

# Transnational Labor Law as a Spiderweb: Is There a Spider? Is There a Web?

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## I. Introduction

In 2005, Sir Bob Hepple published one of the first books describing contemporary transnational labor law/governance (TLG).<sup>1</sup> The book pointed out several characteristics of this contemporary field.<sup>2</sup> First, it signified the transition from international to transnational; that is, a body of law that is no longer confined to the relations between nations. TLG designates both interactions between nation states and interactions that may bracket the nation state altogether, or include it among multiple agents. Second, TLG need not be global, as it can cover regions, and may also refer to developments within states that are influenced by norms and agents situated elsewhere. Finally, the book notes the multiplicity of agents, institutions, and legal forms that govern states and markets.

Hepple describes this transition with a metaphor, likening TLG to a spiderweb. Metaphors in academic writing are not uncommon, and have various objectives. They can help circumvent complex academic jargon or abstain from precision, leaving room for personal interpretations, or conversely, create a platform for further clarification and detail. I believe that the spiderweb metaphor, other than being quaint and accessible to readers, belongs to the latter category. It is a simple illustration of a web, but with further contemplation it produces distinct categories and ideational references. As noted by a scholar of spider webs:

I focus on behavior and evolution [of spider webs] partly because [they] have the potential to make especially important contributions to resolving central questions in behavior and evolution.<sup>3</sup>

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1. BOB HEPPLE, *LABOUR LAWS AND GLOBAL TRADE* (2005).

2. For the use of transnational over international or global labor law, see: Adelle Blackett & Anne Trebilcock, *Conceptualizing Transnational Labour*, in *RESEARCH HANDBOOK ON TRANSNATIONAL LABOUR LAW* 3-31 (Adelle Blackett & Anne Trebilcock eds., 2015). Similar attempts to map transnational labor governance include: Kevin Kolben, *Transnational Labor Regulation and the Limits of Governance*, 12 *THEORETICAL INQUIRIES IN L.* 403 (2011); Beryl ter Haar, *Community, Authority, Power: Three Times Epistemic, but What Fits the International Labour Organisation?*, 13 *Ежегодник Трудового Права* 296 (2023).

3. WILLIAM EBERHARD, *SPIDER WEBS: BEHAVIOR, FUNCTION, AND EVOLUTION* (2020).

Webs appear in diverse scientific fields, such as computing and engineering, but spiderwebs are more familiar to most readers as they are easier to visualize and consider. Even the most basic information about spider webs is highly illustrative:<sup>4</sup> First, there is a spider—an agent that weaves and controls the web. Second, the web is composed of interlocking threads, all of which are fragile, but together they can carry incredible weight (relative to the weight of the web itself). Third, there is much air in the web, and therefore much can fall through the cracks. Are those who get caught in the web a matter of random selection, or the victims of a systematic capture? This question alludes to the search for a systematic effect of the TLG-web, as demonstrated by an activist using another metaphor: “Imagine your hands going through some sand,” he said. “What you deal with is what sticks to your fingers. Most sand doesn’t stick to your fingers. But sometimes you get lucky.”<sup>5</sup>

Bearing in mind these three characteristics, the following review seeks to identify which of these three characteristics applies to the ever-growing TLG-web. The research questions therefore ask:

1. Is there a “spider” in the web? If ever there was a spider, it must have been the International Labor Organization (ILO), but is this image still applicable? Is there a unitary logic driving the development of TLG, resonating with the image of a single central agent who is actively weaving a meticulous web?
2. Are the various components of TLG networked as a “web?” Is this web carrying more than its parts, or perhaps, are the governance gaps so big that much falls in between?
3. To what extent is the metaphor helpful in identifying the vices and virtues of a web-like structure of TLG?

In response to these questions, this article follows the metaphor and surveys the components of the TLG-web. The following section describes the transition from what was an “ideal model” for global regulation of the labor market to a “non-ideal” TLG system. Digging further into the spiderweb metaphor, the TLG is assessed according to various types of webs: orb-webs, funnel-webs, and sheet-cover webs. The subsequent sections describe the TLG along three axes—the norms, the agents and the processes. I conclude by bringing these findings together. Rather than pronouncing a clear verdict on the TLG-web, I note the possible virtues and shortcomings of the transnational web structure of governance. Although its development is marked by innovative efforts to advance the objectives of labor law to cover a complex transnational labor market, it also allows loopholes and escape routes from lifting labor standards. I also ask to what extent is the assessment of a non-ideal web model, distinct from the ideal model of global regulation, a worthy project, because non-ideal models develop along the lines of uncoordinated institutional entrepreneurship and power relations, precisely where careful normative planning failed.

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4. *Id.* at 3.

5. Megha Rajagopalan and Qadri Inzaman, *The Brutality of Sugar: Debt, Child Marriage, and Hysterectomies*, N.Y. TIMES (Mar. 24, 2024), <https://www.nytimes.com/2024/03/24/world/asia/india-sugar-cane-fields-child-labor-hysterectomies.html> [<https://perma.cc/L8GY-VYVH>].

Nevertheless, I conclude by highlighting the importance of realistically realizing what the web structure can offer and where expectations may fail.

## II. The Move Away from the Ideal Model—ILO as a Single Hierarchical Agent (SHA)

If there is a weaver of the global web, akin to Hepple's metaphorical web, it is likely the International Labour Organization (ILO). In 1919, the ILO was founded with an eye of advancing coordination at the global level as a means for fostering global peace.<sup>6</sup> It was an innovative model of international regulation that addressed several axes of power imbalance. Parts of the model remain unique to this day. The regulatory system was established with attention to several characteristics. It was intended to be a single hierarchical agent (SHA), deriving its legitimacy from the subjects (the nation states), and therefore conforming to the Westphalian system, rather than contesting it. The SHA was to devise an international code of law, similar to that of domestic labor codes, for the purpose of establishing a global floor of rights. Rather than authoring one comprehensive labor code, regulation was to be based on a dynamic writing of Conventions and Recommendations. State delegations take part in authoring the norms, member states are then expected to ratify them and are then entrusted with the responsibility to enforce them domestically. The model is granted legitimacy by the states and is dependent on their commitment to the ILO standards. The innovative part that distinguishes the ILO from other international institutions is the tripartite (State-Labor-Employers) composition of the ILO governance structure.<sup>7</sup> While ILO members are the states, state delegations include the equal representation of labor and employers. Finally, some enforcement power is included in this regulatory scheme, but, for the most part, reporting and mutual monitoring was to suffice for applying the global labor code.<sup>8</sup>

Institutional simplicity is a virtue, and the ideal underlying this regulatory model was to author an international labor code that resembles the labor codes of member states, where employment standards are mandatory, comprehensive, and include accessible venues for remedies when necessary. Although the project gathered momentum in the first few decades, its shortcomings became evident over time.<sup>9</sup> Throughout the century, the legitimacy accorded by states

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6. Anne Trebilcock, *The ILO as an Actor in International Economic Law: Looking Back, Gazing Ahead*, in *EUROPEAN YEARBOOK OF INTERNATIONAL ECONOMIC LAW* 2019 3-34 (2020).

7. The foundational principle of tripartism is based on the INTERNATIONAL LABOUR ORGANIZATION [ILO] CONSTITUTION art. 7, (June 28, 1919). On the foundational history of tripartism in the ILO see Janice Bellace, *The ILO and Tripartism: The Challenge of Balancing the Three-Legged Stool*, in *ILO100—LAW FOR SOCIAL JUSTICE* 289-310 (George P. Politakis et al. eds., 2019).

8. ILO, CONSTITUTION art. 33, *id.*

9. Breen Creighton, *The Future of Labour Law: Is There A Role for International Labour Standards?* in *THE FUTURE OF LABOUR LAW* 253 (Catherine Bernard, Simon Deakin & Gillian Morris eds., 2004); William R. Simpson, *Standard-Setting and Supervision: A System in Difficulty*, in *ILO, LES NORMES INTERNATIONALES DU TRAVAIL: UN PATRIMOINE POUR L'AVENIR* 47-74 (Jean-Claude Javillier & Bernard Gernigon eds., 2004); Jan Klabbers, *The Past and Future of Governance: Epistemic Authority and the ILO*, in *SOCIAL JUSTICE AND THE WORLD OF WORK*

to the ILO endured (with some disruptions, such as the temporary resignation of the United States), but the authoring of norms considerably dwindled, as did the rate of ratifications. The transfer of norms into domestic law was uneven, and so was the task of domestic enforcement by the member states. The enforcement measures of the ILO are not effectively in use and compliance remained mostly a matter of ongoing reporting, monitoring, and persuasion, and therefore a matter of good will. At the same time, these measures enabled the ILO to develop its expertise as a consultant, which is most effective for countries that seek to improve labor rights and labor relations.<sup>10</sup> Its web is not a trap, but a source of support, offering an ongoing network of agents, institutions, and ideas.

Signs of the disintegration of the SHA model appeared early on, and parallel tracks for authoring transnational labor standards emerged. However, these remained at the background and never cast serious doubt on the ILO's central position. There were indications of business-led displays of corporate social responsibility (CSR) already in the 1950s.<sup>11</sup> Early on, the GATT incorporated a limited reference to prison labor, but the concern for labor conditions in the context of trade permeated debates from the outset.<sup>12</sup> Institutional developments in the early 1990s brought to the front an array of new structures and methods, inside and outside the ILO. The seminal ILO Declaration on Fundamental Principles and Rights at Work, issued in 1998, was already foreshadowed earlier in the 1995 Copenhagen Development Summit.<sup>13</sup> Further, CSR policies grew exponentially throughout the 1990s.<sup>14</sup> The establishment of the WTO in 1995 resulted in a growing concern with conditioning free trade upon honoring labor rights, leading to a debate around the inclusion of a social clause in WTO treaties.<sup>15</sup> With the turn of the millennium, a growing concern with human rights around labor issues led to new instruments such as the Palermo Protocol of 2000, on trafficking in persons.<sup>16</sup> New institutional configurations evolved, such as Better Factories Cambodia, later turning

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(Brian Langille and Anne Trebilcock eds., 2023); Ruth Dukes, Judy Fudge & Guy Mundlak, *Labour Law in the 100 Years of the International Labour Review*, 5 Centenary Collection, INT'L LAB. REV. 1 (2021).

10. James J. Brudney, *The Internationalization of Sources of Labor Law*, 39 U. PA. J. INT'L L. 1 (2017).

11. Rami Kaplan, *Who Has Been Regulating Whom, Business or Society? The Mid-20th-Century Institutionalization of "Corporate Responsibility" in the USA*, 13 SOC. ECO. REV. 125 (2015).

12. Elissa Alben, *GATT and the Fair Wage: A Historical Perspective on the Labor-Trade Link*, 101 COLUM. L. REV. 1410 (2001).

13. KATHERINE A. HAGEN, *POLICY DIALOGUE BETWEEN THE INTERNATIONAL LABOUR ORGANIZATION AND THE INTERNATIONAL FINANCIAL INSTITUTIONS: THE SEARCH FOR CONVERGENCE* (2003).

14. Latapí Agudelo et al., *A Literature Review of the History and Evolution of Corporate Social Responsibility*, 4 INT. J. CORP. SOC. RES. 1 (2019).

15. Steve Charnovitz, *The Influence of International Labour Standards on the World Trading Regime, A Historical Overview*, 126 INT'L LAB. REV. 565 (1987).

16. United Nations Human Rights Office of the High Commissioner, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime*, 2237 U.N.T.S. 319 (Nov. 15, 2000); Hila Shamir, *A Labor Paradigm for Human Trafficking*, 60 UCLA L. REV. 76 (2012).

into a multi-state operation under the heading of Better Work.<sup>17</sup> In the following years, labor concerns led to the rise of international framework agreements negotiated by labor unions, global union federations and multinational corporations.<sup>18</sup>

The Rana Plaza catastrophe in 2013 was undoubtedly a watershed in the development of an elaborate system of transnational labor governance.<sup>19</sup> Its horrific outcomes led simultaneously to numerous responses at multiple levels. Many involved the ILO in one way or another,<sup>20</sup> possibly indicating that it continued to play an important role in TLG, but also posing a possible alternative framing, suggesting that it is (“only”) part of an assemblage of institutions. The partial division of responsibility between the various agents could indicate a thoughtful use of limited political resources, but also slack coordination and further waste of whatever legitimacy the TLG-web may have gained. Its success in quickly responding to the catastrophe indicated that the TLG-web can pursue difficult aims, but also raised the question whether all the efforts channeled into the garment industry in Bangladesh made a difference elsewhere (other sectors, other countries). The responses to the Rana Plaza catastrophe can be a source of institutional learning and a model for replication, but it can also be an idiosyncratic solution to a high-visibility event that could not be concealed or dismissed. Finally, the weight placed on one segment of the web may create tears and fractures elsewhere as global value chains in the garment sector shift their contracts to other locales that are less visible to the global public.<sup>21</sup>

At this time, 25 years have passed since the ILO Declaration of 1998, and a decade since the Rana Plaza tragedy, and many new developments have been documented and researched. The field of TLG is quickly growing, but its architecture remains fuzzy. The internal mission of the ILO may have changed, and its global model is now complemented by regional and bilateral developments; its hierarchical status is replaced by interaction with competing claimants for the top tier of the governance structure; its enforcement shortcomings are addressed by developments in trade law; and the notion of enforceable law has gradually transformed into the dominance of soft law measures under the umbrella of CSR, which was rebranded as “Environmental, Social and Governance” (ESG).<sup>22</sup> A new wave of instruments brings together multiple

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17. BETTER WORK, <https://betterwork.org/> [<https://perma.cc/SX32-M74C>].

18. Urs Luterbacher, Andrew Prosser & Konstantinos Papadakis, *An Emerging Transnational Industrial Relations? Exploring the Prospects for Cross-Border Labour Bargaining*, 156 INT'L LAB. REV. 307 (2017).

19. Anne Trebilcock, *The Rana Plaza Disaster Seven Years On: Transnational Experiments and Perhaps a New Treaty?*, 159 INT'L LAB. REV. 545 (2020). Notably, the catastrophe also induced stated-centered changes alongside the transnational ones. Shahidur Rahman, *Post-Rana Plaza Responses: Changing Role of the Bangladeshi Government*, in LABOR, GLOBAL SUPPLY CHAINS, AND THE GARMENT INDUSTRY IN SOUTH ASIA 131-148 (Sanchita Saxena ed., 2019).

20. PAUL VAN DER HEIJDEN & RUBEN ZANDVLIET, ENFORCEMENT OF FUNDAMENTAL LABOR RIGHTS: THE NETWORK APPROACH: CLOSING THE GOVERNANCE GAPS IN LOW-WAGE MANUFACTURING INDUSTRIES (2014).

21. Gay W. Seidman, *Labouring Under an Illusion? Lesotho's 'Sweat-Free' Label*, 30 THIRD WORLD Q. 581 (2009).

22. Arguably, there is a difference between CSR and ESG. The former is a general account of responsibility, whereas ESG refers to a series of measurable variables. Other ways

agents, while hardening some components of the TLG-web, in both international and domestic law with extraterritorial effects.<sup>23</sup> Some may recognize a growing coherence in these various developments, while others may lose sight of what, if anything, is working in practice.

