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Legal Dimensions of International Framework Agreements in the Field of Corporate Social Responsibility

ANDRÉ SOBCZAK

The aim of this article is to offer an in-depth analysis of the different legal aspects of international framework agreements (IFAs) negotiated between multinational companies and global union federations. Using examples from different agreements, the article shows the potential added value IFAs have in contributing to an effective social regulation within international groups and global supply chains that are today regulated insufficiently by national, European and international labour law standards. It also analyses the impact of the international negotiation process of the IFAs and the powers of the signatory parties on the legally binding character of these texts. To conclude, the article discusses the potential added value of an optional legal framework for IFAs.

Between 2000 and 2007, about 50 international framework agreements (hereafter IFAs) have been negotiated in the field of corporate social responsibility (hereafter CSR) between multinational companies and international trade union federations to define labour standards for the workers of the company, its subsidiaries and in many cases, of its subcontractors (see table 1 for a list of existing IFAs). The development of this form of social regulation (Drouin, 2005; Daugareilh, 2005a; for a historical approach: Descolonges, 2006) is linked to two converging interests. On the one hand, companies intend to increase the legitimacy and the credibility of their strategies and actions in the field of CSR, which supposes to transform their unilateral commitments into negotiated texts

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and to involve their stakeholders in dissemination and monitoring. On the other hand, trade unions recognize that such negotiated strategies may complement the existing national and international instruments of social regulation that remain insufficient to face the challenges of globalization (Fairbrother and Hammer, 2005; Sobczak and Havard, 2006).

TABLE 1
List of International Framework Agreements

<i>Company</i>	<i>Year</i>	<i>Country</i>	<i>Global Union Federation</i>	<i>Signature by EWC</i>	<i>Signature by National Union</i>
Danone	1989	France	IUF	No	No
Accor	1995	France	IUF	No	No
Faber Castell	2000	Germany	BWI	No	Yes
Hochtief	2000	Germany	BWI	Yes	Yes
Freudenberg	2000	Germany	ICEM	No	Yes
Carrefour	2000	France	UNI	No	No
Merloni	2001	Italy	IMF	No	Yes
OTE	2001	Greece	UNI	No	Yes
Skanska	2001	Sweden	BWI	No	No
Telefonica	2001	Spain	UNI	No	Yes
Chiquita	2001	USA	IUF	No	No
IKEA	2001	Sweden	BWI	No	No
Anglogold	2002	South Africa	ICEM	No	No
Endesa	2002	Spain	ICEM	No	Yes
Ballast Nedam	2002	Netherlands	BWI	No	No
Fonterra	2002	New Zealand	IUF	No	Yes
Volkswagen	2002	Germany	IMF	Yes	No
Norske Skog	2002	Norway	ICEM	No	Yes
DaimlerChrysler	2002	Germany	IMF	Yes	No
Leoni	2002	Germany	IMF	Yes	No
Eni	2002	Italy	ICEM	No	Yes
ISS	2003	Denmark	UNI	No	No
GEA	2003	Germany	IMF	Yes	No
Statoil	2003	Norway	ICEM	No	Yes
Rheinmetall	2003	Germany	IMF	Yes	No
SKF	2003	Sweden	IMF	No	No
Lukoil	2004	Russia	ICEM	No	Yes
H & M	2004	Sweden	UNI	No	No
Bosch	2004	Germany	IMF	No	No
SCA	2004	Sweden	ICEM	Yes	Yes
Prym	2004	Germany	IMF	Yes	No
Renault	2004	France	IMF	Yes	Yes
Impreglio	2004	Italy	BWI	No	Yes
Röchling	2004	Germany	IMF	Yes	No

TABLE 1 (continued)

<i>Company</i>	<i>Year</i>	<i>Country</i>	<i>Global Union Federation</i>	<i>Signature by EWC</i>	<i>Signature by National Union</i>
BMW	2005	Germany	IMF	Yes	No
Rhodia	2005	France	ICEM	No	No
EDF	2005	France	ICEM	No	Yes
Veidekke	2005	Norway	BWI	No	Yes
EADS	2005	Netherlands	IMF	Yes	No
Schwan Stabilo	2005	Germany	BWI	No	Yes
Lafarge	2005	France	ICEM & BWI	No	No
Arcelor	2005	Luxemburg	IMF	No	No
Nampak	2006	South Africa	UNI	No	No
Portugal Telecom	2006	Portugal	UNI	No	Yes
PSA Peugeot Citroën	2006	France	IMF	No	Yes
Royal BAM	2006	Netherlands	BWI	No	No
Euradius	2006	Netherlands	UNI	No	Yes
Staedler	2006	Germany	BWI	No	Yes
France Telecom	2007	France	UNI	No	No

IFAs differ from other CSR norms, in particular codes of conduct that are often adopted unilaterally by the companies' management (Sobczak, 2002), even if the latter may have an impact on new forms of social dialogue (Vallée, 2003). First, codes of conduct suffer from a lack of legitimacy in continental Europe where national labour laws have always aimed at limiting the unilateral powers of the employer (Supiot, 2001) and favoured a regulation either imposed by public authorities or negotiated between the social partners. Second, codes of conduct often have a limited content that does not always refer to the ILO, concentrating on issues that have a high impact in the media, such as child labour (Gordon and Miyake, 1999). Finally, codes of conduct do not always include provisions on their implementation, and are thus often considered as window-dressing or part of the companies' marketing strategies. IFAs seem to be a more legitimate form of social regulation and provide a better guarantee for effectiveness. They generally have a much broader and more precise content and contain detailed provisions on monitoring and implementation. Emerging from social dialogue, they conform to the European social model (Daugareilh, 2006). This is highlighted by the fact that almost all existing IFAs have been signed with companies having their seat in the European Union, and in particular in France and Germany.

