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Case study: the international CSR conflict and mediation

Supply-chain responsibility: western customers and the Indian textile industry*

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On 6 December 2007, the Dutch denim brand G-Star publicly announced that it had pulled out of its long-term relationship with the Indian/Italian jeans manufacturer and supplier Fibres & Fabrics International (FFI/JKPL).¹ G-Star's loss of appetite towards its Indian supplier was the consequence of being trapped for two years between international campaigning by the Dutch campaigning organisations Clean Clothes Campaign (CCC) and India Committee Netherlands (ICN, hereafter together referred to as: CCC/ICN)² and the destructive litigation undertaken by its supplier. Due to the cancellation of further orders by G-Star, the Indian jeans manufacturer, which at that time employed approximately 5,500 people in Bangalore and 100 to 150 people in Italy, risked going out of business in three months' time. Including family members and other dependents, this meant that over 20,000 people would lose their source of income.

In this contribution the effects of campaigning and litigating in issues concerning corporate social responsibility (CSR) will be examined. Limiting the analysis to CSR conflicts in the textile industry, the author will reflect on these new types of international conflicts in a globalising world and will share her view on appropriate ways to avoid them or, ultimately, to (re)mediate them if necessary.

Sections 1 to 4 inform the reader about the events in India and the Netherlands which led to the escalation of the conflict. Section 5 provides an overview of the conflict resolution procedures employed in this case and Section 6 elaborates on the outcome of the 'Lubbers Mediation'. Section 7 compares the applicable legal and soft law labour standards in order to provide the reader with an insight into the

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1. I.e. Fibres & Fabrics International Private Limited, its fully owned subsidiary Jeans Knit Private Limited, and its Italian fabric design division Tintoria Astico s.r.l.
2. Given the fact that ICN is a founding member of CCC and that the two organisations acted jointly from the beginning in respect of this case, they will be referred to as CCC/ICN. Also, see box 2.

different viewpoints of the parties. Section 8 analyses the parties' communication strategies, thereby illustrating that each side used certain terminology to influence public opinion. Section 9 contrasts this case with other CSR conflicts in the textile industry and also reveals a hidden conflict that played a role in this case: the clash between CSR codes.

In the concluding remarks the author will comment on five dilemmas that present themselves in international CSR conflicts, and will provide suggested guidelines.

1. Events in India

The jeans manufacturer FFI/JKPL

India is well known for its large textile industry. A major production area lies in and around Bangalore in the state of Karnataka. The region was booming and more than 600,000 people worked in the textile industry until the global financial crisis also reached India.

The companies Fibres & Fabric International Private Limited (FFI), its subsidiary Jeans Knit Private Limited (JKPL; hereinafter together referred to as FFI/JKPL), and its Italian affiliate Tintoria Astico s.r.l. (Tintoria) are led by a fabric designer and a software expert. Due to this combination, the company processes are progressive and innovative, not only by Indian standards, but also by European standards. They develop new fabrics and fashionable jeans, mainly designed for western customers. Many of the fabrics used in the Bangalore production process are developed and produced by Tintoria in Italy. Consequently, retail prices are not targeted at the local market. Also, labour conditions for the Italian and Indian employees appear to follow the high standards required by FFI/JKPL's western clients: salaries are above the legal minimum wage level, safety measures are prescribed and protective eyewear, gloves and shoes are provided to employees where necessary. Medical services are provided for by a full-time female doctor and she can be consulted by all employees and their family members. A free Indian lunch and bus services are offered to employees. There are also four grievance committees, made up of employee representatives, each on the basis of circulation: a committee to redress sexual harassment, a health and safety committee, a workers' grievance committee, and a canteen committee. Since 1994, the company has made use of a waste water cleaning installation; purified water is reused for washing activities and for watering the garden.

FFI/JKPL has four production units in Bangalore, adjacently located, which deal with 1) the cutting of materials, 2) the sewing of trousers and other clothes, 3) the washing and brushing of the jeans, and 4) the packaging and dispatching of orders. Many of the 5,500 employees have been employed for several years. The majority come from rural areas in the state of Karnataka.³

For legal advice FFI/JKPL usually turns to Pramila Associates, a law firm also based in Bangalore. Ms Pramila Nesargi is a qualified lawyer and for more than three decades she has been a Member of the Legislative Assembly of the State of Karnata-

3 Instructions on the premises are in English and Kannada (the language spoken in Karnataka).

taka. She focuses on, among other things, women's rights and labour issues. Besides advising companies on their labour policies, she also assists individual women in their fight for equal treatment and against sexual harassment.

In the spring of 2006, after improving its internal performance and control standards and being submitted to an external SA8000 audit, FFI/JKPL obtained an SA8000 certification. FFI/JKPL established monthly checks, carried out by the employees and managers jointly. In addition to the regular external SA8000 audits, over the past few years many other audits have been carried out at the request of FFI/JKPL's customers. Independent consultant agencies and *multi-stakeholder-initiatives* (MSI) thereby interviewed employees on the factory premises as well as outside and at their homes.⁴

Box 1

Social Accountability 8000 is an international standard for improving working conditions based on the principles of 13 international human rights conventions, covering child labour, discrimination, discipline, working hours, freedom of association and the right to collective bargaining, forced labour, wages, health and safety, and management systems. Assessment of compliance to the SA8000 standard and the issuance of SA8000 certifications are only available through independent organisations accredited by Social Accountability Accreditation Services (SAAS). The SA8000 certification scheme was initiated in 1999 by Social Accountability International (SAI), a non-governmental, international, multi-stakeholder organisation, dedicated to improving workplaces and communities by developing and implementing socially responsible standards. SAI partners with trade unions, local NGOs, multi-stakeholder initiatives and other relevant stakeholders to carry out research, training and capacity-building programs. Amnesty International is one of the partnering NGOs. For more information, please visit <www.sa-intl.org>.

GATWU, a new trade union

As responsible as the set-up of FFI/JKPL towards its employees may seem, one may wonder why Dutch campaigning organisations (CCC/ICN) have targeted FFI/JKPL.

Box 2

Clean Clothes Campaign (CCC) is an international campaigning organisation established in 1991. It aims to improve working conditions in the global garment and sportswear industry, and to empower the labourers in this industry. CCC is made up of an international secretariat and national cam-

4 For instance, the audit by SGS and the Indian NGO ASK which took place in September/October 2007 (which will be discussed next).

paingning organisations. It has special task forces in garment production countries.

India Committee Netherlands (ICN) is also a Dutch campaigning organisation, focused on improving the lot of the dalits – casteless people in India – and specific issues such as child labour and human rights in India. A special focus of ICN is the garment industry. For that reason, ICN is a member organisation of CCC Netherlands. See: <www.cleanclothes.org> and <www.indianet.nl/english.html>.

It started in late 2005. A new trade union, the Garment and Textile Workers Union (GATWU), was in the process of being established. As the Bangalore area employs many textile workers, and labour conditions sometimes give rise to great concern, GATWU wanted to obtain a foothold there. GATWU approached the FFI/JKPL management in February and March 2006, but did not find an enthusiastic reception. At that time GATWU had not yet been officially registered as a union or organisation of any kind. The Indian Trade Unions Act of 1926 (as subsequently amended, hereafter referred to as the Trade Unions Act)⁵ stipulates that no trade union shall be *registered* unless at least 10%, or 100 of the workforce, whichever is less, are engaged in the establishment or industry with which it is connected and are members of this trade union on the date of applying for registration. On 29 March 2006, GATWU was registered under the Trade Unions Act.⁶ However, Indian labour law case law⁷ shows that a union needs to represent a majority of the workforce of a particular establishment in order to be entitled to *recognition* as a representative, thereby enabling it to enter into negotiations and to reach settlements with the management of this establishment. Moreover, several states in India have enacted separate legislation dealing with the recognition of a trade union, in some cases lowering the representation threshold to a minimum of 30%.⁸ Since GATWU – once registered – did not have any FFI/JKPL members, it was unclear to the FFI/JKPL management who GATWU represented. FFI/JKPL could not recognise GATWU as a representative of the workforce.

GATWU subsequently teamed up with its sister organisations that are also supportive of garment workers: Civil Initiatives in Development and Peace ‘Cividep’,⁹ and

- 5 Indian Trade Unions Act 1926, Sec.4, Mode of Registration of a Trade Union. See also Section 7.
- 6 Registration certificate issued by the Government of Karnataka, Department of Labour, No.ALCB-4/DRT/TUA/18/2005-06, GATWU Articles of Association and membership list (Form C) which show that there were no FFI/JLPL members.
- 7 Confirmed by various Courts and various enactments on this subject (information by Indian legal counsel on 24 March 2009).
- 8 E.g. the State of Maharashtra in India has enacted the Maharashtra Recognition of Trade Union and Prevention of Unfair Labour Practices Act, 1971. Sec.11 of this Act specifies that in order to gain recognition a trade union should not have less than 30% of the total number of employees employed in that undertaking as its members.
- 9 Cividep’s work is made possible with support from Oxfam-GB in India, and Netherlands-based OECD Watch and SOMO (source: <www.cividep.org>, visited on 14 February 2009).

the Women Garment Workers' Front 'Munnade'.¹⁰ Lastly, the New Trade Union Initiative (NTUI), a labour union with a communist ideology, joined GATWU's campaign.¹¹ As most of the FFI/JKPL employees were not unionised, this team of organisations (together referred to as: the Indian Organisations) decided to actively persuade FFI/JKPL employees to sign up with GATWU. These actions proved to be unsuccessful however. The FFI/JKPL management therefore considered that there was no legal basis for entering into dispute settlement or collective bargaining negotiations with GATWU.

Later on, in December 2006, the Government of Karnataka Labour Department (Labour Department) investigated whether FFI/JKPL workers enjoyed freedom of association and other issues, pursuant to a complaint by CCC/ICN. The resulting report showed that employees felt free to become union members.¹² In March 2007, an SA8000 audit was carried out by the international audit firm SGS.¹³ Another extensive audit took place in the autumn of 2007, at the instigation of G-Star. SGS was hereby assisted by the Indian NGO ASK.¹⁴ One of the focal aspects was freedom of association. Employees were interviewed onsite as well as outside the FFI/JKPL premises in order to create an atmosphere in which interviewees could speak freely. Former FFI/JKPL employees were also interviewed to help understand the factory from a different perspective and to make a comparison between the earlier and the present scenario. The answers showed that employees were aware of their right to

10 Munnade is linked with Cividep. See: <www.cividep.org/munn.htm>.

11 In India, signing up with a trade union is generally not only about labour conditions; it also has political significance, as the more traditional, national unions are affiliated with national political parties.

12 Report of the Government of Karnataka: Labour Department: No.GLA-1/Investigation/Report/06-07 dated 19 December 2007, p. 8, and the letter re 'Submission of report on labour situation on the question of child labour at G-Star's suppliers in Bangalore Fiber & Fabrics International (FFI) and Jeans Knit Pvt. Ltd (JKPL) and background of Landelijke India Werkgroep (India Committee of the Netherlands (LIW) organisation'; D.O.No. LD84 CLC 2006, dated 26 December 2006. This report discloses the results of an inspection by the Karnataka Government Labour Department on 11 December 2006 pursuant to complaints filed by CCC/ICN on 14 July 2006 regarding 'information sought in respect of labourers and child labourers, employed by FFI/JKPL'. By a letter of 1 February 2007 from the Embassy of India in the Netherlands, the results of this investigation were shared with CCC.

13 SGS: Société Générale de Surveillance, a Swiss-based auditing and certification firm, accredited by Social Accountability Accreditation Services (SAAS) to give SA8000 certifications. See: <www.sgs.com>.

14 Association for Stimulating Know-how (ASK) is a capacity-building, self-supporting, voluntary organisation that works countrywide in India, as well as internationally, to promote the best interests of marginalised groups in society. Its expertise covers capacity building, evaluation and studies, and corporate social accountability, amongst other things. See: <www.askindia.org>.

associate themselves and felt free to do so, but were not motivated to become union members.¹⁵

So, what caused the Indian Organisations and CCC/ICN to campaign against FFI/JKPL and G-Star as they did, and to convince other western customers to cancel their orders with FFI/JKPL?

June-July 2006, the complaints

In late 2005, GATWU claimed to have received information from Cividep about complaints from FFI/JKPL employees in September and November 2005 concerning working conditions. GATWU was not able to commence a dialogue on this with FFI/JKPL management, as their letters of February and March 2006 remained unanswered. In order to investigate the complaints, a 'fact-finding committee' was established, consisting of representatives of various social, human rights and women's rights organisations, and social activists (Fact-finding Committee). This Committee prepared a so-called 'fact-finding report' which stated that it reflected the outcome of interviews with 14 workers, jointly conducted on 23 April 2006 (Fact-finding Report). The interviewees, although anonymous, stated that they worked at the FFI/JKPL washing unit. This unit employs 1,400 people excluding office staff.¹⁶ The workers' complaints concerned mainly the non-payment of overtime work, working without employment contracts, working in the washing unit without protective clothing, and physical and verbal abuse.¹⁷

On 9 June 2006, FFI/JKPL and GATWU/NTUI had a meeting in which the complaints were discussed one by one. The minutes of this meeting as presented by GATWU greatly differ from FFI/JKPL's report.¹⁸ The FFI minutes reveal that some complaints were countered by FFI/JKPL management by producing letters of employment, payroll registers and identity cards, and that others, such as physical abuse and the arbitrary termination of services, could not be substantiated by GATWU/NTUI as no specific instances could be provided. GATWU's minutes emphasise that FFI/JKPL 'categorically denies all allegations' and claim that FFI/JKPL 'did not want trade union disturbances within the company premises'. During this meeting, GATWU informed FFI/JKPL about the research that was being carried

15 SGS Management System Certification Audit Summary Report dated 20 March 2007; SGS Summary Findings from the Visits to FFI Factories in Bangalore dated 27 November 2007; ASK Summary Reports for Workers Discussions of FFI Units 1-5 (audits conducted respectively on 31 October/1 November, 14/15 September, 11/12 September, 2/3 November and 30/31 October 2007). Reports were made accessible by G-Star, also to CCC/ICN. The reasons for workers not becoming union members relate to the good payment and other working conditions at the FFI/JKPL sites, and the possibility to discuss any issues with management, amongst others through the workers committees; workers generally stated that the need to unionise had not arisen.

16 Fact Finding Report of Violation of the Rights of Workers at Washing Unit of FFI/JKPL, Peenya Industrial Area, Bangalore, final version of 24 August 2006; <www.cleanclothes.org/ftp/06-08-Fact_Finding_Report-FFI/JKPL.pdf>, visited on 9 March 2009.

