

# **The interaction of Labour Inspection and Private Compliance Initiatives: A case study of Better Work Indonesia**

Ockert Dupper, ILO, University of Stellenbosch

Colin Fenwick, ILO, Melbourne Law School

*Paper presented at the 17<sup>th</sup> ILERA World Congress, Cape Town, September 2015*

**\*\*\* EARLY DRAFT \*\*\***

**\*\*\* NOT FOR CITATION \*\*\***

## **Abstract**

This paper explores the interaction of Better Work Indonesia (BWI) with the public labour inspectorate in that country. We consider the programmes and mechanisms of interaction, and also how Better Work's contributions are implemented. We present here the preliminary findings of our field work, using the analytic model presented in Kolben's study of the interaction between Better Work Jordan and the Jordanian labour inspectorate. His concept of "dialogic regulation" captures and distinguishes between the degree of institutional *formality* in which interaction takes place, and the degree of subjective *intentionality* of the parties in their interaction.

We find that the interaction between BWI and the Ministry has altered and shaped how labour inspection in Indonesia is conceptualised and managed in practice. The BWI model seems to have contributed to a recent initiative to require that enterprises have "Labour Norms Cadres". BWI also appears to have influenced the interaction between the central and district levels of the Indonesian inspectorate. Although it has never been an explicit programmatic objective of Better Work, our findings suggest that in Indonesia, the public labour inspectorate has been strengthened as a result of its interactions with BWI, even if that has come about largely in an *ad hoc* fashion.

Our findings tend to reinforce those of other empirical studies of the interaction of private and public compliance. Prior studies have shown that the empirical reality is far more complex than some of the policy or theoretical arguments would accommodate. It transpires that displacement, for example, may not be a risk, even if only because of limited resources – at least in the case of Indonesia. Our findings also tend to suggest that complementarity in regulatory regimes may be feasible, even if the mechanisms and mechanics by which that can be achieved are likely to vary significantly according to the country and the context, and may often only be discovered through trial and error, and through persistence of interaction.

## 1. Introduction

This paper examines how Better Work Indonesia (BWI) interacts with the public labour inspectorate in that country, and what the potential impact of this interaction is. The relevant institutional motivation for the study is the 2011 discussions about “private compliance initiatives” (PCIs) conducted by the ILC Committee on Labour Administration, the subsequent Tripartite Meeting of Experts (2013), and the follow-up discussion at the GB (2014). While the ILO recognises the existence of private institutions engaged in similar activities as labour inspectorates, “the ILO has not taken a position on how labour inspection services and PCIs might best relate to one another”.<sup>1</sup> The Tripartite meeting agreed that “the ILO should seize opportunities to examine ... the relationship between labour administration and PCIs through research, empirical studies and collection of good practices”.<sup>2</sup>

Better Work is chosen as the case study because it is the compliance initiative with which the ILO has the closest connection, given that Better Work is a joint programme of the ILO and the International Finance Corporation (IFC). Better Work Indonesia (BWI) is chosen for a number of reasons. First, BWI has embarked on an explicit strategy of working closely with the labour inspectorate. Secondly, the ILO has been working intensively over a number of years with the labour inspectorate, and indeed has carried out joint activities with Better Work. Thirdly, Indonesia has a de-centralized labour administration and inspection system, which opens up the possibility for comparisons within the country.<sup>3</sup> And fourthly, Better Work Global has already begun to develop a research programme in collaboration with BWI and external researchers, which would interact well with the subject matter of this project.<sup>4</sup>

We explore not only the programmes and mechanisms through which this interaction takes place, but also how Better Work’s contributions are implemented. To capture the empirical reality of how private and public regimes interact on the ground, we will draw on the analytical model developed by Kolben in his study of the interaction between Better Work Jordan and the Jordanian public labour inspectorate.<sup>5</sup> Entitled “dialogic regulation”, the model focuses on two descriptive categories to describe a given interaction: the first takes into account the degree of

---

<sup>1</sup> Background paper, p.ix. The Report and background documents can be found here: [http://www.ilo.org/labadmin/events/WCMS\\_230788/lang--en/index.htm](http://www.ilo.org/labadmin/events/WCMS_230788/lang--en/index.htm).

<sup>2</sup> GB.322/POL/5, para 13.

<sup>3</sup> This will change because a Ministerial decree has been issued to recentralize labour inspection services. However, it is expected to only come into effect in two years since it is part of a larger program to reverse the decentralization program introduced in 2001. See World Bank “Decentralizing Indonesia (2003), p.i.

<sup>4</sup> This research will be led by Professor Matt Amengual, MIT.

<sup>5</sup> Kevin Kolben, “Dialogic Labor Regulation in the Global Supply Chain” (2014, unpublished manuscript).

institutional *formality* in which the interaction takes place, and the second examines the degree of subjective *intentionality* of the parties in engaging in that transaction.

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

The study used a mixture of research methods. Apart from traditional desktop research involving primary and secondary sources, it also included empirical research through field work. During the field research, the authors met individually and collectively with over 40 people, including staff from the ILO Jakarta Office, BWI staff (current and past), representatives from the Ministry of Manpower<sup>6</sup> (hereafter Ministry), the Serikat Pekerja Nasional (SPN) trade union in North Jakarta, and senior labour inspectors in the North Jakarta provincial office of the Ministry.

The paper is structured as follows: In part 2, we place the study in its proper theoretical context with a brief overview of regulatory theory – in particular the theoretical paradigm of “decentred” regulation – and then follow this with an examination of the way in which decentred regulation operates in practice. The latter includes a discussion of the range of ways in which scholars have analysed the modes or practice of interaction between public - and private regimes. We offer reasons for why we have adopted Kolbens’s “regulatory dialogism” analytical framework for the analysis of the data gathered during our field research in Indonesia. Part 3 provides background information on the two main actors in our study, namely Better Work - in particular BWI - and the public labour inspectorate in Indonesia. In part 4, we apply the analytical framework of regulatory dialogism to Indonesia. Part 5 contains some concluding remarks.

## 2. Theoretical framework<sup>7</sup>

---

<sup>6</sup> Formerly known as the Ministry of Manpower and Transmigration.

<sup>7</sup> We note that this part of the paper draws heavily on a literature review conducted for this study by Dr Tess Hardy of Melbourne Law School.

Private compliance initiatives (such as Better Work) implicitly reflect the theoretical paradigm of “decentred” regulation which is ‘distinct from (or perhaps rather subsumes within it) the “regulatory state”.’<sup>8</sup> Kolben explains that a decentred analysis is premised on:

a shift away from command-and-control regulation towards forms that are more decentralized, dynamic, interactive and responsive. In this notion, sovereignty and rule-making authority are layered and complex, allowing a more pluralistic range of legal orders to exist that are equal, or equivalent to that of the state. Traditional dichotomies between hard and soft law, informal and formal, public and private, and even law and non-law being to break down leading to a form of legal hybridity. Law-making and enforcement are created by a diverse range of private and public actors including governments, NGOs, corporations, and private regulatory bodies that sometimes work together to formulate policies and regulate themselves, and each other, both within and without the framework of the state.<sup>9</sup>

Indeed, much of the contemporary scholarship on transnational regulation<sup>10</sup> and international governance<sup>11</sup> suggests that a state-centric approach is ‘misguided’<sup>12</sup> given that many developing countries have weak legislative protections and a dysfunctional labour inspectorate. In what follows, we will expand on some of the key elements of decentred regulation, and the regulatory strategies that have emerged on the basis of this broader understanding of regulation and governance.

## 2.1 A brief exposition of theories of regulation

In traditional debates concerned with regulatory enforcement, there has been a sharp division drawn between the deterrence or punishment model and the compliance or accommodative

---

<sup>8</sup> Black (2001), 19.

<sup>9</sup> Kevin Kolben, ‘Integrative Linkage: Combining Public and Private Regulatory Approaches in the Design of Trade and Labor Regimes’ (2007) 48(1) *Harvard International Law Journal* 203, 243.

<sup>10</sup> “Transnational Legal Regulation [is] a notion that attempts to capture the hybrid nature of international rule-making and enforcement in which a range of public and private actors are engaged.” *Ibid.*

<sup>11</sup> See, e.g., Harry Arthurs, ‘Labor Law Without the State?’ (1996) 46 *University of Toronto Law Journal* 1; Harry Arthurs, ‘Private Ordering and Workers’ Rights in the Global Economy: Corporate Codes of Conduct as a Regime of Labour Market Regulation’ in Joanne Conaghan, Richard Fischl and Karl Klare (eds) *Labour Law in an Era of Globalisation* (2002) 471; Adelle Blackett, ‘Codes of Corporate Conduct and the Labour Regulatory State in Developing Countries’ in John Kirton and Michael Trebilcock (eds) *Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment and Social Governance* (2004) 121; Peer Zumbansen, ‘The Parallel Worlds of Corporate Governance and Labor Law’ (2006) 13 *Indiana Journal of Global Legal Studies* 261.

<sup>12</sup> Kolben (2007), 21, 204.

model.<sup>13</sup> In light of the limitations of both compliance and deterrence as ‘stand-alone’ strategies,<sup>14</sup> and in order to more sensitively respond to the ‘motivational diversity’ of firms, regulatory theorists increasingly advocated for a form of engagement which has been variously described as ‘flexible’,<sup>15</sup> ‘tit-for-tat’<sup>16</sup> and ‘creative’.<sup>17</sup> One of the most influential conceptualisations was that of ‘responsive regulation’. This economic model of regulation – developed by Ayres and Braithwaite – advocates that ‘the most credible and optimal enforcement strategy is achieved by a judicious mix of deterrence and persuasive approaches being applied in a regulatory enforcement pyramid.’<sup>18</sup> In addition to the enforcement pyramid, the original formulation of responsive regulation envisioned that enforcement processes would be supplemented and strengthened through ‘tripartism’.<sup>19</sup>

Ayres and Braithwaite argue that tripartism – the involvement and empowerment of public interest groups (**PIGs**) – could effectively maintain the ‘advantages of the evolution of cooperation’,<sup>20</sup> whilst simultaneously guarding against both regulatory cheating (by purportedly compliant firms) and regulatory capture (by overtly powerful firms). They also defend tripartism, which pushes for increased participatory governance, as important ‘not only in terms of outcome but also in terms of process’.<sup>21</sup> While these are powerful ideas, the popularity of the enforcement pyramid frequently meant that the tripartite elements of

---

<sup>13</sup> Neil Gunningham, ‘Strategising Compliance and Enforcement: Responsive Regulation and Beyond’ in Christine Parker and Vibeke Nielsen (eds), *Explaining Compliance: Business Responses to Regulation* (Edward Elgar, 2011) 199, 201.

