



International  
Labour  
Organization

# ► Decent work in a globalized economy

## Lessons from public and private initiatives

Edited by Guillaume Delautre,  
Elizabeth Echeverría Manrique  
and Colin Fenwick





▶ **Decent work in  
a globalized economy**  
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## Introduction

Guillaume Delautre, Elizabeth Echeverría Manrique  
and Colin Fenwick

### ► The complexities of global labour governance

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Over the last thirty years globalization, technological change, and governments' policy choices have wrought massive structural changes in the world of work. These transformations pose unprecedented challenges for established institutions and modes of the governance of work, and have been accompanied by a growing complexity and “hybridization” of regulatory modes and mechanisms (Hendrickx et al, 2016). In this volume, “governance” is understood to comprehend all processes of governing: whether undertaken by governments, or by other actors (Bevir, 2012). This does not suggest that governments, or the State, are not important. On the contrary, the State remains the central actor in the governance of work. Only the State has the authority – and the responsibility – to promulgate and to enforce laws and regulations. At the same time, employers and workers are obliged to comply. In this sense, they contribute to and sustain governance in the world of work. It follows that governance is a central, but not a sole responsibility of governments (Mayer and Posthuma, 2012): *public governance* co-exists with *private governance* and *social governance*.

*Private governance* encompasses actions taken by companies in the realm of corporate social responsibility or private compliances initiatives, such as codes of conducts and social audits. *Social governance* comprises the actions of civil society groups, including trade unions, and sometimes in partnership with private enterprises. The complexity of labour governance flows from the proliferation of different types of regulation promoted by a multiplicity of actors: inter-governmental, national, public and private. It is also a consequence of the emergence of new mechanisms of enforcement, relying on both hard and soft law, alongside traditional international labour law.

The hybridization and proliferation of forms and mechanisms of governance is a consequence of the fragmentation of production across national boundaries. Most international organizations and a majority of researchers consider these phenomena under the rubric “global value chains” or “global production networks.” The International Labour Organisation (the ILO) however

generally favours the term “global supply chains” (GSCs).<sup>1</sup> Regardless of the terminology, we are referring to organizational models relying on two main characteristics: the cross-border organization of production, and its fragmentation between different interlinked economic entities. In their seminal article, Gereffi, Humphrey and Sturgeon (2005) showed how diverse are the organizational patterns across industries and goods. They helped to identify five ideal types of governance patterns (hierarchy, captive, relational, modular and market) that range from high to low levels of explicit coordination and power asymmetry between the firms within chains. Power relationships between purchasing and supplying firms are likely to vary substantially, depending on the type of products and other factors. According to Lakhani, Kuruvilla and Avgar (2013), some of the key elements of employment relations will differ according to these patterns of value chains.

As pointed out by the ILO (2016 and 2020), the emergence of global supply chains has provided new opportunities for many developing countries to participate in global trade. This has enabled them to diversify their economies, and to generate employment. At the same time, production for global supply chains has raised new concerns about working conditions, and the protection of workers’ rights. These challenges for decent work were often already there in many developing economies. But the expansion of supply chains across borders has in some cases perpetuated, and even exacerbated them.

## ► Beyond the criticisms of private governance

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The capacity and effectiveness of private governance to address decent work deficits in GSCs has been extensively explored by academics, and also debated at the ILO (ILO 2013 and 2016). Their effects, and the limits on their ability to lead to sustainable improvements in labour compliance are now well known (see chapter 6). There are several structural factors that limit their possible impact. First, private governance is not present in *every* supply chain: by definition it is present where a private actor elects to introduce or to participate in it. In practice, private governance is mostly present in the context of purchasers in developed economies sourcing from less developed economies. Secondly, private governance is limited in its application along supply chains: it is particularly weak at reaching to the lower tiers of supply chains, which is where the greatest and the most egregious non-compliance is usually found.

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1 In the following articles, the different denominations are used according to authors’ choice.

This is a function of the fact that where private governance operates, it is implemented through contracts between purchasing companies and direct or upper tier suppliers. And even then, it is not necessarily a standard practice.

Private governance has sometimes succeeded in addressing some of the most easily detectable violations of labour standards, including wages, working hours, and occupational safety and health. Private governance is also criticized for being selective in terms of the standards and rights that are enforced. Even when codes of conducts explicitly include such enabling rights as freedom of association and non-discrimination, social audits often are not equipped to detect violations in these domains. This partly reflects the difficulty of measuring and monitoring the implementation of these rights (Barrientos and Smith 2007, Anner 2012, Bartley and Egels Zanden 2015).

Another line of research has pointed to practical challenges that arise in the implementation of private governance. At the level of the purchasing firms, recent research highlights the lack of alignment between social responsibility and sourcing practices as a reason for their limited impact (Amengual and Distelhorst 2020). At the level of the supplying firm, several challenges can arise. One is that codes may not be consistent with national law, which is the primary form of governance that is relevant. Secondly, supplying firms may be subject to a multiplicity of codes (Marx and Wouters 2016). Thirdly, auditing processes are unregulated and can vary widely in consistency and quality (Short et al 2016 and 2020). Recently, the literature has moved to a perspective which acknowledges that the complexity and variety of business models may make it difficult to identify a clear link between companies' policies, and results in practice (Bromley and Powell 2012). Kuruvilla et al (chapter 6) show that field opacity is a key factor explaining this decoupling between firms' policies and their real impacts on working conditions in GSCs.

Recent research explores ways to improve labour governance, and to consider the roles and responsibilities of all relevant actors. Marx and Wouters (2016) examine the possibility of overcoming the limits of private governance by empowering local and global stakeholders. One way to do this may be to enable stakeholders to have access to complaint mechanisms, and for workers to have access to dispute settlement systems. Yet the effectiveness of these types of mechanisms will depend on the incentives for workers and local stakeholders to file a complaint. It will also be shaped by economic and political factors. These include the rule of law, the competitiveness and the tightness of local labour markets, and the nature and level of the sanctions attached to violations of labour rights. In addition, the likelihood of developing such a mechanism is likely to depend on external demand from customers, or on governments pushing for a more stringent and protective system.

In the same vein, various researchers have started to complement the largely vertical perspective of Global Value Chains studies with a horizontal

perspective that takes into account the socio-economic context in which buyers and suppliers operate. This approach seeks to better integrate into the discussion the perspective of local and national institutions, in addition to other resources and constraints to workers' mobilization. It also analyses their complex interactions with macro forces such as industry dynamics (Bair 2017, Stroehle 2017, Louche, Staelens and D'Haese, 2018, Bartley 2019). A key question in this literature is how to identify the possibilities of complementarities or synergies between different forms of governance that may lead to greater compliance, and to reinforcement of local labour institutions. Most recent quantitative research shows that strong public regulations and an empowered civil society are crucial for effective private compliance initiatives. This is particularly relevant in the case of "process standards" or enabling rights such as freedom of association and non-discrimination. As they are less tangible, it is more difficult to identify and redress violations (Stroehle 2017). Likewise, the mobilization of local unions has proved in certain cases to be a factor in limiting the decoupling between companies' commitments, and their concrete impacts on working conditions (Bartley and Egels-Zanden 2016).

Some of this research demonstrates the scope to address decent work deficits in GSCs through the fruitful interaction of the three forms of governance. But that scope is also shaped by global and local factors. A "quick fix" is not a possibility (Louche, Staelens and D'Haese 2018). In this respect, the joint ILO/IFC programme Better Work has been a very rich ground for research.<sup>2</sup> Better Work is one of the most highly developed forms of hybrid governance, featuring both public and private governance, and involving local, national and global stakeholders. Amengual and Chirot (2016), for example, examined the mobilization of local unions and the role of Better Work Indonesia as a bridge between the state and supplying factories. They showed how these were crucial in the interpretation of local rules, and the reinforcement of local institutions, especially in the case of minimum wage renegotiations.

## ► Developments in public governance

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Public governance has evolved beyond its traditional focus on enforceable rules directed to actors within national jurisdiction, with failure to comply subject to sanction. Increasingly States seek to shape business practices, in order to respond to decent work deficits in global supply chains. And increasingly they seek to have impact beyond their national territory, as they look to

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<sup>2</sup> See for example Amengual and Chirot (2016), Bair (2017), Anner (2017 and 2018), Dupper, Fenwick and Hardy (2016), Kolben (2015).

shape the outcomes of business conduct in sourcing countries. This evolution is noticeable in a series of measures taken mostly by governments in developed economies, although not exclusively. One example is the increasing inclusion of labour provisions in bilateral and regional trade agreements, and the growing number of agreements that refer to the promotion of corporate social responsibility and responsible business conduct in supply chains. Curtis and Echeverría (chapter 3) discuss the potential impacts of these mechanisms in a supply chain context. A different example is the use of public purchasing rules to promote improved labour practices in supply chains. The several examples that have arisen in the last few years mainly operate within the limits of domestic jurisdictions. Their effects remain relatively little known so far (Martin-Ortega and Methven O'Brien, 2019).

Another development is the adoption of legislative measures that require enterprises to publicly disclose information on specific aspects of business operations in their supply chains. The first of these laws, the California Transparency in Supply Chain Act, and the UK Modern Slavery Act relied primarily on the economic leverage of better informed consumers and investors to draw attention to labour rights, and particularly to slavery and forced labour. The very few empirical studies available on these laws highlight their helpfulness in raising awareness. But they also tend to show the rather symbolic nature of companies' disclosure responses (Marx and Wouters 2017, Koekkoek et al 2017, LeBaron and Rühmkorf 2017, Birkey et al 2018). Others point to a lack of clarity about what companies should report. This both complicates the task of assessing the effectiveness of specific corporate measures, leading to a focus on reporting requirements, rather than on improving labour standards (Phillips, LeBaron and Wallin, 2018).

A few governments have since moved forward to require enterprises to undertake human rights due diligence in their supply chains. In other countries, proposals for similar laws are at different stages of development (chapter 2). One of the most politically debated laws so far was the 2017 French Duty of Vigilance Law. It established an obligation for major companies to draw up a vigilance plan to prevent risks, among others, related to human rights and workers' rights in their own activities. It also applies to the activities of their subsidiaries, subcontractors and suppliers, both in France and abroad. The Law includes different judicial mechanisms to ensure the effective implementation of vigilance plans. These include company civil liability, and damages awards to any person with a legitimate interest in this regard (Brabant and Savourey 2017). Barraud de Lagerie et al (chapter 5) is one of the first studies to consider the concrete implementation of this law.

## ► The evolution of social governance

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There have also been new developments in social governance, including the emergence of mechanisms of cross-border social dialogue. These encompass a very large number of activities at the multilateral, bilateral, regional, sectorial, and enterprises levels (chapter 4). The actors promoting these types of mechanisms consider that consultation and negotiation among social partners can address some of the decent work deficits observed in global supply chains.<sup>3</sup> One of the most frequently analysed forms of cross-border social dialogue is international framework agreements (IFAs). IFAs are agreements signed by multinational companies and Global Union Federations (GUFs) that represent workers at the global level by sector. In some cases, they are signed with national or sectorial labour unions. IFAs aim to formalize the parties' relationship, with a view to solving problems and working in the interests of both parties through negotiation and agreed implementation mechanisms (Papadakis, 2008 and 2011).

Since the late 1980s, a number of (mostly European) multinational enterprises (MNEs) have entered into IFAs. These instruments increasingly address not only the MNE's internal employees, but also workers down the supply chain. For instance, they promote social monitoring of the supply chain (Hadwiger, 2015). Recent research highlights the heterogeneity of IFAs, showing the diversity in their negotiation, their intended purposes, and their implementation processes (Bourguignon and Mias, 2017). More research is needed to understand how these commitments are concretely implemented at a local level. There is a need to explore, for example, their articulation with local institutional frameworks, especially in countries where basic collective labour rights are not guaranteed. It does appear that IFAs are more effective where local stakeholders are able to play a role. But it is not clear how to measure their real impacts at the workplace. Bourguignon and Hennebert (chapter 11) also argue that the "effectiveness" of these agreements should be considered beyond strict compliance with labour standards and introduce a concept of procedural effectiveness.

Finally, cross-border social dialogue is not limited to the agreements signed by individual pioneer MNEs. In recent years, other examples have emerged at sectoral and country levels. One example is the maritime sector agreement by the International Maritime Employers' Council (IMEC) and the International Transport Workers' Federation (ITF). Another is the Accord on Fire and

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<sup>3</sup> For a discussion on the current developments of crossborder social dialogue and its perspective for the future, including IFAs and other forms, see chapter 4.

Building Safety signed in the aftermath of the Rana Plaza building collapse in 2013.<sup>4</sup> These innovative agreements are definitely encouraging. More research is however needed to assess the conditions for them to be successful in practice, and to know if they can serve as models for other discussions and engagements at sectorial level. Recent research on the Accord points out that the absence of complementarity between private and public governance undermines the effectiveness of private commitments and regulations (Bair et al 2020).

## ► The ILO and GSCs

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In a world of hybridized labour governance, it is natural to consider how the ILO has responded in this governance and regulatory space. ILO standards contribute to global labour governance by guiding member States in their own governance of work, including in the context of GSCs. As this volume is focused on transnational governance, in this section we look at how the ILO has responded. It must not be forgotten, however, that the International Labour Office (the Office) delivers a lot of technical assistance to promote decent work in GSCs. Since 2017 the Office's work is coordinated in a five-year programme of action, which grew out of a general discussion on decent work in GSCs at the 2016 International Labour Conference (ILC).<sup>5</sup> This is discussed below.

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4 The Accord Fire and Building Safety is the first binding agreement gathering more than two hundreds global brands and retailers, two union federations and eight Bangladeshi unions in order to work towards a safe and healthy garment and textile industry in Bangladesh.

5 The programme of action comprises five areas of work. First, *knowledge generation and dissemination*, intended to help constituents to shape policies for decent work. Secondly, *capacity-building* for governments to enforce compliance with national and international labour law; for enterprises, to help them create and maintain decent working conditions; and for both social partners to support social dialogue and effective industrial relations. Thirdly, supporting the tripartite constituents to engage in *effective advocacy* for decent work in GSCs at all levels, including through ratification of key ILO standards. Fourthly, *policy advice and technical assistance* to assist member States to develop and implement a targeted mix of policies for reducing decent work deficits at country level. Finally, deeper engagement with other international organisations and actors in global supply chains: *partnerships* to pursue greater *policy coherence*.

The overall goal of the programme of action is to assist member States to reduce the governance gaps and decent work deficits in global supply chains, thereby strengthening the role of supply chains as engines of inclusive and sustainable growth (ILO 2016c). The programme is primarily a reflection of the Office's normal work, but with a supply chain angle. A significant part of the work is technical cooperation activities. A particularly prominent example of the Office's work to promote decent work in GSCs is the Better Work programme. Rossi (chapter 8) provides a concise overview of the programme's work, its own governance model, and its contribution to improved governance both nationally and transnationally.

The ILO has considered the role of the organization and its standards in the context of GSCs and new forms of governance at several meetings and discussions over the last ten years. These discussions have posed significant challenges for the ILO and its tripartite constituents, who have not yet agreed on a way forward. The constituents did reach extensive conclusions at the 2016 ILC. They did agree in 2017 to revise the Tripartite declaration of principles concerning multinational enterprises and social policy (MNE Declaration). The revised instrument includes elements that outline the different roles that different actors have in achieving the aim of the MNE Declaration, in keeping with the United Nations Guiding Principles on Business and Human Rights.<sup>6</sup> To date, however, there is no consensus on the question of whether there should be a new international labour standard in this sphere.

The constituents touched on the growth of private governance in their general discussion on labour administration and labour inspection at the International Labour Conference (ILC) in 2011 (ILO, 2011). The ILC resolution noted the growth of auditing and social monitoring, and concluded that some of these initiatives could undermine public labour inspection. They recommended that the ILO Governing Body consider convening a tripartite meeting of experts to examine “private compliance initiatives, self-regulation and potential public-private partnerships.” (ILO 2011a, para 16).

The Rana Plaza collapse in 2013 sparked renewed calls for global action to assure decent work in GSCs (ILO 2016, p 1). At the next session of the ILO Governing Body, it decided to convene a meeting on private compliance initiatives in December that year (ILO 2013b). It also decided there should be a general discussion on decent work in global supply chains at the 2016 ILC (ILO 2013a). The constituents reached no conclusions at the meeting on private compliance initiatives. They did consider the interaction of private and public governance, and a number of participants at the meeting noted that ILO involvement may be able to help private compliance initiatives to be more fair and sustainable. (ILO 2013c, Appendix). In the absence of conclusions, any decision about how the ILO and the Office should proceed has to be made by the Governing Body. This is also a tripartite and political organ. A lack of conclusions makes it more challenging for the Governing Body itself to reach consensus, and to guide the Office in its subsequent work.

By contrast, the constituents did reach conclusions during the general discussion at the 2016 ILC (ILO 2016c). Those conclusions note that GSCs have made important contributions to economic growth and development, and have had a positive impact on job creation. They recall that failures at all levels of GSCs have contributed to decent work deficits. The conclusions note that some

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<sup>6</sup> The MNE Declaration can be found here: [https://www.ilo.org/empent/Publications/WCMS\\_094386/lang--en/index.htm](https://www.ilo.org/empent/Publications/WCMS_094386/lang--en/index.htm)



governments may have limited capacity and resources to effectively monitor and enforce compliance with regulations. They further noted that the expansion of global supply chains across borders has exacerbated governance gaps (ILO 2016c). The conclusions acknowledge that many stakeholders are taking action to ensure that decent work in global supply chains goes hand in hand with economic development. The conclusions also identify roles for governments, business and the social partners in addressing persistent decent work deficits and governance gaps that must be addressed (ILO 2016c). They also led to the elaboration of the Office's programme of action on decent work in GSCs.<sup>7</sup>

The constituents concluded that the ILO "is best placed to lead global action for decent work in global supply chains" (ILO 2016c, para 14). But they were not able to agree that a new standard was the way that the ILO should play this role. The constituents addressed this issue in the final paragraph of the conclusions:

There is concern that current ILO standards may not be fit for purpose to achieve decent work in global supply chains. Therefore, the ILO should review this issue and convene, as soon as appropriate, by decision of the Governing Body, a technical tripartite meeting or a meeting of experts to:

- (a) Assess the failures which lead to decent work deficits in global supply chains.
- (b) Identify the salient challenges of governance to achieving decent work in global supply chains.
- (c) Consider what guidance, programmes, measures, initiatives or standards are needed to promote decent work and/or facilitate reducing decent work deficits in global supply chains. (ILO 2016c, para 25).

Read together with the rest of the conclusions this final paragraph illustrates the difficulty the constituents had in reaching consensus. The conclusions elsewhere acknowledge that there are decent work deficits in GSCs; that the expansion of GSCs across national boundaries has exacerbated weak national governance; and that a range of actors can and should contribute to effective governance in GSCs. It is not immediately obvious why the constituents then agreed there was also a need for a further assessment of the decent work deficits, and the salient challenges of governance, in GSCs. A way to reconcile this is to consider the significance of the opening words of paragraph 25: that there is concern that ILO standards may not be fit for purpose to achieve decent work in GSCs. It is however instructive that "standards" are only one of five types of action mentioned in sub-paragraph (c) as possible ways to address the issues.

Following the 2016 ILC, the Governing Body decided that the Office should convene three further expert or technical meetings as part of its programme

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<sup>7</sup> Above, n 5.

of action on GSCs. There was a meeting of experts on promoting decent work and protecting fundamental principles and rights at work in export processing zones in November 2017 (ILO 2017). A meeting of experts on cross-border social dialogue took place in February 2019 (ILO 2019). The ILO constituents touched briefly on the issue of decent work in GSCs in their conclusions following the 2017 ILC recurrent discussion on fundamental principles and rights at work (ILO 2017a), and the 2018 ILC recurrent discussion on social dialogue (ILO 2018). At its centenary conference the ILC adopted the ILO Centenary Declaration for the Future of Work. It calls on the ILO to direct efforts to ensure that “diverse forms of work arrangements, production and business models, *including in domestic and global supply chains*, leverage opportunities for social and economic progress, provide for decent work and are conducive to full, productive and freely chosen employment” (emphasis added) (ILO 2019a).

The third meeting following the 2016 ILC discussion was a technical meeting on achieving decent work in global supply chains, in February 2020 (ILO 2020).<sup>8</sup> The discussion was framed by paragraph 25 of the 2016 Conclusions. So the meeting was asked to address – if not fully to answer – the question whether ILO standards are fit for purpose to achieve decent work in global supply chains. The constituents at the technical meeting did not reach any conclusions. It therefore falls to the ILO Governing Body to consider that fact, and to determine what future action, if any, the Office and the ILO should take. Normally that discussion would have taken place in late 2020, but due to the COVID-19 pandemic, the issue was deferred to the March 2021 Governing Body session.

In the absence of conclusions, and without a Governing Body decision, it is too early to say what the ILO may do in respect of ILO standards and GSCs. Other international organisations (the OECD and the UN in particular) continue to move ahead with their own programmes of activities (OHCHR 2014 and OECD Responsible Business Conduct 2011). For its part, the UN has begun a process to discuss adopting a legally binding instrument on transnational corporations and other business enterprises with respect to human rights (OHCHR 2019). The UN also continues to promote, and to support the implementation of the UN Guiding Principles on Business and Human Rights (OHCHR 2011). Following the technical meeting, the international trade union movement published a report on how States could adopt binding legislation to require corporations to implement human rights due diligence in their supply chains (ITUC 2020). As noted above and elsewhere in this volume, some States are continuing to consider and adopt human rights due diligence legislation, although not using a uniform approach.

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<sup>8</sup> A meeting of experts and a technical meeting are both tripartite. The difference is that an unlimited number of governments may participate in a technical meeting, while at an experts meeting each group is equally represented.

## ► Overview of the chapters in this volume

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### 1) Transnational labour governance in Global Supply Chains: Asking Questions and Seeking Answers on Accountability

*(Ingrid Landau, Monash University and Tess Hardy, Melbourne Law School)*

Landau and Hardy address the challenges for accountability in a transnational environment. Following Scott (2000) and Mashaw (2006), they frame their analysis around five questions: i) who is liable or accountable to whom?; ii) for what are they liable to be called to account?; iii) what mechanisms or processes assure accountability?; iv) by what standards should the putatively accountable behaviour be judged?; and v) what are the potential effects of finding that these standards have been breached? Understanding accountability in transnational labour governance is complicated because *accountability* itself can be either a *normative* concept, or a description of a *social mechanism*. In addition, there is wide range of actors involved in accountability systems. By problematizing the concept of accountability, Landau and Hardy shed light on the challenges that arise in categorizing and in assessing what happens in practice.

### 2) Mapping human rights due diligence legislation and evaluating their contribution in upholding labour standards in global supply chains

*(Claire Bright, Universidade Nova de Lisboa)*

This chapter maps national laws and legislative proposals that incentivize or require business enterprises to undertake human rights due diligence. Bright identifies two broad approaches: the *reporting* model, typified by the UK Modern Slavery Act, and the *mandatory human rights due diligence* model, illustrated by the French Duty of Vigilance Law. She also sees the two combined in some current legislative proposals. Bright considers the key elements of legislative approaches: i) companies covered; ii) human and labour rights covered; iii) duties prescribed; iv) business activities covered; and v) enforcement mechanisms. Drawing on the few studies available, she also examines the effectiveness of existing laws, understood as a combination of whether companies comply with their obligations, and whether the provisions achieve their stated aims. Bright highlights that most laws are limited to larger companies, but argues that if appropriately adapted, legislation can and should also apply also to small and medium enterprises

### **3) Trade arrangements and labour standards in a supply chain world: current issues and future considerations** (*Karen Curtis and Elizabeth Echeverría Manrique, ILO*)

There is no global consensus on linking labour standards and market access. World Trade Organization agreements do not refer to labour standards, other than prisoners' labour. Curtis and Echeverría explore how and why countries fill this gap by linking these issues in bilateral and regional trade agreements. They argue that by including labour provisions in trade agreements, countries are responding to the uneven distribution of the benefits of globalization, and concerns about labour issues in GSCs. The authors survey the normative state of the art, and explore the limited available evidence on the limits to using labour provisions in trade agreements to address decent work deficits in supply chains. This includes the absence of direct commitments for enterprises. They conclude with options to better link international trade rules with labour standards in a supply chain world, and for the possible role of the ILO in this regard.

### **4) A short history and future prospects of cross-border social dialogue and global industrial relations agreements** (*Konstantinos Papadakis, ILO*)

This chapter examines some key aspects of the phenomenon of cross-border social dialogue (CBSD), and of their outcomes – generically defined here as “global industrial relations agreements” (GIRAs). After defining key concepts, the author surveys the multilateral and intergovernmental processes, and the private governance initiatives that shape CBSD. He identifies four main “triggers” of CBSD: i) the “shadow of regulation”; ii) “protest and mobilization” campaigns by global unions, and public discontent following major disasters; iii) a shared interest (also called by the author a “federating theme”); and iv) the industrial relations “culture” of the concerned company, or of the country where it operates. The chapter concludes by discussing four developments that are likely to influence the future evolution of CBSD: i) the strengthening of the ILO’s mandate as facilitator of CBSD; ii) the emergence of binding national and international “due diligence” regulation; iii) continuing efforts to establish legally binding frameworks for GIRAs; and iv) the disruptive force of the COVID-19 pandemic.

**5) Implementing the French Duty of Vigilance Law: When enterprises drew up their first plans** (*Pauline Barraud de Lagerie, Arnaud Mias, Elise Penalva-Icher, Université Paris Dauphine, and Elodie Bethoux, Ecole Normale Supérieure Paris-Saclay*)

The French Duty of Vigilance Law is the first to require companies to establish a vigilance plan to identify and prevent violations. Plans must cover their own activities, and those of subcontractors and suppliers with whom they maintain a commercial relationship. As the law provides for civil remedies, it is the first to move from a *soft* to a *hard* law approach. Barraud de Lagerie et al draw on the findings of a survey of a dozen companies, and an analysis of vigilance plans published in 2018 and 2019 to explore how companies internalise and operationalise their obligations. The authors show that the law leaves companies significant room to interpret the scope of their obligations. Hence, companies tend to define risk management around their existing actions – rather than in terms of human rights outcomes – and the risk mapping they undertake varies widely. There is also only limited consultation with key stakeholders, including unions, in elaborating the plans. The authors illustrate how *compliance professionals* shape vigilance plans to match companies’ economic or business interests, and how this drives implementation of the law in practice.

**6) Private Regulation of Labour Standards in GSCs: Current status and future directions** (*Sarosh Kuruvilla, Ning Li and J. Lowell Jackson, Cornell University*)

This chapter draws on institutional theory to develop an explanation for why the whole organizational field of private regulation has led to little improvement in labour standards over the last 25 years. Kuruvilla et al seeks to move beyond the assumption of a symbolic adoption of compliance policies by lead companies, seeking instead to understand the persistence of decoupling between practices and outcomes. Following institutional theorists, they argue that this decoupling is more likely to be prevalent in opaque institutional fields, noting that key drivers of opacity include behavioural invisibility, practice multiplicity and causal complexity. The chapter concludes by considering avenues to improve private regulation so it may have greater impact on working conditions in GSCs. At the same time, the authors advocate for better enforcement of labour regulation, and stronger transnational union activity.

**7) The social responsibility of multinational enterprises vis-à-vis the State: The case of the automotive and television industries in Mexico**  
*(Graciela Bensusán, Universidad Autónoma Metropolitana and Jorge Carillo, El Colegio de la Frontera Norte)*

Bensusán and Carillo examine the effectiveness of private and public regulation in promoting and protecting the labour rights of workers in MNEs in Mexico's TV manufacturing and automotive industries. In the authors' view, Mexico's labour law is protective of workers' rights – far more so, for example, than that of its trade partner, the United States of America. In addition, MNEs have implemented forms of private governance including codes of conduct. Despite this combination of regulatory regimes, there has been continued downward pressure on working conditions in the two sectors. The authors argue that companies pursued private governance more to improve their image than to fulfil the commitments they made. The fact that freedom of association and the right to bargain collectively are rarely respected in the national labour relations system also limited their impact. The authors conclude by considering the scope to improve the implementation of collective rights. These include the recent labour law and Constitutional reforms adopted in the framework of the renegotiation of the North American Free Trade Agreement (now the USMCA), and the Transpacific Partnership Agreement.

**8) Better Work: lessons learned and the way forward for decent work in the global garment industry** *(Arianna Rossi, ILO)*

Rossi draws on key findings from the empirical literature on Better Work to highlight the program's contribution to improved labour conditions *and* business performance in production for GSCs. She illustrates how Better Work is structured to address the shortcomings of private compliance and multi-stakeholder initiatives, including lack of sustainability, exclusion of government, and a limited role for industrial relations. Better Work engages with actors including global brands, retailers, national governments, and employer's and worker's organisations. Better Work also has dialogue at its core: at the factory, industry and national level. At the factory level, bipartite dialogue leads to better working conditions, *and* to better business performance. Better Work has had impact beyond the factories and the garment sector in which it works, up to the national level. Better Work's experience contributed to labour law reforms on trade union rights in Viet Nam, and to improvements in the labour inspection system in Indonesia. Rossi reflects on how the program and its benefits could be scaled up in ways that would overcome key limitations, including its exclusive coverage of the apparel supply chain, focus on the formal sector, and lack of financial sustainability. Against this backdrop and

the current COVID-19 crisis, Rossi reflects on how the Better Work governance model could be leveraged to foster sustainable change.

**9) Access to Justice after Rana Plaza: A preliminary assessment of grievance procedures and the legal system in the apparel global supply chain** (*Youbin Kang, University of Wisconsin*)

The Rana Plaza disaster tragically exemplified the obstacles to access to labour justice for garment workers in Bangladesh. In this chapter, Kang explores whether the subsequent legal and institutional reforms led to a transformation in access to justice for workers. The reforms included strengthening the judicial system; increasing the participation and responsibility of transnational corporations; and raising the legal consciousness of workers and legal professionals. Kang draws on an analysis of internal documents from legal service providers; information obtained during interviews with key interlocutors; and a longitudinal dataset of grievances filed by garment workers with a non-governmental organization (NGO) that provides legal aid. The author shows that transnational pressure worked alongside extrajudicial initiatives to broaden the reach of labour rights in Bangladesh. She also illustrates that legal consciousness is critical for understanding how to translate international labour standards into local labour rights.

**10) Labour governance initiatives in the Costa Rica-EU pineapple supply chain and their impact on social dialogue** (*Deborah Martens and Annelien Gansemans, Ghent University*)

This chapter focuses on working conditions and the implementation of labour rights in all tiers of the supply chain for Costa Rican pineapples. Martens and Gansemans examine the impact of several governance initiatives to improve labour conditions, including in the context of the EU-Central American Association Agreement. They use an impact assessment framework that includes trade union participation; empowerment; and observable change in working conditions and improved social dialogue. The authors illustrate how different initiatives may have differentiated impacts. There may be greater improvement in social dialogue where an initiative works in combination with other forces. The chances are greater where an international actor is involved, and there is a strong institutional context, with formal rules at the company level, so that unions may form, and gain recognition as genuine social partners. The chapter also shows how political will and government resources are critical for overcoming the obstacles to achieving sustainable impact.

### 11) Building transnational social dialogue: A process-based analysis of the effectiveness of international framework agreements

*(Rémi Bourguignon, Université Paris-Est Créteil, and Marc-Antonin Hennebert, HEC Montréal)*

This chapter considers the effectiveness of International Framework Agreements (IFAs). Bourguignon and Hennebert construct an analytical framework that takes account of the heterogeneity of IFAs, and their relative incompleteness: IFAs mainly relate to general objectives and principles. They also consider the changes that IFAs bring about in social relations between management and trade unions. The authors explore case studies of IFAs involving Carrefour, Danone and Orange, and identify different ways to improve IFAs and their development. They see scope in how IFAs define the objectives of cross-border social dialogue; the structuring of the bodies and monitoring tools that IFAs create; and the involvement of local actors in their implementation. Finally, the authors mobilize the concept of *capability* to decipher the power relationships that shape the evolution of IFAs. In particular, they highlight the ability of union networks (under the aegis of Global Union Federations) to link the different levels inside global companies. For a manager, this is often where the real value-added of an IFA can be found. In particular, it can compensate for the lack of control of the central management over local managers in the company's subsidiaries.

## ► The Covid-19 crisis: a major disruption to the governance of labour in GSCs?

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As we finalize this introductory chapter (December 2020), the Covid-19 pandemic continues to provoke a global economic and health crisis. The number of deaths continues to rise sharply in certain regions of the world. The economic consequences will likely play out over many years. As the pandemic has spread quickly along travel and transport routes, the crisis it has provoked starkly highlights the economic and social risks of an increasingly interconnected global economy (ILO 2020b). Governments were forced to put in place lockdown measures that severely adversely affected workers and firms. The resulting collapse in consumer demand led to a massive slump in global exports. There was massive disruptions in GSCs, especially in highly labour-intensive sectors such as garments. Trade in garments virtually collapsed in the first half of 2020: some Asian garment-producing countries saw their exports to major buying countries plummet by as much as 70 per cent. At the same time, they faced massive reduction in their imported inputs



(ILO 2020c). The adverse effects have been particularly significant in developing economies. To provide just one example, there is a risk that the level of disruption would be sufficient to eliminate 20 years' worth of progress to alleviate poverty in Bangladesh (Paton 2020).

In this context, the further evolution of production through GSCs, and of the variety of forms of governance mechanisms that have evolved to date, is highly unpredictable. Many experts anticipate substantial changes in the organization of production networks as major firms will be likely to reassess the risks related to their supply chain and their reliance on just-in-time production. To avoid future supply disruption, it is possible that many firms will be forced to diversify their sources of inputs, and also to increase the regionalization of their production (Shih 2020, Vicard and Gaulier 2020, Javorcik 2020). Furthermore, despite a strong secular trend toward automation, technological bottlenecks and cost advantage trade-offs should not be overlooked when considering the deployment of automation technologies in some GSCs (Kucera and Barcia de Mattos 2020). Automation and technological development are not the only trends that will shape the contours of production through GSCs in the future. In parallel, governments are increasingly aware of the risks of some industries being overly exposed to the risks of sourcing through GSCs. Essential medical supplies, for example, may come to be seen as critical for national security. This and other factors may lead to reshoring of production in some cases.

It seems reasonable to assume that developing countries where GSCs represent a significant proportion of formal employment, or is a key element of a development strategy, will be eager for production to return to pre-pandemic levels and patterns if possible. But it is not clear what effect the urgency may have on their approach to governance of supply chains, whether by the ILO or otherwise.

It seems possible that many MNEs will feel, and also exert pressure to keep costs low. Some may see a decline in their relative economic power within GSCs toward producers – although if this happens it will not necessarily translate to an improvement in working conditions. Whether and how this affects their willingness to continue to participate in private and social governance in GSCs is difficult to predict. Enterprises' shift to emergency mode following the outbreak of the crisis “might have shifted priorities away from social and environmental considerations.” (Trautrim et al. 2020). In some cases, this may be a corollary of a focus on business survival. On the other hand, reputation-conscious firms are likely to be aware that “some supply chains have become less transparent” as purchasing companies find it difficult to ensure control over their suppliers in a period of travel restrictions and social distancing (Trautrim et al 2020). This may create further challenges to the effectiveness of private governance in practice. Although it may in turn depend on the region of production, especially the extent of limitations on travel, and requirements for social distancing.

States in the developed world seem likely to be supportive of the business interests of multinationals headquartered in their jurisdictions – even those states that have adopted human rights due diligence legislation. Moreover, these States are likely to be enthusiastic to reap the benefit of renewed consumer confidence and spending as a potential kick-start to stalled economic growth. This may suggest an easing of the momentum toward the adoption of laws requiring firms to implement human rights due diligence. Yet efforts in this realm have continued during the pandemic. The European Commission recently proposed, in its work plan for 2021, the adoption of legislation requiring mandatory sustainable due diligence for companies. According to the EU Commissioner for justice, the proposal will be modelled on the French ‘duty of vigilance’ law.<sup>9</sup> The European Green Deal may also be a sign of the course of the debate.

The road to decent work in the globalized economy will depend on the willingness of governments and other key private actors to favour global cooperative solutions in order to avoid more social damage (chapter 4). Global cooperation will certainly be needed for any response within the multilateral system. But it is not possible to know whether that cooperation will be forthcoming, or if it is, what might be its outcome. Achieving global agreement on a multilateral response was challenging before the pandemic, and may be more so now. There was already a lack of consensus about the legitimacy and relevance of the various multilateral institutions to which the world might now look to lead efforts to address the challenges posed by the pandemic in relation to supply chains (on the WTO see chapter 3).

As against that, the ILO Centenary Declaration for the Future of Work, adopted by the ILC at its 108th Session in 2019 is a recent example of multilateral (and tripartite) consensus on necessary responses to the profound transformations of the world of work. It may then offer some guidance on the role of multilateralism, the ILO, and responses to the COVID-19 pandemic. The Declaration recalls that the ILO, grounded in its constitutional mandate, must direct its efforts towards engagement and cooperation within the multilateral system with a view to strengthening policy coherence, in line with the recognition that:

- ▶ decent work is key to sustainable development, addressing income inequality and ending poverty, paying special attention to areas affected by conflict, disaster and other humanitarian emergencies; and
- ▶ in conditions of globalization, the failure of any country to adopt humane conditions of labour is more than ever an obstacle to progress in all other countries (Part II, A (xvii)).<sup>10</sup>

<sup>9</sup> Euractiv.com, New human rights laws in 2021, promises EU justice chief, April 30th 2020.

<sup>10</sup> [https://www.ilo.org/wcmsp5/groups/public/@ed\\_norm/@relconf/documents/meetingdocument/wcms\\_711674.pdf](https://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_711674.pdf).

The challenges to global cooperation within the multilateral system make it all the more noteworthy that social partners have mobilized at the international level in a number of industries. A prominent example is the garment industry, where the International Organisation of Employers (IOE), the International Trade Union Confederation (ITUC) and IndustriALL Global Union jointly called for measures to support manufacturers and to protect workers' income, health and employment (COVID-19: Action in the Global Garment Industry). While much will no doubt depend on the speed with which a reliable vaccine can be developed and widely distributed, so too will much depend on the willingness of all actors to seek and to find solutions to the challenges of transnational labour governance through social dialogue.

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# Part I

The evolving  
institutional and  
legal framework

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# 1 Transnational Labour Governance in Global Supply Chains: Asking Questions and Seeking Answers on Accountability

Ingrid Landau and Tess Hardy

## ► Introduction

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Today, a panoply of public, private and hybrid actors and institutions engage at multiple levels in sustained and focused attempts to improve working conditions in global supply chains (GSCs). These actors exercise a range of regulatory functions, from the setting of rules to implementation, monitoring and the imposition of sanctions or other forms of enforcement. We have seen the development of a significant body of scholarship tracing the emergence of transnational labour governance as a polycentric regime and mapping its complex architecture (e.g. Hendrickx et al. 2016; Hassel 2008). There is also a rich interdisciplinary literature assessing the effectiveness of various regulatory initiatives (e.g. Fransen 2012; Locke 2013) and considering how actors, institutions and arrangements interact and what the effects of these interactions are (e.g. Meidinger 2008; Fransen, and Burgoon 2017; Bartley 2018).

The “language of accountability” (Koenig-Archibugi 2010, 1142) has featured prominently in transnational labour governance. For decades now, activists have called on brands and lead firms in the developed world to take more responsibility for working conditions in their supply chains. Private regulatory initiatives are implicitly premised on transparency and market and reputational mechanisms that ostensibly enable consumers, investors and civil society actors to hold companies to account for their labour practices. Yet, there continues to be much debate and uncertainty in international and national fora about the meaning and mechanisms of accountability in global governance (cf. Macdonald and Macdonald 2006; Macdonald 2014). In this chapter, we seek to explore the way in which conceptions of “accountability”

in transnational labour governance have shifted during the recent past. As part of this analysis, we consider how accountability has been constructed and contested across different initiatives and through distinct conceptual frameworks (Black 2008). In undertaking this analysis, we apply a set of critical questions, namely: Who is accountable to whom? For what should they be held accountable for? Through what mechanisms or processes is accountability to be assured? By what standards is the putatively accountable behaviour to be judged? What are the potential effects of finding that these standards have been breached? (Scott 2000; Mashaw 2006, 118). Adopting an explicit focus on the way in which accountability has been applied – both normatively and in practice – reveals new insights into the pluralistic and complex relationships between regulators, intermediaries, targets and beneficiaries.