17 A list of alleged violations of Indian law forms part of the Fact-finding Report; *ibid.*, p.7-8.

18 GATWU 'Report on meeting with FFI/JKPL at the FFI/JKPL office at Peenya, Bangalore on 9 June 2006'; <www.schonekieren.nl/index.php?option=com_content&task=view&id=69&Itemid=519>, visited on 9 March 2009, and FFI/JKPL 'Minutes of the meeting dated 9 June 2006', made available by Indian legal counsel. FFI/JKPL shared these minutes with CCC/ICN and G-Star in June 2006.

out by the Fact-finding Committee. FFI/JKPL indicated that it was not aware of this as no such committee had met with management. GATWU and NTUI provided assurances that they would get back to FFI/JKPL's legal advisors concerning any issue.

A draft Fact-finding Report with complaints was sent by the Fact-finding Committee to FFI/JKPL on 21 June 2006. On 3 July 2006 a meeting took place attended by Fact-finding Committee members, FFI/JKPL management and its lawyer to discuss the allegations. In the report on the meeting, the Committee concluded that GATWU needed to recheck with the workers, because all allegations were successfully countered. Consequently, a second round of interviews with a group of 16 FFI/JKPL employees was held on 30 July 2006,¹⁹ in which workers claimed that their complaints had been addressed. Subsequently, the Committee amended the draft report. The conclusion of the final report, dated 24 August 2006, reads:

'(...) our hope is that the management of FFI/JKPL initiates steps towards creating a free and fair work atmosphere for the workers and also that the palpable sense of suspicion towards the workers is replaced by a genuine recognition of their legal and labour as well as human rights.'²⁰

Non-stop campaigning and legal proceedings

For some reason, the Indian organisations kept on repeating the complaints alleged during the first round of interviews, which were subsequently labelled as 'solved' in the final report. They complained with FFI/JKPL and several of its customers, including G-Star, with the Labour Department,²¹ but also publicly on the internet. They asserted that FFI/JKPL employees were not free to join a labour union, that they would be dismissed if they did so and that the company had already dismissed employees who had become GATWU members. FFI/JKPL rejected the allegations, asking GATWU for substantiation. When it turned out that the Fact-finding Committee had interviewed anonymous workers, FFI/JKPL wanted to close the case, assuming that these employees might also have come from other Bangalore garment factories.²² GATWU and the others were disappointed; in their view FFI/JKPL had not seriously considered their complaints. FFI/JKPL, on the other hand, felt insulted by the complaints. During the meeting with the Fact-finding Committee, it seemed that all complaints had been resolved or found to be incorrect. Moreover, FFI/JKPL found it difficult to address complaints that were not individualised, because this makes it impossible for management to take corrective measures.

19 It is unclear which people were interviewed at this meeting: the same workers as interviewed in the 23 April meeting, or others, in which case the report does not state with which production unit they worked.

20 Fact-finding Report, Conclusion, p. 12.

21 See reference 12.

22 Due to the decision by the Fact-finding Committee and GATWU not to reveal the identities of the interviewees, not even to independent mediators, they were unable to substantiate that the interviewees were indeed employees of FFI/JKPL. The company suggested that the interviewees may just as well have been former FFI/JKPL employees, or employees of another textile company. FFI/JKPL feared attempts at defamation by its competitors.

In late July 2006, FFI/JKPL commenced legal proceedings before the Civil Court of Bangalore against several representatives of GATWU, Cividep, NTUI, Munnade, and the CCC Taskforce Tamilnadu.²³ FFI/JKPL successfully requested an *ex-parte* injunction order restraining the said organisations and others from 'disseminating any untrue and unsupported information'. In response, the Indian organisations appeared before the Court to oppose the injunction, but did not submit any material substantiating the campaign and allegations. Indian law prescribes that the Courts should immediately lift an injunction order if only a small portion of the allegations or other allegedly untrue and unsupported information proves to be true and justified.²⁴ The Indian organisations, however, did not succeed in persuading the Civil Court to lift the order.

The Bangalore Court's injunction against members of the Indian organisations fuelled CCC/ICN's campaign. On their websites they presented the court cases in India as a 'restriction of the freedom of speech and the freedom of association'. They now actively and publicly solicited support for their cause, with success, from other NGOs such as Amnesty International, Oxfam, and Dutch and international trade unions.²⁵

In August 2006, CCC/ICN called upon FFI/JKPL's western (former, current and potential) customers to use their influence in order to ensure freedom of association and to allow GATWU and NTUI to negotiate with FFI/JKPL management. Several customers subsequently confronted FFI/JKPL with this message.²⁶ FFI/JKPL management explained to them that its employees enjoy freedom of association and that if GATWU or NTUI or any other trade union would represent the legally required number of FFI/JKPL employees, they would be happy to allow them to consult and negotiate.²⁷ The customers remained at first, but as CCC/ICN put pressure on them to end their relationship with FFI/JKPL, some large American brands, such as Ann Taylor, Guess, Levi's and Tommy Hilfiger – afraid of losing their good reputation if public campaigns would be targeted against them – stopped ordering from FFI/JKPL.

Although invited to visit the production units and to personally carry out an investigation with regard to the truth of the allegations, CCC/ICN decided not to become involved on a local scale, other than filing the aforementioned complaint with the

23 City Civil Court Bangalore for injunction on disseminating false information; OS16337/2006 (FFI v. GATWU *et al.*) and OS16338/2006 (JKPL v. GATWU *et al.*).

24 The defence of 'truth and justification' is based on the judgment of the Karnataka High Court decided in a similar case of an injunction relating to defamation (information provided by Indian legal counsel).

25 See e.g. public statement Amnesty International, India: Continued Harassment of Defenders of Women Workers' Rights and Campaigners Abroad, 2 October 2007; <www.amnestyusa.org/document.php?id=ENGASA200172007&lang=e>, visited 18 April 2009; and press release by MVO Platform (CSR Platform) of 4 December 2007. MVO Platform facilitates NGO-co-operation. CCC, Amnesty International, Oxfam Novib, Friends of the Earth and OECD Watch are amongst its members.

26 CCC, Demands to the Brands, 31 August 2006; <www.cleanclothes.org/urgent/06-08-16.htm>, visited on 9 March 2009. Indian legal counsel confirmed that FFI/JKPL had received letters from customers.

27 Information received from Indian legal counsel.

Labour Department. They took the position that the Indian organisations, with whom they had previously worked, were responsible for the 'field work'. CCC/ICN asserted that the Fact-finding Committee had carried out a proper investigation as an 'independent' committee;²⁸ the fact that the Committee was paid for its investigation was – in their opinion – of no relevance to the independence thereof. Generally, that should indeed not be considered to be of any relevance. However, the substantiation of the accusations by the Indian organisations of FFI/JKPL should have been of professional concern to CCC/ICN, especially given the observations of the Fact-finding Committee after its meeting with FFI/JKPL management and the far more moderate tone that was heard in the second round of interviews.²⁹ CCC/ICN should at least have paid attention to the reported improvements as well as investigating the explanations by FFI/JKPL. Yet, the CCC/ICN communications concerning FFI/JKPL do not mention the customer audits,³⁰ which show that the complaints communicated in the draft Fact-finding Report were either remediated, incorrect, or could not be retraced. Also, the positive outcome of the inspection carried out by the Labour Department was disregarded. This report stated that FFI/JKPL did not employ child labour, was strictly complying with all labour laws and was paying wages, bonuses, leave benefits and gratuities, as well as providing free food and transport facilities, and that it also ensured the health, safety and social welfare of its employees.³¹ In the opinion of CCC/ICN, such a government report as well as the Civil Court injunction could have been 'purchased'. This type of public statement regarding the Indian legal system infuriated Indian government officials.³²

In June 2007, two members of the Fact-finding Committee, jointly with a CCC/ICN representative, were interviewed in a Dutch radio broadcast.³³ They repeated the complaints listed in the draft Fact-finding Report, including human rights violations such as physical abuse. However, they made no mention of the response by management, the outcome of the second round of interviews or the Labour Department investigation. After the radio interview, some additional customers ended their business relationship with FFI/JKPL. The company decided to protect its interests

28 FFI/JKPL questioned the independence of the members of the committee as all members and organisations they represent work together with GATWU and Cividep in various programmes.

29 The final observation of the Fact-finding Committee after meeting with the FFI/JKPL management team reads: 'GATWU has to recheck with workers and share the statements of the management to see what the real situation is now for the workers.' The claims stemming from the first round of interviews appear to have been questioned by the Fact-finding Committee.

30 The audits were conducted in the period January 2006–October/November 2007 at the request of G-Star and other customers, and showed positive results, for instance as to the question whether FFI/JKPL employees enjoy freedom of association.

31 See reference 12. The report stated that the complaints made against the company were 'baseless and imaginary' (p. 15).

32 For instance, the letter of 1 February 2007 from the Embassy of India in the Netherlands to CCC (reference 12), states: 'India's strong democratic credentials, free press, independent judicial system and a strong and active civil society are well recognised. It is surprising that you have questioned the court orders issued in India, which is serious and represents an attempt to undermine the entire judicial process in India, which is open, fair and based on the rule of law.' See also Section 8.

33 *De Ochtenden*, (the Mornings) Argos Radio, 13 June 2007; <www.ochtenden.nl/afleveringen/33962621/>, visited on 9 March 2009.

by suing the two Fact-finding Committee members in order to claim financial compensation for the cancelled orders.³⁴

In the autumn of 2007, the Bangalore Magistrate Court (a criminal law Court) took cognisance of the charge of defamation against CCC/ICN and their Dutch internet provider XS4All Internet BV and the website host Antenna Foundation (the Internet Service Providers).³⁵ The procedure of the Court on the filing of a private complaint is to record the statements of witnesses and to peruse all the documents and materials placed before it. The Court then decides whether a *prima facie* case of criminal defamation has been made. In the case at hand, the Magistrate Court concluded that this was indeed the case. The Court then issued notices calling upon the defendants to appear. The counsel representing CCC/ICN and the Internet Service Providers gave an undertaking on behalf of their clients that they would appear in Court. However, the Dutch parties did not appear. Their counsel stated that their non-appearance was due to the fact that they had not received visa. Several dates were given to enable them to appear. When FFI/JKPL submitted materials to show that most of them had not even applied for a visa, the Court considered itself to have been misled and it issued non-bailable warrants against the Dutch defendants to appear before the Court.³⁶

2. Political conflicts

The Dutch government assured the Dutch defendants that it would not – when so requested by India – extradite its citizens for such a case. It stated, however, that it could not guarantee that other countries would not extradite the defendants when

34 City Civil Court Bangalore for defamation and compensation; OS26845/07 (JKPL v. Geetha Menon and Shagun) and OS26846/07 (FFI v. Geetha Menon and Shagun).

35 Criminal Court Bangalore for criminal defamation CC11592/07 (FFI v. Representatives of CCC/ICN, Internet Service Providers) and CC11593/07 (JKPL v. representatives of CCC/ICN, Internet Service Providers). The cases for defamation against Geetha Menon and Shagun were filed later and the Magistrate had not yet taken cognisance of the case and had not yet ordered appearance of the said two persons; i.e. PCR15457/07 (FFI v. Geetha Menon and Shagun) and PCR 15458/07 (JKPL v. Geetha Menon and Shagun). The charges also mentioned defamation, cyber crime and xenophobia. Codes of conduct and jurisprudence in Europe and the USA generally demonstrate that internet service providers and hosts should only close a website when displaying or spreading child pornography or terrorist activities. However, since that was not the case in respect of CCC/ICN's website, Antenna and XS4All had not restricted the content published on the website. XS4All, which only provided CCC's office with internet access, was not even able to adjust the content of this website. However, this contribution does not go into this interesting legal matter. For further study, see for instance: <www.sidn.nl/ace.php/c,728,5940,,,,Heemskerk_launches_code_of_conduct_to_tackle_cybercrime.html>; <www.sidn.nl/ace.php/p,728,5935,1662650090,NTD_Gedragscode_UK.pdf>; and D. Lichtman, E. Posner, Holding Internet Service Providers accountable, in: John M. Olin Law & Economics Working Paper 2004-217; <www.law.uchicago.edu/Lawecon/WkngPprs_201-25/217-dgl-eap-isp.pdf>. Sites visited on 24 March 2009.

36 The Indian Code of criminal procedure requires that the parties against whom the cognisance is taken should appear before the Court. The Court can then exempt the appearance of the accused until the trial commences. The accused could also request that the case be dropped before it goes to trial. The non-bailable warrants were not (yet) made enforceable on an international level. Information received from Indian legal counsel.

they would go abroad.³⁷ Given the Netherlands' small size combined with its international orientation, the defendants therefore considered themselves limited when having to travel abroad. CCC/ICN furiously exclaimed that this lawsuit was setting a dangerous precedent for all human right activists worldwide. Members of the Dutch and European Parliament were being informed and encouraged to discuss the case at the political level. In August and December 2007, questions were asked in the Dutch Parliament as well as in the European Parliament concerning the arrest warrants and other aspects of this case.³⁸

At the same time, the Indian Minister for Commerce and Industry, Mr Kamal Nath,³⁹ wrote letters of complaint to the Dutch Minister for Foreign Trade,⁴⁰ Mr Heemskerk, and the European Union (EU) Trade Commissioner, Mr Mandelson.⁴¹ He asserted that the campaigns by the Dutch NGOs were ruining India's textile industry, since they were based on false facts. In addition, Mr Nath raised the issue at a bilateral meeting with the Dutch Minister of Economic Affairs during a visit by queen Beatrix of the Netherlands to India. He claimed that the financial support provided by the Dutch government to CCC created a *de facto*, unfair and

37 Answers by the Dutch Ministers of Justice, Economic Affairs, for Development Co-operation and Foreign Trade to questions by Parliament, 27 September 2007; (in Dutch) <<http://static.ikre-geer.nl/pdf/KVR29631.pdf>>, visited on 1 March 2009.

38 Written questions posed in Dutch Parliament by Member of Parliament (hereafter: MP) Gesthuizen on 27 September and by MP Van Gennip on 7 December 2007; (in Dutch) <<http://parlis.nl/pdf/kamervragen/KVR30474.pdf>>, visited on 1 March 2009; resp. written question by Member of European Parliament Meijer on 4 December 2007; <www.indianet.nl/ffi.html>, visited on 27 March 2009.

39 Mr Nath was appointed Union Cabinet Minister for Commerce and Industry on 23 May 2004. In March 2009 he was still in office.