<sup>14</sup> For example, while the compliance model may be successful in building normative, and even social motivations to comply, there is also a risk that this model can be exploited by those who are driven by economic concerns and not disposed to voluntary compliance. Further, the regulator may be ‘captured’ by strong interest groups who know they can contravene the law with little consequence. This can have the effect of undermining the credibility of the regulator and weakening the normative motivations of others in the same industry or regulatory sphere.

<sup>15</sup> Eugene Bardach and Robert Kagan, *Going by the Book: The Problem of Regulatory Unreasonableness* (Temple University Press, 1982).

<sup>16</sup> John Scholz, ‘Cooperative Regulatory Enforcement and the Politics of Administrative Effectiveness’ (1991) 85 *American Political Science Review* 115.

<sup>17</sup> Peter May and Raymond Burby, ‘Making Sense of Regulatory Enforcement’ (1998) 20(2) *Law and Policy* 157.

<sup>18</sup> Elizabeth Bluff and Richard Johnstone, ‘Infringement Notices: Stimulus for Prevention or Trivialising Offences?’ (2003) 19(4) *Journal of Occupational Health and Safety* 337, 338.

<sup>19</sup> It should be noted that the concept of ‘tripartism’ in the context of responsive regulation is broader than the way this term is used in international arenas (where it is often used to refer to three-way collaborations between government, employer and employee representatives): see, e.g., Tayo Fashoyin, ‘Tripartism and Other Actors in Social Dialogue’ (2005) 21 *International Journal of Comparative Labour Law and Industrial Relations* 37. In particular, tripartism – as used by Ayres and Braithwaite – is intended to encompass a wide range of public interest groups from firms to civil society organisations. See Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992).

<sup>20</sup> *Ibid* 56.

<sup>21</sup> *Ibid* 82.

responsive regulation theory were often overlooked by many policymakers and scholars.<sup>22</sup>

However, the tripartist elements of the responsive regulation model has received renewed attention over the past decade or so and has subsequently been refined and fleshed out through scholarship concerned with decentred regulation. In particular, in the past 15 years, a whole range of 'new'<sup>23</sup> theoretical models have emerged, including, amongst others, smart regulation,<sup>24</sup> strategic enforcement,<sup>25</sup> ratcheting labour standards,<sup>26</sup> new governance,<sup>27</sup> and relational regulation.<sup>28</sup>

While these theories are all unique, they also share a number of common features. First, they all appreciate the challenge of managing inadequate state resources and weak political will. Second, they are all founded on a broad idea of 'regulation':<sup>29</sup> one which recognises the complexity and plurality of social problems, interests and interactions and the dispersion and fragmentation of knowledge, information and regulatory power. These theories all suggest that relying on state inspection alone will not be enough to combat the pluralistic, dynamic and complex factors which underlie decisions about compliance. Finally, on the basis of this broad and decentred understanding of regulation, these theories all encourage, to varying degrees, a regulatory approach which harnesses and exploits the resources and capacities of non-state

---

<sup>22</sup> Peter Mascini, 'Why was the Enforcement Pyramid So Influential? And What Price was Paid?' (2013) 7(1) *Regulation and Governance* 48. Braithwaite himself has recently emphasised this element: John Braithwaite, 'Relational Republican Regulation' (2013) 7(1) *Regulation and Governance* 124.

<sup>23</sup> Murray has pointed out that at least some of the characteristics of these so-called 'new' techniques of regulation have been exhibited in the regulation of labour relations for more than 100 years. See Jill Murray, 'The Sound of One Hand Clapping? The "Ratcheting Labour Standards" Proposal and International Labour Law' (2001) 14 *Australian Journal of Labour Law* 1, 5.

<sup>24</sup> Neil Gunningham and Peter Grabosky, *Smart Regulation: Designing Environmental Policy* (1998).

<sup>25</sup> David Weil (2010), 29,

<sup>26</sup> Archon Fung, Dara O'Rourke and Charles Sabel, 'Realizing Labor Standards: How Transparency, Competition and Sanctions Could Improve Working Conditions Worldwide' (2001) *Boston Review*.

<sup>27</sup> For a useful overview of the various developments and debates surrounding 'new governance': see Orly Lobel, 'The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought' (2004) 89 *Minnesota Law Review* 342; Scott Burris, Michael Kempa and Clifford Shearing, *Partnerships, Governance and Sustainable Development: Reflections on Theory and Practice* (2007); Graine de Burca and Joanne Scott (eds), *Law and New Governance in the EU and the US* (2006). For an interesting and recent analysis in the workplace context, see Cynthia Estlund, *Regoverning the Workplace: From Self-Regulation to Co-Regulation* (2010).

<sup>28</sup> See, e.g., Salo Coslovsky, 'Relational Regulation in the Brazilian Ministerio Publico: The Organisational Basis of Regulatory Responsiveness' (2011) 5 *Regulation & Governance* 70 and Ruthanne Huising and Susan Silbey, 'Governing the Gap: Forging Safe Science through Relational Regulation' (2011) 5 *Regulation & Governance* 14.

<sup>29</sup> Levi-Faur has recently canvassed the diversity of meanings that have previously been ascribed to 'regulation' from functionalist, to essentialist to conventionalist, amongst others. See David Levi-Faur (ed), *Handbook on the Politics of Regulation* (Edward Elgar, 2011) 3-6. For the purposes of this report, we adopt what could be described as a pluralist definition of 'regulation' which is: 'the sustained and focused attempt to alter the behaviour of others according to defined standards or purposes with the intention of producing a broadly identified outcome or outcomes, and which may involve mechanisms of standard-setting, information-gathering and behaviour modification.' See Black (2001), 19.

actors.<sup>30</sup>

Harnessing non-state actors in regulatory enforcement is seen as beneficial in a variety of ways – for example, it is seen to strengthen employers’ compliance motivations, assist in identifying the unintended effects of regulatory action, reduce the costs associated with adversarialism and enhance the efficiency and legitimacy of regulatory solutions through participation and collaboration.<sup>31</sup> Participatory and deliberative processes are also seen to help devise tailored and innovative regulatory solutions and encourage internalisation of public norms – both of which lead to more sustainable compliance. Indeed, the principle of sustainability is another unifying theme of many theories of decentred regulation, such as strategic enforcement. Estlund argues that the sustainability of regulatory solutions is critical:

Unless regulators’ sights are to remain permanently fixed on the targeted sectors and employers, they need to come up with strategies to secure compliance that do not depend on intensive continuing oversight – something to leave behind as they move on to a different set of targets. Those structures will need to draw on nongovernmental regulatory resources, both within and outside regulated firms.<sup>32</sup>

Indeed, there is a broad underlying assumption that private compliance initiatives may lead the way to long-term improvements in the public labour law regime.<sup>33</sup> This assumption is based on the idea that private compliance initiatives may recognise and facilitate the regulatory role played by civil society and trade unions. By helping empower these actors, private compliance initiatives implicitly pressure democratic (and even non-democratic) governments to enact and enforce labour regulation.<sup>34</sup>

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

---

<sup>30</sup> Bridget Hutter, *Managing Food Safety and Hygiene: Governance and Regulation as Risk Management* (Edward Elgar, 2011) 307.

<sup>31</sup> Peter Grabosky, ‘Using Non-Governmental Resources to Foster Regulatory Compliance’ (1995) 8(4) *Governance: An International Journal of Policy and Administration* 527.

<sup>32</sup> Estlund (2010), 69, 147; Dimity Kingsford-Smith, ‘A Harder Nut to Crack? Responsive Regulation in the Financial Services Sector’ (2011) 44 *University of British Columbia Law Review* 695, 702.

<sup>33</sup> Kolben 233. Kolben acknowledges that this is conjectural, and that the interplay of private regulatory regimes and regulatory capacity in developing states ought to be the subject of further study.

<sup>34</sup> Kolben (2007), 21, 234.

Another common thread of many theories of decentred regulation discussed above is that they prompt a ‘rethinking of the role of formal authority in governance and regulation.’<sup>35</sup> Indeed, the growth in private compliance initiatives over the past 15 years is one response to the perception that transnational corporations have more incentive and capacity to improve working conditions in supplier factories than the state in which the supplier is based.<sup>36</sup> However, as Toffel, Short and Ouellet point out: ‘the shift from the state is far from complete.’<sup>37</sup> A number of empirical studies have similarly confirmed that “neither state regulation nor private voluntary regulation function effectively in isolation, and thus a combination of private and public interventions is necessary to promote labor standards in globally dispersed supply chains.”<sup>38</sup>

There are at least two ways in which the modes or practices of interaction between public and private regimes can be analysed. The first is to analyse the *character or quality* of the interaction, and the second the actual *mechanisms and mechanics* of the interaction.<sup>39</sup> Each will be discussed in turn.

### 2.2.1 *Qualities and character of interaction*

A key question considered by a number of empirical studies is whether labour inspection and private compliance initiatives operate *in parallel*, on a *complementary* basis (i.e. intense, institutionalized interaction between state and private actors can work to leverage comparative advantages) or by way of *substitution* (i.e. private compliance initiatives serve to threaten or undermine existing state regulatory institutions through the creation of their own self-regulatory regimes).<sup>40</sup> In other words, scholars have hypothesized that international or transnational institutions can complement, substitute, reinforce, or have no effect on domestic ones.<sup>41</sup>

---

<sup>35</sup> Black (2001), 19, 110.

<sup>36</sup> Dara O’Rourke, ‘Outsourcing Regulation: Analysing Nongovernmental Systems of Labor Standards and Monitoring’ (2003) 31(1) *The Policy Studies Journal* 1.

<sup>37</sup> Toffel, Short and Ouellet, 100.

<sup>38</sup> Salo Coslovsky and Richard Locke, ‘Parallel Paths to Enforcement: Private Compliance, Public Regulation, and Labor Standards in the Brazilian Sugar Sector’ (2013) 41(4) *Politics & Society* 497, 498, citing, amongst others, Tim Bartley, ‘Transnational Governance as the Layering of Rules: Intersections of Public and Private Standards’ (2011) 12(2) *Theoretical Inquiries in Law* 517; Kolben (2007), 21; David Weil, ‘Public Enforcement/Private Monitoring: Evaluating a New Approach to Regulating the Minimum Wage’ (2005) 58(2) *Industrial and Labor Relations Review* 238.

