



Can transnational corporations legally apply conditions to companies that supply them with contract and agency labour?

A research report by Brendan Martin for ICEM



INTRODUCTION

This report has its origins in a discussion at a meeting of ICEM officials and affiliate representatives in April 2007 to discuss progress with ICEM's efforts to bring contract and agency labour (CAL) workers within the protection of labour law and unions. During the meeting, it was stated that one transnational company (TNC) operating in Asia had informed union representatives that it would be unlawful for it to impose conditions on other companies with which it contracted about the terms and conditions on which they employed their workers.

The initial response of the meeting was that any TNC could impose whatever conditions it liked on its suppliers, provided those conditions were not outlawed in the jurisdiction in question, and had no obligation to do business within jurisdictions in which the national law was an impediment to such conditions. The meeting believed that any company refusing to include satisfactory labour conditions within its contracts was evading its responsibilities to workers in its supply chain. In May, following further discussion, it was agreed that some research would be done to try to clarify the situation, particularly in view of the possibility of different national jurisdictions imposing different obligations on TNCs.

Following initial research, a report was produced in July which looked at international labour law, trade law and contract law and concluded that the verdict of the original meeting was essentially correct: a company can include whatever conditions it pleases within a contract with another, provided those conditions are not outlawed in the jurisdiction in question, in which case the company had no obligation to do business there. However, it was also noted that there could be complicating factors with significant bearing on the circumstances in which companies exercise their contractual rights, and that some of these might appear to be legal impediments to including labour conditions in their contracts. These complications arose from both international and national legal frameworks.

Therefore, it was agreed to look more deeply into those areas, and, in August, an outline was produced. The research continued from September onwards, and this report, supplementing and building upon the July report, is based on that research. Its findings confirm the essential point made at the original meeting and confirmed in the July report. However, it also sheds further light on a range of factors that, while not providing TNCs with any excuses, might inform their decisions about inclusion or otherwise of labour standards conditions in their supply contracts. In particular, it shows that the legal implications of a TNC imposing contract conditions concerning labour standards on its suppliers vary greatly with national jurisdictional context.

In producing the second report, the opportunity has also been taken to place these matters within the context of the wider international legal framework, because the linkages between a number of different issues can be seen more clearly in that context. The relationships between TNCs and their sub-contractors and their employees exist within a complex legal framework composed of cross cutting categories of international law and national law,

public law and private law, labour law and commercial law, and what has been called "hard law" and "soft law".

A preliminary point to be made before going on to try to make sense of this framework is that the author of this paper is not a lawyer. If an employer should continue to cite legal reasons for failure to negotiate with ICEM or its affiliates about the terms on which it contracts with a labour supplier, there would be no substitute for obtaining specialist legal advice suited to the circumstances concerned. What follows is based on an extensive literature review by a legal layperson.

Although the research has shed light on the complexities of the subject, and on reasons why a TNC might make such a claim as gave rise to the research, the bottom line conclusion remains. Although in some circumstances it might be unlawful for a TNC to include conditions within its contracts with suppliers that provide particular protections to contract and agency workers, there is no obligation on any TNC to continue to do business within the jurisdiction in which those circumstances obtain. In other words, although the assumptions made at the original discussion can be seen to have been rather too simple, the essential conclusion drawn then was correct. Indeed, business-backed codes of conduct tend to suggest that it is good business practice to enforce labour standards through contract compliance.

However, the research also shows that, by including such contract conditions, a TNC is imposing upon itself an obligation to enforce compliance, and this can give rise to potential legal complications in relation to commercial, trade or consumer protection laws. In those circumstances, some TNCs might choose to claim a legal obstacle to imposing such conditions rather than rise to the considerable challenge of ensuring compliance with them.

After this introduction, the report has three sections. The first looks at the international legal framework, starting with labour law and going on to look at commercial, trade and contract law. The second looks at corporate codes of conduct and the obstacles that might stand in the way of enforcing them through contract conditions. The third looks at national legal frameworks, of both labour and commercial law, and at particular circumstances in which some or all of a jurisdiction's normal regulatory provisions might be waived.

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1. THE FRAMEWORK OF INTERNATIONAL LAW

1.1 The International Labour Organisation and core labour standards

A recent study of international labour law has identified four phases of its development since 1945.¹ The first began with the Declaration of Philadelphia, which redefined the aims and purpose of the International Labour Organisation (ILO) and marked the resumption, on that basis, of the ILO's work of establishing labour standards. The Declaration embodied the principles that:

- labour is not a commodity;
- freedom of expression and of association are essential to sustained progress;
- poverty anywhere constitutes a danger to prosperity everywhere; and
- "all human beings, irrespective of race, creed or sex, have the right to pursue both their material wellbeing and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity".²

Established as part of the Treaty of Versailles after World War I and integrated into the United Nations (UN) system in 1948, the ILO is unique among the international organisations in having representation not just from national governments but from workers' and employers' associations. However, the key institutional responsibility for implementing ILO standards is government, and the shifting balance of power between governments and transnational corporations (TNCs) has been, therefore, a key issue in the development of international labour standards.

Consequently, from the late 1960s until the early 1980s, a second phase of international labour law was marked by increasing governmental regulation of TNCs. A measure of its limited success was the emergence of a third phase marked by a "phenomenal upsurge in the adoption and use of private corporate codes" from the late 1980s onwards.³ Their very limited success in improving labour standards in practice has given rise to a fourth phase, marked in particular by the ILO's adoption of the *Declaration on Fundamental Rights and Principles at Work* and its decent work agenda, which can be seen as an attempt to assert public influence over TNC codes, as well as to extend protection to workers outside formal employment.

Throughout those phases, ILO conventions and recommendations have remained the foundation of international labour regulation, despite the exclusion of probably the majority of the world's workers from their protection, because of their exclusion from formal employment relationships. The ILO describes the international labour standards drawn up through its annual International Labour Conferences (ILCs) as follows:

"International labour standards are legal instruments drawn up by the ILO's constituents (governments, employers and workers)

and setting out basic principles and rights at work. They are either **conventions**, which are legally binding international treaties that may be ratified by member states, or **recommendations**, which serve as non-binding guidelines.

"In many cases, a convention lays down the basic principles to be implemented by ratifying countries, while a related recommendation supplements the convention by providing more detailed guidelines on how it could be applied. Recommendations can also be autonomous, i.e. not linked to any convention."⁴

While 188 conventions and 198 recommendations are currently in force, since 1998 the ILO has specified eight conventions as embodying "core" labour standards.⁵ In its *Declaration on Fundamental Rights and Principles at Work*, the ILO identified four principles, expressed in those eight conventions, that member states have a duty to respect simply by virtue of their membership of the organisation and regardless of whether they have ratified the associated conventions. These are:

- freedom of association and the right to collective bargaining;
- elimination of forced and compulsory labour;
- abolition of child labour; and
- elimination of discrimination in the workplace.⁶

The two ILO instruments with most particular significance for contract and agency labour are Convention 181 and Recommendation 198, which are discussed in the following two sub-sections.

1.2 Convention 181 on Private Employment Agencies

Convention 181 recognises the existence of -- and, indeed, legitimises -- private employment agencies, while setting out the terms on which they should operate.⁷ It requires governments, "in accordance with national law and practice", to "take the necessary measures to ensure adequate protection for the workers employed by private employment agencies", particularly in relation to:

- freedom of association;
- collective bargaining;
- minimum wages;
- working time and other working conditions;
- statutory social security benefits;
- access to training;
- occupational safety and health;
- compensation in case of occupational accidents or diseases;
- compensation in case of insolvency and protection of workers claims;

- maternity protection and benefits, and parental protection and benefits.

In addition, it requires governments to "determine and allocate, in accordance with national law and practice, the respective responsibilities of private employment agencies ... and of user enterprises" in relation to:

- collective bargaining;
- minimum wages;
- working time and other working conditions;
- statutory social security benefits;
- access to training;
- protection in the field of occupational safety and health;
- compensation in case of occupational accidents or diseases;
- compensation in case of insolvency and protection of workers claims;
- maternity protection and benefits, and parental protection and benefits.

So far, only 20 countries have ratified Convention 181.⁸

1.3 Recommendation 198 on the Employment Relationship

The other ILO instrument with particular significance to the subject of this report is Recommendation 198, which was adopted in 2006, with an accompanying resolution urging governments how to go about promoting its terms. This is a significant development because, almost without exception, the legal rights of a worker with respect to an enterprise for which he or she works is dependent on the existence of an employment relationship between them. Indeed, the great increase in the use of contract and agency labour has been designed precisely to evade labour protection by evading an employment relationship. For this reason, agency employers were determined to assert that the recommendation did not in any way change or supersede Convention 181, and this is explicitly stated in Recommendation 198.