40 The Dutch State Secretary of Economic Affairs is entitled to bear the title of Minister for Foreign Trade when abroad.

41 Mr Mandelson was the EU Trade Commissioner from November 2004 until he announced his return to the UK Government in October 2008. He was succeeded by Baroness Ashton of Upholland.

unjustified, non-tariff barrier to trade.⁴² He stated that he was considering filing a complaint with the World Trade Organisation (WTO) about this 'neo-colonial behaviour'.⁴³

3. Events in the Netherlands

G-Star was established in 1989 and has grown significantly since 1996 after the introduction of its specific concept and style referred to as 'raw denim'.⁴⁴ Currently, the brand has sales operations in more than 17 countries covered by over 5,400 sales outlets.⁴⁵

In October 2005, CCC/ICN contacted G-Star in order to discuss their international supply-chain management. G-Star and CCC/ICN agreed to hold a meeting in December 2005. Shortly after this first contact, the Dutch newspaper *Trouw* published an article on the maltreatment of labourers in the Indian textile industry.⁴⁶ Several apparel brands were mentioned, also G-Star. In preparation for the December meeting, the parties agreed on an agenda, containing not only labour conditions in general, but also the article in *Trouw* and the institutionalised verification of good labour conditions through certification by the Fair Wear Foundation (FWF).

42 CCC receives substantive subsidies from the Dutch Ministry for Development Co-operation (see e.g. the joint letter by the Ministers for Development Cooperation and Foreign Trade of 15 April 2007; (in Dutch) <<http://static.ikregeer.nl/pdf/KST117886.pdf>>, visited on 1 March 2009). Whereas CCC/ICN's campaign against FFI/JKPL negatively affected India's international trade relations, Mr Nath asserted that by subsidising CCC, the Dutch Government was creating illegal barriers to trade. Though understandable from Mr Nath's position, this assertion was incorrect in that the Dutch Government does indeed subsidise CCC, but has no direct role or impact whatsoever in CCC's policy and actions, nor does it bear responsibility for CCC's policy and actions. The activities of civil society organisations subsidised by the Dutch government are either supportive of the government's international development goals or meant to keep government and business alert as to possible CSR issues and abuses. See for more information: <www.minbuza.nl/en>.

In international trade one can distinguish between tariff barriers to trade, such as import duties, and non-tariff barriers to trade, such as technical safety requirements. Both can be legal or illegal. WTO member states are allowed to raise import duties as long as 1) they do not exceed the maximum level a member state has laid down in the WTO import duties Schedule, and 2) the duties are levied equally on all imported products from all WTO member states (*i.e.* General 'Most-Favoured Nation' Treatment). WTO member states can also create non-tariff barriers to trade by setting technical requirements as permitted by the WTO Technical Barriers to Trade Agreement. Illegal non-tariff barriers are barriers not explicitly recognised by any WTO agreement or allowed by Article XX of the GATT1947, setting out the general exceptions to the legal obligations laid down in the GATT 1947.

43 Mr Nath has strong visions on international trade systems and the role of India. See e.g. Indiase minister ster van Doha, Dutch newspaper *NRC Handelsblad*, 25 July 2008; and Kamal Nath, India's Century, New Delhi, India: Tata McGraw-Hill Publishing Company Limited 2008, p. 130-147 and 108-110 (re Indian textile industry).

44 See <www.g-star.com>, visited on 5 December 2008.

45 Information from G-Star Communications, Amsterdam, 23 March 2009.

46 G. Moes, De Indiase textiel heeft ze graag onderdanig (The Indian textile industry prefers to keep them humble), Dutch newspaper *Trouw*, 6 November 2005.

Box 3

Fair Wear Foundation is a so-called Multi Stakeholder Initiative, founded by several stakeholders in the Dutch fashion industry, that supports and promotes good labour conditions in the garment industry. Among the initiators are trade unions, sector organisations and also NGOs. CCC is one of the founding members of FWF. ICN, being a member organisation within CCC, can be considered an indirect member to FWF. Apparel brands and producers can become a member of FWF, obliging them to sign the Code of Labour Practices, inform supplier companies and manufacturers of the membership, and pay an annual contribution. FWF is different from other labour conditions certification initiatives by involving local stakeholders in its company audits, rather than in-company audits executed by independent third parties. For more information, please visit <www.fairwear.org>.

Unfortunately, there are no agreed upon minutes of the December meeting, but in the correspondence following the meeting G-Star acknowledged considering membership of FWF. G-Star then scheduled a meeting with FWF for January 2006. The day before this meeting, CCC stressed in an email the need for action against FFI/JKPL and it attached a list of violations. G-Star stated that it would raise the issue with the FFI/JKPL board and it later confirmed that it had done so. Between January and June 2006, CCC wrote several letters and emails to G-Star in which it urged G-Star and its supplier to engage in dialogue with the Indian organisations. Furthermore, CCC stressed that only the FWF approach is a sufficient guarantee for the structural improvement of labour conditions, contrary to other social compliance initiatives such as BSCI⁴⁷ or SA8000.⁴⁸

Public campaigning and the termination of the supplier relationship

On 1 June 2006, CCC/ICN went public with its campaign against G-Star. First, an online press statement was issued alleging labour rights violations at G-Star's Indian supplier FFI/JKPL and G-Star's general lagging behind in the field of CSR. Conversely, G-Star also published press statements on its website explaining the events and facts presented by CCC/ICN and how these were addressed. G-Star also stated that it had opted to rely on the internationally well-known SA8000 certification to ensure decent working conditions at its suppliers (see box 1). On 11 June, G-Star informed CCC/ICN that SGS would audit the FFI/JKPL production units on the basis of the SA8000 certification requirements. In its letter of 12 June, G-Star concluded that the violations alleged by GATWU could not be substantiated, thereby relying on FFI/JKPL's report concerning its meeting with GATWU on 9 June. Sub-

47 Business Social Compliance Initiative (BSCI) is a European business initiative for the improvement of working conditions in all (labour extensive) industries such as textiles, electronics and toys. See: <www.bsci-eu.com>.

48 Emails sent on 31 January and 14 March 2006, and letters sent on 31 March and 4 May 2006, made available by G-Star.

sequently, G-Star pointed out that it was not a party to the conflict between FFI/JKPL and the Indian organisations and it required CCC/ICN to amend its website by deleting any and all references to G-Star. However, CCC/ICN refused to remove these references – on the contrary, CCC/ICN informed G-Star that it would continue to frequently release updates on the issue. In response, G-Star's lawyer informed CCC/ICN about the respective legal responsibilities of G-Star and CCC/ICN.⁴⁹ The latter responded that it no longer considers direct contact with G-Star to be of any added value. The dialogue seemed to have come to an end.

CCC/ICN indeed continued its campaigning. In early August 2006, G-Star made a move by conveying to CCC/ICN that it was considering terminating its relationship with FFI/JKPL. CCC/ICN approved of this step and the parties agreed to meet. However, shortly thereafter, the Bangalore Civil Court issued the abovementioned restraining order against the Indian organisations. CCC/ICN deemed the order to be an obstruction to consulting with its Indian partners and it postponed the scheduled meeting with G-Star. Since then, CCC/ICN and G-Star no longer had any direct contact, but frequently updated their position on their respective websites.

A year later, in December 2007, after various audits, the Labour Department inspection, the interference by Mr Nath on behalf of the Indian government, and the failure of a joint mediatory attempt by Dutch NGOs and unions (see Section 5), G-Star announced its withdrawal of future orders from FFI/JKPL. It publicly stated that it could no longer afford to be held hostage by two fighting groups both trying to use G-Star as a means of leverage in managing their dispute. CCC/ICN was satisfied with this decision but it urged G-Star to implement a 'socially responsible exit strategy' by placing orders with other Bangalore apparel suppliers, while demanding first-hire preference regarding former FFI/JKPL employees.⁵⁰

49 Explained in detail in a letter of 20 June 2006. Letter made available by G-Star.

50 Press statement CCC/ICN at <www.cleanclothes.org/news/07-12-06.htm>, visited on 2 March 2009.

Table 1: Overview of events in the Netherlands and India

Date	The Netherlands	India
2005		
October	First contact G-Star and CCC/ICN re CSR and FWF.	Cividep receives complaints from workers.
November	Article in the newspaper <i>Trouw</i> concerning Bangalore textile labour conditions.	
December	Meeting G-Star and CCC/ICN re <i>Trouw</i> and FWW	
2006		
January	Meeting G-Star with FWF board.	
February/ March	Several letters of protest sent by CCC/ICN.	FFI/JKPL starts implementing SA8000. GATWU sends letters to FFI/JKPL re complaints. GATWU registered as trade union.
April	Second meeting G-Star and CCC/ICN.	First round of interviews by Fact-finding Committee. FFI/JKPL obtains SA8000 certification.
June	CCC/ICN starts public campaign based on information received from GATWU. G-Star and CCC/ICN keep updating their websites with new position papers.	Meeting FFI/JKPL and GATWU/NTUI.
July	CCC/ICN complaint with Karnataka Department of Labour.	SGS audits of FFI/JKPL units on SA8000 basis. Meeting FFI/JKPL and Fact-finding Committee re draft Report. Second round of interviews by Fact-finding Committee.
August		Final Fact-finding Report presented to FFI/JKPL. Court case by FFI/JKPL against GATWU <i>et al.</i> for spreading false information.
October	CCC/ICN complaint with NCP NL against G-Star, and with NCP Italy against Tintoria – OECD Guidelines.	Bangalore Court issues restraining order against representatives of GATWU <i>et al.</i>
November	Complaint by CCC/ICN with SAI against FFI/JKPL.	
December		Investigation by Karnataka Department of Labour resulting in positive report.
2007		
March		SA8000 audit by SGS with positive results.
April	Public statement by SAI on SA8000 and legal proceedings.	

Table 1: (Continued)

Date	The Netherlands	India
June	Informal NCP meeting G-Star and CCC/ICN. Interview with CCC/ICN and Fact-finding Committee members on Dutch radio.	Court case initiated by FFI/JKPL against CCC/ICN and Internet Service Providers for criminal defamation.
August	Questions in Dutch Parliament on litigation in India against NGOs and unions. CCC/ICN releases a report by FWF at the request of Mexx repeating GATWU accusations against FFI/JKPL.	Bangalore Magistrate Court issues arrest warrants against CCC/ICN and Internet Service Providers.
September/ October	CCC/ICN campaign discussed by Mr Nath during NL Royal Visit to India.	Audit of FFI/JKPL by SGS+ASK at the request of G-Star resulting in positive report. Letters of Mr Nath to Dutch cabinet and EU Commission.
November	Complaint by CCC/ICN with SAI re FFI/JKPL's SA8000 certification	
December	Failed mediatory attempt by Amnesty <i>et al.</i> Interview with CCC/ICN on Dutch radio. G-Star announces withdrawal from FFI/JKPL. Questions in Dutch and European Parliament. Start of Lubbers Mediation.	Failed mediatory attempt by Amnesty <i>et al.</i> Start of Lubbers Mediation.

4. Failing dialogue leading to lawsuits

An important element of CSR is maintaining good relations with one's stakeholders. Where possible, one should involve them in the company's decision-making process in order to ensure that 'planet people profit' concerns are balanced against each other, the so-called 'stakeholder dialogue'. Literature and practice offer different definitions of the concept of a 'stakeholder'. A common definition is the following:

'a person, group, or organisation that has a direct or indirect stake in an organisation because it can affect or be affected by the organisation's actions, objectives, and policies. Key stakeholders in a business organisation include creditors, customers, directors, employees, government (and its agencies), owners (shareholders), suppliers, unions, and the community from which the business draws its resources. Although stake-holding is usually self-legitimising (those who judge themselves to be stakeholders are *de facto* so), all stakeholders are

not equal and different stakeholders are entitled to different considerations'.⁵¹

Regarding the FFI/JKPL-GATWU dispute, the question arises who can be considered a stakeholder. From a legal perspective, considering the representation threshold requirement for trade unions⁵² and the fact that GATWU did not represent any FFI/JKPL employees, FFI/JKPL was not obliged to enter into negotiations with GATWU. On the other hand, GATWU, cooperating with the other organisations, undoubtedly had an influence on public opinion concerning FFI/JKPL – after all, many apparel brands stopped ordering from FFI/JKPL.

In practice it may thus be difficult to determine what constitutes a stakeholder. For instance, the SA8000 Guidelines refer to 'stakeholder engagement' (clauses 9.13 and 9.14), but do not define this term. Consequently, parties had a difference of opinion concerning the term 'stakeholder': FFI/JKPL considered its employees and their families,⁵³ people living on neighbouring plots,⁵⁴ and any acknowledged unions, as stakeholders; whereas the Indian organisations and CCC/ICN considered themselves as stakeholders of FFI/JKPL and G-Star, based on the argument that they campaign for better labour conditions in the textile industry in general.

Moreover, companies have an understandable preference for resolving any CSR issue behind closed doors. They fear reputation damage and setbacks vis-à-vis competitors.⁵⁵ As this case seems to confirm, information that damages one's reputation is easily spread and tends to meander for a considerable length of time.⁵⁶ Attempts to start a healthy dialogue did not lead to success in this case. After the first official meeting, FFI/JKPL and GATWU could not even agree upon the minutes. The same is true for the first meeting minutes between G-Star and CCC/ICN.

Another issue that particularly bothered FFI/JKPL was CCC/ICN's pressure on SAI to repeal FFI/JKPL's SA8000 certification for suing its 'stakeholders'. Although SA8000 has no official grievance mechanism, CCC/ICN filed a 'formal complaint' with SAI in November 2006, in which it 'expressed fundamental doubts regarding the quality and reliability of the certification process: with the restraining order in place, no meaningful consultation of the directly concerned local stakeholders could have taken place, which is a prerequisite of the SA8000 procedures'.⁵⁷ In reaction, SAI released a public statement on 30 April 2007 (the SAI statement), stating that:

51 WebFinance, Inc.; <www.businessdictionary.com/definition/stakeholder.html>, accessed on 2 March 2009.

52 See above Section 1, and references 5 and 6.

53 Employees' family members can visit the company doctor when needed. FFI/JKPL also paid for several hospital visits of family members.

54 Neighbours of the production units were consulted when appropriate in respect of upcoming issues of water use and the purification thereof, smell, as well as noise.

55 E.g. R. van Tulder, A. van der Zwart, *International Business-Society Management – Linking corporate responsibility and globalization*, Abingdon (UK): Routledge 2006 (simultaneously published in the USA and Canada), chapters 11 and 19.