<sup>39</sup> Kolben 2015 pp. 21-24.

<sup>40</sup> For further explanation of these concepts and the relevant literature, see Matthew Amengual, ‘Complementary Labor Regulation: The Uncoordinated Combination of State and Private Regulators in the Dominican Republic’ (2010) 38(3) *World Development* 405.

<sup>41</sup> See Amengual Indonesia study.



A number of studies have highlighted the complementary effect that private regimes may have on state regulation. For example, a recent study undertaken by Locke, Rissing and Pal showed that in states, such as the Czech Republic, with more active government enforcement of labour regulation, private compliance initiatives *complemented* government regulation and enforcement.<sup>42</sup> In this instance, an electronic firm's private monitoring of working hours and compensation of agency employees complemented active regulatory efforts and national legislation regarding the working conditions of agency workers. Amengual's study of private and public interactions in the Dominican Republic found that rather than displacing or weakening state institutions, private compliance complemented state regulation in two ways. Firstly, it freed up state resources to allow public regulators to focus on sectors of the economy with potentially more vulnerable workers and little private regulatory pressure (i.e. in the non-export market), thereby facilitating an unintentional form of coordination where each actor could focus its resources more strategically.<sup>43</sup> Secondly, public and private regulators combined their efforts within EPZ factories in ways that drew on the comparative advantage of each.<sup>44</sup> For example, private auditors often undertook routine inspections which uncovered certain types of contraventions (i.e. minimum pay, overtime, OHS etc.), while public inspectors relied heavily on complaints from workers, requests from management, or referrals from NGOs and unions, which dealt with violations that cannot be discovered in relatively short audits, or that required investigations beyond the factory walls (i.e. freedom of association).<sup>45</sup>

While there is a far reaching concern in the literature for "displacement" of public regulation by privatized regimes<sup>46</sup>, there is little empirical evidence of such displacement actually occurring.<sup>47</sup> Even where there is some evidence of displacement, this by no means leads to a complete retreat of state authority and a vacuum of regulation. In their study of the interaction of private and public regimes in the electronic sector in Mexico, Locke et.al. found that in countries with a weak regulatory system, private compliance initiatives could *substitute* for the state enforcement of domestic labour laws. In this instance, an electronic firm, working in collaboration with Mexican NGOs, ensured more effective enforcement of outdated and poorly

---

<sup>42</sup> Richard Locke, Ben Rissing and Timea Pal, 'Complements or Substitutes? Private Codes, State Regulation and the Improvement of Labor Standards in Global Supply Chains' (2013) 51(3) *British Journal of Industrial Relations* 519, 538-539.

<sup>43</sup> Amengual 408, Kolben 23.

<sup>44</sup> Amengual, 404.

<sup>45</sup> Amengual 409.

<sup>46</sup> See Amengual 406 and the literature referred to there.

<sup>47</sup> Amengual 406; Kolben 22.

enforced labour regulation concerning agency work.<sup>48</sup> While the private dispute resolution system operated with minimal engagement of the Mexican legal system, workers still had to register a labour complaint to the courts within two months of its occurrence in order not to forfeit the right to initiate a labour dispute. In addition, the parties also relied on national labour regulations (albeit outdated and poorly enforced) as the basis for all claims. In this case, therefore, substitution did not mean total displacement of the state, undermining some accounts that argue that private voluntary regulation necessarily crowds out state regulation.<sup>49</sup> This confirms the view that “governance institutions are not fungible substitutes for one another, but rather they interact in complex ways, sometimes amplifying one another’s effects on [transnational corporations] and their global suppliers.”<sup>50</sup>

Kolben points out that even if displacement effects are not occurring, the interaction between privatized regimes and state-based regulatory functions may take the forms of *rivalry* or *competition*.<sup>51</sup> However, this need not necessarily be destructive if there are opportunities for mutual learning and ratcheting up of standards:

In the case of labor regulation, state labor regulators and inspectors might feel competitive with their private regime counterparts and try to outcompete each other through more rigorous enforcement. In this case, we might have beneficial outcomes despite the fact that the parties are in a non-cooperative relationship.<sup>52</sup>

Finally, in a recent empirical study of public and private regulatory interactions in the sugar sector in Brazil, Coslovsky and Locke found that the parallel actions of private auditors and public agents worked to *reinforce* each other notwithstanding the fact that they did not necessarily communicate or coordinate directly. By way of example, the authors pointed to the fact that public inspectors were using their legal authority and sanctioning powers to address the most concerning cases of outsourcing. However, these agents were not embedded within the sector, “so they possessed limited understanding of business practices or the reforms that might help targeted firms comply with labour standards without damaging their ability to

---

<sup>48</sup> Richard Locke, Ben Rissing and Timea Pal, ‘Complements or Substitutes? Private Codes, State Regulation and the Improvement of Labor Standards in Global Supply Chains’ (2013) 51(3) *British Journal of Industrial Relations* 519, 535-538.

<sup>49</sup> Locke et al, 538.

<sup>50</sup> Michael Toffel, Jodi Short and Melissa Ouellet, ‘Reinforcing Regulatory Regimes: How States, Civil Society, and Codes of Conduct Promote Adherence to Global Labor Standards’ (Corporate Social Responsibility Initiative, Mossavar-Rahmani Center for Business and Government, Working Paper #65, January 2013) 7-9.

<sup>51</sup> Kolben, 22 (and literature referred to there).

<sup>52</sup> *Ibid.*

compete”. This is where the private auditors came in. While they possessed neither the autonomous power nor the authority to coerce firms to comply with labour standards, they exploited their positions as company insiders “to educate top managers and persuade them that introducing modern production, work, and personnel practices will contribute to the bottom line”, thereby helping to build a process of workplace transformation that facilitates compliance.”<sup>53</sup>

### 2.2.2 *Mechanisms and mechanics of the interaction*

In addition to examining the character or quality of the interaction between private and public regulation, another mode of interaction that can be analysed is the actual *mechanisms* and *mechanics* of interaction.<sup>54</sup> Kolben points out that a major gap exists in the regulatory literature about *how*, not only theoretically but especially empirically, public and private regulatory regimes interact with each other.<sup>55</sup> This is important to analyse, he continues, because “(i)t is only by understanding the how of interaction that policymakers can then design systems that will enable constructive interactions to take place, or to better anticipate what kind of interactions might be anticipated.”<sup>56</sup>

A number of models have been developed to help guide empirical research in this area. Eberlein et al. developed an analytical framework to study interactions in transnational business governance (TBG). TBG schemes, such as fair trade labels, forestry certification schemes, labour right monitoring (to name but a few), interact in highly diverse ways with one another, and with other normative regimes, both state-based and non-state.<sup>57</sup> The authors propose an analytical framework “to facilitate investigation of the drivers, forms, causal mechanisms and pathways of TBG interaction, and their effects on regulatory capacity, performance and outcomes.”<sup>58</sup> The model takes regulatory governance as its starting point. In the first place, scholars should identify the points in the regulatory process at which interactions occur, and should then address six central questions for each such point: (1) who or what is interacting; (2) what drives and shapes interaction; (3) what are the mechanisms and pathways of interaction; (4) what is the character of interaction; (5) what are the effects of interaction; and (6) how do interactions

---

<sup>53</sup> Coslovsky and Locke, 173, 497.

<sup>54</sup> See Kolben, p.24 : Eberlein et al, 2.

<sup>55</sup> Kolben 20.

<sup>56</sup> Kolben 24.

<sup>57</sup> Eberlein et al 3.

<sup>58</sup> Eberlein et al 4-5.

change over time.<sup>59</sup> The questions are not exhaustive, and no single study needs to address them all.

Bartley developed an analytical model to examine the phenomenon of rule layering, namely the interaction of private and public rules in the context of transnational governance.<sup>60</sup> Private standards, like standards for fair labour conditions in export-oriented apparel factories, do not simply add new rules for previously ungoverned phenomena. Instead, as Bartley points out, “they add an additional layer of rules for phenomena that are already embedded in complex political, legal, and regulatory orders.”<sup>61</sup> For example, private standards regarding working conditions of workers in global supply chains are layered on top of existing laws governing minimum wages, hours of work, and union representation, some of which are quite strong on paper (though often flouted in practice).<sup>62</sup> In order to examine this intersection of private – and public rules, Bartley develops a two-step approach. In the first instance, scholars should examine the content of standards “on the books,” which “can highlight topics where the substantive meanings of various rules are consistent, conflicting, or ambiguous”.<sup>63</sup> The next step is to use this analysis of the content of standards to identify focal points for studying implementation in the field. While this is by no means the only way in which to analyse the intersections of public and private rules, “it has the virtues of being straightforward, empirically tractable, and amenable to mapping configurations in a variety of national and sectoral settings.”<sup>64</sup>

Private rules can either subsume themselves to national law, require practices that are substantially different from those required by national law (potentially leading to “beyond compliance” activities), or requiring practices that are substantially similar to those required by national law.<sup>65</sup> With these (most common) relationships between the content of rules in mind, the analysis then moves on to the next phase, namely examining how they play out in practice. Bartley offers the following examples of some of the possibilities: In cases where the rules conflict, do actors involved in assessing compliance defer to one set or the other? Do they develop alternative measures that attempt to resolve the differences? In cases where rules

---

<sup>59</sup> Eberlein 13.

<sup>60</sup> Bartley, *Theoretical Inquiries in Law* (2011), p 525.

<sup>61</sup> Bartley, 518.

<sup>62</sup> Bartley 518.

<sup>63</sup> Bartley 525.