However, IFAs are at odds with the categories of labour law. They may not be considered as collective agreements as they exist in national labour laws and continue to leave many legal questions open which can

lead to mistrust among the social partners and other actors. The lack of legal security is a problem for the unions for whom the support to companies' CSR strategies is new and represents an important challenge (Sobczak and Havard, 2006). It is essential for the unions to be able to show that their support contributes to creating concrete advantages for the workers on a local level and thus that the non-respect of IFAs may lead to sanctions. Otherwise, unions may be seen as being used in the companies' marketing strategies. The lack of legal security is also a problem for the companies. A company having signed an IFA may fear court decisions as NGOs of other citizens may introduce actions against them if the provisions guaranteed by the IFA are not respected within some of its subsidiaries or subcontracting companies, even if it has used its economic powers to force the latter to conform to the principles included in the agreement. It is important for companies to evaluate the legal risk of the signature of an IFA. It is also essential for them that those companies that sign an IFA without respecting it are sanctioned in order to avoid that all IFAs suffer from discredit.

The aim of this article is to offer an in-depth analysis of the different legal aspects of IFAs. This analysis is useful for the social partners having signed these texts or planning to do it, but also for managers who implement these texts and for international organizations that may have a role to play in the development of a legal framework for IFAs. In a first section, the article uses different examples of IFAs to show the potential these texts have in improving the social regulation of international groups and global supply chains that are today regulated insufficiently by national, European and international labour law standards. In a second section, the article analyses the impact of the international negotiation process of the IFAs and the powers of the signatory parties on the legally binding character of these texts. To conclude, the article discusses the potential added value of an optional legal framework for IFAs.

***IFA'S POTENTIAL TO CONTRIBUTE TO AN EFFECTIVE
SOCIAL REGULATION WITHIN INTERNATIONAL GROUPS
AND GLOBAL SUPPLY CHAINS***

Social regulation through labour law norms is currently facing several challenges linked to the impact of globalization (Hepple, 2005; Moreau, 2006). A first challenge is related to the limited scope of application of labour law. Labour law norms, be they imposed by the public authorities or negotiated by the social partners (Gérard, Ost and van de Kerchove, 1996), continue to be deeply embedded in the national context, whereas companies and thus labour relations are increasingly international (Murray and Trudeau, 2004; Gendron, Lapointe et Turcotte, 2004). Furthermore, labour law only regulates relations

between employers and the workers bound to them through a contract of employment, ignoring thus the relations between the headquarters and those working for subsidiaries or suppliers and subcontractors (Sobczak, 2003). A second challenge is linked to the need for social regulation to include issues that are not directly related to working conditions and correspond to much broader social or even environmental aspects linked to the life of the workers and their families. Such a global approach is hardly compatible with a strict separation of legal branches, such as labour law, social security law and environmental law, each of them developing more or less independently from the others and involving other actors. A third challenge corresponds to the lack of effectiveness of labour law. There is a gap between the development of legally binding texts in all parts of the world and their concrete implementation within the companies. This is linked to a lack of control, but also to some extent to an insufficient collective ownership of these texts by both the management and the workers.

IFAs seem to have the potential to face these three challenges for social regulation in the era of globalization and to contribute to an effective social regulation within international groups and global supply chains, complementing thus national, European and international labour law standards without replacing them. To demonstrate this potential, this section analyses their scope of application, the rights they confer and the monitoring procedures they install.

IFA's Broad Scope of Application

To evaluate the impact of a legal norm, it is essential to define its scope of application. This is in particular true in the field of social regulation where there are already labour law standards defined at the national, the European or the international level (Sciarra, 1995). The potential of CSR norms and IFAs depends on their capacity to go beyond the existing legal standards and collective agreements that are already compulsory for the companies. Most IFAs do not increase the rights of the workers that have a contract of employment with the company and that are thus already covered by labour law. However, they represent an added value for the workers in subsidiaries and subcontracting companies, because through its signature of the IFA the company recognizes its responsibility for the respect of their social rights, filling thus the existing gap in labour law that continues to consider that these workers have no legal link with the company, even if it exerts the economic power.

Most IFAs indicate that the norms they contain apply to the whole group.

BMW (2005): "The goals and principles of implementation set out in this joint declaration apply for the BMW Group worldwide."

Some IFAs establish that their commitment varies according to the degree of power they have within their different subsidiaries. Such a distinction seems legitimate and has the advantage of not creating expectations that may not be satisfied later. Indeed, whereas the respect of the IFA can be made compulsory in subsidiaries where the holding has a direct control, the latter can only try to convince the management in subsidiaries where it has no direct control.

ARCELOR (2005): “Group subsidiaries over which Arcelor exercises a dominant influence ensure that the provisions of this agreement are implemented, while taking local factors (rules and practices) into consideration. In the subsidiaries where the Arcelor Group has a significant presence, but does not exercise a dominant influence, the signatory parties undertake to jointly put to use all of the resources at their disposal in order to promote the principles stated in this agreement.”

However, only very few of them precisely define the borders of the group. This is a weakness insofar as the definition of groups remains very vague in most national laws (Hopt, 1982; Sugarman and Teubner, 1990). At best, the group is a functional notion whose definition differs according to the relevant field. In the absence of a definition in the IFA, one may consider that the definition of the group is the one of the national law of the country where the holding company has its seat. To avoid conflicts of interpretation, IFAs should nevertheless indicate their definition of the group, as it is the case in some recent texts that refer to subsidiaries in which the holding company holds the majority of the capital or of the voting rights or can appoint the majority of the directors.

EDF (2005): “This Agreement shall apply to those companies over which EDF Group holds direct control, i.e. companies in which EDF owns a majority shareholding, or enjoys a majority of voting rights linked to the stock issued, or appoints over half of the members of the directing, executive or supervisory bodies.”

As for the relations with suppliers and subcontractors, a main challenge for social regulation, almost 80% of the existing IFAs contain provisions dealing with this issue, showing thus that the signatory parties have identified the potential added value of IFAs as compared to existing labour law standards. In many IFAs, however, the companies only make the commitment to inform or encourage the suppliers and subcontractors to respect the IFA or parts of it, without specifying the consequences of the non-respect of these principles.

STATOIL (2003): “Statoil will notify its subcontractors and licensees of this agreement and encourage compliance with the standards. Schwan STABLO expects of its suppliers to apply similar principles and regards this as being a basis for any enduring business partnership.”

Some IFAs go beyond such a vague commitment and affirm that the respect of the IFA is the condition for being chosen and maintained as a supplier or subcontractor.

EADS (2005): “Compliance with EADS standards serves as a criterion for selecting suppliers.”