The chapter is divided into four parts. Following this Introduction, Part 2 discusses what is meant by the term “accountability”, and it identifies some of the challenges that the concept presents in the transnational context. In doing so, it draws on interdisciplinary scholarship, including research in the fields of international relations and regulatory governance. Part 3 explores why accountability matters in transnational labour governance. In Part 4, we seek to trace how understandings of accountability in transnational labour governance have evolved over recent decades. We first look at the way in which accountability was initially conceived via international governance organizations before considering the embryonic emergence, and subsequent explosion, of private regulation in the form of voluntary codes and multi-stakeholder initiatives. In the latter sections of this part, we consider two critical developments on the accountability front: the increasing focus on fixing legal liability in GSCs; and the increasing influence of regulatory intermediaries. It could be argued that both legal sanctioning and independent monitoring are embedded features of many recent regulatory initiatives. However, in our view, their respective and growing importance merits greater attention from an accountability perspective. In Part 5, we summarize some of our key findings before identifying some outstanding issues that merit further reflection and future research in order to advance more durable, effective and accountable forms of transnational labour governance within GSCs (Diller 2020).

Before proceeding, it is important to clarify key terms and mark out the intention and scope of this chapter. First, we draw on Bartley’s definition of *public regulation* to refer to regulatory activities implicitly associated with activities of the state and *private regulation* to refer to “a structure of oversight in which non-state actors – whether for-profit companies, non-profit organizations, or a mix of the two – adopt and to some degree enforce rules for other organizations, such as their suppliers or clients” (Bartley 2018, 7). Second, our focus is squarely on GSCs; we do not consider, in any detail, accountability or governance of supply chains operating solely in the national or sub-national

sphere. At the same time, we recognize that international standards operate in, and are subject to, domestic rules and institutions and intergovernmental arrangements, which creates “a type of (imperfect and incomplete) multi-layered global governance.” (Trebilcock 2018, 57; Zumbansen 2011). In literature concerned with transnational labour governance, a distinction is often drawn between “hard” and “soft” law and between “substitutive” and “complementary” governance regimes (Locke, Rissing, and Pal 2013). One feature of a pluralistic analysis – which is at the core of this chapter – is a rejection of many of these binary classifications (Black 2001; Karassin and Perez 2018; Van der Heijden and Zandvliet 2014). Instead, we conceive transnational labour governance as consisting of a set of complex interplays that may “co-evolve, hybridize, compete, and reshape organizational behaviour” (Schneiberg and Bartley 2008, 51–52; Eberlein et al. 2014). While this broad definition is designed to capture the full range of regulatory interactions, this chapter does not purport to comprehensively survey the field or cover every possible initiative. Rather, we draw out salient examples to illustrate the diverse ways in which accountability has been defined, documented and determined in the context of transnational labour governance.

## ► 1. Defining and understanding accountability in transnational governance

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The term accountability is used in many ways. It has been described as “one of those golden concepts that no one can be against”, but also as “elusive,” “evocative” and “contested” (Bovens 2010, 448). It also suffers from being a term that has become “a conceptual umbrella” for other distinct concepts, such as legitimacy, transparency, equity, democracy, efficiency, responsiveness, responsibility and integrity (Mulgan 2000). Nonetheless, it is commonly acknowledged that the concept retains a core meaning, whether it is being applied at the domestic or transnational level (Koenig-Archibugi 2010; Goodhart 2011; Scholte 2011; Macdonald 2014). Simply put, accountability can be understood as a moral or institutional relationship between different actors, in which one actor (or group of actors) (sometimes referred to as “power wielders”) has an obligation to explain and to justify its conduct, and another actor (sometimes referred to as “accountability holders”) has the power or authority to pose questions, pass judgement and impose consequences (Bovens 2007, 450; Black 2008; Macdonald 2014). Accountability mechanisms are ostensibly designed

for the protection and advancement of the interests of “beneficiaries”, a group which is often left undefined and may be contested. This simple and broad definition belies its complexity – particularly when one attempts to identify who is being held accountable, for what purpose and on whose behalf.

As we will discuss in greater detail, key categories and terms are fluid and do not neatly map onto the messy and complex relationships that arise in practice. This is partly because accountability relationships are not linear or binary and do not flow in one direction from a single accountability holder to a single power wielder (Black 2008, 150). For example, when considering how accountability is conceived in GSCs, are the relevant power wielders the direct employers, major suppliers, certified members, lead firms or all of these? To what extent are some of these actors simultaneously playing a role as accountability holders? Lead firms often have a dual identity in this respect: on the one hand, lead firms are quintessential power wielders in that they clearly owe an obligation to explain and justify their conduct in respect of the GSC; on the other hand, lead firms have the power and authority to pose questions and pass judgement on suppliers and manufacturers further down the chain (and, in this context, are more properly classified as accountability holders). Trying to identify exactly who is benefiting from the various accountability activities in transnational labour governance is not straightforward. In market-based forms of accountability, are the relevant beneficiaries in GSCs the workers producing the goods, the consumers purchasing those goods or the investors of the lead firms? In our view, teasing out the constitutive elements of key accountability concepts is not just a matter of semantics but may lead to a distinct normative and practical assessment of the relevant accountability regime. Many of the conceptual distinctions and tensions which are touched upon in this section underpin our later analysis of how accountability understandings and activities have evolved in the context of GSCs.

Accountability can be conceptualized as a *normative concept* and a *social mechanism* (Bovens 2010). The term can be used as a normative standard against which to evaluate actors’ behaviour. “Being accountable” is seen as a desirable quality, a virtue. Accountability in this broader sense is instrumental to maintaining legitimacy to actors and organizations, in that it can help legitimize or de-legitimize the exercise of public power (Bovens 2010, 954–955). However, it is also a highly contested concept, as there is rarely any general consensus as to what constitutes the substantive standards for accountable behaviour (Bovens 2010, 949).

Accountability as a social mechanism is a narrower and more descriptive conceptualization. The focus in this second use of accountability is on the institutional arrangements or mechanisms through which one actor is held accountable to other actors (Curtin and Senden 2011, 166). For Buchanan and Keohane (2006, 426), there are three basic components to the concept

of accountability (when conceptualized as a social mechanism). The first element are *standards* which “those who are held accountable [i.e. power wielders] are expected to meet.” The second component is *information* – which is required to be made available to accountability holders “who can then apply the standards in question to the performance of those who are held to account”. The third accountability component relates to “the ability of these accountability holders to impose *sanctions* – to attach costs to the failure to meet the standards”.

When conceived of as a social mechanism, accountability serves a number of specific functions. Accountability processes may serve as “platforms” for victims to voice their grievances and for perpetrators to account for their conduct (Braithwaite 2008, 35). Accountability also serves an important democratic function: as a form of institutional countervailing power that mitigate the risks of powerful actors (governments, international bureaucracies, companies, non-governmental organizations) abusing their power (Grant and Keohane 2005). Finally, accountability may serve as a tool for inducing reflection and learning. Here, it operates as a way of improving the effectiveness of policymaking and implementation, because it can enable external feedback as to shortcomings of policies and implementation processes and encourage processes of institutional learning by accountability holders. Where such information is made public, these processes of accountability can also “teach others in similar positions what is expected of them, what works and what does not” (Bovens 2010, 956).<sup>1</sup>

Transnational governance gives rise to a number of important challenges when it comes to accountability mechanisms (Curtin and Senden 2011; Scott 2011; Black 2008; Bäckstrand, Zelli, and Scleifer 2018). First, the transnational realm lacks the conventional state-based mechanisms of accountability found in liberal democratic systems. Moreover, it is widely accepted that such structures cannot simply be replicated at the transnational level (Grant and Keohane 2005, 29; cf. Bartley 2018). Second is the presence of a significant “accountability gap”: put simply, the growth in influence of global governance processes has not been accompanied by a corresponding development of formal accountability mechanisms that directly link public and private actors to those they affect (Scholte 2011, 25; Curtin and Senden 2011, 172). A third challenge relates to the absence of a single authority or decision-maker. At the transnational level, authority and governance functions are dispersed, fragmented and shared among multiple, often non-state, actors. It can be difficult to determine the mandates of these various actors, or to establish on whose behalf they purport to act and to whom accountability should be

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<sup>1</sup> It is recognized that certain preconditions need to be met in order for accountability to produce institutional reflection and learning. See Bovens 2010, 956.

owed (Black 2008, 142). Finally, there is the problem of “many hands” (Bovens 2007; Black 2008). Governance roles and responsibilities (standard-setting, monitoring, enforcement, etc.) are often dispersed among different actors, rendering it challenging to determine who should be held accountable to whom and for what (e.g. for adverse impacts in supply chains) (Bäckstrand, Zelli, and Schleifer 2018, 341; Black 2008, 143; Macdonald and Macdonald 2006, 98). There are also challenges relating to *how* actors are to be held accountable. It is often the case that a number of different strategies are being used simultaneously or sequentially. This can lead to regulatory complexity, contestation and confusion (Black 2008, 140).

Two further distinctions between accountability at the domestic and transnational contexts are useful for the following discussion. The first concerns accountability mechanisms: that is, the *means* through which accountability is institutionalized. Similar types of accountable mechanisms operate at both levels. These include, for example, electoral, legal, market-based, civil society-based and administrative accountability. However, different types predominate at the different levels (Macdonald 2014, 430; Koenig-Archibugi 2010, 1144). For example, electoral and legal forms of accountability are more commonly found at the domestic level, whereas market-based forms of accountability (e.g. to investors or consumers) are particularly prominent at the transnational level (Macdonald 2014, 430–431). However, in recent developments in the transnational labour context, it is arguable that we are seeing a convergence of legal forms of accountability with market-based forms.

The second distinction concerns the role of intermediaries in accountability mechanisms. At the domestic level, accountability holders (those to whom an obligation is owed) generally play a significant role in sanctioning power wielders (those who are being held accountable), and this role is necessary for the sanctioning of the power wielder to be effective (Rubenstein 2007, 616). For example, workers who have had their legal rights violated may file a complaint against their employer with the relevant state agency. This type of accountability is referred to as “beneficiary accountability” or direct accountability.<sup>2</sup>

At the transnational level, direct accountability is less feasible due to a number of factors. These include significant power differentials between decision-makers and those who are affected by their decisions, social and physical distances between relevant actors and the absence of formal institutions mediating relations between these actors. As a consequence, transnational accountability mechanisms are far more likely to involve third parties who act as “proxies” for accountability holders (Koenig-Archibugi and Macdonald 2013; Rubenstein 2007). In these types of accountability arrangements,

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<sup>2</sup> Other terms commonly used to describe this direct form of accountability include “direct” or “standard” accountability.



intermediaries can perform roles including endorsing standards, receiving information about compliance and sanctioning power wielders, nominally “on behalf” of the accountability holders (Macdonald 2014, 431; Koenig-Archibugi and Macdonald 2013, 500). This indirect form of accountability is referred to as “proxy accountability”.<sup>3</sup> An important feature of accountability by proxy is that accountability-holders cannot sanction the proxy; that is, proxies are not “links in chains of accountability” (Koenig-Archibugi 2010, 1145). Examples include cases in which a lead firm may sanction one of its suppliers for non-compliance with the lead firm’s code of conduct “on behalf of” workers engaged by that supplier; or an investor may sanction a lead firm for failing to address poor working conditions in its supply chain. As Koenig-Archibugi points out, while the distinction between these two forms of accountability is important, it can be hard to apply in practice because of the difficulty of establishing whether an actor is genuinely acting on behalf of another less powerful actor, or whether it is simply promoting its own interests and values. (2010, 1145). As discussed in Section 4.5 below, it is often unclear as to whether auditing firms are acting on behalf of the lead firms who have engaged them, the workers on whom they are ostensibly checking, consumers or investors who rely on their audit reports, or whether they are ultimately acting in a way that promotes and protects their own commercial interests.

Before moving on, it is useful to briefly consider the relationship between *accountability* and *transparency* in transnational governance. While transparency is distinct from accountability, it is intimately related. If we consider accountability as including the three basic elements identified above (standards, information and sanctions), then transparency – making information available to accountability holders who can then determine whether the actor held to account is meeting the standards in question – is essential to any form of accountability. Given the general absence of conventional forms of political accountability from transnational governance, transparency is often identified as an important means by which to foster greater accountability (e.g. Hale 2008) or even (along with participation) as an institutional proxy for accountability in transnational governance (Meidinger 2006). Transparency may lead to soft forms of accountability through what Fung, Graham, and Weil (2007) describe as a “transparency action cycle” that can trigger constructive behavioral change. Salient information disclosed by a power wielder may be used by other actors (e.g. consumers, investors and NGOs) to hold that actor accountable by way of market pressures (e.g. changing consumption or investment behaviour or “naming and shaming”) (Fung, Graham, and Weil 2007; Hale 2008; Hess 2019). However, that transparency is insufficient on its own to secure accountability. The value of transparency is contingent upon

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<sup>3</sup> Other terms commonly used to describe this form of intermediated accountability include “indirect” and “surrogate” accountability.

factors such as the quality of information disclosed, the actors(s) to whom it is disclosed, the existence of standards against which to judge the information disclosed and the question of how effectively this information can be used by other actors to initiate sanctions (Grant and Keohane 2005, 39–40; Schleifer, Florini, and Auld 2019, 491; Van Zyl 2014; Buchanan and Keohane 2006, 427). We will discuss these considerations further in relation to specific forms of governance below.

## ► 2. Why does accountability matter in transnational labour governance?

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First and foremost, we suggest that accountability matters (and should be the subject of increased attention) in transnational labour governance, because it is the political contestation over basic terms of accountability (e.g. who should be accountable, to whom and for what) that has driven many of the developments in the field. In the transnational context, traditional jurisdictional boundaries are often displaced, mandates are generally uncertain and hierarchical notions of accountability are not easily accommodated. It is exceedingly difficult to identify the relevant principal and agent, which makes it even more challenging to ascertain who has the right and the power to call actors to account when issues arise and dispute settlement procedures are invoked (Black 2008, 143). If we take the garment industry as an example, many private forms of governance in the industry have been driven by the contention that brands and lead firms in the Global North exercise extensive – albeit often indirect – power over workers in the Global South. On this basis, it is argued, workers within these production structures should be able to hold these power-wielding actors to account for the impacts of their decisions (Milanovic 2016). Contests in transnational labour governance more broadly – across multiple sectors – continue to be characterized by disagreements and associated uncertainty regarding the content and scope of what companies can properly be held responsible and accountable for.

Accountability also matters in transnational labour governance, because it is a key legitimizing (or de-legitimizing) mechanism for specific governance actors and initiatives (Macdonald 2014; Bovens 2010; Black 2008). As Koenig-Archibugi (2010, 1146) explains, “[a]ccountability is demanded, supplied and studied mainly because of the expectation that it will contribute to establishing, maintaining or enhancing legitimacy” of a specific actor, initiative or institution. Whether an actor is seen as legitimate (i.e. seen as having the right to govern) – both by those who have delegated it with power and those

who are affected by it – depends in whole or in part on whether or not the actor is seen as having appropriate accountability relationships with others (Koenig-Archibugi 2010, 1146; Black 2008). A perceived lack of accountability may also de-legitimize certain actors, at least among certain communities. An example of such dynamics is found in criticism of the United Nations (UN) Global Compact on the basis that it lacks sufficient accountability mechanisms and so permits corporations to claim social responsibility without having to meaningfully change their operations (Voegtlin and Pless 2014).

From a regulatory perspective, legitimacy at the transnational level is important for enabling non-state actors to promote behavioural change. In the absence of a state infrastructure capable of compelling compliance, transnational regulators (whether public, private or other) cannot directly derive authority and power from the law. Regulatory targets are often under no obligation to take any notice of the overtures or efforts of non-state actors in the transnational sphere. Instead, transnational regulators need to actively construct and maintain legitimacy in order to secure motivational responses from those whose behaviour they seek to influence (Black 2008 138–139; Alhambra, Ter Haar, and Kun 2020). Legitimacy is particularly important for non-state based governance systems that are often in competition with each other (Fransen 2012), and whose ultimate success may depend on moving beyond “static systems in which firms and social actors constantly evaluate and reevaluate whether to withdraw support based on short-term cost-benefit calculations” to becoming “deeply engrained as legitimate authorities” (Bernstein and Cashore 2007).

### ► 3. How have understandings of accountability evolved in transnational labour governance?

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In this section, we draw on the concepts identified above to explore how understandings of accountability have evolved in transnational labour governance. Over the last several decades, we have seen a broadening of transnational labour governance from state-centred regulation focusing on individual employers to private and hybrid forms of governance focusing on brand and lead firms and on multiple actors in a production chain. We suggest that this process has challenged conventional understandings of accountability and led to new and reconfigured systems of accountability. While this process has generally entailed a convergence of standards (O’Rourke 2003, 7), it has

simultaneously involved a broadening of the actors in such accountability systems, from national governments and inter-governmental organizations (IGOs) to enterprises, non-governmental organizations (NGOs), consumers, investors, etc. We have also seen a shift in the relative importance of different accountability mechanisms: from an emphasis on soft legal mechanisms to a reliance largely on market forms. More recently, we have been witnessing not only a greater array of actors being enrolled to enhance accountability in GSCs, but also a turn towards mechanisms which seek to institutionalize worker voice, and a much greater focus on imposing sanctions against those who stray from their stated commitments.

### 3.1 Governmental accountability

Until the 1970s, much of the attention of scholarship on international labour governance focused on the role of nation-states – which were perceived as the dominant source of regulatory power (Trebilcock 2018). Emphasis was placed, albeit often implicitly, on accountability of nation-states for international commitments voluntarily assumed by way of the ratification of International Labour Organization (ILO) and UN human rights conventions.

The mid-1970s saw the emergence of the first international soft law instruments directed at multinational enterprises: the *Guidelines for Multinational Enterprises* by the Organisation for Economic Co-operation and Development (OECD) (1976) and the ILO's *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (MNE Declaration)* (1977). In their initial form, neither of these instruments included any means through which to directly hold multinational enterprises (MNEs) accountable for non-compliance.<sup>4</sup> Rather, companies were simply encouraged to regulate their own conduct in line with national and/or international standards where effective governmental regulation was not present. During this early period, we suggest we can discern an overriding focus on the *setting of standards* (by way of international instruments) on the assumption that this would inevitably lead to compliance via the legal apparatus of each Member State. International soft law standards, such as the OECD Guidelines, also played a useful function in providing benchmarks of responsible conduct that could be used by civil society within and across countries to demand greater corporate

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<sup>4</sup> Both these instruments have been subject to significant revisions since their inception. The OECD Guidelines' "Implementation Mechanism", under which interested parties can bring complaints to National Contact Points (NCPs) concerning multinational non-compliance with the Guidelines, was introduced in 1984. However, it was not until 2000 that detailed Procedural Guidance on the role and functions of NCPs gave them a stronger role to deal with all matters relating to the Guidelines, including resolving issues related to the non-observance of the Guidelines by companies (OECD 2016, 11).

accountability (Keck and Sikkink 1998). Other core elements of an accountability system – such as information disclosure and sanctions – were less present in this early period. Accountability mechanisms also appeared rather rudimentary – confined to soft law, relying on “naming and shaming” and other self-regulatory mechanisms to encourage compliance.

Before moving on from this brief discussion of early approaches to accountability in transnational labour governance, two further points are worth noting. First, in recent decades, we have seen a broadening of attention paid to the ILO’s accountability relationships: that is, the question to whom the organization should be accountable. With its tripartite governance structures, the organization has generally been regarded as being accountable to a broader range of stakeholders than most IGOs. However, with the decline of trade unionism and the growing awareness of the significance of the informal economy, questions have been raised over the extent to which the organization should be accountable to broader affected groups, such as NGOs that represent workers in the informal economy (Cooney 1999; Standing 2008). The representativeness of employer groups has also been questioned, given the large numbers of companies not affiliated with their national employer groups, including multinational enterprises. (Rodgers et al. 2009, 17). Secondly, from the late 1990s onwards, we have also seen a growing interest in, and critique of, accountability structures within other intergovernmental organizations – such as international financial institutions (e.g. Woods 2001) and the OECD (e.g. Murray 2001; Ougaard 2011) – that bear upon the regulation of multinational enterprises and labour standards. Here, there are issues relating to the relevant standards or benchmarks that are being used to assess compliance commitment and questions to whom these organizations should be accountable. In other words, is the relevant regulatory beneficiary in these arrangements an NGO, a trade union, workers within the GSC, consumers in developed economies or broader communities affected by the decisions of the IGOs.

### 3.2 Initial steps to address “accountability gaps” through codes of conduct

The anti-sweatshop movement in the early 1990s heralded a significant broadening of understanding of accountability in transnational labour governance. Following the shift of production of goods such as garments, footwear and toys from North America and Europe to developing countries, activists and the media began exposing poor working conditions in supplier factories and demanding that brands and lead firms accept some responsibility for workers in their supply chains, despite the absence of direct ownership or direct legal responsibilities. This focus on multinational enterprises represented a shift

from seeing regulation of labour standards in global supply chains exclusively as the responsibility of governments, and to a growing recognition and desire for companies to be held directly accountable for their adverse social impacts.

Acceptance by brands and retailers of some degree of responsibility for working conditions was initially institutionalized by way of unilateral and voluntarily-assumed corporate codes of conduct. In response to ongoing demands by labour activists to ensure meaningful implementation of commitments, these codes were gradually accompanied by systemized efforts to monitor and secure compliance (Bartley 2018, 19). Brands and retailers adopted codes of conduct that set standards concerning issues such as working conditions, wages, working hours, and health and safety to which their suppliers were required to sign up. Monitoring of supplier compliance with these codes was undertaken by the lead firms' own employees (internal monitoring) or by third parties (external monitoring).<sup>5</sup> Supply chain governance by way of codes of conduct, however, failed to meet demands for retailers and brands to be accountable for working conditions in their production processes. Activists and scholars continued to reveal instances of poor and repressive working conditions and to demand that firms improved both code standards (initial codes were often narrow in scope and selective in the labour standards they chose to promote) and monitoring and enforcement mechanisms (e.g. O'Rourke 2003; Blackett 2001; Esbenshade 2004). The perceived limitations of these audits are explored in more detail in Section 4.5 below.

The 1990s also saw an emerging focus on transparency as an important prerequisite to accountability in transnational labour governance. NGOs began to challenge lead firms and retailers in the garment industry to disclose detailed information about the factories in their supply chains, such as their names, locations and working conditions (see e.g. Esbenshade 2001). These demands were made on the basis that such information would facilitate the monitoring of those factories by labour and human rights actors and enable them to obtain information that could then be used to place further pressure on the lead firms to improve their labour practices. This focus on transparency continues to the present day.<sup>6</sup>

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5 In this chapter, we adopt O'Rourke's terminology to distinguish between different forms of monitoring, with a third term – "verification" – referring to independent evaluations, i.e. not paid for by those being monitored. (O'Rourke 2003, 6).

6 In 2016, for example, nine labour and human rights organizations formed a coalition to demand that apparel companies agree to implement a simple Transparency Pledge, which constituted a minimum standard for supply chain disclosure (Human Rights Watch, 2017).

### 3.3 Strengthening accountability through MSIs?

Sustained concerns around both the content and accountability mechanisms associated with corporate codes of conduct led subsequently to the emergence of multi-stakeholder initiatives (MSIs). MSIs that focused on labour governance in transnational supply chains first emerged in the United States garment industry in the 1990s before rapidly spread to other industries (Bartley 2018). These arrangements are similar in that they all bring together a multiplicity of stakeholders to work together to achieve objectives collectively. However, they differ significantly with respect to their structure, membership, governance, transparency, monitoring and reporting procedures (Bartley 2003; Fransen 2011).

Most scholarship on MSIs that deal in whole or in part with labour standards has focused on the emergence and design of various initiatives, and on their potential and limitations in terms of driving improvements in working conditions. However, we can discern at least three distinct ways in which accountability concerns have featured. The first concerns the efficacy of MSIs as mechanisms through which to hold companies accountable for their social impacts. The second concerns to whom MSIs themselves are accountable and through what mechanisms. The third concerns the extent to which MSIs facilitate or impede the development of local accountability structures. We discuss each of these briefly below.

Regarding the governance of labour conditions in supply chains, MSIs continue to diverge significantly with respect to implementation and enforcement procedures, and the extent to which external review of company performance by external stakeholders is facilitated (Fransen and Burgoon 2012). Some MSIs focus on dialogue between stakeholders (e.g. the Ethical Trading Initiative or the UN Global Compact) and so operate more as learning platforms than accountability mechanisms. Some – such as the Fair Labor Association (FLA) or FairWear Foundation – involve monitoring and enforcement procedures. Others issue certifications or labels to those organizations that comply with the MSIs' standards (e.g. Fair Trade, Social Accountability International) (Fransen 2012). For those MSIs that purport to set standards and adopt some kind of system for monitoring and verification important questions concern the issue of how compliance is verified. As noted above, internal monitoring (self-monitoring) by participant firms has long been regarded as constituting weak accountability, as firms have possibilities to cheat and report falsely on compliance, while compliance cannot be verified (Marx 2008; O'Rourke 2006). External monitoring, involving the engagement of external third-party auditors, has also come under sustained criticism by activists and scholars for being flawed and lacking transparency and accountability (O'Rourke 2003, 11–12; Esbenshade 2006). Monitoring by independent third parties, such as

civil society or governmental organizations, is widely regarded in the literature as being capable of promoting more compliance than the other forms of monitoring (Marx and Wouters 2016; Marx 2008; O'Rourke 2006; Mena and Palazzo 2012, 543). We will discuss monitoring in Section 4.5 below.

With respect to sanctions, MSIs generally rely on peer pressure and the threat of exclusion from the MSI to address persistent non-compliance, and/or on market mechanisms to reward strong performers and sanction laggards. As Estlund (2012, 238) observes, relying on voluntary participation, many MSIs continue to suffer from an “accountability dilemma”, which constrains efforts to enforce commitments against participating companies. Efforts by the MSIs or other stakeholders to ratchet up the strength and efficacy of these arrangements are in constant tension with the need to gain and retain corporate membership. This tension is exacerbated by often intense competition between MSIs (Fransen 2012).

Over time, many MSIs have developed multiple mechanisms through which members are held to account for non-compliance with agreed standards. The FLA today, for example, has four “layers of accountability” (Van Heerden 2016, 132–133). Companies joining the FLA commit to implementing the Obligations of Companies set out in the FLA Charter over the course of an “implementation period” (normally one to two years). First, compliance within participants’ supply chains is assessed on an ongoing basis through independent monitoring organized by FLA staff. Second, company monitoring and assessment result – and third-party complaints – are published on the FLA website. A third level of accountability is exercised by the tripartite FLA Board of Directors, a governing body that receives reports on monitoring activities and third-party complaints and decides whether to accredit companies. A final level of accountability is to be found in the FLA third party complaint mechanism and the Special Review clause in the FLA Charter. The former allows any third party to lodge a complaint if it believes that an FLA-affiliated company does not adhere to its code of obligations. The latter enables the FLA board to place a company on 90-day notice of expulsion if it fails to remedy violations identified in monitoring or third-party complaint reports.

As this FLA example demonstrates, MSIs may complement proxy accountability with beneficiary accountability by way of worker complaint or dispute settlement procedures. It is argued that, where well-designed, these mechanisms may engage workers and other stakeholders in monitoring at the workplace level and enable workers to hold a supplier or lead firm accountable when a standard has been breached (Marx and Wouters 2016, 446–447; Barenberg 2008). However, many arrangements lack such procedures, and, among those that do, there is significant diversity in terms of design, eligibility and conditions for the lodgement of a complaint. There is also little empirical



evidence to suggest these mechanisms operate as effective accountability mechanisms (Marx and Wouters 2016).

A second and related but distinct set of accountability concerns with MSIs relate to who the decision-makers in collaborative governance arrangements are and to whom they should be accountable. As Black (2008, 143) observes, it is often “... not clear on whose behalf they purport to act and to whom accountability should be owed”. As noted above, many MSIs rely primarily on proxy accountability arrangements, whereby NGOs, consumers and others seek to hold MSI decision-makers accountable on behalf of the initiative’s putative beneficiaries (workers and their families) (Koenig-Archibugi and Macdonald 2013, 499–501). In this context, important questions arise concerning the extent and nature of stakeholder representation within MSI governance structures, the degree to which MSI procedures and decision-making are made transparent, and the capacity of stakeholders to effectively sanction poor performance. In an effort to enhance their legitimacy in the eyes of consumers and civil society stakeholders, many MSIs have gradually improved levels of transparency and external participation (Curtin and Senden 2011, 178; Meidinger 2006, 81; O’Rourke 2006, 908). However, while both are generally considered to be essential elements of accountability (as they facilitate the evaluation of the MSI’s performance by stakeholders), scholars have cautioned against an uncritical embrace of such claims by MSIs. Such claims often fail to recognize that the effects of transparency and participation are mediated by other features of decision-making processes (Auld and Gulbrandsen 2010, 101) and may indeed serve to limit accountability where used to provide “cover” to firms and/or to the MSI itself (Meidinger 2006, 82).

Based on an analysis of accountability relationships in three labour governance MSIs (Rugmark, Fair Trade, FLA), Koenig-Archibugi and Macdonald (2013) argue that accountability structures matter, because different combinations of proxy versus beneficiary accountability influence the choice of policy instruments used by MSIs. The authors draw a basic distinction between two types of policy instruments. Regulative instruments are directed at restricting the range of possible courses of action available to those being regulated. They include, for example, the formulation of rules that prescribe or proscribe certain courses of action, as well as monitoring compliance with those rules, certification of compliance, adjudication of disputes and application of sanctions for non-compliance. Allocative instruments are directed at expanding the range of possible courses of action by providing resources. They include, for example, credit, insurance, professional and technical training, and health care. While emphasizing that the mix of policy instruments used by an MSI is determined by “a complex configuration of conditions”, the authors suggest that an over-reliance on proxy accountability arrangements (particularly where consumers act as the primary proxy accountability holders) may lead

MSIs decision-makers to adopt regulative policy interventions, even though this approach deviates significantly from those preferred by the workers and their families.

The final way notions of accountability have featured (albeit implicitly) concerns the extent to which such arrangements facilitate or impede the development of local accountability structures. Labour activists and scholars have consistently expressed concern over the extent to which MSIs that rely on proxy accountability arrangements may operate to exclude workers from emerging accountability relationships and to detract from efforts to empower workers (e.g. Esbenschade 2001; O'Rourke 2006; Estlund 2012). In this context, MSIs that directly involve workers in monitoring and enforcement – such as the Workers' Rights Consortium (WRC) – may be regarded by some as more legitimate, as they have stronger accountability relationships between power wielders and workers as beneficiaries. Unlike many other MSIs, the WRC does not certify company compliance with a code of conduct or conduct systematic monitoring. Rather, its approach is based on inspection of factories from which the WRC has received worker complaints; proactive inspections in countries considered high risk; and information disclosure requirements. This approach, along with a focus on educating workers and assisting organizing efforts, has led some scholars to see the WRC as constituting a model of accountability that is more effective and responsive to workers (e.g. Barenberg 2008). Recent years have also seen growing scholarly interest in understanding the implications of various MSI configurations for local public labour law enforcement structures and institutions. A good example of this is found in the Bangladesh Accord on Fire and Building Safety. While the Accord is widely viewed as a significant advance in transnational labour governance (see further below), concerns have been voiced over the extent to which it has become a parallel private safety inspectorate, and has, in effect, established an accountability regime that bypasses, and fails to contribute to the improvement of, local labour law enforcement (Bartley 2018, 274–276). This tends to buttress existing concerns about the potentially substitutive capacity of transnational labour governance mechanisms: an issue which is critical but beyond the scope of this chapter (but see, Locke, Rissing, and Pal 2013).

### 3.4 Towards legal accountability

Ongoing frustrations with the limited nature of improvements to working conditions in global supply chains delivered by voluntary initiatives has long fueled interest by activists and scholars in strengthening national and international legal accountability mechanisms. Below, we briefly discuss three broad avenues that have featured in scholarship concerning legal accountability for working conditions in their transnational supply chains: (i) direct

liability by way of national tort, contract and consumer protection laws; (ii) mandatory disclosure and due diligence laws; and (iii) enforceable brand agreements, established by way of contract.

Since at least the 1990s, labour and human rights advocates and scholars have explored the extent to which extant laws within various jurisdictions may be used to establish the liability of multinational enterprises for labour rights violations in foreign subsidiaries or suppliers. Tort law has proven a subject of particular focus, however private action in contracts and the use of unfair competition and consumer protection laws to hold corporations accountable for their corporate social responsibility (CSR) reporting has also enjoyed attention. With respect to all these legal avenues, it is widely acknowledged that claimants face significant legal and practical obstacles to establishing lead firm liability for labour rights violations (whether by way of tort or contract), or for establishing liability of firms for misleading statements made to consumers (Brudney 2012; Estlund 2012, 255; Doorey 2018; Spitzer 2019; Cabrelli 2019). Over the years, the limitations of existing legal doctrines have inspired scholars to propose adaptations to existing approaches and/or to explore “new pathways to enforcement” (e.g. Brudney 2012; Cabrelli 2019). These have included, for example, the recognition of a common law duty of care to exercise human rights due diligence (Cassel 2016) or the establishment of a transnational labour inspectorate (Alhambra, Ter Haar, and Kun 2020).

A second and more recent set of legal accountability mechanisms involves national and international “due diligence” laws. These laws have emerged in the wake of the adoption by the UN Human Rights Council in 2011 of the UN’s *Guiding Principles on Business and Human Rights* (2011) and draw upon its concept of corporate “human rights due diligence”. We are now seeing the legalization of human rights due diligence in a number of national jurisdictions, and it is widely anticipated that this trend will continue. Legal due diligence initiatives can be grouped into two broad categories. The first category of laws – which we refer to as “mandatory disclosure laws” – are found in the Anglo-Saxon liberal economies and require companies to disclose certain information regarding specific human rights risks (e.g. modern slavery) in their operations and supply chains. Examples include s54 of the United Kingdom’s *Modern Slavery Act 2015*; California’s *Transparency in Supply Chains Act*; and Australia’s *Modern Slavery Act 2018*. This approach is also found in the *EU Directive 2014/95 on Disclosure of Non-Financial Information*. The second category of laws – which we refer to as “mandatory due diligence laws” – are found in Europe. These initiatives are broader in their scope (that is, with respect to the rights covered) and recognize the potential for civil liability in case of a company’s failure to act with due diligence. To date, only the French *Devoir de Vigilance* law embodies this approach, although

campaigns for similar mandatory due diligence laws are underway in a number of European jurisdictions.

Mandatory disclosure laws such as found in the UK and Australia do not secure corporate accountability for egregious working conditions within their domestic or transnational supply chains. They are predicated on the assumption that transparency will arm consumers, investors, activists and others with information that will enable them to demand better corporate performance by rewarding leaders and sanctioning laggards. Theoretical and empirical critiques of these laws suggest that this approach has significant limitations as a means of securing greater corporate accountability (e.g. Sarfaty 2015; Wen 2016; Landau and Marshall 2019). There is also a significant body of theoretical and empirical scholarship in regulatory governance to suggest that, to be effective, such disclosure-based laws need to be designed adequately and complemented by other regulatory measures (e.g. Weil et al. 2006). Scholars have also raised concerns over the potential for such transparency-based measures to militate *against* efforts to secure greater corporate accountability through bolstering corporate actors' arguments that any additional forms of regulation are unnecessary (LeBaron and Rühmkorf 2019).

The French *Devoir de Vigilance* law is widely regarded by civil society as constituting a more promising legal avenue for securing corporate accountability, including for labour rights violations (e.g. Cossart, Chaplier, and Beau de Loménie 2017). This law is described in detail in Chapter 5, and we make only a few observations on this law here, through an accountability lens. First, the law is narrowly confined in terms of the types of corporate actors on which it imposes accountability. Second, the law operates primarily (but not exclusively) as a mechanism through which a broad range of stakeholders may hold companies to account for the *process* of publishing a vigilance plan and for the effective implementation of this plan. Important questions remain concerning the adequacy of the standards against which actors will be held accountable. Analysis of vigilance plans published in the first year of the law's operation suggest that many companies are producing plans devoid of sufficient detail to be meaningful (ActionAid et al. 2019). The French High Court's decision to the effect that the interpretation of the law falls under the jurisdiction of the commercial courts suggests that a minimalist interpretation of the law may be forthcoming. Furthermore, while the *Devoir de Vigilance* law confirms the ability of victims to sue for damages in negligence, it does not address any of the conventional obstacles to establishing liability in tort (e.g. establishing breach, damages and causation). Overall, we suggest that the extent to which this novel law will significantly reconfigure accountability relationships remains unclear.

The third and final type of legal accountability mechanism we discuss briefly here is the "enforceable brand agreement" or "legally binding buyer

responsibility agreement.” (Anner, Bair, and Blasi 2013). The Accord on Fire and Building Safety in Bangladesh (the subject of Chapter 9) is the best example of this “new form of corporate accountability” at the transnational level, although similar models are found domestically (Anner, Bair, and Blasi 2013). Unlike many other MSIs, the Accord contains a binding arbitration clause that effectively renders the agreement enforceable. This arbitration clause has not been fully tested, as the two arbitrations that took place under the Accord in 2016–2018 (consolidated in a single proceeding) were settled before the issuance of an arbitral award on the merits. Nonetheless, inspired and informed by the Accord experience, we are now seeing labour rights organizations advocating for the wider use of such model arbitration clauses in enforceable brand agreements (Clean Clothes Campaign et al. 2020). This model clause is promoted to advance “a streamlined arbitration system that moves quickly, avoids excessive litigiousness, promotes more transparency, does not impose burdensome costs on parties and their representatives, and provides final and binding enforcement while ensuring impartiality and due process guarantees for all parties to the agreement (Clean Clothes Campaign et al. 2020, 10). We can anticipate these types of contractual approaches to constitute an important focus of experimentation and scholarship in transnational labour governance going forward.

### 3.5 The rise of intermediary accountability

Since the move towards private supply chain governance in the late 1990s and early 2000s, the system of transnational labour governance has become more highly intermediated. Mounting concerns about rule avoidance by private firms, the ensuing reputational risks and the need for investor reassurance have promoted market-based regulatory models which are heavily reliant on monitoring and certification by intermediaries such as auditors and credit agencies (Marx and Wouters 2017). The emphasis on ethical audit regimes as a way of measuring, tracking and enforcing standards in GSCs has been further reinforced by the advance of due diligence under the auspices of modern slavery and transparency legislation (LeBaron, Lister and Dauvergne 2017; Fransen and LeBaron 2019).

In the context of transnational governance, the term “intermediary” refers to any state or non-state actor that operates as a “go-between” concerning the regulator and the target (Abbott, Levi-Faur and Snidal 2017, 18; Levi-Faur 2011). Intermediaries may include: private sector actors (such as certification companies), auditors, advisors, management consultants, accounting firms, law firms and credit ratings agencies; they may also comprise civil society groups, such as NGOs, unions or worker groups; or they may consist of

governmental bodies, such as transgovernmental agency networks or international organizations.

Intermediaries are often perceived as possessing distinctive regulatory capacities and may perform a range of regulatory functions relevant to accountability. Such functions include shaping or endorsing standards, interpreting and constructing legal rules, monitoring compliance behaviour, facilitating information disclosure, fostering communities of trust and supporting enforcement efforts through sanctioning (MacDonald 2018 459; Abbott, Levi-Faur, and Snidal 2017, 20; Talesh 2015). Intermediaries have been identified as being especially influential where “normatively recognised principals of transnational accountability relationships lack sufficient information, power, or institutional access to enforce accountability obligations directly” (Macdonald 2018, 459).