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*

endorse the same practices, does this lead to stronger, more robust implementation? Do circumstances arise that disrupt the apparent compatibility of rules?<sup>66</sup>

Kolben developed a model to help empirical research that is specifically focused on the area of transnational labour governance. Called regulatory dialogism, it has a number of distinct features that make it worthy of adoption for this study. In the first place, it is specifically designed for the area of transnational labour governance, which has unique traits that arguably deserves a distinct model.<sup>67</sup> Secondly, it has the benefit of capturing not only the *qualities* of the interaction and communication (complementarity, displacement, reinforcement, rule layering, etc.), but also the *mechanics* of the interaction.<sup>68</sup> In that sense it captures important elements from both the Eberlein et al. and Bartley models. Finally, Kolben has already applied the model to one of Better Work’s other programmes, namely Better Work Jordan, which creates the potential for cross-country comparisons within the same transnational labour governance programme.<sup>69</sup>

Kolben’s model has two axes. The Y-axis is meant to capture the institutional framework that the actors are working within, and gauges the *formality* of the institutions (ranging from formal, to semi-formal, to informal). The X-axis captures *intentionality*, which is the subjectivity and practice of the public and private individual as they interact. In addition to capturing intentionality, it is here that other dynamics such as complementarity and rule-layering, for example, will be illuminated.<sup>70</sup>

	Intentional	Unintentional
Formal	1	4
Informal	2	3

**Box 1** reflects the most *formal and intentional* mechanisms of interaction, such as an annual or semi-annual formalized meetings between a private entity and the state. **Box 2**, *informal and intentional*, refers to situations in which private and state actors intend to interact with each other “in a spirit of cooperation”, but such interaction takes place through informal mechanisms. Examples are encounters on the factory floor, through social and professional events or, as is the case in our study, through informal contact to discuss particular issues that come up in the

---

<sup>66</sup> Ibid.

<sup>67</sup> Kolben 21.

<sup>68</sup> Kolben 25.

<sup>69</sup> Forthcoming: *Michigan Journal of International Law*.

<sup>70</sup> Kolben 27-28.

field. A third form of interaction (**Box 3 – informal and unintentional**) captures situations in which the parties interact in their regulatory activities without any intention of doing so. As Kolben points out, this is where “many dynamics of public/private complementarity in rule generation and enforcement, including rule layering and implicit or ‘uncoordinated’ complementarity, as well as tacit rivalry and competition dynamics” are captured.<sup>71</sup> While much of the activity in this box occurs “under the radar”, and is more difficult to capture than formal and / or intentional interaction, “it is in these interstices of interaction where many of the most interesting dynamics take place.”<sup>72</sup> **Box 4, formal but unintentional** interactions, is probably the least likely scenario, because it would capture situations in which private and public engage in a formal institutional structure despite a lack of intention to coordinate or cooperate. One could envisage a situation in which a third party like the ILO organises an event to facilitate interaction between the public labour inspectorate and private regulatory actors (brands, MSIs), who have had a history animosity and distrust.<sup>73</sup>

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

### 3. Background on BWI and the Indonesian labour inspectorate

#### *Better Work Indonesia*

The Better Work program is a partnership between the ILO and the International Finance Corporation (IFC) which aims to improve working conditions in the global garment industry.<sup>74</sup> BW is headquartered out of the ILO’s Geneva office, but its governance is shared between the IFC in Washington DC, and the ILO, based in Geneva. The BW Advisory Committee reflects its tripartite nature, consisting of representatives from global union federations (such as the ITUC, IndustriALL), employers, and governments.<sup>75</sup> The program currently operates in eight countries around the world, including Indonesia.<sup>76</sup>

---

<sup>71</sup> Kolben 30.

<sup>72</sup> Kolben 31.

<sup>73</sup> Kolben 32.

<sup>74</sup> For a useful history of BW, see Kolben 34-35.

<sup>75</sup> For a full list of the representatives on the Advisory Committee, see [http://betterwork.org/global/?page\\_id=352](http://betterwork.org/global/?page_id=352) (last accessed 7 June 2015).

<sup>76</sup> The other seven countries are Bangladesh, Cambodia, Haiti, Jordan, Lesotho, Nicaragua, and Vietnam. See [http://betterwork.org/global/?page\\_id=314](http://betterwork.org/global/?page_id=314) (last accessed on 27 May 2015).

The apparel sector in Indonesia has a long history of poor working conditions and rampant exploitation of predominantly female workers.<sup>77</sup> A key objective of BWI – which was established in July 2011 as a five year program – is to improve working conditions and productivity in apparel-exporting factories by enhancing compliance with international core labour standards and Indonesian labour law. BWI seeks to address problems of non-compliance through three main mechanisms: assessments, advisory services, and training.

BW has recently adapted their service model. Until recently, a baseline assessment kicked off the cycle of each participating enterprise. The purpose of the assessment is to identify to what extent the enterprise is out of compliance with international and domestic labour law, and to indicate what it could do to bring itself into compliance. In their assessment of factories, BW uses the Compliance Assessment Tool (CAT), which is used to assess enterprise compliance with international core labour standards, as well as national labour law. Each CAT consists of questions that are generic as well as specific to each country, reflecting differences in national laws.

Following the assessment, the BW Enterprise Advisors (EAs) used the assessments to create improvement plans for each factory, which the EAs then helped the factories to implement in order to improve their performance by the next assessment. The vehicle for these advisory services is so-called Performance Improvement Committees (PICC), which are worker-management committees charged with discussing work-related issues through social dialogue. In some countries, like Indonesia, bipartite dialogue committees are mandated by law, which obviates the need for BW EAs to establish them. In Indonesia, these committees are called *Lembaga Kerja Sama Bipartit* (LKSB), and are mandatory in every enterprise that employs more than 50 employees.<sup>78</sup>

The new service model, rolled out on 1 April 2015, de-emphasises assessments (or audits) and prioritises advisory and training services.<sup>79</sup> Instead of starting with a baseline assessment, BW in-factory work begins with a series of visits over a period of approximately 100 days. The objective of the initial advisory period is to set up necessary social dialogue structures and to provide factory management and worker representatives with an opportunity to set targets and make improvements before the initial assessment is conducted. During this period, the factory

---

<sup>77</sup> Tim Bartley, 'Transnational Private Regulation in Practice: The Limits of Forest and Labor Standards Certification in Indonesia' (2010) 12(3) *Business and Politics* 7.

<sup>78</sup> Better Work Indonesia: Garment Industry 1st Compliance Synthesis Report, p. 13 (<http://betterwork.com/global/wp-content/uploads/Better-Work-Indonesia-Synthesis-Report-EN.pdf> - last accessed 7 June 2015).

<sup>79</sup> Better Work, *The Better Work Service Model*, April 2015, p. 2.

will also complete a self-diagnosis which, together with the assessment report, will form the basis for the improvement process.<sup>80</sup> The self-diagnosis is designed to identify or highlight where the factory needs support to meet legal requirements and standards. These needed improvements and follow-up actions are then included in the improvement plan.<sup>81</sup> As one Better Work official stated, “one of the key things about the new model is that assessment, including the self-diagnosis, now becomes part of the advisory process”. New factories will receive approximately 3 advisory visits before the first assessment is conducted.<sup>82</sup> Factories will be supported in the process through tailored factory visits, issue specific seminars (on topics relevant to the country/industry), and training appropriate to the factory’s specific needs. Factories can register for up to 25 participant days of training per cycle.<sup>83</sup>

As at May 2015, there were 137 Participating Enterprises and 29 Participating Buyers in the BWI Program.<sup>84</sup> BWI also works closely with a number of other stakeholders, including governments, business associations, workers and their representative unions, and global apparel buyers.<sup>85</sup> In Indonesia, these include the Indonesian Ministry of Manpower (Ministry), the Indonesian Employers’ Association (APINDO), the Indonesian Textile Association (API), the Korean Garment Association (KOGA) and the four main union federations of the garment industry: Garteks, TSK Kalibata, TSK Pasar Minggu, and SPN.<sup>86</sup>

#### *The Indonesian labour inspectorate*

As we will illustrate in part 4, below, BWI has close relations with the Ministry of Manpower (Ministry), and in particular with the Directorate-General of Labour Inspection Development (*Ditjen Binwasnaker*), which is the technical unit responsible for labour inspection.<sup>87</sup> The central role of the Ministry is to ensure compliance with the relevant labour laws in every economic sector and in respect of enterprises of all sizes. In addition to its enforcement function, the labour inspectorate is also responsible for formulating policies,

---

<sup>80</sup> The assessment report and the results of self-diagnosis are released to factories and buyers one month after the assessment. At this time, factories are expected to report to buyers on planned improvements. After the assessment, the advisory process continues, focusing on and addressing the issues identified in the self-diagnosis and the assessment.

<sup>81</sup> *Ibid.*

<sup>82</sup> *Ibid.*, p. 5.

<sup>83</sup> *Ibid.*, p. 3.

<sup>84</sup> [http://betterwork.org/indonesia/?page\\_id=25](http://betterwork.org/indonesia/?page_id=25) (last accessed on 25 May 2015).

<sup>85</sup> Brands include, amongst others, Adidas Group, GAP Inc, H&M, Nike, Target and Walmart.

<sup>86</sup> Better Work Indonesia: Garment Industry 4th Compliance Synthesis Report, July 2014, p. 7.

<sup>87</sup> See part 4 below for more detail on the development and content of this relationship. The MINISTRY consists of seven divisions, of which Labour Inspection development is one. See Susanna Palmer, *FOA and CB: Indonesian experience 2003-2008* (ILO Working Paper), p.15.



standards, norms, guidelines, and mechanisms, and providing technical guidance and evaluation services in all the areas falling within its mandate. The mandate of Ministry is relatively wide – it is responsible for the enforcement of laws and regulations relating to working conditions,<sup>88</sup> occupational health and safety and women and child workers.

The labour inspectorate in Indonesia is highly decentralized. The decentralization occurred as part of a much larger programme of fiscal, administrative, and political decentralization that started in the late 1990s, which, “mov[ed] the country from one of the most centralized systems in the world to one of the most decentralized.<sup>89</sup> The “radical and rapid” decentralization programme (dubbed the “Big Bang” by the World Bank<sup>90</sup>) transferred broad autonomy to the regions in all but the few tasks that are explicitly assigned to the centre—namely national defense, international relations, justice, security, religion, and monetary and fiscal policies.<sup>91</sup> In this decentralized system, the central government legislates, sets standards, monitors, and provides fiscal incentives to the regions to pursue national policy goals.<sup>92</sup> The 34 provinces - as autonomous regions - have a relatively minor role. It coordinates among the local governments (cities or regencies)<sup>93</sup>, with the latter performing all functions except those assigned to the centre and the province.<sup>94</sup> This means that the enforcement of national labour relations regulations is the responsibility of local government.<sup>95</sup>

One of the most significant problems facing the Indonesian labour inspectorate is a severe lack of financial and human resources. The budget is extremely constrained and there is a dearth of inspectors<sup>96</sup>, particularly in some areas.<sup>97</sup> It was recently reported that current labour inspection services can only reach between 200,000 and 250,000 firms per year out of a total of

---

<sup>88</sup> ‘Working conditions’ includes laws and regulations relating to the employment relationship, social security, working conditions, placement and training.