ROYAL BAM (2006): “Royal BAM Group NV considers the respect for workers’ rights to be crucial element in sustainable development and will therefore refrain from using the services of those trading partners, subcontractors and suppliers which do not respect the criteria listed above.”

In case of non-respect, some IFAs contain precise sanctions for suppliers and subcontractors, including the termination of the contract. In principle, these sanctions only apply in the case of violations of clauses that are considered to be the most important ones, for example the provisions on health and safety or on human rights. This reflects the balance the companies try to create between the definition of some principles that have to apply throughout the global supply chain and the autonomy of the legally independent suppliers and subcontractors and their local context.

RHODIA (2005): “Any serious violation of employee health and safety legislation, environmental protection or basic human rights that is not remedied shall lead to termination of relations with the company concerned in compliance with contractual obligations.”

The fact that the termination of the contract with the supplier or subcontractor is mentioned as a possible sanction in case of non-respect increases the credibility the signatory parties attach to the relevant principles. The successful implementation of the IFA supposes, however, also that the suppliers and subcontractors are informed or even trained not only on the content of the IFA, but also on the advantages of a more responsible way of management. They should thus receive support from the company imposing the respect of the IFA. Only very few IFAs mention this aspect explicitly.

PSA (2006): “A specific process will also be implemented for small suppliers and subcontractors so that they may apply the aforementioned ILO standards gradually.”

Whatever be the content of the provisions on the company’s suppliers and subcontractors, it is essential that they are not limited to the direct contractors of the company, but include also the suppliers of the suppliers, as it is specified by some IFAs.

EDF (2005): “The subcontractor must apply the requirements set out by EDF Group to any other subcontractor hired by him/her for the assignment in question.”

The Rights Conferred by IFAs

In comparison to unilateral codes of conduct, the definition of the rights conferred by IFAs is much more precise. IFAs systematically include provisions on the four fundamental social rights, i.e. the prohibition of forced labour, of child labour and of discrimination as well as the recognition of freedom of association. On the contrary, in many codes of conduct, freedom of association is not an issue (Gordon and Miyake, 1999). Furthermore, all IFAs refer to the ILO conventions for the definition of the social norms they contain rather than to adopt specific standards whose legitimacy may be questioned. More than one IFA out of two explicitly mentions the eight ILO core conventions dealing with the four fundamental social rights.¹

The reference to these ILO core conventions has insofar an added value as these conventions only impose obligations on the States that have decided to ratify them. There are still several States in the world that have not ratified all eight ILO core conventions. If the company's IFA refers to these core conventions, it is committed to respect them also in those countries that have not ratified them. Furthermore, any reference to ILO conventions in an IFA signed by the company constitutes a progress, insofar as the commitment concerns also the workers of the subsidiaries and of its suppliers and subcontractors. For the same reason, even provisions that are limited to the respect of the national labour law or of collective agreements are not useless. In many States, the control of labour law standards by the public authorities is insufficient if not inexistent. Even if these standards are legally binding, they are not necessarily effective. When including the respect of national laws in the IFA, their effectiveness may be increased because of the procedures on monitoring and implementation most IFAs contain.

Beyond the reference to the fundamental social rights, many IFAs contain provisions on other issues directly linked to working conditions and employment. About 85% of the existing IFAs deal, for example, with health and safety. The content of the provisions in this field varies a lot, ranging from IFAs that refer only to the national labour laws to those that mention the ILO norms and those that are committed to a more proactive approach based on the development of training and continuous improvement.

1. C. 29 Forced Labour Convention, 1930 ; C. 87 Freedom of Association and Protection of the Right to Organize Convention, 1948 ; C. 98 Right to Organize and Collective Bargaining Convention, 1949; C. 100 Equal Remuneration Convention, 1951; C. 105 Abolition of Forced Labour Convention, 1957; C. 111 Discrimination (Employment and Occupation) Convention, 1958; C. 138 Minimum Age Convention, 1973: C. 1982 Worst Forms of Child Labour Convention, 1999.

ROYAL BAM (2006): “A safe and healthy working environment shall be provided (ILO Convention 155 and 167). Best occupational health and safety practice shall be followed and shall be in compliance with the ILO Guidelines for Occupational Health and Safety Management System. All workers shall be given training on occupational hazards and shall have means of preventing them.”

Similar differences appear among the provisions that 70% of the existing IFAs contain on wages. In this field, most IFAs only refer to the respect of the national labour law, the relevant collective agreements or industry standards. Some companies are more ambitious and aim at offering pay wages that are sufficient to meet the basic needs of the workers, or even of their families.

EURADIUS (2006): “The wages and allowances that the employees receive shall correspond to a standard working week and shall at least equal those established by law or by the collective labour agreements in the country in question for work of a similar nature, in the sector active in the area where the work is performed. No employee shall receive payment that is below the legal minimum wage. Wages shall always be sufficient to meet the basic needs of the employees and their families, with a certain amount of disposable income (Conventions 94, 95 and 131 of the ILO).”

More than 50% of the existing IFAs include specific provisions on restructuring. In the era of globalization, this issue is indeed a major challenge for companies and their workers (Segal, Triomphe and Sobczak, 2003). The potential impact of IFAs is crucial in this field because national and European labour law standards are not sufficiently putting the emphasis on a proactive approach aiming at preparing the employees for future changes in their career. Many IFAs contain in particular the commitment to inform the workers’ representatives on future changes in the structure of the company in a timely manner, which is conform to the European labour law standards, but not to those in other parts of the world.

ARCELOR (2005): “Arcelor undertakes to anticipate, as much as possible, economic and industrial changes and their consequences in terms of human resources. The establishment of a prospective and permanent social dialogue will encourage the application of this principle of anticipation.”

To limit the social impact of restructuring, some IFAs also include commitments in terms of continuous training of the workers. One IFA explicitly mentions the creation of a special task force in charge of helping the workers having lost their jobs to find new ones within the group or on the labour market.