56 When searching 'CCC' and 'FFI', Google produced easily over 60,000 hits containing approximately the same information.

57 Stephen Frost, *Suing stakeholders: solution or setback?*, CSR Asia weekly, Vol.3, Week 33, 15 August 2007; also available at <www.indianet.nl/a070815.html>, visited on 2 March 2009.

‘The existence of a court order or other impediments to discussion of the company’s internal affairs by external stakeholders renders a full investigation impossible. (...) It is SAI/SAAS’s policy that, in cases where a legal or other impediment exists to consultation with external stakeholders regarding issues affecting the certified organisation, the continuation of certification is inappropriate.’⁵⁸

Subsequently, SAI suspended FFI/JKPL’s SA8000 certification. The company was furious about this sudden change of certification requirements giving in to pressure from CCC/ICN. FFI/JKPL considered this to be a restriction of its democratic right to litigate and protect its interests. Meanwhile, FFI/JKPL communicated that they were still keeping their factories in compliance with the SA8000 standards.⁵⁹ Monthly checks by staff revealed good results.⁶⁰ SAI indicated that as soon as the litigation had ended, FFI/JKPL’s SA8000 certificate would be revalidated, subject to the outcome of regular external audits.⁶¹

The main reason, however, why the stakeholder dialogue between FFI/JKPL (and G-Star) and the Indian organisations (and CCC/ICN) had failed relates to the diverging opinions about the factual labour conditions at FFI/JKPL. Since the first meeting in which FFI/JKPL refuted GATWU’s accusations and explained which measures the management (and lawyers) had taken to resolve any issues, FFI/JKPL persistently denied all allegations made by GATWU *et al.* The Indian organisations and CCC/ICN on the contrary kept on repeating those allegations. Apart from that, accusations, whether true or not, tend not to be the most fruitful starting point for a stakeholder dialogue.⁶² As FFI/JKPL was convinced of its own beneficial behaviour towards its labour force while nevertheless incessantly being attacked by GATWU *et al.*, the FFI/JKPL management felt insulted. FFI/JKPL considered that it had no option other than to resort to one means: legal proceedings to stop the public allegations and insults and to recover damages suffered from lost business.

5. Overview of the conflict resolution procedures

First mediatory attempt: the Dutch NCP

After their dialogue with G-Star ended in a stalemate CCC/ICN decided to file a complaint with the Dutch National Contact Point (NCP) against G-Star for violating

58 SAI Public Statement, 30 April 2007; <www.saasaccreditation.org/docs/SAI_Public_Statement043007.pdf>, visited on 2 March 2009.

59 Information communicated to Ms Lambooy when visiting the factories in Bangalore, in March 2008, and later confirmed on various occasions by FFI/JKPL management by email. However, due to their disappointment about the SAI decision, FFI/JKPL management considered liaising with other CSR initiatives such as BSCI.

60 Also, independent audits confirmed that FFI/JKPL’s units conformed to all labour laws and CSR standards. Information by Indian counsel, March 2009.

61 Information provided during a meeting, and also by email, to Ms Lambooy by a SAI representative in the spring of 2008.

62 M. van Huystee, P. Glasbergen, *The Practice of Stakeholder Dialogue between Multinational and NGOs*, Wiley InterScience 2007, p. 10; <www.interscience.com>.

the OECD Guidelines.⁶³ During the same period, CCC Italy filed a complaint with the Italian NCP against FFI/JKPL's Italian affiliate.⁶⁴

Box 4

The OECD Guidelines for Multinational Enterprises (OECD Guidelines) are a set of recommendations of the 30 OECD countries' governments, and currently also eleven non-OECD countries, so-called adhering countries. The recommendations address multinational companies, both large companies as well as small and medium sized enterprises from OECD countries and the adhering countries. They offer a basic outline for corporate conduct vis-à-vis social, environmental and other aspects of doing business, such as human rights, corruption and consumer interests. The guidelines were negotiated in a multipartite way, meaning that they were drawn up by the OECD member states governments in co-operation with business and civil society, trade unions, and non OECD-member states.

Every OECD country or adhering country is obliged to establish a so-called National Contact Point for the OECD Guidelines (NCP). The NCPs are given the task of promoting the Guidelines, and of dealing with complaints ('specific instances') of alleged violations. This grievance mechanism regards investment-related issues, thus ruling out complaints on trade-related issues. The grievance must relate to an enterprise registered in an OECD

63 Most NCPs are staffed by civil servants from, and usually have their office at, the Ministries of either Foreign Affairs, Economic Affairs or Trade. Since July 2007, the Dutch NCP consists of a committee of four *independent* members appointed on a personal basis. Each has a background that represents one of the stakeholder groups in the CSR discussion. The NCP is supported by four advisory members from the Ministries of Economic Affairs, Foreign Affairs, Social Affairs and Employment, and Housing, Spatial Planning and the Environment respectively, and a secretariat consisting of three full-time employees. See also Resolution European Parliament (EP) (INI/2006/2133), March 2007; the EP 'calls on the (EU) Commission and the Member States to improve the functioning of national contact points (NCPs) in particular in dealing with specific instances raised concerning alleged violations throughout operations and *supply chains* (emphasis added) of European companies worldwide' (§ 47) and 'calls for a broad interpretation of the definition of investment in the application of the OECD Guidelines to ensure supply-chain issues are covered under (the) implementation procedures' (§ 65). Furthermore, see Report of Professor John Ruggie, Special Representative of the UN Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, 7 April 2008. This report contains a basic framework for addressing business' responsibility towards human rights issues and was warmly welcomed in the UN Human Rights Council on 8 April 2008 as well as by the business society and the labour unions. It attaches great value to grievance mechanisms for victims and stakeholders of multinationals' practices. Special mention is made of the British and Dutch NCP because of their far more independent structure. Prof. Ruggie also praised the Dutch NCP as 'the gold standard for NCPs' during a special seminar on Business and Human Rights on 1 December 2008, organised by the Dutch Ministry of Foreign Affairs. Currently, the meetings of the Investment Committee, in which *inter alia* the OECD Guidelines are discussed, appear to have a quadripartite structure: member state governments, business society, labour unions, and NGOs (jointly organised in OECD Watch; see: <www.oecdwatch.org>).

64 Regarding this complaint, the author could not trace any public information.

member state or to an 'investment-like' business affiliate of such enterprise. In this unique procedure, the NCPs can offer mediation services between the parties in order to contribute to an amicable resolution of a conflict. When no agreement is reached, the NCP can issue a public statement on the issues at hand. See for more information <www.oecd.org> or <www.oesorichtlijnen.nl> (website Netherlands NCP)

In the complaint of October 2006, CCC/ICN alleged that G-Star had failed to use its influence towards FFI/JKPL to remediate the allegedly poor labour conditions. Strictly speaking, FFI/JKPL was not an investment of G-Star as the two companies were trading partners. Nevertheless, the NCP accepted the grievance, which was a novelty from an NCP perspective. The NCP decided that the G-Star-FFI/JKPL relationship was sufficiently 'investment-like' since G-Star was a major buyer and had been cooperating closely with FFI/JKPL in designing fabrics and jeans models for more than seven years and all products were provided with G-Star labels.⁶⁵ FFI/JKPL thus fell within G-Star's 'sphere of influence', hence G-Star bore a certain extent of responsibility towards the situation at FFI/JKPL. The NCP was requested to consider whether G-Star had sufficiently used its leverage with FFI/JKPL in order to foster a local stakeholder dialogue in Bangalore.⁶⁶ Although the investment nexus imposes a 'duty of care' on an accused enterprise for possible issues at the foreign company, it does not make the latter a party to the procedure. Also, since India is not an adhering country to the OECD Guidelines, these guidelines do not apply directly to FFI/JKPL. Consequently, there was no way for the NCP to directly engage in a dialogue with FFI/JKPL. Nevertheless, the NCP sought to mediate between the parties.⁶⁷ However, there was a lack of trust between G-Star and CCC/ICN. G-Star indicated that it did not expect any positive outcome to an NCP-led dialogue, since CCC/ICN refused to cease its public campaign against G-Star during the mediation process. Consequently, the NCP first had separate meetings with each of the two parties. In June 2007, a first joint meeting was scheduled to discuss various solutions. G-Star announced that FFI/JKPL would be audited once again in the early autumn by SGS/ASK (Section 1). CCC/ICN stressed that it deemed SGS a controversial firm for not having withdrawn FFI/JKPL's SA8000 certification despite the

65 Final NCP Statement Concerning a Specific Instance notified by CCC/ICN against G-Star, 18 March 2008, p.1; (in Dutch and English) <www.oesorichtlijnen.nl>.

66 Ibid., p. 2.

67 OECD Guidelines, Part III. Commentaries, Commentary on the Implementation Procedures of the OECD Guidelines for Multinational Enterprises, § 16-17, p. 61; <www.oecd.org/dataoecd/56/36/1922428.pdf>.

fact that FFI/JKPL had started litigation against its critics.⁶⁸ CCC/ICN also pointed to the SAI Statement (Section 4). The NCP considered the outcome of the audit to be of importance for judging G-Star's local involvement before initiating further steps.

However, when G-Star presented the audit results to the NCP and CCC/ICN in October/November 2007, the whole situation had become out of hand and had turned into an international conflict between G-Star, FFI/JKPL, CCC/ICN, the Indian Organisations, and – to a lesser extent – the governments of India and the Netherlands. Despite the positive outcome of the audit, G-Star announced the termination of its business relationship with FFI/JKPL on 6 December 2007. After the resolution of the conflict in 2008 by the Dutch Minister of State Ruud Lubbers (Section 6), CCC/ICN withdrew its complaint at the NCP. Consequently, the NCP had to terminate the procedure with a formal rather than a substantive final statement. Similarly, CCC Italy also withdrew its complaint at the Italian NCP.

Second mediatory attempt: Amnesty et al.

In October 2007, the Dutch NGOs Amnesty International Netherlands and Oxfam-Novib, and the Dutch labour union FNV, initiated a joint mediatory attempt between FFI/JKPL, G-Star and CCC/ICN. All three belonged to the group of FWF initiators (see box 3).⁶⁹ The mediators demanded that FFI/JKPL must withdraw all legal proceedings. FFI/JKPL could not accept this as CCC/ICN intended to continue their campaigns. FFI/JKPL stated that it was its democratic right to defend itself in court against false accusations from the Indian organisations and CCC/ICN, and to claim damages. Although understandable, FFI/JKPL's attitude was not helpful in reaching an agreement. Furthermore, the fact that the mediators – through FWF – were directly linked with CCC/ICN did not help to establish a position of impartial mediator.⁷⁰ Moreover, at the beginning of October, Amnesty had released a press statement in which it expressed its concerns regarding:

'(...) The continuing harassment of defenders of women workers' rights in the garments export industry in Bangalore city in the Southern Indian State of Karnataka, as well as associated campaigning activists based in the Netherlands.

68 This objection though is not based on correct assumptions; an auditing firm, like SGS, can audit a company on its SA8000 conformity at one specific moment. When all the requirements are met, the company will obtain SA8000 certification. If, however, the circumstances change after the certification, the auditing firm is not in a position to withdraw the certification. If it would, it would endanger its neutral position as an auditing firm. Therefore, companies with SA8000 certification are audited regularly to make sure that the labour conditions are still in conformity with the SA8000 requirements.

69 Each of these organisations is a member of the FWF executive or advisory board. Interestingly, Amnesty International Netherlands was a founding organisation of the FWF, while Amnesty International is a partner of SAI. This raises questions concerning, for example, Amnesty's position towards CCC/ICN's fierce critics on CSR initiatives other than FWF.

70 See for instance chapter 2 of the European Code of Conduct for Mediators on Independence and Impartiality, published by the EU Commission, and H. Verbist, *Bemiddeling in handelszaken in internationale context* (Mediation in commercial matters in an international context), TMD 2008-3, p. 16-36.

The harassment has included the filing of apparently false criminal charges against them, aimed at curbing their freedom of expression'.⁷¹

This may have resulted in the FFI/JKPL management feeling that it was being pressed by 'third organisations' to acknowledge the allegations of the Indian organisations and CCC/ICN in a roundabout way. The mediatory attempt failed.

Third mediatory attempt: Dutch Minister of State Ruud Lubbers

Now that the conflict also affected diplomatic relations between India and the Netherlands, the Dutch government offered to facilitate a high-level mediatory attempt in November 2007. All parties had reached a difficult situation: CCC/ICN and their Internet Service Providers felt troubled because of the pending international arrest warrants and FFI/JKPL was concerned about bankruptcy. All parties acknowledged the added value of such mediation. Each of them proposed names for a mediator. As it turned out, all parties involved accepted Mr Ruud Lubbers, the former Prime Minister and Minister of State of the Netherlands,⁷² as an independent mediator. In mid-December 2008, the Dutch government requested him to avail himself as a mediator. He agreed to take up this challenge.⁷³ Two weeks earlier, G-Star had just announced the termination of its relationship with FFI/JKPL. The continuity of the Indian company was in jeopardy. The completion of the work-in-process orders would take approximately three months, after which FFI/JKPL would probably have to close its doors in Bangalore and Italy.

6. The Lubbers Mediation

The mediatory attempt by Mr Lubbers took place in the Netherlands behind closed doors. After having heard the parties, Mr Lubbers informed the governments that he would try to mediate the case as long as the arrest warrants against the Dutch persons would not be issued on an international level. He also considered that besides the direct parties to the conflict, CCC/ICN, the Internet Service Providers and FFI/JKPL, also G-Star had to be consulted. A continuation of its relationship with FFI/JKPL was vital to avoid bankruptcy on the part of FFI/JKPL and hence for the success of the mediatory attempt. The Indian organisations were not present during the first meetings in the Netherlands, but CCC/ICN was encouraged by Mr Lubbers to communicate with them at all times in order to collect their ideas and to gain their commitment for a structural solution, and so they did.

Mr Lubbers examined all reports and publications available on the conflict and he instigated many meetings and consultations with CCC/ICN, FFI/JKPL, G-Star, SAI,

71 See reference 25.

72 Mr Lubbers was Prime Minister from 1982 to 1994. From 2001 to 2005, he was the UN High Commissioner for Refugees. Mr Lubbers is also one of the founding fathers and a member of the Earth Charter Commission, which was released in 2000. He lectured in Globalisation Studies at Tilburg University, the Netherlands, and at John F. Kennedy School of Government, Harvard University, USA (1995-2000).