<sup>89</sup> World Bank, p.1.

<sup>90</sup> Ibid.

<sup>91</sup> World Bank, p. 7.

<sup>92</sup> World Bank, p. 23.

<sup>93</sup> There are currently 508 local districts. See ILO Factsheet, p.

<sup>94</sup> Ibid.

<sup>95</sup> Revisions to Act 22/1999 under the auspices of Act 32/2004. See Warnecke and De Ruyter, p. 397.

<sup>96</sup> It has been reported that the ratio of inspectors to workers in Indonesia is 1/47,000, which falls below even the ratio in less-developed countries as recommended by the ILO. In its 2006 benchmarking survey, the ILO suggested that the ideal ratio between labor inspectors and workers was 1/10,000 in industrial market economies; 1/15,000 in industrializing economies; 1/20,000 in transition economies; and 1/40,000 in less-developed countries. See Frans Supiarso, “Labor auditing in certified palm oil industry”, Jakarta Post, 14 November 2013. Also see <http://www.ilo.org/public/english/standards/relm/gb/docs/gb297/pdf/esp-3.pdf>, last accessed on 28 May 2015.

<sup>97</sup> Ibid 397-8. See also Tjandra, 6, 12. While all provinces have labour inspectors, the ILO reports that only 300 out of 504 districts/cities have labour inspectors, with the most inspectors concentrated in Java. See ILO factsheet, p.2.

22.7 million micro and small enterprises and 3.8 million medium and large enterprises in Indonesia. This, the ILO notes, “leaves a large gap in provision of services, with it [being] estimated that less than 1 per cent of enterprises are serviced by labour inspectors each year.”<sup>98</sup>

In addition to inadequate resourcing, there is defective coordination on labour inspection between the central and regional governments and within and between regions.<sup>99</sup> It has also been found that district-level inspectors have poor levels of motivation and high turnover,<sup>100</sup> limited accountability and problems with corruption,<sup>101</sup> and inadequate training and technical capacity.<sup>102</sup> Finally, in this regard, labour inspectors have been found to turn a “blind eye” to businesses that openly violate labour laws and to side with employers rather than workers when interpreting or applying the relevant labour laws.<sup>103</sup>

Currently, the central office of Ministry has no authority over the district inspectors because they fall under the authority of the local government. As a result, the MINISTRY is often powerless to ensure uniform interpretation of the law<sup>104</sup>, or to address instances of corruption or undue influence. During our field visit, we heard from a number of interviewees that inspectors often get rotated to other duties or transferred out of labour inspection by the mayor if they happen to inspect business with close relationships to the mayor. As one interviewee pointed out:

“The majority of inspectors at district level are dedicated but they often face conflict of interest. They go into enterprises and find many non-compliances. If the factory owner

---

<sup>98</sup> ILO, *Labour and Social Trends in Indonesia 2012* (Jakarta 2013), p. 49.

<sup>99</sup> ILO, *Labour and Social Trends in Indonesia 2012* (Jakarta 2013), p.49.

<sup>100</sup> Tjandra has argued that poor motivation can be linked to limited prospects for promotion and career progression following the devolution of responsibility to the district agencies: *ibid.*

<sup>101</sup> Warnecke and De Ruyter, p. 398. In some cases, political considerations of patronage appear to have influenced the appointment of the head of the agency with little regard for the knowledge and expertise of the relevant government official. Tjandra, p. 12. During our field visit, claims of corruption amongst inspectors at the district level were frequently made, alluding to the fact that inspectors at district level often do favours for businesses (like approving the use of fixed-term contracts) in return for cash. A 2008 survey conducted by the Corruption Eradication Commission confirmed the general public perception that the Ministry is prone to corruption. Of the 30 ministries surveyed by the Commission, Ministry placed 26<sup>th</sup> in respect of the quality of their services and their susceptibility to corruption. See “Shamed ministries pledge to provide better public service”, *Jakarta Post*, 31 March 2008.

<http://m.thejakartapost.com/news/2008/03/31/shamed-ministries-pledge-provide-better-public-service.html>, last accessed on 29 May 2015.

<sup>102</sup> Inspector training was previously provided by the central government authority. As a result of decentralisation, the technical training provided to inspectors is dependent on the inclination (and budget) of the relevant district agency. *Ibid* 12; and Warnecke and De Ruyter, pp. 397-8.

<sup>103</sup> Warnecke and De Ruyter, 397-8.

<sup>104</sup> In part 4, below, we will indicate to what extent BW has been able to play an important a mediating role in this regard.

is close to the mayor, he will call up the mayor and say the inspector is making a fuss. The mayor would then just call the *dinas*<sup>105</sup> and say forget about this company. They are close to me.”

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

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

A 2005 joint study by the ILO and ASEAN noted that almost 60% of registered labour inspectors have been transferred to other positions outside their expertise since decentralization and a large number of regencies are operating without labour inspectors.<sup>106</sup> In 2008, the central labour inspectorate agency claimed that they had not received any reports from the regional inspectorates since regional autonomy was introduced in 2001.<sup>107</sup> By 2010, this had only improved slightly, when it was reported that only five provinces out of 33 regularly submitted inspection reports during that year.<sup>108</sup> In 2011, the ILO found that was no evidence of any inspection plans or programs at the district/province level (ILO 2011).<sup>109</sup>

In 2014, the Indonesian government enacted legislation<sup>110</sup> to curb the autonomy of local governments and restore some power to the central – and provincial governments.<sup>111</sup> This broader recentralization-process will also affect labour inspection. Under this new system, which is expected to take two years to implement, labour inspectors will no longer fall under the authority of the local government but will instead report to the governor as head of the

---

<sup>105</sup> The local offices of the Ministry are called the *Dinas Tenaga Kerja dan Transmigrasi*, or *Dinas* for short. In colloquial speech, the word *dinas* is used to refer to both the office and the people (inspectors in this case) who work there.

<sup>106</sup> Tirta Hidayat & Diah Widarti, *ILO/ASEAN Joint Study on: Social Implications of ASEAN Free Trade Agreement (AFTA) on Labour and Employment: the case of Indonesia*, Jakarta, December 2005, p. 34.

<sup>107</sup> Susanna Palmer, *FOA and CB: Indonesian experience 2003-2008* (ILO Working Paper), p.5-6

<sup>108</sup>Warnecke and De Ruyter, pp. 397-8 (citing Oemar).

<sup>109</sup> Ibid, citing 2011 ILO study.

<sup>110</sup> *Law on Regional Government 23/2014*.

<sup>111</sup> "Overcoming problems in new autonomy era", Jakarta Post, 22 December 2014

(<http://www.thejakartapost.com/news/2014/12/22/overcoming-problems-new-autonomy-era.html> - last accessed on 2 June 2015).

provincial government.<sup>112</sup> This, we were informed, is primarily to secure the independence of the inspectorate and to avoid undue political interference from the district leadership.<sup>113</sup>

In addition to recentralisation, there have been two other initiatives designed to improve the compliance and enforcement activities and processes of the Indonesian labour inspectorate. In April 2012, a tripartite Labour Inspection Committee was established. This Committee – which is made up of representatives from government, employer associations, trade unions and other civil society organisations – is designed to act as an advisory and consultative body.<sup>114</sup> A second initiative is designed to place so-called ‘Labour Norms Experts’ (LNEs) in each Participating Enterprise in Indonesia. These ‘experts’ are employees of the factories who have been specifically trained on Indonesian labour norms, and are expected to assist the enterprises in completing an annual self-assessment. According to the recent Ministerial decree, LNEs will “become the partner of [the] labor inspector in enhancing the company’s compliance toward ... labor norms implementation”.<sup>115</sup> BWI has been involved in the establishment of this initiative – an aspect to which we will return in part 4, below.

#### 4. Application of the analytical model to BWI

##### 4.2.1 *Formal and intentional*

While there is no formal cooperation agreement between BWI and Ministry,<sup>116</sup> there are a number of examples of formal and intentional interaction between BWI and the Ministry. Arguably the best example of this type of interaction is the Project Advisory Committee (PAC). Others include the bipartite ad hoc committee, collaboration on enforcement and training, among others.<sup>117</sup>

Each country programme in Better Work is advised by a tripartite PAC that includes representatives from the national government (usually the Ministry of Labour) and national-level employers’ and workers’ organizations/trade unions, representing the sector or industry.

---

<sup>112</sup> Some officials pointed out to us that labour inspection is a form of law enforcement, which in their view means that it should be treated like the police and immigration authorities, who fall directly under the authority of the central government. One official mentioned that there was some support for placing the labour inspectorate directly under the authority of the central government, and that this was still one of the options on the table (see interview with Pak Syamsul).

<sup>113</sup> Pak Herman.

<sup>114</sup> To date, the committee has met twice. See Pak Herman interview.

<sup>115</sup> Attachment I to Ministerial Decree on *Labor Norm Cadre Formation and Training* (257/2014), p.2.

<sup>116</sup> There are such agreements in other BW countries like Jordan and Lesotho.

<sup>117</sup> See part 4, below.

The presence of the government in the governance structure of all BW country programmes sets it apart from other, more private regimes, where such formalized interaction is often absent. In Indonesia, the PAC includes representatives of the Ministries of Trade, Industry, and Manpower, APINDO (employers' organization) and four key national and sectoral trade unions. BWI is represented by three senior staff members, including the BWI programme manager.