Recommendation 198 was the product of discussions at International Labour Conferences that had evolved over a decade. In 1997 and 1998, there had been discussion of "contract labour", but no conclusions were reached, mainly because of failure to reach agreement about the meaning of the term (its usage varies between countries) and how to define and identify the workers concerned. The 1998 meeting agreed that a so-called Meeting of Experts should be held to try to solve these problems, and that was held in 2000. Meanwhile, the tactical approach of the workers' side adapted to the obstacles placed in the way of agreement by the employers' and governments' sides. The workers' side redefined the issue as the need to provide protection to the growing numbers of workers who were not being protected by labour law, either because of failure to enforce it, or because of the difficulty of distinguishing between the scope of commercial legislation and labour law, or

because labour legislation had not been updated to reflect the realities of new forms of work.

The underlying aim was to extend protection to workers who were in fact in a dependent employment relationship, even if that was not their formal status. With adoption of Recommendation 198, the ILO acknowledges that "contractual arrangements can have the effect of depriving workers of the protection they are due", but it does so in the wider context of the "employment relationship". The ILO states: "The issue of who is or is not in an employment relationship – and what rights/protections flow from that status – has become problematic in recent decades as a result of major changes in work organization and the adequacy of legal regulation in adapting to those changes. Worldwide, there is increasing difficulty in establishing whether or not an employment relationship exists in situations where (1) the respective rights and obligations of the parties concerned are not clear, or where (2) there has been an attempt to disguise the employment relationship, or where (3) inadequacies or gaps exist in the legal framework, or in its interpretation or application."⁹

Consequently, Recommendation 198 urges governments towards:

- formulation, application and periodic review of national policies to clarify and adapt the scope of relevant laws and regulations to protect workers in the context of an employment relationship;
- development of criteria for determining whether or not such a relationship exists, based on the facts about what is actually expected of the worker and how the worker is paid, rather than whatever the parties to the relationship might call it;
- establishment of a new mechanism, or the use of an existing one, to monitor developments in the labour market and the organization of work "so as to be able to formulate advice on the adoption and implementation of measures concerning the employment relationship".

In addition to the Recommendation, the 2006 ILC adopted a resolution inviting the ILO Governing Body to instruct the Director-General to "assist constituents in developing national policies and setting up monitoring and implementing mechanisms, as well as to promote good practices at the national and international levels concerning the determination and use of employment relationships". At its November 2006 session, the Governing Body so instructed the Director-General, and one product so far has been the production of an annotated guide to Recommendation 198, which was published in March 2007.¹⁰

1.4 Workers' rights as human rights

With their special status as "core labour standards" that all members of the ILO are obliged to adhere to regardless of national ratification, alongside their thematic link to the terms of the Universal Declaration of Human Rights adopted in 1948, the four principles enshrined in the *Declaration on*

Fundamental Rights and Principles at Work can be seen as human rights. Bob Hepple, a British expert on international labour law, notes that while human rights include some workers' rights, not all workers' rights are human rights, and that "to call them human rights is to devalue the importance of basic civil and political rights".¹¹

However, some workers' rights are also explicitly protected under the terms of other international human rights codes, such as the Universal Declaration (articles 23 & 24)¹² and the International Covenant on Economic, Social and Cultural Rights (articles 7 & 8)¹³, which was adopted by the United Nations General Assembly in 1966. The terms of the Universal Declaration are more general in formulation than the core labour standards, but their scope would appear to go beyond the core standards and to extend to all "workers", whether or not in an employment relationship. Articles 23 and 24 state that:

"Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.

"Everyone, without any discrimination, has the right to equal pay for equal work.

"Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

"Everyone has the right to form and to join trade unions for the protection of his interests.

"Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay."

The terms of the International Covenant are also broader than the core labour standards, and also refer specifically to gender equality and to trade union rights. Its Article 7 states:

"The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular:

(a) Remuneration which provides all workers, as a minimum, with:

(i) Fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work;

(ii) A decent living for themselves and their families in accordance with the provisions of the present Covenant;

(b) Safe and healthy working conditions;

(c) Equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence;

(d) Rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays."

Article 8 states:

"1. The States Parties to the present Covenant undertake to ensure:

(a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;

(c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.

"2. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces or of the police or of the administration of the State.

"3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organize to take legislative measures which would prejudice, or apply the law in such a manner as would prejudice, the guarantees provided for in that Convention."

1.5 Human rights, labour standards and transnational corporations

In 2003, the UN Sub-Commission on the Promotion and Protection of Human Rights, the main subsidiary body of the Commission on Human Rights, unanimously approved a set of norms setting out the responsibilities of TNCs and other business enterprises in relation to the respect and protection of human rights.¹⁴ By including "other business enterprises", the scope of the norms extends not only to TNCs but also to any other business entity, including domestic companies contracting with TNCs.

The norms recognize that even though states have the primary responsibility to promote and ensure respect of human rights, TNCs and other business enterprises, "as organs of society", are also responsible for promoting and securing the human rights set out in the Universal Declaration. They note that TNCs and other business enterprises have "the capacity to cause harmful impacts on the human rights and lives of individuals through their core business practices and operations, including employment practices, environmental policies, relationships with suppliers and consumers, interactions with Governments and other activities."

Therefore, TNCs and other business enterprises have an obligation to promote and respect human rights recognized in international as well as national law. Specifically, and in direct relation to the ILO core standards, the norms hold that TNCs and other business enterprises shall not use forced or compulsory labour, shall respect the rights of children to be protected from economic exploitation, and shall respect freedom of association and effective recognition of the right to collective bargaining. The norms also require provision of a safe and healthy working environment and that workers are provided with remuneration that ensures an adequate standard of living for them and their families.

The UN norms can be regarded as "soft law", as can the Guidelines on Multinational Enterprises agreed by the Organisation for Economic Cooperation and Development (OECD).¹⁵ The OECD, in its own words, brings together the governments of countries committed to democracy and the market economy from around the world to support sustainable economic growth, boost employment, raise living standards, maintain financial stability, assist the economic development of other countries, and contribute to growth in world trade. It currently has 30 member states, but a major expansion of the organisation is currently under discussion which would involve inviting the major emerging economies of the global south (India, Brazil, China, Indonesia, South Africa) to become members.

In 1976, in response to worries that TNCs were becoming too powerful, the OECD produced a set of Guidelines for Multinational Enterprises. This was essentially a kind of code of conduct for large companies with their headquarters in the developed world, particularly with respect to their operations in developing countries. Having fallen into disuse in the 1980s and 1990s, the Guidelines were reviewed and updated in 2000. They cover disclosure of information, employment and industrial relations, the environment, bribery, consumer interests, science and technology, competition and taxation. The employment and industrial relations section closely follows the ILO's core conventions, but puts a particular emphasis on union representation and bargaining. Notably, it outlaws the use of the threat of delocalisation in negotiations.

In recent years, intergovernmental financial institutions have begun to attach conditions relating to labour standards to their projects, which is a new form of "soft law" with potentially further reaching significance than the OECD's guidelines. In 2006, the International Finance Corporation (IFC), the agency of the World Bank Group that lends directly to the private sector, amended its performance standards (with which companies that borrow from it have to comply) to include a new Performance Standard 2 (PS2), on labour standards. This is important not only in itself, but also because other agencies of the World Bank Group, as well as regional development banks such as the Asian Development Bank, are increasingly adopting the same standards. Indeed, the IFC PS2 terms are becoming the global benchmark for international financial institutions.

The IFC states that PS2's content has been "in part guided by a number of international conventions negotiated through the International Labour Organisations and the United Nations". The declared objectives of PS2 are:

- to establish, maintain and improve the worker-management relationship;
- to promote the fair treatment, non-discrimination and equal opportunity of workers;
- to protect the workforce by addressing child labor and forced labor;
- to promote safe and health working conditions, and to protect and promote the health of workers.¹⁶

Most of the standards apply to "certain types of non-employee workers", who are defined (Clause 17) as workers who are:

- (i) directly contracted by the client, or contracted through contractors or other intermediaries; and
- (ii) performing work directly related to the core functions essential to the client's products or services for a substantial duration.

Note that the word linking those clauses is "and" rather than "or"; this means that the standards do not apply to contract workers deemed to be working in non-core functions, which employers are defining increasingly broadly in order to justify the increasing use of contract and agency labour.

Moreover, some of the standards do not apply even to "non-employee workers" as defined by Clause 17. Contract workers employed directly by the user enterprise are excluded from the clauses on human resources policies, retrenchment and the supply chain, while those employed through intermediaries are excluded from those on human resources, retrenchment and grievance mechanisms. In some respects, those exclusions can be explained by the logic of the workers' situation -- a directly employed contract worker has no supply chain, for example -- but the exclusion of contract and agency workers from the human resources clause is a matter for concern, because the human resources clause includes a requirement for the employer to inform the worker of his or her rights.

As of May 2007, the World Bank (i.e. the IBRD, which lends to middle income country governments, and the IDA, which lends and makes grants to the poorest countries) is applying the IFC standards in its Standard Bidding Documents (SBD) for construction projects in its infrastructure portfolio above a \$5m value, and it is expected that regional development banks will follow this example.