DANONE (1989): “In the event of major changes in working conditions or in business activities causing redundancies, the employees concerned should be entitled to receive training for the purpose of helping them find occupation

either within the companies of Danone Group or elsewhere. Consultations should take place as early as possible, and not later than 3 months prior to the expected changes, whenever said changes concern a significant number of jobs (partial or total closing) permanent jobs should be considered the priority. . . . A specific structure shall be set up whenever a management decision results in job losses. Its task shall be to help employees having lost their job find positions corresponding to their qualifications, skills, pay level, working conditions and place of residence. The structure shall be created at the time of management's decision, subject to applicable legal provisions, and may remain in existence after the implementation of said decision."

Finally, some IFAs contain norms that go beyond the scope of labour law and include other social issues linked to the impact of the company's activities on the living conditions of the workers, their families or even the citizens in general. Almost 20% of the existing IFAs include, for example, provisions on the company's policies to fight against AIDS.

ROYAL BAM (2006): "Royal BAM Group NV undertakes to raise awareness of the HIV/AIDS problem and of the prevention programme in compliance with the ILO HIV/AIDS code of practice."

As IFAs are often embedded in the CSR strategies of the company, almost one out of two deals also with the protection of the environment. This rate increases to more than 80% for the companies in the chemical sector.

EADS (2005): "Aware that its activities interact with the environment, EADS therefore regards environmental protection as a fundamental part of its corporate social responsibility. Over and above compliance with international, European and national regulations, EADS is committed to continuously improving its environmental impact wherever the Group operates. In this context, EADS is ready to cooperate with the competent public institutions, as appropriate."

Even if the legitimacy and the expertise of workers' representatives may be questioned in the field of environmental protection, the integration of these issues in IFAs should be welcomed, insofar as a closer link between social and environmental issues is necessary for the success of a sound CSR strategy. This integration of environmental aspects in IFAs also opens new opportunities for a better co-operation between trade unions and NGOs, two key stakeholder groups for companies (Sobczak and Havard, 2006). Above all, it creates new perspectives for a more holistic approach to the different impacts companies have on their workers and society, and on the quality of life for workers, which may not be confined to working conditions and employment and also has to take into account their living conditions outside the company.

The content analysis of the existing IFAs enables us to distinguish different categories among these texts. Daugareilh (2005b) mentions three

different content profiles: IFAs that focus on one particular issue, IFAs that refer to fundamental social rights, and IFAs that include also provisions on working and employment conditions as well as on the implementation of the text. It is possible to add a fourth category, i.e. IFAs that go beyond the scope of labour law and include other issues linked to the impact of the company's activities on the company's natural and social environment. While the more recent IFAs tend to correspond to the last category because the global union federations learn from their first experiences and companies start to compete on the most innovative content, it seems difficult to consider that the evolution is linear, insofar as the content of each IFA is the result of negotiations and embedded in the corporate culture. For example, the IFA adopted in the French Areva Group in 2007 only deals with one particular issue (diversity) like the two first IFAs adopted in the late 1980s and the middle of the 1990s at Danone and Accor.

IFA's Implementation and Monitoring Procedures

Contrary to many codes of conduct but also many labour law standards, many IFAs contain precise provisions on their implementation in the different subsidiaries. Labour law standards suffer in many cases from a lack of effectiveness, in particular in developing countries that do not have the means or the willingness to organize a control by public authorities (Hepple, 2002; Lascoumes and Serverin, 1986). Formally, the great majority of States in the world have ratified the ILO conventions on the fundamental social rights. Many States have also very precise labour law standards that are in line with the ILO conventions. However, these legally binding norms are far from being effective in all companies in these countries.

The added value of IFAs is not only to reaffirm these rights when referring to national labour law standards, but also to organize procedures on implementation and monitoring that aim at making them effective. Almost all IFAs indicate that they are disseminated among the whole workforce of the company and its subsidiaries. Comprehensive information on the existing social regulation is, of course, the first condition for their effectiveness. However, in many cases, workers ignore the content of codes of conduct and even of labour law standards. IFAs that are negotiated by the social partners have a much better chance to be considered as the collective ownership of these actors and thus known by the workforce. The responsibility for the dissemination of the IFA may be either in the hands of the management or in those of both social partners.

LUKOIL (2004): "ICEM will distribute copies of the Agreement to all its member unions, including those that organize employees in Lukoil companies around the world, and will broadly publicize the existence of the Agreement and explain its implications to the unions organizing workers within Lukoil.

Lukoil will in the same manner distribute copies of the Agreement to all Lukoil offices in the relevant local languages of the countries concerned.”

The involvement of the local social partners in the dissemination process seems particularly interesting, because it develops the feeling of a collective ownership of the IFA and because it allows to show the local workers the concrete impact of the text. To improve the effectiveness of the IFA, some companies are committed to translating the text into the local languages or to offer special training on the content of the text.

FONTERRA (2002): “Fonterra will distribute copies of this agreement to its local offices in a national language of the country concerned and will inform local management of the existence and contents of this agreement. The IUF will distribute copies of this agreement to all of its member trade unions that organize Fonterra’s employees. Fonterra, the IUF and the NZDWU shall cooperate to give practical effect to this agreement. This includes communication, training or other means as appropriate.”

Almost all IFAs contain specific provisions on the monitoring process of the text. In principle, this process is the shared responsibility of the signatory parties, but it may also involve other actors, such as the European Works Council. Usually, there is at least one annual meeting between the management and the workers’ representatives to discuss on the actions that have been adopted and on the difficulties that have been met.

RÖCHLING (2004): “The parties to the Agreement shall act to ensure that the Agreement is respected, information regarding problems, differences or required changes in the basic principles shall be exchanged and discussed by the partners on an annual basis. This exchange of information is currently taking place in the European Works Council of Gebr. Röchling KG.”

A recent IFA explicitly defines an interesting monitoring procedure that involves the local social partners as well as those at the level of the group. This procedure reflects a principle of subsidiarity that takes into account the need for an approach based on the local realities while allowing a common approach at the group level.

PSA (2006): “This agreement will be monitored at two levels. In each of the major countries local social observatories will be set up. These will be made up of human resources divisions and labour unions. The social observatories will monitor the application of the Global Framework Agreement on an annual basis using a common monitoring document to be created jointly by the parties to this agreement. At the corporate level, a report on the deployment of the agreement in the countries concerned will be presented each year to the PSA Peugeot Citroën Extended European Council on Social Responsibility.”