The PAC guides the implementation of BWI programming while also helping to monitor and evaluate BWI's implementation against its work plan.<sup>118</sup> As the name suggests, the PAC plays an advisory and not decision-making role. As one BWI staff member put it: "We listen to them but in the end we implement; their role is only advisory". One issue that is currently under discussion in the Indonesian PAC is that of public reporting (or transparency). BW already implements public reporting on non-compliances in Haiti and Cambodia, and, based on the "positive results" there, intends to "implement public reporting in all of its country programmes from late 2015/2016 onwards".<sup>119</sup> The first meeting of the PAC took place in June 2012, and while meetings are normally held twice a year in other BW countries, the Ministry has requested quarterly PAC meetings, which could be viewed as evidence of the Ministry's "particular interest in overseeing the BWI programme."<sup>120</sup>

As we will point out later, the entry of BW into Indonesia was not an easy one, and it took at least one year of discussion between BW and the Ministry before BWI was allowed to officially operate in the country. Currently, the relationship between BWI and the Ministry is a very strong one, with both parties viewing it as "very positive" and mutually supportive. We believe that there are at least two reasons for this, which present us with two additional instances of formal and intentional interaction between BWI and the Ministry. Firstly, BWI arranged for the secondment of two Ministry officials to the ILO in Geneva in 2012. Funded by the BWI and the ILO, the two senior Ministry officials were hosted partially by Better Work Global in Geneva, and by the ILOs technical department responsible for labour inspection, LABADMIN/OSH.<sup>121</sup> This study tour increased the Ministry's understanding of the role and functions of BWI, and opened up the space for closer cooperation.<sup>122</sup> The secondment has been so successful that it has since

---

<sup>118</sup> Better Work Indonesia Newsletter, 4th edition, 2013 (see [http://betterwork.org/indonesia/wp-content/uploads/4th-Edition\\_FINAL-DIGITAL-ENG-LOW.pdf](http://betterwork.org/indonesia/wp-content/uploads/4th-Edition_FINAL-DIGITAL-ENG-LOW.pdf) - last accessed 8 June 2015).

<sup>119</sup> The Better Work Service Model, April 2015, p. 11.

<sup>120</sup> See Tajgman, p. 9.

<sup>121</sup> Tajgman, p. 11.

<sup>122</sup> One of the two seconded Ministry officials indicated that after the visit to Geneva, he started to work tirelessly to "convince colleagues in the inspectorate to accept BW".

become an annual event.<sup>123</sup> Since 2014, the Ministry has taken over financial responsibility for the secondment because – as one interviewee noted - “they saw the benefit of the tours”.

Secondly, BWI and the Ministry created a so-called bipartite *ad-hoc committee* in 2011. The significance of the ad-hoc committee cannot be overstated. As we will discuss in the next part, the committee has – in addition to *the formal and intentional* contact – also engendered significant *informal and intentional* interaction between BWI and the Ministry. The committee consists of a number of representatives from BWI and fifteen officials from the Ministry. Formal meetings usually take place once a year but after the first two years, they have been organised largely on an ad hoc basis when the need arises.<sup>124</sup> However, as we will point out in the next part, *informal* contact between the committee and BWI takes place at least monthly.

The idea for the ad hoc committee came from the then Director-General of Inspection Services, who wanted to create a forum in which BWI and the Ministry could interact to “reduce the tension” that existed in respect of their respective roles. As one ex-senior official in BWI told us, “this was a great recommendation to address a delicate problem”. Formally, the first two meetings of the committee were devoted to an evaluation of the Better Work Compliance Assessment Tool (CAT).<sup>125</sup> Ministry used the meetings to ensure that “BW was following the existing [labour] regulations”. This is not unusual since Better Work works closely with the relevant Ministries in all the countries in which it operates to receive guidance on how the national law should be interpreted and applied to the garment industry.<sup>126</sup>

More recently, the Ministry has consulted BWI on a new initiative to improve labour compliance in Indonesia. To date, three formal meetings have taken place. Indonesia’s labour inspectorate – like the majority of labour inspectorates around the world – experience severe capacity constraints.<sup>127</sup> In order to address these constraints, the Ministry is developing a system to introduce so-called “Labour Norm Cadres” (LNC) into Indonesian workplaces.<sup>128</sup> The cadres will be employees of the enterprises, and after certification by the government, will assist the enterprise in improving labour compliance in a number of ways, including assisting with the

---

<sup>123</sup> We were also informed that the Ministry has recently taken over financial responsibility for the study tours from BWI and the ILO, which reflects the value they attach to the initiative.

<sup>124</sup> As one senior BWI staff member pointed out: “The ad hoc committee is convened “whenever there is a need from BWI to discuss certain issues that needs the approval of Ministry or to ensure that our work is aligned or supports Ministry policies or workplan”.

<sup>125</sup> See part 3, above.

<sup>126</sup> See <http://betterwork.org/global/?faq-category=ii-assessments> – last accessed 19 June 2015.

<sup>127</sup> See part ?, above. In a meeting with the Ministry, we were informed that there are 240 000 companies in Indonesia, and only 1900 inspectors. Out of the more than 500 districts in Indonesia, 190 have no labour inspectors.

<sup>128</sup> See Ministerial Decree No. 257/2014 on Labor Norm Cadre Formation and Training.

completion of an annual self-assessment. It is hoped that the cadres will “become ... partner(s) of [the] labor inspector ...[by] enhancing the company’s compliance toward ... labor norms implementation”.<sup>129</sup> One senior Ministry official and ad hoc committee member confirmed that BWI was a “source of inspiration” for the initiative.<sup>130</sup> Ministry believes that one of the reasons that BWI factories are generally more compliant than non-BWI factories is the fact that BW factories are more familiar with labour norms and do not “learn about labour standards from Google”. Since the initiative involves a self-assessment component, the Ministry is particularly interested in self-diagnostic tools developed by international buyers to assess their own suppliers. In this regard, BWI has facilitated contact between international buyers and Ministry, and also provided input on the feasibility of using the BW CAT as the basis for the planned self-assessment. In addition, BWI has invited international buyers and BW factories to the LNE meetings with Ministry. This has directly increased brand support for the initiative. For example, one major international brand is sending all their compliance staff in the country to be trained as LNC’s, and is encouraging their factories (suppliers) to participate. Finally, BWI has used their access to the district to encourage them to attend information sessions presented by the Ministry.<sup>131</sup> As one BWI staff member said, “we are helping the Ministry to socialize the idea of the Labour Norm Cadres in the provinces where we operate”.

There are also several additional instances of *formal and intentional* interaction between Ministry and BWI in the areas of enforcement and training. First, an extensive *Zero Tolerance Protocol* has been discussed between the Ministry and BWI. The protocol provides that when EAs discover instances of child labour, forced labour, sexual violence and issues that pose an imminent threat to worker health and safety, they will report the issue to the BWI Programme Manager, who in turn will inform the Ministry and the district or provincial labour inspectors in writing of the violation within 24 hours.<sup>132</sup> However, since the protocol has not yet been

---

<sup>129</sup> See Attachment I to Ministerial Decree No. 257/2014, Chapter 1.

<sup>130</sup> It also appears that the discussions of PCIs – especially the tripartite committee of experts in Geneva and the background paper – prompted the Ministry to investigate the use of internal company resources for compliance purposes. The influence of the ILO therefore goes beyond BWI.

<sup>131</sup> Apparently, attendance of provincial inspectors at the first event was very poor, which promoted BWI staff to reach out to the district level inspectors in the areas in which BW operates to encourage them to attend the subsequent events, which had a positive effect on attendance.

<sup>132</sup> See *Zero Tolerance Protocol between the Indonesian Ministry of Manpower and Transmigration and Better Work Indonesia*, 8 July 2013 (on file with the authors).

formally approved by the Ministry<sup>133</sup>, the BW's general zero tolerance protocol is applicable, which covers the same issues albeit in slightly less detail.<sup>134</sup>

Important interchanges have also taken place in the area of training. The two labour inspectors who were seconded to the Better Work team in Geneva helped to review and adapt Better Work's training modules on occupational safety and health and fire safety.<sup>135</sup> On their return to Indonesia, they were involved in training workers and managers in Better Work subscribed factories.<sup>136</sup> Ministry officials have also been working with Better Work to train district and provincial manpower officials to better understand the law and industrial relations, and with a view to harmonizing interpretations of national labour law provisions.<sup>137</sup> The topics for these so-called "refresher trainings" are decided by BWI, but the delivery of the training is usually done by a member of the ad hoc committee "because they know BW and the way we think". In order to ensure convergence, the training material is developed jointly by BWI and the Ministry, and is often based on case studies developed from the factory experiences of EAs.<sup>138</sup> In 2012, during a refresher training offered to district inspectors presented by BWI, the need for convergence came into sharp relief when a BWI case study evoked widely divergent answers from the district inspectors. This prompted BWI to bring in national level inspectors to deliver the training since the national level inspectors could use its authority to "enforce" a uniform interpretation by the district level inspectors. As we will see in the next section, this is a tactic that has served BW well. Combining transnational labour regulation with state regulation in this way has indirectly strengthened the public labour inspectorate in Indonesia.

#### 4.2.2 *Intentional and informal*

Given Indonesia's decentralised system of labour inspection, BWI works in highly varying contexts. Inspectors in the various regions often differ in their interpretation and application of the law, especially in instances where the central government is either not aware of the problem or their decisions do not cascade down to the provinces and districts. These divergent views often complicate the work of BW EAs because the difference in interpretation prevents them

---

<sup>133</sup> Although the protocol has received the "approval" of the PAC, we were informed that the Ministry would like to expand the list of "zero tolerance issues" beyond the list currently contained in the draft protocol before they would consider signing it.

<sup>134</sup> See <http://betterwork.org/global/?faq=appendix-two-generic-global-zero-tolerance-protocol> (last accessed 9 June 2015).

<sup>135</sup> See GB discussion document, *Update on the Better Work Programme*, 4 February 2014, p. 5 para. 22, Tajgman, p. 11.

<sup>136</sup> GB document, p. 5 para. 22.

<sup>137</sup> Tajgman, p. 10.

<sup>138</sup> Tajgman, p. 11.



from taking any clear action in the factories. As one senior BW staff member remarked: “(W)e don’t want to go to a factory and identify a NC [non-compliance] when the local *dinas* [district inspectors ] consider it a compliance. That’s not good.”