### III. Assessing the TLG-web

The TLG-web is a non-ideal system.<sup>24</sup> While an ideal system is based on a clear normative purpose, with a careful design to achieve it, a non-ideal system is developed by multiple agents with different ideals and even more diverse interests. It is possible to assess an ideal model by comparing its normative objective and the design that was deliberately selected to achieve it. Non-ideal models cannot be assessed in such a way. They are better placed within the analytical framework of political economy, which accounts for their emergence, stability, or constant flux. Intrinsic to the idea of a non-ideal model is its development based on power relations, entrepreneurship (on both capital and labor sides), and circumstances.<sup>25</sup>

Power relations are an integral component of labor regulation generally and also at the basis of the ideal model. Labor norms are driven first and foremost by the state or international institutions, responding to the power resources of organized workers and employers.<sup>26</sup> Trade unions, employers' associations, and other interest groups, on both sides of work and industry, attempt to tilt regulation to serve their interests. In international regulation, there is a further layer to consider, formulated by power competition between states generally, and a variation of class conflict between global south and north, as well as developed and developing countries.<sup>27</sup> The ILO designates an ideal model because it attempts to create a stable institutional design that acknowledges these conflicts and seeks to mediate them. As an ideal model, the ILO is not designed around naïve assumptions that bracket power; rather, it attempts to create an ongoing foundational arrangement to address it.

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of distinguishing them is to identify the function of CSR to convey information internally (to its immediate stakeholders, including workers and shareholders), whereas ESG indicators are aimed at an external group of stakeholders, communities, government units, consumers, and other business organizations in the same sector. See ELIZABETH POLLMAN, *CORPORATE SOCIAL RESPONSIBILITY, ESG, AND COMPLIANCE* 662-672 (Benjamin Van Rooij & D. Daniel Sokol eds., 2021).

23. See sections IV.C1 & C2, *infra*—on Processes.

24. On the distinction between ideal and non-ideal framings see A. John Simmons, *Ideal and Non-ideal Theory*, 38 PHIL. & PUB. ASS'N 5, 12 (2010). (Where ideal theory dictates the objective, non-ideal theory dictates the route to that objective from whatever imperfectly just condition a society happens to occupy); Laura Valentini, *Ideal vs. Non-Ideal Theory: A Conceptual Map*, 7 PHIL. COMPASS 654 (2012). (describing three versions of the ideal and non-ideal contrast).

25. Kolben, *supra* note 2.

26. Stefan Schmalz, Carmen Ludwig & Edward Webster, *The Power Resources Approach: Developments and Challenges*, 9 GLOB. LAB. J. 113 (2018).

27. On the categories of south-north, or developed and developing, see TONIA NOVITZ, *TRADE, LABOUR AND SUSTAINABLE DEVELOPMENT: LEAVING NO ONE IN THE WORLD OF WORK BEHIND* 11-14 (2024).

The non-ideal model is composed of multiple agents and institutions, developed without a comprehensive plan, and without a single planning authority. The TLG-web is shaped by traditional power relations, like those underlying the ideal model of the ILO, but its development is further shaped by additional forms of power competition. Tim Bartley identifies various forms of power contestations that are useful to make sense of the TLG-web mapping in the following sections.<sup>28</sup> “Power of harmonization” refers to attempts at gaining a central role in generating the norms of the transnational web. Although multiple efforts by different agents can gradually lead to harmonization, they are also a source of competition which leads to variations and distinctions, whether real or artificial. The “power of grounding” refers to the will of agents and institutions to accept norms and processes developed by others. Such power relations are particularly important for considering the multi-scale nature of the global governance system, which no longer conforms with the centralized method of the ILO. They are indicative of challenges between international governance regimes (labor and trade), within regimes (WTO and the flourishing field of sub-global agreements and unilateral measures), between and within regions, between corporate power-seeking market players, and within communities (occupational, national, municipal) seeking to improve their own lot in the complex system. The “power of credibility” points at strategies that make standards more rigid or flex them, harden or soften their implementation, and draw the lines between adversarial action, cooperative measures, and co-optation. In the attempt to demonstrate that labor protective obligations are credible, whether self-imposed, mutually agreed upon, or forced by others, agents must find ways to display their commitment.

As a way of grasping complex transnational system, some analyses identify fragments of the transnational system, noting differences between subset-systems.<sup>29</sup> Another way is to explore the system as a whole, with a focus on a particular subset of concerns, such as slavery (trafficking, unfree labor), the freedom of association or gender.<sup>30</sup> In the following sections, I will attempt to critically capture the components of the TLG system as a whole, without a particular thematic focal point.

Methodological challenges in this mapping exercise are instructive. Methodologically, it would have been ideal to depict the transnational system using the mapping tools of network analysis.<sup>31</sup> Network mapping works best with nodes of a similar kind; for example, identifying which states are at the center or periphery of the ILO activities, based on ratifications of conventions or other activities. Similarly, it is possible to list all free trade agreements and identify the connectivity between partner states. It is also possible to map the appearance of the freedom of association in various CSR-ESG instruments, or the connections between many institutions that developed into what can

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28. Tim Bartley, *Power and the Practice of Transnational Private Regulation*, 27 *NEW POL. ECON.* 188 (2022).

29. Mark Anner, *Three Labour Governance Mechanisms for Addressing Decent Work Deficits in Global Value Chains*, 160 *INT'L LAB. REV.* 613 (2021).

30. STEPHANIE BARRIENTOS, *GENDER AND WORK IN GLOBAL VALUE CHAINS – CAPTURING THE GAINS?* (2023).

31. JOHN SCOTT, *WHAT IS SOCIAL NETWORK ANALYSIS?* (2012).

be described as an ESG industry. Yet, it is difficult to capture simultaneous changes in norms, agents, processes, and most importantly, the multiscalar aspect of transnational law.<sup>32</sup> The multiple features, operating in different scales, across, within and regardless of geo-political borders, make a neatly ordered mapping strategy too difficult to manage.

This is the transnational challenge as captured by the spiderweb metaphor. To elaborate further on the metaphor, substituting the formal network mapping, it is possible to distinguish three distinct types of webs.<sup>33</sup> The *orb-web* remains mostly on a single (vertical or horizontal) plane, designating here the coverage of instruments with similar agents, which is gradually spreading on the same plane. Such would be the proliferation of trade agreements connecting many countries with the dominant state-weavers — notably the US and the EU.<sup>34</sup> A *funnel web* is vertical and offers a thicker body, but also limited coverage, as well as escape routes within and outside the funnel. The best demonstration of the TLG funnel are discrete projects of worker-driven social responsibility (WSR).<sup>35</sup> The most comprehensive forms are *sheet-cover webs* that can cover vast areas in what looks like transparent blankets. In the TLG-web, Better Work programs demonstrate the development of a sheet-cover web, but which nonetheless remain limited in their territorial scope (focused exclusively on the garment sector in 13 countries at present).<sup>36</sup> This type resonates most with the idea that a governance system is multiscalar. Typical network analyses can deal with orb-(horizontal) systems, or with discrete instances of funnel (vertical) systems, but have difficulty in exploring the formation of the multiscalar sheet-cover web.

The following discussion maintains a simultaneous interest in the components of the multiscalar web, starting with the norms, then proceeding with the agents and the processes. This description designates the distance travelled from the original intent to devise an ideal SHA model and the exponential growth of the non-ideal TLG-web. Is the non-ideal model gradually developing as an orb, or isolated funnels, or as a new form of sheet-cover web that overtime can match the institutional logic of the ideal model?

Beyond the attempt to describe the growth of the TLG-web, this discussion addresses two competing views of development in transnational law. These frame the search for an answer to the third research question posed earlier: the extent to which the metaphor of the web helps in identifying the vices and virtues of the TLG web-like structure. A positive view suggests that the exponential growth of interwoven regulatory techniques reflects neoliberal challenges and an attempt to address them. The move from the SHA regulatory model of international law helps cover the blind spots of various imperfect

32. NANCY FRASER, *SCALES OF JUSTICE: REIMAGINING POLITICAL SPACE IN A GLOBALIZING WORLD* (2009).

33. For more detail on the distinction between the different types of webs, see EBERHARD, *supra* note 3 at chapter 9. The three forms selected for discussion here do not exhaust the diversity of spiderwebs and were chosen as a heuristic method for explaining the TLG web.

34. ILO, *LABOUR PROVISIONS IN G7 TRADE AGREEMENTS: A COMPARATIVE PERSPECTIVE* (2019).

35. Aaron Gladstone, *Worker Driven Social Responsibility Agreements: A New Future in Labor Rights Protections*, 44 *FORDHAM INT'L L.J.* 549 (2020). Also see *infra* notes 155, 162-163.

36. *Where we Work*, BETTER WORK, *supra* note 17.



instruments. It is a rather easy task to identify how flimsy the threads appear in the emerging web. Some rely on vague norms with a broad space for conflicting interpretations; others are not attuned to the conflicting needs of workers and lack democratic qualities; others yet lack enforcement measures; and many are caught in structures that do not address power imbalances. However, each thread in the web also brings advantages and together they forge a system of complementarities. Together the strings move away from traditional notions of regulation and draw instead on a more contemporary idea of governance, which relies on ideas of responsive regulation, smart regulation, risk-based regulation, and similar variations.<sup>37</sup> Thus, each addition to the web can induce further layering of innovative attempts that overcome past difficulties, and lead to extension of coverage (orb), depth (funnel), and success in designing a sheet-cover web.<sup>38</sup>

An alternative view suggests that such governance systems carry a significant cost. The proliferation of rules, norms, and venues for action offer escape routes for those who are governed.<sup>39</sup> New forms of regulation renounce necessary power confrontations and turn to process-based norms, such as “encourage social dialogue,” “devise a due diligence plan,” or “establish an effective enforcement plan” (regardless of which norms are in place and whether they are adequate). Process-based standards accommodate any preference with little material consequences. They enable jurisdiction shopping, cherry-picking of regulatory provisions that are most convenient to the regulated entities, claims that enforcement efforts should be moved to other venues, effective window-dressing, and, more generally, they enable deflecting responsibility to others. They also involve high costs of complex systems with partially overlapping objectives, whether financial or non-pecuniary (time, effort, coordination, and the demands of multiple alliances and solidarities). Instead of emphasizing complementarities, this view suggests that governance is an escape system from clear outcome-based regulation and from necessary confrontation with skewed power relations. Governance systems cater to the powerful who find greater use in complexity, rather than to the power-less who need clear regulatory protections. Such systems can benefit managerial resistance to transnational dictates by weakening labor’s representatives who proliferate within the web.<sup>40</sup> Therefore, they are seen as supportive ingredients of the transnational neoliberal challenge and not its remedy.

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37. Neil Gunningham & Darren Sinclair, *Smart Regulation*, in *REGULATORY THEORY: FOUNDATIONS AND APPLICATIONS* 133-148 (Peter Drahos ed., 2017); MALCOLM K. SPARROW, *FUNDAMENTALS OF REGULATORY DESIGN* (Penelope Sparrow & Sophie Sparrow eds., 2020); see also Kolben, *supra* note 2.

38. Sarah Ashwin et al., *Spillover Effects Across Transnational Industrial Relations Agreements: The Potential and Limits of Collective Action in Global Supply Chains*, 73 *INT’L LABOUR REV.* 995 (2020).

39. Daniel W. Drezner, *The Tragedy of the Global Institutional Commons*, in *BACK TO BASICS: STATE POWER IN A CONTEMPORARY WORLD* 281 (Martha Finnemore & Judith Goldstein eds., 2013).

40. Ian Greer & Marco Hauptmeier, *Management Whipsawing: The Staging of Labor Competition Under Globalization*, 69 *INT’L LABOUR REV.* 29 (2016).

#### IV. Describing the TLG model

Attempts to capture the TLG system as a whole are based on qualitative analyses of governance systems. The literature on governance encompasses several dimensions: (a) classification of spheres (public, private and social), (b) the agents, (c) the norms, and (d) processes.<sup>41</sup> For the purpose of the following discussion, this list can be reduced to the last three, as the TLG covers all spheres and brings them together.<sup>42</sup> A correlative approach refers to the TLG as a multiscale system. According to Nancy Fraser, “scale” refers to both the multiple measures of justice and the geo-political units involved. Fraser points at the difficulty of moving away from the democratic unit of the nation-state to analyze transnational processes. In response, she proposes an analytical framework with three fundamental questions to structure the analyses: “What” (is being regulated)? “Who” (is involved)? “How” (is the process conducted)?<sup>43</sup> This framework structures the analysis in the following sections that traverse norms, agents and processes.

##### A1. Describing the TLG Model: Authoring the Norms

One view conceptualizes the move from the SHA model to the TLG-web as one that does not compromise the ILO’s position as the main author of norms. Under this conception, other agents and institutions in the TLG rely on ILO norms and echo them. For example, Blackett (2020) holds that “international labor law... provides the normative core of transnational labor law, which draws much of its strength and legitimacy from the painstakingly built and carefully consolidated corpus of international labor standards, currently being culled and honed.”<sup>44</sup> Such a description alludes to a well-sorted orb-web woven around a core of ILO norms. It therefore implies that authorship remains with the SHA model, while other institutions are intended for essential complementary functions, such as implementation, diffusion, and enforcement.

Undoubtedly, the most obvious consensus around the core is situated in the four fundamental labor principles: prohibition of slavery, child labor and discrimination, and the importance of the freedom of association, and, with some reservations—the ILO Conventions that are attached to these principles. In 2022, the ILO added a fifth principle regarding safety and health, following much criticism of its absence—particularly after the Rana Plaza

41. Stephen J. Frenkel & Elke S. Schuessler, *From Rana Plaza to COVID-19: Deficiencies and Opportunities for a New Labour Governance System in Garment Global Supply Chains*, 160 INT’L LABOUR REV. 591 (2021). For a similar mapping attempt of the evolving system, see Beryl ter Haar, *Love, Flirt or Repel: Hybrid Global Governance of the ILO Core Labour Standard*, 2 EUR. J. SOC. L. 68 (2013).

42. See for example the IRIS ethical recruitment initiative, created by the IOM in coalition with governments, civil society and private sector. IRIS Ethical Recruitment, *What is IRIS?*, INT. ORG. FOR MIGRATION, <https://iris.iom.int/what-iris> [<https://perma.cc/L7JY-Q2LQ>]. This structure defeats attempts of classification along the lines of public/private, and it is no longer clear whether the distinction is helpful.

43. FRASER, *supra* note 32.

44. Adelle Blackett, *Introduction: Transnational Futures of International Labour Law*, 159 INT’L LAB. REV. 455, 457 (2020).

collapse.<sup>45</sup> This addition also came with some reservations regarding its effect on other instruments in the transnational web, namely in trade agreements.<sup>46</sup> The consensus is evident at the descriptive level, but the normative debate around the Declaration of 1998 remains unsettled. The debate predicted the effect of the Declaration over time quite well, and more than two decades later, the outcomes oddly confirm the positions of both sides to the debate.<sup>47</sup> For those who endorsed the Declaration, it provided a consensual focal point that all agents grew to accept. For those who criticized it, the Declaration created a thin body of international labor law, downgrading other norms that are repeatedly marginalized. The two lenses converge in their prediction that, over time, most, if not all, instruments that take part in the TLG-web will allude to these principles. However, with the acceptance of the fundamental Principles as the guideline, many instruments stop there and do not extend the list further.