73 Mr Lubbers requested the assistance of Ms Lambooy because of her expertise regarding CSR.

the Indian Embassy in the Netherlands, the ministers involved and their representatives, Indian lawyers and mediation advisors, and ILO representatives. It seemed that none of the disputing parties was prepared to put their campaigning or litigation on hold during the beginning of the mediation process. Mr Lubbers' goals were 1) to avoid that the international arrest warrants would be activated, 2) to find confidence that the labour conditions at the FFI/JKPL sites were conforming to generally acceptable international standards so that he could encourage the (former) customers of FFI/JKPL to place orders, and 3) to achieve a consensus between the parties about terminating their public campaigning and litigation, while finding a means to re-establish communication where necessary. As a mediator, Mr Lubbers enquired of the parties which solutions they envisaged. By 28 January 2008, Mr Lubbers had issued a press release in which he announced that an agreement had been reached between the parties involved.⁷⁴ It reads:

"The Indian clothing producer and the Dutch NGOs have jointly come to the following solution: in consultation with local Indian organisations and unions, an ombudsperson in Bangalore will be appointed. The ombudsperson for future conflicts will be independent and have the full confidence of all parties, local as well as international. Should employees, local organisations or CCC/ICN have any complaints concerning labour conditions at FFI/JKPL, they can submit these to the ombudsperson, who has a mandate to resolve them. This initiative will not hinder the right of any employee to become a member of a union of his choice, which can then directly represent him towards the FFI/JKPL management. CCC/ICN are confident that any possible violations of labour rights will be reported in a timely fashion and will be resolved in a correct manner. Should FFI/JKPL or any of their customers have complaints about the remarks or behaviour of NGOs or unions, they can submit these to the ombudsperson, who will independently verify the issues and take binding decisions.

Supported by this solution, parties no longer require the courts to provide judgment on their difference of opinion concerning the allegations put forward by local Indian organisations, and disputed by FFI/JKPL as to events lying in the past (2005/2006). Therefore, the Indian company withdraws all legal proceedings and CCC/ICN bring to an end all campaigns against FFI/JKPL and the Dutch jeans brand G-Star. The NGOs have also withdrawn the complaint about the alleged violation of the OECD Guidelines.

In good consultation with Lubbers, G-Star, the most important former customer of FFI/JKPL, re-establishes its commercial relationship with FI/JKPL, so that the 5,500 Indian employees are not the victim of the conflict. Lubbers has ascertained that with the litigation ending and the appointment of an ombudsperson, there is no reason to consider the labour conditions not in compliance with Indian law and international standards. He has encouraged G-Star to re-

74 Press release by Mr Lubbers, 28 January 2008; <www.ez.nl/dsresource?objectid=155086&type=PDF>, accessed on 14 February 2009.

establish its commercial relationship with the Indian producer. He has made this request expecting that other customers will follow.⁷⁵

Indeed, as Mr Lubbers indicated almost a month later in a new press release of 21 February 2008, 'no party (FFI/JKPL employees, Bangalore NGOs or unions, or CCC/ICN) has contradicted this positive statement (regarding the labour conditions being in compliance). This is encouraging.'⁷⁶ Fortunately for all parties, following the mediation agreement and the first press release by Mr Lubbers, G-Star re-established its relationship with FFI/JKPL, thereby saving the FFI/JKPL employees' jobs. In following up the questions raised in the Dutch Parliament (Section 2), the Dutch Ministers of Economic Affairs and for Foreign Trade informed Parliament of the outcome of the Lubbers Mediation.⁷⁷ They emphasised the importance of CSR for the Netherlands, but also for India, and stressed that maintaining a dialogue is essential. They underlined that CSR can only take place by creating a channel of communication between companies and civil society organisations for the exchange of ideas, even when their positions differ greatly; all parties bear responsibility for maintaining such a dialogue.

Appointment of the Conciliator-Ombudsman-Mediator

Since the conflict had emerged and evolved in India, Mr Lubbers felt that the best place to resolve it would be in India. Therefore, he sought the assistance of Mr Ashok Khosla, a former Indian government and UN officer.⁷⁸ Mr Lubbers and Mr Khosla

75 The content of the mediation agreement is disclosed in more detail in a joint press release of September 2008, issued by Mr Lubbers and supported by the COM: 'With all parties I reached a mediation agreement consisting basically of: (i) termination of the public campaigns against FFI/JKPL and its customers launched by CCC and ICN; (ii) any and all old electronic information concerning this case would be declared irrelevant and history because not verified (all information is supposed to carry a 'case closed' banner); (iii) termination of the legal claims filed by FFI/JKPL against the NGOs, trade unions and action committee's; and (iv) appointment of a Conciliator-Ombudsman-Mediator (COM) in Bangalore to whom any complaints about labour issues at FFI/JKPL, and complaints about the behaviour of the NGOs, trade unions and action committee's, could be addressed. Parties agreed that it would be best that the COM be the only person entitled to publicly provide information about these matters, especially about the labour conditions at FFI/JKPL (to avoid unsupported information to be spread which could immediately lead to bankruptcy of the factories). [...] The COM is presently the only person who has been empowered by the parties to disseminate information about FFI/JKPL, its factories and the mediation process. He informed me that he is communicating with all parties and will issue half-annual public reports on his work.'

76 Press release by Mr Lubbers, 21 February 2008; <www.ez.nl/dsresource?objectid=155526&type=PDF>, visited on 21 March 2009.

77 Letter by the Ministers of Economic Affairs, Ms Van der Hoeven, and for Foreign Trade, Mr Heemskerck, to Parliament of 31 January 2008, reference no. 31 200 XIII 46; <<http://rijksbegroting.minfin.nl/2008/kamerstukken,2008/2/6/kst114958.html>>, visited on 18 April 2009.

78 Mr Khosla holds the chair of the international NGO International Union for Conservation of Nature, based in Switzerland, and of the Indian NGO Development Alternatives, based in Delhi, and he co-chairs the international NGO Club of Rome.

are both representatives of the Earth Charter.⁷⁹ Amongst other issues, Mr Khosla was requested to propose a suitable candidate to act as ‘conciliator-ombudsperson-mediator’ (COM), an idea suggested by CCC/ICN. It was agreed that the COM would have to perform its task in accordance with its terms of reference and within the framework of Indian law and international standards including the Earth Charter, so as to provide it with flexibility in reaching wise decisions. CSR conflicts – as this case study illustrates – often cross borders. Since laws are mainly organised within state-based systems, commonly resulting in different legal standards, it is difficult to solve these conflicts by means of legal standards only.⁸⁰ For that reason, the COM was also provided in its terms of reference with the Earth Charter as a tool against which to measure its decisions. As the Earth Charter provides for a common ethical basis against which no one would object, depolarisation would so be fostered. In addition to appointing the COM, Mr Khosla and Mr Lubbers announced that they – as ‘custodians’ of the mediation agreement – remained available to implement the agreement and to act as a ‘sounding board’ for the COM. The parties also found agreement about the appointment of a third Custodian, based in Bangalore, in the person of Sri. A.P. Venkateswaran.⁸¹

In consultation with the parties involved, the Custodians requested the Bangalore Mediation Centre (BMC) to act as COM. By the end of February 2008, the BMC had formally accepted the assignment and proposed to appoint Justice Malimath, an independent and wise person, to execute this task.⁸² All parties welcomed his appointment and agreed to empower him to evaluate potential complaints from

79 The Earth Charter is an international declaration of fundamental values and principles for building a just, sustainable, and peaceful global society in the 21st century. Created by a global consultation process, and endorsed by many organisations, the Charter ‘seeks to inspire in all peoples a new sense of interdependence and shared responsibility for the wellbeing of the human family and the larger living world’, <www.earthcharter.org>.

80 The choice of the Earth Charter supports the statement by E. van Beukering, *Over wat advocaten moeten weten en nog veel meer* (What lawyers need to know), TMD 2008-2, p. 10; she underlines that mediation does not need to follow traditional legal frameworks and thus can enlarge the scope for possible remedies. A. de Roo, *Conflictmanagement in de zakelijke sfeer: recente ontwikkelingen* (Conflictmanagement in business: recent developments), *ibid.* p. 3, emphasises that mediation is better equipped to achieve in a short time span a long-term solution; that is certainly the goal sought by the parties in the case at hand. M. Schonewille, *Geslaagde samensmelting tussen best practices en de nieuwste inzichten uit de wetenschap* (Successful merger between best practices and the newest scientific developments), *ibid.* p. 17, points at the fact that legal disputes often poorly relate to the factual dispute at hand, and hence that legal remedies cannot contribute to a good solution to the problem. Also that point has been clearly demonstrated in this case study.

81 Sri. A.P. Venkateswaran served the Indian government for a long time. He retired as the Indian Foreign Secretary. Before that, he was Ambassador to, amongst others, China and Russia, and represented India at the UN in Geneva, including the ILO.

82 Mr Justice V.S. Malimath held, amongst other posts, the following positions: Chief Justice of the Karnataka and Kerala High Courts, Member of the Indian National Human Rights Commission, Head of the Fact Finding Mission, appointed by the UN to investigate on the violation of human rights in Nigeria after the execution of the environmentalist, lawyer and writer, Ken Saro Wiwa. Mr Malimath was also chosen as the International Observer to Colombo, Sri Lanka, representing the Human Rights Institute of the International Bar Association (London) and the International Commission of Jurists (Geneva) regarding the trial of cases before the Supreme Court of Sri Lanka. The Indian President conferred the National Citizens Award on him in 1996.

employees, NGOs and other organisations and to solve these in consultation with FFI/JKPL. He was also instructed to safeguard diligent public communications on FFI/JKPL and its customers.⁸³ Another task is to encourage FFI/JKPL to obtain certification of its operations by a CSR certification institution.⁸⁴ Consequently, permanent monitoring was provided for.

In early March 2008, Justice Malimath received a vote of confidence from all parties and – at the Inaugural Meeting of 6 March 2008, in the presence of the Custodians⁸⁵ and all the Indian parties⁸⁶ – he accepted the mandate to resolve future conflicts and agreed to publicly report on any complaints and his work on a half-yearly basis.

By the end of March 2008, the Dutch Ministers of Economic Affairs and for Foreign Trade informed Parliament that the Lubbers Mediation had succeeded in a structural solution to the conflict, thereby indicating that the facilitating role of the Dutch government in offering the Lubbers Mediation had come to an end. The government expressed its hope that besides G-Star also other former and new customers would place orders with FFI/JKPL.⁸⁷

The COM in office

The COM issued its first public report in September 2008.⁸⁸ It reported on the meetings held in Bangalore, the finalisation of the terms of reference, the implementation of the Lubbers Mediation agreement, and on the complaints that it had received. The COM confirmed that FFI/JKPL had terminated all litigation against the Indian organisations as well as against CCC/ICN and the Internet Service Providers and urged all parties 'to enter this information in their respective websites and to give wide publicity to it with utmost expedition'.⁸⁹ The report did not record any complaints relating to the labour conditions at the FFI/JKPL factories, but it did register various complaints about errors on CCC's and other websites. The report, furthermore, discussed complaints regarding publications involving CCC/ICN which repeated the 'old' but unsubstantiated allegations of poor labour conditions at FFI/JKPL without providing information on the positive outcome of the Lubbers Mediation. The COM indicated that it had found the grievances about the errors on the CCC/ICN websites to be well founded and it had hence requested that corrections be made. Regarding another complaint concerning an article entitled

83 In so far as it regards their relationship with FFI/JKPL.

84 Such as SAI or a similar institute.

85 Mr Khosla and Mr Venkateswaran were present; and Ms Lambooy represented Mr Lubbers.

86 Representatives of GATWU, Munnade, Cividep, NTUI and its lawyer, FFI/JKPL and its lawyers, Ms Pramila Nesargi and Ms Geeta Menon, were present. CCC/ICN representatives were not able to come to India because they could not obtain a visa on time, but they had given full power to their Indian affiliate organisations.

87 Letter by the Ministers for Development Co-operation and Foreign Trade to Parliament of 15 April, 2008, reference no. 26 485 (57); <<http://static.ikregeer.nl/pdf/KST117886.pdf>>, visited 18 April 2009.

88 'Public Report of COM – Mr Justice V.S. Malimath (for the period 6-3-2008 to 5-9-2008), as per Clause 15 of ToR.'

89 Mr Lubbers was also requested by the COM to issue a press statement and to give wide publicity to the withdrawal of all the pending cases.

Schmutzwäsche published in the Austrian magazine *Profil Extra* in May 2008, the COM had convened a meeting. The report stated that '[the article] is unjustifiably negative in character [about FFI/JKPL and G-Star]' and 'the COM having entered office, publication of the Article in PROFIL without first approaching and collecting correct information from him was against the spirit of ToR [Terms of Reference]'. To prevent further damage, the COM agreed with the parties that they would publish on their websites a joint statement to correct the false information contained in the article *Schmutzwäsche*.⁹⁰

7. Differences in law and confusing soft law labour standards

Those persons who played a role in this dispute came from countries with distinct legal systems and cultures. Moreover, they worked in dissimilar sectors of society. Businesspeople, NGOs, unions and campaigning organisations aim for divergent goals in life and usually their thought processes are not aligned. Diverse backgrounds imply different practices and traditions. In order to gain a better understanding of the conflict, the complaints filed and the individual party's expectations, it is useful to briefly outline the various perspectives from Indian and Dutch law, as well as those of the ILO standards and the OECD Guidelines. In Table 2, these standards are presented, all centred around the allegations against FFI/JKPL as mentioned in the draft Fact-finding Report. In this Section the most disputed standards will be highlighted and contrasted with each other.

The main issues in this case study concern 1) the right to collective bargaining, which FFI/JKPL denied to GATWU and 2) the freedom of association of FFI/JKPL workers. Regarding the first issue, on the basis of the facts of this case and the applicable law, it seems difficult to argue that the FFI/JKPL employees were denied their *right to collective bargaining* as FFI/JKPL complied with the Indian law. Contrary to the detailed set of rules contained in the Trade Unions Act concerning the establishment of unions and the right to collective bargaining, international law and CSR instruments only give general directions. The ILO core principles⁹¹ of freedom of association and collective bargaining apply to India (not directly to companies), but their generality does not add to the pertinent Indian law. As India has not ratified other ILO conventions covering this subject, the provisions thereof do not apply to India.⁹² The ILO Tripartite Declaration of Principles concerning Multinational

90 See the documents referred to in references 75 and 88.

91 The 1998 ILO Declaration on Fundamental Principles and Rights at Work declares four core principles as laid down in several separate conventions to be applicable to all member states regardless ratification, as these principles are considered to lie at the heart of the ILO's *raison d'être* (article 2). The Conventions relating to the following rights must be respected, promoted and realised: 1) freedom of association and the effective recognition of the right to collective bargaining; 2) the elimination of all forms of forced or compulsory labour; 3) the effective abolition of child labour; and 4) the elimination of discrimination in respect of employment and occupation.