In order to address this, BWI has adopted an interesting tactic. Instead of engaging directly with the district inspectors, BWI officials approach members of the ad hoc committee for a definitive interpretation, which they hope will filter down to the provinces and the local districts. However, given the fact that district level inspectors are under the control of local politicians, and therefore have no direct contact with the Ministry, policy decisions taken at national level “do not always cascade down to the regional level”.<sup>139</sup> As we will show, this *intentional and informal* interaction between BWI and the Ministry overshadows the *formal and intentional* interaction both in frequency and potential significance. As far as frequency is concerned: the formal meetings of the ad hoc committee – apart from the first two years when it met annually – takes place whenever “the need arises”. However, the informal contact between BWI staff and members of the ad hoc committee takes place on a regular basis – at least monthly.<sup>140</sup> These informal interactions usually occur between one or two BWI staff members responsible for assessments or advisory services, and one current (or even, in one instance, retired<sup>141</sup>) member of the ad hoc committee.<sup>142</sup>

These exchanges are potentially significant because through the process of clarifying the law with the Ministry, BWI indirectly strengthens the authority of the Ministry, who otherwise has little direct contact with the *dinas* or much influence over the manner in which they interpret labour regulations. One example pertains to the issue of minimum wage postponements. Minimum wages in Indonesia are locally determined, and have increased significantly in recent years. In order to smooth the process of increasing wages, Indonesian law allows for factories to delay part of the wage increase after consultation with workers, an audit from regulators to

---

<sup>139</sup> During a meeting with the ad hoc committee, one member of the committee lamented the fact that they had no direct contact with the local inspectors, and suggested that BW should create the equivalent of an ad hoc committee in every district in which it operates in order to ensure that national level decisions cascade down to the local *dinas*. This indicates that in many ways, the Ministry recognises the important “brokering” role that BWI plays to facilitate contact between them and the *dinas*.

<sup>140</sup> This is in stark contrast with the situation in Jordan, where there is very little informal interaction between BW Jordan and the public labour inspectorate. See Kolben “Dialogic Labor Regulation in the Global Supply Chain, forthcoming *Michigan Journal of International Law* (2015), p. 139.

<sup>141</sup> One of the persons that BWI regularly consults with is a former member of the ad hoc committee, and former Director of Inspection Services.

<sup>142</sup> As one senior BWI staff member explained: “Any questions that buyers and factories have on interpretation [of labour regulations] come to me. I am the one who will contact the Ministry and discuss the issue (with them) and then I will either issue a legal update on the issue or communicate directly with the brand or factory via e-mail to say that this [official] interpretation is BWs compliance decision.”

determine the factory's profitability, and approval from the provincial governor.<sup>143</sup> However, it was reported that in many instances factory managers were able to circumvent the formal process for postponement with tacit or explicit support from local government officials, including local labour inspectors. BWI refused to honour wage postponement increases that did not meet the formal legal procedural and substantive requirements for postponement, which is a position that was supported by the central Ministry. In a recent paper, Amengual and Chirot show that as a result of the approach BWI adopted towards the issue (ensuring that its position converged with that of the central Ministry and then applying that interpretation in its factories, facilitating meetings between BW factory management and the Ministry, and issuing a series of legal updates on the matter), BWI factories were more likely to go through proper wage setting procedures than other factories.<sup>144</sup>

BWI also consults regularly with ad hoc committee members in developing training material. We have pointed out that BWI often organises refresher training on industrial relations topics for local inspectors, and that in developing the material, consults with ad hoc committee members, who would also deliver the training. However, there are also instances where BWI consults with *dinas* in developing training material for training that Better Work offers to its factories. For example, EA's in Semarang consulted with *dinas* in developing training material on chemical handling management, which the EA's reported they found "valuable", "beneficial" and "helpful".

In addition to the interaction with the members of the ad hoc committee to receive clarification on the interpretation of labour regulations, BWI staff also act as brokers to facilitate contact between Ministry staff and local inspectors. In addition to the formal training sessions where BWI invites Ministry officials to provide "refresher training" to local inspectors,<sup>145</sup> BWI has also facilitated "informal" knowledge-sharing sessions between Ministry officials and local inspectors. For example, after a discussion with Ministry on the issue of chemical safety, BWI facilitated a visit by a Ministry official and a number of local inspectors to one of BWI's factories, which the Ministry official used as an opportunity to mentor the *dinas* on how chemical risk

---

<sup>143</sup> See Minister of Manpower and Transmigration Decree No. 231 of 2003.

<sup>144</sup> Matt Amengual and Laura Chirot, "Layering Global and Domestic Labor Regulations in Indonesia" (unpublished paper on file with the authors). Recently, BWI convened a meeting with the Ministry and local inspectors (*dinas*) from Jakarta, Tangerang, Bogor and West Java to urge convergence in how the matter of postponement would be handled during 2015. As one BWI staff member explained: "We did not want the same thing to happen in 2015 because ... you have disputes, allegations and all of this can be avoided if we have convergence on how we approach postponement".

<sup>145</sup> See above.

levels should be assessed. This also represents an instance where Ministry adopted one of BWI's practices – in this case the manner in which BW EAs assess chemical risk.

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

#### 4.2.3 *Informal and unintentional*

Kolben points out that this category is where “some of the most interesting and difficult dynamics to analyze are found”<sup>146</sup> and where interactions take place without intentionality or explicit awareness that such interaction is occurring.<sup>147</sup> It is here where dynamics such as “rule layering”, competition and rivalry as well as complementarity can be identified.

#### Competition / rivalry / displacement

Currently, the Ministry and BWI consider their relationship to be “very good”, “positive” and “mutually beneficial”. This stands in stark contrast to the Ministry's attitude towards BWI when it attempted to establish BW's presence in Indonesia in 2011. While BWI began conducting assessments in apparel factories in July 2011, it took almost one year before the project document was signed and for the first formal interactions between Ministry and BWI to take place. According to BWI staff, the main reason for this initial antagonism was the concern on the part of the Ministry that BWI constituted *competition* or a potential *rival*. As one senior BWI staff member observed: “The key tension within the Ministry at the time was to determine what the role of BW is if we have a labour inspectorate.” It took a year for the project document to be

---

<sup>146</sup> Kolben, p. 139,

<sup>147</sup> Kolben, p. 127.

approved and signed “because it took that long to convince them [Ministry] that we weren’t a threat and that there was a space [in Indonesia] for a group like us”. A least one BW staff member believed that the Ministry was concerned about being *displaced* by BWI: “At the beginning the relationship was difficult because they [Ministry] thought we would take their jobs”.

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

The displacement thesis seems hard to sustain in light of the relative scope of influence of the respective actors. While the labour inspectorate in Indonesia is responsible for all sectors of the Indonesian economy and operates – in theory<sup>148</sup> - across all of Indonesia, BWI operates in the Indonesian textile industry only, and only in areas that produce for the export market. Almost 90% of the textile industry is located in Java, and 55% of these enterprises are concentrated in West Java alone.<sup>149</sup> As a result, BWI has a presence in only 15 of the over 500 districts in Indonesia.<sup>150</sup> Tajgman reports that the Ministry views BWI as just one of many sector initiatives designed to promote improved and safer work conditions for Indonesian workers, and while the interactions appear to be welcomed and beneficial for the inspectorate, “they appear not to be potential game changers for PLIS [public labour inspection service] operations.”<sup>151</sup>

In addition, the two actors have distinctly different methodologies. As pointed out earlier, BWI has always placed an emphasis on continued improvement through its advisory services and has recently decreased the significance of assessments even further.<sup>152</sup> The public labour inspectorate, on the other hand, focuses on the inspections of enterprises – primarily by means

---

<sup>148</sup> Even though a sizeable number of regions have no labour inspectors – see part 3 above.

<sup>149</sup> [http://betterwork.org/indonesia/?page\\_id=45](http://betterwork.org/indonesia/?page_id=45) – last accessed on 12 June 2015.

<sup>150</sup> As Tajgman observes: “BWI’s influence on broader public labour inspection issues is commensurate to the size of the sector in which it operates.” See Tajgman, p. 9.

<sup>151</sup> Tajgman, p. 13.

<sup>152</sup> See the discussion of the new revised BW model in part 3, above.

of routine inspections.<sup>153</sup> While BWI's assessments are 2-person, 2-day assessments, and involve interviews with a wide range of people – including management and workers, labour inspectors spend far less time in each enterprise (“an hour or two”) and their interviews are more limited (“they only talk to management”).<sup>154</sup> Finally, BW's sanctions are primarily economic (poorly performing factories might be “dropped” by international buyers<sup>155</sup>), whereas the public labour inspectorate has the leverage of state sanctions. As one senior Ministry official remarked: “There are some things that only labour inspectors can ask people to do. BW can only report to Geneva. Labour inspectors have the right to enter, inspect, take note, and impose penalties. BW has no right of punishment”. In sum, “the framework in which BW operates – tripartite oversight, compliance benchmarked by international standards where national standards do not conform, no sanction authority in law, a focus on correction of causes, regular periodic assessments, etc. – is significantly different from a PLIS (public labour inspection service)”.<sup>156</sup>

### Complementarity

Complementarity occurs “when the private and public regimes work compatibly to achieve desirable regulatory goals”.<sup>157</sup> In this study, we have identified a number of ways in which the two actors complement or strengthen one other, which includes both obvious ways (such as training and diffusion of practices) and ways that occur “under the radar” – in particular the way in which BWI's informal interaction with the ad hoc committee indirectly strengthens the PLI in Indonesia.

In his seminal study on the interaction between state and private regulators in the Dominican Republic, Amengual shows that uncoordinated complementarity<sup>158</sup> can occur when state and

---

<sup>153</sup> In a meeting with North Jakarta district inspectors, we were informed that each inspector is expected to visit 10 companies per month. Out of approximately 100 inspections conducted each month, approximately 15-17 are in response to complaints, which are lodged mostly by trade unions.

<sup>154</sup> As mentioned earlier, the labour inspectorate in Indonesia faces severe resource constraints. In North Jakarta, there are 12 inspectors, and 7000 registered companies. At most, inspectors will be able to visit 120 companies a month (12 inspectors each visiting 10 companies per month).

<sup>155</sup> Although, as Amengual et al. point out, in practice brands rarely drop factories. Amengual, p. 409. Interestingly, the labour inspectorate seems to favour a “softer” approach to sanctions that will stop short of brands dropping factories. As one Ministry official remarked: “We need the approach of a hard warning, but we don't want buyers to cut off orders. This would bring unemployment, which is the new problem [in Indonesia]”.

<sup>156</sup> Tajgman, pp. 30-31.

<sup>157</sup> Kolben, p. 141.