Since the Declaration of 1998, the project of setting international norms has slowed down considerably, having produced only eight new conventions, eighteen recommendations, and five supplementary protocols. Some are sectoral or occupational (maritime, fisheries), and some are lagging in time after gaining considerable experience in domestic legislation (violence and harassment at work). This is not to undermine the added value of these conventions, which contribute to a consistent and coherent set of ideas. For example, the most recent Convention 190 extends general claims on harassment beyond more common approaches in domestic labor codes that focus exclusively on sexual harassment.<sup>48</sup> Moreover, it nests typically individual employment rights in the context of the freedom of association and social dialogue.<sup>49</sup> Some of the new norms are of special importance for breaking away from the sole focus on tripartite deliberations, introducing language that can provide recognition to new agents in the domestic and international civil society.<sup>50</sup> Others offer

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45. ILO, Resolution on the Inclusion of a Safe and Healthy Working Environment in the ILO's Framework of Fundamental Principles and Rights at Work, Res. 110/I (June 16, 2022), available at <https://www.ilo.org/resource/ilc/110/resolution-inclusion-safe-and-healthy-working-environment-ilos-framework> [perma.cc/XZ87-E5JF].

In the following text I will refer to the five principles when discussing the present and future, but other times—when referring to past developments in the shadow of the 1998 Declaration—I will refer to the original four principles.

46. Desirée LeClercq, *Integrating Non-Binding Labour Standards in Binding Trade Agreements: The ILO's Feedback Loop*, 26 J. INT'L ECON. L. 542 (2023).

47. Philip Alston, "Core Labour Standards" and the Transformation of the International Labour Rights Regime, 15 EUR. J. INT'L L. 457 (2004); Brian A. Langille, *Core Labour Rights—The True Story (Reply to Alston)*, 16 EUR. J. INT'L L. 409 (2005); Phillip Alston, *Facing Up to the Complexities of the ILO's Core Labour Standards Agenda*, 16 EUR. J. INT'L L. 467 (2005).

48. ILO Convention (No. 190) Concerning Violence and Harassment art. 1, June 21, 2019, 3444 U.N.T.S. [hereinafter ILO Convention No. 190]; Anne Trebilcock, *What the New convention on Violence and Harassment Tells us about Human Rights and the ILO*, in ILO100—LAW FOR SOCIAL JUSTICE 1031, 1031-1056 (George P. Politakis et al. eds., 2019).

49. See ILO Convention No. 190, at Art. 5.

50. See, e.g., references to civil society in ILO Convention (No. 159) Concerning Vocational Rehabilitation and Employment (Disabled Persons) art. 5, June 20, 1983, 1401 U.N.T.S. 235; ILO, Recommendation Concerning HIV and AIDS and the World of Work, ¶ 6, ILO Report No. 200 (June 17, 2010); ILO Convention (No. 182) Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour art. 6, June 17,

novel models of transnational governance, notably Convention MLC 2006, on Maritime Labour.<sup>51</sup> At times, some instruments, such as Recommendation 205 on Labor Law in Times of Crisis, just rehearse general ILO principles of decent work and social dialogue.<sup>52</sup> Some imminent issues that challenge the world of work are gaining traction in the ILO by building expert knowledge and know-how that can aid member states and the international community, but lack a clear prospect of being translated into a formal ILO norm. Such matters include the platform economy and labor protection in global value chains.<sup>53</sup>

The debate around the Declaration of 1998 is therefore still as relevant today as it ever was. Did the authoring of norms gradually reach a plateau? Was the focus on four fundamental principles (now five) causally connected to the slowdown of the law-making function of the ILO? Causal connections are difficult to prove in this case, but it is noteworthy that, while over time the authoring of norms is slowing down, other instruments outside the ILO are lifting more rights to a higher level in terms of recognition, importance, legitimacy and acceptance, or offer more detailed norms and means to achieve them.

Observing the development of other norms in the TLG-web it is possible to identify three main trajectories. First, some instruments subscribe to the four principles wholesale with nothing added or withheld. These are indicative of the central web-weaving authority of the ILO, accepting its focus without any reservation. For example, the UN Global Compact lists ten principles, four of which belong to the category of labor, copying the fundamental labor principles of the ILO.<sup>54</sup> Other international codes follow a similar path. Nevertheless, not all references to the fundamental labor principles are alike. The principles are associated with conventions and the elaborate jurisprudence that developed around them, particularly around the freedom of association, based on decisions of the Committee on the Freedom of Association.

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1999, 2133 U.N.T.S. 161; ILO, Recommendation Concerning Employment and Decent Work for Peace and Resilience, ¶ 9, ILO Report No. 205, (June 16, 2017); ILO Convention (No. 169) Concerning Indigenous and Tribal Peoples art. 6, June 27, 1989, 1650 U.N.T.S. 383.

51. ILO Maritime Labour Convention, Feb. 23, 2006, 45 I.L.M. 792 (2006); Patrick Bollé, *The ILO's New Convention on Maritime Labour: An Innovation Instrument*, 145 INT'L LAB. REV. 135 (2006).

52. ILO, Employment and Decent Work for Peace and Resilience Recommendation, ILO Recommendation No. 205 (June 16, 2017); Claire La Hovary, *The International Labour Organisation and Disasters: The Contribution of ILO Recommendation No. 205 on 'Employment and Decent Work for Peace and Resilience' to International Disaster Law*, 3 YEARBOOK INT'L DISASTER L. 274 (2022).

53. The ILO coordinated actions towards regulating for decent work in global value chains, demonstrating the development of organizational expertise and innovation. However, this is yet to be translated into the authoring of a Convention. See Huw Thomas & Peter Turnbull, *From Horizontal to Vertical Labour Governance: The International Labour Organization (ILO) and Decent Work in Global Supply Chains*, 71 HUM. RELS. 536 (2018). Recent stepping stones in the development of these two fields towards a future Convention include: ILO, REALIZING DECENT WORK IN THE PLATFORM ECONOMY, INTERNATIONAL LABOUR CONFERENCE, 113TH SESSION, REPORT V(1), (2024), <https://www.ilo.org/resource/conference-paper/realizing-decent-work-platform-economy> [<https://perma.cc/YTN3-2ZXR>]; and ILO, ILO Strategy on Decent Work in Supply Chains (2023) <https://www.ilo.org/resource/gb/347/ilo-strategy-decent-work-supply-chains> [<https://perma.cc/N5AV-BKJP>].

54. *The Ten Principles of the UN Global Compact*, U.N. GLOBAL COMPACT (July 26, 2000), <https://unglobalcompact.org/what-is-gc/mission/principles> [<https://perma.cc/A3HK-3W26>].

These can serve other institutions within the web and demonstrate that the ILO is a comprehensive jurisprudential source.<sup>55</sup> At the same time, some strategies dilute the power of the four principles. In the past, some trade instruments and corporate codes entirely circumvented the freedom of association, but this has become a rare exception. At present, uneven application of the principles, which de-facto derogates from the ILO benchmark, may include instruments that merely subscribe to the principles while deliberately avoiding the associated conventions and jurisprudence.<sup>56</sup> In these situations, the reference to the principles maintains a declaratory aura but contains little detail, and is suspected of having only minimal impact. Between complete adoption and expressive declarations, linking instruments to the fundamental principles provides a wide range of possibilities. Even in the UN sustainable development goals, the treatment of freedom of association, which generally follows the adopting trajectory, is not fully up to par with ILO jurisprudence.<sup>57</sup>

A second trajectory subscribes to the fundamental labor principles, while incorporating other norms that appear in various ILO instruments, with or without reference to the specifics of the ILO labor code. This is demonstrated by emerging unilateral, bilateral and regional trade agreements that add norms on top of the fundamental labor principles such as occupational safety and health (prior to the ILO 2022 decision to include this norm in the list of fundamental principles), and acceptable conditions of work (minimum wages and hours of work).<sup>58</sup> A different form of extension appears in corporate codes pertaining to labor protection in global value chains. Whereas early codes (circa the 1990s) sufficed with the four fundamental principles or even excluded the freedom of associations,<sup>59</sup> at present, many codes extend the list of protected rights and interests to cover a broad array of labor standards.<sup>60</sup> Although these are considered “soft law” and therefore it is possible to discount the significance of such expansion, they potentially attenuate the distinction between the fundamental principles and the domain of other labor standards.

A third trajectory moves beyond the tweaking of the ILO standards and their hierarchy, proposing an alternative focal point for other agents in the field. This is an apt example of the “harmonization power” interplay presented

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55. Virginia Mantouvalou, *Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation*, 13 HUM. RTS. L. REV. 529 (2013).

56. Jordi Agusti-Panareda, Franz Christian Ebert & Desirée LeClercq, *ILO Labor Standards and Trade Agreements: A Case for Consistency*, 36 COMP. LAB. L. & POL'Y J. 347 (2014).

57. Tonia Novitz, *Engagement with Sustainability at the International Labour Organization and Wider Implications for Collective Worker Voice*, 159 INT'L LAB. REV. 463 (2020).

58. Notably, see the Trans-Pacific Partnership, Feb. 4, 2016, available at <https://ustr.gov/trade-agreements/free-trade-agreements/trans-pacific-partnership/tpp-full-text> [https://perma.cc/3WW2-K4AS], now defunct, turning into the CPTPP, Comprehensive and Progressive Agreement for Trans-Pacific Partnership, (Mar. 8, 2018), available at <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/cptpp> [https://perma.cc/2UFT-FWCR].

59. OECD, *Codes of Corporate Conduct: Expanded Review of their Contents*, OECD WORKING PAPERS ON INTERNATIONAL INVESTMENT 2001/06 (2001).

60. Guy Mundlak & Issi Rosen-Zvi, *Signaling Virtue? A Comparison of Corporate Codes in the Fields of Labor and Environment*, 12 THEORETICAL INQUIRIES IN L. 603 (2011).

earlier. That is, the attempt of agents to author norms, set priorities and lead the development of the TLG-web. The most prominent example is that of the UN sustainable development goals (SDGs) that address labor rights explicitly (SDG8), but also consider labor dimensions in other SDGs.<sup>61</sup> Whereas, in the past, the focal point of labor-related instruments was strictly the ILO Declaration that established the four principles, currently, more instruments seek guidance from SDGs. Referring again to the UN Global compact, alongside the ten principles mentioned earlier, there are now prominent references to “awareness and action in support of the SDGs by 2030”.<sup>62</sup> The emergence of the new focal point suggests that the position of the ILO as the weaver of the transnational web at its center no longer remains unchallenged.

## A2. Discussion: Authoring the norms and the power of harmonization.

This description points to the resilience of ILO’s dominance, but also to competing claims for a central position in the web. A clear example of a sheet-cover web is to be found in the Declaration of 1998. In terms of recognition and cross-references in other instruments, the Declaration remains a prominent focal point. The critique of the Declaration would not contest the sheet cover form, but rather point out its thin layers. The focus on the four principles, only recently becoming five, served as an umbrella and guidance for policy focus. To solidify the content of this focal point, ancillary instruments broadened its terms. Notably, the plethora of norms on trafficking and other forms of slave and unfree labor gradually expanded the original framing of slavery.<sup>63</sup>

Justifying the small number of rights in the Declaration is the argument that the freedom of association serves as an “enabling right,” which promotes all other substantive rights. Yet, various data cast doubt on the assumption that the freedom of association as an enabling right can substitute an additional focus and detail on substantive ends, such as fair wages, decent working hours, or days of rest. For example, an empirical study that tested the effect of the Declaration indicates some positive advances and much stagnation.<sup>64</sup> Foreign direct investment has some positive effects on child labor and unfree labor, and may explain improvements better than international standards.<sup>65</sup> Gender equality is advanced through funnel like governance schemes, but to a lesser extent by instruments that declare their general adherence to the international

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61. G.A. Res. 70/1, U.N. Doc. A/Res/70/1, Transforming Our World: The 2030 Agenda for Sustainable Development (Oct. 21, 2015) (“UN 2030 Agenda”). On the development of sustainable development as a transnational focal point, see NOVITZ, *supra* note 27.

62. *The SDGs Explained for Business*, U.N. GLOB. COMPACT (July 26, 2000), <https://unglobalcompact.org/sdgs/about> [<https://perma.cc/K5Z8-Q974>].

63. Shamir, *supra* note 16; GENEVIEVE LEBARON, RESEARCHING FORCED LABOUR IN THE GLOBAL ECONOMY: METHODOLOGICAL CHALLENGES AND ADVANCES (Genevieve LeBaron ed., 2020); Judy Fudge, *Bad for Business: The Construction of Modern Slavery and the Reconfiguration of Sovereignty*, 10 LONDON REV. INT’L L. 3 (2022).

64. David Kucera & Dora Sari, *Globalization and Freedom of Association and Collective Bargaining Rights*, in HANDBOOK ON GLOBALISATION AND LABOUR STANDARDS 13-35 (Kimberly A. Elliott ed., 2022).

65. Eric V. Edmonds, *Globalization and the Persistence of Forced Labor and Child Labor*, in HANDBOOK ON GLOBALISATION AND LABOUR STANDARDS 36-63 (Kimberly A. Elliott ed., 2022).

focus on equality.<sup>66</sup> Empirical evidence does not provide a clear answer to the causal effect between the 1998 focus on fundamental principles and outcomes on the ground.

Alongside the orb-web of the four fundamental principles, several others have developed. In the global trade law orb-web, the focus on the linkage with the four principles remains, and there is a gradual increase in references to the conventions associated with the principles.<sup>67</sup> The addition of safety and health to the principles was contested because of concerns that it may expand hard state obligations in the area of free trade.<sup>68</sup> Additional references over and above the four principles remain rare and are typically not associated with any detailed convention.<sup>69</sup>

Unlike the global trade law orb-web, norms are proliferating in two other governance sites. As discussed below, both are more “soft” than the potentially “hard” commitments in trade. This tradeoff can account for the development of norms. One field is constituted by corporate codes of conduct and ESG commitments. Unlike some international codes and indices that adhere only to the fundamental principles, company instruments are fertile ground for seeking a longer and detailed list of norms to which businesses declare their responsibility. These include fair wage schemes, protection of migrant workers, working conditions, bullying and harassment, and more. Setting aside the question of their efficacy, given the weak, often non-existent forms of enforcement, they do not provide a sheet-cover alternative to the ILO principles because they are confined to particular value chains. Nevertheless, a process of imitation and isomorphism does lead to some convergence.<sup>70</sup>

By contrast, the UN SDGs do compete against the focal point of the ILO.<sup>71</sup> They attempt to weave a sheet-cover that is thicker and denser than the ILO principles, incorporating the latter as one ingredient in a more elaborate scheme of social law. Their compatibility with the ILO norms is extensive but not complete.<sup>72</sup> Their appearance in other instruments at various scales demonstrates its importance as an emerging sheet-cover. For example, the Global Reporting Initiative (GRI), self-described as “the architect of the common global language to assess and report on environmental, social, and economic impacts” bases its labor component on ILO conventions, but, since 2017, it also contains a document establishing a linkage between GRI reporting duties and SDGs.<sup>73</sup>

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66. Barrientos, *supra* note 30.