1.6 The World Trade Organisation and labour standards

The other main sources of international public law with relevance to workers' rights are international trade agreements, which regulate access to domestic markets by foreign enterprises. Trade agreements can be either multilateral, applying in three or more countries at once, or bilateral, applying between two countries. One aspect of their relevance for workers' rights is that some include labour or social clauses that make trade privileges (lower or no tariff barriers, increased market access, etc.) conditional on respect for labour standards. In most such cases, ILO conventions and recommendations, and in particular the core labour standards, are the reference points. An additional source of relevance, however, could be the potential for conflict with labour rights, in the event that they are portrayed as unfair barriers of trade.

On the global scale, the various agreements of the World Trade Organisation (WTO) form the most important body of multilateral regulation of international trade in goods, services and intellectual property. Indeed, WTO members are obliged to ensure that any other bilateral or regional trade agreements they enter into conform with WTO rules.

During the 1990s, there was considerable discussion within the global trade union movement about whether or not labour clauses should be included within those rules. This was opposed by many civil society organisations (CSOs) as well as governments in the global South, on the grounds that labour clauses in trade agreements would amount to protectionist obstacles for developing country products. Others argued that it is the ILO's role to police labour standards, and that the WTO would be an unsuitable institution for doing so, and in 1996 the WTO came to that conclusion.

According to one recent authoritative study, "any attempt to make trade conditional upon observance of labour standards risks falling foul of two important principles of international economic law: Most Favoured Nation (MFN) and National Treatment (NT)."¹⁷ The WTO explains: "Under the WTO agreements, countries cannot normally discriminate between their trading partners. Grant someone a special favour (such as a lower customs duty rate for one of their products) and you have to do the same for all other WTO members. This principle is known as most-favoured-nation (MFN) treatment."¹⁸ It is so important, states the WTO, that it is the first article of the General Agreement on Tariffs and Trade (GATT), which governs trade in goods. MFN is also a priority in the General Agreement on Trade in Services (GATS) (Article 2) and the Agreement on Trade-related Aspects of International Property Rights (TRIPS) (Article 4). The WTO states:

"Some exceptions are allowed. For example, countries can set up a free trade agreement that applies only to goods traded within the group -- discriminating against goods from outside. Or they can give developing countries special access to their markets. Or a country can raise barriers against products that are considered to be traded unfairly from specific countries. And in services, countries are allowed, in limited circumstances, to discriminate. But the agreements only permit these exceptions under strict conditions. In general, MFN means that every time a country lowers a trade barrier or opens up a market, it has to do so for the same goods or services from all its trading partners -- whether rich or poor, weak or strong."

With regard to the National Treatment principle, the WTO states: "Imported and locally-produced goods should be treated equally -- at least after the foreign goods have entered the market. The same should apply to foreign and domestic services, and to foreign and local trademarks, copyrights and patents."

Although the WTO's agreements do not include labour clauses, research for this paper found no cases in which a challenge had been made under WTO rules arising from any attempt by a TNC to impose contract conditions on suppliers.

1.7 Regional and bilateral trade agreements and labour standards

Many bilateral trade agreements do include labour clauses, normally referring to ILO core standards. The USA has been in the forefront of attempts to tie respect for labour standards to trade sanctions, and there are currently 15 such agreements.¹⁹ The US Trade Act (Article 301) also includes the general formulation "breach of worker rights" as possible grounds for discretionary trade sanctions. This apparently pro-labour standards position is in contrast with the USA's poor domestic record on labour rights. The Harvard Law Review has cited a number of opinions that cast doubt on the good faith of the US government in this respect and that suggest that "trade and security interests, not concern for human or labor rights, control decision making".²⁰

The substance of the North American Free Trade Agreement (NAFTA), which links the USA with Canada and Mexico, and of bilateral free trade agreements concluded by the USA, certainly tends to confirm the sceptical view. The problem in the overwhelming majority of these agreements is enforceability. As two senior ILO officials have recently written, "some critics ... have pointed out that the recent free trade agreements negotiated by the United States do not contain an enforceable commitment to respect the ILO's core labour standards: the only enforceable labour commitment contained in these FTAs is to enforce domestic labour laws."²¹

As a political as well as economic bloc, the European Union (EU) has more scope for the introduction of labour protections. Yet the tension between trade rules and measures to protect workers, and the political struggles over these issues, has been demonstrated in the EU too in various ways, including through the continuing deadlock about the European Commission's proposed directive on agency workers. The draft directive, as revised by the Portuguese EU presidency during the latter half of 2007, would provide agency workers with employment protection with a user enterprise after just six weeks of working there, and has been proposed as a response to abuse of temporary work arrangements to avoid the labour rights that come with an employment relationship.

According to the European Trade Union Confederation (ETUC), temporary agency work is the most rapidly growing form of atypical work in the EU over the last 20 years. "In Denmark, Italy, Spain and Sweden, the use of temporary agency workers has increased five-fold, and has at least doubled in most other countries, according to the Dublin-based European Foundation for the Improvement of Living and Working Conditions. ... In the new EU Member States, this form of working is also on the increase, although few statistics are yet available. Slovenia, for example, passed legislation to authorise temporary work agencies in 1998, with new measures to protect workers in 2003. Since enlargement in May 2004, more opportunities for temporary agency workers from these countries have opened up in the EU-15, making it crucial to establish minimum standards to avoid undercutting of pay and working conditions."²²

The ETUC adds: "The growing need for a legal framework offering protection to temporary agency workers is clear. The European Commission responded in 2002 by proposing a Directive laying down the principle of non-discrimination against temporary workers, aiming to set minimum EU-wide standards and create a level playing field for companies in different Member States. It states that a temporary agency worker may not be treated less favourably, in terms of basic working conditions (working time, rest periods, holidays, pay etc), than a permanent member of staff doing a 'comparable' job in the same firm. But in order to accommodate national law and practices, it also allows exceptions to be made where workers have a permanent contract with an agency, or collective agreements provide adequate protection."

However, the latest attempt to push through the directive was again blocked in December 2007, with opposition continuing from the United Kingdom in particular. According to ETUC: "Until this Directive becomes law, the growing

army of temporary agency workers across the EU is at risk of unfair treatment and discrimination in the workplace -- a situation that should not exist in Social Europe."

1.8 Status of international law and compliance enforcement

ILO standards and human rights norms, despite their status in international law, are not directly justiciable; that is, they are not the kind of legal rights that allow private individuals or organisations to make claims against other private individuals or organisations. Rather, the obligations to which they give rise are binding in the first instance only on governments, and apply to national legal systems and enforcement practices, not to individual cases of abuse or denial of rights.

States found to be in breach of this kind of international law might be obliged to change their domestic law or to take steps to improve its enforcement, but there are no circumstances under which, for example, an individual corporation could be directly required to change its behaviour by any of the bodies that supervise the application of international law. Even when national courts have the authority to apply international law, any rulings will apply to the law itself and not to the application of the law in individual cases.

Therefore, international law on human rights and labour standards is enforced through political means. Even in the case of clear breaches of the law there is no sanction that can be applied other than public opprobrium and, in the worst cases, the suspension or exclusion of states from the international organisations responsible for monitoring compliance.

To become enforceable at national level, ILO conventions have to be ratified by the country concerned and given expression in labour law. In practice, labour laws are often not enforced effectively even when that has happened. In addition, some governments formally waive them, especially in the context of the growing phenomenon of special zones, such as free trade zones, export processing zones and special economic zones. (See Section 3).

The application of the OECD guidelines is organised via a network of "national contact points" (NCPs). Although the detail of the administrative arrangements varies from state to state, in practice these NCPs are government officials whose first duty is in effect to try to resolve any issue raised to everyone's satisfaction. Ultimately they have the power to make a ruling on whether a company is in breach of the guidelines and to make that ruling public, although it is not obligatory to do so, and there is no sanction attached to such a ruling. Anyone can approach an NCP to ask it to investigate a claimed breach. The OECD Committee on International Investment and Multinational Enterprises (CIME) is the body ultimately responsible for the interpretation of the guidelines and issues advice on interpretation when asked to do so by the NCPs.

So, although the OECD Guidelines can be applied to individual corporations, and although unions or any other interested party can ask for a claim to be

investigated, the lack of sanctions means that their influence is very limited. What is more, the interpretation of the guidelines by CIME has tended towards the conservative. An ILO commentary argues that the committee's clarifications "show an extremely cautious, even opaque attitude to interpreting the Declaration, an unswerving adherence to the principle of national treatment and the primacy given to national systems of industrial relations and the law".²³ It goes on to suggest that the primacy accorded to national law is a major problem for the guidelines, as no exception is made for laws which breach the fundamental tenets of the code itself or other relevant international statutes.