Some IFAs contain very detailed provisions on the organization of the annual meeting, such as the documents that have to be addressed to

the workers' representatives beforehand, the time to be spent for discussions during the meeting and the financing of the costs created by the meeting.

OTE (2001): "The joint annual meeting will last at least one day and will be preceded by a preparatory meeting with UNI/OME-OTE delegations of at least one day. At the joint annual meeting OTE management will communicate general information in the form of an oral presentation and written documents regarding the company's world-wide activities and prospects and their impact on employees' interests. . . . The costs arising out of the application of this agreement will be borne by OTE. These costs include the necessary travel, accommodation and other expenses of an agreed number of UNI delegates, the facilities needed to hold the joint and preparatory meetings, and the costs of the contact persons. Any UNI delegates who are OTE employees will receive their normal pay during their absence for the meetings."

Only one IFA explicitly mentions the possibility to invite NGOs to the annual meetings. This illustrates the difficulties to transform the bilateral social dialogue into a trilateral dialogue, even if such an approach would be more coherent with the tendency of most IFAs to include other rights than those directly linked to working conditions and employment.

EDF (2005): "The Committee may invite NGO representatives to attend its assemblies, by common agreement among its Members, and as justified by relevant items on the meeting agenda."

Many IFAs define complaint procedures enabling the workers to act if there is a violation of the rights conferred by the agreement. Usually, the workers or their local representatives have to meet at a first stage the local management. If the problem cannot be solved at this level, the worker or the union can contact the national union that will discuss the issue with the national headquarters of the company. If the problem can still not be solved at this level, the signatory parties of the IFA will deal with the conflict. The main advantage of this multi-level approach is that it may favour the diffusion of the IFA to managers and workers' representatives at all levels of the company, reinforcing thus the chances that the text will be effective.

VEIDEKKE (2005): "In the event of a complaint or an infringement of the agreement the following procedure will normally apply: Firstly, the complaint should be raised with the local site management. If the complaint is not resolved with local management, it should be referred to the appropriate national union who will raise the issue with the company's regional president. If still unresolved, the complaint will be referred to the IFBWW Geneva office, which will raise the matter with the company's Corporate Management."

During the annual meeting, the signatory parties can decide to amend the initial text. Several IFAs explicitly mention this possibility.

ROYAL BAM (2006): "The present accord may be revised at the request of one of the parties, which revision needs the consent of the other party, no later than two years after it has been signed."

No problem will arise if all signatory parties agree on the amendment, but there is a risk that no consensus may be reached and this may cause a legal problem. In any case, each signatory party has the possibility to cancel the agreement. Such a cancellation has no impact if the management and at least one of the different workers' representatives continue to support the agreement. Otherwise, the IFA will stop from producing effects.

Through their scope of application, the rights they confer and the monitoring procedures they put in place, IFAs have the potential to contribute to a more effective social regulation within international groups and global supply chains. However, not all IFAs have such an ambition, and the potential of some texts is much lower. Even if there are model agreements developed by the global union federations, each IFA is negotiated and is thus different from the others. Under these conditions, the potential of each IFA differs from the one of others. The signatory parties, however, usually analyse the IFAs adopted by other companies before negotiating a new text, contributing thus to creating an inter-organizational learning process and favouring the development of the potential of IFAs in terms of social regulation. This underlines that the potential added value of IFAs lies both in their content and in the negotiation process between the management and the workers' representatives. From a legal point of view, however, this negotiation process poses several questions linked to the powers of the involved parties.

THE INTERNATIONAL NEGOTIATION PROCESS OF IFAS AND ITS IMPACT ON THEIR LEGAL VALUE

The legal nature of a norm depends on the powers conferred to its authors, in particular if the norm aims at defining rules of conduct applying to third parties. Given the lack of a legal framework in the field of transnational collective bargaining, no power has been explicitly conferred by labour law to any actor to negotiate such agreements. Consequently, those who want to adopt IFAs act in an unclear context and have to invent new solutions.

In some cases, public authorities such as ministers of labour attend the signature of the IFA by the representatives of the management and of the employees. Chiquita's IFA has even been co-signed by the director general of the ILO. From a legal point of view, such a co-signature is surprising, as it does not correspond to any specific commitments of the ILO. The aim is rather to increase the public character of the IFA and to demonstrate the support for this form of social regulation by a legitimate international actor.

Beyond the issue of third parties attending the signature of the IFA or co-signing it, other legal questions arise and relate to the identification of the representatives both on the employer side and on the workers' side.

Signatory Parties Representing the Employer

For the employers, the IFA is signed by one or several representatives of the company's headquarters, usually either the CEO or the human resource manager. This solution reflects the reality of economic powers within the company, but constitutes a legal problem, because each subsidiary has its own legal personality, even if it is highly integrated in a group. There is indeed a gap between the holding's control over an economic activity within a group and the lack of its legal liability for the social consequences of this activity (Hopt, 1982; Sugarman and Teubner, 1990; Rorive, 2004). This gap makes it legally impossible to consider the holding company as the employer of the workers in the subsidiaries (Supiot, 1985), but also means that the holding company may not conclude collective agreements that bind the subsidiaries. If some national labour laws, such as the French one (Antonmattei, 2004), recognize today the existence of collective agreements at the group level and thus the power of the holding company to represent its subsidiaries in the negotiation process, such a provision lacks at the EU and at the international level. Consequently, the signature only by a representative of the holding company precludes the IFA from being considered as a collective agreement as defined in labour law.

To allow companies to conclude IFAs for their subsidiaries and subcontractors, they have to receive a mandate to negotiate legally binding commitments. The Directive of September 22nd, 1994 on European Works Councils uses this legal technique. For companies or groups with a European dimension, the Directive imposes the obligation to open negotiations on information and consultation within the whole group with the aim to conclude an agreement that applies to all subsidiaries within the EU. However, in this case, the mandate to negotiate is explicitly conferred by the Directive. Furthermore, the agreement establishing the European Works Council creates obligations for the holding company, i.e. delivering information and opening consultations, not for the subsidiaries. IFAs, on the contrary, contain norms that have to be applied by the subsidiaries, even if the holding company can be considered as guaranteeing the respect of the norms in the agreement. Consequently, an explicit mandate to negotiate such agreements conferred to the holding company by a specific legislation would clarify the legal value of IFAs and recreate a link between the economic powers and the social responsibilities within the group.