67. Agustí-Panareda et al., *supra* note 56.

68. LeClercq, *supra* note 46.

69. For example, the USMCA refers to the four fundamental principles and adds “acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health”. United States-Mexico-Canada Agreement art. 23.1(e), Nov. 30, 2018, [hereinafter USMCA].

70. Mundlak and Rosen Zvi, *supra* note 60.

71. This is admitted also within the cadre of advocates for the ILO’s centrality. See Francis Maupain, “There is a Way, Can there be a Will?”, (Speech at Geneva Graduate Institute) (July 13, 2023).

72. Novitz, *supra* note 57.

73. The reporting format on labor issues is currently re-drafted. *Topic Standards for Labor*, GLOBAL REPORTING INITIATIVE, <https://www.globalreporting.org/standards/standards-development/topic-standards-project-for-labor> [<https://perma.cc/QS9B-5ST5>] (last visited May 28, 2024) The technical committee is composed, “in accordance with due process”

There is a growing reference to the SDGs in in the GRI reports of multinational companies.<sup>74</sup> Similarly, international instruments often place the SDGs in their headlines. Although there is a working relation between the ILO and the UN High Global Forum, which is responsible for promoting the SDGs, there is yet an unmeasured (and possibly unmeasurable) indication of a new focal point. The consequence may be an expansion of a new sheet-cover, placing it in a greater socio-economic context, and the mainstreaming of agents who are outside the tripartite structure, and were institutionally marginal in the ILO. This process is an apt demonstration of the power of harmonization, which describes synergy but also competition over framing and setting the agenda.

#### B1. Describing the TLG model: The agents

The move from the ideal model of the SHA to a TLG-web incorporates many agents that are involved at different levels or scales. They include international associations that address work-related issues alongside the ILO. States remain the basic units for the power and legitimacy of the ILO and other international institutions by means of membership, but they are also independent and proactive agents outside the well-ordered ideal model of international institutions. International trade union federations, as well as business associations and lead firms in global value chains, are obvious additions to the list. Beyond the traditional agents that constitute industrial relations systems at multiple levels, civil society organizations are active as well. The diversification of agents partially complements the previous discussion of norms, as they also take part in authoring the norms. At other times, their role is mostly one of implementation. The discussion here groups the agents into four categories: international institutions, territorial public entities (states, localities and regions), business units, and civil society, which for the purpose of the discussion, include trade unions and employers' representatives.

The first category is the easiest to cover, because it includes large international institutions. Alongside the ILO there are several intergovernmental institutions (WHO - World Health Organization, IOM - International Organization for Migration), agencies within the UN (CEDAW- Committee on the Elimination of Discrimination against Women, and, most notably, the High-Level Political Forum on Sustainable Development), the economic institutions (The World Bank Group, WTO - the World Trade Organization, and the IMF - International Monetary Fund), and the OECD. Some less formal institutions also touch on work issues, such as the labor group (L20) associated with the G20, endorsing the principle of just transition and proposing general

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(as stated in the GRI website) of two representatives each from the organized labor and organized business, and one ILO representative. The experts group is appointed with a reference to their constituency: business enterprise (CEO of a social company collecting social data, a social responsibility/sustainability agent in IKEA, and a member of a human rights organization, an international labor law specialist, human rights—business expert), investment institution, civil society (academia), mediating institution (academia and research (2), manager of an INGO, member of a social auditing company).

74. Simone Pizzi et al., *The Determinants of Business Contribution to the 2030 Agenda: Introducing the SDG Reporting Score*, 30 *BUS. STRATEGY & ENV'T.* 404 (2021).



guidelines on other contested issues, such as the gig economy.<sup>75</sup> These agents sometimes cooperate, with mutual formal and informal representation in each others' governing bodies, while, at other times, they compete.<sup>76</sup> Cooperation can be illustrated by the ILO's participation in the UN High Level Political Forum and constant interaction, in various forms, with UN agencies, notably the Economic and Social Council. The Singapore Ministerial Meeting of the WTO, which led to the statement regarding the "division of labor" between the ILO and the WTO, demonstrates that mutual recognition can be interpreted in various (and conflicting) ways.<sup>77</sup> The WTO statement recognized the role of the ILO, and, at the same time, refused to further integrate the norms authored by the two institutions. Similarly, the development of comparative indexes (ILO's Decent Work versus World Bank's Doing Business) that displayed opposing views of protective labor norms demonstrated competition on certain grounds between the ILO and the global economic organizations.<sup>78</sup>

The ILO brings to the TLG-web its tripartite structure, unmatched by any other international organization. This structure has its advantages and shortcomings.<sup>79</sup> Notably, it is highly structured, with rules on recognition for the labor and employers' benches and a representation method applied throughout the organizational units of the ILO. At the same time, it displaces those voices of workers and businesses that are not represented by organized labor and employers.<sup>80</sup> Arguably, other forums authoring norms complement and compensate for the representation deficit resulting from the tripartite structure, and, in exchange, create other deficits, such as lack of coordination, power takeovers, and the tyranny of structurelessness.<sup>81</sup> As opposed to the clear structure of the ILO on the one hand, and civil society with their relatively open-ended structure of representation on the other hand, more autocratic and less deliberative forums lack clear democratic participation. This type of governance can be identified in institutions where executives and

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75. L20 STATEMENT TO THE G20: BUILDING A JUST WORLD AND A SUSTAINABLE PLANET THROUGH A NEW SOCIAL CONTRACT (2024), <https://www.ituc-csi.org/L20-statement-G20-2024-en?lang=en> [<https://perma.cc/HMA3-UKXF>]; L20 STATEMENT TO THE G20 LEADERS SUMMIT, A NEW SOCIAL CONTRACT FOR RESILIENCE AND RECOVERY (2023), [https://www.ituc-csi.org/IMG/pdf/en\\_l20\\_statement\\_lemm\\_2023.pdf](https://www.ituc-csi.org/IMG/pdf/en_l20_statement_lemm_2023.pdf).

76. On the relationship between the G20 and the SDG framework of the UN, see, e.g., Dries Lesage, *The Multiple Roles of the G20 with Regard to the UN Sustainable Development Goals*, in *THE G20, DEVELOPMENT AND THE UN AGENDA 2030*, 135-158 (Dries Lesage & Jan Wouters eds., 2022).

77. World Trade Organization, Ministerial Declaration of 13 Dec. 1996, WTO Doc. WT/MIN(96)/DEC Art. 4 (1996).

78. JANINE BERG & SANDRINE CAZES, *THE DOING BUSINESS INDICATORS: MEASUREMENT ISSUES AND POLITICAL IMPLICATIONS* (2007).

79. Guy Mundlak, *Tri-Plus: Reflections on Opening the ILO's Tripartite Structure*, in ILO100—LAW FOR SOCIAL JUSTICE 311-336 (George P. Politakis et al. eds., 2019); Desiree LeClercq, *A Tale of Tripartism, a Tribunal, and Trade*, in *SOCIAL JUSTICE AND THE WORLD OF WORK: POSSIBLE GLOBAL FEATURES* (Brian Langille & Anne Trebilcok eds., 2023).

80. On the rationales and institutional attempts to increase associational democracy beyond a tripartite model, see Lucio Baccaro, *Civil Society Meets the State: Towards Associational Democracy?*, 4 *SOC. ECO. REV.* 185 (2006).

81. Jo Freeman, *The Tyranny of Structurelessness*, 7 *BERKELEY J. SOC.* 151 (1972).

professionals carry more weight (international economic institutions), as well as in instances when member states determine rules for non-state entities, notably—business, as is the case when the OECD members establish norms to govern multinationals.<sup>82</sup>

The other three categories present a much more complex web of agents. The category of states appears to be simple. States can be codified formally as a unitary agent. For instance, a state sends a delegation to the ILO and the UN or signs a trade agreement with another. However, there are reasons to unpack this image of the unitary agent. Certain agencies within the state advocate different ideas and pursue different objectives. Ministries of labor and social affairs are not the same as ministries responsible for the ratification of conventions. Some ministries are engaged with issues that touch on labor concerns but may not be focused on difficulties facing workers in a global environment. For example, departments of commerce, industry, or economy that deal with trade issues are gaining an important role in the transnational web. They manage global trade responsibilities, influence proceedings in the WTO, negotiate trade agreements, and devise unilateral trade preference schemes (GSP) that condition trade privileges on compliance, among other things, with global labor standards. Regional deliberative forums, for example—regarding economic development in the European Union—bring together different state agents alongside agents from civil society.<sup>83</sup> There is little documentation of how different state agents perceive labor law obligations. The literature tends to maintain the state as a unitary agent, even if it appears to be wearing different hats and be represented by different personnel. Postulating a unitary agent may lead to an assumption that states have a coherent position. Indications from organizational and social theory should caution against such an assumption.<sup>84</sup>

Another intra-state agent is the judiciary. While the focus on the state as a member of an international body, or a party to a trade agreement, points at the legislature and executive branches as representatives of the “state,” courts are also engaged in the transnational web, albeit to a lesser extent. They appear as active agents in transnational cases, although to date with little contribution to proactive action.<sup>85</sup> Their reluctance to open judicial forums to transnational activities relies on multiple rationales, including the deflection of responsibility to the legislature. With the development of domestic legislation requiring

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82. OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES ON RESPONSIBLE BUSINESS CONDUCT (2023), [https://www.oecd-ilibrary.org/finance-and-investment/oecd-guidelines-for-multinational-enterprises-on-responsible-business-conduct\\_81f92357-en](https://www.oecd-ilibrary.org/finance-and-investment/oecd-guidelines-for-multinational-enterprises-on-responsible-business-conduct_81f92357-en) [<https://perma.cc/2TJU-ZZW9>].

83. The deliberative forums were part of the Open Method of Coordination, which was initiated by the Lisbon European Council. Minna Van Gerven, & Sabina Stiller, *The Open Method of Coordination (OMC): A Hybrid Tool of Political Leverage in the Making*, in RESEARCH HANDBOOK ON SOFT LAW 288-303 (Mariolina Eliantonio, Emilia Korkea-aho, & Ulrika Mörth eds., 2023).

84. KITTY CALAVITA, *INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE INS* (2010).

85. Judy Fudge & Guy Mundlak, *Peeling the Onion: On Choices Judges Make in Transnational Labour Litigation*, in SOCIAL JUSTICE AND THE WORLD OF WORK: POSSIBLE GLOBAL FEATURES 249-260 (Brian Langille & Anne Trebilcok eds., 2023) .

domestic companies to develop due diligence norms for overseas operations, domestic courts may be drawn into the web with greater impact.<sup>86</sup> Other proposals point to the need to establish an international judiciary to step in when domestic judiciaries are not capable or willing to take part in the transnational web.<sup>87</sup> Alongside the traditional judicial tribunals, there is a growing cadre of arbitrators engaged in transnational disputes on an *ad hoc* basis.<sup>88</sup>

Beyond the state, we can maintain a territorial focus while recognizing a greater role of localities above and below the nation-state. Regional institutions proliferate in the EU, but also in other regions, including the Americas, East Asia, West and Central Africa, and more. The region may be an effective level that mediates between the jurisdiction of a single state and the challenges presented by global disparities. But rather than just a mid-level compromise, it may also be an essential and distinct player.<sup>89</sup> Regional institutions range from weak (in regulatory terms) and business-oriented (APEC) to the most comprehensive model of the EU, with its claim for a distinct social model that observes and develops workers' rights, and with a range of directives that seek regional harmonization.<sup>90</sup> Such measures advance greater cohesion between the member states but also erect high barriers before non-member states. Regional institutions can develop a thicker web of norms, and may also introduce judicial forums (such as the Inter-American Court of Human Rights, the European Court of Justice, and the European Court of Human Rights). At the opposite end, localities below the state level also play a role, for example, through procurement processes,<sup>91</sup> (establishing) local norms of living

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86. For a first decision on merits in France, Tribunal judiciaire de Paris [TJ] [Paris Judicial Court], Dec. 5 2023, no. 21/15827.

87. Shelley Marshall, *Enforcing the Global Living Wage at International and National Levels Against States and Business* (Feb. 10, 2019), <https://shelleymarshall.net/blog/2019/2/10/xwe7nugfid4h4dkthhfs7r3n17xqcv> [<https://perma.cc/6PRL-SJEK>].

88. There are currently several proposals to increase the use of arbitration as a method to "harden" international and transnational agreements. Clean Clothes Campaign et al., *Model Arbitration Clauses for the Resolution of Disputes Under Enforceable Brand Agreements* (Jan. 2020), [https://globallaborjustice.org/wp-content/uploads/2020/07/ArbProjFinalDraft\\_June-17-2020-1.pdf](https://globallaborjustice.org/wp-content/uploads/2020/07/ArbProjFinalDraft_June-17-2020-1.pdf) [<https://perma.cc/9L9T-BRZU>]; *The Hague Rules on Business and Human Rights Arbitration*, CTR. INT'L LEGAL COOP. (Dec. 2019), [https://www.cilc.nl/cms/wp-content/uploads/2019/12/The-Hague-Rules-on-Business-and-Human-Rights-Arbitration\\_CILC-digital-version.pdf](https://www.cilc.nl/cms/wp-content/uploads/2019/12/The-Hague-Rules-on-Business-and-Human-Rights-Arbitration_CILC-digital-version.pdf) [<https://perma.cc/3NFU-JPJM>]; *The Hague Rules serve as a basis for the, International Labour Arbitration and Conciliation Rules*, INT'L ACCORD (July 2, 2021), [https://internationalaccord.org/wp-content/uploads/2023/02/2021JU\\_1.pdf](https://internationalaccord.org/wp-content/uploads/2023/02/2021JU_1.pdf) [<https://perma.cc/9JWM-EZQ6>].

89. Adelle Blackett, *On Social Regionalism in Transnational Labour Law*, 159 INT'L LAB. REV. 591 (2020).

90. The European "social model" is a fuzzy term that refers to documents, such as the Commission of the European Communities White Paper, and European Social Policy. *Commission of the European Communities, European Social Policy – A way Forward for the Union*, COM (94) 333 final (July 27, 1994). Numerous policies and documents that were written and compiled thereafter are loosely framed as a social model; ROBERT GEYER, *EXPLORING EUROPEAN SOCIAL POLICY* (2013).

91. KAREN JAEHRLING, *COMPARATIVE REPORT: BUYING DECENT WORK: PUBLIC PROCUREMENT STRATEGIES FOR THE IMPROVEMENT OF WORKING CONDITIONS IN THE EUROPEAN SERVICE SECTOR* (2023).

wage,<sup>92</sup> or denizen rights for migrant workers.<sup>93</sup> These local initiatives are of particular importance when they depart from the state norms and improve on them. Localities are, therefore, additional venues for action and an independent source for change.