As for the IFC performance standards, the first compliance step is to develop an action plan with the client, and the IFC has a small team whose role is to help with that and to monitor compliance. The IFC also reserves the right to cancel a contract in the event of failure to develop or implement an action plan, and this potential sanction in itself lends weight to the idea that there is nothing to stop a TNC from writing labour standards conditions into its contracts with suppliers.

As with international human rights and labour standards, labour clauses in trade agreements do not provide individuals and organisations with actionable rights against other individuals and organisations. Rather, they apply to domestic labour legislation and enforcement practices. As a general rule it is only the parties to an agreement that includes labour clauses that are entitled to have claims that another party is in breach of the agreement heard by whatever machinery the agreement establishes.

Although trade sanctions arising from breaches of labour standards cannot be applied to individual corporations, labour clauses in trade agreements ought in principle to have a significant impact on labour standards as there is the possibility that real, economically painful sanctions can be applied to states whose labour law or law enforcement is inadequate. However, the nature and enforcement history of such clauses strongly suggests that they are generally weakly worded and that even when governments are in a position to press for the imposition of sanctions they are generally reluctant to do so.

1.9 Contract law and labour standards

Freedom of contract is the core principle of international commercial law. Indeed, Article 1.1 of the Principles of International Commercial Contracts adopted by the International Institute for the Unification of Private Law (UNIDROIT) states simply: "The parties are free to enter into a contract and to determine its content."²⁴ This is subject to the limitation that any contract that has the effect of requiring a subcontractor to breach national law would itself be likely to be unlawful in the jurisdiction concerned. In effect, therefore, contracting parties are free to bind each other to whatever courses of action they wish, provided they are otherwise lawful in the jurisdiction within which the contract has legal status.

There is nothing in either the UNIDROIT Principles or the UN Convention on Contracts for the International Sale of Goods (CISG)²⁵ that makes any reference to labour standards or workers' rights. So there appears to be nothing in international contract law to prevent a TNC from observing specified labour standards as a condition in a commercial contract. A contract could not require a supplier of contract labour to break national labour law, but there appears to be nothing to prevent it from requiring it to meet standards that improve on national labour law. The latter possibility cannot be entirely excluded in some countries, however, or in particular circumstances within them, such as special zones where labour law and other regulatory provisions are waived.

The International Labor Rights Fund, a US-based NGO, has pointed out: "In most cases, local labor laws even in developing countries offer adequate protections for workers, conforming with at least minimum international standards on subjects such as working hours, overtime compensation, forced labor and child labor."²⁶ In this context, it is difficult to see how TNC-imposed standards could be in conflict with national law, even if, as is frequently the case, this national law is not properly enforced. However, some of the demands ICEM affiliates might make as to the labour conditions it would want a TNC to impose upon its suppliers would likely exceed the core standards. As the ILRF points out, the major exception to this picture of adequate on-paper labour legislation is the field of freedom of association and trade union rights, and unions have in the past been, or are still, outlawed in a number of export processing zones.

Those issues are explored further in Section 3, where it becomes evident that it is possible that a TNC contract condition on a sub-contractor that required it to honour the same employment terms and union rights as had been negotiated between a union and the TNC itself could be rendered unlawful in certain circumstances by breaking anti-union national law. However, research for this paper could find no evidence that this has ever occurred in practice. Hence there seems to be no reason why a TNC should not make it a contractual condition that a subcontractor conform to certain labour standards, even where these improve significantly on the standards mandated by domestic labour law in the subcontractor's country.

The prevalence of corporate "codes of conduct" and similar efforts at self-regulation in support of labour standards suggests that many TNCs take that view. Moreover, some corporate codes specify that if suppliers consistently fail to live up to the requirements of the code, then any contracts will be terminated. This is explored further in Section 2.

2. CORPORATE CODES OF CONDUCT

2.1 Examples of codes of conduct threatening contract termination

Corporate codes of conduct have been adopted by an estimated 4,000 TNCs,²⁷ and while most refer to the need to observe national law, some explicitly state that compliance with national law is a minimum rather than satisfactory standard.²⁸ A handful also state that a consequence of non-compliance could be cancellation of contract, although it is "not clear whether this sanction has ever been invoked".²⁹

For example, Adidas-Salomon states that: "In very serious cases or in cases of zero tolerance non-compliance, a single letter will be issued advising our suppliers that [Adidas-Salomon] has recommended the business relationship be terminated. Our Sourcing, Business Unit and Legal departments would then follow-up with a formal notification of the end of the business relationship."³⁰

Similarly, Hewlett-Packard warns: "We have the greatest impact on conditions in our supply chain by remaining engaged with suppliers and providing support and tools to raise their capabilities to improve their performance. However, if this approach is rejected by the supplier, HP will not tolerate serious or repeated violations of our Code of Conduct or the General Specifications for the Environment. HP is prepared to discontinue the business relationship."³¹

Likewise, Levi Strauss: "If LS&Co. determines that a contractor is not complying with our TOE [terms of engagement], we require that the contractor implement a corrective action plan within a specified time period. If a contractor fails to meet the corrective action plan commitment, Levi Strauss & Co. will terminate the business relationship."³²

However, the picture could be complicated somewhat by the terms of international trade agreements, as we saw in the previous section. Restrictions on labour law (either in general in some countries or in particular enclaves, such as special zones, in others), or conflict with other areas of law (such as company law requiring company directors to prioritise the interests of their shareholders), could also complicate the picture, and will be explored in Section 3.

2.2 Potential conflict with consumer protection law

A possible further complication that has arisen from a United States case suggests that there could be conflict also with laws governing companies' legal obligations to their customers and to the public in general. This arises precisely from the ability of TNCs to control the behaviour of their suppliers, or to choose not to contract with them. As the United States Council for International Business, in a position paper on codes of conduct, points out: "The codes can be used to strengthen the power of senior central management. This is particularly the case with outsourcing guidelines which

enable central management to dictate the labour practices of sub-contractors and suppliers as part of a monitoring process which leads to better product quality. Contractors, too, may welcome a level playing field in the otherwise cut-throat competition for supply contracts. By complying with code standards they may be assured of long-term contractual relationships and protect themselves from 'free-riders'.³³

The position outlined in that quotation suggests that there is nothing to prevent a TNC from including labour standards within its contract conditions, but a recent case involving Nike reveals the legal complications potentially associated with doing so. Nike was a pioneer in attempting to make its code of conduct's application to contractors more transparent and, in 2005, the company "took a ground-breaking step" by issuing "a corporate responsibility report which for the first time includes a list of its 700+ suppliers around the world. Now anyone can check real working conditions against the list, and call Nike to account."³⁴

However, this in itself appears to have stimulated a claim that, by seeking to enhance its reputation in that way but without adequate means to enforce it, a company could be misrepresenting its products to ethically conscious consumers. Nike claims on its website to "take full responsibility for working conditions wherever its products are produced", and one American consumer, concerned by reports of conditions in some of the company's supplier factories, mounted a legal challenge because of it. In 1998, Mike Kasky sued Nike under California's unfair competition and false advertising laws, alleging that the company's claims were misleading. The case rose through the courts until it reached the California Supreme Court in spring 2002. The result was a 4-3 split decision in favour of Kasky, which Nike then appealed to the US Supreme Court.

According to the NGO Corporate Watch: "The case turned on the distinction between 'political' speech and 'commercial' speech. Under US constitutional law, political speech, or speech on public issues, enjoys special protection and freedoms. Commercial speech, on the other hand, is not subject to the same protection. Unlike political speech it can be regulated by government, making it subject, for example, to truth in advertising laws. The US Supreme Court was asked to decide whether Nike's statements indeed constituted commercial speech, or political speech entitled to First Amendment protection. It was widely expected that the Court would produce a landmark decision which would clarify the free speech rights of corporations.