Another possibility for clarifying the legal status would be to transpose the IFA through local collective agreements concluded with the different

subsidiaries according to national labour laws. This solution is inspired by the autonomous agreements mentioned in Article 139 of the EU Treaty which suggests that social partners transpose collective agreements concluded at the EU level through national collective agreements in order to provide them with a clear legal status and to avoid the legal problems linked to the international dimension. Only a few IFAs explicitly mention such an involvement of the local social partners, even if it would facilitate the implementation of the text. Among the IFAs dealing with such a local social dialogue, many concern French companies.

DANONE (1989): “The local management of Danone companies and the trade unions—or in their absence employee representatives—are now responsible for translating the general principles outlined below into practical provisions.”

EDF (2005): “In each Group company concerned, dialogue shall be initiated between the management and the employee representatives on the initiatives to be taken and the conditions for the implementation of the present Agreement, within a period of six months following its signature.”

The choice of the signatory party representing the employer has an impact on the legal value of IFAs. The choice of efficiency, i.e. the signature by the CEO of the holding company, does not seem to be legal problem that may not find a solution. This is true in particular because the main aim of IFAs is to confer new responsibilities for the holding company that is not the employer of the workers in the subsidiaries rather than for the subsidiaries that already have to respect labour law in the relations with their employees. The choice of the signatory party representing the workers may be more complicated.

The Signatory Parties Representing the Workers

For the workers, different actors have signed the existing IFAs. It would be impossible to conceive that only the workers’ representatives in the holding company negotiate an IFA that applies to workers in the subsidiaries and even to the ones in the subcontracting companies. Such a solution would challenge the principle of the legal autonomy of the subsidiaries as it is the case on the employer side, but also create a problem of representativity. It would indeed be difficult to consider that workers’ representatives at the headquarters of a company in a (Western) country may legitimately represent the interests of the workers of its subsidiaries in the whole world. The idea of a legal mandate conferred to the workers’ representatives at the headquarters that may be envisaged for employers is difficult to transpose here, because the problem is not only a legal one.

The social partners had thus to invent and test new solutions to insure the legitimacy of the signatory parties on the worker side. All existing IFAs

have been signed by a global union federation, but some have been co-signed with other workers' representatives, either by the European Works Council, by national unions or by both (table 1).

Signature by Global Union Federations

All existing IFAs are signed by one or several global union federations organized at the sector level. The International Metalworkers Federation (IMF) has been the most active global union federation in this field with 15 IFAs, followed by the International Federation of Chemical, Energy, Mine and General Workers' Unions (ICEM) and Building and Wood Workers' International (BWI) with both 11 IFAs and Union Network International (UNI) with 10 IFAs. The International Union of Food workers (IUF) had signed the two first IFAs, but has stopped signing these agreements after their fourth IFA in 2002.

The choice of the sector level avoids two main obstacles existing for transnational collective bargaining at the company level. First, negotiating with workers' representatives at the sector level excludes the debates on the legal personality of subsidiaries and even of subcontracting companies. The global union federation at the sector level is supposed to represent the workers in all the companies of the world, whatever be the legal link with the company signing the IFA, as long as the companies belong to the relevant economic sector. Second, negotiating with a global union federation avoids the conflicts between different national laws defining the legitimate workers' representatives as well as the procedures of collective bargaining. It seems coherent with the aim to establish social norms at the transnational level to choose an actor situated at the same international level as the company.

However, neither national, nor European or international labour law norms confer a power to negotiate collective agreements to global union federations. This bargaining power also needs the support of the national unions that are members of the global union federation. Beyond a general political mandate to promote IFAs defined within their governing bodies, the global union federations thus usually consult the relevant national unions before signing an IFA, at least those of the country of the company's headquarters.

From a legal point of view, the signature of an IFA by a global union federation creates a problem of asymmetry between the two actors involved in the process. Whereas the workers' representatives are organized at the sector level, their partner is an individual company and not the employers' association at the sector level. This asymmetry contrasts with the existing legal categories in labour law distinguishing sector agreements on the one hand and company agreements on the other hand. It constitutes thus

a further obstacle to the recognition of IFAs as collective agreements as they exist in labour law.

Signature by European Works Councils

About 25% of the existing IFAs have been co-signed by the global union federations and the EWC of the relevant company. In some sectors, the part of IFAs co-signed with the EWC is even higher. For example, almost all IFAs signed by the IMF have also the co-signature of the company's EWC. Furthermore, in several companies, the negotiation process had been launched within the EWC, even if in the end the latter did not sign the IFA. This highlights the fact that the EWC is more and more perceived by management as a legitimate or even as the natural discussion partner on social regulations, at least for companies having their seat in Europe.

On the contrary to negotiations with the global union federation, those conducted between the company and its EWC do not create an asymmetry of the levels of representation. Negotiating with the EWC allows to build on the existing social dialogue within the company, to better take into account the specific issues and priorities of the company and to establish permanent and long lasting relations, which may be more difficult with an global union federation whose activities are much broader and whose resources are limited.

From a legal point of view, however, the signature of an IFA by the EWC constitutes a problem insofar as the directive that governs this institution has not conferred any bargaining powers to it, but has limited its powers to information and consultation. One reason for this is that the transposition of the directive by national labour laws does not guarantee that only union representatives have a seat in the EWC, whereas collective bargaining is in many EU Member States a monopoly of the unions. If the EWC is supposed to have the power to conclude collective agreements, its composition has thus probably to be changed in order to guarantee that only union representatives may be appointed to this council.

A second problem is that the EWC does not represent the workers in countries others than those of the EU, nor the workers in the subcontracting companies, whereas the added value of IFAs mainly lies in the provisions concerning these two groups. Indeed, IFAs hardly improve the social regulation for workers in European subsidiaries already covered by national and European labour laws, but offer additional protection for the members of the two other groups. The latter should thus be involved in the process via their representatives. If it seems almost impossible to involve the workers in the subcontracting companies, this is not the case for the workers in non-European subsidiaries. In a few companies, the negotiations

have indeed been carried out with an enlarged EWC including members from countries others than the EU. In the case of PSA, the experience of the negotiation and implementation of the IFA with an enlarged EWC is even used as an opportunity to test the transformation of the EWC into a World Works Council.

