimes may be attainable, even if the mechanisms and mechanics by which that can be achieved are likely to vary significantly according to the country and the context, and may often only be discovered through trial and error, and through persistence of interaction.

Finally, in much of the existing research on decentred regulation, it is assumed the state assumes the role of facilitator/coordinator of the interactions between public and private regulators, and

¹⁹² In a more cautionary vein, it is worth pointing out that a significant drawback or risk of informal interactions is that it is exposed to shifts in the broader political environment and changes in personnel. This may compromise the sustainability of the positive interactions which are currently taking place between BWI and the Ministry. Some of the new governance literature suggests that formalisation of collaborative processes is important, if not, essential. For instance, Harry Arthurs has argued that formalisation of collaborations between the state and non-state actors may help ensure that there is a 'sustained, professional and integrated approach to education and information, especially one that is coordinated with other elements of a comprehensive compliance strategy'. See Arthurs, H. 2006. *"Fairness at Work: Federal Labour Standards for the 21st Century"*, in *Commission on the Federal Labour Standards Review* (Ottawa). Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=953049 [June 2016]. Fine and Gordon similarly contend that formalisation of the regulatory interactions makes the collaboration less temporal and more institutionalised, which means that it is less contingent on individual relationships, less vulnerable to changes in agency leadership and less exposed to shifts in political interests. See Fine, J.; Gordon, J. 2010. *"Strengthening Labor Standards Enforcement through Partnerships with Workers' Organizations"*, in *Politics and Society*, Vol. 48, No. 4, pp. 552-585. One implication of this may be to seek to transform an interaction which is taking place in one category (i.e. informal, intentional) into another category (i.e. formal, intentional) in order to maximise its regulatory potential and sustainability.

¹⁹³ We thank one of the anonymous reviewers for highlighting this particular benefit of adopting Kolben's analytical framework.

the one providing insight into the regulatory problem. In this case study, however, the situation is reversed. Here BWI plays both functions traditionally assumed by the state, namely facilitating or coordinating other regulatory players (including the Ministry and the labour inspectorate) as well as providing much of the inside or local on-the-ground information.¹⁹⁴ This role reversal raises unique issues and questions, many of which have not been fully explored in the existing literature on decentred regulation. In our view, this provides a strong justification for undertaking similarly structured empirical analysis of other Better Work country programmes.¹⁹⁵

¹⁹⁴ Our findings in this regard have been confirmed by a complementary study undertaken by Amengual and Chirot, who determined that “BWI brings information about compliance to the central government – in multiple instances BWI has reported practices to the MOMT that central officials were not previously aware of – and then diffuses information about legal processes back down to factories and buyers”. See Amengual, M; Chirot, Laura. Forthcoming (current version March, 2016). “*Reinforcing the State: Transnational and State Labor Regulation in Indonesia*”, in *Industrial and Labour Relations Review* (forthcoming). Available at: http://web.mit.edu/amengual/www/Amengual_Chirot_20150730.pdf [June 2016].

¹⁹⁵ Despite the decentralised nature of the Indonesian labour inspectorate, the focus of the paper has been primarily on the relations between BWI and the Ministry, which in our view makes the findings generalisable to any centralised or decentralised labour inspection system where Better Work operates.

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