92 India has ratified 41 Conventions; see: <www.ilo.org/ilolex/english/newcountryframeE.htm>, visited on 22 March 2009.

Table 2: Applicable legal and soft law standards re the allegations

Labour Issue	Indian Law	Dutch Law ^a	ILO	OECD Guidelines ^b
Occupational Health & Safety	Factories Act 1948: - Health (Sec.11-20, Ch. III); - Safety in Factories (Sec.21-41, Ch. IV). Penalty will be levied for contra-vention. Workmen's Compensation Act: - workers compensation. ^c Karnataka Factory Rules 1969: - Health (Rules 16-56, Ch.III); - Safety applicable to different types of industry (Rules 57, Ch.IV).	Health and Safety Act 2007: - Mandatory risk assessment; - Consultation and information.	ILO Conventions (C), ^d C.155* (art.16.1 relevant for jeans manufacturing), C.161*, C.170*, C.184*: - Safety at work-places, machinery and equipment; - Informing, training and consulting of employees; -Emergency management. ILO MNE Decl. §100)	Ch. IV §3, 4(b),V (environment): - Within framework of applicable law minimise risks & accidents and raise level of safety; - Duty to inform, communicate and consult employees.
Working hours and paid leave	Factories Act-1948 and Factories Rules: -Working hours (Sec.51-54, Ch.VI); -Annual leave with wages (Sec.79).	Working Hours Act, Civil Code: - Standard of 40 hrs/wk, optional deviation with consultation; - Minimum number of paid holidays.	C.1, C.4, C.14, C.30*, C.106*, C.132*, C.175*: - 8hrs/day, 48 hrs/wk (40 hrs/wk as reduced later on to 36 hrs); - Minimum of 24 consecutive hrs leave every 7 days; - Annual paid holiday.	Ch.II: -Referral to the laws and regulations applicable in the host country. ^e
Protection against Discrimination	Equal Remuneration Act 1976 prohibits discrimination in payment of salary or recruitment (Ch.II).	General Act on Equal Treatment, Equal Opportunity Act: -Prohibition of discrimination on any ground.	C.100, C.111: - Equal remuneration; - Equal opportunity and treatment re employment and occupation.	Ch.IV: -Precludes any form of discrimination; several types of discrimination are outlined.
Payment of fair wage	Government of Karnataka Notifications under the Minimum Wages Act 1958 (Sec.12): - Minimum wages per category of employees in different industries in different local zones are annually set. ^f	Minimum Wage Act 1968.	C.95*, C.131*, C.100: - Payment of wage in full & timely manner; setting minimum wage; - No clear provision on wage level; - Equal remuneration	Ch.IV: - Observance of local standards in same industry is suggested.

a The Netherlands has ratified 105 ILO Conventions. As regards industrial relations, the country is well known for its so-called 'polder model'. Although its name refers to the Netherlands' flat, rural landscape, in practice it refers to the traditional social dialogue and policy-making by consensus between the government, employers and trade unions. Dutch labour law is detailed but is found in scattered pieces of legislation. T. Claessens, *The Netherlands*, in: B.A. Hartstein, *Labour & Employment in 31 Jurisdictions worldwide*, 2007, p. 122.

b The OECD Guidelines were inspired by many international conventions and declarations, e.g. Chapter IV on Employment and Industrial Relations was based on the ILO Conventions. See OECD Guidelines Commentaries § 20-25, § 30 and § 37. India is not an OECD Member nor an adhering country (box 4). However, as demonstrated in Section 5 supra, the Guidelines can be of relevance to Indian suppliers.

c The Workmen's Compensation Act entitles workers to compensation for damage suffered from any occupational hazards contracted during the course of the employment, including any accident happening during the course of employment.

d Those ILO Conventions marked with * are not applicable to India as this country had not ratified them by February 2009. A UN (and hence ILO) member state is only bound by the ILO Conventions that it has ratified and by the ILO core principles (see reference 91 and 92).

e OECD Guidelines, Commentary § 2: 'Obeying domestic law is the first obligation of business. The Guidelines are not a substitute for nor should they be considered to override local law and regulation. They represent supplementary principles and standards of behaviour of a non-legal character, particularly concerning the international operations of these enterprises. While the Guidelines extend beyond the law in many cases, they should not and are not intended to place an enterprise in a situation where it faces conflicting requirements.'

f The Payment of Bonus Act, Payment of Gratuity Act, and Payment of Wages Act also relate to wages. With regard to contractual matters, the law under the Contract Act (Section 27) clearly bars any agreement in restraint of employment.

Table 2: (Continued)

Labour Issue	Indian Law	Dutch Law ^a	ILO	OECD Guidelines ^b
Freedom of Association (FoA) and Collective Bargaining (CB)	Trade Unions Act of 1926: - Registration (Sec.4) and recognition of trade unions. ^g - It would be considered Unfair Labour Practice if an employer is showing partiality or granting favour to one of several trade unions attempting to organise his workers or to its members, where such a trade union is not a recognised trade union (Sec.i2(b)). - Dispute settlement procedure for workers provided by Trade Union Act and Industrial Dispute Act (Sec.18).	Constitution (Sec.8), C.87, C.98, Works Council Act, Civil Code, Collective Agreement Act 1927, Extension of Collective Agreement Act 1937; ^h - FoA and protection of employees' representatives; - Right to establish trade unions, works council & European Works Council; - Recognition of CB agreements.	C.87 (art.2), C.98, C.135, C.141* (art.3), C.154: - FoA for workers and employers; - Protection against anti-union activities and protection for representatives; -Right to CB. FoA and CB are declared as 'core principles' in 1998 ILO Declaration on Fundamental Principles and Rights (applicable to all ILO Members).	Ch.IV: - Referral to ILO Conventions on FoA and CB.
Protection against Dismissal	Summary dismissal of any employee is not possible. Disciplinary dismissal actions are governed by Industrial Disputes Act 1947.	Civil Code, Act on Notification on Mass Layoffs: - Mandatory notification with administrative bodies for individual and mass layoffs; - Specified grounds for dismissal; - Protection against unfair dismissal.	C.158*: - Protection against unfair dismissal; ⁱ - Specified grounds for dismissal; - Mandatory notification with administrative bodies and consultation with workers' representatives in case of (collective) dismissals. - No arbitrary dismissal procedures (ILO MNE Decl. §27)	Ch.IV: - Enterprises should file notice to employees and their representatives re potential mass lay-offs.
Worker Participation/Co-determination		Works Councils Act: - Rights to information, consultation and approval. ^j	C.154, C.158*: - Mandatory consultation with workers' representatives in case of (collective) dismissals.	Ch.IV: - Consultation and co-operation on matters of mutual concern is recommended; - Providing information re substantial changes in operations.

^g See also reference 8.

^h The 1927 Act recognises the binding force of collective agreements over individual contracts. It precludes employers and employees from agreeing contrary to the collective agreement. The 1937 Act vests power in the government to extend the 'binding force of a collective agreement to the personnel of all enterprises in a certain sector of the economy'. See e.g. Antoine T.J.M. Jacobs, Labour Law in the Netherlands, The Hague: Kluwer 2004, p. 145; and Blanpain (ed.), Collective Bargaining and Wages in Comparative Perspective: Germany, France, The Netherlands, Sweden and The United Kingdom, in: Bulletin of Comparative Labour Relations, Kluwer Law International 2005, p. 96. Whether a union can claim a seat at the table for negotiating a collective bargaining agreement is determined by jurisprudence and depends on several factors, such as number of employees it represents also in relation to other unions. See: P.Th. Mantel, Recht op toelating tot CAO onderhandelingen: Meer dan representativiteit? (Right to Collective Bargaining: More than representation?), Magazine for Labour Law and Social Affairs, SMA February 2008-2, p. 74-81.

ⁱ Non-valid reason are: union membership, illness, injury, pregnancy, participation in legal proceedings against employer.

^j Besides unions, works councils play an important role in the Dutch labour system. The Works Council Act prescribes that any company or business unit employing fifty employees or more is obliged to establish a works council, which consists of elected employees. A works council convenes with the management board at least six times a year. The management must consult the works council on material business decisions that might affect employees, such as reorganisations or the sale of (part of) the company. Moreover, decisions concerning a change in labour conditions or working hours require the works council's consent. The Netherlands is quite advanced in works council legislation and practice. Although it is a common European approach, only in Germany and the Netherlands are works councils taken quite seriously by employers and the courts. Their rights and duties are distinct from those of unions. In other European countries, like the UK and France, unions play the major role in defending labour rights and standards.

Enterprises and Social Policy (ILO MNE Declaration)⁹³ and the OECD Guidelines call upon enterprises to 'respect the right of their employees to be represented by trade unions and other *bona fide* representatives of employees, and engage in constructive negotiations (...)', but they do not impose specific conditions. Consequently, Indian law plays the most dominant role in the determination of what the duties and responsibilities of an Indian employer are regarding collective bargaining. Since this case study occurred in India, a democracy that applies the rule of law, these types of questions shall not be answered differently when viewed from the perspective of CSR.

With regard to the second issue, the *freedom of association*, the question is of a very factual nature: were the FFI/JKPL employees free to organise or to join a union, or did they fear dismissal when doing so? It seems reasonable to consider the outcome of the various SGS/ASK audits and the Labour Department inspection (Table 1). The employees interviewed (a 10% sample of the workforce) acknowledged their awareness of their rights and other benefits. They indicated that they were not particularly interested in joining a union as FFI/JKPL was already paying above-average wages and other benefits. In general, though, freedom of association is certainly an issue that should be monitored carefully at textile suppliers based in developing countries (*vide* Section 9 for other case studies). However, in the case at hand, the situation was different. The question could even be posed whether FFI/JKPL would have violated its employees' rights to associate with a union of their choice, if the company had accepted GATWU's demand to represent FFI/JKPL's employees and had entered into collective bargaining with GATWU, since GATWU had no FFI/JKPL members.

Looking from a Dutch perspective at the labour conditions and workers' relations at FFI/JKPL, or any other company with a comparable workforce, one would expect that a works council, union or any other employee representative body exists to balance management's power and to take care of the employees' rights and interests. At FFI/JKPL there are indeed four grievance committees, consisting of elected workers. Yet, their duties are slightly different from works councils' and unions' rights and duties. However – not only by Indian labour law standards – this committee system is quite advanced. SA8000 also recommend establishing these types

93 The ILO MNE Declaration contains recommendations of the ILO especially targeted at multinational enterprises, which also includes Indian enterprises. Not entirely coincidental, the ILO MNE Declaration dates back to November 1977, and was revised in November 2000, immediately after the release of the OECD Guidelines in 1976 and their revision in June 2000. Although the OECD Guidelines do not apply to FFI/JKPL directly, it has been successfully argued that – in view of their intensive relationship – G-Star had a duty to promote the OECD Guidelines with its business partner (Section 5).

of committees.⁹⁴ The Lubbers Mediation agreement provided for an intermediary step with the appointment of an ombudsman with the mandate to resolve any labour complaints. So far, the COM has been perfectly capable to 'keep the peace'. Perhaps, as a more general comment, the presence of an ombudsman could develop into a more permanent communication body for companies' management and employees.

Concluding, as Indian laws are well developed, including labour law standards and collective bargaining mechanisms, western customers who want to purchase 'socially responsible produced' textiles from Indian producers, should – as a first step – convince these producers to comply with domestic laws, if necessary. If the customers want to go beyond local standards, they can require their suppliers to follow social compliance certification standards, such as SA8000, FLA, FWF, BSCI, and submit them to regular audits carried out by independent agencies. A next step on the CSR ladder would be to impose certain conditions on the local suppliers by means of contractual clauses, e.g. by including covenants or representations and warranties in purchase contracts that require the factories to provide additional medical care and educational services for workers or their families. The Indian producer thereby commits itself to follow these higher labour standards and has to provide his employees with the additional benefits which he has agreed upon with his customer. Obviously, he will also have to charge a higher price for his products to such a customer. It would be useful for apparel brands to jointly come to such additional requirements in order to keep them realistic for manufacturers.

8. Communication strategies of the parties

During the conflict, each of the Indian organisations, CCC/ICN, G-Star and FFI/JKPL communicated in their own manner, using different vocabulary based on personal perceptions, which led to misunderstandings of actual situations. In this Section several issues that may have aggravated the conflict will be presented.

Impossibility of independent research versus positive outcome of multi-stakeholder audits
The parties, CCC/ICN and the Indian organisations, on the one hand, and G-Star and FFI/JKPL on the other, strictly kept to their own perception of the factual labour conditions at FFI/JKPL, while denying arguments made or materials released by

94 Article 4.2 of the SA8000 standard; available at <www.sa-intl.org>. See also M. Ma, The Story of Ying Xie – Democratic Workers' Representation in China as a Tool for Better Business, in: A. Nadgrodkiewicz (editor), From Words to Action: A Business Case for Implementing Workplace Standards – Experiences from Key Emerging Markets, Washington DC/New York: Center for International Private Enterprise (CIPE) and Social Accountability International (SAI) 2009, p. 11. The study by Ma focuses on capacity building, internalisation, and ownership of compliance programmes by workers and managers within a medium-sized garment factory in China producing for the brand Timberland. The same volume also contains an interesting case study on the usefulness of SA8000 in managing contract workers and supply contractors for the steel giant TATA in India, and a case study which analyses the key drivers for and the results of SA8000 certification for workers, managers, and customers of a textile company in Turkey. Also compare M.J. Hiscox, C. Schwartz, M.W. Toffel, Evaluating the Impact of SA 8000 Certification, Boston: Working paper 08-097, May 2008.

the other party. This may have led to confusion in the outside world. For instance, during the legal proceedings against the Indian organisations, CCC/ICN always claimed that the FFI/JKPL production units could – by definition – not meet G-Star's code of conduct, let alone the SA8000 standard, since the involvement of local stakeholders was impossible because of the restraining order. Moreover, CCC/ICN claimed that SGS was a commercial auditing firm and therefore not independent, that SGS was part of the controversy, and that the Delhi-based NGO ASK was not suitable for executing an audit amongst Bangalore employees, as it 'did not understand local culture and custom', as did GATWU. In this way, CCC/ICN downplayed in advance any positive outcome of audits or checks by organisations or authorities other than those affiliated with CCC/ICN. G-Star, on the other hand, denied the allegations of the Indian organisations, since they could not substantiate these and the SGS/ASK audits did not confirm them, and informed the public that the FFI/JKPL labour conditions were up-to-standard. G-Star pointed to the professional level of the SGS and ASK personnel.