The expansion of intermediaries in the transnational domain has generated a growing interest in the opportunities, risks and dilemmas presented by these types of accountability relationships (Short, Toffel, and Hugill 2016; Macdonald 2018). A number of activists and scholars have identified critical shortcomings of ethical audits by intermediaries, including a general failure to detect or correct labour violations in GSCs (O’Rourke 2003; Esbenshade 2004; Marx and Wouters 2017). The audit scope and methodology are often confined and selective – with a focus on outcome standards (such as health and safety and working hours) rather than process rights (such as freedom of association and non-discrimination) (Barrientos and Smith 2007). Auditors frequently adopt a checklist approach, which allows for quantification of conditions on a given day and makes for easier tracking and comparison. However, standardized audits can often miss crucial information which is essential for sustained compliance (e.g. whether workers are engaged via labour providers or contractors; whether there are collective forms of worker voice; and whether there are avenues for raising complaints and remediating breaches) (Esbenshade 2004; LeBaron, Lister, and Dauvergne 2017).

It is sometimes the case that audit results are kept confidential, which has the effect of undermining transparency mechanisms. The lack of any compulsive investigatory powers or direct sanctioning capacity beyond de-listing or de-certification may mean that auditors are unable to oversee improvements in labour standards (Locke 2013). A growing body of literature on audits within GSCs has been directed at addressing these functional challenges in a bid to enhance the effectiveness of ethical audits. While these inquiries are critical, there has been a tendency to overlook one of the most fundamental governance questions raised by intermediated arrangements – that is, “*who the audit regime is effective for*” (LeBaron, Lister, and Dauvergne 2017, 960). The rise of intermediaries has generated immense empirical and conceptual

confusion “around previously sacred notions such as independence and conflict of interest as measures of regulatory effectiveness” (Loconto 2017, 112).

More recent empirical research confirms that audit regimes are not technical or benign, but are often responsive to, and protective of, commercial interests. Rather than allowing for enforcement of private governance, the audit regime may be used by multinational corporations (MNCs) as a mechanism to legitimize their business models and construct an illusion of governance effectiveness. Firms commissioning the audits exercise power and control over the depth, timing and methodology of subsequent inspections and checks. While auditors are often perceived as independent arbiters, “in reality brands give them strict instructions about when, where, and how to audit” (LeBaron, Lister, and Dauvergne 2017, 968). The financial relationships between auditors and their clients can perpetuate conflicts of interest, create incentives towards leniency, distort audit processes and lead to an underreporting of bad practices (Locke 2013; LeBaron, Lister, and Dauvergne 2017, 965).

The audit firms themselves have also been identified as thwarting accountability efforts. Rather than being engaged in a way that assists the putative regulator to curb worker exploitation in GSCs, audit firms may do the opposite (Hardy 2011). By leveraging their relationships with client firms, audit firms may promote themselves as experts and informal representatives of MNCs. In this capacity, they may seek to influence the policy position of many key stakeholders, including governmental regulators, private regulators, NGOs and consumer groups. The informal and covert influencing practices of big audit firms can lead to a privileging of soft-law governance over binding and concrete enforcement mechanisms (Fransen and LeBaron 2019, 261). Concerns about the regulatory influence of intermediaries, and their accountability (or otherwise) to principals, are even more pronounced “when such actors have not been explicitly authorized to act in such roles, and where their own organisational values or interests diverge from those of the people they claim to represent” (MacDonald 2018, 458–459).

While auditors have growing influence over transnational labour governance, and they continue to deepen and legitimize their role as governance actors, the audit firms themselves appear to be largely insulated from accountability demands. It is common for auditors to seek to minimize or avoid liability for poor quality audits through the insertion of disclaimers in engagement agreements (Marx and Wouters 2016). There have previously been calls for a level of oversight of auditors in order to distinguish credible auditors from the non-credible ones (Marx and Wouters 2016, 451, citing Sabel, O’Rourke, and Fung, 2000). There is growing interest in exploring legal channels through which to hold auditors accountable (Van Ho and Terwindt 2019), and cases have been initiated against audit firms which are challenging the accuracy and quality of social audits (Fransen and LeBaron 2019, 275). If auditors are

to be held liable for the way in which they perform their work, it is critical that research is undertaken to understand whether such litigation ultimately prompts any changes to the audit approach and the overall rigor of the accountability apparatus. It clearly remains a continuing challenge to ensure that “the interests of the most powerful stakeholders do not overshadow the voices of those most affected by an organization’s activities” (Curtin and Senden 2011, 187). Given that auditors are now actors with significant regulatory power, it is clear that they should also be held accountable for their conduct in GSCs – whether through formal legal mechanisms or otherwise.

## ► 4. Conclusion

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While there has been much debate and discussion about the need for greater accountability in transnational labour governance, the complex, pluralistic and decentred nature of the regulatory system means that there is no single accountability narrative, structure or mechanism. Rather, accountability roles and responsibilities are fragmented, diverse, dynamic, contested and evolving. In this chapter, we underlined the importance of deepening our understanding of accountability beyond implicit or normative conceptions and we distilled a set of key questions through which to analyse key developments in relation to the regulation and oversight of GSCs. While questions, such as “Who is liable or accountable to whom?” appear simplistic at first glance, application of these questions to various case studies soon revealed the challenge of using linear or democratic conceptions of accountability to networks which are hierarchical and fluid. For instance, the lack of a clearly identifiable principal or stakeholder group to whom actors “should be accountable creates challenges of obscured responsibility and pervasive blame avoidance” (MacDonald 2018, 5).

The chapter has discussed the way in which conceptions of accountability have shifted in recent decades. Initially, accountability efforts were geared towards standard-setting, were largely overseen by IGOs and were overwhelmingly directed towards the status and commitment of nation states. Where accountability featured in transnational labour governance, it often did so on an implicit basis and in the sense of being a virtue or a normative standard. Accountability conceptions and demands shifted significantly with the rise of private labour governance, the proliferation of codes of conduct and the recent wave of MSIs. These developments prompted a greater focus on enhancing accountability through information disclosure and transparency. Direct accountability mechanisms were largely superseded by “accountability by



proxy” arrangements. The rise in intermediated arrangements was driven by a combination of few formal institutions to facilitate and supervise standard accountability mechanisms, significant power differentials and large social and physical distances between accountability-holders and power-wielders (Koenig-Archibugi 2010, 1150). To overcome these challenges, auditing and certification has emerged as a dominant accountability tool used to monitor labour rights. The deficiencies of auditing as an accountability process have been well documented. We surveyed many of the main problems, including the fact that audits may selectively focus on labour rights, which are easier to quantify and track; auditing firms may undertake a superficial audit and/or suppress adverse results. Some have also pointed out that audits are commonly thwarted through inherent conflicts of interest and a lack of clarity about the aims of the audit process and the question whom the auditor is actually serving (the client, the regulator or the beneficiary).

Activists and scholarly concerns with the “enforcement gap” in transnational labour governance and the absence of legal mechanisms by which to hold private actors to account (e.g. Estlund 2012; Ter Haar and Keune 2014; Vosko et al. 2020) has led to an increasing focus on enhancing accountability through formal enforcement mechanisms in public and private governance, including via bottom-up monitoring processes, improved complaint and dispute resolution procedures and stronger sanctioning powers (e.g. Bartley 2018; Marx and Wouters 2016). These developments inevitably provoke a new set of opportunities and challenges, which are ripe for further research, including how to involve and empower workers and local stakeholders in monitoring efforts; how to integrate private initiatives in a way that supports and reinforces public governance mechanisms at a local, national and transnational level; and how best to cultivate mechanisms of collective or horizontal accountability through courts, arbitration tribunals, ombudsmen, complaint processes, transparency requirements and sanctioning capabilities (MacDonald 2018, 5–6). These accountability mechanisms are applicable as much to lead firms, suppliers, manufacturers and others, as they are to key intermediaries, such as auditors and consultants. By way of a final reflection, we note that much of the rich theoretical and empirical work on accountability in GSCs has focused on Global North-South relationships. Given changing patterns of trade, it is clear that there is more work to be done in understanding whether, and to what extent, existing accountability models, mechanisms and metrics can be transposed to South-South relationships, where there may be fewer legal avenues and less reputational pressure but potentially alternative points of leverage and novel accountability mechanisms.

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# 2 Mapping human rights due diligence regulations and evaluating their contribution in upholding labour standards in global supply chains

Claire Bright

## ► Introduction

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In order to fulfil their responsibility to respect human rights under the United Nations (UN) *Guiding Principles on Business and Human Rights* (UNGPs), companies are expected to exercise human rights due diligence.<sup>1</sup> The concept of human rights due diligence refers to a “bundle of interrelated processes” (UNGA 2018b, para. 10) through which companies can identify, prevent, mitigate and account for the actual and potential adverse human rights impacts that they may cause or contribute to through their own activities, or which may be directly linked to their operations, products or services by their business relationships.

The UNGPs specify that the corporate responsibility to respect human rights applies in relation to all “internationally recognized human rights”, which are understood to include, at a minimum, those expressed in the International Bill of Human Rights and the fundamental rights in the eight ILO core Conventions, as set out in the Declaration on Fundamental Principles and Rights at Work. The convergence between labour rights and human rights has also been recognized in the literature (see, for example, Alston 2005), and there is now a wide consensus that fundamental labour rights are at the core of human rights (Mantouvalou 2012; Bellace, Blank, and ter Haar 2019).

The UNGPs have been highly influential (Smit et al. 2020a, 18), and the concept of human rights due diligence was subsequently incorporated in several other international instruments: for example, the OECD Guidelines for Multinational Enterprises, revised in March 2011 (OECD 2011), and the

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1 UNGPs, Guiding Principle 15.

Due Diligence Guidance for Responsible Business Conduct (OECD 2018) and related sector and issue-specific guidelines, and the ILO MNE Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (ILO 2017).

However, the soft law character of these instruments entails that they do not create legally binding obligations for either States or companies (Ramasastry 2013; López 2013, 58). In the absence of implementing regulation, the corporate responsibility to respect remains more of a moral obligation, which is rooted in social expectations (UNGA 2008, 17) – rather than a legal obligation. As a result, the fulfilment of the corporate responsibility to respect, and the correlated expectation to exercise human rights due diligence, rely on voluntary approaches by companies. However, a number of studies have highlighted the limitations of such voluntary approaches (Vigeo Eiris 2016; CHRB 2019; Smit et al. 2020a, 16). The 2020 Corporate Human Rights Benchmark assessment, which assessed the human rights disclosures of 230 global companies across five sectors identified as presenting a high risk of adverse human rights impacts, noted that, “human rights due diligence, despite being so crucial for the effective management of human rights risks, remains an area of poor performance across all sectors, with nearly half of the companies assessed (46.2%) failing to score any points for this part of the assessment” (CHRB 2020, 3). The report further highlighted a disconnect between commitments and processes on the one hand and actual performance and results on the other, and affirmed that “even for those companies with robust commitments and management systems, these do not automatically translate at a practical level, with allegations of severe human rights violations regularly raised, even against some of the highest scoring companies.” (CHRB 2020, 3)

In the absence of binding regulatory frameworks requiring companies to undertake human rights due diligence,<sup>2</sup> companies may continue to fall short of their corporate responsibility to respect human rights. They may also be constrained in their efforts for fear of being put at a competitive disadvantage compared to companies that are laggards in the field (Joseph 2004, 154). As well as being prejudicial to companies themselves, the lack of binding regulation and over-reliance on voluntary approaches by companies have been criticized as being prejudicial to rights holders, who have been adversely affected by business-related activities (Marx, Bright, and Wouters 2019).

The literature has noted that efforts to regulate labour rights abuses across global supply chains have remained limited to date (Nolan and Bott 2018). Nonetheless, in recent years, a growing number of countries have started to

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<sup>2</sup> It should be noted that there are also other sources of legal obligations besides human rights due diligence laws which are relevant for corporate responsibility; however, the study of these sources are beyond the scope of this paper.

adopt, or are currently considering, legislative measures to that effect (Groulx Diggs et al. 2020, 507). First steps of regulatory efforts have focused on legislation seeking to incentivize the exercise of human rights due diligence in relation to certain labour rights issues through reporting requirements. In a second step, another type of legislation has emerged that goes beyond mere reporting requirements to create a positive duty for companies to exercise human rights due diligence. This paper endeavours to provide a comparative analysis of these different developments and evaluate their contribution in upholding labour standards in global supply chains.

## ▶ 1. Methodology

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The purpose of this paper is to facilitate discussions around regulatory measures seeking to encourage or require companies to exercise human rights due diligence in relation to labour issues in the global supply chain. In this perspective, it proposes a mapping of key existing legislation and legislative initiatives at the national level. Even though the main focus of the paper is on Europe, other relevant legislation or initiatives of particular comparative value will be analysed. The ambition of the paper is not to be exhaustive but rather to map key legislation and legislative initiatives in order to gain a better understanding of the current legal landscape.

Based on extensive desk-based comparative research, the paper establishes a typology of two types of existing key legislations based on the type of obligations that they place on companies:

(1) *Reporting legislation*: This category incorporates national legislations that aim to encourage the exercise of human rights due diligence through reporting requirements. Two key examples of national legislations are analysed in particular: the United Kingdom (UK) Modern Slavery Act and the Australian Modern Slavery Act, which is of comparative value.

(2) *Mandatory human rights due diligence legislation*: This category encompasses national legislations that require companies to undertake substantive human rights due diligence. Two examples of such legislation which have been adopted to date are analysed in this paper – the French Duty of Vigilance Law and the Dutch Child Labour Due Diligence Act.

This paper also examines selected legislative proposals of particular comparative value because of the level of detail of the draft put forward and their specific characteristics. These are the Norwegian Draft Law and the Swiss Responsible Business Initiative and Indirect Counter-Proposal.

The paper compares and assesses the effectiveness of the various approaches based on an analysis of selected criteria. The paper concludes by considering the lessons that can be drawn from legislations and legislative initiatives analysed. It provides a framework, which can be used to inform policy-makers and other stakeholders in the evaluation of new legislation seeking to improve labour standards and decent work in global supply chains.

## ► 2. Mandatory reporting regulations

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In recent years, a growing number of jurisdictions have introduced mandatory reporting legislation (Philipps, LeBaron, and Wallin 2018) in an attempt to improve corporate accountability by requiring companies to make certain information publicly available so as to facilitate public scrutiny by relevant stakeholders such as civil society, consumers and investors (Sinclair and Nolan 2020). The wave of regulatory measures using transparency to fight forced labour, in particular, in companies' supply chains was spearheaded by the California Transparency in Supply Chains Act of 2010,<sup>3</sup> which requires certain large companies to disclose their efforts to eradicate slavery and human trafficking from their direct supply chains. The legislation inspired other similar legislations around the world, such as the UK Modern Slavery Act which followed suit five years later and the Australian Modern Slavery Act which was adopted in 2018.

### 2.1 The UK Modern Slavery Act 2015

The UK Modern Slavery Act (UK MSA)<sup>4</sup> was adopted in March 2015. Among the **aims of the legislation**, one key purpose is to address the role of businesses in “preventing modern slavery from occurring in their supply chains and organisations”. The legislation seeks to promote a “race to the top” by encouraging companies to exercise transparency in their operations, thus increasing competition to drive up standards and creating a “level playing field” between compliant and non-compliant businesses. (UK Home Office 2017, 3).

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3 California Transparency in Supply Chains Act of 2010, Senate Bill No 657; [https://leginfo.ca.gov/faces/billNavClient.xhtml?bill\\_id=200920100SB657](https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=200920100SB657).

4 UK Public General Acts, 2015 c.30, Modern Slavery Act 2015; <http://www.legislation.gov.uk/ukpga/2015/30/contents/enacted>.

## Main provisions

The **companies covered** by the UK MSA are those with an annual turnover of at least £36 million,<sup>5</sup> which carry on a business, or part thereof, in any part of the UK, regardless of where they are incorporated. As a result of its broad scope, the UK MSA applies to an estimated total of 12,000 companies (Shift 2015, 2). In terms of **human rights and labour issues covered**, the legislation focuses narrowly on questions of modern slavery, which include the offenses of slavery, servitude, forced or compulsory labour, as well as human trafficking.<sup>6</sup> The UK MSA does not cover other types of human rights or labour rights issues.

The **duties prescribed** in the UK MSA include, among others, the preparation of a yearly “slavery and human trafficking statement” disclosing the steps that the company has taken “to ensure that slavery and human trafficking is not taking place (i) in any of its supply chains, and (ii) in any part of its own business”.<sup>7</sup> Alternatively, a company can issue a statement that it has taken no such steps. Three minimum requirements that must be satisfied by the statement: (1) it must be published on the company’s website (if it has one) and include a link to it in a prominent place on that website’s homepage; (2) it must be approved by the board of directors (or equivalent management body; and (3) signed by a director (or equivalent).<sup>8</sup>

The UK MSA does not mandate what should be reported in the statement but simply specifies that statements *may* include, inter alia, information about the company’s due diligence processes and other activities to counter slavery and human trafficking in its operations. While the **reporting obligation** covers both a companies’ own activities as well as those of entities in their supply chains, it does not extend to the entirety of the supply chain.<sup>9</sup>

5 The annual turnover threshold does not need to be generated in the UK and includes the turnover of the company as well as of any of its subsidiaries, including those operating wholly outside the UK (UK Home Office 2017, 7).

6 Slavery is defined by reference to the 1926 Slavery Convention; forced or compulsory labour is specified by reference to the ILO’s Forced Labour Convention, 1930 (No. 29) and its Protocol; and human trafficking is defined as requiring “that a person arranges or facilitates the travel of another person with a view to that person being exploited” (UK Home Office 2017, 17). In addition, the Home Office’s guide specifies that the worst forms of child labour, as defined by article 3 of the ILO Convention (No. 182), are very likely to constitute modern slavery (UK Home Office 2017, 17–18).

7 UK MSA, Section 54.

8 UK MSA, Section 54.

9 The guide issued by the UK Home Office clarifies in this respect that “this does not mean that the organisation in question must guarantee that the entire supply chain is slavery free. Instead, it means an organisation must set out the steps it has taken in relation to any part of the supply chain (that is, it should capture all the actions it has taken)” (UK Home Office 2017, 5).

As far as **enforcement mechanisms** are concerned, the Secretary of State may bring civil proceedings in the High Court requiring compliance if a company does not meet its reporting obligation. Failure to comply with the court's injunction constitutes contempt with a court order and is punishable by an unlimited fine (UK Home Office 2017, 6). However, this mechanism has never been used, and there have been no penalties to date for non-compliant organizations (Butler-Sloss, Miller, and Field 2019, 14).

### Effectiveness and limitations

The UK MSA has contributed to greater awareness of modern slavery in companies' supply chains (Butler-Sloss, Miller, and Field 2019, 14) and has fostered internal conversations within companies (Smit et al. 2020a, 104), including at the senior level (Ergon Associates 2018). The number of CEOs and other senior executives actively involved in addressing modern slavery is said to have doubled since the act has come into force (Lake et al. 2016).

However, the obligation prescribed by the UK MSA is limited to a mere reporting requirement and does not place a legal duty on companies to exercise substantive human rights due diligence (Ergon Associates 2018, 2; Smit et al. 2020a, 172). Nor does it seek to assess the adequacy of the due diligence steps taken, if any (Nolan 2017, 42, 44). In fact, the law expressly allows companies not to take any steps in this respect.

Studies have suggested that, in practice, compliance with the reporting requirement has remained largely cosmetic (Nolan and Bott 2018, 53; Ergon Associates 2016), with many companies publishing generic statements committing to fight modern slavery (BHRRC 2018, 3) but failing to report on the human rights due diligence undertaken (Core Coalition 2017, 8). In the absence of monitoring, the quality of the statements issued have been poor (Butler-Sloss, Miller, and Field 2019, 43), and a number of companies have been approaching their obligations as a mere tick-box exercise (Butler-Sloss, Miller, and Field 2019, 39). In addition, many statements are not compliant with the basic requirements of the legislation, in particular with regard to senior level approval (Ergon Associates 2018, 2). Furthermore, since the duty to report on the steps taken does not have to cover the entirety of the supply chain, this creates issues of "companies offloading their responsibilities at the first tier" (Butler-Sloss, Miller, and Field 2019, 42).

The lack of an effective enforcement mechanism has led to widespread issues of non-compliance (Smit et al. 2020a, 246), with an estimated 40 per cent of eligible companies not complying with the legislation at all (Butler-Sloss, Miller, and Field 2019, 42). As a result, the legislation has been criticized by civil society organizations and leading companies alike for not having succeeded in its objective of creating a level playing field between those businesses that act



responsibly and those that need to change their policies and practices (Butler-Sloss, Miller, and Field 2019, 14). The basic rationale behind the approach of the UK Modern Slavery Act is that consumers, investors and non-governmental organizations (NGOs) would apply the necessary pressure in areas where they believed a company had not taken sufficient steps (UK Home Office 2017, 6). However, this approach has shown its limitations.

In its response to the transparency in supply chains consultation – which sought views from businesses, public bodies, investors and civil society on various options to strengthen the UK MSA – the UK Government recently committed to introducing new measures which would address a number of the issues identified (Home Office and Victoria Atkins MP 2020). These would include notably mandatory reporting areas that the modern slavery statements will need to cover (and which will include the topics that are currently suggested to be incorporated in companies’ statements, and notably their due diligence processes), the requirement for companies to publish their statements on a new digital government reporting service, the extension of the requirements set out in the UK MSA to public bodies with a budget of £36 million or more, and the establishment of a single enforcement body for employment rights to “better protect vulnerable workers and ensure a level playing field for the majority of employers complying with the law” (Home Office and Victoria Atkins MP 2020).

Nonetheless, this will not change some of the more fundamental limitations of the UK Modern Slavery Act. In particular, the literature has converged in highlighting the limitations of the approach which requires mandatory reporting while failing to prescribe a duty to exercise substantive human rights due diligence and to provide for an assessment of the adequacy of the due diligence exercised (BHRRC 2018, 25; Nolan and Bott 2018, 53; Macchi and Bright 2020, 224).

Another important limitation of the legislation lies in the fact that it does not address any of the recurring obstacles in access to remedy faced by victims of corporate human rights abuses and, more specifically, by victims subjected to forced labour or human trafficking by UK companies or their business partners in the UK or abroad (Macchi and Bright 2020, 226). In addition, the act does not require reporting on companies’ grievance mechanisms, where issues of modern slavery or human trafficking have been found to have taken place (Shift 2015, 3).

Finally, it has been noted that the narrow focus of the legislation on a specific labour issue could produce unintended effects by creating “a strong driver for businesses to prioritise efforts to address that particular issue, even if, objectively it would not qualify as one of the salient human rights risks facing that organisation” (Clifford Chance 2019, 7).

## 2.2 The Australian Modern Slavery Act 2018

Following in the footsteps of its predecessors, the Australian Modern Slavery Act (Australian MSA)<sup>10</sup> was adopted in 2018 (Commonwealth Modern Slavery Act 2018, 13). The legislation entered into force on 1 January 2019. According to the Australian Department of Home Affairs, the **aims of the legislation** are to “increase business awareness of modern slavery risks, reduce modern slavery risks in the production and supply chains of Australian goods and services, and drive a business ‘race to the top’ to improve workplace practices” (Commonwealth Modern Slavery Act 2018, 13).

### Main Provisions

The **companies covered** by the Australian MSA are large entities with an annual consolidated revenue<sup>11</sup> of more than AU\$100 million which are domiciled in Australia or which carry out business in Australia. An estimated 3,000 companies fall within the scope of the legislation (Sinclair and Nolan 2020, 167). With regard to **human rights and labour issues**, the act covers only issues related to modern slavery.<sup>12</sup>

The **duties prescribed** by the Australian MSA require relevant entities to report annually on the risks of modern slavery in their operations and supply chains, and actions the actions taken to address those risks, including the due diligence and remediation processes. The statement must be approved by the principal governing body of the entity, signed by a responsible member of the entity and communicated to the relevant minister within six months.<sup>13</sup> The Australian MSA prescribes that the statement must cover seven mandatory criteria that comprise “the actions taken by the reporting entity and any entity that the reporting entity owns or controls, to assess and address those risks, including due diligence and remediation processes”.<sup>14</sup>

10 Australian Modern Slavery Act 2018, No 153, 2018; <https://www.legislation.gov.au/Details/C2018A00153>.

11 The annual consolidated revenue includes the total revenue of the entity as well as all the total revenue of all the controlled entities, considered as a group.

12 Modern slavery is defined by the legislation as: conduct which would constitute an offence under existing provisions of the Commonwealth Criminal Code (Divisions 270 and 271); trafficking in persons, as defined in article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime; or the worst forms of child labour, as defined in article 3 of the ILO Convention (No. 182) concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour.

13 Australian MSA, Section 14(2).

14 Australian MSA, Section 16(1)(d).

The ***business activities covered by the duty*** comprise the entirety of the supply chain, since the reporting obligation involves the “risks of modern slavery in the operations and supply chains of reporting entities and entities owned or controlled by those entities”.<sup>15</sup> In case of non-compliance with the reporting obligation, the ***enforcement mechanism*** authorizes the relevant minister to send a written request to non-complying entities, asking them for an explanation or requiring them to take remedial action. The minister may publish information about a non-complying entity should it fail to comply with the request.<sup>16</sup>

### Effectiveness and limitations

Given that the legislation only entered into force on 1 January 2019, there has not yet been any comprehensive evaluation of its effectiveness. The legislation provides for a three-year review, which will present an opportunity to consider potential improvements (Sinclair and Nolan 2020, 169). However, a few preliminary comments may be offered based on the existing literature. The Australian MSA is largely modelled on the UK MSA but differs in important points.

Firstly, the Australian MSA provides for the creation of a centralized government-run repository, known as the Modern Slavery Statements Register, which is freely available to the public on the internet.<sup>17</sup> Scholars have noted that this should create greater certainty about publication and encourage higher rates of reporting (Sinclair and Nolan 2018).

Secondly, the Australian MSA sets out mandatory criteria against which companies must report, which include the measures taken to assess the effectiveness of their actions.<sup>18</sup> Thus, it goes a step further than the UK MSA in incentivizing companies to conduct human rights due diligence by mandating reporting on such processes. Scholars have observed that this will allow for “more consistent and comparative statements” (Sinclair and Nolan 2020, 167) and create “an expectation that entities will undertake these actions as part of their reporting process” (Sinclair and Nolan 2018).

Thirdly, the reporting obligations are not limited to the private sector but extend to the Australian government itself, as well as public companies that have a consolidated revenue of at least AU\$100 million. This allows extending the scope of the legislation to public buyers, who have a heightened responsibility to fight human rights violations in supply chains (Martin-Ortega 2013).

15 Australian MSA, Part 2, Section 11.

16 Australian MSA, Part 2, Section 11.

17 Australian MSA, Part 3, Sections 17–20.

18 Australian MSA, Part 2, Sections 16 and 16A.

However, despite these noteworthy improvements, the Australian MSA suffers from some of the same limitations as the UK MSA. To begin with, it only requires companies to report, rather than to act, and, as scholars have pointed out, “the assumption that greater transparency and availability of information about companies’ activities will translate into both improvements in practice and increased corporate accountability remains largely untested” (Sinclair and Nolan 2020, 169). Moreover, the lack of effective enforcement mechanisms and financial penalties in case of non-compliance risks leading to issues of non-compliance similar to those of the UK MSA. In addition, the Australian MSA does not contain any provisions to facilitate access to remedy for victims of modern slavery (Macchi and Bright, 226). Finally, the Australian MSA, like the UK MSA, focuses on a single issue (that is, modern slavery), potentially to the detriment of other more salient issues. Scholars have noted that “the modern slavery approach enables states to create the appearance of being tough on modern slavery without having to adopt stronger or more effective labour or business regulation. For business, the modern slavery framework does not involve third parties such as unions and civil society in a formal system of enforcement in the same way that other laws do (Landau and Marshall, n.d.). The Australian Department of Home Affairs’ Guide seems to acknowledge this limitation, as it recognizes that not addressing other poor working conditions and limiting efforts to serious exploitation may also lead to modern slavery (Commonwealth Modern Slavery Act 2018, 8).

Overall, legislations on mandatory reporting have represented a first step towards greater corporate accountability (see chapter 1), and reporting is one of the steps of the human rights due diligence process as identified in the UNGPs. However, the UNGPs envisage it as the last core element of the human rights due diligence process, once the company has assessed its actual and potential human rights impacts, integrated and acted upon the findings and tracked responses. Detaching the reporting requirement from these other elements makes it lose its legitimacy (Sinclair and Nolan 2018). Despite their variations in terms of institutional design, reporting regulations have done little more than reinforcing the status quo by providing statutory endorsement of existing private voluntary initiatives and reporting (LeBaron and Rühmkorf 2019). These limitations point to the need to go beyond mere reporting towards more stringent requirements to exercise substantive human rights due diligence in order to uphold labour standards in companies’ operations and throughout their supply chains.

## ► 3. Mandatory human rights due diligence regulations

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A number of jurisdictions have sought to implement the UNGPs and turn the soft law requirement to exercise human rights due diligence into a hard law requirement (Macchi and Bright 2010, 218). In this respect, different types of regulations exist. Some of them focus on a single labour issue, whereas others provide for an overarching framework (Bright et al. 2020, 18). They also differ in terms of scope of application and enforcement mechanisms. Two key examples of such regulations are provided by the Dutch Child Labour Due Diligence Act and the French Duty of Vigilance Law. They will be analysed in turn.

### 3.1 The Dutch Child Labour Due Diligence Act

Adopted on 14 May 2019, but not yet in force (Hoff 2019), the Dutch Child Labour Due Diligence Act (CLDDA)<sup>19</sup> mandates companies selling goods or providing services to Dutch end users to exercise substantive human rights due diligence in relation to child labour (Bright et al. 2020, 27). The CLDDA is framed in terms of consumer protection (Enneking 2020, 178), the **aim of the legislation** being to ensure that goods and services brought onto the Dutch market are free from child labour so that consumers can buy them with “peace of mind”.<sup>20</sup>

#### Main provisions

The legislation **applies to all companies** that sell or supply goods or services to Dutch end users.<sup>21</sup> There are no restrictions in terms of the size of the companies, their turnover or their legal form, although certain categories of companies might be exempted from the legislation by future general administrative orders. These may pertain to smaller companies and companies from

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19 The Dutch Child Labour Due Diligence Act 2019. An unofficial English translation of the act, commissioned by the law firm of Ropes & Gray, is available for downloading at <https://www.ropesgray.com/en/newsroom/alerts/2019/06/Dutch-Child-Labor-Due-Diligence-Act-Approved-by-Senate-Implications-for-Global-Companies>. For the original Dutch language text, see [https://www.eerstekamer.nl/behandeling/20170207/gewijzigd\\_voorstel\\_van\\_wet/document3/f/vkbbk8pud2zt.pdf](https://www.eerstekamer.nl/behandeling/20170207/gewijzigd_voorstel_van_wet/document3/f/vkbbk8pud2zt.pdf).

20 CLDDA, Preamble.

21 CLDDA, Article 4.

low-risk sectors (Enneking 2020, 174). Companies that are merely transporting goods are exempt from the law.<sup>22</sup> In terms of **human and labour rights**, the CLDDA only covers issues related to child labour.<sup>23</sup>

The **duties prescribed** by the CLDDA include the exercise of due diligence in order to prevent the use of child labour during the production of goods sold, or services provided, to the Dutch market. More particular, companies concerned are required: (1) to investigate “whether there is a reasonable suspicion that the goods or services to be supplied have been produced using child labor”<sup>24</sup>; (2) if this suspicion arises, to adopt and implement a plan of action; and (3) to issue a statement declaring that the company has exercised due diligence as set out in the legislation.<sup>25</sup> Under the CLDDA, the **scope of the human rights due diligence obligation** extends throughout the supply chain, since companies are expected to investigate whether there is a risk that child labour has been used in the production of the goods sold or services supplied (Enneking 2020, 176).

The law provides for a state-based **enforcement mechanism** through a public supervising authority in charge of monitoring compliance with the legislation, and which may impose an administrative fine for failure to comply with the law.<sup>26</sup> Third parties affected by a company’s failure to comply may submit their claims to the public supervising authority on the basis of concrete evidence of non-compliance.<sup>27</sup> The public supervisory authority can give legally binding instructions to the company, accompanied by a time frame for execution, and the company may be fined up to €8,200 in case of failure to submit the statement, or up to 10 per cent of its worldwide annual turnover in case of failure to exercise due diligence (Littenberg and Blinder 2019). In addition, directors may incur criminal sanctions in case of repeat offenses.<sup>28</sup>

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22 CLDDA, Article 4.4.

23 Child labour is defined by reference to the ILO Worst Forms of Child Labor Convention, 1999 (No. 182) as well as to the Minimum Age Convention, 1973 (No. 138) in the situation where the work takes place on the territory of a State Party to that Convention. Otherwise, child labour is defined as: “(i) any form of work, whether or not under an employment contract, performed by persons who are subject to compulsory schooling or who have not yet reached the age of 15, and (ii) any form of work, whether or not under an employment contract, performed by persons who have not yet reached the age of 18, insofar as such work, by virtue of the nature of the work or the conditions under which it is performed, may endanger the health, safety or morality of young persons”. CLDDA, Article 2(c).

24 CLDDA, Article 5.1.

25 The law mandates the appointment of a public supervising authority to which the statement must be sent, and which is in charge of publishing the declarations in an online registry on its website (Enneking 2020, 175).

26 CLDDA, Article 3.1 and Article 7.

27 CLDDA, Articles 3.2.–3.4.

28 CLDDA, Article 9.

## Effectiveness and limitations

Since the Dutch CLDDA has not entered into force, its implementation has not yet been evaluated, and any remarks related to its effectiveness will therefore remain preliminary. Scholars have highlighted that the legislation is overly focused on consumer protection and does not contain provisions that would ensure access to remedy for victims of child labour (Enneking 2020, 177). Nor does it require the exercise of due diligence in relation to goods which are not sold to end-users but are simply brought onto the Dutch market for further processing purposes. In addition, it leaves unaddressed issues of child labour linked to Dutch companies in other markets. Indeed, the legislation does not cover the goods and services sold by Dutch companies outside the Netherlands, and, as a result, it does not mandate Dutch companies to exercise due diligence to prevent and address issues of child labour concerning the goods sold or services supplied outside the country (Bright et al. 2020, 30). Furthermore, scholars have pointed out the limitations of the reporting requirement, which is a one-off exercise that does not need to be repeated annually, thus failing to incentivize a continuous exercise of human rights due diligence as required by the UNGPs (Macchi and Bright 2020, 231).

In addition, as argued by some scholars, the obligation “could also be understood as covering only the first tier of a supply chain if interpreted narrowly” (Krajewski and Faracik 2020, 10). In particular, the legislation specifies that companies can discharge their due diligence obligations by purchasing goods or services from companies that have issued a statement in this respect (Enneking 2020, 176), which may suggest that companies can fulfil their due diligence obligation simply by considering their immediate contractual partners (Krajewski and Faracik 2020, 10). Finally, the law requires the exercise of human rights due diligence only in relation to child labour. As noted above in relation to reporting regulations focusing on modern slavery, this may spur companies to prioritize their efforts to address this particular issue over potentially more salient human rights risks for the company in question (Chance 2019, 7). In turn, other types of legislation, such as the French Duty of Vigilance Law, have opted for an overarching approach.

## 3.2 The French Duty of Vigilance Law

The French Duty of Vigilance Law (DVL)<sup>29</sup> was adopted on 21 February 2017 and enacted on 27 March 2017. It was a pioneer legislation worldwide in turning the soft law human rights due diligence expectations under the UNGPs into hard law and extending it to health and safety and environmental issues (Barraud de Lagerie et al. 2020 and chapter 5). Introduced in the wake of the Rana Plaza tragedy, the **aims of the legislation** are two-fold: (i) to provide access to remedy for individuals and communities whose human rights were adversely affected by the activities of French companies or suppliers in their global supply chains; and (ii) to enhance corporate accountability.<sup>30</sup>

### Main provisions

The law **applies to companies** incorporated or registered in France under French company law as *sociétés anonymes*, *sociétés en commandite par actions* and European companies (Brabant and Savourey 2017, 3). Among these companies, the French DLV only applies to those employing, for two consecutive fiscal years, at least 5,000 people in France (either directly or through their French subsidiaries), or at least 10,000 people worldwide (through their subsidiaries located in France and abroad).<sup>31</sup> The total number of companies affected is estimated between 200 and 250 (Duthilleul and de Jouvenel 2020). With regard to **human rights and labour issues**, the DLV covers “severe violations of human rights and fundamental freedoms, serious bodily injury or environmental damage or health risks”<sup>32</sup>.

The **duties prescribed** in the French DLV require the companies concerned to put in place, effectively implement and disclose a vigilance plan (*plan de vigilance*),<sup>33</sup> which include “the reasonable vigilance measures to allow for risk identification and for the prevention of severe violations of human rights and fundamental freedoms, serious bodily injury or environmental damage or health risks resulting directly or indirectly from the operations of the company and of the companies it controls ... as well as from the operations

29 Loi no. 2017–399 du 27 Mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre. [For an English version of the law, see http://www.respect.international/french-corporate-duty-of-vigilance-law-english-translation/](http://www.respect.international/french-corporate-duty-of-vigilance-law-english-translation/).

30 Even though the version of the legislation which was finally adopted on 21 February 2017 was watered down compared to the initial version, it nonetheless retained these two initial objectives (Bright 2020).

31 It therefore applies both to French parent companies and to the direct or indirect subsidiaries of companies whose head office is located abroad, and which satisfy these criteria.

32 French DVL, Article 1 (French Commercial Code, Article L. 225-102-4).

33 See chapter 5 in this volume for details regarding the vigilance plans.



of the subcontractors or suppliers with whom it maintains an established commercial relationship”.<sup>34</sup>

The *due diligence obligations* cover the *business activities* of the concerned companies themselves, as well as those of companies under their control,<sup>35</sup> and of partners with whom they have an “established business relationship”.<sup>36</sup>

In terms of enforcement, the French DVL sets out two judicial *enforcement mechanisms*. The first is an injunction to ensure corporate compliance with the vigilance obligations set out in the law. Under this mechanism, any interested party<sup>37</sup> can serve a non-complying company a formal notice (*mise en demeure*) asking the company to comply with its obligations to elaborate and publish its vigilance plan. In case of persisting or unsatisfactory compliance three months after the notice has been served, the interested party can seek an injunction with the relevant French court to order the company to comply, with periodic penalty payments in case of continued non-compliance.<sup>38</sup> To date, seven formal notices have been served to several French businesses – including some of its largest companies such as Total and EDF – for their alleged failure to comply with various aspects of the French DVL; all of these notices are currently pending (Brabant and Savourey 2020). The second enforcement mechanism provides for the possibility of remediation when harm has occurred which could have been prevented by the execution of the due diligence obligations set forth by the law. Interested parties can file civil proceedings, in the conditions set forth under French Tort Law.

### Effectiveness and limitations

Various reports have evaluated the implementation of the French DVL over the first three years since its adoption. The 2020 report for the French Government on the implementation of the law noted that, as a result of their corporate culture or of the pressure of NGOs and public opinion, many companies were already exercising human rights due diligence prior to the adoption of the French Duty of Vigilance Law (Duthilleul and de Jouvenel 2020, 31). A 2018 report by Shift found that French companies had a slightly higher level of

<sup>34</sup> French DVL, Article 1 (French Commercial Code, Article L. 225-102-4).

<sup>35</sup> The French Commercial Code defines the concept of control as “exclusive control”, enabling the company to “have decision-making power, in particular over the financial and operational policies of another entity” (Brabant, Michon, and Savourey 2017, 2).

<sup>36</sup> The notion of “established business relationships” covers stable, regular commercial relationships of a certain volume of business, with or without contract, which can be reasonably expected to last (Cossart, Chaplier, and Beau de Loménie 2017, 320).

<sup>37</sup> Interested parties include affected individuals or communities, employees, consumers, trade unions and NGOs (Beau de Loménie and Cossart 2017, 5).