<sup>158</sup> Amengual, p. 412 (“(The) driver of complementary regulation is comparative advantage, not coordination. Complementary regulation occurs when the actions of state and private regulators are mutually supportive of one another's efforts and, because of the different pressures on these actors, they bring different tools to the task of regulating).

non-state regimes are able to strategically focus resources on issue areas in which they have a comparative advantage. In the first place, it freed up state resources to allow public regulators to focus on sectors of the economy with potentially more vulnerable workers and little private regulatory pressure (i.e. in the non-export market). Secondly, public and private regulators combined their efforts within EPZ factories in ways that drew on the comparative advantage of each, with private auditors uncovering certain types of contraventions (e.g. minimum pay, overtime, OHS etc.), while public inspectors relied heavily on complaints, which meant they uncovered violations that cannot be discovered in relatively short audits, or that required investigations beyond the factory walls (e.g. freedom of association).<sup>159</sup>

There is no evidence in Indonesia of complementarity of the first kind (PLI focusing energy on sectors not covered by non-state actors). While the Ministry recognises the important role that BWI plays in addressing some of the resource constraints of the PLI<sup>160</sup>, a senior official confirmed that BWI factories are not exempt from inspections: “Labour inspectors still do inspections ... in BW factories – there is no special privilege for a BW factory”.<sup>161</sup> However, senior officials in the Ministry stated that the inspectorate currently focuses their resources on the manufacturing, mining, fishing and maritime sectors. It may well be that these sectors represent the sectors with the greatest risk, but it may also (in part) be because the garment industry is already under intense scrutiny from international brands, MSIs and organizations like BWI, which enables the public labour inspectorate to focus its limited resources elsewhere.<sup>162</sup>

In respect of complementarity of the second kind, there is some evidence that BWI and the PLI have comparative advantages in specific areas. For example, officials from the Ministry acknowledged that they had learnt a lot from BWI in the domain of freedom of association – in particular the manner in which EAs identify and investigate freedom of association violations in factories.<sup>163</sup> Given the fact that freedom of association violations are particularly difficult to uncover, and often require in-depth investigations and triangulation of evidence, it makes sense

---

<sup>159</sup> See part 2, above.

<sup>160</sup> “BW helps our labour inspectors in the field – where we have too few [because] (they) help us by the way they find NC and they help factories to comply with the regulations”.

<sup>161</sup> This was confirmed during an interview with senior labour inspectors in North Jakarta, who said that they are unlikely to know if a factory they are inspecting is in the BWI programme (2 April 2015).

<sup>162</sup> This, however, is speculative at this stage and will need to be verified.

<sup>163</sup> As evidence, BWI provided training to labour inspectors on investigation skills related to freedom of association .

that BWI EAs are better placed to uncover those.<sup>164</sup> BWI EAs confirmed that the fact that they have continuous contact with a factory in the form of advisory services allow them to follow-up on freedom of association violations discovered (or even suspected<sup>165</sup>) during assessments. This is a luxury that a resource-strapped PLI - whose visits are usually limited to a few hours and primarily involve interviews with management - does not have. On the other hand, BWI acknowledges and often relies on the expertise of the Ministry in the field of occupational health and safety by using Ministry officials as training service providers<sup>166</sup>, or by relying on the expertise and experience of district inspectors to develop BWI training material.<sup>167</sup>

In our view, the most significant instance of complementarity occurs as a result of the intentional and informal contact between BWI and individual members of the ad hoc committee. What is most striking to us is the way in which BWI use their unique access to the factories to uncover how Indonesian labour law and regulations are being interpreted and applied locally, and then to use their equally unique access to ad hoc committee members to obtain the “authoritative” interpretation of the law or regulation, which is then filtered back down to the district level.<sup>168</sup> This, we believe, is an important and innovative way of combining a private regulatory actor with state regulation to strengthen state institutions indirectly. Not only does BWI assist in converging conflicting interpretation of laws and regulations in the different districts and provinces in Indonesia, but it also helps to enhance and shape the influence of the Ministry with district inspectors over whom they have very limited authority or control. We believe that BWI has been able to achieve this as a result of their strong integration within the Ministry. This arguably sets BWI apart from other non-state actors in the transnational labour regulatory field, where it is highly unusual to find robust relationships between private and public regulatory actors. As the ILO has noted:

---

<sup>164</sup> An additional reason may be the fact that most of the BWI EAs have a background in compliance auditing, which means that they have experience in dealing with freedom of association-issues in factories.

<sup>165</sup> EAs informed us that they may have a *hunch* or *gut feeling* during an assessment that a FOA violation has occurred, but due to a lack of direct evidence, do not cite it as a non-compliance. However, in such a case, the EA responsible for the assessment would inform the EA responsible for advisory services in the factory (they are always different EAs in order to avoid conflict of interest) of their suspicions, and leave it to that EA to raise and investigate it further during advisory services.

<sup>166</sup> Tajgman, p. 11.

<sup>167</sup> This recently happened in Semarang, where EAs consulted with district inspectors in preparing training material on chemical handling management – a process described as “valuable”, “helpful” and “beneficial” for BWI.

<sup>168</sup> This is done either through conveying the Ministry’s interpretation directly to the district inspectors, implementing the Ministry’s interpretation in the factories in defiance of the interpretation of the district inspectors, or using regular “legal updates” to publicise and entrench the Ministry’s interpretation. See

“In practice, public institutions (including labour inspection) tend not to be involved directly in PCI activities. The exceptions to this are cases where the public authorities have been instrumental in making the PCIs operational, or where the PCI has, on its own initiative, brought public institutions in to play essential functions in the compliance scheme.”<sup>169</sup>

#### 4.2.4 *Formal and unintentional*

The relationship between BWI and the Ministry – apart from the initial interactions – is described as positive and mutually beneficial by both parties. Even at the beginning, when the Ministry viewed BWI with some scepticism, there was a common desire to meet and to interact. In other words, none of the interactions between BWI and the Ministry has required the intervention of an independent third party to bring together two parties who were reluctant to meet. However, there may be incidences of the formal/unintentional interaction at work when broadening the analysis to the interaction between BWI and the district inspectors. It appears that the interaction between BWI and district inspectors have been mostly informal and ad hoc, and largely based on the personal relationships that the EAs have with individual inspectors.<sup>170</sup> However, in some instances in which BWI and the district inspectors have *formally* interacted, the Ministry has been instrumental in facilitating the interaction. For example, in a meeting that we had with the district inspectors in North Jakarta, we were told that the instruction to the district inspectors to attend had come directly from the Ministry, and we were left with the clear impression that the meeting would not have occurred in the absence of the Ministry directive.

## 5. Conclusion

The proliferation of private compliance initiatives has provoked a wide range of assessments and views, from both policy and theoretical perspectives. Kolben, for example, views private regimes as a helpful and necessary means of addressing labour governance deficits in global supply chains. He nevertheless believes that these regimes “should ideally be utilized in ways that aim to enhance state capacity through implicit and explicit discursive and dialogic

---

<sup>169</sup> *Labour inspection and private compliance initiatives: Trends and issues* (ILO background paper for the meeting of experts on labour inspection and the role of private compliance initiatives, December 2013), p. 21.

<sup>170</sup> For example, in Semarang, one of the EA’s who has good relations with the local *dinas* indicated that this is due to the fact that he worked in one of the BWI factories before joining BW, and that he has known the *dinas* since then. It must be noted that there are on-going discussions within BWI to designating one EA in each region as the point-person for interaction with the local government /district inspectors. While some EA’s have indicated to us that interaction with district inspectors is required of each EA and is part of their job description, other EA’s have contradicted this, and indicated that they have either had no contact with local inspectors, or that the contact they have had has been entirely accidental and ad hoc.



engagement.”<sup>171</sup> He points to the well-known limits of transnational private regulation (such as lack of effectiveness, lack of sustainability, limitation in scope, and lack of democratic legitimacy) to argue that increased attention should be paid to the state, “especially the ones that are currently weak or politically unwilling to enforce domestic and international labor law”.<sup>172</sup> Private regimes in the transnational labour sphere, he argues, should be “designed and oriented towards strategically developing state regulatory capacity, especially in the specific areas of comparative advantage.”<sup>173</sup>

It remains largely unclear, however, under what conditions collaborations between private compliance initiatives and public enforcement activities are most likely to ‘work’, and how these conditions may be adjusted in order to maximise the benefits and limit the risks. In this sense, it remains unclear – in the abstract – to what extent the interaction of private and public regulation in any context is likely to satisfy the goals that Kolben (for example) would like to see pursued. In the end, these are first matters for empirical research. It is vital to map the specific ways in which private and state actors interact. More than this, though, the mapping should be geared towards identifying ways in which regulatory institutions can be shaped to optimize efficiencies and to “take full advantage of complementary relations”.<sup>174</sup>

In this study, we have drawn on Kolben’s analytical framework of “regulatory dialogism” to identify the ways in which BWI and the public labour inspectorate in Indonesia interact. Through an empirical analysis of regulation in practice, the paper has attempted to highlight both the *mechanics* and the *qualities* of interaction between BWI and the labour inspectorate. What the paper has *not* tried to do is to capture the *effect* of the interaction on labour conditions in Indonesia,<sup>175</sup> or to look at how rules and norms develop and change over time based on the interactions.<sup>176</sup> While these are useful questions to consider, our study has a more limited scope, namely to examine who or what interacts, what drives and shapes the interaction, what are the mechanisms or pathways of interaction, and what is the character or quality of the interaction (rivalry, displacement, complementarity).

As noted in Part 4 above, BWI and the Ministry have interacted in ways – formal and informal, intentional and unintentional – that have had the effect of altering and shaping how labour inspection in Indonesia is conceptualised and managed in practice. BWI seems to have been the

---

<sup>171</sup> Kolben 18.

<sup>172</sup> Kolben 18. For an analysis of the limitations of transnational private labour regulation, see pp. 14-18.

<sup>173</sup> Kolben 26.

<sup>174</sup> Amengual, p. 413.

<sup>175</sup> Eberlein et al., p. 13.

<sup>176</sup> Bartley develops a model for doing. See Barley, *Theoretical Inquiries in Law* (2011), p 525.

source for the Ministry initiative to introduce the requirement to install Labour Norms Cadres in enterprises. Through the ad hoc committee and interactions between EAs and Indonesian labour inspectors, BWI has also influenced the interaction between the central and district levels of the Indonesian public labour inspectorate. While it has never been an explicit programmatic objective of the Better Work country programmes, our findings suggest that in Indonesia, the public labour inspectorate has been strengthened as a result of its interactions with BWI,<sup>177</sup> even if that has come about largely in an *ad hoc* fashion.<sup>178</sup>

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

---

<sup>177</sup> See Tajgman 31.

<sup>178</sup> See part 4; Tajgman 31.