'Gagging order' versus prohibition of the dissemination of untrue statements

When the Bangalore Civil Court issued the restraining order against the Indian Organisations prohibiting them from disseminating false information, CCC/ICN consistently referred to this as a 'gagging order', which allegedly prohibited them from discussing the FFI/JKPL situation in its entirety with their Bangalore affiliates. CCC/ICN in its press statements and on its website even referred to G-Star as 'Gag-Star' and displayed pictures online of activists forming the actual letters.⁹⁵ FFI/JKPL and G-Star, however, always stated that the restraining order only prohibited the individual activists from Bangalore from disseminating information which the Bangalore Civil Court considered *prima facie* untrue statements, such as the aforementioned interview on Dutch radio. The activists were thus not restrained from speaking out about FFI/JKPL *in general*. Another aspect is the continuation of the restraining order; if the Bangalore organisations would have presented evidence to the Court to substantiate the allegations against FFI/JKPL, the Court would have immediately withdrawn the restraining order. However, although the organisations sometimes appeared in Court and filed responses, they did not place a iota of material to substantiate their claim. Hence, the Court prolonged the restraining order on several occasions. In the meantime, CCC/ICN publicly showed its anger over the 'threats to freedom of speech' and FFI/JKPL's 'policy of threatening its critics' and tried to force FFI/JKPL to withdraw the legal proceedings by intensifying the public campaigns and by putting pressure on FFI/JKPL's customers. CCC/ICN and the Indian organisations preferred to submit their case to the 'court of public opinion' rather than substantiating their allegations against FFI/JKPL in Court.

95 See the short article 'Gag Star' of 29 November 2007 at <www.schoneklaren.nl/index.php?option=com_content&task=view&id=133&Itemid=793>, visited on 15 February 2009, and also CCC/ICN's press release of 31 August 2006, 'Gag Order Placed on Indian Labour Support Organisations,' in which CCC/ICN furthermore stated that the restraining order prevented the Indian Organisations from circulating *any information* about the labour situation at FFI/JKPL.

Seemingly unbalanced attention to G-Star's role compared to the role of other buyers

Before the conflict between CCC/ICN and FFI/JKPL evolved into large-scale warfare, FFI/JKPL supplied multiple buyers, including G-Star. Interestingly enough, CCC/ICN's campaign was fully aimed at G-Star, whereas there were other apparel brands, even Dutch-based brands that were originally sourcing from FFI/JKPL in the same period. One of those brands was the Amsterdam-based company Mexx which became an FWF member in November 2006, after CCC/ICN's press release on the 'gagging order'. In an article in the Dutch newspaper *Trouw*, the FWF director explained how FWF and Mexx had jointly engaged in dialogue with the FFI/JKPL management to discuss the issues alleged by FWF's Bangalore partnering organisations.⁹⁶ He stressed the need for 'silent diplomacy', a view quite opposite to FWF's initiating member organisation CCC.⁹⁷

Criminal proceedings and arrest warrants versus appearance in person

When the representatives of CCC/ICN and the Internet Service Providers were charged with criminal defamation and – upon their non-appearance in Court – the Magistrate Court subsequently issued arrest warrants, CCC/ICN publicly claimed that the Indian Court qualified them as 'international terrorists' and that this lawsuit was a full-frontal attack against 'international human rights activists'. FFI/JKPL, on the other hand, had initiated the court case as an attempt to stop the CCC/ICN from continuing their (internet) campaigns in which they spread information that the court had found to be *prima facie* untrue. FFI/JKPL was rapidly losing business, G-Star was also publicly considering leaving FFI/JKPL, and there was a threat of bankruptcy. The Magistrate Court had issued non-bailable arrest warrants, because the criminal procedure in India requires that the defendants appear in Court. The Court can exempt the appearance of the accused until the trial commences.

Claims of corruption versus a fully functional democracy and judicial system

After the issuance of the restraining order by the Bangalore Civil Court and the criminal charges by the Magistrate Court, CCC/ICN claimed that these Court actions were 'purchased' by FFI/JKPL. CCC/ICN claimed the same about the positive report of the Labour Department. Basically, any (positive) information on FFI/JKPL that

96 In August 2007, FWF published a report regarding FFI/JKPL, conducted for FWF member Mexx. It repeated the allegations presented in the draft report of the Fact-finding Committee. Upon its release CCC published it on its website, but it is no longer available online.

97 G. Moes, *Duurzaam Ondernemen/Foute fabriek mijden werkt niet* (Corporate social responsibility/Avoiding a wrong factory does not work), Dutch newspaper *Trouw*, 22 February 2007; www.trouw.nl/nieuws/economie/article1399358.ece, visited on February 2009. In a Memorandum of Understanding between Liz Claiborne, Inc., Mexx, Fair Labor Association (FLA) and the FWF, signed on 6-10 November 2006 by all parties, it was agreed that 'FLA and FWF will observe the confidentiality commitments and transparency that both initiatives have, with regards to information regarding member/participating companies and their supply chains'. This clause may clarify why CCC/ICN was not campaigning against Mexx' business relationship with FFI/JKPL. See <www.fairwear.nl/images%20site/File/Deelnemers/Mexx/MoU-Mexx.pdf>, accessed on 15 February 2009.

did not come from sources affiliated to the Indian organisations was regarded as unreliable or suspicious by CCC/ICN.

Concluding, due to the intemperate and strong terminology used by CCC/ICN, and the type of legal claims filed against them by FFI/JKPL, the conflict became interesting for the international media and was easily picked up by politicians (*supra* Section 2). Both sides were in the process of igniting their differences of opinion. De-escalation was not part of their vocabulary.

9. Comparison with other CSR textile conflicts

To put the CCC/ICN's campaign against G-Star into perspective, some other international campaigns against garment manufacturers will be compared to the FFI/JKPL case. It is interesting to note that although their outcomes differ, there are also some striking similarities. Conspicuous campaigns were those against the underwear brand Triumph International (Triumph), in which CCC/ICN played a leading role, and against the American sportswear company Gildan Inc. (Gildan), in which CCC/ICN only played an indirect role. In addition, American campaigns against Fruit of the Loom to source college wear from a Honduras factory will be mentioned. Lastly, in the next paragraph, other CCC/ICN campaigns against Dutch retailers will be examined, revealing as a hidden conflict a clash of CSR codes. A summary of the first three cases is presented below, followed by some brief remarks:

- 1 *Bras from Burma*. In June 2000, the ILO Conference adopted a Resolution in which Burma was called upon to take action against the widespread and systemic use of forced labour.⁹⁸ In December 2000, an NGO coalition, consisting of CCC/ICN, cooperating with its Swiss branch, Burma Centre Netherlands, the Burma Campaign UK, the Dutch trade union FNV Global, and OxfamNovib contacted the Swiss-based company Triumph International (Triumph) about Triumph's Burmese branch. They wanted Triumph to leave Burma, because Triumph's production facilities were located in government-owned property, therefore contributing financially to the military regime. When Triumph did not respond to the NGOs' call, the NGOs started a public campaign to press Triumph to leave Burma ('support breasts – not dictators'). After one year, Triumph gave in and left Burma. Later on, Triumph revised its code of conduct so as to include ILO and human rights standards.⁹⁹
- 2 *Textiles from Honduras*. In 2001, a Canadian and a Honduran NGO investigated the labour conditions at the production units in Central and South America of Canadian sports apparel brand Gildan Inc. (Gildan).¹⁰⁰ When the findings of

98 ILO Press release, ref.no. ILO/00/27, <www.ilo.org>, accessed on 26 March 2008. The Resolution also recommends 'Organisations constituents as a whole – governments, employers and workers – that they review their relations with Myanmar (Burma).'

99 Tulder, Zwart, reference 55, p. 298-303; and see: <www.burmacampaign.org.uk>, accessed on 24 March 2009.

100 M.-F.B. Turcotte, S. de Bellefeuille (Université du Québec à Montréal) and F. den Hond (VU University, Amsterdam, the Netherlands), Gildan Inc. – Influencing Corporate Governance in the Textile Sector, *Journal of Corporate Citizenship*, issue 27, Autumn 2007, p. 23-36.

the two NGOs – mainly concerning denial of freedom of association – were made public in a documentary shown on nationwide Canadian television, a controversy was born that was to last for five years. Although denying the claims made by the NGOs, Gildan adopted the Worldwide Responsible Production and Certification Programme (WRAP) in 2002.¹⁰¹ The NGOs were not satisfied with this attempt to address labour rights violations, and continued their campaigning, even involving Gildan's shareholders. In October 2003, Gildan obtained a Fair Labor Association (FLA) accreditation for implementing and verifying fair labour conditions,¹⁰² followed by an environmental certification in early 2004 by the Austrian Textile Research Institute (ÖTI).¹⁰³ Shortly after obtaining FLA accreditation, the NGOs filed a complaint with the FLA. Gildan was given 45 days to investigate and resolve the issues put forward by the NGOs. A few months later, the FLA – after a joint investigation with the labour monitoring organisation, the Workers Rights Consortium (WRC)¹⁰⁴ – confirmed that the right of freedom of association was being violated at a particular Honduran production facility. After implementing a corrective action plan, which gained the consent of the NGOs, Gildan decided to leave this factory for another Honduran production site in 2005, where they urged the application of a first-hire preference to workers from the former site.

- 3 *American college apparel*. In a report released on 7 November, 2008, WRC announced the closure of Russell Corporation's Honduran textile factory. Russell is a subsidiary company of Fruit of the Loom.¹⁰⁵ A WRC inquiry found substantial credible evidence that animosity against workers exercising their associational rights was a significant factor in Russell's decision to close this 'Jerzees de Honduras' plant. The closure announcement came after a year-long process during which WRC had worked with Russell to remediate particularly severe violations of associational rights at the Jerzees de Honduras plant and a sister facility known as Jerzees Choloma. According to the WRC, during mid-2007, Russell unlawfully dismissed nearly 150 workers from these facilities in retaliation for the workers' decision to form a union. As a result of a WRC investigation (corroborated by an FLA-commissioned report), and the intervention of affiliate universities, Russell was forced to acknowledge the violations, to offer

101 WRAP is an independent, non-profit organisation dedicated to the certification of lawful, humane and ethical manufacturing throughout the world. The organisation is an initiative of the American Apparel Industry. For more information please visit <www.wrapapparel.org>.

102 The FLA was established in 1999 in the USA upon the initiative of the former President Clinton. It involves companies, colleges and universities, and civil society organisations to improve working conditions in factories around the world. See: <www.fairlabor.org>.

103 The Institut für Ökologie, Technik und Innovation, established in 1967, provides services such as research, testing, certification, know-how transfer and equipment manufacturing. See: <www.oeti.at>.

104 The WRC is an independent labour rights monitoring organisation, conducting investigations into working conditions in factories around the globe. It was created by college and university administrators, students and labour rights expert. See: <www.workersrights.org>.

105 Worker Rights Consortium, Russell Corporation's Rights Violations Threaten 1,800 Jobs in Honduras; <www.workersrights.org/russellrightsviolations.asp>, visited on 9 March 2009.

reinstatement to the illegally dismissed workers, and to pay roughly USD 150,000 in back pay. WRC stated that

‘if allowed to stand, the closure would not only unlawfully deprive 1,800 workers of their livelihoods; it would also send an unmistakable message to workers in Honduras and elsewhere in Central America that there is no practical point in standing up for their rights under domestic or international law and university codes of conduct and that any effort to do so will result in the loss of one’s job’.¹⁰⁶

Many universities sourced their college wear from Russell, but terminated the relationship when the reports on Russell Corporation’s practice came out.¹⁰⁷

Comparing these three cases, differences and similarities can be observed. Similar to G-Star, Triumph was not prepared for the severe actions by civil society organisations. Triumph gave in to the call of the NGO coalition. The question remains though whether the divestment of Triumph has improved the labour conditions of 850 employees, also noting that the military regime has not lost any of its strength. In the second case, Gildan gave in to the demands of the NGOs: it became an FLA member, and involved them in a dialogue on labour practices. In contrast, as described *supra*, G-Star did not become an FWF member but instead decided to rely on the SA8000 audit and certification system. Furthermore, the Gildan case resembled the case study at hand in terms of 1) the set-up of the NGOs, one in the home country (Canada-The Netherlands), and one in the country of production (Honduras-India); 2) the campaigns were supported by an international network of other NGOs; 3) the complaints were filed at multiple levels; 4) the ‘responsible exit strategy’ demand re first-hire preference; and 5) the campaign was characterised by continued efforts to collect information, frequent press releases, media events and requests to consumers to send letters to the management of the western customers. The Fruit of the Loom case shows that despite ILO and other standards, freedom of association and collective bargaining are still a challenge in some places. To find credible evidence of violations will help employees and civil society organisations to enforce such rights.

A hidden conflict: clash of CSR codes

After the OECD Guidelines and ILO MNE Declaration were released in 2000, several multi-stakeholder initiatives (MSIs) emerged to translate these recommendations into practical working schemes for the business sector. In the Netherlands, SA8000,

106 Ibid.

107 S. Greenhouse, Michigan Is the Latest University to End a Licensing Deal with an Apparel Maker, *The New York Times*, 23 February 2009; <www.nytimes.com/2009/02/24/business/24sweat.html?ref=worldbusiness>, accessed on 18 April 2009.