<sup>38</sup> French DVL, Article 1 (French Commercial Code, Article L. 225-102-4).

reporting than other companies. On a scale of 1 to 5, French companies had an average level of 2.5, compared to a level of 2 for the average non-French company (which included over 130 of the largest companies worldwide) (Langlois 2018, 6). Nonetheless, several reports have documented the positive impacts that the French Duty of Vigilance Law has had on the due diligence practices of French companies, pushing them further towards the implementation of the UNGPs. For instance, according to a recent report from *Entreprises pour les droits de l'homme* (EDH), the law prompted 70 per cent of companies to start mapping risks of adverse human rights and environmental impacts or to revise existing mappings and processes (EDH 2019, 7). The report also highlights that 65 per cent of companies now have a dedicated process of identifying risks of adverse human rights impacts (while only 30 per cent had such a process prior to the adoption of the law) (EDH 2019, 13).

However, there is still room for progress. A report by a coalition of French NGOs, analysing 80 vigilance plans published between March and December 2018 (first year of the application of the law), concluded that “companies must do better” (ActionAid et al. 2019). The report revealed that the majority of the vigilance plans tended to be inward-looking, focusing on the risks to the business itself, when they should be outward looking, focusing on the risks to people and the planet (ActionAid et al. 2019, 10). Issues of non-compliance persist (Duthilleul and de Jouvenel 2020, 7; ActionAid et al. 2019, 10). A study has pointed to the insufficient and heterogeneous implementation of the law among the complying and eligible companies. It emphasizes that the concept of the duty of vigilance remains vague and is unevenly understood by stakeholders (Duthilleul and de Jouvenel 2020, 7). In the absence of a publicly available database, a great amount of uncertainty surrounds the question of which companies are actually concerned (Bright et al. 2020, 31) – to the point that it is currently impossible to establish a reliable list of those companies (Duthilleul and de Jouvenel 2020, 20). In addition, the legislation does not define what constitutes “severe violations”, which may generate legal uncertainty (Krajewski and Faracik 2020, 6). To remedy some of these weaknesses, it has been recommended to nominate a public authority which would be in charge of: (i) monitoring the promoting and implementation of the law; (ii) contributing to the harmonization of corporate practices; and (iii) promoting sectorial and multi-party approaches (Duthilleul and de Jouvenel 2020, 7).

Several reports have shown that, in practice, consultation with external stakeholders has remained limited (Barraud de Lagerie et al. 2020, 5; ActionAid et al. 2019, 13; Ibañez et al. 2020, 56). In this respect, the French DVL encourages the consultation among relevant stakeholders in the elaboration of the vigilance plan, which can take place, where appropriate, within multi-stakeholder initiatives that exist in the subsidiaries or at territorial level. However, the

legislation does not make such consultation a legally binding obligation at the drafting stage of the plan. It only imposes the consultation with trade unions about setting up the alert mechanism. These findings were corroborated by the recent report for the French Government, which observed that the insufficient dialogue with relevant stakeholders and more specifically NGOs was one of the main pitfalls of the implementation of the law (Duthilleul and de Jouvenel 2020, 37).

Furthermore, scholars have criticized the narrow scope of application of the law, which, as the result of a compromise in the negotiations leading to the adoption of the legislation, covers only a small number of large French companies of a certain corporate form (Brabant and Savourey 2017, 3). However, it is worth noting that, despite of its narrow scope of application, the French DVL has a trickle-down effect to a large number of entities down the supply chain of the companies concerned.

Finally, although the French DVL brings greater legal certainty on corporate accountability by making an explicit connection between human rights due diligence and civil liability, and by defining the conditions by reference to the general principles of French tort law, it nonetheless falls short of the UNGPs requirements of ensuring access to remedy for the victims (Macchi and Bright 2020, 235) and reducing legal and practical barriers that could lead to a denial of justice. In particular, the burden of proof remains on the claimants who have to show that the damage suffered was the result of a breach of the vigilance obligations on the part of the parent or lead company which, in practice, is likely to constitute a serious obstacle to accessing remedy for affected individuals, especially given the lack of access to information and to internal documents that often prevent claimants from substantiating their claims (Marx, Bright, and Wouters 2019, 15). To date, no legal action has been brought on that basis.

Despite of these limitations, the French DVL has inspired a number of new legislative initiatives in the EU and beyond.

## ► 4. Legislative initiatives

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As the momentum for mandatory human rights due diligence is growing, a number of legislative initiatives have surfaced. Some have opted for a hybrid model with differentiated requirements (of transparency and human rights due diligence) depending on the type of companies or the issues concerned, while others prefer an overarching mandatory human rights and environmental due diligence applying to all types of companies.

### 4.1 The Norwegian Draft Act

The Norwegian Draft Act “relating to transparency regarding supply chains, the duty to know and due diligence” (Draft Act)<sup>39</sup> was published in November 2019. The aims of the legislation are twofold: (i) provide stakeholders – consumers, trade unions, civil society organizations – with the right to information on the impacts of companies on human rights and working conditions, enabling them to make informed decisions about purchases and investments;<sup>40</sup> and (ii) advance respect for and improve fundamental human rights and decent working conditions in businesses and their supply chains.<sup>41</sup>

The Draft Act provides for the **application of different types of duties** based on the size of a company. The Draft Act makes a distinction between (a) *all* enterprises which offer goods and services in Norway, regardless of their size or country of incorporation; and (b) *larger enterprises* which are covered by specific sections of the Norwegian Accounting Act or which exceed certain figures in sales income or assets or number of employees in an accounting year. The **issues covered** by the Draft Act relate to fundamental human rights and decent work.

Among the **duties prescribed**, the first one for any enterprise operating in Norway is the “duty to know” of “salient risks that may have an adverse impact on fundamental human rights and decent work, both within the enterprise

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39 Report from the Ethics Information Committee, appointed by the Norwegian Government on June 1, 2018 (hereafter: Report from the Ethics Information Committee). Report delivered on November 28, 2019. Draft translation from Norwegian of sections of Part I: [https://www.business-humanrights.org/sites/default/files/documents/Norway%20Draft%20Transparency%20Act%20-%20draft%20translation\\_0.pdf](https://www.business-humanrights.org/sites/default/files/documents/Norway%20Draft%20Transparency%20Act%20-%20draft%20translation_0.pdf).

40 Report from the Ethics Information Committee, 3.

41 Report from the Ethics Information Committee, 1.

itself and in its supply chains”.<sup>42</sup> Moreover, companies distributing goods to consumers must publish information about their production sites.<sup>43</sup> The Draft Act also provides for a correlated right to information, whereby any person is entitled to information about how a company conducts itself with regard to fundamental human rights and decent work within its enterprise and supply chains (for example, information about the enterprise’s work, systems and the steps taken to prevent or reduce adverse impact on human rights and working conditions).<sup>44</sup>

The second duty provided for by the Draft Act, which only applies to larger companies, is the duty to exercise substantive human rights due diligence in relation to “fundamental human rights and decent work”. Larger enterprises would, in addition, be required to publicly report on their due diligence processes regarding actual and potential adverse impacts on human rights and decent work as well as the result of these processes.<sup>45</sup>

Regarding the **business activities covered by the duty**, the obligations under the Draft Act would extend throughout the supply chain. In terms of the **enforcement mechanism**, the Consumer Authority and the Market Council would be in charge of monitoring and ensuring compliance with the provisions of the law. In case of non-compliance by a company, sanctions and penalties could be imposed.<sup>46</sup>

## Opportunities and challenges

One of the main opportunities of the Norwegian Draft Act stems from the fact that it is the first legislative attempt to explicitly require due diligence in relation to decent work specifically, as well as in relation to human rights more generally. While decent work has been recognized as a human right itself,<sup>47</sup> fundamental labour rights are generally considered to be limited to four specific issues: child labour, forced labour, non-discrimination and

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42 The Draft Act specifies that “the duty to know applies in all cases where the risk of adverse impact is most severe, such as the risk of forced labour and other slavery-like labour, child labour, discrimination in employment and at work, lack of respect for the right to form and join trade unions and undertake collective bargaining and risks to health, safety and the environment in the workplace”. Norwegian Draft Act, Section, 5(2).

43 Norwegian Draft Act, Section 6.

44 Companies would, therefore, have an obligation to respond to specific enquiries for information, which may include the due diligence processes that they have in place. It is worth noting that the duty to know and the correlated right to information differ from a reporting requirement, as they do not oblige a company to prepare and publish an annual statement.

45 Norwegian Draft Act, Section 10(2).

46 Norwegian Draft Act, Section 13.

47 ILO Statement to the Third Committee of the 68th General Assembly, 23 October 2013, [https://www.ilo.org/newyork/speeches-and-statements/WCMS\\_229015/lang--en/index.htm](https://www.ilo.org/newyork/speeches-and-statements/WCMS_229015/lang--en/index.htm).

freedom of association; many other labour rights may be overshadowed in practice by the focus of companies on certain human rights issues perceived as more prominent. Against this backdrop, certain non-state actors have called for the adoption of an EU-level mandatory human rights due diligence legislation to “include trade unions’ and workers’ rights as main components” and to “ensure the full involvement of trade unions and workers’ representatives in the whole due diligence process” (ETUC 2019).

On the other hand, the limited scope of application of the due diligence duty to larger companies constitutes one of the main limitations of the draft legislation. In addition, it does not contain any liability mechanisms aimed at facilitating access to remedy for the victims. In this respect, the Swiss Responsible Business Initiative had taken a different approach.

## 4.2 The Swiss Responsible Business Popular Initiative and the Indirect Counter-proposal

In Switzerland, a federal popular initiative known as the Responsible Business Popular Initiative (RBI) for the protection of humans and the environment,<sup>48</sup> launched by a broad coalition of over 80 NGOs, was submitted in 2016 after having collected over 120,000 signatures (Werro 2019, 166). A popular vote took place on the 29th of November 2020. Although a popular majority supported the adoption of the initiative, it was eventually rejected as it did not obtain the support from a majority of the cantons (the double majority was required as the proposal required an amendment to the Federal Constitution). This means that the indirect counter-proposal which was adopted by the Swiss Parliament in June 2020 will most likely enter into force (Lenz & Staehelin 2020). Nonetheless, the support that the Swiss RBI got from a majority of voters and the content of the legislative initiative gives it a particular comparative value. Its content will therefore be briefly analysed before detailing the content of the counter-proposal.

### The Swiss Responsible Business Popular Initiative

The *aim of the RBI* was to amend the Swiss Federal Constitution through the introduction of new provisions aimed at strengthening “respect for human rights and the environment through business”.<sup>49</sup> **Companies covered** by the

48 Confédération Suisse. Chancellerie fédérale, *Initiative populaire fédérale ‘Entreprises responsables – pour protéger l’être humain et l’environnement’* (2016), <https://www.bk.admin.ch/ch/f/pore/vi/vis462t.html>; for an unofficial English translation, see Swiss Coalition for Corporate Justice (SCCJ). 2016. “The Initiative Text with Explanations,” Factsheet V: 1–2, <https://corporatejustice.ch/about-the-initiative/>.

49 RBI, Article 101a(\$2c).

initiative would have been the ones that “have their registered office, central administration, or principal place of business in Switzerland”, including small and medium enterprises that were operating in high-risk sectors.

The RBI *aimed to cover internationally recognized human rights* and international environmental standards. It *prescribed the legal duty* of Swiss-based companies to respect these international rights and standards and to ensure that the companies under their control also adhere to them.<sup>50</sup> The initiative also provides that, in order to fulfil their duty, companies were required to carry out “appropriate due diligence” in order to “identify real and potential impacts on internationally recognized human rights and the environment; take appropriate measures to prevent the violation of internationally recognized human rights and international environmental standards, cease existing violations, and account for the actions taken”.<sup>51</sup> The due diligence obligation of the RBI would have applies to controlled companies and call *cover all business activities*.

The RBI provided for a *judicial enforcement mechanism* through a specific civil liability provision stipulating that “[c]ompanies are also liable for damage caused by companies under their control”.<sup>52</sup> The provision is accompanied by a due diligence defence, according to which companies can escape liability “if they can prove that that they took all due care ... to avoid the loss or damage, or that the damage would have occurred even if all due care had been taken”.<sup>53</sup>

### Opportunities and challenges

The associated liability provision creating a strict liability regime constituted one of the strongest points of the draft text, since it would have entailed that parent and lead companies were presumed liable for the human rights or environmental harms caused by entities under their de facto or economic control, unless they could prove that they exercised the required human rights due diligence. This provision effectively reversed the burden of proof (in part) by placing the burden on companies to show that they exercised the appropriate human rights due diligence (Bright et al. 2020, 42), rather than leaving it up to the claimant to prove that the company failed to exercise such

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50 The initiative further specifies: “Whether a company controls another is to be determined according to the factual circumstances. Control may also result through the exercise of power in a business relationship.” (RBI, Article 101a(\$2a)). The commentaries on the text of the initiative further explain that, while controlled companies are generally subsidiaries of parent companies, in certain cases, a lead company can also exercise de facto control over another entity through the exercise of economic control (SCCJ, “The Initiative Text,” Art. 101a(\$2a), 1).

51 RBI, Article 101a(\$2b).

52 RBI, Article 101a(\$2c).

53 RBI, Article 101a(\$2c).

due diligence (as in the case of the French DVL). Against this backdrop, the Swiss RBI would have alleviated persistent obstacles to access to remedy faced by claimants in business-related human rights cases. In this respect, the UN Commissioner of Human Rights also noted that a due diligence defence could incentivize companies to meaningfully engage in human rights due diligence activities, thereby constituting an important preventative effect (UNGA 2018a, para. 29; Werro 2019, 175).

### The Indirect Counter-proposal

Two indirect counterproposals to the RBI were put forward by the two chambers of the Swiss Parliament. In June 2020, a parliamentary conciliation committee opted for the counterproposal of the Council of States, which was subsequently approved by both chambers (SCCJ 2020). As the RBI failed to obtain the double majority at the popular vote of the 29th of November 2020, the counter proposal should normally enter into force if no other facultative referendum is called on within 100 days.

The counter-proposal provides for differentiated duties with different scopes of application. The first duty prescribed is a reporting obligation on certain social, environmental and human rights matters (following from the EU Non-Financial Reporting Directive). This obligation would apply to large Swiss public-interest companies<sup>54</sup> which include publicly traded companies or regulated entities supervised by the Swiss Financial Market Supervisory Authority FINMA (Lenz & Staehelin 2020). The second duty prescribed is an obligation to exercise human rights due diligence, which is limited to conflict minerals (following from the EU Conflict Minerals Regulation) and child labour (following from the Dutch Child Labour Due Diligence Act of 2019) (Knöpfel 2020).

**Companies covered** by the due diligence obligations would be all companies which have their registered office, central administration, or principal place of business in Switzerland which either 1) put on the Swiss market or process minerals or metals containing tin, tantalum, tungsten, or gold from conflict or high-risk areas; or 2) offer goods and services in relation to which there is a reasonable suspicion of child labour.

The counter-proposal provides that the Swiss Federal Council may provide for exemptions based on annual import volumes of minerals and metals in the case of the due diligence obligations relating to conflict minerals, or based on the size of the company for the due diligence obligations relating to child

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<sup>54</sup> Defined as employing at least 500 full-time employees as an annual average over the course of two consecutive business years, or exceeding at least one of the following thresholds: a balance sheet sum of CHF 20 million or a turnover of CHF 40 million.



labour. It also provides that companies complying with internationally recognized standards such as the OECD Guidelines for Multinational Enterprises, may also be exempted from due diligence and reporting obligations.

In terms of enforcement mechanisms, the counter proposal provides for criminal sanctions and in particular fines in case of non-compliance with the reporting duties of for making false statements. However, the counterproposal does not contain any civil liability provision for affected individuals.

### Opportunities and challenges

The counter-proposal is much less ambitious than the RBI and suffers from much of the same flaws identified in the existing reporting and issue-specific legislation analysed above and which will be summarized in the conclusion.

## ► 5. Conclusion and Policy Discussion

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Home States are increasingly expected, and, arguably at least, even required to adopt domestic legislation mandating companies in their territory or under their jurisdiction to exercise human rights due diligence wherever they operate (De Schutter 2020, 16). Across Europe and beyond, a broad spectrum of legislation and legislative proposals has emerged over the past few years, with mandatory reporting or transparency regulations, at one end of the spectrum, and, at the other end, mandatory human rights and due diligence regulations (Bright et al. 2020, 18). The comparative analysis of various relevant legislations and legislative proposals undertaken in this paper points to a number of conclusions.

First of all, in terms of objectives, mandatory reporting laws intend to spur companies to fulfil their responsibility to respect human rights by incentivizing<sup>55</sup> or requiring<sup>56</sup> them to report on their human rights due diligence processes. With the aim of facilitating the availability of this information to civil society, investors and consumers, these laws, in effect, rely on pressure from public scrutiny to ensure corporate compliance. Transparency legislative proposals such as the Norwegian Draft Act share a similar objective by seeking to create a “duty to know” of salient risks associated with a correlated duty of information held by any interested person. However, the underlying assumption that companies will be eager to comply with reporting requirements as a

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<sup>55</sup> For example, the UK MSA.

<sup>56</sup> For example, the Australian MSA.

result of the pressure exerted by civil society, consumers and investors has not been confirmed by early evaluative research (PwC 2018, 59). This is the case especially for non-public facing companies that are under less scrutiny (PwC 2018, 40). Furthermore, the assertion that mandatory reporting regulations could level the playing field between responsible companies and laggards, fuelling a race to the top for labour rights, is yet to be substantiated.

Secondly, in terms of scope of application, certain legislations and initiatives apply to companies of certain corporate forms domiciled in their territory,<sup>57</sup> whereas others also cover foreign-based companies doing business on their territory.<sup>58</sup> Most legislations and proposals are limited to larger companies fulfilling these criteria. These are defined in terms of annual turnover<sup>59</sup> or revenue<sup>60</sup>, or in terms of number of employees.<sup>61</sup> The criteria used to define larger companies give rise, in practice, to a wide variation in the number of affected companies, and developing clear and coherent thresholds has proven challenging (Krajewski and Faracik 2020, 8). This approach falls short of the UNGPs's approach, according to which human rights due diligence expectations apply to all companies, even though the extent of the expected due diligence exercise will be commensurate to the size and context of the company.<sup>62</sup> Accordingly, small- and medium-size enterprises (SMEs) should not be exonerated altogether from any requirements to exercise human rights due diligence,<sup>63</sup> but their needs and special challenges should be taken into consideration in the implementation of these requirements (Smit et al. 2020, 267). Furthermore, the Australian MSA shows how governments can lead by example, by including reporting obligations for the public sector (Butler-Sloss, Miller, and Field 2019), in line with the UNGPs.<sup>64</sup>

Thirdly, in terms of human rights covered, certain types of legislation and legislative proposals are issue-specific,<sup>65</sup> while others provide for an overarching framework for all human rights and environmental issues.<sup>66</sup> The analysis of issue-specific regulations suggests that this kind of focus creates fragmentation and may detract companies' attention from other more salient human rights or labour rights issues. It is noteworthy in this context that

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57 For example, the French DVL.

58 Such as the UK MSA., the Australian MSA, the Dutch CLDDA and the Norwegian Draft Law.

59 For example, the UK MSA.

60 The Australian MSA.

61 For instance, the French DVL.

62 UNGPs, Guiding Principle 17.

63 UNGPs, Guiding Principle 17.

64 UNGPs, Guiding Principle 4.

65 This is the case of the UK and the Australian MSAs, the Dutch CLDDA and the Counterproposal to the Swiss RBI.

66 As in the French DVL and the Swiss RBI.

the corporate responsibility to respect under Guiding Principle 12 refers to all “internationally recognized human rights”.<sup>67</sup> The Norwegian Draft Act is the only example that makes specific reference to decent work in addition to human rights more generally, which, as argued, might prove useful to ensure that labour rights are given appropriate attention in companies’ due diligence practices. The French DVL only applies to “severe violations”, which remain undefined in the legislation (Krajewski and Faracik 2020, 6). Scholars have argued that this reference to “severe violations” can lead to legal uncertainty, as there is no internationally recognized definition of what might constitute a “severe violation”. Rather, they suggest that it “seems more appropriate to incorporate the seriousness of a human rights violation in companies’ respective responses as part of the proportionality principle” (Krajewski and Faracik 2020, 6), in line with Guiding Principle 24, which allows for a prioritization of companies’ responses based on the severity of the human rights impacts.<sup>68</sup>

Fourthly, with regard to the duties prescribed by the legislations and legislative proposals, the established typology distinguished between transparency regulations (that is, mandatory reporting regulations<sup>69</sup> and transparency legislative initiatives<sup>70</sup>) on the one hand, and, on the other hand, mandatory human rights due diligence legislations and legislative proposals<sup>71</sup>. The analysis has suggested that the first type of regulations, requiring companies to communicate information rather than to act, have not, to date, been successful in prompting a meaningful change in corporate behaviour. The experience of the French DVL shows that the second type of regulations – mandating the exercise of human rights due diligence – is much more likely to induce noticeable changes in corporate behaviour.

Fifthly, with regard to the business activities covered by the duty, all legislations and proposals cover the activities of the concerned companies themselves, but the reach of the obligations in the supply chain vary. Some cover part of the supply chains,<sup>72</sup> while others extend to the entire supply chains.<sup>73</sup> In this respect, it is worth remembering that the UNGPs require the exercise of human rights due diligence throughout the entire value chains by providing that it should cover “adverse human rights impacts that the business enterprise may cause or contribute to through its own activities,

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67 UNGPs, Guiding Principle 12.

68 UNGPs, Guiding Principle 24 and comment.

69 For instance, the UK MSA and the Australian MSA.

70 The Norwegian Draft Law.

71 Such as the French DVL and the Swiss RBI.

72 For example, the UK MSA and the French DVL inasmuch as the latter is limited to “established business relationships”.

73 For instance, the Australian MSA, the Norwegian Draft Act and the Swiss RBI.

or which may be directly linked to its operations, products or services by its business relationships”.<sup>74</sup>

Sixthly, in terms of enforcement, the experience of the UK MSA shows that the lack of effective enforcement mechanisms and deterring sanctions have led to widespread issues of non-compliance. Other legislations have opted for stronger enforcement mechanisms, either through a supervising public authority<sup>75</sup> or through judicial enforcement mechanisms.<sup>76</sup> Reports on existing laws that do not provide for a public enforcement mechanism have suggested the need to amend this aspect of the legislation in order ensure legal certainty (Duthilleul and de Jouvenel 2020, 27). It has also called for a uniform interpretation of the relevant act by providing a clear and uniform interpretation of the legislation, in addition to monitoring and ensuring compliance (Duthilleul and de Jouvenel 2020; Butler-Sloss, Miller, and Field 2019). In this respect, scholars have argued that an “engaged and committed regulator” might help limit the risk of “cosmetic” compliance with human rights due diligence requirements (Landau 2019). At the same time, judicial enforcement mechanisms providing for the introduction of an associated liability regime aim to enhance effective access to remedy for affected individuals, and may prove useful to help close the accountability gap. In particular, the strict liability regime with the due diligence defence in the Swiss RBI presented some important advantages in easing potential obstacles to remedy for claimants. This is in line with the UNGPs requirements for States to ensure access to remedy for the victims (Macchi and Bright 2020) and reduce legal and practical barriers that could lead to a denial of justice. In addition, the explicit connection between human rights due diligence and civil liability ensures greater legal certainty in relation to corporate accountability (Bueno and Bright 2020, 789) However, in line with the UNGPs, conducting human rights due diligence should not, by itself, automatically and fully absolve companies from any type of liability.<sup>77</sup> Rather, the assessment should turn to the adequacy of the due diligence exercise. In this respect, setting out clear criteria – for instance, by reference to the UNGPs and the OECD Guidelines and related materials – will be key to ensuring legal certainty and avoiding the risk of assessing whether a company has indeed taken “all due care” from becoming highly subjective.

Finally, the experience of the French DVL shows that the lack of legal requirement for meaningful consultation with external stakeholders as part of the entire human rights due diligence process has, in practice, led to insufficient dialogue and is thought to constitute one of the main pitfalls of the

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74 UNGPs, Guiding Principle 17.

75 Authorities in the Dutch CLDDA and the Norwegian Draft Act have the power to impose sanctions in case of non-compliance.

76 The French DVL and the Swiss RBI.

77 UNGPs, Commentary to Guiding Principle 17.

implementation of the French DVL. This finding points to the need to emphasize and potentially even require consultation with external stakeholders – including with potentially affected groups, NGOs and trade unions – in legislative instruments, which, in line with the UNGPs, should play a central part in the human rights due diligence process.

The momentum for mandatory human rights due diligence is growing and gaining increasing support from civil society organizations (ECCJ 2019) and trade unions (ETUC 2019) but also from a growing number of businesses (Smit et al. 2020a) and certain business organizations (see, for example, Amfori 2020). Scholars have argued that “the introduction in domestic legislation of the duty to practice human rights due diligence should be seen as an opportunity to counter the potentially negative impacts of economic globalization on human rights and workers’ rights as stipulated in the core ILO conventions” (De Schutter 2020, 3). However, despite the positive effects of the various domestic-level legislative developments in enhancing companies’ accountability for labour issues in their supply chains, the resulting legislative patchwork gives rise to legal uncertainty where companies are subject to multiple or different standards. In this respect, the adoption of a harmonized standard at the regional and international levels would allow for a more consistent approach.

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# 3 Trade arrangements and labour standards in a supply chain world

## Current issues and future considerations

Karen Curtis and Elizabeth Echeverría Manrique

### ► Introduction

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The COVID-19 pandemic has shown – if it was not already evident – that international trade is fundamental to effectively face the global health crisis. The shortage of medical goods has been felt globally, irrespective of a country’s level of development. Scholars and international organizations have raised the alarm indicating that, to deal with the health crisis, countries need to collaborate across borders rather than leaving each to handle the emergency alone (Baldwin and Evenett 2020). The pandemic, coupled with its economic consequences, will exacerbate existing global inequalities (ILO 2020a; Belser 2020). Hence, solutions to a global issue cannot be limited to national responses. Solutions must rather strive to coordinate transparent, rules-based and solidary responses, with a concomitant rethinking of international trade.

Existing multilaterally negotiated instruments shape the way trade is conducted, such as those that are the foundation of the World Trade Organization (WTO). Just as international trade does, these instruments of international economic law have distributional effects (Rodrik 2018).<sup>1</sup> After the decision at the multilateral level to leave aside the inclusion of the so-called “social clause” from the remit of the WTO, as far as the internationally recognized core labour standards were concerned, the International Labour Organization (ILO) was affirmed as the “competent body to set and deal with these standards” (Singapore Ministerial Declaration 1996) and to ensure through its mechanisms a level playing field. In the same declaration, the Ministers espoused the belief that “economic growth and development fostered by increased trade and

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<sup>1</sup> At the aggregate level (on average), trade has had a positive impact on economic growth. However, evidence suggests that “trade liberalization is unlikely to produce beneficial results across all households”. Trade policies, have important impacts on redistribution, benefiting some people but also penalizing others (World Trade Organization and United Nations Conference on Trade and Development 2012, 211). See also chapter 8.

further trade liberalization contribute to the promotion of these standards”. Indeed, trade agreements are instrumental to globalization and have been vehicles to foster the participation of countries at different levels of development in international trade. This has been done, for example, through exceptions to trade rules such as that of “special and differentiated treatment”.<sup>2</sup> Despite these lofty aims, the benefits of participating in international trade have not resulted in reducing inequalities or improving the working conditions for many. The current global pandemic, therefore, provides a perfect opportunity to revisit the question of the linkages between international trade and labour standards.

To date, none of the WTO agreements explicitly refers to or deals with labour commitments, and continues to be a controversial matter for some. At the ILO, no agreement has been reached regarding minimum standards that should condition access to trade with low or free from tariffs or non-tariff measures (Swepston 2019).<sup>3</sup> Instead, a “bilateral surge” (Harrison 2019) has been observed in an increasing number of countries.<sup>4</sup> The “web” of bilateral trade agreements, as noted by Shaffer (2019), intended in part to advance regulatory aspects stalled at the WTO that would lead to “more efficient” global supply chains. The expansion of global supply impacts on working conditions and labour rights challenges the governance of labour as examined in other chapters of this volume. It is recognized in some trade policies, for example in the “Trade for All” strategy, that labour rights violations do occur in global supply chains (European Commission 2015).<sup>5</sup> Countries, in

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2 Developing nations called for “special and differentiated treatment”, considering that the playing field was not the same for nations with different levels of development. Differentiated treatment was agreed for developing and least developed countries to balance the disparities with developed countries in the world trading system (Jones 2019).

3 These agreements are defined as the basis of the current WTO system, and include: multilateral agreements (i.e. the General Agreement on Tariffs and Trade (GATT); the General Agreement on Trade in Services (GATS); the Trade-Related Aspects of Intellectual Property Rights (TRIPS); the related sectoral agreements and annexes, as well as the regulation on dispute settlement and the trade policy review. The only exception is the reference in Article XX of GATT, which sets out as an exception for countries the adoption of restrictive trade measures relating to imports produced by prison labour (Art. XX (e)). Some authors (e.g. Marceau 2009) have considered that, under the same article, other sub-paragraphs can allow for the introduction of labour standards to protect public morals and human, animal or plant life or health (e.g. Art. XX (a) and (b)). For a historical review of the debates on the social clause in international trade, see e.g. Reynaud (2018).

4 The United States, for example, negotiated the North American Agreement for Labour Cooperation (NAALC), a side agreement to the North American Free Trade Agreement (NAFTA), under the Omnibus Trade and Competitiveness Act of 1988 (OTCA), which set out the objective in trade negotiations to promote respect for workers’ rights. Subsequently, other United States Trade Acts have furthered the objectives related to labour and trade. See ILO (2019) for a review of G7 labour-related trade policies.

5 At time of writing, the EU launched consultations as part of a review process of its trade and investment policy. This to ensure that in the recovery period due to the COVID-19 crises the EU continues fostering a sustainable approach to trade and investment and contribute to development, in its single market and abroad (European Commission 2020).

their approaches to trade policy, have also recognized that the benefits of globalization are unevenly distributed. Canada, for example, in its report of 2019 for the Trade Policy Review Body, mentions that the country is “actively promoting and pursuing an inclusive approach to trade as a core approach to address the concerns of a number of individuals that trade, and globalization do not benefit everyone” (WTO Trade Policy Review Body 2019, 23). As a rebalancing measure, countries have recourse to including the promotion and implementation of labour provisions in trade agreements as a trade policy priority. Labour provisions in trade arrangements are seen as one tool used by, and available to, governments to address decent work deficits, including those in global supply chains.

This chapter does not attempt to deal with all trade-related issues brought up by the COVID-19 pandemic or to examine all the possibilities linking trade law and labour standards.<sup>6</sup> It will focus on unilateral and bilateral (or regional) trade arrangements as instruments of international economic law and the labour-related commitments adopted in these arrangements or agreements.<sup>7</sup> It starts with a brief review of the content in relation to labour and the recent developments that may have implications for the labour governance of global supply chains. Next, the chapter will present some cases where labour provisions have been used with a supply chain approach, thus taking into consideration challenges in a specific context and coordinated governance including public and private initiatives with a sectoral focus (Kolben 2017). Bearing in mind specific supply chains, it will discuss, the limitations that may have been observed in relation to their effectiveness in addressing decent work deficits.<sup>8</sup> The chapter concludes with laying out possible options for better linking of international trade rules with labour standards in a world dominated by supply chains and with examining what the role of the ILO could be in this regard.

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6 Marceau (2009), Lazo (2016), and Chartres and Mercurio (2012), for example, have examined different ways by which WTO agreements can be used, as they stand, to push labour standards within the WTO legal framework.

7 Unilateral trade preferences and regional trade agreements (RTAs) are multilaterally agreed exceptions to WTO principles and obligations, in particular the most-favoured-nation (MFN) status (Article I, General Agreement on Tariffs and Trade). Unilateral trade preferences are non-reciprocal preferential schemes generally granted by developed countries to developing countries.

8 In this context, *effectiveness* will be understood as changes related to some extent to trade negotiations or trade arrangements that are in place in: institutions at the national level, including labour laws and policies; improvements in the capacity of stakeholders (including trade unions and employers) to know and promote labour standards; and labour authorities to effectively implement them. Therefore, effectiveness can be understood as multi-layered, with its ultimate outcome reflected in improved working conditions and labour rights (Aissi, Peels, and Samaan 2017). New Zealand has been considered the “champion” of such provisions in the Asia-Pacific region (Engen 2017, 1). New Zealand has agreements with labour provisions, either in the core text or side agreements, with different countries including the Republic of Korea (2015), CPTPP, Malaysia (2010), among others.

## ► 1. Labour considerations in trade arrangements and linkages with international labour standards

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For the past years, developed nations – mainly Canada, the European Union (EU) – and the United States (US) – were the main proponents of labour provisions in trade arrangements.<sup>9</sup> Currently, emerging and developing nations have also integrated labour considerations in their trade agreements or reflected a shift in their views towards more openness in including these provisions (e.g. Mexico). Research has identified different models or approaches (ILO 2016, 2017, 2019). The most frequently studied approaches in the literature are those of the EU and the US, followed by the one of Canada. These three economies have systematically pursued the inclusion of labour provisions in their agreements with other trade partners. Less emphasis has been placed on the models by the European Free Trade Association (EFTA), Australia or emerging countries such as Chile. This may be because the first agreements with labour provisions were concluded precisely by the EU, the US and Canada. Since then, these economies have consistently negotiated labour matters in trade agreements. This is coupled with their relevance as major world traders, with the US being the leading trader worldwide, followed by Asian and the European economies (WTO 2020). While some countries are consistent in the inclusion of labour provisions in their agreements, others, such as Australia, Chile and New Zealand, negotiate on a case-by-case basis, with variations in the commitments adopted and mechanisms for their implementation.<sup>10</sup>

The ILO has identified that, as of 2019, one third of trade agreements in force and notified to the WTO include labour provisions (ILO 2020b).<sup>11</sup> Since the first binding labour provision negotiated in the North American Agreement for Labour Cooperation (NAALC), the language of labour provisions has evolved, moving from merely aspirational commitments or “efforts obligations” to harder legal obligations (ILO 2019a). It has also advanced in terms of the mechanisms for implementation and inclusion of stakeholders. In addition, the language has evolved as a result of the implementation of labour provisions. For

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9 For an overview, see ILO 2019, 19–20.

10 The Chilean approach depends on the trade relations and differences in bargaining power with their trade partners. See further details on Chile, for example, in ILO (2016) and Lazo (2016). See below regarding Australia, which is signatory to the Regional Comprehensive Economic Partnership (RCEP) – with no labour provisions; however, it does have labour provisions, for example, in agreements such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP, in force for Australia since December 2018), the trade agreement with Peru (in force since February 2020) and the agreement with the Republic of Korea (in force since 2014).

11 For more information on the dataset, see ILO (2019, 16).



instance, in US trade agreements, some changes in language can be observed in the recent United States-Canada-Mexico Agreement (USMCA). These changes result from the decision taken by the arbitral panel that was related to the first labour case to reach that stage under a trade agreement: “In the Matter of Guatemala- Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR”.<sup>12</sup>

Interesting developments can be observed concerning agreements between developing and emerging economies in initiatives that include labour concerns. For instance, the Pacific Alliance (2016), a regional integration initiative to which Chile, Colombia, Mexico and Peru are parties, is a “living” agreement, with no references to labour matters in its Framework Agreement. However, labour discussions were held by the Ministries of Labour, and a Technical Labour Group was created at the Eleventh Presidential Summit (2016). The specific mandate for the group, according to some authors, remains uncertain (Palacio Valencia 2018). But broad areas in which the group would work include: youth employment, eradication of child labour, labour migration and social security. In these areas, the cooperation activities and coordination with other international organizations, such as the ILO, are the main means of implementation.<sup>13</sup> It is not yet clear in other recent regional trade agreements (RTAs), involving parties with different levels of development and with different approaches towards trade and labour relationships, whether there would be engagement in matters related to labour standards. This is the case, for example, of the Regional Comprehensive Economic Partnership (RCEP), which does not contain labour provisions. The fact that at least eleven of RCEP signatories have negotiated varying degrees of labour commitments in other agreements (e.g. in the CPTPP, New Zealand – China trade agreement (2008), Republic of Korea – Colombia trade agreement (2016), Chile – Thailand trade agreement (2015)) may have an influence on future developments.<sup>14</sup>

The implementation of labour provisions is pursued through institutional arrangements with governmental participation, as well as by opportunities for dialogue between and including social partners. Most trade agreements with

12 This change was welcomed by the Labour Advisory Committee on Trade Negotiations and Trade Policy (LAC), a body which is part of the US system of trade advisory bodies and that the President of the US (specifically through the US Trade Representative) shall seek information and advice from with regard to trade agreements (19 US Code, §2155). The LAC considered that the text in USMCA moved in the “right direction” but continued to be “problematic” (LAC 2018, 20).

13 See <https://alianzapacifico.net/grupo-tecnico-laboral/>.

14 The RCEP was signed by 15 countries on 15 November 2020. The signing parties include: Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Viet Nam (all these Member States of the Association of Southeast Asian Nations), in addition to Australia, China, Japan, the Republic of Korea and New Zealand. India has so far not signed the agreement. The RCEP aims at “supporting economic recovery, inclusive development, job creation and strengthening regional supply chains ...” (RCEP 2020). For a detailed review of different countries in the Asia-Pacific region and their approaches to labour provisions, see Engen (2017).

labour provisions set forth mechanisms for cooperation. These may include means for building up the capacity of trade partners and their corresponding social partners and, in some cases, other civil society members.<sup>15</sup> A mechanism for dispute settlement is generally available when disagreements related to labour arise between the parties to the agreements.<sup>16</sup> It should be noted that, while most of the literature has focused on the sanction-based approach vis-à-vis the non-sanction aimed approach, labour provisions are also effective through cooperation and stakeholder involvement.<sup>17</sup> For example, some studies highlight how cross-border involvement of civil society actors (including trade union and employers' organizations) in negotiation or implementation of trade agreements has helped to build their capacity through the exchanges of experiences and views generated in cross-border cooperation.<sup>18</sup>

However, challenges to the implementation of labour provisions remain. For instance, fostering cross-border dialogue requires equivalent democratic institutions in partner countries. The absence of these institutions consequently limits the reach of the institutional arrangements provided for in the agreement.<sup>19</sup> In addition, while transparency also remains a challenge (ILO 2017), the EU has announced recent changes in the overseeing of trade agreements as a whole. The proposed changes would allow the social partners and members of civil society to monitor and provide feedback not only on the trade and sustainable development chapters of the agreements, but also on their overall implementation.<sup>20</sup> This could contribute to the analysis of the impacts of entire trade agreements on societies, and not solely of individual chapters, building on information and views that social partners and the broader civil society may provide.

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15 For differences between various approaches, see ILO (2019).

16 Unlike the EU Investor – State Dispute Settlement mechanism included in trade agreements (where an investor can start a dispute directly against a state), disputes related to non-compliance of labour commitments are State-State. However, stakeholders can raise issues through public submissions, which may lead to the request of consultations and the establishment of an arbitral panel or panel of experts (e.g. these submissions are available in Canadian or US trade agreements, and more recently in EU agreements). Also *amicus curiae* submissions in disputes are generally allowed or advice from stakeholders can be sought by the panel. Recent disputes include the trade agreement of the EU with the Republic of Korea, where a panel of experts was established in 2019, following unfruitful consultations held in 2018. The dispute is related to the Republic of Korea's lack of compliance with the labour obligations in the trade and sustainable development chapter, including an "obligation of efforts" on the ratification of the pending ILO fundamental Conventions. A hearing was held in October 2020. A report by the panel should follow. Documents on the disputes are available at: <https://ec.europa.eu/trade/policy/accessing-markets/dispute-settlement/bilateral-disputes/>.

17 See, for example, ILO (2016; 2017).

18 See, for example, Postnikov and Bastiaens (2014).

19 Recent research finds several challenges to implementing these provisions with regard to the independence of the members of the domestic advisory groups, governments' intervention in the functioning of such groups, lack of transparency and lack of coordination in their functioning.

20 See European Commission Services (2018). This approach to civil society monitoring is expected to be included in the agreements with Mexico and MERCOSUR.