Business may seem like an infinitely large category, although it is dominated by the informal competitive leadership of the largest multinationals.<sup>94</sup> They are subjects of transnational governance instruments, as noted earlier, but also agents with significant power resources. They take part in developing and applying transnational norms, typically facing the need to demonstrate compliance, deflect attempts of regulation, or promote a business cause to which they deem the improvement of labor rights could be useful (commitment, investment in human capital, reduction in faulty production, responsiveness to diverse clientele, and the like), but also due to managerial belief in developing a fair market economy.<sup>95</sup> Large businesses and business associations act as lobbyists at the WTO,<sup>96</sup> attempt to change domestic (state level) politics in different locations,<sup>97</sup> and are coordinated at the ILO.<sup>98</sup> Domestic business pressures also affect the sustainability of transnational attempts to improve domestic norms.<sup>99</sup> To supplement the focus on the power that business exerts on other agents, it is also important to study attempts to adapt the content of legal norms through internal organizational practices that harness the norms to managerial and business needs.<sup>100</sup>

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92. Municipal living wage proliferate mostly in the global north. For example in the UK, see Mathew Johnson, *Implementing the Living Wage in UK Local Government*, 39 EMP. REL. 840, 840-49 (2017); in the US, see Benjamin Sosnaud, *Living Wage Ordinances and Wages, Poverty, and Unemployment in US Cities*, 90 SOC. SERV. REV. 3, 3-34 (2016). Campaigns for living wages in the global south tend to focus on country-wide measures, or on corporate subsidiaries and contractors in global value chains. See, e.g., *Framework for Fair Compensation*, UNILEVER (2022), <https://www.unilever.com/files/origin/c95e3f7dfc6a2c98912133ea1e60581965fde340.pdf/Unilever%20Framework%20for%20Fair%20Compensation%202022.pdf> [https://perma.cc/J7HL-BZM6] (noting it seeks to be aware of “what is a credible living wage amount for each country in which we have employees”).

93. Rainer Baubock, *Reinventing Urban Citizenship*, 7 CITIZENSHIP STUD. 139 (2003).

94. Share of Global value chains is estimated by different international organizations between 50% to 70% of all global trade. OECD, TRADE POLICY BRIEF, THE PERSISTENCE OF GLOBAL VALUE CHAINS IN AN UNCERTAIN WORLD (Mar. 13, 2024).

95. On the “business case” and personal beliefs as the driving engines for adopting norms of corporate social responsibility, see Archie B. Carroll & Kareem M. Shabana, *The Business Case for Corporate Social Responsibility: A Review of Concepts, Research and Practice*, 12 INT’L J. MGMT. REV. 85, 85-105 (2010); Sebastian Hafenbrädl & Daniel Waeger, *Ideology and the Micro-Foundations of CSR: Why Executives Believe in the Business Case for CSR and how this Affects their CSR Engagements*, 60 ACAD. MGMT. J. 1582 (2017).

96. Arlo Poletti et al., *WTO Judicial Politics and EU Trade Policy: Business Associations as Vessels of Special Interest?*, 18 BRITISH J. POL. INT’L REL. 196 (2015).

97. Monique Garcia, *China’s Labor Law Evolution: Towards a New Frontier*, 16 ILSA J. INT’L & COMPAR. L. 235 (2009).

98. Janice R. Bellace, *The ILO and the Right to Strike*, 153 INT’L LAB. REV. 29 (2014).

99. Youbin Kang, *The Rise, Demise and Replacement of the Bangladesh Experiment in Transnational Labour Regulation*, 160 INT’L LAB. REV. 407 (2021).

100. LAUREN B. EDELMAN, WORKING LAW: COURTS, CORPORATIONS, AND SYMBOLIC CIVIL RIGHTS (2020). Edleman presents a model in which business is both a recipient of norms and an agent that affects the norms.

Finally, the most diverse group is that of civil society, situated between the public and the private spheres. In this group, although distinct from traditional definitions of civil society, international trade unions and the Global Union Federations (GUFs) are key players.<sup>101</sup> Partially overlapping the tripartite model of the ILO, organized labor is innovating in industrial action across borders to exert pressure at one state by targeting clients and suppliers in other locations,<sup>102</sup> or to coordinate labor norms in multiple venues.<sup>103</sup> Large trade unions in the affluent global north have international outreach departments that lend aid in solidarity to trade unions and workers outside their jurisdiction. Outcomes may be grounded in (“soft”) International Framework Agreements,<sup>104</sup> or result in (“hard”) collective agreements based on industrial relations regimes of states.<sup>105</sup> Like business interest groups, labor associations seek to influence the authoring of norms at all levels, although they are commonly less welcome beyond their borders.

In addition to traditional labor associations, a large segment of activity on the transnational web is attributed to organizations of various kinds that can be placed on the private-public continuum. At the private end of the continuum are commercial companies that serve the web of CSR-ESG activities, such as the large accounting firms that lead the auditing industry. Other private agents include consulting firms that aid in ESG reporting.<sup>106</sup> At the other end, for example, are not-for-profit associations that author international codes (SA8000) or develop projects assessing and monitoring labor norms (Fair Labor Association). Many associations in civil society have an exclusive focus on labor issues, whereas others are concerned, *inter alia*, with work as part of a distinct human rights agenda. Examples include organizations representing women, minorities, indigenous communities, people with disabilities, migrant workers, and asylum seekers. These agents open a parallel track of representation, relying on the institutions and strategies of the human rights

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101. Michele Ford & Michael Gillan, *Understanding Global Union Repertoires of Action*, 53 *INDUS. REL. J.* 559 (2022).

102. JAMIE K. MCCALLUM, *GLOBAL UNIONS, LOCAL POWER: THE NEW SPIRIT OF TRANSNATIONAL LABOR ORGANIZING* (2013).

103. Transnational Social Strike Platform, *Strike the Giant! Transnational Organization against Amazon*, *TRANSNAT'L SOC. STRIKE PLATFORM* (Nov. 29, 2019), <https://www.transnational-strike.info/2019/11/29/pdf-strike-the-giant-transnational-organization-against-amazon-tss-journal/> [<https://perma.cc/8MWS-LXVD>].

104. Mark P. Thomas, *Global Industrial Relations? Framework Agreements and the Regulation of International Labor Standards*, 36 *LAB. STUD. J.* 269, 269 (2011).

105. MARK ANNER & LUIS MENDOZA, *BARGAINING FOR DECENT WORK AND BEYOND: TRANSFORMING WORK AND LIVES THROUGH COLLECTIVE BARGAINING AGREEMENTS IN THE HONDURAN MAQUILA SECTOR*, (Ctr. Glob. Worker's Rts., 2022).

106. Private enterprises try to present themselves as part of civil society. For example, Position Green, a private company selling software to improve ESG reporting, is presented on their website as having the objective of—“empower companies to transform and succeed in the evolving landscape of sustainable enterprise.” For other examples of organizations that are market-driven, see Patrick Clark & Ian Hussey, *Fair Trade Certification as Oversight: an Analysis of Fair Trade International and the Small Producers' Symbol*, 21 *NEW POL. ECON.* 220 (2015); Genevieve LeBaron & Jane Lister, *Benchmarking Global Supply Chains: the Power of the 'Ethical Audit' Regime*, 41 *REV. INT'L STUD.* 905 (2015).

movement.<sup>107</sup> Finally, there is also a proliferation of consortia that tie together agents in the various spheres and at different scales.<sup>108</sup>

## B2. Discussion: The agents and the power of grounding

There is a clear interaction between the proliferation of norms and the agents it involves. Whereas the ILO web-weaver adheres to its formal tripartite structure, generating a uniform architecture of norms (authors, process, subjects, enforcement), other norms are designed in different ways and, therefore, require a different set of agents. Conversely, a more pluralistic set of agents leads to new emphases and norms. The tripartite structure of representation at the ILO has the advantage of stability, with clear norms of representation but also some blind spots in its capacity of representation, legitimacy and effective enforcement. New agents can bring new forms of legitimacy, address the concerns of workers who are under-represented in the tripartite system, and proactively develop effective means for enforcement. However, there are no rules barring entry into the realm of transnational labor law, and there is no rule that distinguishes between legitimate representative agents and those whose interests are foreign to labor or not sufficiently aligned with worker's interests or labor's ends.

These tradeoffs do not conclusively establish the density of the web. Pluralist participation fills gaps and helps forming a sheet-cover web, but it also deepens the holes in coverage. Pluralist participation can be associated with synergetic strategies but also with contradictions. *Prima facie*, the entry of new agents should be considered a virtue. But the survey of agents suggests some caution. While the workers' and employers' benches in the tripartite system are in a position of exerting countervailing power, one over the other, other agents may not have the same systemic pressures to negotiate their views. New public agents may be pulled into the transnational web despite their affiliation with ideas of unfettered international commerce. The influx of private agents is indicative of a blooming ESG-CSR industry, which

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107. On the track of human rights strategies and workers' rights, see GAY W. SEIDMAN, *BEYOND THE BOYCOTT: LABOR RIGHTS, HUMAN RIGHTS, AND TRANSNATIONAL ACTIVISM* (2007). The potential for misalignment between human rights and labor strategies is described by Virginia Leary, *The Paradox of Workers' Rights as Human Rights*, in *HUMAN RIGHTS, LABOR RIGHTS AND INTERNATIONAL TRADE* 22 (Lance A. Compa & Stephen F. Diamond eds., 2003); Guy Mundlak, *Human Rights and Labor Rights: Why Don't the Two Tracks Meet?*, 34 *COMP. LAB. L. & POL'Y J.* 217 (2012); Kevin Kolben, *Labor Rights as Human Rights*, 50 *VA. J. INT'L L.* 449 (2009).

108. For example – ISEAL – an IOM flagship initiative to promote ethical recruitment of migrant workers, operates by forging a coalition with government, civil society and private sector agents. ISEAL ALLIANCE, <https://www.isealalliance.org/> [<https://perma.cc/HLH5-79GU>]. It supports the GLOBAL LIVING WAGE COALITION, <https://www.globallivingwage.org/about/members-partners/> [<https://perma.cc/5AVE-3BDP>]. The coalition brings together other partnerships, coalescing the Anker Research Institute, the Global Living Wage Action Network, and a membership of civil society organizations such as Fairtrade, Rainforest Alliance, Social Accountability International, Fair Labor Association, Bonsucro, Fair Trade USA, and more. Each of these is further connected to other labor initiatives and agents. For example, Bonsucro brings together 300 members representing a spectrum of stakeholders—businesses, farmers, traders, and civil society organizations.

is fundamentally blurring the line between its own economic success and its alleged mission.<sup>109</sup> The borderline between private agents and those in civil society is not altogether clear. Agents of different sorts compete for social funding, recognition, reputation, and status in an overcrowded field that is dependent on a limited number of true patrons for workers' well-being. Unlike trade unions, they are not based on membership fees, or held accountable to workers per se (unless contractually obligated to do so). There is a lack of norms regarding representativeness, which is crucial for securing legitimacy.<sup>110</sup> There is a lack of formal or semi-formal norms of accountability.<sup>111</sup> The large accounting firms verify social obligations and performance while shielding themselves and their clients from responsibility.<sup>112</sup>

The tradeoffs are well framed within the “power of grounding,” whereby agents invite or resist outside intervention. Whereas the ideal ILO model creates a well-ordered forum of deliberations between well-defined agents (states and labor/business benches), the non-ideal model presents ongoing competition. Multiple agents are a source of coalition power that enables agents to strengthen their mission by identifying partners, deliberate over shared interests and identify strategies that advance their joint ends.<sup>113</sup> Conversely, it is also a source for competition over resources, political clout and ideas, which can thwart attempts of one agent by another.

#### C1. Describing the TLG model: Processes

There is a vast diversity of processes in the TLG-web. A previous attempt to use Fraser's framework for analysis of the TLG focused on two specific examples—the EU Posted Workers Directive and a WTO dispute.<sup>114</sup> To avoid an over-focused and detailed analysis of individual processes, which carries the price of losing the view of the web as a whole, the multiple nature of transnational processes is surveyed here along two stages: processes concerned with authoring norms in the TLG-web, and processes concerned with their applications.

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109. Tamar Barkay et al., *Anti-trafficking Chains: Analyzing the Impact of Transparency Legislation in the UK Construction Sector*, 49 L. & SOC. INQUIRY 2152-2183 (2024).

110. Mundlak, *supra* note 79; On the importance of legitimacy (or types of legitimacy) in the development of transnational institutions, see Tonia Novitz & Phil Sypris, *Assessing Legitimate Structures for the Making of Transnational Labour Law: The Durability of Corporatism*, 35 INDUS. L. J. 367 (2006).

111. *Das v. George Weston (Can.) Ltd.*, [2018] ONCA 1053 (Can. Ont. C.A.), leave to appeal dismissed, [2019] S.C.C.A. No. 31 (Can.).

112. Jacob B. Lennard & Robin W. Roberts, *The Accounting Profession, Corporate Social Responsibility, and Ethics*, in RESEARCH HANDBOOK ON ACCOUNTING AND ETHICS 35-49 (Marion Brivot & Charles Cho eds., 2023).

113. Amanda Tattresall, *Coalition Power Resources*, in WORKERS, POWER AND SOCIETY: POWER RESOURCE THEORY IN CONTEMPORARY CAPITALISM 118-136 (Jens Arnholtz & Bjarke Refslund eds., 2024).

114. Judy Fudge & Guy Mundlak, *Justice in a Globalizing World: Resolving Conflicts Involving Workers Rights Beyond the Nation State*, in GLOBAL JUSTICE AND INTERNATIONAL LABOUR RIGHTS 121-158 (Yossi Dahan et al. eds., 2016).

*i. Authoring norms - democratic quality:*

Domestic (state-based) law is characterized by a political, preferably democratic, brokerage of competing interests and political positions. In the survey of the TLG web, domestic norms should seem to be of lesser significance. Hepple's image of the TLG as a spiderweb hovers over domestic labor laws. These may be assumed as fixed components, legislated based on the will of the people in each jurisdiction and covering only those who are within that jurisdiction. This caricature of state-based legislative processes misses the fact that domestic legislation is endogenous—it affects and is affected by the TLG. The simplistic account that all those, and only those, who are directly affected by the norms affect their authorship is inaccurate.

On one hand, domestic legislation seeks to satisfy the interests of agents outside the state. The interest in attracting foreign investment plays an important role in a state's will when considering the level of labor protections. This is again an apt illustration of the politics of grounding, where there is a disjuncture between those who are affected by transnational norms and those who prescribe them.<sup>115</sup> There are examples of business groups and associations in the global north that meddle in the domestic politics of the global south to ensure favorable conditions for their benefits from globalization.<sup>116</sup> On the other hand, domestic legislation has a spillover effect on individuals and institutions outside the jurisdiction. This is most evident in immigration and trade law, where the norms established in one country affect employment opportunities and standards in another.

The move from domestic to transnational norms raises difficult questions about the possibility of installing democratic processes without the well-established unit of the nation-state.<sup>117</sup> In the search for democratic units, there are two distinct and highly differentiated forms of democracy: representative and participatory. The SHA model is built on a model of democracy with equal membership for all states and the unique deliberative aspect of tripartite delegations. Other peak-level norms are based on formal legitimacy and input from members, albeit without a matching tripartite structure or deliberations for solutions to conflicting interests. Various international institutions feature consultation processes, but they are generally less formal. All these examples conform to plausible models of transnational democracy, but they are far removed from the workers whose rights are concerned. Very few workers are aware of the ILO or other international organizations engaged in the authoring of norms.