PSA (2006): “With regard to global changes in the corporation’s business, the parties of this agreement feel that the creation, in due time, of a Global Council is beneficial. Initially, the current PSA Peugeot Citroën European Works Council will be expanded to include labour union representatives from the countries that meet the staffing level requirements set forth in the European Works Council agreement (such as Argentina and Brazil). These representatives will be invited to plenary sessions as observers. The parties agree to examine, after 3 years, the opportunity to definitively undertake the transformation into a Global Council, given that the European directives will legitimately apply to the European subsidiaries and the Extended European Council.”

When analyzing these legal problems caused by the signature of the IFA with the EWC, one must take into account that the EWC is not the only signatory party on the workers side. The EWC always co-signs the IFA with a global union federation. It is this combination of two different forms of workers’ representation—one at the sector level and one at the company level—that makes this model particularly interesting and legitimate. From the legal point of view, however, even the co-signature by the two forms of workers’ representation does not transform the IFA into a collective agreement as it exists in labour law, as neither of the two has the legal power to conclude collective agreements.

Signature by National Unions

About 45% of the existing IFAs are co-signed on the worker side by a global union federation and national unions in the country of the company’s headquarters. Even if the national unions do not sign, global union federations of course consult them, and in many cases the national unions are the driving forces for the negotiation of the IFA (Bourque, 2005). The option of a co-signature by the national union is used in particular for the IFAs negotiated by BWI and ICEM. In three cases, the IFAs have even been signed by the three possible forms of worker representation, i.e. the global union federation, the EWC and the national unions.

The signature by a national union has the potential to transform the IFA into a national collective agreement in the country of the company’s headquarters, as long as the rules of the national labour law in this country are respected. It seems, however, difficult to consider that such an agreement will also be considered as a collective agreement in the other countries because national labour laws in this field differ a lot.

The advantage of involving the national unions in the negotiation process lies in the fact that they already know the representatives of the company's headquarters through the negotiations of national collective agreements. As for the involvement of the EWC, this may facilitate the discussions on much more complex issues included in the IFA. There is however a problem of legitimacy for the national union in the country of the headquarters to negotiate the definition of social regulation whose main added value concerns the workers in other countries, but the national union does not negotiate alone and one may consider that the workers in the other countries are represented by the global union federation.

Another possibility is to involve the national unions of all countries where the company has major subsidiaries. This approach has been used in two recent IFAs and is an interesting way to stimulate local social dialogue on the issues dealt with by the IFA and to improve thus the chances of its effective implementation in all subsidiaries. The IFA concluded at EDF (2005) is particularly innovative, as it was negotiated by a group composed of representatives of national unions of all the main subsidiaries and by managers of these subsidiaries. Even if this process was particularly long and complex, it had the advantage of creating a shared vision of the main issues for the company and the local realities, allowing thus a sound basis for the implementation of the IFA.

The approach was rather different for the IFA concluded at PSA (2006). Here the negotiations were organized between the company's headquarters, the global union federation IMF and an extended EWC. The negotiating parties decided, however, to continuously inform the national unions in the countries with the major subsidiaries about the process, and to invite them to sign the final agreement during special events organized in each country. All national unions but one accepted to co-sign this document and to confirm thus their support to this initiative. The French CGT, the only union that decided not to sign the text considers, nevertheless, that it is bound by the text as it is member of the IMF that has signed the IFA. This experience had the advantage of using an efficient process of negotiation with a limited group of actors while involving the national unions on a more informal basis before obtaining their formal support.

Despite their contribution to a more effective social regulation, the involvement of the national unions of all main subsidiaries does not necessarily have an impact on the legal value of the IFA. To transform the IFA into a series of national collective agreements, as they exist in labour law, the text has to be signed not only by the national unions but also by the local managers, which is not the case, even at EDF where the managers have taken part in the negotiation but without signing the final text. EDF's IFA as well as PSA's include, however, the commitment to

open local negotiations aiming at transposing the text into national collective agreements. Such an approach avoids any discussion about the legal value of the IFA itself, because the legal value of the national collective agreements is clearly defined by the different national labour laws. But, since only very few IFAs are transposed through such national collective agreements, it seems necessary to conclude this article with an analysis on the legal value of IFAs and the potential added value of an optional legal framework for their negotiation.

CONCLUSION

IFAs have the potential to contribute to the creation of an effective social regulation within international groups and global supply chains. They have, however, an unclear legal status that may weaken their potential. Even if the lack of a clear legal status has not been an obstacle for the development of IFAs, it may become a problem in the future. Both parties have an interest in evaluating the legal risks they face in case of a non-respect of the commitments included in the IFAs. Such a risk is less linked to a potential conflict between the signatory parties insofar as the IFAs themselves may define special dispute settlement mechanisms without involving the courts, than to a potential conflict with a third party, be it a NGO or an individual citizen. The example of Nike shows that a court may consider the violation of a public commitment in the field of CSR as a case of misleading advertisement and thus adopt sanctions against the company (Sobczak, 2003). Even if companies usually do not refer to their IFAs in their external communication, the risk of a conflict may not be excluded. Furthermore, both signatory parties have a shared interest to the fact that companies that sign an IFA without respecting it be sanctioned. Otherwise, the credibility of all IFAs may be weakened.

A legal framework for transnational collective bargaining may contribute to a higher legal security. Ideally, such a framework should be adopted at an international level, but the European level may constitute a first step and seems more realistic to attain in the mid-term future. The Ales report to the European Commission has defined the main elements of such a legal framework (Ales et al., 2006) which may only be optional, the social partners being free to choose its rules and to benefit from the legal security it offers or to continue to negotiate without any legal framework, as it is the case today.