As noted earlier, one objective of labour provisions, beyond the aims written in the trade agreements, is a non-explicit objective of rebalancing of the unequal effects of trade agreements. The focus of such provisions is generally centred at a national, legislative and institutional level. Considering that trade agreements are negotiated between states, labour commitments are, therefore, binding exclusively on their signatories. Other beneficiaries from trade agreements, such as multinational enterprises, are not subjects directly of legal labour obligations deriving from the agreements.<sup>21</sup> To date, no labour provision – except for those referencing corporate social responsibility in quite a limited way – has attempted to guide corporate behaviour (Peels, Echeverría Manrique, Aissi, and Schneider 2016). The EU has made efforts to incorporate references to corporate behaviour in supply chains in recently negotiated agreements, but so far no trade agreement in force includes more detailed references.

The trade agreement between the EU and Viet Nam (in force since August 2020) includes the commitment of the parties to enhance the contribution of trade and investment, among other things, to the goal of sustainable development. This goal was to be achieved through the following means: (i) the parties' respective duties – in accordance with their domestic laws or policies – to encourage the development of and participation in voluntary initiatives which complement domestic regulatory measures; and (ii) the promotion of corporate social responsibility, with the limitation that these measures are not disguised restrictions to trade. The latter, in particular, taking into account internationally agreed instruments endorsed or supported by the party, including the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy.<sup>22</sup> Recent available texts of agreements being modernized

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21 It should be noted, however, that there could be legal consequences that may affect enterprises when sanctions are applied as a consequence of a labour dispute under the trade agreement. See below, for example, the possible implications under the USMCA.

22 Article 13.10.2 of EU-Viet Nam free trade agreement states that both parties: "...: (d) recognise that voluntary initiatives can contribute to the achievement and maintenance of high levels of environmental and labour protection and complement domestic regulatory measures; therefore each Party shall, in accordance with its domestic laws or policies, encourage the development of, and participation in, such initiatives, including voluntary sustainable assurance schemes such as fair and ethical trade schemes and eco-labels; and (e) in accordance with their domestic laws or policies agree to promote corporate social responsibility, provided that measures related thereto are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between the Parties or a disguised restriction on trade; measures for the promotion of corporate social responsibility include, among others, exchange of information and best practices, education and training activities and technical advice; in this regard, each Party takes into account relevant internationally agreed instruments that have been endorsed or are supported by that Party, such as the *Organisation for Economic Co-operation and Development Guidelines for Multinational Enterprises*, the *United Nations Global Compact* and the *ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*". <https://trade.ec.europa.eu/doclib/press/index.cfm?id=1437>.

(renegotiated) or not-yet-in-force include specific references to trade and responsible management of supply chains. This is the case with the EU-Mexico trade agreement, which is being modernized as the original agreement in force is from 2000. The available text of the modernized agreement includes obligations for the parties to the agreement to: (i) promote corporate social responsibility or responsible business conduct, including by encouraging the uptake of relevant practices by business in the pursuit of the objective responsible management of supply chains; and (ii) support the dissemination and use of relevant international instruments.<sup>23</sup> These two obligations are not so distant in their content from those agreed in the EU-Viet Nam trade agreement, but they do include commitments that specifically refer “supply chains”, which may, at one point, result in a more targeted general approach to supply chains.

A shift encouraging labour compliance in enterprises might be found in the USMCA. Santos (2019a) considers that the USMCA is a step forward in the “gold standard” of trade agreements, which was previously believed to be the Transpacific Partnership Agreement (TPP)<sup>24</sup>. The USMCA, not only includes a labour chapter, but also the rules of origin chapter comprises labour value content rules applicable to the automotive sector: 40 to 45 per cent of auto content should be made by workers earning \$16 US dollars per hour.<sup>25</sup> The US Department of Labor should enforce this provision, in coordination with Customs Borders Protection and other agencies.

Moreover, it could be argued that the USMCA provides for the most comprehensive framework to date to promote international labour standards at the enterprise level. It establishes a Facility-Specific Rapid Response Labor Mechanism, in addition to the regular dispute settlement mechanism applicable to the whole agreement.<sup>26</sup> Parties set their own procedures for triggering the mechanism, in alignment with the main commitments agreed in the USMCA. For the US, to trigger the new mechanism, stakeholders (including the social partners) may file a “rapid response” or a “labour chapter” petition on possible labour violations to the labour commitments through the *Office of Trade and Labor Affairs*, which follows-up with the recently established *Interagency Labor*

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23 Based on the text of the agreement in principle announced on 21 April 2018, and available at: [https://trade.ec.europa.eu/doclib/docs/2018/april/tradoc\\_156822.pdf](https://trade.ec.europa.eu/doclib/docs/2018/april/tradoc_156822.pdf).

24 Currently, following the withdrawal of the US, the agreement is called Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).

25 Chapter 7 discusses the rules of origin and its relationship with Mexico’s new minimum wages policy and possible effects on specific supply chains.

26 The mechanism, which is also a means to solve disputes, was bilaterally agreed between the United States and Mexico and Canada and Mexico in Annexes 31-A and 31-B, respectively. A “covered facility” means a facility in the territory of a Party that: produces of good or supplies a service traded between the parties; or produces a good or supplies a service that competes in the territory of a Party with a good or a service of the other Party (Articles 31-A.15 and 31-B.15).

*Committee for Monitoring and Enforcement.* It is for the State party to determine activation of the mechanism. The USMCA establishes that a good faith belief from a complainant Party that workers at a facility are being denied from the rights of freedom of association and collective bargaining is sufficient (Article 31-A.2). Unlike other dispute settlement mechanisms observed, not only in agreements negotiated by the US, but also the EU and Canada where trade partners can be held accountable for violating labour standards, this mechanism allows for enterprises to be directly held responsible for denying rights to workers through sanctions.<sup>27</sup> This is crucial, since freedom of association and collective bargaining are recognized as enabling rights. They form the foundation ensuring that worker voice and agency can effectively contribute to the promotion of all fundamental rights at work and other labour rights highlighted in trade agreements.<sup>28</sup>

Besides RTAs, labour considerations are also included in the unilateral trade preferences schemes, but only in those of the US and the EU. The ILO reported (2019) that 112 countries received preferential market access through these arrangements. The US includes among the preference programmes the Generalized System/Scheme of Preferences (GSP) and other programmes with a regional focus, such as the African Growth and Opportunity Act (AGOA). The EU has three schemes, including the GSP, Everything But Arms (EBA) and the GSP+. Developing countries benefiting from these programmes receive preferential treatment and access to US and EU markets when they comply with specific conditions, including those on labour standards. The EU GSP+, for example, requires ratification and implementation of the ILO's eight fundamental Conventions.<sup>29</sup>

Compliance of the beneficiary countries with labour requirements is ultimately reviewed and assessed by the country granting the preferential treatment. However, the ratification and implementation of the fundamental Conventions ensures regular supervision by the robust ILO independent and tripartite supervisory bodies, facilitating a credible international assessment of compliance that is independent of the trading partners. Non-compliance with the requirements set out for preferential tariffs may lead to the suspension, and ultimately the removal, of the programme for the beneficiary

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27 For instance Article 31-A.10 establishes that remedies may include suspension of preferential tariff treatment for goods manufactured at the “covered facility” or the imposition of penalties on goods manufactured at or services provided by the covered facilities. Remedies should be lifted immediately once the “denial of rights” is addressed.

28 See Part I(A)(iv) of the ILO Declaration on Social Justice for a Fair Globalization.

29 The ILO fundamental Conventions are: Forced Labour Convention, 1930 (No. 29); Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); Right to Organise and Collective Bargaining Convention, 1949 (No. 98); Equal Remuneration Convention, 1951 (No. 100); Abolition of Forced Labour Convention, 1957 (No. 105); Discrimination (Employment and Occupation) Convention, 1958 (No. 111); Minimum Age Convention, 1973 (No. 138); and Worst Forms of Child Labour Convention, 1999 (No. 182).

country. Although trade benefits may not apply to all sectors of the economy, case studies show that the possibility of suspending benefits because of non-compliance can raise public awareness and enhance efforts to conform at the country level.<sup>30</sup> Furthermore, stakeholders may participate in the process of providing information to the granting country regarding the labour rights situation in a specific beneficiary country. For instance, in the case of the United States, most reviews of beneficiary status have been triggered by petitions from third parties, including trade unions and other labour organizations.<sup>31</sup>

## ► 2. Effects of labour provisions throughout the supply chain: Mixed and limited results

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Opposition, mainly from developing nations, to the linkage between trade and labour standards included beliefs that the connection between the two could be used as a protectionist measure.<sup>32</sup> The limited empirical evidence in this area shows that, until now, there is no support for this idea (ILO 2016; Carrère, Olarreaga, and Raess 2017). Moreover, in the WTO framework for the granting of unilateral trade preferences (which is regulated by the “enabling clause”<sup>33</sup>), there have been no claims resolved related to the legality – or the lack of legality – of labour “conditionality”.<sup>34</sup> Similarly, however, the effectiveness

30 See, for instance, the case of Uzbekistan in: ILO, OECD, IOM and UNICEF (2019, 54-56).

31 In the case of the United States, as of December 2019, out of the 16 reviews opened exclusively for the GSP programme, seven of them were related to workers’ rights (others concerned intellectual property or market access). Four of them were petitioned by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), one by the International Labor Rights Fund and two by the United States Trade Representative (USTR). The latest petition to review GSP status refers to Azerbaijan for restrictions on freedom of association and a lack of effective enforcement mechanisms to protect worker rights. Among other concerns, labour organizations in Azerbaijan have alleged government interference and severe restrictions of labour inspections, which limit the ability of workers to exercise internationally recognized workers’ rights (USTR 2019).

32 Developing countries have also deemed the inclusion of labour provisions as “unacceptable paternalistic attitudes” (Lazo 2016, 887).

33 This, like provisions in regional trade agreements, constitutes an exception to the most-favoured-nation principle comprised in the GATT, which means that countries should give the same treatment to all trade partners.

34 One exception is the case *European Communities (EC) — India, Conditions for the Granting of Tariff Preferences to Developing Countries (DS246)* on 20 April 2004. India challenged the Drug Arrangements as well as the special incentive arrangements for the protection of labour rights and the environment but announced that it would only proceed against the tariff preferences accorded for combating drugs production and trafficking. For further information on the case see [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds246\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds246_e.htm).

to date of these provisions as a tool to mitigate or prevent a race to the bottom in working conditions and labour rights is also limited, and the results are mixed (see, e.g., chapter 10). Also, there is even less research to provide specific clarity and uniform understanding on the effects of labour provisions on working conditions in global supply chains.

As far as unilateral preferences are concerned, in making assessments, dialogue with the beneficiary country is enhanced to avoid suspension. In general, before trade benefits are suspended, efforts to remedy the situation are required. In early 2019, the EU initiated a procedure to examine Cambodia's trade preferences under the EBA scheme. The rationale behind it was the "serious and systematic violations of human and labour rights" – as to the latter, particularly the freedom of association and collective bargaining.<sup>35</sup> The launch of the procedure triggered a period of intensive monitoring and evaluation by the European Commission. During this period, the EU would still provide support to Cambodia to enable it to adopt measures addressing the concerns and improving the situation on the ground, taking into consideration the economic impacts that a suspension could carry.<sup>36</sup> However, while certain adaptations were made in relation to labour rights, it was considered that Cambodia did not take sufficient steps, especially in the field of civil and political rights, to maintain its trade preferences. This led to the partial (February 2020) and then the temporary withdrawal (in August 2020) of trade preferences for this country.

The European Commission is also in an "enhanced engagement" process with other EBA beneficiaries,<sup>37</sup> namely Myanmar and Bangladesh, where there are serious human rights concerns. The engagement with Bangladesh and Myanmar has focused on compliance with ratified international labour standards, with particular focus on forced labour, child labour, freedom of association and collective bargaining, in addition to other human rights conventions for Myanmar. In the case of Bangladesh, the EU, the US and Canada, established with the government a response to the Rana Plaza disaster in 2013, the "Compact for Continuous Improvements in Labour Rights and Factory Safety in the Ready-Made Garment and Knitwear Industry in Bangladesh" (Sustainability Compact). The Sustainability Compact includes three inter-linked pillars on labour rights, structural integrity of buildings and occupational safety and health, and responsible business conduct (European Commission 2018). The implementation of the Sustainability Compact facilitates the assessment of progress made in relation to these pillars, which echo

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35 Cambodia's exports to the EU makes up 39 per cent of the country's total exports. The main sectors include textile and footwear. Nearly 2 million Cambodians depend on the textile industry, including 750,000 workers (European Parliament 2019).

36 In its reviews, the European Commission takes into account the comments of the supervisory system at the ILO, as well as other review systems from the UN (European Commission 2020a).

37 See European Commission (2020b).

matters being followed by the ILO supervisory bodies in relation to the fundamental Conventions.<sup>38</sup>

With regard to the effects of labour provisions in RTAs, as Kolben (2017) notes, these provisions have been designed to affect the legislation and institutions at the national level, but in their design, a specific focus on supply chains is not evident. Action at the national level is often a lengthy process and does not necessarily bring about immediate results that can be observed down the supply chain. Indeed, research on the effectiveness of labour provisions shows that improvements have been mainly observed in labour law reforms and ratifications of international labour standards. For instance, El Salvador ratified the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), and the Right to Organise and Collective Bargaining Convention, 1949 (No. 98) given the requirements established to access the benefits of the EU's GSP+ (Orbie and Tortell 2009). Moreover, it was only in 2018 that Mexico ratified Convention No. 98 and carried out a Constitutional reform in 2017 and the revision of the Federal Labour Law in 2019. Triggers to these legal changes included the negotiations of the TPP and the renegotiations of the North American Free Trade Agreement (NAFTA),<sup>39</sup> now the USMCA (in force since July 2020). These reforms also respond to long-standing calls for changes in the labour justice system and the return to workers' control over the exercise of their collective rights (Bensusán, 2020). The negotiation of the Comprehensive Economic and Trade Agreement between Canada and the EU, which has been provisionally applied since 2017, has also taken place alongside Canada's ratification of Convention No. 98.<sup>40</sup> Another example is observed in the case of Viet Nam, with an unprecedented labour law reform in 2019 linked to the negotiations of the TPP, the agreement with the EU, and the ratifications of Convention No. 98 in 2019 and No. 105 in 2020. In this respect, it is worth noting the role of the ILO, which has been working with Viet Nam to make progress towards the ratification of ILO fundamental Conventions by its involvement in technical cooperation projects and its provision of technical assistance in the labour law reform process.<sup>41</sup>

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38 In this respect, it is also of note that the ILO's Governing Body has been following up on complaints made under article 26 of the ILO Constitution relating to the non-observance of certain of these fundamental Conventions in relation to Bangladesh and Myanmar, albeit at different stages of the process (ILO 2020c and 2020d). The decision taken at the October–November 2020 Session of the Governing Body when considering whether to establish a Commission of Inquiry for Bangladesh calls for the development of a time-bound roadmap of actions with tangible outcomes to address all the outstanding issues. This may provide external guidance for the parties when assessing the effective implementation of ILO Conventions as called for in their preferential trade arrangement.

39 During the TPP negotiations, bilateral dialogue on labour matters between the US and Mexico took place (Bensusán 2020).

40 See Government of Canada (2017).

41 See, for example, in the case of Viet Nam, ILO (2020c).



As shown by Martens and Gansemans (chapter 10), the civil society mechanisms included in the labour provisions of EU agreements with Central America started to function slowly, but they did have some positive effects in fostering dialogue. The authors also note, however, that in the country they studied (Costa Rica), a supply chain approach is missing, i.e. there is a lack of focus on solving labour issues in specific supply chains affected by trade with the EU. The authors conclude that the EU could have adapted its approach to identify sensitive supply chains to take action in concrete sectors.

Indeed, labour violations within a country may be entrenched and systemic, requiring many years of engagement to resolve. One example is the case of the Dominican Republic, where efforts to remedy labour violations related to forced labour in the sugar-cane sector throughout the supply chain began under GSP (US) monitoring and continued in negotiations and the implementation of the Central America-Dominican Republic-United States trade agreement (CAFTA-DR).<sup>42</sup> Through the mechanism provided by the US GSP, in 1989, a petition was filed by Human Rights Watch (Americas) requesting the withdrawal for the Dominican Republic of trade benefits, arguing that migrant Haitian workers in sugar plantations of the Dominican Republic were forced to work in conditions similar to slavery. This led to institutional and legal changes in this country.<sup>43</sup> The CAFTA-DR negotiations, announced in 2002,<sup>44</sup> prompted further changes not only related to issues in the sugar cane sector, but also concerning the labour ministry in this country as a whole.<sup>45</sup>

In 2011, a public submission was filed by Father Christopher Hartley to prompt the review of the Dominican Republic's compliance with labour obligations with specific focus in the sugar sector under the CAFTA-DR. The public report of the review, issued by the United States Department of Labor (USDOL) in 2013, encouraged: the adoption of firmer political commitments from the national authorities; the initiation of intergovernmental dialogue; discussions with the sugar industry and civil society; and the funding for a technical assistance project to reduce child labour and improve labour rights and working conditions in the Dominican agriculture sectors, including the sugar-cane sector. To date, six reports of progress have been issued by USDOL.

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42 CAFTA-DR is a trade agreement between the US and Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras and Nicaragua.

43 See more on this in Frundt (1998) and Murillo and Schrank (2005).

44 The agreement was signed by all the parties in 2004. However, it entered into force at different times. For El Salvador and the United States, it took effect on 1 March 2006; for Honduras and Nicaragua on 1 April 2006; for Guatemala on 1 July 2006; for the Dominican Republic on 1 March 2007; and for Costa Rica on 1 January 2009.

45 It established a tripartite Joint Protocol to improve the enforcement of labour rights in free trade zones; enacted a law against human trafficking; and instituted a work permit programme for Haitian workers to protect them from deportation and to ensure the payment of fair wages.

The reports show progressive results in the Dominican sugar industry, where some companies have taken steps to resolve situations highlighted in the public submission. For example, the latest report (December 2018) points out governmental efforts regarding inspections in the sector, particularly in the last tiers of the supply chain including small farms. Here, systems are being implemented to allow a better monitoring of hours of work and compensation due, and providing for weekly rest period to workers. Efforts have also been undertaken to convince employers to provide written work contracts. Furthermore, this monitoring is coupled with a technical assistance project to strengthen labour law enforcement and improve working conditions in agriculture. Nevertheless, improvements vary across companies and down the supply chain (USDOL 2018).

From these examples, based on case studies and mostly on qualitative research, one could argue that Kolben's statement holds true. The evidence of the effectiveness of labour provisions in trade agreements to improve working conditions and labour rights, particularly in global supply chains, is still limited but emerging. Already, some studies are showing that labour provisions are not entirely equipped to address all labour issues throughout the whole supply chain. In particular, structural reasons that foster decent work deficits need also to be addressed at the same time. For example, those prevailing in the buyers-driven business model, such as buyers' pressure and pricing squeeze, in the garment industry are illustrated by Rossi (chapter 8).<sup>46</sup>

### ► 3. Rethinking actors' roles and regulatory options: Should the ILO have a more prominent role?

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The multilateral system and its rules are under pressure. International economic law,<sup>47</sup> and related institutions are in a process of transformation to tackle challenges posed by globalization, including increasing trade in services and new technologies.<sup>48</sup> While multilateral institutions are necessary for states and citizens, there is a need to respond to the societal call for more

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<sup>46</sup> See, for example, Smith et al. (2018) and Barbu et al. (2018).

<sup>47</sup> Governing trade, financial, investment and monetary law.

<sup>48</sup> See WTO, Joint Statement on Electronic Commerce, 25 January 2019, WT/L/1056. [https://trade.ec.europa.eu/doclib/docs/2019/january/tradoc\\_157643.pdf](https://trade.ec.europa.eu/doclib/docs/2019/january/tradoc_157643.pdf).

legitimate and inclusive institutions. Tensions between international legal frameworks and domestic social policies and regulations emerge particularly when the policy sphere of a state seems to be constrained by international commitments that do not consider broad-based social inclusion or are not coherent with other international frameworks to ensure minimum floors of protection and redistribution.<sup>49</sup> For example, research has shown that international labour standards, in particular collective bargaining, contribute to reducing inequalities through the sharing of productivity gains and closing gender pay gaps (ILO 2019b; Garner 2020).

Some authors contend the importance of labour provisions in trade agreements, especially when dealing with global supply chains. Rittich (2019) argues that, whereas trade may allow for the diffusion of higher standards, the development of more (trade-enabled) “far-flung supplier networks” is likely to “normalize low labour standards and reliance on precarious forms of work” (Rittich 2019, 205). This is due, she maintains, to structural reasons related to supply chains operation, for instance contractual relations that shield lead firms from the costs and responsibilities derived from employment relationships. However, she also acknowledges the importance of institutions and laws that set the foundation of the workplace and influence the effects of globalization and trade liberalization. Santos observes that “the most powerful responses to redressing the effects of trade on labour, then, may lie in identifying what changes to background laws might improve the resilience of the social benefits of work” (Santos 2019b, 8). He maintains that responses could include making firms accountable for working conditions in their contractors’ and subcontractors’ facilities in supply chains. This could be done, for instance, through the implementation of mandatory due diligence laws (e.g. chapter 2 and chapter 5). In addition, it could take into account in trade agreements other areas, such as government procurement, investment and social dumping remedies, in addition to stronger pressure for labour law reform – as it happened in some of the examples analysed in this chapter, such as the EU-Viet Nam agreement and the USMCA.

Labour provisions emerged mostly as state-centric, putting the main responsibility for compliance on the states. However, they are limited in their implementation, as there is a limited acknowledgement of the different actors and regulators shaping global labour governance. Therefore, they constitute only one tool of a “transnational legal process that includes other efforts” (Shaffer 2019, 27).

As this chapter shows, the available evidence indicates that labour provisions can provide leverage in promoting and enforcing compliance with international labour standards mainly through cooperation, dialogue and

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<sup>49</sup> See for example, ILO (2017; 2019).

participation of the social partners and, in some cases, other members of civil society, and with the assistance of international organizations such as the ILO. Labour provisions cannot act in isolation in dealing with the complexities of labour issues and decent work deficits, particularly in supply chains. A supply chain approach to labour provisions should take into consideration context-specific challenges and incorporate coordinated private and regulatory interventions with a sectoral approach (Kolben 2017).

Experience has also shown that labour provisions are limited and cannot be seen any longer as a sufficient tool to mitigate distributional effects of trade. First, they could only have an effect when trade is happening and when companies are trading. The WTO has estimated that the COVID-19 crisis will continue to slow down trade, with a decline between 13 percent and 32 percent in 2020 (WTO 2020, 29). Second, assuming that trade flows stabilize, it is expected that supply chains will be more regional, which will also increase trade within regions, as has been shown in Asia (UNCTAD 2020; McKinsey Global Institute 2020). This could result in changing or diminishing expectations in relation to labour. In addition, even in the event that labour provisions were proven sufficiently effective at the national level – positively impacting labour regulations and institutions, and at the firm level, improving firm compliance with labour laws and improving working conditions – there would still be a regulatory gap applicable to uncovered regions.

We, therefore, suggest possible solutions for fostering the impact of labour provisions. One of them includes action at the multilateral level. This action is supported by the ILO Centenary Declaration for the Future of Work, adopted by the International Labour Conference at its 108th Session.<sup>50</sup> The Declaration calls for the ILO, grounded in its constitutional mandate, to take “an important role in the multilateral system, by reinforcing its cooperation and developing institutional arrangements with other organizations to promote policy coherence in pursuit of its human-centred approach to the future of work, recognizing the strong, complex and crucial links between social, trade, financial, economic and environmental policies” (Part IV(F)). In some ways this could be seen as the contemporary echo of the call in the Philadelphia Declaration concerning the aims and purposes of the ILO that it is the responsibility of the ILO to examine all national and international policies and measures. In particular, those policies and measures of an economic and financial character, on the basis of their ability to hinder or to promote the fundamental objective of the Organization for peace and social justice.

Taking into consideration that the WTO is already undergoing a process of reform, rethinking how the ILO and the WTO can better collaborate should

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50 [https://www.ilo.org/wcmsp5/groups/public/@ed\\_norm/@relconf/documents/meetingdocument/wcms\\_711674.pdf](https://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_711674.pdf).

be put on the agenda.<sup>51</sup> For instance, promoting the integration of a working group dealing with trade and decent work could be one option. Another possibility could be the systematic discussion of the implementation of labour standards in the work of the Trade Policy Review Mechanism (TPRM) at the WTO. During the TPRM, Members of the WTO are in full freedom to ask questions to the country whose trade policies are under examination, related to “other issues”, including labour practices and regulation. The Secretariat, in different occasions has also included labour references in their reports because it is deemed relevant for economic growth (Lazo 2014, 924). Both a “committee on trade and decent work” at the WTO and including labour discussions under the Trade Policy Review and other relevant contexts have been supported previously by the EU, but no consensus has been achieved among WTO Members (European Commission 2011).<sup>52</sup> In all initiatives that may be undertaken, guiding principles – provided by the ILO Constitution, the 1998 Declaration on Fundamental Principles and Rights at Work and the 2008 Social Justice Declaration – should be taken into account as setting the ground rules. It would be critical for all actors that labour standards are not to be used for protectionist purposes, while ensuring that the violation of the fundamental principles and rights at work must not be invoked as a legitimate comparative advantage.

It is clear, as elsewhere mentioned in this chapter, that labour provisions do not operate alone and cannot, on their own, remedy decent work deficits in global supply chains. Nevertheless, labour provisions have the potential for targeted impact in their sphere of action, which normally, as horizontal to trade agreements, apply to both trade in goods and services. The USMCA, as discussed above, explicitly provides that if a “denial of rights” in a “covered facility” has occurred as per the rapid response panel, one of the remedies that could be applied may include suspension of preferential tariff treatment for goods manufactured at the “covered facility” or the imposition of penalties on goods manufactured or services provided by the “covered facilities”. This can result in reduction of the decent work deficits at the facility in question in reaction to the potential damage of the “sanction” in question, but it may also result in greater prevention and damage control across the sector or territory in order to assure preferential access. This movement towards greater compliance, however, does not address the many challenges that reducing this deficit may encounter. A question for further research could be to determine the extent to which the references to labour provisions – specifically in terms

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51 ILO (2020e, para 24) points out that to date, while the WTO enjoys observer status at the Governing Body and the International Labour Conference, this status is not reciprocal. Collaboration seems to be rather limited.

52 Consideration could also be given to providing the ILO observer status at the WTO and ensuring consultation in dispute resolution provisions. See, for example, on this discussion European Commission (2011).

of particular principles and standards (including international labour standards) – are or are not actually equipped to address in any consistent manner decent work deficits found in global supply chains. This could include, for instance, the use of non-standard forms of work or informal workers, which may, moreover, render invisible gaps to be addressed.

The strength in the provisions and mechanisms to facilitate their implementation is only the first step. The specificities of the context in which they are meant to act reflect what other studies in the present volume also highlight: sectors and systems of industrial relations where anti-union discrimination seems to be part of the culture.

Many have called for a new trade order, with recent events even going so far as calling into question the WTO, the main regulator of trade matters, leaving its future uncertain. Any new path for international economic law, and in particular trade law, will need to recognize that trade, labour and global supply chains are intrinsically linked and must be reinforcing to ensure sustainable development. It is time, therefore, to re-think a “coherent” approach to labour standards, trade and global supply chains. Cho and Rosado-Marzan (2020) propose a standard where the WTO and its members are on board. Regardless of the direction taken, these three interlinked elements cannot be isolated from one another but must form part of the global holistic picture to ensure sustainable development moving forward.

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# 4 A short history and future prospects of cross-border social dialogue and global industrial relations agreements

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## ► Introduction

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In the context of rapid transnationalization of corporate operations, deepening economic integration and parallel concerns about ensuring global respect for fundamental labour rights, governments, workers and businesses have at times responded by augmenting their cross-border collaborative activities. The latter, often premised on multilateral and intergovernmental standards, have increasingly led to the emergence of “hybrid” forms of labour regulation or transnational (self-)regulatory instruments, involving public and private actors and going beyond traditional international labour law (see, for example, Bair 2017; Landau 2019). In this context, a growing literature is studying the particular role assigned to social dialogue actors and initiatives beyond national borders, including value chains. Cross-border social dialogue actors and initiatives not only shape transnational labour (self-)regulation, but also contribute to the emergence of global industrial relations frameworks in the absence of a single multilateral framework regulating social and labour rights.

This chapter discusses some key aspects of the phenomenon of cross-border social dialogue (CBSD) and their outcomes – generically defined here as “global industrial relations agreements” (GIRAs). After this introductory section, section 2 provides working definitions and a snapshot view of the origins of CBSD and GIRAs. Section 3 describes key multilateral and intergovernmental

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<sup>1</sup> The present chapter reflects the views of the author and not necessarily those of the ILO. It draws on earlier research by the author on the topic of cross-border social dialogue as well as on ILO reports and publications in which he acted as main author, including ILO 2019a.

standards that shape the content and process of most cross-border dialogue initiatives. Section 4 discusses the public spaces which contribute to the emergence and consolidation of CBSD, while section 5 focuses on private spaces of CBSD and their voluntary, (self-)regulatory outcomes, such as transnational company agreements (TCAs). Section 6 identifies main “triggers” of CBSD and GIRAs. Section 7 highlights some policy and regulatory developments that are likely to further boost CBSD and GIRAs. The conclusion draws attention to possible scenarios regarding the evolution of CBSD and GIRAs in the context of the COVID-19 pandemic and its aftermath.

## ► 1. Working definitions and origins of cross-border social dialogue

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Cross-border social dialogue (CBSD) refers to the dialogue developed between or among governments, workers and employers or their representatives beyond national borders for the purpose of promoting decent work and sound industrial relations.<sup>2</sup> Such dialogue may focus on the opportunities and challenges associated with a country, economic sector, enterprise, region or group of countries. It may take place within ad hoc or institutionalized fora, mechanisms involving two or more parties or as a result of public or private (self-)regulatory initiatives developed in the context of a dynamic of economic integration and the organization of production along increasingly complex global supply chains (GSCs) (ILO 2019a, 2).

For the purposes of the present chapter, the outcomes of such CBSD are defined as “global industrial relations agreements” (GIRAs). GIRAs do not correspond to traditional forms of “collective agreements” – performing “redistributive” or “integrative” functions, which aim essentially at the redistribution of wealth and the sharing of costs associated with economic activity.<sup>3</sup> Rather, parties to GIRAs usually seek to set up general frameworks of harmonious relations between concerned parties by encouraging them to adopt cooperative (instead of competitive or individualistic) actions towards each other in

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2 The literature uses terms, often interchangeably, such as “global/international social dialogue”, “transnational collective bargaining” and “supranational social dialogue”, even though they refer to different aspects and outcomes. The term “cross-border social dialogue” used in the present chapter is intended to encompass all of these.

3 Distributive bargaining implies a negotiation process over the distribution of a fixed sum, where a gain for one side marks a corresponding loss for the other. Integrative bargaining implies a negotiation process in which both sides look for ways to “expand the pie” – that is to say, to develop solutions leading to benefits for both sides.

order to strengthen socially sustainable development. They perform, in other words, a function of “attitudinal structuring”.<sup>4</sup>

With regard to the process, GIRAs are more often than not consensus driven. They rely more on deliberation and less on negotiation and are not enforceable in the same way as, for example, national collective agreements. Their successful design and implementation depends heavily on awareness-raising mechanisms and “name and shame” techniques, rather than on legally binding and sanction-driven procedures (Papadakis 2012). As a result, it may be argued that CBSD may be most suitable for particular enterprises, such as multinational enterprises (MNEs) with a tradition of social dialogue, and specific sectors, like big-name brand manufacturers vulnerable to public pressure (which will be discussed in section 6). In terms of content, GIRAs are often based on public multilateral and intergovernmental standards, notably the core international labour standards (ILS) of the International Labour Organization (ILO) and, more recently, standards promoting human rights “due diligence” – a point that will be taken up in section 3 below.

CBSD is not new. Since 1919, the practice of bringing representatives of governments, employers and workers together at the international level to seek consensus-driven solutions to socio-economic issues has become a key feature of the multilateral system, originating with the creation of the ILO (ILO 2018a, 3). Today, CBSD continues in the executive bodies of the ILO, in global, sectoral and regional meetings. Such meetings and their outcomes (such as declarations, codes of practice, guidelines, conclusions and points of consensus) are intended to shape attitudes, policies and regulations at all levels. The agenda of ILO meetings is itself the outcome of cross-border social dialogue.<sup>5</sup>

The spaces for CBSD have multiplied over the past century in response to deepening globalization and regional integration. CBSD is emerging and consolidating in both public (section 4) and private (section 5) governance spaces, as globalization continues to raise three broad challenges: (a) an ineffective implementation and enforcement of national labour laws and regulations in many countries, which prevents the improvement of working conditions that could be possible as a result of increased participation in GSCs; (b) the

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4 In the sense of Walton and McKersie (1965, 185), for whom “attitudinal structuring” encompasses all the actions and attitudes of the parties to a negotiation. They are either consciously or unconsciously aimed at shaping the opponent’s behaviour, that is, feelings of trust towards the other, beliefs about the other’s legitimacy, feelings of friendliness towards the other and motivational orientation.

5 For instance, sectoral meetings, approved by the ILO’s Governing Body every two years, are the result of social dialogue in “sectoral advisory bodies”, which are composed of governmental regional coordinators and other government representatives; coordinators from the International Organisation of Employers (IOE) and the International Trade Union Confederation (ITUC); and representatives of the relevant Global Union Federations (GUFs) and IOE sectoral partners.

relocation of some particularly labour-intensive processes from developed economies to countries with lower labour costs, which intensifies the fear, or reality, of “social dumping”;<sup>6</sup> and (c) widening income inequality and a declining wage share in many countries’ gross domestic product, related in large part to the erosion of collective bargaining and the deteriorated climate of industrial relations in these countries (ILO 2018d, 4). CBSD and GIRAs are expected to complement, not replace, national regulation and efforts by governments and the social partners to address these gaps at country level.

It should be also noted at the outset that most CBSD initiatives and their outcomes largely benefit the first-tier suppliers in global value chains. Much less is known on how they serve lower tiers, let alone specific categories of workers and business units operating in the (huge) informal sphere of the global economy, where, more often than not, labour law coverage remains problematic.

## ► 2. Multilateral and intergovernmental standards and processes shaping cross-border social dialogue

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The process of CBSD and the content of GIRAs draws largely on multilateral and intergovernmental (soft law) instruments aimed at contributing to a fairer globalization in increasingly interlinked economies. Their main focus is on strengthening the principles governing the behaviour of multinational enterprises (MNEs), which, together with their affiliates and suppliers, are major vectors of globalization.<sup>7</sup> Importantly, these instruments not only establish benchmarks for good management practices but also come with a follow-up mechanism that is often premised on CBSD as a sine-qua-non for ensuring effectiveness.<sup>8</sup> In their more recent version, these instruments incorporate the notion of “due diligence”, which further specifies business

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6 The term “social dumping” is used to refer to the use by companies or employers of labour which is cheaper than usually available at their site of production or sale through, for instance, employing migrant or informal workers or through moving production to countries or special areas with low wages, sub-optimal working conditions or weakly respected labour rights. For an in-depth analysis of social dumping, see Alber and Standing (2000).

7 Foreign direct investment (FDI) flows are driven by over 80,000 MNEs, which, together with over 800,000 foreign affiliates, employ more than 75 million people throughout the world. One in five jobs created globally is the result of MNE activity (ILO 2019a, 3).

8 For an analysis of follow-up mechanisms based on reporting by governments, employers and workers’ organizations to the ILO and beyond, see Tapiola (2018).



engagement in the area of human rights with regard to both process and content – as shown below.

The United Nations (UN), in the early 1970s, began discussing guidance to enhance the positive social and labour effects of the operation and governance of MNEs – and indeed the governance of globalization – while mitigating their negative impact. These discussions paved the way for the adoption of two important (soft law) instruments addressed to MNEs: the OECD Guidelines for Multinational Enterprises (OECD Guidelines) by the Organisation for Economic Co-operation and Development (OECD 2011) and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE Declaration) (ILO 2017b), originally adopted in 1976 and 1977, respectively. Both instruments include follow-up mechanisms based on institutionalized reporting by and dialogue between governments, employers and workers' organizations.<sup>9</sup>

The United Nations Global Compact (UNGC), established in 2000, invited businesses to uphold principles based on internationally agreed standards, notably the key principles set out in another seminal soft law instrument, the ILO Declaration on Fundamental Principles and Rights at Work (ILO 1998), which is founded on the contents of the four categories of core principles and rights: freedom of association and the right to collective bargaining; the elimination of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in employment and occupation.

In 2011, the United Nations Human Rights Council endorsed the UN *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* (UNGPs) (United Nations 2011). The UNGPs set out the duty of States to protect human rights (PROTECT), the responsibility of all business enterprises to comply with all applicable laws and to respect human rights (RESPECT) and the need for rights and obligations to be matched with appropriate and effective remedies when breached (REMEDY). In order to identify, prevent, mitigate and account for how they address their human rights impacts, the UNGPs call on enterprises to carry out human rights due diligence. This process should draw on internal and/or independent external human rights expertise, and involve "meaningful consultation with potentially affected groups and other relevant stakeholders, as appropriate to the size of the enterprise and the nature and context of the operation" (United Nations 2011, 19).

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<sup>9</sup> For instance, in the OECD Guidelines, National Contact Points (NCPs) are called upon to facilitate dialogue between the parties on questions or complaints relating to business conduct in OECD and non-OECD countries. The Business and Industry Advisory Committee (BIAC) and the Trade Union Advisory Committee (TUAC) meet the NCPs biannually to exchange experience on the implementation of the Guidelines and report to the OECD Investment Committee (OECD 2011).

The revised ILO's MNE Declaration of 2017<sup>10</sup> is aimed, among other things, at promoting sound industrial relations in multinational and national enterprises throughout their operations, including in supply chains (ILO 2017b). To achieve this aim, the MNE Declaration addresses recommendations to governments (home and host), enterprises (multinational and national) and social partners. It also promotes CBSD by urging governments to ensure that social partners with representation in MNEs can affiliate with international employers' and workers' organizations of their own choosing; encouraging MNEs to hold consultations with governments and representative national employers' and workers' organizations; and asking governments not to restrict the entry of employers' and workers' representatives from other countries at the invitation of local or national organizations for consultation on matters of mutual concern. Furthermore, consistent with the UNGPs, the MNE Declaration emphasizes that all enterprises should carry out human rights due diligence with the meaningful consultation of relevant stakeholders, including workers' organizations, taking into account "the central role of freedom of association and collective bargaining as well as industrial relations and social dialogue as an ongoing process" (ILO 2017b, para. 10(e)).

It is important to note that an emerging national, (sub)regional and international (hard law) due diligence regulation is likely to further boost CBSD – this point will be addressed briefly in section 7.

### ► 3. Public spaces contributing to the emergence and consolidation of CBSD and GIRAs

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The establishment of multilateral organizations and other supranational entities has been accompanied by new social dialogue institutions and processes to strengthen democratic governance on socio-economic policy issues. New roles of the social partners and institutionalized social dialogue mechanisms are found in (sub)regional integration initiatives such as the European Union (EU), in bilateral and plurilateral trade agreements, but also in influential intergovernmental fora such as the G20 or the G7.

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<sup>10</sup> The fifth and most recent revision of the MNE Declaration was adopted by the ILO Governing Body in March 2017.

### 3.1 Regional integration

The EU's experience of CBSD remains by far the deepest of any other multi-lateral economic integration initiatives, with results at the cross-industry, sectoral and enterprise levels. Since 2012, the Treaty on the Functioning of the European Union (TFEU) has provided a legal basis for EU-level social dialogue and an institutional role for the social partners.