"In a surprising development, the Supreme Court handed down a one sentence ruling stating that their decision to review the case had been 'improvidently granted'. Basically, the Court changed its mind about hearing the case and side-stepped making a judgement on the free speech issue. The case was then set to go to trial, but in September 2003, Mike Kasky and Nike announced a settlement stipulating that Nike would pay \$1.5 million to the Washington, DC-based Fair Labor Association (FLA) for 'program operations and worker development programs focused on education and economic opportunity'. The case therefore came to a close, without the nature of Nike's claims ever having been established."³⁵

2.3 Potential conflicts with laws governing the "employment relationship"

Despite the inconclusive nature of the case law established in *Kasky v. Nike*, the case was well publicised and might well influence a TNC's interpretation of its legal entitlement to claim to be able to impose labour standards through its contracts. Since some TNCs have so many suppliers in such long supply chains that they do not even know themselves ultimately who produces for them, enforcement is clearly a challenge, especially given the tension between "just-in-time" production methods and social responsibility norms. As one recent commentary for the Irish Congress of Trade Unions has noted:

"With the best Code of Conduct in the world, it is not easy to monitor how well it is implemented all through the supply chain. Tesco has something like a million suppliers, and all their goods travel along complicated supply chains. Moreover, many suppliers sub-contract part of their production contract to other companies, and they in turn perhaps to sweatshops and even homeworkers. All of this is often unbeknown to the major companies. In reality, they rarely know the whole of their supply chain. Yet a worthwhile code should say at least that the principal company will do its best to ensure that its own highest standards also operate in its sub-contractors and suppliers. If a company is really serious, it can write it into its contracts."³⁶

As we have seen, some have done so, as have some industry-wide codes, such as the toy industry's code. In addition, according to an ILO paper: "It is possible in some cases that the terms of a company's code will be sufficiently precise and binding to form part of the individual contract of employment of employees, who in this case could seek performance of the contract or damages in the case of breach in the national courts."³⁷

If we consider this in the context of the discussion in Section 1 about the criteria for determination of the existence of an employment relationship, however, it might be possible that, by writing strict provisions about suppliers' labour standards into contracts, a company could be deemed in some circumstances to be the effective employer of the supplier's workers. This seems highly unlikely unless the terms on which the company was using a supplier's workers met other criteria too, but as we shall see in Section 3, when we look at some national examples of employment relationship criteria, the possibility cannot be entirely excluded

2.4 Potential conflict with national sovereignty

It has been suggested in an ILO article that when a TNC imposes such contract conditions on its suppliers, it "raises the question of whether such initiatives are genuinely 'voluntary'. Indeed, private-sector initiatives are supposed to be voluntary only because they are not directly enforced by law, but some -- particularly representatives of developing country enterprises or

governments -- contend that market pressure effectively renders them compulsory on terms which can be unfair."³⁸

Another commentary has argued that, by doing so, a TNC could be said to be interfering with a country's national sovereignty. "Such intentional use of TNC influence arguably constitutes involvement in a host country's internal affairs regarding the effective implementation of the national government's laws and policies," it argues, adding: "More broadly, TNC actions can also affect the achievement of priorities chosen by national governments where trade-offs may exist between relative improvements in labour conditions and other economic growth objectives. The more TNCs impose detailed labour requirements through supply chain contracts, the more those standards will influence the level and distribution of economic benefits resulting from a country's comparative advantage factors."³⁹

2.5 Codes of conduct and international framework agreements

That argument clearly articulates the tension between the power of TNCs and national governments, but the reality of that power balance is bound to influence union approaches. Hence, GUFs are increasingly seeking to persuade TNCs to add protocols about supply chain management to their IFAs. For example, BWI's IFA with IKEA was amended in 2002 to include the company's code of conduct in this way, and at the same time "IKEA also introduced a worldwide model buyer contract based on its code for all suppliers".⁴⁰

Similar initiatives have been taken at national industry levels. For example, the Korean Federation of Construction Industry Trade Unions collective agreement with many principal construction companies requires that the main contractors would "abide by labour laws and ensure respect for the rights of all workers at construction sites, regardless of their employment status", including union rights.⁴¹

BWI has sought to widen such obligations by urging employers to sign a "model framework agreement" that extends code of conduct provisions to suppliers. Approved by BWI's world council in November 2007, it includes a paragraph stating: "This agreement relates to all (company name) operations. The (company name) will secure compliance with the principles set out in this agreement also with its subsidiaries, contractors, subcontractors, suppliers and joint ventures."⁴²

According to Bob Hepple, while most IFAs remain "silent on whether they cover suppliers and licensees of the TNC", the most extensive agreement in this respect to date is that between Triumph International, its European Works Council and the ITGLWF. This requires sub-contractors, suppliers and licensees to provide Triumph with information, allow their work places and activities to be checked at any time, and record details of all employees. The agreement states that non-compliance allows Triumph to "stop the actual production, annul existing orders, suspend future orders or terminate the business relationship", although it does not say Triumph *has* to do these

things.⁴³

This approach could become a model for GUFs, as a further recent commentary has suggested: "Arguably, one of the most important innovations of IFAs is that they allow trade unions a grip on the global supply chain, thereby extending (core) labour rights beyond national borders. ... Monitoring stretches from integration of the agreement into the internal corporate audit (Leoni and DaimlerChrysler) to being included in the work of a separate compliance organisation (IKEA). MNCs at the end of buyer-driven commodity chains find advantages in making the framework agreement part of the contractual obligations of suppliers and subcontractors, together with a host of other obligations."⁴⁴

Again, therefore, those developments suggest that, the potential legal complications arising from national commercial and consumer protection laws notwithstanding, there is nothing in principle to prevent a TNC from including labour standards provisions within its contract conditions with suppliers.

2.6 Contract conditions in multi-stakeholder initiatives

Many "multi-stakeholder initiatives" (MSIs) have developed in recent years in a bid to extend the principles and practices expressed in corporate codes of conduct throughout and across industries, and to improve compliance by developing and sharing best practice. Some of these MSIs now have their own codes and monitoring systems, and there are now so many of them that they have linked through a Joint Initiative on Corporate Accountability and Workers' Rights (Jo-in).⁴⁵

The MSIs include the Ethical Trading Initiative (ETI), based in the United Kingdom and established in 1998 with British government support, which has a "base code" that, among other things, suggests that "to every extent possible work performed must be on the basis of recognised employment relationship established through national law and practice. and monitoring systems".⁴⁶ Companies that sign up to the ETI base code are required to make it work throughout their supply chains, and ETI estimates that some 22,000 suppliers are reached in this way. ETI companies are required to report annually, and when one company, Levi Strauss, was held to be failing in its obligations, it was suspended from membership, which is the ultimate sanction provided by the initiative.

A similar initiative developed at around the same time in the USA was the Fair Labor Association (FLA), which requires that any company that adopts its Workplace Code of Conduct "shall require its licensees and contractors and, in the case of a retailer, its suppliers to comply with applicable local laws and with this Code in accordance with the Principles of Monitoring and to apply the higher standard in cases of differences or conflicts."⁴⁷ Moreover, although the FLA code, like other MSIs, is based on ILO conventions and explicitly refers to a requirement to comply with national laws and practices, it also requires compliance with standards that exceed national law where legal standards are held to be too low. For example, the FLA code states:

"Except in extraordinary business circumstances, employees shall (i) not be required to work more than the lesser of (a) 48 hours per week and 12 hours overtime or (b) the limits on regular and overtime hours allowed by the law of the country of manufacture or, where the laws of such country do not limit the hours of work, the regular work week in such country plus 12 hours overtime; and (ii) be entitled to at least one day off in every seven day period." And: "In addition to their compensation for regular hours of work, employees shall be compensated for overtime hours at such premium rate as is legally required in the country of manufacture or, in those countries where such laws do not exist, at a rate at least equal to their regular hourly compensation rate."

As with the ETI, TNCs signing up to the FLA code are supposed to apply it to their contractors, which strongly implies that there is no legal impediment to TNCs applying contractual conditions on their suppliers. This view is reinforced by the Global Reporting Initiative, which advocates more transparency in supply chain monitoring, and that TNCs should work in a more participatory way with their suppliers to ensure compliance with code of conduct standards. It also notes that "many MNEs [multinational enterprises] bind the supplier to sustainability measures, thus making violation possible grounds or terminating the commercial relationship".⁴⁸

This is further reinforced by Social Accountility International (SAI), which was established in 1997 specifically to guide TNCs about how to ensure compliance along the whole supply chain, using a system called SA8000.⁴⁹ There is much criticism of the way in which SA8000 works, particularly on the grounds that it relieves TNCs of responsibility to control their contractors, and there is growing scepticism in general about the way in which all the MSI codes are monitored and enforced. Nevertheless, their existence undermines any claim that a TNC cannot enforce labour standards of its choosing through contract compliance.

Perhaps the clearest evidence for this, however, comes through Business for Social Responsibility⁵⁰, also based in the USA, which is developing a programme called *Beyond Monitoring: A New Vision for Sustainable Supply Chains*, which has four "pillars":

"(1) *Buyer Internal Alignment* of purchasing practices with social and environmental objectives. It is widely agreed that greater collaboration between functions overseeing social compliance and purchasing are an essential way to overcome current barriers.

"(2) *Supplier Ownership* of good working and environmental conditions in their workplaces. This is most likely to be achieved through a basic bargain: Suppliers assume greater responsibility for managing their workforces consistent with global expectations, and Buyers provide greater security of ongoing business relationships.

"(3) *Empowerment of Workers* who take a stronger role in asserting and protecting their own rights. This will develop through an increasingly informed and participatory workplace, with access to secure communications channels, effective means of raising and resolving disputes, and opportunities for skills development.