BSCI and FWF are popular MSIs in the retail sector.¹⁰⁸ MSIs are CSR initiatives based upon co-operation with stakeholders, such as the business society, trade unions and NGOs. Although some work on a not-for-profit basis, they usually require a fee from participating companies. As demand increased for CSR certification and verification systems (CSR Implementation Systems), competition became inevitable. In short, 'selling' CSR Implementation Systems became business. For various Dutch companies operating on an international level, the internationally operating MSIs – BSCI or SA8000 – seem more logical to follow than the primarily Dutch FWF.¹⁰⁹

CCC/ICN's campaign against G-Star was not a one-off event. In the spring of 2007, in the midst of their campaign against G-Star, CCC/ICN also campaigned against the Dutch retailer HEMA concerning the allegedly poor labour conditions under which their apparel supply was produced. CCC/ICN stressed that only the involvement of local organisations can provide a buyer with a good view of the labour conditions at its supplier.¹¹⁰ HEMA replied that its labour conditions complied with its own code of conduct, and that HEMA had joined BSCI for independent verification. CCC/ICN's response exemplifies the clash between competing CSR Implementation Systems. CCC/ICN asserted that the way BSCI works by no means guarantees fair labour conditions. CCC/ICN expressed its disappointment that HEMA did not make use of FWF's knowledge of the textile sector, and notified HEMA that it would continue its campaigning.¹¹¹

On 27 February 2008, the Dutch Council for the Retail Sector (RND)¹¹² complained to the Dutch Minister for Foreign Trade about CCC/ICN's campaign against 'a Dutch denim wear producer'. The RND moreover asserted that CCC/ICN, being a campaigning organisation on the one hand, and an initiator of FWF on the other, acts as a 'norm setting, verifying and judging' body. The RND also expressed its discontent with the substantive subsidy which FWF received from the Dutch government, stating that 'apparently without this subsidy FWF does not seem to have a future'. Above all, the RND called upon the Dutch government and civil society organisa-

108 SAI and its SA8000 label was established in 1997, and revised in 2001; <www.sa-intl.org/index.cfm?fuseaction=Page.viewPage&pageId=473>. BSCI: the Brussels-based Foreign Trade Association held its first deliberations with the business society on creating a framework for addressing labour conditions, which led to the worldwide implementation of the BSCI in the spring of 2004. See: <www.bsci-eu.com/index.php?id=2011>. FWF (see box 3) was created in 1999 in the Netherlands. In 2001, FWF became operational and from 2003 onwards companies were recruited to subscribe to the FWF Code of Labour Practices; <www.fairwear.nl/index.php?p=25&s=32&t=2>. These sites were visited on 18 February 2009.

109 By 2009 FWF has members from Belgium, Denmark, Germany, the Netherlands, Sweden, Switzerland and the UK, but the majority of the members are Dutch. Although FWF's Board and Committee of Experts still consists of only Dutch stakeholders, FWF aims to set an international standard. <www.fairwear.nl/index.php?p=25&s=34&t=2>, visited on 18 February 2009.

110 CCC letter to HEMA of 16 April 2007; (in Dutch) <www.schonekieren.nl/hema/index.php?option=com_content&task=view&id=28&Itemid=38>, visited on 18 February 2009.

111 Letters of 27 April and 16 May 2007; (in Dutch) <www.schonekieren.nl/hema/index.php?option=com_content&task=view&id=28&Itemid=38#_ftn1>, visited on 18 February 2009.

112 See <www.raadnederlandsedetailhandel.nl>.

tions to 'focus on a constructive dialogue with the Dutch business society, on the basis of (policy) choices made by the business society'.¹¹³

While the investigation for this contribution was conducted, a consecutive development evolved in this 'clash of codes'. On 10 February 2009, CCC published a report blaming large European retailers for violating a whole series of fundamental labour rights.¹¹⁴ In the Netherlands, only a few days after its publication, the report led to questions by Members of Parliament to the Ministers of Foreign Affairs and for Foreign Trade, asking them to demonstrate that they fully integrate CSR in their Dutch business promotion policies.¹¹⁵

The CCC's report also points at alleged flaws by various CSR Implementation Systems, such as the Ethical Trading Initiative (ETI), the Global Social Compliance Program (GSCP), SA8000 and BSCI. Many of the retailers targeted in CCC's report, such as Aldi and Lidl, have indeed implemented one of these systems for securing fair labour conditions amongst their suppliers.¹¹⁶ CCC's Dutch website subsequently directs one to another report containing a comparison between several CSR Implementation Systems. This report argues that FWF offers the highest standards in implementing and verifying fair labour conditions, whereas other systems are all flawed in some way, especially BSCI.¹¹⁷

Concluding, the hidden conflict that the FFI/JKPL case study and the other campaigns reveal is the clash between competing CSR Implementation Systems.

10. Concluding remarks

This case study has focussed on the discord between a modern Indian textile company and its western customers, on the one hand, and two Dutch campaigning organisations liaising with Indian organisations, on the other. The dilemmas pre-

113 Letters by the *Raad Nederlandse Detailhandel* to the Cabinet and Parliament of 27 February 2008 and 7 April 2009. The last letter led to questions in the Parliament to the Minister for Development Co-operation, Mr Koenders. By 18 April 2009, these questions had not yet been answered. The letters and the MP questions are available (in Dutch) at <www.raadnederlandsedetailhandel.nl>, visited on 18 April 2009.

114 M. Hearson, Clean Clothes Campaign, *Cashing In – Giant retailers, purchasing practices, and working conditions in the garment industry*, 25 February 2009; available at <www.cleanclothes.org>, visited on 18 April 2009.

115 Questions by the MPs Voordewind, Ortega-Martijn and Gesthuizen, 18 February 2009, reference no. 2080913970; (in Dutch) <<http://static.ikregeer.nl/pdf/V080913970.pdf>>, visited on 26 February 2009.

116 Aldi and Lidl are members of BSCI.

117 K. Hudig, Clean Clothes Campaign, *Van papier naar praktijk – Controle van gedragscodes in de kleding- en sportgoederenindustrie* (From paper to practice – Monitoring compliance with codes of conduct in the textile and apparel industry), February 2007; (in Dutch) <www.schonekieren.nl/index.php?option=com_content&task=view&id=103&Itemid=0>, visited on 20 February 2009. In this report the following CSR Implementation Systems are compared: FWF, ETI, SAI, FLA, WRC and BSCI. It reads: 'The BSCI was initiated by employer organisations, and currently is a typical example how it should not be done ... Moreover, its standard is below any standard of the other initiatives. Officially the goal of the initiative is studying complaints of abuses in the supply chain. However, it often seems that they (the initiators) sought to develop a means to counter justified critics, without addressing the abuses;', p. 22.

sented were: 1) whether the filing of lawsuits against civil society organisations is an effective way of countering public campaigns and of avoiding reputation damage; 2) to which extent should civil society organisations investigate the truthfulness of allegations concerning labour rights abuses; 3) which role should local labour law play in pursuing a sustainable international supply chain; 4) whether engaging in a battle concerning CSR standards leads to better CSR practices; and 5) to which extent can or should a government require accountability on the part of civil society organisations. The author will briefly comment on each of these dilemmas:

- 1 The sequence of events in this case clearly demonstrates that the commencing of lawsuits to resolve a CSR dispute resulted in FFI/JKPL falling into a bottomless abyss. Its reputation had already been severely damaged. The fact that the employees were not unionised also raised questions. It has been argued that FFI/JKPL's attempt to litigate appeared to be a so-called 'Strategic Law Suit against Public Participation' (SLAPP) – corporate endeavours by economic interests to stifle dissent towards projects by using court procedures¹¹⁸ – but given the facts of the case this does not seem likely here. The court cases provided the campaigning organisations with new ammunition to gain the sympathy of many consumers, other civil society organisations and politicians. Moreover, it made both sides dig in their heels deeper and deeper. Dialogue became impossible. However, it was also quite understandable that FFI/JKPL wanted the Indian organisations to substantiate their accusations, as FFI/JKPL suspected the information to be false and only to have been circulated because of other motives (e.g. attracting new union members or suggested by competitors). Yet, it would have been better if FFI/JKPL would have started mediation behind closed doors to solve these issues rather than by litigation. Mediation tends to lead to a more cooperative attitude between the parties and often to a long-term solution.
- 2 Generally, studies show that civil society organisations are publicly perceived as more reliable than politicians and businesses. This perception is based upon the assumption that these organisations are often uniquely well placed to furnish vital grass-roots early warning facilities such as where particular governmental or business measures may inadvertently result in a disturbance or impact in some other unintended negative way to local communities. Nonetheless, 'facts' publicly presented should truly be *facts*. Allegations based on anonymous hearsay evidence do not suffice to build a media campaign thereon, nor can they constitute a basis for a constructive stakeholder dialogue. In the case at hand, it remained unclear whether the anonymous witness statements were truthful or imaginary. The Dutch and Indian organisations gave nebulous responses when requested to substantiate their accusations, they could not provide any specific instances, nor were any complaints filed with the local police. Concrete facts need be presented in order to develop a fruitful dialogue. Only then will a company's management board be able to address any misconduct on the factory floor. In this case study the strategy of CCC/ICN was ques-

118 A. Perry-Kessaris, *Global Business, Local Law – the Indian Legal System as a Communal Resource in Foreign Investment Relations*, Ashgate, India: Aldershot 2008, p. 67-68.

tionable: (new) facts presented by FFI/JKPL, the Indian Labour Inspection Department, and by the independent audit firm SGS and ASK, its NGO partner, were sidetracked as being 'unreliable'. When civil society organisations work on the basis of unfounded charges, they undermine their own reliability and thereby the position of NGOs in general. Even more so, if NGOs support the messages of other civil society organisations as happened in this case; i.e. many Dutch and other organisations (MVO Platform, Amnesty, FNV, etc.) publicly expressed their support for the CCC/ICN campaign, without having checked the research carried out by the Indian organisations. Just as it cannot be tolerated that a government or a company can exclaim statements unsupported by facts or scientific findings, each civil society organisation also has a responsibility in this regard ('practice what you preach'). Still, the CCC/ICN communications snowballed around the world. The campaign rather resembled a perfect marketing plan than a sincere effort to engage in a constructive stakeholder dialogue aimed at improving workers' conditions. Ultimately, the FFI/JKPL employees almost lost their jobs, while actually working in an SA8000 certified company! At the same time, many other textile workers in the Bangalore area work in far less favourable circumstances and probably would have appreciated more support from civil society organisations.

- 3 An understanding of local labour law systems is imperative for organisations fighting for better labour standards worldwide. The overview in Section 7 on the applicable legal and soft law standards exhibited a major cause of the misery in this case: the Indian Trade Unions Act and the related case law provide for a detailed system regarding trade union representation in collective bargaining. In this case, GATWU did not qualify as such. The accusation against FFI/JKPL that it did not respect employees' rights to collective bargaining was therefore not justified. Moreover, the Indian legal system offers ample opportunity to execute one's legal rights, if GATWU indeed should have been recognised by FFI/JKPL. In addition to the fact that India is a state in which the rule of law applies, it is also the largest democracy in the world. Any changes desired by civil society with respect to Indian labour laws could probably be more effectively addressed through political channels than by forcing one company to deviate from local labour law standards. It would be different, though, when examining a CSR case related to e.g. factories in a state governed by a dictatorial regime that does not allow for individual political rights, such as the freedom of expression or freedom of association. In that case, it will be difficult for civil society to change the political setting. Salaries and workplace conditions can certainly be improved through good CSR practices, but the establishment of unions will be difficult. Inventive solutions like establishing workers' committees can improve the situation.¹¹⁹ Furthermore, in failed states or weak governance zones, imposing CSR standards on local suppliers can indeed improve the local labour situation. It is recommendable to develop best practices – together with the local company and civil society,¹²⁰ or simply to avoid countries, such

119 Ma, reference 94, p. 11.

120 The Kimberley process has found its way in several failed states. See: <www.kimberleyprocess.com>.

as Burma, where companies and civil society are unable to make a difference through CSR given the political situation.

- 4 The harsh campaigns in the G-Star and Gildan cases have seemingly resulted in better CSR practices by the international textile suppliers and purchasers. In spite of this, it poses the question whether these results could not have been achieved in another way, for instance by engaging in a constructive stakeholder dialogue behind closed doors. No party would then have been pushed into digging in its heels, partly out of face-losing considerations. Moreover, the local employees would have been spared a great deal of misery, like losing their jobs because of cancelled orders. Hard-hitting campaigns specifically have a severe impact in the fashion industry, a sector that is vulnerable to varying designer trends and where brands can only survive with public support. Such campaigns are more suitable for targeting e.g. the oil industry, a sector with everlasting demand, fewer personnel, relatively easy money and large reserves of oil and assets. As a general observation it might be concluded that a public battle concerning CSR standards probably does not encourage companies' enthusiasm to improve their CSR behaviour. In the end, it is a company's management that determines its CSR strategy. Civil society may help companies to become acquainted with issues and solutions, but when it comes to opting for a specific CSR Implementation System, this really is a corporate decision. Campaigning organisations cannot claim a decisive vote therein. Their role as 'CSR aid' or a 'CSR watchdog' is essentially different from that of a company's management which has to balance 'planet people profit' concerns within a long-term perspective; and
- 5 CSR has been developed – and is still developing – based on three pillars: 1) companies try to take business decisions in consideration of social and environmental concerns, thereby also trying to promote compliance with CSR standards further on in the international supply chain; 2) civil society tries to alert companies concerning any negative impacts that their activities might have, and – where possible – to cooperate with them in developing 'best practices'; and 3) governments design legislation to support corporate accountability and the development of best practices. Governments support this development by e.g. introducing sustainability reporting regulations, building platforms to encourage multi-stakeholder dialogue, and subsidising civil society organisations. As this case study has demonstrated, maybe the time has come for governments to require civil society to practise what they preach: following socially responsible standards as set out in codes of conduct, creating transparency as to their activities, supporting their claims by factual or scientific evidence, and by being willing to be held accountable for their acts. It could be argued that when a local company becomes bankrupt due to severe campaigning, the multi-stakeholder dialogue and thus the civil society efforts to improve the local labour conditions have invariably failed. Who can be held responsible for that undesired result? Especially when governments subsidise civil society organisations, they have reasons to impose an 'NGO code of conduct' reflecting the issues raised in this case study, particularly the mindfulness of other (legal) traditions, factual substantiations of public communications, the transparency

of activities and financial expenditures, and the acceptance of responsibility for their deeds.

Yet a final important observation is that civil society can profit from mediation and complaint mechanisms which are built into various codes of conduct (e.g. the OECD Guidelines provide for mediation through NCPs), and CSR Implementation Systems (e.g. FLA, FWF, SA8000). Legal tools cannot always play an important role in a mediatory setting, as CSR tends to cross state boundaries (whereas law generally does not), and CSR often aims to follow standards which are higher than the applicable local legal standards. Therefore, it might help mediators to use non-legal standards to reach wise decisions. Internationally recognised CSR codes of conduct such as the Global Compact Principles or the OECD Guidelines, but also the widely-supported civil society document the Earth Charter may be of assistance. Additionally, searching for innovative solutions like establishing workers' committees as recently shown by SAI, or appointing an ombudsman – as in the conflict at hand – may have a positive effect on engaging in a constructive CSR stakeholder dialogue. Conflicts, like the one presented in this case study and in the other case studies recorded in Section 9, can be avoided when the parties involved have opted for a constructive dialogue first or, if necessary, mediation at an earlier stage.