Cross-industry European social dialogue has resulted in numerous GIRAs, such as framework agreements that have been transformed into EU directives (on parental leave, part-time work and fixed-term work) as well as various autonomous “framework agreements”,<sup>11</sup> which have been implemented by the social partners themselves. Cross-industry dialogue has also resulted in a number of framework actions, as well as joint opinions and declarations intended to influence EU policies and actions.<sup>12</sup> At the company level, CBSD takes place in European Works Councils (EWCs), which are fora for transnational employee representation for the purpose of information sharing and consultation in MNEs operating in EU Member States.<sup>13</sup> The scope of the information and consultation procedures in EWCs is limited to transnational issues, such as the situation and probable trend of employment in the company, substantial organizational changes, transfers of production, mergers and collective redundancies.

Similar – albeit more embryonic – initiatives institutionalizing actors and institutions of social dialogue at (sub)regional level are being mapped in other continents, such as MERCOSUR in South America, the Economic Community of West African States (ECOWAS) and the Southern African Development Community (SADC) in Africa. In Asia, while the integration process of the Association of Southeast Asian Nations (ASEAN) countries in trade, investment and the free movement of skilled labour commenced in 2015, there is no institutionalized space for CBSD at this level, apart from some emerging

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11 For example, the agreement on active ageing and an intergenerational approach of 2017, the agreement on inclusive labour markets of 2010 and the telework agreement of 2002.

12 At the sectoral level, by early 2020, there were 43 sectoral social dialogue committees involving sectoral social partners. Over 1,000 joint texts relevant to specific sectors had been adopted in the form of joint statements, opinions, policy guidelines, declarations and framework agreements, with some leading to legislative action. The latest “joint recommendation” agreed upon by sectoral social partners of the temporary agency work industry (WEC-Europe and UNI-Europa) is on “Protecting workers in the COVID-19 pandemic, safeguarding work and preparing for an inclusive economic and social recovery”, 29 April 2020. <https://www.weceurope.org/uploads/2020/04/WEC-Europe-UNI-Europa-Joint-Recommendations-final-29-April-2020.pdf>.

13 By early 2020, MNEs had concluded 1,578 EWC agreements, covering an estimated workforce of 17 million people. See <http://www.ewcdb.eu/stats-and-graphs>.

bipartite social dialogue, especially on issues related to international migration (ILO, 2019a, 21-22).<sup>14</sup>

### 3.2 Bilateral and multilateral trade agreements

The negotiation and implementation of bilateral and plurilateral trade agreements provide opportunities for cross-border dialogue, particularly when the agreements contain labour or sustainability clauses, as is increasingly the case.<sup>15</sup> Over two thirds of such provisions refer to ILO instruments, and most include legally binding commitments to fundamental principles and rights at work. Clauses contain provisions requiring or allowing social dialogue in various forms to promote the effective implementation and monitoring of commitments (ILO 2019a, 23–24). At the same time, references to responsible business conduct and instruments, such as the ILO MNE Declaration mentioned above, are also being promoted through EU trade agreements (ILO 2020, 20–21).

The approaches of trade agreements to CBSD vary. Agreements concluded by Canada and the United States and their trade counterparts envisage consultations with any concerned entity, including national employers' and workers' organizations, on the implementation of their labour provisions and on failure by the parties to honour their labour commitments. Public submissions and joint solutions may also rely on trade union dialogue and collaboration across borders.<sup>16</sup>

EU trade agreements provide for special consultative committees, with the involvement of the social partners, to discuss economic, social and environmental issues. For instance, since 2011, the EU–Republic of Korea Free Trade Agreement (FTA), which includes commitments to labour and environmental standards, has set up “monitoring mechanisms”. These include representation from labour and business and a “Civil Society Forum” that convenes on

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14 However, in 2016, a first bipartite “joint statement” on migrant worker flows in the ASEAN region (hosting some 9.5 million international migrants) was signed by a regional Trade Union Council (with observer status in the ASEAN Free Trade Area) and its counterpart, the ASEAN Confederation of Employers. The text identifies joint priorities, for instance in the areas of mutual recognition of skills for medium- and low-skilled workers, social protection for migrant workers, ethical recruitment and the protection of workers throughout the migration cycle.

15 As of 2019, out of some 300 regional trade agreements in force and notified to the World Trade Organization (WTO), about one third included trade-related labour provisions, according to the ILO's Research Department calculations using the WTO Regional Trade Agreements Information System (RTA-IS).

16 For instance, under the Canada–Colombia Agreement on Labour Cooperation, a public submission was filed in 2016 as a result of the collaboration between trade unions in the two countries.

a yearly basis in order to conduct CBSD on sustainable development aspects of trade relations between the parties.<sup>17</sup>

Despite the existence of mechanisms to promote social dialogue in trade agreements, the use of provisions and mechanisms that promote the participation of stakeholders is still very limited in practice.<sup>18</sup> Ongoing efforts, driven especially by the European Union, are aiming to address this gap.<sup>19</sup>

### 3.3 Other intergovernmental fora

The G20 has two formal structures involving the social partners: the Labour 20 (L20), which brings together trade unions from G20 countries and global unions; and the Business 20 (B20), which represents employers and the business community. The B20 and L20 hold consultations with G20 leaders and ministers of finance and labour and employment, which have led to joint B20–L20 statements (in 2018, for example, on skills and social protection for inclusive growth). Such joint statements manifest a shared commitment to social dialogue as a core principle of the G20 process. In 2017, the G20 Leaders’ Declaration emphasized the responsibility of businesses to exercise due diligence, report on the findings and provide access to remedies in GSCs (G20 2017). Similar bilateral statements are adopted also at the G7 level. Under the French Presidency of the G7 in 2019, the first G7 Social Tripartite Declaration was adopted, with a focus on the need to “promote enabling environments for job creation and decent work, economic and sustainable growth as well as equal opportunities and reduced inequalities”.<sup>20</sup>

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17 <https://www.eesc.europa.eu/en/sections-other-bodies/other/eu-korea-domestic-advisory-group>.

18 A key challenge is to enhance accountability, for instance, by informing stakeholders on how their input has been taken into consideration in the decision-making process. Cross-border collaboration remains a challenge due to the lack of capacity of counterpart institutions in some countries and the insufficient resources allocated for cross-border activities (ILO 2016a, chapter 3; ILO 2017a).

19 Such efforts are observed, for instance, during the EU-MERCOSUR negotiations over a new FTA or for modernizing existing ones (e.g. EU-Mexico or EU-Chile). Also, in some EU FTAs that are in force, some resources are earmarked for improving participation in the “civil society fora” established for monitoring the “sustainable development” chapters of FTAs (European Commission, 2018).

20 Signed between G7 members and international social partners represented by the IOE, the ITUC, the TUAC and the BIAC.. See [https://travail-emploi.gouv.fr/IMG/pdf/g7\\_social\\_tripartite\\_declaration\\_final.pdf](https://travail-emploi.gouv.fr/IMG/pdf/g7_social_tripartite_declaration_final.pdf).

## ► 4. Private spaces for cross-border social dialogue and (self-)regulation

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### 4.1 Corporate social responsibility (CSR)

In parallel with public (inter-state) regulatory action to ensure respect for labour rights and intergovernmental guidelines for responsible business conduct, many companies have developed corporate policies and management systems since the 1970s to promote compliance with the law, ethical standards of conduct and respect for international principles, over and above their legal obligations. Under the broad terms of “corporate social responsibility” (CSR), “responsible business conduct” (RBC) and “sustainability”, companies have taken many actions and developed various instruments and initiatives, including corporate codes of conduct, supplier codes of conduct and multi-stakeholder initiatives (ILO 2019a, 40–44).

These company-driven initiatives and actions often use as benchmarks or reference points authoritative intergovernmental instruments and frameworks, notably the UNGPs and the ILO MNE Declaration. Many private compliance initiatives include multi-stakeholder dialogue in their adoption or implementation phases to “identify, prevent, mitigate and account for how they address human rights impacts” of business enterprises, which imply broad consultation with all those potentially affected by the operations of companies, including, although not exclusively, workers and trade unions.

Even though the bulk of CSR and RBC practices are premised on a logic that privileges “unilateral” enterprise action or “civil dialogue”, a number of CSR codes explicitly envisage social dialogue with workers’ organizations, including involvement in their implementation.<sup>21</sup> Similarly, many multi-stakeholder initiatives promoting labour standards bring together business enterprises, trade unions and NGOs and have clear guidelines on stakeholder participation. They have triggered dynamic dialogue and (self-regulation)

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21 For example, in its Human Rights Progress Report, Unilever refers to a range of formal and informal consultations with trade unions, including twice a year through a forum with the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers’ Associations (IUF) and the IndustriALL Global Union, where local and global rights issues, and new developments, policies and programmes affecting workers are discussed. See *Unilever Human Rights Progress Report 2017*, p. 39. [https://www.unilever.com/Images/human-rights-progress-report\\_tcm244-513973\\_en.pdf](https://www.unilever.com/Images/human-rights-progress-report_tcm244-513973_en.pdf).

processes which, in some cases, have evolved into independent international bodies with a strong trade union presence and CBSD components.<sup>22</sup>

The role of trade unions and workers' representatives especially in the follow-up phase of codes of conduct, notably for suppliers, is not very evident; neither is the role of social dialogue institutions. Meanwhile, there is a lot of space for CSR initiatives to develop complaint and conflict resolution mechanisms which integrate local and global employers' and workers' organizations, not least in view of improving their implementation effectiveness (Marx and Wouters 2016). Indeed, the minimal role assumed by organized workers in CSR (in contrast to NGOs and private auditing firms usually found in most CSR processes) can be associated with the suboptimal outcomes in the process of auditing and monitoring CSR results and may be seen as a challenge for their effectiveness (ILO 2016c, para. 139). At the same time, little attention to the promotion of freedom of association (an enabling right) is likely to have an adverse influence on other dimensions of CSR (Delautre and Abriata 2018).

## 4.2 Transnational company agreements (TCAs)

As a result of campaigns by international trade unions or at the initiative of big enterprises with a deeply rooted social dialogue culture,<sup>23</sup> some MNEs and global unions have increased cross-border collaboration through negotiating and signing transnational company agreements (TCAs). Such agreements include international framework agreements (IFAs) between Global Union Federations (GUFs) and MNEs and European Framework Agreements (EFAs) between MNEs and European trade union federations and/or European Works Councils. Between 1988 and early 2020, some 325 TCAs were signed by over 200 enterprises, mostly European-based MNEs, especially from France and Germany.<sup>24</sup>

TCAs are distinct from labour relations at the global level stemming from CSR initiatives. Above all, they are joint management-union initiatives which

<sup>22</sup> For example, the Ethical Trading Initiative (ETI), an alliance of companies, trade unions and NGOs, promotes respect for workers' rights around the world. Participant companies are called upon to abide by the ETI Base Code of labour practices, which is based on ILO standards, and to commit that all their suppliers will work towards its implementation.

<sup>23</sup> Bourguignon and Hennebert (chapter 11) describe the motivations to engage in an international framework agreement (IFA) since the adoption of the first IFAs have evolved. Today, a key motivation seems to be a shared willingness to prevent industrial conflict.

<sup>24</sup> Data collected by Planet Labor (<https://www.planetlabor.com/en/tag/international-framework-agreements/>) and the EC-ILO database on TCAs (<https://ec.europa.eu/social/main.jsp?catId=978&langId=en>) show that over 85 per cent of IFAs have been signed by some European MNEs. Only 26 non-European MNEs have signed IFAs, namely, six from Brazil, five from the United States, three from Indonesia, Japan and South Africa, and one each from Australia, Canada, Malaysia, New Zealand, Qatar and the Russian Federation.

entail corporate recognition and the participation of GUFs or European Industry Federations as core partners in the negotiation and implementation of agreements. They often include direct references to ILO Conventions, and they focus predominantly on creating conditions conducive to the organization of workers, trade union activity and collective bargaining down the value chains of MNEs concerned by these agreements. TCAs, particularly IFAs, increasingly refer to GSCs and contain provisions that state that sub-contractors and suppliers must comply with the IFA (ILO 2018a, 17).

TCAs have a proven record of helping to solve local conflicts down the value chains of MNEs through joint grievance mechanisms established by the agreements; they trigger trade union campaigns that may lead to an increase in the unionization rate; and they boost collective bargaining for trade union recognition and the improvement of working conditions (Papadakis 2011b). Such impacts are mostly observed in subsidiaries and first-tier suppliers of the MNEs. Little is known about their impacts on second- and third-tier suppliers, mainly due to a lack of supply chain transparency and the dearth of resources for the effective implementation and monitoring mechanisms (ILO 2018a, 59). The impacts of TCAs on other core labour rights, such as the elimination of child labour and forced labour, and non-discrimination, are not well documented either (ILO 2019a, 38).

It should be noted that TCAs cannot be defined as “collective agreements” of a global scale, according to the ILO definition of collective agreements (Papadakis, Casale, and Tsotroudi 2008). Indeed, the only fully-fledged global collective agreement between organized international social partners (ship-owners and seafarer representatives from across the globe) can be found in the maritime transport sector – an agreement regulating transnationally wages and other terms and conditions of work, including maternity protection. This important example of CBSD will be discussed in the following section.



## ► 5. Key incentives and developments shaping the evolution of cross-border social dialogue and their outcomes

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Nowadays, few actors engaged in public or private socio-economic governance – such as governments, MNEs, trade unions or employers’ organizations – would contest global value chains the need for CBSD when it comes to promoting decent work and sound industrial relations in. However, the degree of engagement in such dialogue processes and the depth of their outcomes vary.

Experience shows that there are three main – often interconnected – incentives or “triggers” that boost actors’ awareness of the need to join CBSD and to reach tangible GIRAs. At the risk of oversimplifying, these include: (a) the “shadow of regulation”; (b) “protest and mobilization” campaigns by global unions on the occasion of major disasters or public discontent; (c) a federating theme; and (d) the industrial relations “culture” of the concerned company, or of the country where it operates. “Successful” cases of CBSD and agreements may imply a combination of all the above triggers. (The latter are used here as *Idealtypus* in a Weberian logic).

### 5.1 The shadow of public regulation

The readiness of actors to engage in CBSD and (self-)regulation can be boosted when actors perceive a regulatory threat by an external authority, especially when binding public legislation is meant to be pre-empted. For instance, the shadow of regulation functioned as a key trigger for the first TCAs, signed in the late 1980s.

Efforts by the International Trade Secretariats (the predecessors of GUFs) to negotiate global company agreements directly with MNEs, including those on wages and employment conditions, date back to the 1960s. However, by the early 1970s, with the exception of a few successes of transnational union action (for instance, the first transnational solidarity strikes), no MNE had accepted to join in CBSD, let alone negotiate global agreements. Unions had to wait until the 1980s for the first TCA to emerge when a pro-active European Commission announced its intention to make negotiations with the central management of MNEs compulsory in the case of a planned transnational restructuring – the so-called “Vredeling directive” draft of 1980 (da Costa and Rehfeldt 2008).

It was in the context of this political debate at the European level (experienced as a threat by some enterprises and as an opportunity for many unions), that the first MNEs – initially from France and later on from Germany – accepted to participate in CBSD and, indeed, to sign the first TCAs. This may explain why the majority of the first TCAs were initiated by the central management of the MNEs (Rehfeldt 1998).

The regulatory threat by the European Commission (EC) and the ensuing TCAs made numerous important contributions to the establishment and strengthening of CBSD and GIRAs: first, MNEs were brought to the table of CBSD; second, for the first time, the central management of MNEs formally recognized international global trade union organizations as their bargaining partners at the cross-border level (thus TCAs performed as “recognition agreements” (Papadakis 2011a)); third, TCA led to the establishment of bilateral “liaison committees”, transnational employee representation with information rights, “European group committees” and similar bodies; fourth, TCAs paved the way for the adoption of the EWC directive in 1994, which formalized transnational employee representation, further boosting the practice of TCAs.

## 5.2 A transnational trade union protest and mobilization campaign following a major disaster or public indignation

Serious, sudden and highly visible disasters have been another factor that has in the past led actors to engage in CBSD and reach important agreements.<sup>25</sup> The Accord on Fire and Building Safety (the Accord), for instance, often viewed by the industrial relations literature as one of the most promising developments in the area of global industrial relations, was a response to the terrible disaster that hit Bangladesh on 24 April 2013: the collapse of the Rana Plaza building in Dhaka (hosting five garment factories), which killed at least 1,132 people and injured more than 2,500.

Following this disaster, a multi-company bargaining activity was launched, which led, with ILO facilitation, to the signing of the first legally binding sectoral IFA between two Global Union Federations (IndustriALL Global Union and UNI Global Union) and several MNEs (220 apparel buyers covering over 2 million workers) with production facilities in Bangladesh (1,700 factories).

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25 As explained elsewhere (Papadakis 2009), information and mobilization campaigns by trade unions at various levels (sometimes in alliance with NGOs) in favour of core labour rights and cross-border workers’ organization in the global value chains of MNEs, have been a major “civil pressure” factor that seems to have motivated company managers to adhere to CBSD and sign IFAs.

The Accord has not been the only instance of such global mobilization and sectoral agreement. An earlier example has been the international campaign against child labour in the Sialkot soccer ball industry in Pakistan. This case was one of the first illustrations on how a trade union initiated awareness-raising campaign, using “name and shame” techniques of transnational advocacy networks (Keck and Sikkink 1998), can effectively pressure MNEs and governments to be part of CBSD processes and reach agreements on workers’ rights.

On the occasion of a European soccer championship scheduled in England, the International Confederation of Free Trade Unions (ICFTU) used this event as an opportunity to launch an international campaign against child labour in the soccer industry. The campaign, built on a collaboration between the International Trade Union Confederation (ITUC), local and international NGOs and the ILO, and accompanied by a media campaign that included photographs and films of children stitching balls with the European championship logo on it, shocked many throughout the globe.

This campaign paved the way, in 1997, to negotiations among the Sialkot Chamber of Commerce and Industry, the ILO and UNICEF, various Pakistani NGOs, the Government of Pakistan, Save the Children UK, and the World Federation of Sporting Goods Industry (WFSGI). It resulted in the signature of the “Atlanta Agreement”, which committed the signatory parties to work together on eliminating child labour from the football industry in Sialkot (Baccaro 2001, 21–23).

### 5.3 A federating theme/a shared interest/a common enemy

As stated above, the maritime sector is the only sector covered by a fully-fledged global collective agreement between international social partners – that is, shipowners represented by the International Maritime Employers’ Committee (IMEC) and seafarer representatives from across the globe represented by the International Transport Workers’ Federation (ITF).

The agreement regulates wages and other terms and conditions of work, including maternity protection, and has strong links with ILO standards.<sup>26</sup> The agreement, first negotiated in 2001, has been regularly re-negotiated and updated under the auspices of what is now known as the International

26 The Seafarers’ Wages, Hours of Work and the Manning of Ships Recommendation, 1996 (No. 187), [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:R187](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R187); and the Maritime Labour Convention, 2006, as amended (MLC 2006), [https://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---normes/documents/normativeinstrument/wcms\\_554767.pdf](https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/normativeinstrument/wcms_554767.pdf).

Bargaining Forum (IBF).<sup>27</sup> Once the agreement is negotiated, ITF affiliated unions begin local negotiations with companies in their country, resulting in national industry or company level collective agreements. While entitlements may vary slightly, all agreements must be within the framework of the global agreement agreed for the period.

This global sectoral agreement finds its roots in the 1990s, which witnessed a progressive consensus among global social partners on the need to launch collective bargaining of a global scale in the maritime sector. Shipowners had previously formed the IMEC for the purpose of negotiating a global industry pay agreement with the ITF, for seafarers working aboard “flag of convenience” (FOC) ships – that is, ships profiting from a global maritime regime which allows shipowners to avoid unions and regulation by flagging their vessels in countries with weak regulatory systems.<sup>28</sup>

The FOC was the key federating theme (or a “common enemy”) between a majority of shipowners and seafarers. For the former, FOC represented the epitome of unfair competition by rogue shipowners who were disrespectful of minimum pay and of the regulations concerning working and occupational safety and health (OSH). For the latter, FOC led not only to bad working and pay conditions and dangerous workplaces, but also to a downward spiral of social conditions prevailing mostly in the European maritime sector.

## 5.4 The industrial relations culture and environment

Finally, cultural reasons seem to constitute another key factor during the decision-making process of an MNE that engage in CBSD and GIRAs. Such reasons are associated either with the industrial relations culture prevailing in the country of origin of the MNE or with the industrial relations culture in the country where the company operates (ILO 2019a, 64).

Early observations on the reasons explaining the adoption of GIRAs by MNEs, showed that GIRAs tend to be an extrapolation of well-established German, French and Nordic systems of industrial relations.<sup>29</sup> Industrial relations in

27 With ILO facilitation on establishing the minimum wage in the sector, within the Joint Maritime Commission (JMC), the ILO’s only permanent bipartite standing body.

28 The ITF had unilaterally imposed a uniform labour cost scale on ships in internationally competitive market segments (namely, FOCs), prompting employers to organize themselves for bargaining purposes in an attempt to influence labour costs (Lillie 2004).

29 A large-scale survey of several companies conducted in 2007 showed that US-headquartered MNEs were the most likely to have a code but were the least likely to have negotiated it with workers, whereas German and Nordic firms were the most likely to have negotiated a code (such as an IFA) but were among the least likely to have a code in the first place, reflecting different industrial relations cultures (Edwards et al. 2007).

these countries are based – contrary to the industrial relations system of the United States, for instance – on institutionalized incentives for collective representation and industrial action (for example, tripartite dialogue, bargaining at industry level and enterprise regulation through works councils) aimed at ensuring that social dialogue between the social partners promotes and protects labour standards, and contributes to a sound redistribution of the wealth generated by economic activity.<sup>30</sup> The management of MNEs established in these countries internalizes this culture and may be more prone than others to reproducing it elsewhere through processes of social dialogue.

A recent illustration can be found in the aftermath of the Rana Plaza catastrophe in Bangladesh described above, when, in parallel with the Accord (which involved global and local social partners, MNEs and the public authorities), an Alliance for Bangladesh Worker Safety was launched by mainly North American MNEs, which did not involve trade unions, let alone the signing a binding GIRA (ILO 2019a, 46).

This being said, the environment within which a company actually operates would largely determine the degree of commitment to adopted GIRAs: it is not rare that some of the largest and best-known multinationals headquartered in countries respectful of systems of collective representation and bargaining adopt a different stance towards social dialogue when the dominant business culture in the country of operation is more voluntaristic.<sup>31</sup> In such instances, even successfully adopted GIRAs risk being ineffective and even denounced on these grounds.<sup>32</sup>

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30 For a comprehensive overview of the historical evolution of industrial relations and the main differences between the United States and European industrial relations cultures, see Bamber et al. (2016).

31 For instance, Fichter and Stevis (2013) describe the observed resistance to implementing some IFA clauses by local management of European MNEs operating in the United States.

32 For example, in early 2019, IndustriALL suspended its long-standing GFA with Volkswagen on the grounds that the German car manufacturer consistently refused to accord the same rights to its workers in Chattanooga, Tennessee, United States, as it did in the rest of the world. See <http://www.industrialunion.org/industrial-suspends-global-agreement-with-volkswagen>.

## ► 6. Developments that are likely to further shape the evolution of CBSD and GIRAs

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A number of developments are likely to shape the evolution of CBSD and GIRAs. These include: first, the strengthening of the ILO's mandate as facilitator of CBSD; second, the emergence of binding national and international "due diligence" regulation; third, continuing efforts to establish legally binding frameworks for GIRAs; fourth, and by far the most critical development at the time of the writing, the disruptive force of the COVID-19 pandemic. Each one of them is briefly described below.

### 6.1 A strengthened ILO mandate

In the last five years, the ILO has firmly placed the question of cross-border social dialogue, on top of its policy agenda. In 2016, following a general discussion on decent work in GSCs in the International Labour Conference (ILC), the Organization was called upon to promote CBSD, such as by offering assistance, "upon joint request", in the design and follow-up phase of IFAs, "including monitoring, mediation and dispute settlement where appropriate".<sup>33</sup> In the years that followed the 2016 ILC, the ILO's mandate was further strengthened.

In 2017, the revised version of the ILO MNE Declaration multiplied the opportunities for CBSD, taking the form, for instance, of tripartite-plus dialogue platforms between the governments and employers' and workers' associations, and MNEs from home and host countries; or by way of a direct dialogue between the company and the union, involving MNEs and representatives of the workers concerned by the operations of the MNE (ILO 2018c). In June 2018, the ILC adopted "Conclusions concerning the second recurrent discussion on social dialogue and tripartism", which distributed roles and mandates for action in the area of CBSD to both ILO Member States and the Secretariat of

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<sup>33</sup> "Under the programme of action, the ILO should: "Promote effective national and cross-border social dialogue, thereby respecting the autonomy of the social partners. When social partners decide to negotiate international framework agreements, the ILO could support and facilitate the process, on joint request, and assist in the follow-up process, including monitoring, mediation and dispute settlement where appropriate. Furthermore, the ILO should undertake research on the effectiveness and impact of cross-border social dialogue" (ILO 2016b, para. 23(c)).

the ILO.<sup>34</sup> Importantly, in early 2019 the ILO's mandate in the area of CBSD was further consolidated on the occasion of a tripartite Meeting of Experts, which reviewed existing standards, practices developed at various levels and the instances that pave the way for cross-border social dialogue and agreements.

The “Conclusions” reached by the experts, approved by the ILO Governing Body in November 2019, called upon ILO Member States to create an enabling environment for cross-border social dialogue by building the capacity of labour administrations and labour inspectorates in relation to CBSD; ensuring effective access to justice, including to judicial and non-judicial remedies; adopting national policies and regulations that are conducive to CBSD, with emphasis on the needs of vulnerable workers in global supply chains; consulting the national social partners during the negotiation, implementation and monitoring of the labour provisions of bilateral and multilateral trade and investment agreements; and promoting effective linkages between different forms and levels of social dialogue and strengthen their complementarity (ILO 2019d).

## 6.2 National and supranational due diligence (hard law) regulation

Another major development that is likely to boost CBSD and GIRAs in the years to come, is the progressive emergence of national and (increasingly) supra-national regulation embracing human rights due diligence. The content of this regulation follows the UNGPs and OECD Guidelines and has been largely inspired by the California Transparency in Supply Chains Act (2010)<sup>35</sup> and the United Kingdom Modern Slavery Act (2015)<sup>36</sup> which take into account the entire MNE value chain beyond first-tier suppliers (ILO 2019d).

At national level, a French law adopted in 2017 provides, *inter alia*, for “vigilance plans” to be formulated by large French MNEs<sup>37</sup> in association with stakeholders. The vigilance plans must identify risks of serious violations of environmental and human rights; map, analyse and rank such risks; and establish alert and monitoring mechanisms.<sup>38</sup> The plan, and its alert and monitoring mechanisms, should be formulated in consultation with stakeholders,

34 “Social dialogue comes in various forms and levels according to national traditions and contexts, including in the form of cross-border social dialogue in an increasingly complex globalized economy” (ILO 2018b).

35 See <https://oag.ca.gov/SB657>.

36 See <http://www.legislation.gov.uk/ukpga/2015/30/contents/enacted>.

37 All French companies employing at least 5,000 people themselves and through their French subsidiaries, or a minimum of 10,000 employees located in France and abroad, in both parent and foreign subsidiaries.

38 For a comprehensive analysis see chapter 5 in this volume.

including representative union organizations and, failing that, within the framework of multiparty initiatives by subsidiaries.<sup>39</sup>

Germany and other European countries are also in the process of exploring similar regulation, while, at the EU level, following an EU Commission study on due diligence<sup>40</sup>, a proposal for a regulation on human rights due diligence in GSCs is to be part of the EU Commission's 2021 work plan to prevent the risks of human rights violations in GSCs. The text would draw largely on the French due diligence legislation and should ensure similar ways to design and implement vigilance plans, as well as remedy and enforcement mechanisms.<sup>41</sup>

At the international level, since mid-2014, an open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, established by the United Nations Human Rights Council, has prepared a zero draft of a “legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises”, as well as a zero draft of an optional protocol to be annexed to the draft legally binding instrument (UNHRC 2018). Their objective is to make companies and financial institutions legally accountable for addressing the human rights and environmental impacts of their global operations and supply chains. It is important that the latest version of the draft instrument opens the door to cross-border dialogue on due diligence, for instance, by promoting an obligation to

[carry] out meaningful consultations with groups whose human rights can potentially be affected by the business activities, and with other relevant stakeholders, through appropriate procedures including through their representative institutions, while giving special attention to those facing heightened risks of violations of human rights within the context of business activities, such as women, children, persons with disabilities, indigenous peoples, migrants, refugees, internally displaced persons and protected populations under occupation or conflict areas. Consultations with indigenous peoples will be undertaken in accordance with the internationally agreed standards of free, prior and informed consultations, as applicable. (UNHRC 2019, article 5.3(b)).

It remains to be seen in practice whether (compulsory) due diligence regulation, such as the French law, will be able to generate more (or less) social dialogue during its implementation. Chapter 5 seems to suggest that the first vigilance plans by French MNEs have been rather disappointing in terms

39 <https://www.legifrance.gouv.fr/eli/loi/2017/3/27/2017-399/jo/texte>

40 <https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en>

41 *Planet Labour*, 6 May 2020. <https://www.planetlabor.com/en/corporate-social-responsibility/initiatives-from-the-public-authorities-and-other-stakeholders/eu-eu-commission-to-propose-a-regulation-by-2021-on-human-rights-due-diligence-in-global-supply-chains/>.



of social partners' involvement in their design (chapter 5 in this volume). Interestingly, the (voluntary) international corporate social responsibility (ICSR) covenants launched by the Government of the Netherlands (in sectors considered to be at high risk in terms of human rights, labour rights and environmental protection) have been far more productive in terms of generating CBSD and agreements that apply down the value chains of signatory (Dutch) MNEs. Indeed, in 2016, businesses, employers' organizations, trade unions, NGOs, international organizations and the Dutch Government signed an Agreement on a Sustainable Garment and Textile sector, committing the parties to work together in countries considered at greater risk in order to promote fundamental principles and rights at work, a living wage, occupational safety and health (OSH) and environmental sustainability (businesses which participate in this Agreement produce over one third of the revenue generated in the Dutch market). This was the first in a series of multi-stakeholder dialogues and agreements on international responsible business conduct in GSCs covering the garment and other sectors.<sup>42</sup>

### 6.3 Continuing efforts to establish legally binding GIRAs

In spite of their qualification as “agreements”, GIRAs such as transnational company agreements (TCAs), are voluntary. No legal framework regulates their design or implementation, and they are not enforceable in the same way as most national collective agreements.

However, GIRAs can become legally binding if: (a) they are implemented through enterprise collective agreements at country level; or (b) if this is the stated intention of their signatories (as seen above, in the case in the 2013 Accord on Fire and Building Safety in Bangladesh). A third (theoretically possible) way to enforce GIRAs is through (c) adopting a supra-national instrument making them enforceable. In that respect, since the mid-2000, the EU has been at the forefront in efforts to establish an “optional legal framework” for transnational collective bargaining (European Commission 2005). While the EC has so far refrained from presenting a proposal for a legislative instrument due to strong opposition from the European employers to such a legal framework,<sup>43</sup> the European trade union movement continues to campaign in favour of this transnational arrangement. Supported by a resolution of the European Parliament (European Parliament 2013), the European Trade Union Confederation (ETUC) and some GUFs have called for the elaboration

<sup>42</sup> [https://www.imvoconvenanten.nl/garments-textile?sc\\_lang=en](https://www.imvoconvenanten.nl/garments-textile?sc_lang=en).

<sup>43</sup> Employers' organizations, particularly BusinessEurope, disputed in particular the assumption that the lack of EU rules on TCAs discourages multinationals from opting for TCAs, emphasizing a preference for tailor-made arrangements and highlighting the practical and legal difficulties of developing an EU legal framework.

of a Council Decision to make TCAs binding in EU Member States in the same way as national collective agreements (ETUC 2014; ETUC et al. 2016).<sup>44</sup>

## 6.4 The disruptive force of the COVID-19 pandemic: One “mega-driver of change” to rule all others?

In early 2019 the Global Commission on the Future of Work identified a number of “mega drivers of change”, four of which particularly affected social dialogue and industrial relations outcomes at all levels. These were, first, current technological revolutions such as increasing automation and digitization; second, demography-related challenges, migration movements and a refugee crisis; third, climate change and moving towards a low-carbon future; and fourth, deepening globalization. Around these mega-drivers of change, the Global Commission made 10 policy recommendations addressed to countries and the ILO, aimed at a “brighter future of work” (ILO 2019b). Large parts of these recommendations shaped the emblematic ILO Centenary Declaration (ILO 2019c).

Yet, in early 2020, the magnitude of the disruptive force of the COVID-19 pandemic appeared to relegate the mega-drivers of change to secondary considerations. At the time of the writing of the present chapter, the coronavirus pandemic has continued to unfold its devastating socio-economic impacts, disrupt business and supply chains and impact workers on an unprecedented global scale, particularly the most vulnerable ones.<sup>45</sup> And while the pandemic reinforced the legitimacy of governments and public administrations to intervene in view of saving jobs, enterprises and entire economies (which stands at odds with dominant market-driven governance paradigms), its long-term socio-economic impacts remain uncertain. Certainly, it will also test the resilience of governance and social dialogue actors and institutions, including at those the cross-border level.

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44 Among other things, the ETUC’s proposal includes clauses for signatory parties to disclose a negotiating mandate; the inclusion of a “non-regression” clause; the possibility of voluntary external mediation in the event of conflicts and the establishment by the EC of a list of available mediators; and the official registration of TCAs – all constitutive elements of collective bargaining agreements found at country level.

45 At the time of writing, the pandemic had affected more than 2.5 million individuals worldwide, killing over 180,000 people. The sharp decline in working hours globally due to the COVID-19 outbreak meant that an equivalent to 305 million full-time jobs would be affected, while 1.6 billion workers in the informal economy – nearly half of the global workforce – faced the immediate danger of having their livelihoods destroyed (ILO, 29 April 2020, [https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS\\_743036/lang-en/index.htm](https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_743036/lang-en/index.htm)). According to the International Monetary Fund (IMF), the world GDP growth rate was projected to fall by three percent (as opposed to the 2008 crisis, in which it dropped by 0.3 percent), while the cumulative loss to global GDP over 2020 and 2021 from the pandemic crisis could be around 9 trillion dollars, greater than the economies of Japan and Germany, combined. (IMF, 14 April 2020; <https://blogs.imf.org/2020/04/14/the-great-lockdown-worst-economic-downturn-since-the-great-depression/>).

For the moment, there are hopeful signs that CBSD between global social partners may be one tool of dealing at least with the immediate effects of the pandemic. For instance, a statement on “COVID-19: Global Action to Support the Garment Industry”, signed on 22 April 2020 by the IOE, the ITUC and IndustriALL Global Union calls for measures to support the garment manufacturers and to protect garment workers’ income, health and employment.<sup>46</sup> UNI Global Union has signed a Declaration with four global food retailers (Auchan, Carrefour, Casino Group and El Corte Inglés) – with a combined global workforce of one million workers – to protect supermarket workers and customers during the COVID-19 pandemic.<sup>47</sup> Similarly, at the (sub)regional level, but also within fora such as the G20, several joint bipartite or tripartite statements have called for adequate responses to the pandemic, including by sector of activity.

## ► 7. Concluding observations

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We foresee two possible scenarios in the evolution of social dialogue, including CBSD, within the broader socio-economic conditions created by the COVID-19 pandemic – by far the greatest global health and economic crisis of the past 100 years.

According to a first scenario, the pandemic and ensuing economic, financial and public debt crises, may decelerate social dialogue, at both national and cross-border levels. Such deceleration may take the form of infrequent participation in dedicated dialogue structures, a stagnation in the number of tangible outcomes, or a certain regression in the scope of new agreements (for example, they would tend to focus more on basic social rights and address the most visible human rights issues). Indeed, as governments and global economic actors will be under pressure to shift policy priorities from economic stimulus (that characterized the first phase of the pandemic) towards fiscal consolidation and debt reduction, social dialogue and tripartism at all levels may be given a less prominent role. As described elsewhere, austerity policies are rarely based on democratic deliberation, let alone presented as negotiable (Ghellab and Papadakis 2011). Such “unilateralism” would be reminiscent of the observed marginalization of social dialogue actors and institutions in Ireland and the European South (Greece, Portugal, Spain, Italy) following the

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<sup>46</sup> “Employers, Workers and Major Brands Join with ILO on a Call for Action to Support the Garment Industry.” [https://www.ioe-emp.org/no\\_cache/en/news-events-documents/news/news/1587567131-covid-19-global-action-to-support-the-garment-industry/](https://www.ioe-emp.org/no_cache/en/news-events-documents/news/news/1587567131-covid-19-global-action-to-support-the-garment-industry/).

<sup>47</sup> <https://uniglobalunion.org/news/global-food-retailers-sign-landmark-declaration-uni-tackle-covid-19-others-should-follow>.

2008 public debt crisis, as part of the austerity/fiscal consolidation measures, or of similar crises, such as the 1998 Asian financial crisis (Papadakis and Ghellab 2014). A possible strengthening of economic nationalism, populism and de-globalisation (initiated well before the pandemic) could further reinforce such unilateralism and marginalisation of participatory processes.

According to a second scenario, key governance actors (governments, international organizations, MNEs, employers' organizations and, of course, the international trade union movement) would recognize the unprecedented challenges posed by the Covid-19 crisis and the shared interest to avoid further damage to the social and political fabric, globally. In this context, they would privilege global cooperative solutions, for reasons that would come to the rescue of supply chains and their business units and workers. The use of national and cross-border social dialogue would be seen as powerful tools not only for coping with the immediate challenges of the crisis, such as preventing social unrest, but also for avoiding a pernicious deflationary spiral and maintaining social cohesion. Under this scenario, the role of CBSD and GIRAs would go beyond promoting basic labour rights and the management of the most serious human rights risks in supply chains; they would progressively perform more "redistributive" and "integrative" functions, in addition to their traditional "attitudinal structuring" function (section 2). In this context, CBSD and GIRAs, such as TCAs, may serve as instruments to manage enterprise restructuring, promote living wages, social protection floors,<sup>48</sup> work-life balance, effective OSH, "decent digiwork" (Mexi 2019) and support for micro and small companies within supply chains.

A more elaborated version of this second scenario may include a stage in which GIRAs are gradually consolidated into fully-fledged global enterprise collective agreements (such as those envisaged by Levinson in 1972)<sup>49</sup> or

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48 For instance, the ENGIE Group launched a programme to cover hospitalization costs and death insurance (that also applies to any deaths and hospitalizations that may have occurred since the beginning of the pandemic) for its 177,000 employees worldwide. The same programme also foresees the reduction of executive compensation and support for small and very small companies within its supply network. Three GUFs with which the MNE was negotiating a TCA (IndustriALL Global Union, Public Services International (PSI) and Building and Wood Workers' International (BWI)), expressed strong support for this initiative. A similar initiative has been announced by Solvay. See *Planet Labour*, 29 April 2020; <https://www.planetlabor.com/en/hr-practices/comp-and-ben-en/in-the-face-of-covid-19-engie-accelerates-implementation-of-the-first-pillars-of-its-future-social-protection-program/>.

49 "The third stage is the decisive one of integrated negotiations around common demands. This would involve the parent [company] and all or some of the subsidiaries. Similar wage rates would be difficult to achieve at the outset, but proportionate increases could be sought. More reasonably, demands would concern job security, salary systems, pension programmes, training and retraining, industrial democracy and asset formation. Such a strategy necessarily depends upon the degree of union strength, the industrial relations history and the structure of the company's operations. It is one thing to formulate such a programme, another to carry it out. The difficulties and obstacles of all kinds are enormous" (Levinson 1972, 111).

into global multi-company agreements by sector, such as the IMEC and the ITF agreement in the maritime transport sector, or the Accord on Fire and Building Safety in the Bangladeshi garment and textile sector.<sup>50</sup>

Undoubtedly, the two scenarios are diametrically opposed. The scenario which may ultimately prevail will certainly amount to a combination of the two, reflecting the degree of political will to devise cooperative solutions in the post-pandemic era. Prospected regulation, trade union mobilization, federating themes and the industrial relations culture of companies and countries (the three triggers of CBSD identified above) that could possibly shape social dialogue processes and outcomes in the post Covid-19 context may concern policy areas where important impacts have been witnessed as a result of the pandemic. Such areas may include: tackling (rising) poverty and inequality, accelerating ecological transition, regulating telework and digitization and promoting living wages and sound working conditions for vulnerable (yet indispensable – as the crisis has demonstrated) groups of workers.