At the other end of the spectrum are grassroots processes. They are likely funnel-web cases that require the active involvement of domestic trade unions and other organizations in civil society. They exist, therefore, in the sporadic examples of worker-driven social responsibility, or in segments of the Better Work projects. Participation usually involves implementation, monitoring,

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115. Jennifer Bair, Mark Anner & Jeremy Blasi, *The Political Economy of Private and Public Regulation in Post-Rana Plaza Bangladesh*, 73 INT'L LAB. REV. 969 (2020).

116. *Supra* notes 95-99 and accompanying text.

117. DANI RODRIK, *THE GLOBALIZATION PARADOX: DEMOCRACY AND THE FUTURE OF THE WORLD ECONOMY* (2011).



and ongoing negotiations, rather than actual authoring of norms. It has educational and empowerment components. Power is not perceived only in negative terms (power over others), but also in the positive sense—making it possible for workers and their allies to act together by defining a joint purpose and the means to reach it.

In the interim, there are instances of workers' engagement in authoring norms, demonstrated by domestic workers' nudging ILO delegations, with the aid of trade unions and NGOs, leading to the Domestic Workers Convention 189. Thereafter, the Convention served as an instrument in campaigning for the improvement of domestic workers' rights in various countries.<sup>118</sup> The birth of Convention 189, as much as its effects, would not have taken place without the network of agents that represented the workers, engaging them in action consistent with the principle of "nothing about us without us."<sup>119</sup> A similar process can be attributed to the Violence and Harassment Convention 190. The active participation of workers' groups and the strong gender dimension of the two conventions suggest that it is strongly tied to the proliferation of agents outside the traditional tripartite system, as discussed in the previous section.

Finally, many instruments in the web, notably those related to free trade, lack representation or participation, other than the fact that states act as representatives of interests, although not exclusively those of labor. Some instruments are even lacking democratic engagement according to the prescripts of Westphalian politics, such as unilateral trade arrangements (GSP), and domestic due diligence legislation.<sup>120</sup> Not only are individuals (and their representatives) merely passive recipients of whatever rights are established at high political echelons in the TLG-web, even their states are not an active party in drafting or applying these instruments.

## ii. *Applying, Monitoring and Enforcing—Hard vs. Soft Norms:*

The literature and practice clearly distinguish between hard and soft forms of law. As in other mapping exercises of the web, it is necessary to substitute a dichotomous distinction with a continuum. "Hard" law refers to clear rights and obligations whose violation the workers can address in a legal process that involves concrete sanctions. At the other end of the continuum, 'soft' law refers to expressions of intention and good-will in which individuals, organizations, and states have no recourse to legal action and therefore no direct sanction or remedy. The epitome of soft measures are instruments devised as part of the self-imposed moral commitment of voluntary CSR. Soft norms do not preclude non-legal sanctions. They may elicit consumer sanctions, affect

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118. Adelle Blackett, *Regulatory Innovation on Decent Work for Domestic Workers in the Light of International Labour Organization Convention No. 189*, 34 INT'L J. COMPAR. LAB. L. & INDUS. REL. 141 (2018); Daniela Cherubini, G.G. Geymonat & Sabrina Marchetti, *Global Rights and Local Struggles: The Case of the ILO Convention n. 189 on Domestic Work*, 11 ARTECIPAZIONE E CONFLITTO 717 (2018); Lorena Poblete, *The Influence of the ILO Domestic Workers Convention in Argentina, Chile and Paraguay*, 34 INT'L & COMPAR. LAB. L. & INDUS. REL. 177 (2018).

119. Eileen Boris & Jennifer N. Fish, "Slaves no more:" *Making Global Labor Standards for Domestic Workers*, 40 FEMINIST STUD. 411 (2014).

120. Debadatta Bose, *Decentring Narratives Around Business and Human Rights Instruments: An Example of the French Devoir de Vigilance Law*, 8 BUS. & HUM. RTS. J. 18 (2023).

procurement decisions, and make a difference in corporate decision making by nurturing a corporate habitus that draws on internal organizational commitments, the drafting of guidelines and codes, the development of clear ESG targets, and cooperation with NGOs, trade unions and communities. But, to date, these self-imposed norms have not amounted to a legal cause of action for workers whose work experience is not aligned with those commitments, even when they are suffering from very poor working conditions. This is not because there is something innate in the fact that moral commitments are outside the hard legal domain, but because the transnational legal system legitimizes their classification as such, despite jurisprudential possibilities in public and private law to harden them.<sup>121</sup> A fundamental concern in maintaining CSR norms on the soft end of the continuum is that once sanctions are applied to soft commitments, corporations will withdraw their commitments altogether. It is therefore assumed that carving a domain of soft commitments enables the expansion of the web, over and above the fundamental labor principles of the ILO. This expansion is expected to create a culture of ex-ante prevention, rather than follow the traditional regulatory pattern of punishing violations.

In between the paradigmatic “hard” and “soft” are (a) very general norms, (b) quasi-legal processes, such as reporting requirements (but with no substantive requirement attached), and (c) sanctions that do not address individual grievances but exert general legal pressure for change. The following examples demonstrate variations along the continuum.

Domestic labor law is structured around hard norms that directly obligate employers. Their contribution to the transnational web is that they ought to be applied to migrant workers.<sup>122</sup> Moreover, in addition to passive rights of equality for migrant workers, states have developed targeted and proactive instruments to address the worst abuses, such as trafficking.<sup>123</sup> In situations of offshoring, trade unions can draw on domestic law while considering the many caveats regarding the permissible topics for bargaining and industrial action.<sup>124</sup> Regional courts, notably the European Court of Justice and European Court of Human Rights, but also the Inter-American Court of Human Rights, can issue decisions that either address individual claims or require domestic courts to issue remedies.<sup>125</sup> The opportunities for individual claimants to reach these

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121. FUDGE & MUNDLAK, *supra* note 85; For a general argument on the malleability of legal components, see Katharina Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality*, 11 ACCT. ECON. & L. 1 (2019).

122. Guy Mundlak & Hila Shamir, *The Global Governance of Domestic Work*, in MIGRATION AND CARE LABOUR: THEORY, POLICY AND POLITICS 192-212 (Bridget Anderson & Isabel Shutes eds., 2014).

123. For a survey of state legislation and a model for future legislation, see: UNODC, MODEL LEGISLATIVE PROVISIONS AGAINST TRAFFICKING IN PERSONS (2020), available at [https://www.unodc.org/documents/human-trafficking/2020/TiP\\_ModelLegislativeProvisions\\_Final.pdf](https://www.unodc.org/documents/human-trafficking/2020/TiP_ModelLegislativeProvisions_Final.pdf) [<https://perma.cc/LE8N-VD9W>].

124. James Atleson, *The Voyage of the Neptune Jade: The Perils and Promises of Transnational Labor Solidarity*, 52 BUFF. L. REV. 85, 85 (2004); Ashwini Sukthankar, *Global Organizing and Domestic Constraints*, in RESEARCH HANDBOOK ON TRANSNATIONAL LABOUR LAW 37-50 (Adelle Blackett ed., 2015); JAMIE MCCALLUM, GLOBAL UNIONS, LOCAL POWER: THE NEW SPIRIT OF TRANSNATIONAL LABOR ORGANIZING (2013).

125. Judy Fudge, *Constitutionalizing Labour Rights in Europe*, in THE LEGAL PROTECTION OF HUMAN RIGHTS: SKEPTICAL ESSAYS 244-67 (Tom Campbell, Keith Ewing & Adam Tompkins eds.,

Courts, or to obtain direct forms of reparations, are *de jure* or *de facto* limited and cannot serve as a common form of redress. The OECD's contact points are open for individuals' claims regarding the violation of domestic rights, but the remedial power is not "hard" in the common domestic form, as it is not a judicial tribunal.<sup>126</sup> Agents in contact points can instigate a dialogue to remedy unwarranted business practices, issue recommendations, and follow up on implementation.

Reliance on domestic norms to "harden" soft norms can be conducted through two domestic judicial channels: transnational litigation and reliance on domestic reporting and due diligence requirements. The former has been rarely used and even less so proven effective, altogether marked by scarce, even if important, exceptions.<sup>127</sup> Underlying the limitation of transnational litigation is the abovementioned assumption that self-imposed moral obligations remain outside the juridified sphere. To the extent that they create legal rights, it is between adjacent nodes in global value chains. Familiar cases illustrating such obligations concern the relationship between consumers and leading brands.<sup>128</sup> A blind spot in the literature is a systematic study of situations in which contracting agents along the value chain litigate (or otherwise act in a legal manner, e.g., by commercial arbitration) if their contracts are terminated for reasons of non-compliance with private corporate norms. Beyond the general agreement that private self-regulation is an expression of good will, judges are often reluctant, with few exceptions, to accept transnational claims. Their reasons involve arguments rooted in private international law (the choice of forum and the choice of law), in substantive norms of private law (such as the principle of privity in contract), and in judicial deference to legislatures and a constitutional reluctance to open the gates of the judiciary to transnational claims.<sup>129</sup>

Shifting the weight from judicial to legislative innovation, states have enacted a growing number of domestic laws that require local companies with international activity to provide information on their labor (and environmental) policies, and, more recently, to develop a sustainability program to address these concerns. Legislation that is limited to requirements for disclosure and transparency has led to weak remedies which are aimed at penalizing non-compliant companies and offer little or no remediation power for individuals.

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2011); Virginia Mantouvalou, *Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation*, 13 HUM. RTS. L. REV. 529 (2013); Miguel F. Montejo & Canessa Montejo, *Labor Human Rights and the Jurisprudence of the Inter-American Court of Human Rights*, in RESEARCH HANDBOOK ON LABOUR, BUSINESS AND HUMAN RIGHTS LAW 334-357 (Janice R. Bellace & Beryl ter Haar eds., 2019).

126. Kari Otteburn & Axel Marx, *Seeking Remedies for Corporate Human Rights Abuses: What is the Contribution of OECD National Contact Points?*, in RESEARCH HANDBOOK ON GLOBAL GOVERNANCE, BUSINESS AND HUMAN RIGHTS, 229-253 (Axel Marx, Geert Van Calster, Jan Wouters, Kari Otteburn, & Diana Lica eds., 2022).

127. FUDGE & MUNDLAK, *supra* note 85.

128. A prominent successful case is: *Kasky v. Nike, Inc.*, 27 Cal.4th 939 (4th Cir. 2002). However, in a number of cases there are also notable drawbacks; *see, e.g., Barber v. Nestlé USA, Inc.*, 154 F. Supp. 3d. 954 (3d Cir. 2015).

129. FUDGE & MUNDLAK, *supra* note 85.

Moreover, their effect on the business practices of the companies that are covered is limited.<sup>130</sup>

Alongside the slim requirements in disclosure legislation, there is a shift to legislation that requires business to conform with procedural and substantive due diligence.<sup>131</sup> This development is an apt demonstration of a multiscalar instrument, as it involves both transnational and domestic developments.<sup>132</sup> Three strands uphold this conceptual framework: the UN Guiding Principles on Business and Human Rights (2011, articles 17-24),<sup>133</sup> the ILO's Tripartite Declaration of Principles Concerning Multinational Enterprise and Social Policy (most recent update 2022),<sup>134</sup> and the OECD's Guidelines for Multinational Enterprises (most recent update 2023).<sup>135</sup> The UN Guiding Principles remain fixed on the 4 fundamental labor standards, but the ILO expands the field by emphasizing employment promotion, job security, training and employment conditions (wages, benefits, health and safety, and access to remedies). The OECD Guidelines add occupational health and safety as well as effective means to convey information to workers and their representatives. The instruments and follow-up reports acknowledge the complementarity between them and refer one to the other. Domestic legislation, notably the French Vigilance legislation, acknowledges the umbrella of transnational instruments, as does the enactment of a European directive on Corporate Sustainability Reporting (CSRD), followed by the Corporate Sustainability Due Diligence Directive (CSDDD).<sup>136</sup> The *de facto* use of comprehensive due diligence requirements is still embryonic. There are problems with the legal process that can explain why domestic legislation elicited very few lawsuits, and a handful of decisions at most, even when assigning civil liability and prescribing hard remedies.<sup>137</sup>

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130. Barkay et. al., *supra* note 109; AMY SINCLAIR & FREYA DINSHAW, PAPER PROMISES? EVALUATING THE EARLY IMPACT OF AUSTRALIA'S MODERN SLAVERY ACT (2022).

131. I classify this development under processes, rather than norms, because it does not generate independent norms, but draws on those developed elsewhere. Whether due diligence norms evolve into an independent source of norms making, akin to norms in the CSR/ESG realm, remains to be seen.

For a useful list of relevant instruments, see BUS. AND HUM. RTS. IN L., <https://www.bhr-law.org/> [<https://perma.cc/2QDQ-FTE8>].

132. Surya Deva, *Business and Human Rights: Alternative Approaches to Transnational Regulation*, 17 ANN. REV. L. & SOC. SCI. 139 (2021).

133. UN, GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS (2011), [https://www.ohchr.org/sites/default/files/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](https://www.ohchr.org/sites/default/files/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf) [<https://perma.cc/X9AF-8GH6>].

134. ILO, TRIPARTITE DECLARATION OF PRINCIPLES CONCERNING MULTINATIONAL ENTERPRISE AND SOCIAL POLICY (6th ed., 2022), <https://www.ilo.org/publications/tripartite-declaration-principles-concerning-multinational-enterprises-and-3> [<https://perma.cc/LZ7C-TN5A>].

135. OECD, GUIDELINES FOR MULTINATIONAL ENTERPRISES ON RESPONSIBLE BUSINESS CONDUCT (2023).

136. The first Directive in the field is: Directive 2013/34, 2013 O.J. (L 182) 19 (EU), of the Corporate Sustainability Reporting Directive (most recent change entered into Force – Jan. 5, 2023). This Directive seeks to improve reporting requirements and increase transparency. The second, Council Directive 2024/1760, 2024 O.J. (EU), on Corporate Sustainability Due Diligence, aims at ratcheting up the substantive commitment to responsible behavior.

137. Nicolas Friedlich, *Tempered Vigilance: Realizing Effective Remedy for Rights-holders under the French Duty of Vigilance Law*, 64 VA. J. INT'L L. 609 (2023).

Such schemes have been criticized for their lack of institutional design to grant simple access to workers and their representatives.<sup>138</sup>

Shifting from the obligations of businesses to those of states, harder law can be found in the power of the ILO to impose sanctions on non-compliant member states through the procedure set in its constitution. Despite the black-letter possibility of such sanctions,<sup>139</sup> its use demonstrates its *de facto* weakness in action.<sup>140</sup> Like the growing reliance on reporting for direct business responsibility, international norms are, for the most part, subject to reporting requirements. Even when extending the observance of compliance with international standards to other international agencies, such as the Committee on Economic, Social and Cultural Rights, (CESCR), reporting and observations remain the dominant instrument of enforcement, leaning heavily to the soft end of the continuum.<sup>141</sup>

Trade-related instruments provide the hard sanctions, which are absent from public international law. Consequently, there are numerous references to trade law as the juridification of international labor standards, despite the WTO's view that trade and labor are interrelated but separate and distinct.<sup>142</sup> Consequently, the linkage between trade and labor is, for the most part, incorporated in unilateral, bilateral or multilateral trade agreements. Critically, such agreements may include arbitration clauses or other methods of dispute resolution. These may be invoked in instances of violating a "social clause" that may require a host of state responsibilities, ranging from observing their domestic labor legislation, to demands for upgrades of domestic labor standards, to the benchmark of international labor norms. As noted, such benchmarks typically refer to the fundamental ILO labor standards, but, over time, they have developed to include a somewhat more extensive list of norms. The extent of arbitration processes conducted within this framework is unclear.