"(4) *Public Policy Frameworks* that ensure wider and more even application of relevant laws. In many contexts, enforcement of labor laws has de facto been left to private actors. Emerging models of public-private partnerships, and an increased appreciation by global business of the importance of effective public governance as a pre-condition for economic growth, offer interesting new pathways to progress."⁵¹

The fact that the business-backed BSR promotes codes of conduct and compliance procedures of this kind should be significant evidence that there is little legal risk in doing so (although this may depend on their content and the extent to which they may conflict with international trade agreements and national laws). Indeed, the BSR's approach may even have the effect in itself of mitigating legal risk. So might the fact that the BSR promotes the business case for social responsibility, which could undermine a claim that enforcing codes of conduct is in conflict with the primary responsibility of company directors to their shareholders' interests. (See Section 3). In outlining the business case, BSR cites in particular the obligations of company leaders to:

- "*Protect brand reputation*: The reputation of a company and its brands is a valuable asset that requires protection. More now than ever, consumers are examining and judging whether corporate practices are ethical. This includes practices of suppliers, whether wholly owned or independent, that are part of the value chain that provides profit to the brand. ... Codes of conduct are typically based upon compliance with local law and are also associated with international norms such as the International Labor Organization (ILO) covenants. When they are applied consistently and universally codes may help protect brand reputation by aligning business partner behavior with accepted norms.
- "*Increase reliability, trust, quality, and productivity*: Experienced brands suggest that their best business partners have reliable delivery times and dependable quality and manage code compliance well. The management and communication systems that enhance productivity and quality also enhance workplace conditions and give factory management the information they need to build a successful business. It is increasingly common to hear that code of conduct programs have helped businesses simultaneously improve areas such as quality and efficiency and build greater trust with the buyer as a result.
- "*Strengthen legal compliance and reduce future risk and liability*: Codes are designed for universal implementation. In locations of lax legal enforcement, this is challenging, but still useful for identifying desirable, committed, and forward-thinking business partners. Good labor standards may reduce the risk of future liability, in case laws are enforced or governments launch campaigns targeting industry. Workers themselves may seek redress for legal violations, as in the case of workers in the Northern Mariana islands who formed a class action lawsuit against several US-based brands and retailers.

- *"Reduce negative publicity, increase ability to respond to crisis:* Implementing a code of conduct may prepare a company to respond to an unexpected crisis. Codes may provide staff with guidelines on making appropriate decisions thereby avoiding risk and communicating values to business partners. Developing a code can provide a company with an awareness of issues that may arise and provides staff with relevant experiences to help guide its actions if something unexpected does occur. Most importantly, should negative publicity occur, having a code and relevant experience with the issues allows a company to refrain from taking a defensive posture, or offering an unsatisfactory reaction; instead, the company may respond in a principled, flexible, and proactive manner to address the core issues."⁵²

Further evidence that TNCs are entitled to enforce labour standards through contractual conditions, and to shift production elsewhere if necessary, comes from the UN's Global Compact, in which ICEM is an active participant. In 2003, the Global Compact conducted policy dialogue on "supply chain management and partnerships", at which was agreed that participants would, among other things, "develop incentives and rewards for good practices, including long-term commitments to responsible suppliers and performance standards for sourcing and procurement managers" and "implement policies for first-tier suppliers and put responsibility for sub-contractors on them as a first step so implementation is not overwhelming for those just beginning".⁵³

In December 2007, the Global Compact held a forum with the World Petroleum Council Forum in Delhi, India, on "Responsible Business Practices in the Oil & Gas sector: Implementing the Global Compact Principles", about which a report is due to be published in 2008.

3. THE LEGAL FRAMEWORK AT NATIONAL LEVEL

3.1 Labour law at national level

We have seen in the earlier discussion of international law that, in considering the framework within which TNCs contract with their suppliers, a range of potentially conflicting areas of law, ranging from "hard" to "soft" law, needs to be taken into account. The same is true at national level, where hard to soft law spectrum runs from legislation, through judge-made case law, collective agreements and formal and informal rules, to custom and practice. The picture at national level is complicated not only by potential tensions between labour law and commercial law parallel to those discussed at international level, but also by potential conflicts between the national legal framework of different countries and between them and international law.

The complexities arising from internationalisation of production and "just-in-time" delivery systems give rise to both opportunities and threats for trades unions, as British labour law expert Bob Hepple has pointed out: "On the one hand, these global commodity chains enable TNCs to dominate international markets. On the other hand, these very links provide new opportunities for solidarity between workers in different countries, and between workers and consumers. This provides a social basis for new forms of labour regulation. The legal sources for such regulation are to be found in the mechanisms for interpreting and enforcing contracts between enterprises in different countries."⁵⁴

Hepple adds: "Even if the central management of a TNC lays down employment rules or codes of conduct, these have to be interpreted and enforced under the multiple national systems in which the TNC or its contractual suppliers operate. Thus, if a TNC decides to observe multinational codes of conduct, it will have to find managerial means of ensuring compliance with these labour standards within the affiliates of the TNC, and contractual means in relation to its suppliers. However, in both cases, it has no means of influencing entirely independent enterprises in the same country."⁵⁵

Complicated though the task of enforcement of company codes of conduct undoubtedly is within that context, Hepple's point is certainly encouraging in terms of confirming the entitlement of a TNC to use "contractual means in relation to its suppliers" to require them to comply. It must be at least theoretically possible, however, that a TNC might be concerned that, the more it can be said to exercise control over a supplier's workforce via contract conditions, the more it could be claimed that that workforce has, in effect, an employment relationship with the TNC itself.

ILO Recommendation 198 outlines a range of criteria that could determine whether or not an employment relationship between a company and a worker exists in fact, regardless of the contractual terms between them, and the ILO's guidance note published as part of its discussions on the recommendation details the variation in the weight attached to these criteria in various

countries' labour laws. The ILO states that the "most important criteria" tend to be those concerned with the extent of control, subordination and dependence of the worker, and the allocation of financial risk and opportunity.⁵⁶

In Canada, for example a category called "dependent worker" has been included in labour relations legislation to ensure protection for workers who are economically dependent on a particular employer with which he or she has a contract but not, formally, an employment relationship. A provincial example is that the Ontario Labour Relations Act specifically defines a dependent contractor as: "A person, whether or not employed under a contract of employment and whether or not furnishing tools, vehicles, equipment, machinery, material, or any other thing owned by the dependent contractor, who performs work or services for another person for compensation or reward on such terms and conditions that the dependent contractor is in a position of economic dependence upon, and under an obligation to perform duties for, that person more closely resembling the relationship of an employee than that of an independent contractor."⁵⁷ In other words, as with the ILO recommendation, the facts of the situation take precedence over the intentions of the employer.

South Africa's Code of Good Practice provides similar protection, stating: "An employee is subjected to the employer's right of control and supervision while an independent contractor is notionally on a footing of equality with the employer and is bound to produce in terms of the contract. The right of control by the employer includes the right to determine what work the employee will do and how the employee will perform that work. It can be seen in an employer's right to instruct or direct an employee to do certain things and then to supervise how those things are done. The employer's right of control is likely to remain, in most cases, a very significant indicator of an employment relationship. The right of control may be present even where it is not exercised. The fact that an employer does not exercise the right to control and allows an employee to work largely or entirely unsupervised, does not alter the nature of the relationship."⁵⁸

Argentina's Labour Code states: "An individual contract of employment shall mean, whatever name it is given, the written or verbal contract under which a person is obliged to render services or do work for another person, being subordinate to or dependent on that person. Employment relationship means, no matter what its origin is, a person doing work in conditions of legal subordination and economic dependence." Anticipating the role of agencies, it also states: "For determining the existence of an employment relationship, or the parties to it, no account shall be taken of any similar measures or contracts, nor of the participation of intermediary persons like supposed employers, nor the fabricated creation and operation of a legal person as a supposed employer."⁵⁹

In other jurisdictions, some specific obligations are imposed on the user enterprise. For example, in Uruguay, law No.18.099 stipulates that end users and subcontractors/intermediaries are jointly liable for the workers' protection and the payment of their social security contribution.⁶⁰ In Chile, section 8 of the Labour Code automatically presumes a contract of employment when an

employee works under the subordination and dependence of another person and enjoys a fixed remuneration.⁶¹

In addition, as was reported to ICEM's CAL conference for Latin America and Caribbean affiliates, held in Salvador, Brazil, in June 2007, Chile's new National Law no. 20,123, while permitting any work activity to be outsourced, also regulates the distribution of obligations when it is outsourced and stipulates circumstances in which temporary workers may not be employed. They can be taken on, for example, to cover for holidays, up to 90 days, and for new projects, up to six months, but they cannot be taken on to break a strike. In addition, the user enterprise is obliged to make financial provision for the labour obligations of the contractor firm, by holding back sums to cover wage debts to the workers. If the contractor doesn't pay them, the user enterprise is liable for doing so, and the worker automatically becomes an employee of the user company if its contractor fails to fulfil its obligations to her or him.