The optional legal framework for transnational collective bargaining and IFAs might define the legitimate actors of the negotiation on the employer side and on the workers' side. It seems in particular important to define the role of the global union federations at the sector level, of the

national unions in the subsidiaries and of the EWC during the negotiation process but also during the implementation and the monitoring of the texts. The optional legal framework might also impose a certain minimum content on the social partners as well as provisions on the scope of application and on the monitoring process, while leaving them a lot of freedom as to the definition of the scope and as to forms of the monitoring process. Finally, the optional legal framework for transnational collective bargaining might define the legal effects of IFAs. The best solution would probably be to impose that the IFA be transposed by texts adopted at the level of each subsidiary, be it through unilateral decisions of the management or through collective agreements. The legal value of those texts would change according to the national labour laws, but this solution would leave the necessary flexibility to the local social partners and avoid the problems linked to the determination of the applicable law.

The adoption of such an optional legal framework for transnational collective bargaining and IFAs by the EU institutions would solve many of the current legal problems created by IFAs and may thus favour their future development as a tool that contributes to an effective social regulation within international groups and global supply chains.

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RÉSUMÉ

Les dimensions juridiques des accords-cadres internationaux dans le domaine de la responsabilité sociale des entreprises

Entre 2000 et 2007, plus de 50 accords-cadres internationaux (ACI) sur la responsabilité sociale des entreprises (RSE) ont été négociés entre des entreprises multinationales et des fédérations syndicales internationales pour définir des normes sociales pour les salariés de ces entreprises, ceux de leurs filiales et souvent aussi de leurs sous-traitants. Le développement de cette nouvelle forme de régulation s'explique par deux intérêts convergents. D'un côté, les entreprises cherchent à renforcer la légitimité et la crédibilité de leurs stratégies et actions dans le domaine de la RSE, ce qui suppose de transformer leurs engagements unilatéraux dans des textes négociés et d'impliquer leurs parties prenantes dans la mise en œuvre et le contrôle. De l'autre côté, les organisations syndicales reconnaissent que de telles stratégies négociées peuvent compléter la régulation sociale existante qui se révèle insuffisante face aux défis de la mondialisation.

Certains ACI ont le potentiel de contribuer à une régulation sociale plus effective au sein des groupes internationaux et leurs chaînes d'approvisionnement, complétant ainsi les normes du travail au niveau national, européen et international, sans pour autant les remplacer. Par contre, tous les ACI n'ont pas cette ambition. L'analyse du contenu des ACI existants nous amène à distinguer différentes catégories de ce texte : des ACI qui se concentrent sur un seul aspect ; des ACI qui intègrent les

droits sociaux fondamentaux ; des ACI qui incluent aussi des dispositions sur les conditions de travail et d'emploi ; et des ACI qui vont au-delà du champ du droit du travail pour traiter d'autres sujets relatifs à l'impact des activités de l'entreprise sur son environnement social et naturel. Si les ACI plus récents tendent à correspondre à la dernière catégorie, parce que les fédérations syndicales internationales apprennent de leurs premières expériences et que les entreprises commencent à vouloir se distinguer par un contenu innovant de leur ACI, il est difficile de considérer que l'évolution est linéaire dans la mesure où le contenu de chaque ACI est le fruit d'une négociation spécifique et lié à la culture de l'entreprise.

Le potentiel des ACI dépend aussi de leur mise en œuvre et des procédures de contrôle qui diffèrent beaucoup d'une entreprise à l'autre. L'implication des partenaires sociaux locaux dans ce processus semble particulièrement intéressante, parce qu'elle contribue à développer l'appropriation collective de l'ACI et à montrer aux salariés locaux l'impact concret de ce texte. En principe, le processus de contrôle relève de la responsabilité conjointe des signataires de l'ACI, mais il peut aussi impliquer d'autres acteurs, comme le comité d'entreprise européen. En général, il y a au moins une réunion annuelle entre le management et les représentants des salariés pour discuter des actions qui ont été mises en œuvre et des difficultés rencontrées. Beaucoup d'ACI définissent aussi des procédures de résolution des conflits qui permettent aux salariés de dénoncer des violations des droits reconnus par l'accord. En principe, les salariés ou leurs représentants locaux doivent dans une première étape rencontrer les gestionnaires locaux. Si le problème ne peut être résolu à ce niveau, le salarié ou ses représentants peuvent saisir le syndicat au niveau national qui discutera du sujet avec la direction de l'entreprise dans le pays concerné. Si le problème ne peut toujours pas être résolu à ce niveau, ce sont les signataires de l'ACI qui discuteront du problème au niveau international. Le principal avantage de cette approche est d'impliquer les partenaires sociaux à tous les niveaux de l'entreprise, ce qui favorise la diffusion du texte et donc les chances de son application effective.

De telles procédures innovantes visant à rendre l'application du contenu des ACI effective sont particulièrement importantes dans la mesure où les ACI ne rentrent pas dans les catégories juridiques du droit du travail. Ils ne peuvent être considérés comme des accords collectifs et ne sont pas juridiquement contraignants. Même si l'absence d'un cadre juridique précis n'a pas empêché le développement de ces textes, elle peut poser un problème à l'avenir. Les partenaires sociaux ont intérêt à évaluer les risques juridiques en cas de non-respect des engagements contenus dans l'ACI. Un tel risque semble moins lié à un conflit potentiel entre les signataires, dans la mesure où ces textes contiennent souvent des mécanismes de résolution

des conflits et que les organisations syndicales ne signent pas ces textes pour saisir une juridiction, qu'à un conflit potentiel avec un tiers comme une ONG ou un citoyen individuel qui reprocherait à l'entreprise le non-respect de l'ACI.

Un cadre juridique pour la négociation collective transnationale pourrait contribuer à renforcer la sécurité juridique. Idéalement, un tel cadre devrait être adopté au niveau international, mais le niveau européen pourrait constituer une première étape plus réaliste à atteindre à moyen terme. Le rapport Ales à la Commission européenne a défini les éléments principaux d'un tel cadre juridique qui ne saurait qu'être optionnel, les partenaires sociaux étant libres de choisir de bénéficier de la sécurité juridique qu'offrent ces dispositions ou de continuer à agir sans cadre juridique spécifique comme aujourd'hui. Ce cadre optionnel pourrait définir les acteurs légitimes pour négocier aussi bien du côté de l'employeur que du côté des salariés et, encore plus important, préciser les effets juridiques des ACI.

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