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138. SHELLEY MARSHALL ET AL., *MANDATORY HUMAN RIGHTS DUE DILIGENCE: RISKS AND OPPORTUNITIES FOR WORKERS AND UNIONS* (2023).

139. ILO, *CONSTITUTION*, *supra* note 7.

140. Brian Langille, *The Curious Incident of the ILO, Myanmar and Forced Labour*, in *RESEARCH HANDBOOK ON TRANSNATIONAL LABOUR LAW* 509-522 (Adelle Blackett & Anne Trebilcock eds., 2015). A different indication of "hard" power can be observed in the possibility of referral to the International Court of Justice. This avenue was utilized recently (November 2023) in the referral of an ongoing dispute within the ILO over the status of the right to strike. Int'l Ct. Just., Request for an Advisory Opinion on the Right to Strike Under ILO Convention No. 87, 2023 General List No. 191 (Nov. 13, 2023), available at <https://www.icj-cij.org/sites/default/files/case-related/191/191-20231110-req-01-00-en.pdf> [<https://perma.cc/Q37R-JAWX>]. However, this unprecedented referral does not follow a particular claim on the violation of rights and should be viewed as an idiosyncratic form of adjudicating a fundamental organizational dispute within the ILO regarding the interpretation of its own standards.

141. UN, *MANUAL ON HUMAN RIGHTS MONITORING* (Rev. ed., 2011), available at <https://www.ohchr.org/en/publications/policy-and-methodological-publications/manual-human-rights-monitoring-revised-edition> [<https://perma.cc/W55Z-7GKE>]

142. Gabrielle Marceau, *Trade and Labour*, in *THE OXFORD HANDBOOK OF INTERNATIONAL TRADE LAW* 539-570 (2009). Marceau demonstrates that despite the decision of the Singapore Ministerial meeting to maintain a division of labor between the WTO and the ILO, there are possibilities within the GATT to address free trade that relies on violations of labor's international rights.

A high-visibility arbitration process regarding garment workers in Guatemala has demonstrated the making of a hard law regime, but has also revealed its structural weakness, beyond the weak protective outcomes of the particular case.<sup>143</sup> More recently, trade agreements have been incorporating rapid response mechanisms, used to some extent by social stakeholders. These can be found in the USMCA,<sup>144</sup> as well as in recent EU trade agreements.<sup>145</sup> Although according to these trade instruments, the state is responsible for representing the interest of labor, a key challenge is to involve the affected workers and their direct representatives in filing grievances, as well as in the process of investigation and decisions on appropriate remedies. Despite these difficulties, there are preliminary attempts in this regard under the USMCA and the EU Single-Entry Point for filing trade-related complaints.<sup>146</sup> As is to be expected, though, the design of accessibility and efficacy in such instruments is yet to be perfected. However, they are regarded as better than trade-related sanctions in the form of import bans, which are handled by trade officials alone, with an eye to securing labor-related obligations without involving the stakeholders in the process.<sup>147</sup>

This short inventory of measures contains the potential for further complexity. Even when there is a hard obligation, there are competing ideas about the appropriate strategy for efficacy. One approach emphasizes the need for hard sanctions, whereas the other emphasizes dialogue. At times, this distinction appears in crude comparisons between EU (dialogue) and US (sanctions) free trade instruments.<sup>148</sup> It also appears in debates on the efficacy of trade

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143. Tequila J. Brooks, *Enforcement of Labor Standards in Trade Agreements: The Case of Guatemala*, in HANDBOOK ON GLOBALISATION AND LABOUR STANDARDS 314-325 (Kimberly A. Elliott ed., 2022).

144. USMCA, *supra* note 69, at Chapter 31 Annex A.

145. Council Regulation (EC) 381/2001 of Feb. 26, 2001, Rapid Reaction Mechanism, 2001 O.J. (L 57). The European model follows a 15-point action plan that was developed to promote sustainable trade, *See* Commission Non-Paper, Feedback and Way Forward on Improving the Implementation and Enforcement of Trade and Sustainable Development Chapters in EU Free Trade Agreements, Feb. 26, 2018 (the 15-point action plan). The European approach seeks to expedite response to complaints and the enforceability of sustainability-related commitments in free trade agreements. *Single Entry Point*, EUR. COMM'N, <https://trade.ec.europa.eu/access-to-markets/en/content/single-entry-point-0> [https://perma.cc/S6EQ-ZNTT] (last visited July 20, 2024).

146. Stakeholders involvement and an emphasis on organizations in civil society receive a prominent place in the European trade-sustainability nexus. JANA TITIEVSKAIA, SUSTAINABILITY PROVISIONS IN EU FREE TRADE AGREEMENTS (2021), available at [https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/698799/EPRS\\_BRI\(2021\)698799\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/698799/EPRS_BRI(2021)698799_EN.pdf) [https://perma.cc/J96E-KWG5].

147. Matthew M. Higgins, *Closed Loophole, Open Ports: Section 307 of the Tariff Act and the Ongoing Importation of Goods Made Using Forced Labor*, 75 STAN. L. REV. 917 (2023). (Demonstrating ineffective coverage and implementation. It is important to note that bans are used with regard to indications of forced labor, and do not apply to infringement of other norms, even those included in the fundamental principles). Temisan Fanou, *Literature Review: Forced Labour Import Bans* (GFLC Research Project, 2023). (reviewing literature that notes unintended consequences that harm labor).

148. Tobias Leeg, *Negotiating Sustainable Trade: Explaining the Difference in Social Standards in US and EU Preferential Trade Agreements*, 24 CONT. POL. 398 (2018).

bans,<sup>149</sup> and is a recurring debate about the hardening of private self-regulation by multinationals.<sup>150</sup>

To complete the system developed for the “hardening” of soft norms, even the epitome of soft norms—CSR-ESG obligations—has produced a vast industry that assesses compliance with private self-regulation. First, demonstrating the power of recognition, there are incentives for corporations to conduct internal monitoring, attempting to demonstrate credibility by using reputable accounting firms for the audit.<sup>151</sup> Second, to generate further credibility, companies subscribe to external codes and standards that involve certifications, ranging from comprehensive industry-wide codes with business reputation, such as ISO, to idiosyncratic labor-focused codes of international NGOs.<sup>152</sup> Third, shareholder activism, with particular emphasis on some institutional investors (such as social pension funds), uses corporate governance to encourage corporate displays of responsibility.<sup>153</sup> Finally, financial institutions rely on reporting and due diligence requirements as a means of risk management when funding new projects in need of financial support.<sup>154</sup>

At the time of writing, there are also several funnel-type examples of enforceable brand agreements that seek to overcome the weakness of private voluntary CSR regulation and soft declaratory international framework agreements. The design of enforceable brand agreements, such as the Bangladesh Accord, brings them close to worker-driven social responsibility. Enforcement is made possible through layers of obligations combining international agreements, that are concluded with brands, and domestic agreements that are made with local trade unions. Each brand agreement is designed differently, but they share the need to identify multiscale solutions that involve both transnational

149. For the critique of import bans, see note 147.

150. *Das v. George Weston Limited*, [2017] ONSC 4129, ¶¶ 456, 525, in which Justice Perell presents strategic concerns about the effects of hardening soft laws. For a similar claim in support of a voluntary approach: Nikolay A. Dentchev, Mitchell Van Balen & Elvira Haezendonck, *On Voluntarism and the Role of Governments in CSR: Towards a Contingency Approach*, 24 *BUS. ETHICS EUR. REV.* 378 (2015); Benedict Sheehy, *Defining CSR: Problems and solutions*, 131 *J. BUS. ETHICS.* 625 (2015). For a critique of this position, see David J. Doorey, *Lost in Translation: Rana Plaza, Loblaws, and the Disconnect Between Legal Formality and Corporate Social Responsibility* 4245 (2018) (Unpublished Paper) available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3265826](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3265826) [<https://perma.cc/7VM2-S9L5>].

151. Aladdin Dwekat et al., *The Role of the Audit Committee in Enhancing the Credibility of CSR Disclosure: Evidence from STOXX Europe 600 members*, 31 *BUS. ETHICS ENVIRON. RESPONSB.* 718 (2022); John Abernathy et al., *Literature Review and Research Opportunities on Credibility of Corporate Social Responsibility Reporting*, 32 *AM. J. BUS.* 24 (2017).

152. Lars Moratis, *The Credibility of Corporate CSR Claims: a Taxonomy Based on ISO 26000 and a Research Agenda*, 28 *TOTAL QUAL. MANAG. BUS. EXCELL.* 147 (2017); Federica Murmura, Laura Bravi & Federica Palazzi, *Evaluating Companies' Commitment to Corporate Social Responsibility: Perceptions of the SA 8000 Standard*, 164 *J. CLEAN PROD.* 1406 (2017).

153. ERIKA GEORGE, *INCORPORATING RIGHTS: STRATEGIES TO ADVANCE CORPORATE ACCOUNTABILITY* 201–58 (2021); Emma García-Meca & María Consuelo Pucheta-Martínez, *How Institutional Investors on Boards Impact on Stakeholder Engagement and Corporate Social Responsibility Reporting*, 25 *CORP. SOC. RESPONSB. ENVIRON. MANAG.* 237 (2018).

154. OECD, *DUE DILIGENCE FOR RESPONSIBLE CORPORATE LENDING AND SECURITIES UNDERWRITING: KEY CONSIDERATIONS FOR BANKS IMPLEMENTING THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES* (2019).

and local agents.<sup>155</sup> There are only a few examples, therefore distancing them from the model of a sheet-cover web, but they are used as a benchmark for well-grounded, hard and promising forms of voice.

## C2. Discussion: Processes and the power of credibility

The ideal SHA model prioritizes a set of assumptions that underlie its fixed process. These include the acceptance of the nation-state as the basic unit, which, in turn, gives political legitimacy to the ILO and also reinforces the nation-state as the important agent responsible for compliance and implementation of international norms. Second, the model is based on the fixed tripartite structure underlying the activities of the ILO. Third, there are possibilities for hard enforcement although the system rests first and foremost on voluntary compliance, sharing of knowledge, inquiry regarding the facts (commissions of inquiry),<sup>156</sup> and the development of legal ideas and concepts (ILO jurisprudence as written by its committees).<sup>157</sup>

An alternative framework is needed to understand the dynamics of the non-ideal TLG-web.<sup>158</sup> Such a model would include workers' active participation in negotiating their rights, with multiple agents who voice their interests. The non-ideal model opens opportunities to empower the workers themselves rather than delegate the task to states. Workers can then monitor, report, reach out, and designate their allies from within the vast range of agents described in the previous section and determine whether a juridified process or dialogue and engagement best addresses their needs. The state remains an active agent of change, supported by international organizations and financial institutions. Therefore, the TLG-web develops in two parallel streams, nudging domestic regimes to lift labor standards and, at the same time, empowering workers to act. Business is likely to comply for reasons related to the power of credibility. Whether for risk management or for fostering true change in practice, business is both a subject and a proactive agent in developing the TLG-web of labor norms.

Fragments of this non-ideal model are present in the various processes, and they deviate from an ideal SHA model in every respect. They do not rely exclusively on the broad terms of fundamental principles, but rather add localized

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155. Ben Vanpeperstraete, *The Rana Plaza Collapse and the Case for Enforceable Agreements with Apparel Brands*, in *TRANSNATIONAL LEGAL ACTIVISM IN GLOBAL VALUE CHAINS* 137–69 (Miriam Saage-Maaß et al. eds., 2021); JEREMY BLASI & JENNIFER BAIR, *AN ANALYSIS OF MULTIPARTY BARGAINING MODELS FOR GLOBAL SUPPLY CHAINS* (2019); Mark Anner, *Worker-Driven Co-Research in Global Supply Chains: Three Studies from Latin America*, 33 *NEW LABOR F* 32 (2024); Kelly Pike, *Voice in Supply Chains: Does the Better Work Program Lead to Improvements in Labor Standards Compliance?*, 73 *INT'L LAB. REV.* 913 (2020); Judy Fudge & Genevieve Lebaron, *Regulatory Design and Interactions in Worker-Driven Social Responsibility Initiatives: The Dindigul Agreement*, 163 *INT'L LAB. REV.* 575 (2024).

156. ILO Constitution, *supra* note 7, arts. 26–34.

157. ILO, *COMPILATION OF DECISIONS OF THE COMMITTEE ON FREEDOM OF ASSOCIATION* (6th ed, 2018), available at <https://normlex.ilo.org/dyn/normlex/en/?p=1000:70001:::NO> [<https://perma.cc/35Q7-53WL>]; ILO, *General Observations adopted by the Committee of Experts on the Application of Conventions and Recommendations* (May 25, 2024), available at <https://www.ilo.org/resource/other/general-observations-adopted-committee-experts-application-conventions-and> [<https://perma.cc/8FZP-UD3M>].

158. Laura Valentini, *supra* note 24.



norms that give them concrete substance and prescribe details of decent work. They involve multiple agents. They draw on the direct support and monitoring of workers' representatives (trade unions or NGOs) and involve the indirect influence of external stakeholders, such as financial institutions or consumers. They deploy multiple processes and integrate different levels of hierarchy, dispute resolution, and grievance mechanisms. They link trade or other financial benefits with strong commitments by the business beneficiaries, who are obligated to report, host external monitoring agencies, cooperate with local and international agents of voice, and develop a due diligence policy. Comprehensive examples that rely on multiple forms are all of the funnel-web archetype. They are multiscalar but limited in coverage: territorial, sectoral, occupational; or focused on a given set of rights such as the right to health and safety.

The overview of the non-ideal web model complicates the simple dichotomy between hard and soft law. Nevertheless, the mapping of the TLG-web points to an interaction between two axes: one aligns norms on a spectrum according to the degree of specificity (general vs. detailed norms); the other aligns them according to the multiple meanings of soft and hard. This interaction is demonstrated on a matrix, depicted in Table 1. Although the demanding cell of hard and specific norms is of the funnel-web type, the other cells relax one of two requirements, or both, and provide an institutional configuration that conforms better with the orb-web type.