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<sup>50</sup> Such development may concern sectors of a nature similar to that of maritime transport where most operations take place in international waters, and where there are established and organised global social partners on both sides of the dialogue table, to represent the interests of workers and employers in the sector – a condition *sine qua non* for social dialogue and collective bargaining. One such sector is air transportation.

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# Part II

Challenges and lessons  
on the effectiveness  
of public, private and  
hybrid arrangements

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# 5 Implementing the French Duty of Vigilance Law

## When enterprises drew up their first plans

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### ► Introduction

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The French Duty of Vigilance Law, adopted on 27 March 2017 following a long process, marks a major turning point in the redefinition of the scope of corporate liability. Henceforth, companies with over 5,000 employees in France or over 10,000 employees abroad will have to establish a vigilance plan to identify and prevent serious risks and violations relating to human rights, occupational safety and health and the environment, for their own activities and those of their subcontractors and suppliers with which they have an established commercial relationship.<sup>1</sup> Over and above the text of the Law itself, its symbolic nature and its legal effects, the question arises of the effects that the adoption of the Duty of Vigilance Law have had on enterprise practices. What are their vigilance plans like? Are they similar? Who was involved in drawing them up? What factors complicated or facilitated their design? And what type of “vigilance” do they cover? These are just some of the questions that we intend to examine.

We have undertaken a vast survey with two components.<sup>2</sup> First, we collated a corpus of 86 plans published in 2018 (the first wave of plans) and another of 111 plans published in 2019 (the second wave of plans). We also met 42 professionals who, in the course of their work, have been involved in the

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1 For a legal analysis of the Law, see Moreau (2017), Sachs (2017) and Cossart, Beau de Loménie and Lubrani (2019).

2 This research was financed by the Research Department of the International Labour Office (Geneva). It was conducted with the help of Rémi Bourguignon, whom we thank for his collaboration. The full version of the report is available on the website of the ILO Paris Office: [https://www.ilo.org/paris/actualites/WCMS\\_732938/lang--fr/index.htm](https://www.ilo.org/paris/actualites/WCMS_732938/lang--fr/index.htm) [accessed on 20 May 2020].

establishment of vigilance plans. These professionals, whom we met during 26 interviews (individual and collective), occupy various positions (such as corporate social responsibility (CSR) managers, ethics and vigilance managers, human resources directors, jurists ...) in 11 French groups in various sectors, one non-governmental organization (NGO) and a consulting bureau on social risks.<sup>3</sup>

In this research on the implementation of the Law, we are following the Law and Society approach to study the “legal lives of organizations” (Edelman and Suchman 2007). The underlying idea is to consider that, far from being a mechanical application of legal rules, compliance is a process through which professionals in organizations (and their environment) take ownership. From this perspective, the United States sociologist Lauren B. Edelman (2016) places particular emphasis on the way in which these *compliance professionals* can apply a form of “managerialization” of the law, or in other words adopt a definition of compliance with the law that is in line with the organizational and economic or business interests of the enterprises.

This article investigates mechanisms for taking ownership of the Duty of Vigilance Law and examines the extent to which its implementation involves the managerial fashioning of the plans. After describing the outline and ambiguities of the Duty of Vigilance Law (first part), we analyse the role played by the professionals who, within or on the sidelines of the groups, have contributed to the preparation of the very first vigilance plans (second part). Turning to the content of the plans, we then examine two elements: the form taken by the “mapping” of risks, with emphasis on the still weakly regulated nature of this new exercise (third part) and the manner in which enterprises have described risk management, based largely on already existing action (fourth part). Finally, we question the extent to which the managerialization of the Law is at play (fifth part), before concluding on the possible way forward for this French legislation.

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<sup>3</sup> At this stage of the survey, we did not carry out formal interviews with staff/employee representatives, who in practice were associated very little in drawing up the first plans. However, we were attentive to the reception of the plans and our study by union leaders.

## ► 1. The Law and its “ambiguities”

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The French Duty of Vigilance Law is the outcome of a long process. From a genealogical viewpoint, the “duty of vigilance” can be seen as the offspring of the concept of *due diligence* developed in relation to corporate social responsibility (CSR) in several international texts (d’Ambrosio forthcoming 2021).<sup>4</sup> However, what is new about the Duty of Vigilance Law is it is no longer *soft law*, but is now *hard law*. In this respect, the Law is the outcome of a legislative process which has its origins in reflection undertaken since 2012 by NGOs and jurists, and which took the form of a first legislative proposal (Bill No. 1) put forward in 2013 in the wake of the Rana Plaza drama and then, following its referral to a parliamentary commission, a second Bill (Bill No. 2) in 2015. The Law was finally adopted on 27 March 2017, after many Parliamentary comings and goings. It entered into force immediately.

The process of drawing up the legislation involved significant drafting and redrafting, with the final text being the product of several compromises. The initial intention of the coalition of NGOs and jurists in drawing up the draft legislation was to bring an end to the impunity of large companies in the event of harm (health, social or environmental) caused by their subsidiaries or suppliers. Denouncing the capacity of multinational enterprises to make use of complex legal schemes to externalize their production and dilute their responsibilities, it was the aim of the NGOs to redraw the limits of corporate responsibility to include the whole of the enterprises’ economic sphere of influence. They had to lower some of their ambitions between the first and second Bills (particularly with regard to criminal liability). Then the Constitutional Council invalidated some of the provisions contained in the legislative text voted for by Parliament (and particularly the possibility of civil fines). The text that finally entered into force provides that companies with over 5,000 employees in France or over 10,000 employees throughout the world are required to establish and implement a vigilance plan. The plan must include “reasonable vigilance measures to identify risks and foresee serious violations of human rights and fundamental liberties, safety and health and the environment”, whether these risks are a result of the activities of the company and its subsidiaries, subcontractors or suppliers “with which they have an established commercial relationship”. The plan has to include, in particular: a mapping of risks; procedures for the regular evaluation of the risk situation; adapted action to mitigate risks and prevent serious violations;

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<sup>4</sup> Particularly the *Guiding Principles on Business and Human Rights* adopted in 2011 by the United Nations Human Rights Council (the “Ruggie Principles”) and the *OECD Guidelines for Multinational Enterprises* published the same year.

a mechanism for whistleblowing and the receipt of reports relating to such risks; a mechanism to control the measures implemented and to assess their effectiveness. It must be published in the company's "management report" and may therefore be revised annually. Finally, the legal requirement for the implementation of a vigilance plan opens up a dual regime of liability for any failures by the lead company, which may be required by injunction to adopt a vigilance plan in accordance with the law; and may be liable for harm caused by its subsidiaries or established commercial relations which the implementation of an effective vigilance plan would have prevented.

The publication of the text of the Law marks the completion of the legislative process. In contrast, it is only the first stage of a long process of enterprises taking ownership of these new requirements. Faced with the requirement to establish a vigilance plan, the first reaction of the management of the major groups concerned was to highlight, and sometimes criticize, the vagueness of the Duty of Vigilance Law. As summarized by a consultant, it is "a Law that is actually short, comes without a decree, without guidelines or explanations, which groups together five aspects that everyone expects, but which does not explain them much". The Law specifies in overall terms what a vigilance plan consists of in relation to the three major types of risks concerned (human rights, safety and health and environment), the scope of the prevention of harm (which includes commercial partners) and finally the five measures required (mapping, evaluation, mitigation, whistleblowing and control). However, the specific implementation of these elements is still to be determined, both in terms of drawing up the plans and the tools to be established. Over and above the broad margin for interpretation left by the text of the Law, enterprise professionals have placed much emphasis on the overlapping with other French laws (see part 4 below). Finally, the Law represents a reversal of the CSR approach for the teams responsible: considered affirmative when they consisted of voluntary corporate initiatives, it is deemed less inspirational now that it revolves around an obligation often seen as more binding. As indicated by a CSR manager: "For some, it was a bit like a deer in the headlights, paralysis. What do I do? Where am I going? Where do I start?".



## ► 2. Designing a vigilance plan: Organizational effects and the interplay of actors within and outside the enterprise

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Despite the criticisms and doubts expressed in relation to the 2017 Law, most of the enterprises concerned have committed rapidly to its implementation with the publication of their first vigilance plans. Our attention was therefore first drawn to the various actors who participated in the design of the plans, both outside and within enterprises. Three observations may be made in this regard.

First, faced with the ambiguities of the Law, a significant need emerged for information on the legislative text and for an exchange of practices before drawing up vigilance plans. The interpretation of the terms of the Law and planning for its implementation took place in a context of intense exchanges between and within enterprises. There was an intensification of participation in legal conferences, the reading of professional publications, the mobilization of professional networks and the organization of internal meetings during the months following the adoption of the Law in an attempt to draw up a road map with a view to the publication of the very first plans. Jurists (specializing in labour law, company law and also information and intellectual property law), journalists and consultants also contributed in building this first collective understanding of the meaning of the duty of vigilance. Emphasizing that there was “a need to interpret the Law, to take ownership of it [...], to make it known, it is true, but also and in particular to explain it”, the French association *Entreprises pour les droits de l’homme* (Businesses for Human Rights),<sup>5</sup> as other employers’ organizations, has played a driving role for its 20 or so affiliated enterprises through the provision of advice, the organization of exchanges of good practices and the examination of the plans that have been published.

Second, in the enterprises concerned, the organizational effects of the implementation of the Law were the first to be felt. The great majority of the texts of the vigilance plans refer to the establishment of a specific body responsible for drawing up the vigilance plan and its deployment in the enterprise or group. Whether it is described as a “working group” or a “steering committee”, this body is normally characterized by its transversal nature, which is something that is highlighted in the vigilance plans, and also by our interviewees. “That is

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<sup>5</sup> See the association’s website: <https://www.e-dh.org>

what is very interesting: it places the issue at the transversal level [...]. What is positive is the exchange between the different departments”.<sup>6</sup> This new breaking-down of divisions between departments, and between the different areas of expertise that they represent, has been widely emphasized and valued.

Nevertheless, in most of the enterprises surveyed, the task of designing the vigilance plan has in practice been carried out by a (very) small number of actors. Small teams of one, two, three or four people are the ones who have really been involved in drawing up the plans and have taken responsibility for them. Whether they are members of this hard core or peripheral contributors, two types of actors merit particular attention: legal experts and risk experts. The former, from legal services or departments, do not always play a central role in the implementation of the Law (which is perhaps an indication that fears of legal action are fairly limited in the enterprises concerned). When they take up the pen, they do so as much to control the wording as to help in giving legal form to pre-existing CSR commitments, as emphasized by this interviewee: “the legal department has been coordinating the subject so as to fully understand what was going on elsewhere and how it should be refined to respond to the duty of vigilance”. The risk experts, who are internal experts, or more rarely external consultants, bear witness to the importance given to the adoption of tried and tested methods of risk management (see parts 3 and 4 below) in undertaking the “risk mapping” required by the Duty of Vigilance Law. The identification of where leadership lies within the enterprise in relation to the vigilance plan is not only significant in terms of the internal balance of power that this reveals, but particularly because different units have varying views of what the duty of vigilance is, or should be. The action taken by those responsible for CSR, sustainable development and vigilance place greater emphasis on a more practical and operational approach to vigilance than those responsible for legal matters, who are particularly careful to ensure respect for the requirements set out in the Law, without always specifying how they are to be given effect. One illustration is found in discussions on what must or must not be disclosed in the vigilance plan: “Departments such as the legal service or the compliance department say as little as possible, while others, such as ourselves (responsible for CSR), say that we do however need to show what we’re doing”.

Third, the preparation of vigilance plans raises the issue of the role of stakeholders in the process. Alongside the NGOs and public actors who have been mobilized, French trade unions worked actively for the adoption of the 2017 Law. They have since supported their activists in the enterprises concerned, first by informing them of the requirements of the law, and then by helping

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<sup>6</sup> CSR manager, Group C. The identity of the persons interviewed and of the groups in which they work have been systematically left anonymous. However, as vigilance plans are public documents, the citations made below are not anonymous.

them ensure compliance with those requirements. Our general observation is, however, that the involvement of unions in drawing up vigilance plans is still limited. It should be recalled in this regard that the 2017 Law provides that “the plan is to be drawn up in association with stakeholders in the enterprise” (section 1), but does not make this a requirement, and does not specify the form that such “association” shall take. In practice, calls for union representatives to be involved in the work of drawing up the plans still appear to be limited: the provision of information, where it occurs, is still much more common than consultation. Their involvement is also belated, as they are mainly called upon towards the end of the process, when the plan is ready to be published or has just been published. In certain cases of enterprises that have also concluded an international framework agreement (IFA), efforts have been noted for the closer involvement of union representatives, either from within the enterprise or from European or international union federations, without this yet taking the form of effective partnerships. Where an IFA exists, human resources or industrial relations directors are also more closely involved in the implementation of the duty of vigilance, although their role remains relatively secondary in comparison with that of CSR directors, for example. The existence of this form of collaboration with unions emphasizes the interpenetration of vigilance with other, sometimes older frameworks. External stakeholders (NGOs) have at best contributed, as previously, through the formulation of materiality matrices (see section 3.3 below). Globally, however, consultation with them does not appear to have increased during the process of drawing up vigilance plans.

In short, the 2017 Law, before its potential operational impact throughout the global production chain, has had preliminary effects of an organizational nature within enterprises in which vigilance plans have been drawn up, particularly at headquarters. These effects can be perceived, in the view of the actors surveyed, in the fact that the implementation of the duty of vigilance has offered them the possibility to reinforce their own professional legitimacy and that of their action at the enterprise level. The preparation of vigilance plans has therefore offered an occasion to shed further light on the CSR subjects that they have dealt with, sometimes over a long period. This effect of offering greater legitimacy and perceived value, which they broadly welcome, should however, in their view, be strengthened in three ways. Although the implementation process remains broadly centralized, they hope, in the first place, to achieve greater decentralization of the process, which would involve the broader participation by the various actors within the enterprise, including operational actors at the local level. In this regard, they highlight the education and communication effort that needs to be made for those involved (for example, for purchase managers at the various levels of the enterprise) with a view to the “vigilance” dimension being more closely integrated into their professional practices. Greater association or involvement of the social

partners is then expected and, in this respect, several managers within enterprises acknowledge that it was not possible to activate this association due to the lack of time, on the one hand, and of experience, on the other, during the preparation of the first vigilance plans. However, they envisage greater involvement in future versions. Finally, while the 2017 Law has provided an opportunity to shed further light on the measures adopted in relation to environmental, labour and human rights, the issue is now, for those responsible at the enterprise level, to be able to really “raise” the issue of “the duty of vigilance” at the level of the central governance of the enterprise or group, and even with the Board of Directors and top management, if possible, so as to ensure that it becomes a really strategic issue.

### ► 3. Risk mapping: Four forms of compliance with the Law

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Of the various measures required in vigilance plans, risk mapping, while not fundamentally innovative, has emerged as a new exercise. Few enterprises could claim to have undertaken risk mapping that corresponded to the requirements of the Law, particularly in the fields covered, and especially human rights. Faced with these new requirements and the attendant uncertainty, enterprise managements have adopted varying strategies, which are partly reflected in the diversity of the forms taken by the paragraphs on risk mapping in the vigilance plans that have been drawn up. Based on an analysis to classify the 111 plans published in 2019, we draw a distinction between four ways of responding to the requirement for the mapping of risks.<sup>7</sup>

#### 3.1 Many minor mapping exercises

Accounting for nearly half of the cases, a first relatively heteroclitic set includes plans with the common characteristic of avoiding any presentation of the mapping, its method and results. Some make absolutely no reference to a process of mapping, or the identification of risks. Others announce a forthcoming mapping process. In cases where a section of the plan is specifically devoted to “risk mapping”, it may be limited to a few lines indicating succinctly that

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<sup>7</sup> We would like to thank the students in the enterprise and corporate responsibility Masters course (the 2020 year) of the Paris-Dauphine University for their help in gathering together the plans. Our collection is not exhaustive, but allows types to be classified. Citations from the plans made below are solely for purposes of illustration.

a mapping exercise has been undertaken, without including information on the methods used or its content: “A mapping of the specific risks covered by the vigilance plan has been drawn up. This mapping did not reveal risks that had not already been identified by the Group and that are not addressed by existing measures.” (Altran, 2019 reference document). What is essential is therefore to indicate that the enterprise has undertaken a mapping of risks and that these risks are being managed and are under control. In other vigilance plans, the “mapping” sections exclusively contain references to procedures and measures that already existed before the 2017 Law. The explanations accompanying these references may be short: “The same methodology as that used for non-financial risks was adopted during the course of 2018 to undertake a mapping of specific risks relating to our suppliers and subcontractors” (Lambert Dodard Chancereul - LDC Group, 2019 reference document). In the same spirit, some enterprises make reference, without further detail, to the integration of the risks covered by the Law in an existing mapping.

These cases illustrate a process observed more broadly: the strong integration, and even absorption of the issues related to the duty of vigilance in the enterprise risk management system (see below, section 4). When the mapping has been carried out in collaboration with risk management specialists, subjects relating to the duty of vigilance are redefined as “risks” supplementing the list of risks already taken into consideration in the mapping exercise: “In our view, for risk management in the group, the subject of the vigilance plan, and even the theme of CSR in the broad sense, is one theme among the others covered by global risk mapping”. Another way of indicating a reliance on existing tools and measures consists of referring to other parts of the reference document, or to other documents. Such referral is not only the result of a euphemistic view of the effects of the 2017 Law on enterprise practices, highlighting what had already been done prior to the adoption of the Law, but is also the outcome of an effort of compliance, according to which the Duty of Vigilance Law is one target among other legal measures. For example, the Valéo Group refers to “a broad process of mapping non-financial risks” carried out in 2018 “to comply with the provisions transposing the European Directive of 2014 on the disclosure of non-financial information”, and accordingly cites other sections of the reference document covering non-financial risks. The case of the Orano Group should also be noted: its annual report does not have a section on the duty of vigilance, but it provides in annex a “Table of concordance with the data required in respect of the disclosure of non-financial performance [on the one hand] and that required by the Duty of Vigilance Law”, on the other, with each line of the table referring to specific sections of the report.

### 3.2 Discourse on method: describing the mapping process

A second set of plans (16 per cent of the total) describe mapping as a process that mobilizes the respective actors, procedures and tools. These differ from the previous plans in terms of the provision of an explanation of the process of risk mapping. This consists of indicating the actors involved in the process: the various departments that have participated, whether an advisory bureau has been called in, the working group or steering committee established, and whether or not it is a standing body, and more rarely the stakeholders consulted. The mapping section sometimes adopts a pedagogical approach, describing the methods of risk analysis, such as: the identification of risks; the distinction between gross risks and net risks (taking into account the prevention measures established); and the weighting of risks. These plans once again describe the significance of risk management tools and procedures, such as the inter-relationship between the frequency and seriousness of risks and the prevention measures taken into account. It should also be noted that, although the terminology adopted is in common use, the vigilance plans do not describe all the different types of mapping in the same way. The level of detail of the explanations can vary depending on the areas covered. However, in many cases, the description of mapping is principally related to the activities of suppliers, with reference being made, insofar as the risk mapping of the activities of subsidiaries is concerned, to measures that have already been adopted, in terms similar to those of the first set of plans (see above). Some descriptions of the mapping also describe the information base used to undertake the mapping process, particularly for human rights, with a view to identifying so-called “at risk” countries (Global Rights Index of the International Trade Union Confederation, reports by the United States Department of State on forced labour, child labour and the human rights situation throughout the world, etc.). In the case of enterprises which adopt this approach, the section is confined to a description of the mapping process. In most cases, no reference is made to the content or nature of the risks.

### 3.3 Mapping as a list of risks and issues

In contrast, a third set of plans (one quarter of the total) specifies the major risks identified by the mapping process. However, most of them remain silent on the methodology as such, with mapping being presented as a list, with varying levels of detail and precision, of the principal risks and issues identified. In these cases, the process of mapping consists of determining a hierarchy of risks and issues. In certain cases, the establishment of a hierarchy of risks appears to be a second stage consisting of weighting the issues identified during the first stage, for example in the form of a materiality

matrix, that is, a tool indicating the views of the various internal and external stakeholders, for the purpose of determining a hierarchy of the CSR issues of an enterprise: “We worked on a materiality analysis, for the various subjects involved in all our occupations and projects. Once we identified around 20 environmental issues [...], we established a hierarchical list, or mapping, which allowed us to highlight four major areas” (manager responsible for innovation and environment, Group B). The description of risks is sometimes very generic. In such cases, it is necessary to highlight the main issues as a basis for focusing on risk prevention and mitigation measures. In a minority of cases, the list of major risks is preceded by a fairly precise description of the mapping methodology used.

### 3.4 Providing a graphical presentation of the mapping

Finally, a last set of plans, representing 10 per cent, seek to provide a graphical presentation of the risk mapping in various ways. They are not necessarily the most explicit of the plans from the viewpoint of the mapping methodology or the results of the analysis. They differ however in their graphical presentation of the mapping: a figure similar to a list of risks, a graph intended to describe the critical level of the risks identified, a planisphere indicating the countries “at risk” or a table setting out the probability of the occurrence of the most important risks at the various levels of the supply chain.<sup>8</sup>

This shows that the presentation of risk mapping arising out of the duty of vigilance is far from standardized at present. However, care is needed in interpreting these differences, as each drafting approach does not necessarily correspond to a single logic of building a mapping. For example, the avoidance of describing the methodology and its results may be the result of a strategy of concealing an approach that has not (yet) been applied, or the need to choose between different priorities while taking into account space constraints in the reference document with a view to presenting all the enterprise policies on sustainable development and CSR.

Over and above differences in descriptive techniques, the presentation of risk mapping shows a tendency among certain enterprises to adopt a strictly formal response to the requirements of the Law, while many others base their response on risk management tools and procedures, thereby demonstrating another form of the “managerialization” of the Law.

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<sup>8</sup> This is only indicated by one enterprise. Globally, the vigilance plans very rarely indicate the level of the value chain to which analysis is undertaken by the enterprise.

## ► 4. Risk management tools: Making use of what already exists

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The text of the Law provides that the vigilance plan shall contain, in addition to the mapping, a description of the mechanisms for risk assessment, mitigation and prevention, whistleblowing and control. The survey carried out in the enterprises gives grounds for considering that, although risk mapping is presented at least formally as a new exercise, most of the other components of the vigilance plan tend to be based on what already exists.

With reference first to the description of risk management mechanisms (evaluation, mitigation and prevention), it is striking to see how closely they resemble what is already found in reporting documents. This was confirmed by one of the interviewees, who emphasized that the drawing up of the plan “consisted above all of updating in a certain manner our procedures and making them more precise” (manager responsible for human resources and CSR, Group F). Basically, the procedures described are therefore approaches that are already well integrated into enterprise policies: “We are really in processes that have been very well known in enterprises for a long time”, as emphasized by one interviewee (responsible for ethics and vigilance, Group B). In formal terms, the plan has therefore provided an opportunity for an exercise of rationalizing and ensuring the coherence of the action taken. How do enterprise actors therefore classify these risk management procedures in their subsidiaries, on the one hand, and in the management of the supply chain, on the other?

With regard to subsidiaries, three major types of measures have been implemented by the groups to organize risk management: managerial policies based on internal audit; recourse to standards, based on external audit procedures; and, finally, social dialogue, which in practice is only referred to fairly marginally. In their vigilance plans, enterprises seek less to produce new instruments than to raise the awareness of their subsidiaries of issues relating to the implementation of vigilance. In this respect, a specific link is developed by certain enterprises between requirements relating to the duty of vigilance and the international framework agreements that they signed some time ago, or at more or less the same time. The international agreement is seen in such cases as an effective instrument for the implementation of the group’s CSR policy and, by extension, its vigilance plan in its various subsidiaries.<sup>9</sup>

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<sup>9</sup> On international framework agreements as a means of implementing enterprise policies, see Barraud de Lagerie, Mias, Phé and Servel (2020).



The management of risks in the supply chain also follows the logic of the purchasing policies already established by enterprises since the 1990s (Barraud de Lagerie 2019). Reference is often made to a model normative document (ethics charter, code of conduct...) distributed to suppliers recalling the group's commitments. Suppliers generally have to undertake to comply with this document, through clauses included in commercial contracts, which take the form of "small social clauses", as they have been described by Isabelle Daugareilh (2009), to distinguish them from those contained in international trade agreements. Finally, evaluation of compliance by suppliers is based on three types of measures, ranging from those that are more declaratory to those that are the most externalized: self-evaluation, which is not widely used; documentary audits, which are mentioned very frequently (particularly with reference to EcoVadis, a business sustainability rating platform which has become a particularly central actor in this context);<sup>10</sup> and site audits, undertaken internally or by consultants.

Since the very first CSR reports, the question of the comparability of the data provided in audits has been a real issue. With vigilance plans, it continues to arise at two levels: scope and the indicator. With regard to their scope, the prevailing logic is to consider that audits mainly cover level one suppliers; the coverage of level two suppliers, where it exists, mainly involves action within the chain and the requirement for level one suppliers to audit their own suppliers. However, even among level one suppliers, a distinction can be made between enterprises which apply audits without distinction to all their suppliers, and those that draw a distinction between suppliers deemed to be more important or sensitive, or "key suppliers". In the latter case, certain enterprises apply purely geographical parameters to determine the suppliers to be evaluated, while others use parameters based on other criteria for the assessment of risks (purchase category, turnover...). The proportion of suppliers that are actually audited tends to be expressed either as a share of the number of suppliers, or in terms of the volume of purchases (in value). Finally, in the absence of specifications concerning the indicators to be used, the vigilance plans show the same level of heterogeneity as the voluntary reports published previously, and are therefore open to the same criticisms.

Finally, the implementation of whistleblower provisions has followed a slightly different logic to that of other risk prevention tools. In practice, the whistleblower mechanism in relation to the duty of vigilance has been rapidly and fairly widely assimilated to that introduced under another French

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<sup>10</sup> Established in 2007, EcoVadis is the leader in documentary audits (alongside such competitors as Sedex, for example). Any supplier may request an evaluation, which takes the form of a mark out of 100, to which client enterprises can then have access.

law adopted a little earlier, the “Sapin II Law”.<sup>11</sup> This 2016 Law is intended to provide protection for whistleblowers who denounce corruption and influence peddling. It introduces the requirement for enterprises with over 500 employees (or belonging to a group with its headquarters in France and which has at least 500 employees), and with a turnover of over 100 million euros, to establish a whistleblower system. The whistleblower system envisaged in the Duty of Vigilance Law is therefore specifically grafted onto this pre-existing measure, with the principal concern being its adaptation, as the scope of the two Laws is not entirely the same. Enterprises have had to extend the scope of the action that can be covered by whistleblowing to include, in addition to instances of corruption, risks relating to human rights, the environment and safety and health. The question also arises of the scope of authorized whistleblowing. The Sapin II Law specifies that it covers employees and collaborators outside the company, while the Duty of Vigilance Law is silent on this point. A number of enterprises have envisaged extending the measure all along the value chain (beyond headquarters and subsidiaries, to include suppliers) and to persons other than employees and external collaborators (such as locals). The implementation of whistleblowing mechanisms, and in particular the manner in which the cases raised are dealt with, remains in most cases a work in progress.

In the end, by availing themselves of what already existed, enterprises have been able to fulfil their duty of vigilance without having to invent totally new measures. But there has also been a feeling of overlapping with other reporting mechanisms. In particular, when drawing up the first vigilance plans, French enterprises also had to fulfil the requirement of making a Declaration of non-financial performance (DPEF) as a result of the transposition of a 2014 European Directive.<sup>12</sup> A certain duplication has been noted, giving rise to both greater motivation to work on subjects that are common to both the DPEF and the vigilance plan, as well as a feeling of confusion with regard to the expected format: “enterprises are not going to do it in four different places, as we have reporting requirements under the DPEF, and the categories of risks are changing. So in practice, everything is coming up against everything else and [...] in the end [...] we are saying the same thing three times. There will probably have to be a little more rationalization” (human rights manager, Group B).

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11 Law No. 2016-1691 of 9 December 2016 on transparency, action to combat corruption and the modernization of economic activity.

12 Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups.

## ► 5. What makes a good plan?

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Analysis of the vigilance plans, including their design and content, reveals the “managerialization” process (Edelman 2016) that has guided enterprises in the process of taking ownership of the new legal obligation. Even so, the question remains: has the manner in which enterprises have developed their first plans resulted in consensus, among enterprises and with such interested parties as the NGOs that were behind the Law, on what makes a “good plan”? To identify the manner in which the various actors outline a good plan, it is necessary to examine the comments that followed the publication of the first plans. On the one hand, the viewpoint of enterprises can be understood from the way in which enterprise managers describe their own plans,<sup>13</sup> but also more indirectly by examining the benchmarks produced by consultants, which more or less explicitly indicate what are considered to be good practices. On the other hand, the views of NGOs have been disseminated in a series of publications.<sup>14</sup>

Our survey shows that many enterprises do not claim to have produced a “perfect” plan (in either the first or second year). It is fairly significant that they often claim to have done what they could. They justify this necessary imperfection on the grounds of a whole series of constraints that they are working under: the Law is not very clear, the reference document cannot be extended indefinitely, local data is not easy to collect, etc. Even consultants, while very clearly identifying practices that are deemed better than others, highlight these constraints and emphasize that the prevailing approach has to be that of improvement. Between 2018 and 2019, most enterprises therefore worked on their plans once again: “Between vigilance plan 1 and vigilance plan 2, we looked at what others had done and positioned ourselves in a process of continuous improvement, and we established tools that challenged us, as the market also evolved. We see it as an update so that we can improve” (CSR manager, Group C); “Really, from one year to the next, we will improve and refine it, I’m certain of that” (interviewee, Group H). Among consultants,

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13 B&L Evolution and Edh, *Application de la loi sur le devoir de vigilance: analyse des premiers plans publiés*, April 2018; Edh, *Application de la loi sur le devoir de vigilance: plans de vigilance 2018-2019*, 14 June 2019; EY (Ernst & Young and Associates), *Loi sur le devoir de vigilance: analyse des premiers plans de vigilance*, September 2018; FIR (Forum pour l’investissement responsable) and A2 Consulting, Powerpoint presentation for the prize awarded for the best vigilance plan, 12 December 2018.

14 ActionAid, Friends of the Earth, Amnesty International, CCFD-Terre Solidaire, Collectif Éthique sur l’étiquette and Sherpa, *Loi sur le devoir de vigilance des sociétés mères et entreprises donneuses d’ordre. Année 1: Les entreprises doivent mieux faire*, February 2019 (study examining 80 vigilance plans); Sherpa, *Guide de référence pour les plans de vigilance*, December 2018.

the benchmark is viewed as a tool to accompany this process of “continuous improvement”, according to the term that acts as a leitmotiv in this context. Considering that they have made as much progress as they could, the professionals that we met do not therefore appear to be worried about the legal risks. However, they hope that expectations will not become more stringent, as indicated by this purchasing manager: “Laws are all very well, but they still have to be achievable, and that is why in my view the concept of what is “reasonable” in law is very important, because it can be ambiguous. One court may interpret it in one way, and another in a different way. In the end, there is always the understanding that we can’t cover everything. It has to be reasonable, and we therefore have to make an effort, we have to show we are committed, we have to do as much as possible, OK, but even as much as possible must still be reasonable” (purchasing manager, Group A).

Among activist organizations, Sherpa in particular has developed an interpretation of the Law that is in contrast with that of enterprises. Its “interpretation guide” (December 2018) therefore places emphasis on the expected exhaustive nature of the plan. In its view, that involves the obligation not only to have “a formalized, accessible, transparent, exhaustive and sincere plan”, but it must also “be put up visibly on the group’s various websites” (*Reference guide*, 14). More specifically, this involves the dual expectation made possible by its online publication: the plan should include a complete list of the companies controlled that are covered by the plan; and it should identify exhaustively all the risks. It should also be complete and precise concerning all the action taken, the means adopted and the results achieved. The other point on which Sherpa and the NGOs insist relates to the purpose of the plan: to prevent serious violations of human rights and fundamental freedoms, the health and safety of persons and the environment. What will happen in the case of a serious violation? In contrast with the enterprise professionals, who claim that they have done their best with the plan, Sherpa recalls that the Law explicitly refers to the tools and objectives of civil liability (in relation to sections 1240 and 1241 of the Civil Code), which are intended to prevent harm, bring it to an end and provide a remedy when it has occurred. Sherpa adds that “This clearly distinguishes the wording of the Law from the mere obligations of “reporting” or “compliance”” (*Reference guide*, 42). It is on this point in particular that case law is awaited. Under what conditions will the courts, in the context of actions seeking remedies, find a lack of vigilance by the lead enterprise in the event of the occurrence of a serious violation of human rights or the environment?

The history of the implementation of the Duty of Vigilance Law is only just beginning, even though certain enterprises have already published three plans since March 2017. As we have indicated, that has led them to make use of internal and external networks of professionals to reorganize themselves

for the implementation of “vigilance” and to produce plans that fairly broadly take up already existing measures, and in which innovation is more marginal. It will be the case law relating to section 1 (requirement to have a plan) and section 2 (liability) that will stabilize the interpretation of the Law and, in so doing, lead to a definition of a “good plan”. But it would be wrong to think that the findings of the courts will be independent of the process that has just been described. According to Lauren B. Edelman (2016), if the courts have the same difficulties as other actors in interpreting legal texts of which the meaning is ambiguous, they most frequently tend to consider the model of compliance that has prevailed in organizations as a valid interpretation of the legal rule. This may be described as “judicial deference to symbolic conformity”. It is therefore important not to overlook the resistance that is shown. Indeed, what is currently happening is a real trial of strength between the pragmatic conception of vigilance plans advocated by enterprises, which claim they are doing their best to comply with the letter of the law, and the definition offered in contrast by NGOs in accordance with what they believe to be the real meaning of the law. This trial of strength will be prolonged in the courtroom, to judge from the first skirmishes in a case brought by French and Ugandan NGOs against the Total group. In the view of the complainants, Total’s vigilance plan should refer explicitly to the Tilenga and EACOP project undertaken by Total Uganda which, in their opinion, is giving rise to significant social and environmental risks. The NGOs consider that Total should specify in its plan the measures “effectively” implemented to prevent such violations. “The risk mapping required by the Law is not a general list which could apply to any enterprise”, argued the representative of the NGO, Friends of the Earth, in the court at Nanterre on 12 December 2019.<sup>15</sup> “The legislator has never required this level of detail, as it would run counter to the requirement of the readability of the management reports that a listed company has to publish”, rebutted Total’s lawyer. “The citation of all [Total’s] projects in a report that is already 400 pages in length would not be readable. It is not because Tilenga is not referred to that Total is not fulfilling its duty of vigilance”. The court of Nanterre (formerly the High Court) however found that it was not competent to rule on the case, indicating that it could only determine the liability of enterprises in cases where harm had already been caused, and referring litigation respecting more theoretical matters (such as disputes concerning the content of vigilance plans) to commercial tribunals.<sup>16</sup> The issue is therefore far from being resolved.

15 Laurence Caramel, “Total affirme remplir son ‘devoir de vigilance’ à l’égard de sa filiale ougandaise” (“Total claims that it has fulfilled its ‘duty of vigilance’ in respect of its Ugandan subsidiary”), in *Le Monde*, 13 December 2019.

16 “Activités de Total en Ouganda: le tribunal judiciaire de Nanterre se déclare incompétent” (“Total’s activities in Uganda: The court of Nanterre finds that it is not competent”), in *Le Monde*, 30 January 2020.

## ► 6. Conclusion

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The Duty of Vigilance Law constituted a legal revolution by reformulating the liability of companies in relation to their economic power. This is the principle underlying the requirement for companies presumed to be dominant (lead companies) to identify and prevent serious risks and violations in other companies that are legally independent, but economically dependent (subsidiaries and suppliers). Nevertheless, based on its interpretation by enterprises, its effects in terms of the reduction of risks and violations remain unclear. This conclusion was drawn by the Minister of the Economy, Bruno Le Maire himself, when, based on a report prepared by the General Economic Council, he indicated on 21 February 2020 that: “This first assessment of the application of the Duty of Vigilance Law shows that enterprises have approached the subject at arms length. But much remains to be done to give full effect to the duty of vigilance in subcontracting chains”. In this, he is close to the views expressed by NGOs such as CCFD-Terre Solidaire which, in a press release dated 27 March 2020, called for “the full application of the Duty of Vigilance Law so that it can achieve its objective of prevention and provide victims with a remedy”.<sup>17</sup> Without expressing a view on the content of the plans, the NGO considers that improved application would require the establishment of real control, which could be the competence of an “independent body” responsible for publishing the list of enterprises concerned by the Law, making the vigilance plans available to the public and penalizing enterprises that do not comply with the requirement to publish plans.

Over and above this preliminary issue, the question also arises of the adoption of similar regulations beyond the strict French context. This issue is important for the NGOs, which are seeking other bases than French law alone to advance the cause of the duty of vigilance, and also for certain French enterprises, which claim to fear suffering from international competition if they are the only ones that have to submit to these new requirements. Two ways forward at least are envisaged.

The first is at the European level, which could take the form of a revision of Directive 2014/95/EU on the disclosure of non-financial information (proposal by the General Economic Council, taken up by the French Minister of the Economy) or the publication of a specific new directive (the NGO position).<sup>18</sup> There appears to be progress, at least at the European level as, on 29 April

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<sup>17</sup> <https://ccfd-teresolidaire.org/nos-combats/partage-des-richesses/loi-sur-le-devoir-de-6571> [accessed on 31 March 2020].

<sup>18</sup> <https://ccfd-teresolidaire.org/nos-combats/partage-des-richesses/loi-sur-le-devoir-de-6571> [accessed on 31 March 2020].

2020, the Commissioner for Justice, Didier Reynders, announced that next year, in the framework of the European “Green Deal”, he would put forward a legislative proposal to create an obligation of reasonable diligence to prevent risks of the violation of human rights in global supply chains.

The second is through the United Nations, where the route was opened in 2014 by Ecuador and South Africa, which succeeded in having the UN Human Rights Council approve the establishment of an intergovernmental working group on business and human rights, that has so far held five sessions. A draft legally binding instrument on business and human rights has been drawn up and revised in this framework. And, although there is much opposition in the United Nations (by certain States and employers’ representatives), negotiations are making progress, with a close eye being kept on the implementation of the French Law.

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# 6 Private regulation of labour standards in global supply chains

## Current status and future directions

Sarosh Kuruvilla, Ning Li and J. Lowell Jackson

### ► Introduction

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As this essay is being drafted (April 2020), the world is confronting the human and economic devastation caused by Covid-19. The number of deaths is rising, businesses have closed and millions of employees have lost their livelihood. In the global garment industry, we are seeing global brands canceling their orders. As a result, supplier factories are laying off workers or closing their businesses, without paying workers the wages they are owed or the severance pay that is their due – issues that are covered in the Codes of Conduct of these global brands. To be sure, this failure of private regulation to protect workers in the global supply chain is happening under extraordinary circumstances. But even in the best of times, there was considerable skepticism regarding the effectiveness of private regulation.<sup>1</sup>

By private regulation, we mean the voluntary programmes used by companies to “regulate” labour and environmental issues in their global supply chains. The most common form of private regulation has three elements: (1) setting of standards regarding labour practices in global supply chains through a corporate Code of Conduct (CoC) that is generally based on the Conventions of the International Labour Organization (ILO); (2) “auditing” or “social auditing” that involves monitoring whether supplier factories comply with the CoC; and (3) incentives for suppliers to improve compliance by linking future sourcing

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<sup>1</sup> It is important to note that we do not see private regulation as an answer to improving working conditions in global supply chains. We think that private regulation approaches are to be integrated with and reinforced by public regulation approaches. Other authors have made this point over and over again. This essay concentrates narrowly on how private regulation is working and how it can be improved, because that is the focus of the forthcoming research on which this essay is based.

decisions to their compliance records (penalizing or dropping noncompliant suppliers and rewarding more compliant ones). Although other forms of private regulation exist – such as certification schemes (in which organizations “certify” that a product has been made without child labour under sweatshop-free conditions) and reporting initiatives (the setting of guidelines as to how corporations should report on their regulation policies) – for the purposes of this essay, we use the term “private regulation” to refer to corporate CoCs.