In the Philippines, according to research conducted for the International Transport Workers Federation (ITF), a worker cannot be a contractual employee for a period of more than six months, and even as a contractual employee enjoys some of the same benefits as permanent employees. A common practice (especially in the retail and hospitality sectors), however, is for employers to replace contractual employees after the six-month period with new hires, and in practice contractual employees often do not receive the benefits to which they are legally entitled.⁶²

Case law is also building up an increasingly rich picture of these employment relationship issues in some countries. In Britain, for example, a Court of Appeal hearing of the case *Hawley v. Luminar Leisure Ltd. & Others* in 2006 appears to have set a landmark. The case concerned a member of the public, Mr Hawley, who was seriously injured when punched in the face by a doorman employed by a security services firm to work at one of the defendant company's clubs. The Court of Appeal held that Luminar was vicariously liable for the conduct of the doormen at its clubs since they had become their "temporary deemed employer". The facts showed that the club exercised detailed control not only over what the doormen did, but also how they were to do it, and -- as with the legislation discussed in respect of other countries earlier in this section -- the level of control and subordination was the crucial point rather than the contractual terms of the doormen's employment.⁶³

In France, the Supreme Court examined the case (Cour de Cassation Ruling No. 5371 of 19 December 2000) of a person who drove a taxi under a monthly contract which was automatically renewable, called a "contract for the lease of a vehicle equipped as a taxi", and who had to pay a sum to the taxi company described in the contract as "rent". The Court held that this contract concealed a contract of employment, since the taxi driver was bound by numerous strict obligations concerning the use and maintenance of the vehicle and was in a situation of subordination. In addition, in Rulings Nos. 5034, 35 and 36, of 4 December 2001, the Supreme Court examined the case of workers engaged in the delivery and collection of parcels under a franchise agreement. It determined that the provisions of the Labour Code were applicable to workers

operating at an enterprise, under conditions and at prices imposed by that enterprise, without the need to establish a subordinate relationship.⁶⁴

In the USA, however, the Supreme Court reached the opposite conclusion in 2003 when it held that drivers who own their trucks and had consignment contracts with one company were not employees covered by labour laws, despite the content of their work, personnel regulations and subordination to user companies. But that interpretation appears to be coming under challenge at state level. In August of this year, the California Court of Appeal denied the appeal of FedEx against the trial court's decision in *Estrada vs. FedEx Ground Package System, Inc.*. The court found that FedEx Ground drivers are employees and not independent contractors. The grounds cited by the court included that the work performed by the drivers was wholly integrated into FedEx's operation, and that they received some of the benefits to which regular employees were entitled.

3.2 Commercial and trade law at national level

The tensions at international level between trade and labour laws is also finding expression at national level, and it is doing so in India in an alarming way, with the government there claiming that even publishing material about labour standards is a "technical barrier to trade". This has arisen from a case involving the country's Garment and Textile Workers' Union, and its allies in international non-governmental organisations (INGOs), and two companies called Fibres and Fabrics International (FFI) and Jeans Knits (JKPL). The companies demanded the prohibition of information sharing between unions and the INGOs. This was upheld by an "interim order" issued by a Bangalore court in July 2006 in favour of FFI. The court decided that its order applied to "the defendants and their men or anyone through them" and declared them to be "hereby restrained from passing on any information, data or articles touching the matter relating to the plaintiff company to any organization or persons or entity outside India in any form of communication or through any media or electronic media including Internet."⁶⁵

Clearly, such a prohibition could apply also to GUF representatives, and ICEM might, therefore, wish to follow progress with this case, which has recently been debated in the European Parliament. Richard Howitt, a member of the European Socialists group in the parliament, is reported to have said: "As Parliament's rapporteur on this issue, I am deeply concerned that in Bangalore this week Indian courts will seek to execute an international arrest warrant against seven Dutch activists from the Clean Clothes Campaign because they posted a report on labour violations at the Indian supplier of the fashion label G-Star, including forced overtime and physical and verbal abuse, on the internet. This is in contradiction of the Indian Government's responsibilities under Article 19 of the International Covenant on Civil and Political Rights. I ask the Council and Commission to investigate this case, and I appeal for all EU governments not to cooperate with this arrest warrant on a fundamental issue both of labour rights and of freedom of speech."⁶⁶

Howitt's statement is reported to have drawn the following response from EU Commissioner for External Affairs, Benita Ferrero-Waldner: "We are aware of the legal action that has been taken by Fibres and Fabrics International against the Clean Clothes Campaign. This issue is particularly important to those of the Commission's directorates-general that are concerned with fair labour practices. We have asked the Commission delegation in Delhi to keep us apprised of the situation that is proceeding in the Indian courts, and we have to look into the detention that has been mentioned."⁶⁷

Another potential area of conflict between laws concerns the obligations of company directors to their shareholders. In Britain until recently, for example, the primacy of directors' obligations to shareholders might have caused them to be liable for failure to obtain the cheapest deal from competing suppliers, which could potentially have limited their entitlement to impose conditions that could impose an unnecessary cost on their company. However, in 2006, Britain's company law was changed to redefine the obligations of company directors as being "to promote the success of the company", including in the following ways:

"(1) A director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard (amongst other matters) to:

- (a) the likely consequences of any decision in the long term,
- (b) the interests of the company's employees,
- (c) the need to foster the company's business relationships with suppliers, customers and others,
- (d) the impact of the company's operations on the community and the environment,
- (e) the desirability of the company maintaining a reputation for high standards of business conduct, and
- (f) the need to act fairly as between members of the company.

"(2) Where or to the extent that the purposes of the company consist of or include purposes other than the benefit of its members, subsection (1) has effect as if the reference to promoting the success of the company for the benefit of its members were to achieving those purposes.

"(3) The duty imposed by this section has effect subject to any enactment or rule of law requiring directors, in certain circumstances, to consider or act in the interests of creditors of the company."⁶⁸

There may be other ways in which the tensions between labour law and commercial law could have implications for the legality of labour standards conditions included in contracts between a TNC and a supplier. For example, the Korean government has recently passed legislation allowing independent workers to form business associations but not unions.⁶⁹ This appears to be in conflict with the core labour standard of freedom of association, and could therefore be a matter for ILO jurisprudence. As it stands, however, it could

lead to restraint of trade issues if a TNC negotiated with such an association on terms not available to other business associations.

Several other countries waive some or even all labour laws in special zones, such as free trade zones, and some examples follow in the next sub-section.

3.3 Labour law in free trade zones

There is a range of different definitions of special zones -- free trade zones (FTZ), export processing zones (EPZ), special economic zones (SEZ) and so on -- available in the literature, but to some extent most of these are too narrow and do not cover all different types. The term FTZ is frequently used interchangeably with EPZ, which the ILO has defined as "industrial zones with special incentives set up to attract foreign investors, in which imported materials undergo some degree of processing before being re-exported."⁷⁰

That definition is too narrow to cover the operations of all FTZs, however. Some FTZs in some countries, for example Singapore, are logistics parks rather than manufacturing locations. Others are locations for offshore service provision, such as the Shannon Free Zone in Ireland. A broad definition is therefore needed to cover the wide variety of different types. The United Nations Economic and Social Commission for Asia in collaboration with the Korea Maritime Institute has defined the FTZ concept as "a business estate that offers investors: an offshore location; above average business infrastructure; flexible business regulations; attractive tax incentives and lower investment and operating cost."⁷¹ We will not dwell on the definitional differences here, and will use various terms depending on contextual usage.

FTZs are expanding rapidly. In 2003 the ICFTU reported that there were upwards of 43 million people working in 3,000 zones globally, and asserted that such zones have become symbols of globalisation. "They illustrate perfectly how crude free market liberalisation, without respect for social and environmental standards, is resulting in profits for a few, while millions...face debilitating conditions and exploitation."⁷² The ILO estimates that there are approximately 66 million people working in export processing zones throughout the world. Of these, 40 million are in China, 15 million are in Asia excluding China, five million are in Central America, and almost 1.5 million are in Africa. In addition to the 15 million mentioned in Asia, there are 3 million working throughout Bangladesh for firms with EPZ-like conditions without being in a zone. The Indian government is setting up "hundreds of SEZs throughout the country."⁷³

According to the International Trade Union Confederation (ITUC), governments seek to attract foreign direct investment (FDI) to EPZs "by offering them the least restrictive regulatory framework in terms of social and employment rights...Hence, restrictions on trade union freedoms, the right to strike, bans on collective bargaining, abusive salaries and working hours, poor working conditions (even affecting health and safety regulations) constitute the rule rather than the exception in EPZs."⁷⁴

That verdict is borne out by a recent ILO study, which found that some governments use a general ban on industrial action in "essential services" to restrict labour rights far beyond what is normally understood as an essential service (such as the police service): "In EPZs in Bangladesh, India and Pakistan, the application of domestic labour laws and international labour standards have been restricted. Part of the production in the EPZs is considered as essential public services. Local governments in India are given autonomy to review the list of essential public services and utilities every six months to ban labour action. The Government of West Bengal included the information technology (IT) sector as an essential service and the Government of Karnataka also put the automobile industry under the list of essential public utilities for the same reason. Union activists cannot enter EPZs without permission from authorities in many South Asian countries."⁷⁵