	Detailed and demanding	General Claims
Hard	<p>Transnational litigation (weak outcomes and scarce)</p> <p>Worker-driven social responsibility and enforceable brand agreements (strong outcomes but scarce)</p> <p>Multiscalar labor activism across borders (developing bargaining power rather than juridified power)</p> <p>Unilateral imposition of norms (e.g., US trafficking report; significant impact but difficult to reconcile with democracy)</p>	<p>State obligations in trade agreements</p>
Soft	<p>Private self-regulation (common)</p> <p>Reporting and due diligence requirements (recent addition to the web that may transform into hard norms in future application)</p>	<p>Public norms aimed at business</p> <p>Public international law with processes of reporting</p> <p>International framework agreements</p>

Table 1: Mapping Norms and Processes in the Multiscalar Web

## V. Bringing the norms, agents, and processes together: Assessing the TLG-web

### A. Presenting a New Trilemma

The SHA presented, conceptually, a simple method of global regulation. It was based on an ideal model which did not fully materialize over time. The evolution of the TLG system does not offer a “model” counter-response. It is by nature uncoordinated, and not centrally planned. It is an outcome of power relations that requires identifying an effective response to the escape route globalization presents from state-level protective labor norms. At the global level, labor possess limited power resources. Labor’s structural (market) power within the TLG system is low; institutional power in the TLG still relies heavily on the norms associated with the ILO; and organizational power relies, for the most part, on the power of trade unions that learn to externalize their activities and achievements outside the borders of a home state. Legitimacy power is garnered by trade unions and NGOs that invoke sympathy and concern for the plight of workers worldwide. For human rights campaigns, putting workers’ difficult conditions on display may suffice, but this strategy falls short of an organizing model that builds power at the grassroots.<sup>159</sup> Only some NGOs and social movements have learned to engage workers in an organizing model like that of trade unions.<sup>160</sup>

The new system cannot capture all the aims and objectives associated with the ideal SHA model. Drawing on Rodrik’s trilemma, claiming that democracy, national sovereignty and global economic integration are incompatible,<sup>161</sup> I suggest an analogous trilemma regarding the development of the TLG-web. It is impossible to maintain significant democratic legitimacy (orb) with (funnel) depth and global (sheet-cover) jurisdiction, all of which are required for the transformative development of a comprehensive, monitored, and enforced labor code. The trade-offs are clear.

On one hand, international labor standards potentially enjoy broad coverage, but, as a result, they are more difficult to achieve for instrumental reasons, such as the heterogeneity of the economic conditions of states and persistent conflicts between employers’ and workers’ interests. The authoring of international standards is based on the democratic principle of state membership, but not on the more demanding participatory democracy of the workers themselves. The standards are difficult to enforce and compliance relies on other instruments and processes outside the ILO.

On the other hand, attempts to develop worker-driven social responsibility (WSR) enjoy grassroots legitimacy from the workers and are gaining legitimacy from businesses and states, with effective enforcement and compliance measures. They are best illustrated by the success of the Coalition of

159. See GAY W. SEIDMAN, *supra* note 107.

160. On the meaning of an organizing model in its traditional labor context: GUY MUNDLAK, *ORGANIZING MATTERS: TWO LOGICS OF TRADE UNION REPRESENTATION* (2020). On the use of organizing strategies by NGOs outside the trade union movement: JANICE FINE, *WORKER CENTERS: ORGANIZING COMMUNITIES AT THE EDGE OF THE DREAM* (2006).

161. DANI RODRIK, *supra* note 117.

Immokalee Workers,<sup>162</sup> a domestic venture, strongly involved in the protection of migrant labor. Although its original mission was to avoid slavery, it shifted to a broader proactive agenda of promoting “fair food.” Similarly, it started with workers picking tomatoes in Florida but gradually moved to adjacent states. This growth of the funnel-web remains within the boundaries of a limited agricultural sector. A different institution associated with WSR, the Bangladesh Accord,<sup>163</sup> is transnational, but is limited to one sector (garments) in a single state (Bangladesh), and has limited engagement with the workers themselves. Consequently, even funnel examples demonstrate punctured webs that do not fully respond to all the parameters that would be expected from an alternative to the ideal model, despite the integration of plural norms, agents, and processes as demonstrated throughout the previous sections. At their best, they provide a model that can be incrementally extended, as demonstrated by the gradual expansion of the Coalition of Immokalee Workers to new crops and the replication of the Bangladesh Accord in the garment sector of Pakistan.

Taking ILO standards and WSR as two diametrically different instruments in the TLG-web, I return to the questions posed at the outset. First, is there still a spider? The ongoing activity of the ILO, with its focus on the five fundamental labor principles (following the addition of occupational safety and health in 2022), remains the center of an orb-web despite the slow development of new conventions and recommendations. The authoring of norms is complemented by a host of projects under the umbrella of “decent work.” By contrast, WSR confirms the need for a refined metaphor in the vein of the funnel-web. It is an apt example of multiple agents that draw on different norms and conceptual framings as they develop processes that traverse scales throughout the value chain. In the competition between these two images, it seems that there would be a real disagreement about the efficacy of attempting new conventions compared to building grassroots coalitions. Which carries more weight, and where do labor-related violations slip through the spider’s webs? The easy answer would be that the two forms are non-exclusive and that there is much merit in trying to foster change at all levels, from the tomato crops in Florida to the ILO’s General Conference in Geneva. However, Advocating multiple developments casts doubt on the idea that a single spider is weaving the transnational web. Only a few decades ago, the image of the ILO as the spider would have gone unchallenged, regardless of whether it was considered a strong or weak agent, but now there are reasons to consider whether the web is growing outside the control and supervision of a central agent.

An inconclusive attempt to search for the spider leads to the second question: Is there a web, or merely a set of independent and unrelated developments?

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162. THE COALITION OF IMMOKALEE WORKERS, <https://ciw-online.org/> (last visited Jul. 31, 2024); Manoj N. Dias-Abey, *Mobilizing for Farmworker Rights in an Era of Shifting Legal and Governance Opportunities*, 2 MICH. J.L. & SOC’Y 1 (2023); Greg Asbed & Steve Hitov, *Preventing Forced Labor in Corporate Supply Chains: The Fair Food Program and Worker-Driven Social Responsibility*, 52 WAKE FOREST L. REV. 497 (2017).

163. Juliane Reinecke & Jimmy Donaghey, *Creating Representation through Industrial Democracy versus CSR: The Accord and Alliance as a Natural Experiment*, in STITCHING GOVERNANCE FOR LABOUR RIGHTS: TOWARDS TRANSNATIONAL INDUSTRIAL DEMOCRACY? 119–45 (2023).

The positive view of a multiscale transnational governance supports the idea that the peak-level writing of standards and field-level practice of the standards are complementary.<sup>164</sup> Institutional innovation compensates for what may be insurmountable limitations and blind spots of any one ideal design. None of these innovative reforms come with a blueprint for comprehensive change. Rather, different types of power coalesce to form a sheet-cover web.

The critical view suggests that, rather than complementarity, the emerging web is designed around multiple escape routes or loopholes. First, the power of the ILO is compromised by declining representativeness, legitimacy, and authority of its traditional agents. The “power of harmonization” is translated into a competition that further challenges the exclusive centrality of the ILO, all the while offering alternative frameworks of reference. Alongside its power of expertise, norms are being designed on parallel tracks in the UN High Forum (the SDGs), in the OECD (norms for multinationals), in regional forums (notably the EU), in business (ISO standards), and in civil society (Global Living Wage Coalition). As negotiations over standards in the ILO become lengthy and difficult to manage on the foundations of a well-ordered tripartite system, there are ways to circumvent the political power of the ILO. It is no longer clear that a stable labor compromise regarding platform work, new technology (such as artificial intelligence), or obligations along the many tiers of global value chains will first emerge from the ILO.<sup>165</sup> More powerful agents, whether on the business side or on the scale of inter-state competition, may benefit from the weakening of a dominant player and the opening of parallel paths of action. Similarly, it is reasonable to expect that business will prefer to deal with political and market-oriented officials in trade and commerce departments, rather than traditional labor advocates.

Second, the closely-knit design of the Coalition of Immokalee Workers serves tomato pickers. This institutional design can serve as a model for other workers, whether farm workers growing other crops in the United States, workers outside the farming sector, or farm workers abroad, and it may also remain an exceptional funnel on the web. While funnels offer depth, they can also serve as escape routes by pushing production to other sites, such as other states or locations. This is the common argument of escape and loopholes, underlying accounts of a global “race to the bottom” and corporate forum shopping. However, there are also other forms of escape, for example, by offsetting the success of tomato pickers with cost-cutting pressures in other ingredients used by the fast-food chains: pickles, lettuce, meat and poultry, eggs and milk, or wheat for the buns. If fast food chains now exert more pressure on their cattle suppliers, the virtues of the system for the workers in one branch of the supply chain may be a vice for those in another. Patchy coverage is typical of the web, with ever-looming implications for efficacy. For example, consumer pressure is considered a form of enforcement that induces businesses to

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164. Guy Mundlak, *In Search of Coherence?* 154 INT'L LAB. REV. 79 (2015).

165. See for example European legislation that serves as the engine of innovation in some of these areas: Council Directive 2024/1760, 2024 O.J. (EU), on Corporate Sustainability Due Diligence. This is not to claim that the EU legislation prescribes the perfect response to the current challenges in the labor market. But it does point at the fact that cutting edge labor norms are developed outside the ILO.

demonstrate their power of credibility. Yet, empirical studies are not fully supportive of consumers as enforcers, showing that consumers provide an uneven layer of monitoring and supervision.<sup>166</sup> Some want fair coffee. Others want social footwear. But most socially aware consumers do not develop a comprehensive social responsibility purchasing lifestyle. A possible business view of a successful governance system lends credibility to appearances of advance and compliance, while offering adequate loopholes that enable to maintain traditional profit-seeking interests.<sup>167</sup>

The mapping exercise conducted in this article cannot resolve a debate between those who find in the web the virtues of complementarity and those who point to the regulation and governance gaps throughout the web. The uncertain resolution of this debate leads to two concluding queries.

## B. Towards empirical answers

How much do we know, empirically, about the success of the TLG-web compared to the ideal SHA model? The measurement of efficacy in a domestic regulatory system seeks to assess, for example, how compliance changes as a result of tweaking a substantive norm or enforcement measures. Depending on the quality of the norm, even compliance may have unintended consequences when measuring data pertaining to employment rates, wages and working conditions, adequate subsistence, or equality. None of these empirical efforts are easy to manage because of the need to identify causality between a certain norm or institution and outcomes. There are several added layers of complexity when shifting from domestic regulation to the transnational web.

Even when remaining within the framing of the ideal SHA model, international norms have been claimed to be relatively broad and leave much leeway for differentiation between states. For anyone familiar with the nuts and bolts of domestic labor law, the devil is in the details. Merely prescribing the freedom of association is not enough to secure an effective voice. The international prescription of a few fundamental principles and even the further broadening of the regulatory scope in pursuit of decent work is too general to make a difference.

Moreover, norms pass through two stages: (a) adoption of international norms and enforcement priorities by states, and (b) employers' decisions on compliance. It is, therefore, necessary to independently observe each stage. First, why and how do states adopt international norms, which indicates the power of grounding and possible resistance to international dictates? Thereafter, it is necessary to observe why employers comply with the local grounding of the international norm, thus demonstrating the power of credibility, which may require adherence to the norms but also elicits performative demonstrations of compliance that mask the many loopholes that accommodate resistance.

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166. Kevin Kolben, *The Consumer Imaginary: Labor Rights, Human Rights, and Citizen-Consumers in the Global Supply Chain*, 52 *VAND. J. TRANSNAT'L L.* 839, 861–75 (2019).

167. Bartley, *supra* note 28.

The move from the ideal SHA model to the TLG-web further complicates the study of efficacy in several ways. First, the discussion of process emphasized the importance of workers' participation in authoring norms and ascribing meaning to very general principles. Therefore, a study of efficacy must endogenize the authoring of norms and consider democratic participation in defining them. Second, norms are derived from multiple sources and compliance is motivated by multiple concerns. The multiple agents and processes in the TLG-web indicate that employers are not only concerned with economic costs incurred by direct enforcement measures and penalties, but must constantly keep an eye on the legitimacy concerns of various stakeholders including the public. A third empirical challenge lies in the nature of the web, where no instrument stands alone. Any attempt to seek the effects of one norm, agent, or process undermines the non-ideal model, underscoring the constant interaction and interdependence of them all.

Attempts to empirically determine whether the TLG-web provides a set of complementarities or escape routes, are characterized by two types of impact studies. First, qualitative studies of political economy that render some funnel experiments successful ("best practice") can accommodate future isomorphic institutional mimicry.<sup>168</sup> These studies engage advocates of trade and international labor norms on one hand and supporters of worker-driven social responsibility on the other. Second, there are macro-policy studies, which are difficult to conduct, whereby even the starting point of defining the variables is a value-laden problem.<sup>169</sup> An alternative approach seeks to extract more precise variables to assess differences in outcomes in a limited field, for example: distinguishing between discrete practices within one multinational,<sup>170</sup> observing the effect of audits on purchasing practices in a single supply chain,<sup>171</sup> or assessing the effects of seemingly minute tweaking in the institutional design of the Better Factories program (e.g., withdrawing the publication of audit results to the public).<sup>172</sup>

### C. Is it worth the effort?

A critical view of mapping the TLG-web and the dearth of empirical knowledge associated with the exercise may cast doubt on the purpose of this article altogether. Whatever virtue lies in the TLG model, it is its uncoordinated and innovative development in response to needs. These may be needs of institutional legitimacy, agency, identity, efficiency, and individual motivations. The attempt to assess the quality of a system is more applicable to the

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168. Diane Stone, *Transfer and Translation of Policy*, 33 *POL'Y STUD.* 483 (2012).

169. Jonas Aissi, Rafael Peels & Daniel Samaan, *Evaluating the Effectiveness of Labour Provisions in Trade Agreements: An Analytical and Methodological Framework*, 157 *INT'L LAB. REV.* 671 (2018).

170. RICHARD M. LOCKE, *THE PROMISE AND LIMITS OF PRIVATE POWER: PROMOTING LABOR STANDARDS IN A GLOBAL ECONOMY* (2013).

171. Matthew Amengual, Greg Distelhorst & Danny Tobin, *Global Purchasing as Labor Regulation: The Missing Middle*, 73 *INT'L LAB. REV.* 817 (2020).

172. Debra Ang, Drusilla Brown, Rajeev Dehejia & Raymond Robertson, *Public Disclosure, Reputation Sensitivity, and Labor Law Compliance: Evidence from Better Factories Cambodia*, 16 *REV. DEV. ECON.* 594 (2012).

SHA, which is based on an ideal model. There have been such attempts, usually with the objective of bringing the ILO back to its dominant spider position in the web.<sup>173</sup> Such ideas suggest different, non-exclusive directions—that the ILO should serve as an instrument for making other segments of the web more coherent (e.g., a focal point for trade agreements and their implementation), or focus and develop its power of expertise, or speed up the writing of new substantive standards, or develop the notion of social justice using a process-based approach that follows up on the Declaration on Social Justice for a Fair Globalization of 2008. The different options for the ILO's evolution are therefore important for its own internal organizational concerns, but the foregoing analysis demonstrates that it is doubtful it can direct the course of the web. The TLG-web has a “life of its own.”

I believe that the image of the various spiderwebs and the mapping of their growth can help explain why a web grows in a particular way, but it is not clear that it is possible to tame its growth, or that we should attempt to steer it towards a new ideal model. Nevertheless, the mapping exercise is important. It is important to understand the declining sense of a “spider” weaving the web, especially at a time when the web is rapidly growing. It is important to admit that within this growth, its coverage is erratic, with a thin sheet-cover composed of general and often soft norms, several successful funnels, and many loopholes and escape routes. And it is important for assessing normative tracks for further development, whether from a moral or an empirical point of view.

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173. FRANCIS MAUPAIN, *THE FUTURE OF THE INTERNATIONAL LABOUR ORGANIZATION IN THE GLOBAL ECONOMY* (2013); Agusti-Panareda et al., *supra* note 56; Maupain, *supra* note 71.