In Pakistan, according to the same source, workplaces covered by a special industrial zone scheme are exempt from government labour inspection for a five year period, particularly in the Sindh and Punjab provinces. A self-certification scheme is also being introduced in India, while: "Trade union activities legitimately recognized by law are restricted not only by unfair labour practices happening at workplaces but by the use of the judicial system in India and by the State Ordinance in Sri Lanka."⁷⁶

For example: "When workers of the Sri Lanka Ports Authority (SLPA) went on a strike in July 2006 after the management refused to negotiate with trade unions on a pay increment, the employers used the judicial system to restrict trade union rights. The Joint Apparel Association Forum (JAAF), which uses the SLPA ports for import and export of raw material and finished apparel, appealed to the Supreme Court that the strike led by 14 port unions violated the employers' right to lawful employment and equal treatment before the law and also affected their normal business activities. The Supreme Court ruled that industrial action should be called off and the police and armed forces deployed to oversee this." p. 10

Also in Sri Lanka, the Public Security Ordinance (amended August 2006) "lists the garments export industry as an essential service and bans strikes or industrial action in that sector."⁷⁷

According to the ILO⁷⁸, there are a few countries that openly and officially exclude zones from the national labour legislation and system of labour-management relations. It lists those countries as Bangladesh, Sri Lanka, the Dominican Republic and Zimbabwe, while Mauritius, Kenya, Malaysia, Philippines and Namibia apply partial exemptions in special zones.

In Bangladesh, Section 11A of the Bangladesh Export Processing Zones Authority Act (BEPZA) provides that: "The Government may, by notification in the *Official Gazette*, exempt a zone from the operation of all or any of the provisions of all or any of the following enactments, or direct that any such enactment or any provision thereof shall, in its application to a zone, be subject to such modifications or amendments as may be specified therein, namely: the Employment of Labour Act 1965, the Industrial Relations Ordinance 1969, the Boilers Act 1923, the Factories Act 1965."

The EPZs are also excluded from the scope of the Industrial Relations Ordinance (1969), which provides for organizing and bargaining rights in other sectors, and the *Guide to investment in Bangladesh* published by the Board of Investment states that the law forbids the formation of any labour union in EPZs. "These measures are sometimes defended as interim provisions that could be lifted at an appropriate time when sufficient investment has been attracted and the trade union movement and foreign investors are ready to begin a sound bargaining relationship. The ILO Committee of Experts on the Application of Standards and Recommendations and the ILO Governing Body Committee on Freedom of Association have both found this provision to be incompatible with the terms of Convention No. 87, which recognizes the right of workers to form and join organizations of their own choosing."

The ILO paper adds: "The fact that EPZs in Bangladesh have been excluded from the scope of labour laws does not mean that there are no labour regulations in force in zones. The BEPZA issues instructions to investors which specify standards relating to the classification of employees, minimum wages, leave and holiday periods, termination of employment, welfare facilities such as clinics and canteens, contributions to the provident fund and zone medical centre and grievance procedures. One such Instruction states that the relevant laws of the country apply in cases of compensation for injury sustained while on duty."

Panama is the only country in Central America to have adopted special labour legislation for the EPZs, replacing the Labour Code, according to the same ILO paper, which states: "Chapter VII of Act No. 25 of November 1992 provides inter alia for flexibility of contracts and functions in zone enterprises and permits retrenchment for economic reasons. An Executive Legislative Decree to facilitate the establishment of enterprises in EPZs was promulgated in 1996. This tried to limit the influence of trade unions in its EPZs by stipulating inter alia that zone enterprises were not obliged to negotiate or sign collective agreements during their first five years of operation and limiting the right to strike by providing for lengthy administrative, conciliation and arbitration processes before workers may declare a strike. The opposition to this Decree was pronounced and the Government has been forced to amend it a number of times to restore the recognition of trade union freedoms. However, the controversy has not been fully resolved and freedom of association is not well established in zones in Panama. There is only one trade union and one collective agreement in existence in the zones. Act No. 3 of January 1997 also established certain minima for zone workers, including a minimum wage, a weekly rest-day and the payment of overtime."

In Zimbabwe, according to the ILO paper: "Section 56 of the Zimbabwe Export Processing Zones Act (1994) states that the Labour Relations Act (1985) shall not apply to the zones. This has the effect of denying zone workers the right to freedom of association and collective bargaining and removes protections against discrimination and unfair labour practices. The EPZs also fall outside the jurisdiction of the Ministry of Labour, Manpower Planning and Social Welfare, the Labour Relations Board and the Labour Relations Tribunal. These provisions drew a lot of criticism from the labour movement and there

was an in-principle agreement with the Government that they should be amended."

The ILO paper goes on to show that, while some countries have not excluded their zones from national labour legislation, they have modified them to a certain extent: "In Namibia, for example, section 8 of the 1995 Export Processing Zones Act stated that the Labour Act of 1992 would not apply in the zones but that the Minister of Trade and Industry, in consultation with the Minister of Labour and Human Resources Development, could regulate issues such as minimum standards of employment, termination, health, safety and welfare." Although freedom of association and collective bargaining would be allowed, "strikes and lockouts would be prohibited for a period of five years". The ILO's Committee of Experts on the Application of Conventions and Recommendations has requested that the Government take appropriate steps to further amend the Export Processing Zones Act to ensure that workers in export processing zones, like other workers in the country, are not denied the right to strike.

In Malaysia, the Employment Act, 1955, is the principal law regulating terms and conditions of employment, including those offered by foreign firms, while the Industrial Relations Act, 1967, provides for the regulation of labour-management relations and the prevention and settlement of disputes. "In terms of the Act the scope of representation of trade unions and collective bargaining may be limited and trade unions may not negotiate on matters relating to promotion, transfer, recruitment, retrenchment, dismissal, reinstatement and allocation of duties. Strikes on any of these matters are prohibited. Malaysia also pursues a policy of imposing a five-year moratorium on collective bargaining in 'pioneer industries', which are enterprises in the manufacturing, agricultural, hotel, tourist or other industrial or commercial sectors which undertake promoted activities or produce promoted goods. An additional restriction is that, although trade unions may be formed in the electronics industry, they may not affiliate to national unions."

Even where such formal restrictions on workers' rights are not legally defined for special zones, failure to actually apply labour law and exclusion of the zones from other types of regulation have similar effects. The ITUC has catalogued resulting abuses in many countries.⁷⁹ The working day is often 12-16 hours, and overtime is not optional. In some countries, such as the Philippines, toilet breaks are limited, leading to health problems for workers. Lack of enforcement of national health and safety regulations puts workers in danger; for example, practices of locking workers in, allegedly to prevent theft, has been known to lead to deaths in fires. In addition, jobs are insecure, and workers face a constant threat of dismissal; for example, in Vietnam, 90% of the FTZ workforce are on temporary contracts. In Egypt, workers have to sign resignation letters before they are given a job, meaning they can be instantly dismissed, and the police force is used against workers to stop them from unionising. In other cases, companies shut down and re-open under a different name in order to get rid of a union.

An important issue for women workers in FTZs is that of maternity rights. In some FTZs women are systematically forced to have pregnancy tests as a

condition of gaining employment (for example workers in the CIT International factory in Guatemala.)⁸⁰ In the Dominican Republic, if they are pregnant, they do not get work. In addition, women who become pregnant do not get maternity leave. Instead they are either forced to leave or forced to continue working long days, sometimes standing up for as long as 16 hours.⁸¹ Miscarriages and stillbirths are, unsurprisingly, very common. Emily Mugo, a worker in a Kenyan EPZ factory, reported that a colleague of hers was forced to resign after the company refused to let her sit down for her 13 hour work days despite a warning from a doctor that standing up all day was likely to make her miscarry.⁸²

In short, in many special zones there are exemptions from labour laws and other regulatory instruments affecting workers and labour relations, and these obviously affect the legal framework within which TNCs contract with suppliers operating in such environments. In those cases, an already complex relationship between various bodies of "hard" and "soft" international and national laws is further complicated, and this may give rise to claims by TNCs that there are legal obstacles to their inclusion of labour standards in their contracts with contract and agency labour providers.

However, there is no law that obliges a TNC to continue to contract with any company or in any jurisdiction that is unable to meet any labour standards it might wish to impose. Therefore, any such claim by a TNC is a product of its limited will rather than real legal obstacles, except insofar as any contract might have to run its course before additional conditions are added.

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- ² For the full declaration and its place in the ILO constitution, go to <http://www.ilo.org/public/english/bureau/inf/download/brochure/pdf/page5.pdf>
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- ⁵ A full list of conventions and recommendations as well as information about how labour standards are agreed and monitored is available at <http://www.ilo.org/public/english/standards/norm/index.htm>
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- ¹⁰ The annotated guide to ILO Recommendation 198 is available online at <http://www.ilo.org/public/english/dialogue/ifpdial/downloads/guide-rec198.pdf>
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