Private regulation emerged approximately 25 years ago in the global apparel and footwear industries in part as a result of pressure from consumer and activist movements calling for apparel and footwear corporations to be more socially responsible and avoid the use of child labour and sweatshops in their supply chains. What we know about the model’s effectiveness relies on a plethora of case studies (e.g., Barrientos and Smith 2007; Locke 2013; Bartley et al. 2015), anecdotal evidence, investigative reporting by journalists and critical non-governmental organizations (NGOs), along with such disasters as the 2013 Rana Plaza collapse in Dhaka, Bangladesh, that killed 1,132 workers. Summing up all the evidence concerning private regulation programs over the past two decades, Bartley et al. (2015, 161) note: “Existing evidence suggests that they have had some meaningful but narrow effects on working conditions and the management of human resources. But the rights of workers have been less affected, and even on the issues where codes tend to be most meaningful, standards in many parts of the [apparel] industry remain criminally low in an absolute sense.”

Despite growing evidence of its ineffectiveness, we have seen an explosive growth in the adoption of private regulation in multiple industries (e.g., horticulture, home furnishings, furniture, fish, lumber, fair trade coffee). This diffusion has created a large and growing ecosystem of actors and institutions to support private regulation. Multi-stakeholder institutions (MSIs) such as the Fair Labor Association (FLA), the Ethical Trading Initiative (ETI) and other business and human rights organizations provide “collective fora” for private regulation (Short, Toffel and Hugill 2016). A growing number of companies, such as Intertek, ELEVATE and TÜV Rheinland, for example, engage in “social auditing” for global companies and MSIs. Others facilitate the exchange of audit information among global companies (e.g., Sedex) and provide a myriad of consulting services to global brands and supplier factories. A number of critical NGOs use investigative reporting to pressure brands into improving their labour-standards performance (e.g., Oxfam, Labour Behind the Label). More recently, organizations such as the Sustainable Apparel Coalition and the Better Buying initiative have emerged that seek to improve the efficacy of private regulation by layering new policies onto the basic model. Socially responsible investment companies engage in evaluating private regulation programmes. International institutions such as the United Nations Global

Compact promote the growth of private regulation. University centres have emerged that are devoted to the study of private regulation and workers' rights, and the number of scholarly books, special journal issues and articles devoted to the subject continues to grow. The expansion of private regulation and assorted ecosystems in the face of increasing evidence of their ineffectiveness in improving labour standards in global supply chains is therefore puzzling.

This essay draws on contemporary (recently published or forthcoming) research that proposes an alternative explanation for why private regulation may not be achieving its objectives. It provides comprehensive empirical evidence about the impact of private regulation across multiple countries and industries to complement earlier approaches that were based on case studies<sup>2</sup>. It also outlines pathways to its improvement. The research we refer to consists of detailed empirical investigations that were published in seven articles in a special issue of the *Industrial and Labor Relations Review (ILR Review)*, 2020) and in a forthcoming book by Kuruvilla<sup>3</sup>. Our purpose in this essay is not to report on the analyses to be found in these works (for which we refer the readers to the forthcoming special issue of the *ILR Review* and Kuruvilla's book) but to draw lessons and implications from this body of work for the improvement of the private regulation of labour standards in global supply chains. However, there is an important caveat: We are not suggesting that private regulation is the best way of improving labour conditions in global supply chains; rather better methods include the enforcement by countries of their own labour laws and stronger transnational union activity. It is the failure of those arrangements that have given rise to private regulation in the first place, and it is important for us to examine how it can best be enhanced. In what follows, we briefly summarize the forthcoming research on the effectiveness of private regulation before turning to explanations for the limited progress, and, thereafter, to the pathways leading to an improvement of private regulation.

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2 An exception to case study approaches is the research by Toffel, Short and Ouellet (2015). The authors analysed data from a global auditing firm and used this data in several subsequent articles to explore compliance improvement.

3 The book is tentatively entitled *Private Regulation of Labor Standards in Global Supply Chains: Problems, Progress and Prospects* and is to be published in April 2021 by Cornell University Press. The New Conversations Project: Sustainable Labor Standards in Global Supply Chains at Cornell University (NCP) facilitated both the special journal issue and the book by enabling access to research sites and providing funding for a conference that generated the contributions to the special journal issue.

## ► 1. New research: What have we learned about the effectiveness of private regulation?

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As noted earlier, given the lack of transparency among companies and MSI's regarding the results of their private regulation efforts, the conclusion that this regulation is not achieving its intended impacts has been drawn from a number of case studies of selected companies in relatively few industries, such as garments and food; from several investigative reports by NGOs<sup>4</sup>; and from critical incidences, such as the Rana Plaza factory collapse. The forthcoming research builds on these efforts by providing a comprehensive picture of the overall performance of private regulation across multiple industries and multiple countries. The research uses several data sources, especially some 40,000 audits conducted over a seven-year period in more than 12 countries and 13 industries<sup>5</sup>, as well as data from several global companies and MSIs. In addition, the research is based on several new qualitative case studies of different dimensions of private regulation<sup>6</sup> and includes a new theory that explains both the lack of progress and the challenges and pathways for improvement.

### 1.1 Summary of key findings

With regard to whether private regulation has improved labour rights and working conditions in global supply chains, the results from the forthcoming book by Kuruvilla and the articles in the special issue of the *ILR Review* suggest a mixed picture. We discuss first the positive findings, followed by the more

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4 Selected examples include different reports regarding purchasing practices published in 2019 by Human Rights Watch, the Business and Human Rights Center and Better Buying; Clean Clothes Campaign's report on wages; and reports by Global Labor Justice and the Asia Floor Wage Alliance, as well as the International Labor Rights Forum and Labour Behind the Label.

5 The countries are Bangladesh, Cambodia, China, India, Indonesia, Jordan, Mexico, Turkey, the United States and Viet Nam. The industries include agriculture, apparel, apparel accessories, electronics, food, footwear, furniture, hard goods, jewelry, kitchen and housewares, soft goods, toys, and a catchall category called "other".

6 This body of work includes: (1) a detailed evaluation of wages in global supply chains, drawn from disparate sources of data; (2) a detailed evaluation of progress on freedom of association, an enabling right that affects all other rights and worker outcomes and is a core labour standard; (3) studies of the link between purchasing practices and private regulation practices inside a global company (the first study of that type); (4) investigations of Better Work (BW) programmes in Cambodia and Lesotho; and (5) studies on the evolution of the Action, Collaboration, Transformation (ACT) agreement, the performance of the Accord on Fire and Building Safety in Bangladesh, and changes in corporate governance through B-corporations (three important innovations in the private regulation space).

negative ones. On the positive side, using evidence on violations of labour standards provisions in company codes from 12 countries and industries over a seven-year period from 2011 to 2018 (the data was provided by an auditing company), there is clear evidence that the incidences of child labour are close to zero. Violations of child labour provisions still exist (some of these relate to record keeping), but they are still negligible. With regard to forced labour as well, the incidences of violations are insignificant; but, as we know, it is not always easy to detect forced labour violations in a brief two-day audit. The difficulty of detecting violations with regard to discrimination in a brief audit is also well known (women workers experiencing discrimination and harassment are unlikely to confide in an unknown auditor in a brief meeting inside the factory premises). Hence, while the discrimination violation data show a positive trend (less than 0.1 violations per audit), they must be taken with a grain of salt.

The same dataset also indicates a clear and discernible decline in total working hours and continuous working without rest, two provisions that are included in most CoCs. Weekly working hours have declined on average from 60 hours per week to 55 hours per week, but there is substantial variation across the 12 countries and industries examined. While the overall trend is generally towards reduced hours, we note increased hours in the toy and footwear industries, particularly after 2017. With regard to the number of days of continuous work without a rest day, there is an average decline across 12 countries and all industries from 10.5 days to 8.5 days over the period from 2010 to 2018, which is significant progress. This progress could be attributed to private regulation's effectiveness, but, just as plausibly, it could be the result of better enforcement of national laws by the respective governments. Either or both explanations are relevant here. However, the number of continuous working days without rest is still above 12 days in China. The data also show that the percentage of workers in a factory who are paid correctly (according to the relevant laws) has increased, in every country and industry, from an average of 90 per cent to about 94 per cent. Thus, there are some positive effects.

Unfortunately, negative results, in terms of violations per audit, and a number of other findings discussed below, outweigh the positive ones. The overall number of violations on all labour issues combined has increased rather than decreased during the 2010–2018 period, from 2.5 violations to 3.5 violations per audit in most industries and all countries – although China takes the lead in labour violations. Similarly, the number of violations per audit with regard to health and safety shows a clear and discernible increase over the period in all countries and industries, from an average of 2.5 violations to over 6 violations per audit, but declining to 5 violations by the end of the period. Perhaps, this reflects the heightened focus on safety and health issues in most corporate private regulation programmes after Rana Plaza. We should note that these

results indicate a gross picture of progress, since we know that factories often cycle in and out of compliance (Locke 2013), but also because the factories in the audit database keep changing as they enter or exit being suppliers.

In order to examine the progress in the same factories over time (a better measure than the gross progress measure used above), the forthcoming book by Kuruvilla also includes the results of investigations in a set of factories that have been audited multiple times during a four-year period from 2014 to 2018. The results of this analysis are even more damning of private regulation's effectiveness – there was no sustained improvement in wages, the percentage of workers paid correctly, weekly working hours and various other measures, even though some of these factories had been audited more than 10 times during the 4-year period.

With regard to wages, the evidence in Kuruvilla's book is mixed as well. On the one hand, the data indicate that, in most countries, workers in the garment industry are being paid above the local minimum wage (with some very minor exceptions found in a few audits). Thus, companies that only require wages to be paid according to local minimums in their corporate codes can claim that wages are consistent with the provisions of their code, although it is hard to claim that private regulation has a causal effect on wages (as many local labour market features account for wage levels). However, many companies and MSIs (e.g., FLA, ETI and FWF<sup>7</sup>) have committed to more than minimum wages in their codes. These commitments range from endowing workers with discretionary income to providing them with living wages. On these commitments, the evidence from Kuruvilla's book is quite clear – average wage levels hover close to the minimum in most countries and industries examined. As an example, the wages of Bangladeshi workers would have to increase by 223 per cent to meet a low estimate of living wages (provided by the Wage Indicator Foundation) and by 428 per cent to meet the highest estimate of living wages (provided by Asia Floor Wage). The percentage increases required for Cambodian workers are 193 per cent and 509 per cent, respectively.

It is with regard to freedom of association (FOA) that the results reported in the research are most disappointing. The Kuruvilla book uses a variety of empirical data from diverse sources to exhaustively examine the state of FOA in global supply chains and to arrive at several conclusions. First, leading apparel brands source primarily from countries in which the national institutional support for FOA and collective bargaining (CB) is weak – a finding that is consistent with prior research of Short, Toffel and Hugill (2016), Stroehle (2017) and Distelhorst and Locke (2018). Second, the quality of information regarding FOA and CB rights provided by private regulation, including by firms and MSIs, is poor. Typically, the number of violations of FOA and CB is

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<sup>7</sup> FWF: Fair Wear Foundation.

small, consisting only of a minor proportion of overall CoC violations, despite substantial evidence that workers' rights to organize are routinely violated. Third, the nature of FOA and CB violations highlights a large range of obstacles for workers to exercise their rights in a meaningful way. Two different sources of data show that global companies and MSIs are not ensuring that their suppliers and members, respectively, enforce compliance with FOA and CB standards. Finally, analysis of data from the Better Work programme of the ILO and the International Finance Corporation (IFC) suggests that, where FOA and CB do exist, compliance<sup>8</sup> with all code provisions is significantly higher.

A further problem with private regulation concerns the third element, i.e. whether companies are incentivizing their suppliers to improve on compliance. In what is the first empirical study on the question of whether purchasing and compliance are aligned in a global corporation, Amengual, Distelhorst and Tobin (2020) show, by analyzing purchasing data and compliance data, that there was no relationship between the two: factories with mediocre compliance records were getting more orders, while factories with improving records were getting fewer orders.

Finally, the forthcoming book and the articles in the special issue of the *ILLR Review* also suggest some positive aspects of private regulation that are working. As noted, where it exists, FOA appears to improve compliance significantly, but it exists in relatively few industries in global supply chains. There are some remarkable instances of compliance improvements found in the analysis of Better Work data (Kuruvilla forthcoming 2021), and especially the positive impact of transparency on compliance improvement (Robertson, 2020). However, Pike (2020) shows how the improvements in workers' voice in Lesotho disappeared once Better Work stopped functioning there. There is also an interesting case study of improvement in compliance in the supply chain of a global retailer. The explanation for the improvement centres on the retailer using both a strong stick and a strong carrot approach. Suppliers were given a five-year window to reach the compliance levels mandated by the retailer, but the retailer guaranteed to continue sourcing from those suppliers during the period.

To summarize, the accumulated evidence in the forthcoming book and articles, derived from analyses of a range of data from multiple actors in the global supply chain ecosystem, does not suggest sustained improvement in labour rights and working conditions, despite 25 years of private regulation. How can we explain this?

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<sup>8</sup> Better Work (BW) measures compliance in eight different clusters of labour rights, based on responses to a series of dichotomous questions for each cluster, where 1 equals evidence of non-compliance and 0 equals the absence of non-compliance. More details on BW compliance measurements can be found in Brown, Dehejia and Robertson (2018).

## ► 2. Explaining the lack of sustainable progress in private regulation of labour standards in global supply chains

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What explains the lack of sustainable progress in improving working conditions? Prior research has advanced several different explanations, notably: the model of private regulation is not suitable to solve the problems of poor working conditions; it is based on unwarranted assumptions; and there are numerous problems with the implementation of the model. While all of these explanations are valid, we advance a plausible new explanation, using institutional theory.

### 2.1 Prior Explanations

Several authors have questioned whether the private regulation model is the right model to improve labour standards, particularly since the answer to improving labour standards rests with stronger governmental intervention and the enforcement of legislation in supplier countries, as well as with trade union activity. There is a justifiable concern by some authors that private regulation efforts will replace government and union activity, while others argue that the purpose of private regulation is not to improve labour standards but to limit legal liability and protect brand value (see Esbenshade 2004; Frundt 2004; Rodríguez-Garavito 2005; Bartley 2007). Yet, private regulation has grown in popularity over the past 20 years.

Locke (2013) suggests that the model is, in effect, badly designed, as it is based on several unwarranted assumptions. The model, he argues, assumes that asymmetric power relations exist between buyers and suppliers, where powerful global buyers have the leverage to force suppliers to comply with their CoCs. This assumption does not hold for two reasons. First, factories may produce for several brands, which allows them to spread their risk and insure themselves against an unforeseen change in consumer demand for any single brand's product. This reduces the brand's leverage over specific factories. Second, some large suppliers and vendors such as Foxconn actually have leverage over the companies they supply to. Apple, for example, is 80 per cent dependent on Foxconn for its most popular products.

Locke (2013, 36) also points to the faulty assumption that it is possible to achieve an alignment of interests of the different actors in the supply chain



that are responsible for increased compliance through a system of incentives. Buyers and suppliers often have different interests that “provoke mixed and often contradictory behaviors”. Buyers want suppliers to invest in improving labour standards, but they also consistently “squeeze” suppliers with lower prices for their products, thus prompting suppliers to hide or falsify compliance data. A third assumption that Locke (2013) suggests to be unwarranted is that the auditing mechanism is capable of producing high quality and reliable information to drive sourcing decisions.

Problems with the implementation of the private regulation model constitute another set of explanations for the lack of sustainable progress in improving working conditions. Empirical investigations have identified problems with each of the three components of the private regulation model presented in the Introduction, consistent with some of these unwarranted assumptions. Regarding the first component, there is a multiplicity of codes across companies and MSIs. While the labour codes are all based on the underlying ILO Conventions, the specific provisions of codes vary, resulting in a multiplicity of auditing protocols that makes it difficult for supplier factories that are supplying multiple companies to meet differing standards (Kuruvilla forthcoming 2021).

The second component, auditing, has attracted the most attention from researchers and others as a cause of failure. Audits have been criticized for being too short in duration to detect violations, and auditors have been charged with not being trained well enough to uncover violations. Auditing has become a low cost, commodified and outsourced activity (relatively few companies use in-house auditors), so that audits simply consist of “checking the boxes” rather than uncovering the root causes of violations. Interviewing workers in the factory remains a problem, as workers are coached to provide “desirable” answers. Workers are not interviewed at their homes, where they may provide a more forthright assessment of whether the factories engage in union suppression or discrimination. There is some degree of “audit fraud”, where factories bribe outsourced auditors to give them a “passing report”. Falsification of audit records also exists, as many factories have learnt to keep “double sets of books”. In addition, auditors are rarely able to detect unauthorized sub-contracting. For a review of the criticisms of auditing, see Locke (2013), Bartley et al. (2015), Short, Toffel, and Hugill (2016) and the 2019 Clean Clothes Campaign’s *Fig Leaf for Fashion* report on auditing. The range of problems lend support to Locke’s argument that it is unwarranted to assume that factory audits produce the high quality reliable information that global buyers are supposed to take into account when making sourcing decisions.

We know very little about implementation issues with regard to the third component of private regulation, which requires brands to incentivize their suppliers to comply with CoCs by linking compliance with their orders. In principle, factories that failed to show improvement in compliance would

be punished, while factories that showed improvement would be rewarded with more orders. Our lack of knowledge is largely due to the refusal by global companies to share their purchasing data or to show how purchasing and compliance are interlinked in their sourcing policies. Researchers such as Bartley et al. (2015) suggest that compliance departments generally do not have the power to shape sourcing practices, and the study by Amengual, Distelhorst and Tobin (2020) referenced earlier suggests that there was no alignment between purchasing and compliance in the company they examined. This alignment is crucial, however, as it is often the case that poor purchasing practices cause poor compliance (Anner 2018). An ILO global survey of 1,454 suppliers reveals how purchasing practices of global buyers affect working conditions in their factories: low prices, insufficient lead times and inaccurate technical specifications result in lower wages and longer hours (Vaughan-Whitehead and Caro 2017).

Finally, a frequent criticism is that companies adopt private regulation policies, but they are not serious about implementing them. This, the critics argue, explains the lack of sustainable improvements in labour conditions in the supply chain (Nova and Wegemer 2016; Appelbaum and Lichtenstein 2016). The argument here is that private regulation policies are adopted primarily as a reputational risk minimizing strategy. The disconnect between sourcing and compliance within global firms is considered as evidence that policies have not been put into practice.

All of the above explanations have merit in explaining failures in private regulation. Yet, the research on the correlates of compliance show substantial variation across companies and suppliers. Some companies appear to implement their private regulation programmes in ways that do indeed produce results, as shown by the example of the retailer noted earlier in this essay. Locke (2013) has documented some improvement when compliance programmes were buttressed by capacity building programmes in Nike factories. Companies that use their own in-house auditors appear to show better results. It is, therefore, unlikely that the explanations discussed above can account for this variation. On the other hand, the recent comprehensive evidence summarized in the earlier section of this essay suggests a general failure of private regulation to yield improvements in outcomes for workers. Hence, it is possible that there is a more general organizational field-level explanation for this phenomenon, to which we turn to next.

## 2.2 A field-level explanation for the failure of private regulation

Kuruvilla, Liu, Li and Chen (2020) and Kuruvilla (forthcoming 2021) use institutional theory to develop a new and plausible explanation for the failure of

private regulation. Institutional theorists have long studied organizations' responses to regulation. Meyer and Rowan (1977) suggested that organizational decoupling could account for the so-called policy-practice gap, i.e., why organizations adopt policies but do not implement them. Institutionalists argue that policy-practice gaps typically occur when organizations respond to rationalizing pressures from the environment – for example, by adopting an “externally induced” rule to gain “legitimacy” or by avoiding legal sanction through “symbolic adoption”. This means that policies are adopted but not implemented at all or implemented so weakly “that they do nothing to alter daily work routines” (Bromley and Powell 2012, 7). Policy-practice decoupling is also more evident early in the adoption process, where the capacity to implement policies is weak and internal constituents do not reinforce the external pressures for the policies.

We acknowledge that many global firms are adopting policies symbolically. There are many cases of small and medium-sized firms that have very small sustainability departments which are incapable of implementing a private regulation policy that is effective, even if they join MSIs. It is possible that many global firms, especially those not in the public eye, have adopted policies symbolically. The arguments made in prior research (e.g., Appelbaum and Lichtenstein 2016) and the accumulated case study evidence (Bartley and Egels-Zandén 2015) suggest that the symbolic adoption thesis is largely supported. However, even symbolically adopted policies sometimes become integrated into the organization over time, particularly if they are monitored through hard and soft law channels.<sup>9</sup> This is clearly the case with private regulation labour practices, as many firms that have adopted policies have gradually had to implement them.

A new strand of institutional theory hypothesizes the existence of a second decoupling form – practice-outcomes decoupling, which occurs when formal structures are adopted, work activities are changed and policies are implemented. However, scant evidence exists to show that these activities are linked to organizational effectiveness or outcomes (Briscoe and Murphy 2012; Bromley and Powell 2012, Wijen 2014), thus resulting in practice-outcomes gaps. This type of decoupling could occur when private regulation structures are implemented within the organization without being clearly integrated with the core goals of the organization – that is, core goals such as profitability are internally “buffered” from more peripheral private regulation structures. We know that many companies have extensive, well-staffed and well-funded private regulation programmes, with records of implementation for over 20 years. In the apparel industry, Nike, Gap, PVH and Adidas, among others,

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<sup>9</sup> An example of a hard law channel is legislation, such as the United Kingdom's Modern Slavery Act. An example of a soft law channel are the United Nations Guiding Principles on Human Rights.

are examples that have been well studied. Yet, as Locke (2013) demonstrates in his extensive studies of Nike, the improvement in labour standards is not sustained. Understanding why programs that are implemented still do not result in better outcomes for workers is thus, crucially important.

Institutional theorists argue that practice-outcomes decoupling is more likely to be prevalent in opaque institutional fields. Wijen (2014, 302) defines an opaque institutional field as one where “observers have difficulty identifying the characteristics of prevailing practices, establishing causal relationships between policies and outcomes and precisely measuring the results of policy implementation,” as opposed to more transparent fields where these issues are clear. In general, private regulation conforms to this definition. Companies do not share the results of the impact of their private regulation programmes on workers. There is little or no transparency.<sup>10</sup> Even MSI’s do not share their analyses of each of their corporate members’ private regulation programmes publicly or even internally with their members. The difficulty of identifying “best practices” is the key problem, as institutional theorists have long maintained that companies through processes of imitation converge on best practices. An example is the diffusion of the Toyota production model, widely seen as “best practice” in the 1990s to other global carmakers, but there is a large amount of literature on the diffusion of innovative best practices in numerous fields (see Barker 2004).

Thus, even if the symbolic adoption issue (policy-practice decoupling) could be solved – and the new draft of legislation emanating from European Union (EU) countries on Mandatory Human Rights Due Diligence is designed to do exactly that – it will still not solve the problems of practice-outcomes decoupling given the opacity noted above. Therefore, with the absence of transparency and the lack knowledge about what works and what constitutes best practice, companies continue to engage in ritualistic auditing, even if it does not result in improvements in outcomes for workers. After all, doing so, still provides firms with some legitimacy (Wijen 2014).

### Drivers of Opacity

Wijen (2014) argues that three aspects cause opacity: behavioural invisibility, practice multiplicity and causal complexity. The contribution of Kuruvilla et al. (2020) is to show how opacity is created in the private regulation organizational field. Each of these are discussed below.

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<sup>10</sup> From an institutional theory viewpoint, transparency is required so that the organizational field can see what is working, i.e. what best practices are. Others call for transparency in order to be able to hold companies accountable.

### Behavioural invisibility

This refers to the difficulty of observing and accurately measuring the behaviour of actors. The inability to accurately measure their behaviour gives suppliers with a low incentive to comply the opportunity to disguise their non-compliance or “pretend to be substantively compliant” (Wijen, 2014). Prior research has outlined the variety of ways in which auditing fails to measure the behaviour of suppliers (Locke 2013; Bartley et al. 2015; Short, Hugill and Toffell 2016), contributing to behavioural invisibility.

Building on this research, Kuruvilla et al. (2020) suggest that supplier heterogeneity contributes to behavioural invisibility in three ways. First, since suppliers are located in multiple countries and in numerous regions within those countries, it poses significant measurement challenges for auditors, who need to be aware of the variety of national and local laws and regulations. For example, although national laws on social security exist in China, regulations vary by province and city. Second, measurement challenges for auditors increase, because suppliers vary in terms of the products they produce, resulting in variations of safety issues, health risk issues and industry rules. And finally, the employment practices of suppliers – such as shift work, flexible working arrangements and leave taking – vary significantly, which standardized CoC provisions do not take into account.

In addition to the above, Kuruvilla and Li (forthcoming 2021) use data from an auditing firm covering more than 40,000 audits over a seven-year period, spanning multiple industries and countries. Using the auditing company’s processes, they classify the information provided by supplier firms to their auditors as being either reliable or unreliable. Unreliable information includes information about which auditors had a clear sense that it was “falsified”, or about which they had doubts regarding its full reliability. The results of their analyses are quite revealing. The percentage of unreliable audits is far higher than previously assumed, with unreliable ones exceeding 50 per cent over the seven-year period in China and India, with Bangladesh and Cambodia also exhibiting a high percentage of unreliability. When looking at the unreliability of audit information across industries, the toy industry is found at the top with 61 per cent, while soft goods, hard goods, jewelry and housewares are all indicating unreliability percentages of above 50 per cent.

In an extension of this analysis, the authors study the “audit consulting industry” in Guangdong Province in China. This is a “grey” industry that helps supplier factories pass audits through a variety of methods, including software that generates false payroll records. An analysis of 15 audit consulting companies underlines the variety of ways in which this industry advertises its services, including guarantees that supplier factories engaging its services

will pass the audits of well-known companies and MSIs.<sup>11</sup> In addition, through an extensive analysis of the work logs of an audit consultant over a period of eight years, they show the ways in which these companies work. These include prepping factory workers to give desired responses to auditors, renting a better looking factory for the audit, choosing an appropriate individual to impersonate the factory manager at the time of the audit and using their extensive networks and relationships (*guanxi*) to persuade auditors to give a passing grade to the factory. While the range of services provided by audit consultants makes for interesting and humorous reading, the net impact of this research is to highlight the extreme difficulty of accurately measuring suppliers' behaviour. It seems hard to believe that global buyers are not aware of this level of falsification of audit information, which ensues in the “decoupling” of private regulation policies and actual practice at the supplier level. The result seems to suggest that there are failures in “due diligence”. In sum, the forthcoming research emphasizes how behavioural invisibility is caused by institutional factors relating to supplier heterogeneity as well as by active data falsification on the part of suppliers.

### Practice Multiplicity

This refers to the diversity of practices adopted by actors – spread across different geographic, institutional, economic and cultural contexts – that makes it difficult to engage in compliant behaviour (Wijen 2014). Prior research has already demonstrated how corporate and multi-stakeholder CoCs differ, resulting in programme multiplicity (Fransen and Burgoon 2012). But given that we are talking about practice-outcomes decoupling, Kuruville (forthcoming 2021) examines how a global supplier, supplying about 70 global brands, experiences the private regulation practices of those brands. Here, too, the author finds a multiplicity in how private regulation programmes are implemented, and how this multiplicity contributes to opacity in different ways. This research demonstrates that the brands use a plethora of rating scales that differ significantly; that auditors use different weights to judge what are severe and less severe violations; that auditors appear to focus more on some labour standards than on others; and that there is no relationship between the number of violations and the final rating. Given these differences, the factories receive vastly different ratings for audits conducted by different brands. In an interesting example, the study shows that two brands auditing a specific supplier factory during the same time frame find vastly different violations, resulting in a rating of “acceptable” by one brand and

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<sup>11</sup> In addition to analysing the advertisements of 15 audit consulting companies in Guangdong province, the authors analyse the detailed work logs of an audit consultant over an 8-year period posted on the Chinese website *Tianya*, which allows them to show how these companies work.

“major deficiencies” by the other. For the factory, the different auditing practices and the ratings given by different brands make it impossible to couple their labour practices to the heterogeneous private regulation approaches of the brands to which they supply. The evaluation procedures employed by these brands suggest considerable multiplicity, thus obscuring what is real.

### Causal Complexity

The third key contributor to field opacity is causal complexity. Since the practice of private regulation globally involves heterogeneous actors following a multiplicity of practices in vastly different institutional contexts, it becomes difficult to establish clear cause and effect – i.e., what works and what does not work – and to determine what are the direct and indirect effects of various drivers of compliant behaviour (Wijen 2014). To be sure, prior research has uncovered many causes of compliance improvement. Reviewing this research, Berliner et al. (2015, 194), note that “given the vast array of work on this topic, we know surprisingly little about how various insights and findings fit together, and we still face significant gaps in data and research”. Additionally, given that institutional contexts regarding workplaces vary so dramatically across countries, what is likely to be seen as an established cause in one country does not necessarily need to work in another. Kuruvilla and Li (forthcoming 2021) demonstrate this by investigating whether “causes” established in prior research in some settings translate to other settings. Through an investigation of data from the 30 factories in the Chinese supply chain of a large global retailer, the authors show that prior hypothesized causes of compliance improvement are not significant predictors of compliance in this sample. For example, although the factories vary considerably in terms of leverage (the percentage of a factory’s products purchased by the buyer), Kuruvilla and Li find that high leverage percentages do not matter with regard to compliance. Similarly, long-term buyer-supplier relationships, another frequently hypothesized cause of compliance, is not found to be a significant predictor. Rather, more important predictors involve factory level variables that private regulation does not usually measure. The key implication of this work is that the causes of improvement in working conditions in supplier factories in global supply chains are complex. The complexity arises from the interaction between heterogeneous actors (companies, auditing firms, suppliers) following a multiplicity of practices, combined with the effect of local institutional conditions (province and city level rules, for example) and industry and workplace contexts.

In demonstrating the three ways by which opacity is created in private regulation, the contribution by Kuruvilla et al. (2020) is a new field-level and “systemic” explanation of why private regulation has failed to fulfil its promise. Opacity makes it impossible for actors in private regulation (companies,

suppliers, auditors) to get a clear idea of what works, why it works and what best practice is. Hence, they continue to follow the current model (because it still gives them legitimacy), even though there is a decoupling between private regulation practices and outcomes for workers. Thus, such decoupling constitutes a new and plausible explanation for why we do not see sustainable progress in improving workers' lives in global supply chains. The key implication of the institutional perspective adopted by Kuruvilla et al. is the need to transform an opaque institutional field into a more transparent one.

### ► 3. Reforming private regulation: New pathways

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Given that field opacity makes it difficult to identify best practices in private regulation programmes, the key implication is to move the institutional field from opacity to transparency. Such a transformation requires the actors in the private regulation ecosystem to rethink their roles and practices and to learn from the few examples of success that we have seen in the recent research. Of course, we acknowledge that private regulation alone will not solve the problems encountered. As many have highlighted (see Amengual and Chirot 2016), the interaction between private and public regulation in supplier countries is important, as are the interactions with broader global governance mechanisms. However, since the forthcoming research focuses specifically on how private regulation could be improved, we organize our discussion below into several different but interrelated categories for ease of presentation and discuss them one by one.

#### 3.1 Buyer Collaboration

A central lesson from the past is that private regulation requires collaboration among major companies (Locke 2013). No single company can improve working conditions at a supplier factory when it accounts for only a relatively small portion of the supplier's production. And the payment of living wages, for example, requires that all buyers sourcing from a particular supplier work in a concerted effort. What has been absent until recently are vehicles that facilitate such concerted action. Institutional theorists like Wijen (2014) have stressed the role of "*niche*" institutions. Since the causes of compliance improvement are both complex and situation specific, uniform "rules" – like the one-size-fits-all model of private regulation as we know it – need to be tailored to specific contexts. To strike a balance between universality and context



specificity, niche institutions can play an active role by transferring broad principles to unique approaches and practices that work in specific contexts.

The idea of niche institutions is not new. The Accord on Fire and Building Safety in Bangladesh (henceforth: “the Accord”) and the Alliance for Bangladesh Worker Safety (henceforth: “the Alliance”) are contemporary examples. Both have been remarkably successful, even though they have focused on a subset of labour standard issues, such as fire and building safety (Bair, Anner and Blasi, 2020, provide a more detailed evaluation).

It is crucial to understand the factors that make niche institutions emerge and be successful. The first requirement is a catalyst. The key catalyst for the Accord was the Rana Plaza factory collapse, which galvanized collaboration among the brands and resulted in the binding agreement with the unions. The key catalyst in the Indonesian Freedom of Association Protocol (FOA protocol – another example of a niche institution) was the publication of a report about the lack of freedom of association before the 2008 Beijing Olympic Games. This report spurred the June 2008 meeting between the Playfair Alliance and major sportswear brands in Hong Kong, resulting in efforts to reach a multi-party agreement among six global brands, 73 Indonesia-based suppliers, two global union federations and five Indonesian union federations.

A second requirement for niche institutions with collaboration among multiple parties is *arrangements with clear rules and expectations*. The Accord, for example, required all participating brands to commit to sourcing from Bangladesh during the period of operation, and a variety of rules and expectations were outlined that made every party’s obligations very clear (Bair et al., 2020). The FOA protocol required suppliers to implement the protocol as a minimum workplace standard, with the brands to ensure adoption of the provisions by all first-tier suppliers and encourage adoption by second-tier suppliers (Connor, Delaney and Rennie 2016). The protocol also outlined clear rules regarding unfair employer practices and union representatives’ rights for time off to carry out their union duties.

Finally, niche institutions work better when there is a *supportive infrastructure*. For the Accord, this infrastructure is the Bangladesh Accord Foundation, chaired by the ILO. It supports the signatories in implementing the agreement by actually carrying out the inspections, monitoring remediation progress, reporting on progress in a transparent manner, providing training for safety committees and operating a safety complaints mechanism. Similarly, the FOA protocol also has its infrastructure in the form of factory-level committees. It also has a national-level committee with representatives from each union, each brand and designated suppliers, as well as relevant NGOs.

Of course, the world cannot depend on disasters and negative reports as key catalysts. That is why the paper by Ashwin et al. (2020) in the special issue

of the *ILR Review* is particularly relevant, since it highlights the emergence of the Action, Collaboration, Transformation (ACT) agreement, another niche arrangement that requires multi-firm coordination. ACT is also a transnational industrial relations agreement between 20 global brands and a global union federation (IndustriALL). ACT aims to promote living wages by establishing industry-wide collective bargaining agreements in selected garment exporting countries. While ACT also exhibits clear rules and expectations of the parties, the key contribution by Ashwin et al. lies in their finding that ACT emerged not as a result of pressure from civil society or consumers (private regulation emerged through that pressure), but due to the trust and common group understandings built up over time through the participation of global brands in other MSIs such as the ETI and the Accord (both of which have unions in their governance structures). A key implication is that prior relationships matter, especially in catalyzing the emergence of union inclusive multi-firm governance institutions.

These prior relationships may also account for the development of another niche initiative, the Social and Labor Convergence Program (SLCP, established in 2015 and still developing), which involved multi-brand collaboration and supplier relationships that include more transparency (among members) using a common audit “tool”. However, it is still too early to evaluate this initiative.

The problem of practice multiplicity noted earlier in this essay illustrates the role a niche institution could play in ensuring that all the brands sourcing from a large supplier follow a uniform approach to auditing, acceptance of each other’s audits and perhaps even an agreement on paying wages consistent with their CoCs. Such collaboration and coordination would resolve the problem of practice multiplicity, allowing the brands sourcing from the same factory to share best practices. In sum, we need more such arrangements at the supplier level, at local and regional levels and at national levels. It is crucial that there be a geographic and institutional boundary to such institutions to ensure “place-conscious” solutions. The key, of course, is to identify potential catalysts of these efforts.

### 3.2 Internalizing private regulation’s goals among actors

Another way to move the field from opacity to transparency requires that the actors who were instrumental in developing private regulation initiatives not only internalize the goals of private regulation programmes themselves, but stimulate internalization among other actors in the ecosystem.

For *global companies*, internalization of private regulation goals cannot be achieved without integrating their sourcing and compliance efforts. Currently, we have little information as to whether these are integrated in most

companies, and anecdotal evidence suggests that many sustainability or compliance departments cannot even access their company's sourcing data. Meanwhile, sourcing departments do not prioritize compliance performance when making their purchasing decisions. Thus, purchasing is "buffered" from private regulations goals. To stimulate internalization, efforts such as guaranteeing that the head of the compliance department holds a sufficiently high enough senior position to ensure the department's basic function are not enough. Global companies must pay more attention to adjusting their organizational systems and processes, such as performance management. As long as sourcing managers are rewarded for obtaining products at the highest quality and cheapest price, and compliance managers are rewarded for compliance improvements, there can never be internalization. The research by Amengual, Distelhorst and Tobin (2020) suggests the need for flexibility in supplier relationships for global brands to be capable of reallocating their orders in response to compliance performance. Kuruvilla's (forthcoming 2021) case study of Pangia, a global retailer, highlights the variety of challenges faced by the company in trying to integrate sourcing and compliance and provides valuable lessons for other companies wishing to achieve this alignment.

For *multi-stakeholder institutions*, the internalization of private regulation goals can be stimulated by increasing the stringency in selecting new members and establishing more rigorous socialization processes for them (Wijen 2014). Well-known MSIs such as the FLA, FWF and ETI all have selection and socialization procedures for their members, although these selection procedures are not disclosed publicly. We also know relatively little about how these MSIs hold their members accountable for their progress regarding their private regulation goals. Suggestions for more stringent selection procedures include, for example, the requirement that corporate members completely integrate sourcing and compliance as a condition of membership, perhaps within three years of joining the MSI. Evidence that companies have integrated sourcing and compliance would constitute evidence of internalization. Apart from this, MSIs should be capable to hold their members strictly accountable for progress towards their goals. For example, the ETI code requires member companies to pay living wages in the supply chain. As of this writing, we are not aware of any evidence that any ETI member is paying living wages in its global supply chain in the apparel industry. To stimulate internalization of the living wage goal among its members, the ETI could make progress in paying living wages one condition in both member selection procedures at the time of enrolling and the membership review process within several years of joining.

As for *suppliers*, the major way by which they will internalize their buyers' private regulation programme goals is through incentives. Global companies will have to reward suppliers for complying – and not necessarily in the form of paying a higher price for products. Incentives can take the form of long-term

collaborative and partnership-based relationships that provide suppliers with steady orders, as Amengual and Distelhorst (2019) show in their study of Gap Inc.'s supply chain. The case study by Kuruvilla (forthcoming 2021) of the global retailer Pangia shows that it is indeed possible to develop stable, long-term collaborative relations with suppliers. Not only were Pangia's suppliers guaranteed long-term orders, with firm commitments for three years, but the company shared software with them that made it possible to jointly plan their production. In effect, Pangia rationalized its supply chain to deal with a smaller number of vendors, but it deepened its relationship with those vendors to create a partnership model that positively affected compliance. This demonstrates the utility of partnership-based buyer-supplier relationships in encouraging suppliers to internalize the goals of buyers' private regulation practices. Nike and New Balance are among the companies that have been moving in a direction similar to that of Pangia. Of course, it is also possible that suppliers may voluntarily adopt high labour standards to signal to potential buyers their suitability as a highly compliant supplier.

To involve *factory workers* in the achievement of private regulation goals is another compelling way to stimulate internalization. The currently prevailing private regulation practices have not incorporated workers with a clear role. However, workers in supplier factories are actually the most knowledgeable about their working conditions, and their voice and experience need to be harnessed. Interviewing workers off-site – including by way of worker hotlines (for example through mobile monitoring platforms such as the one developed by Labor Link) – allows global brands to see the information in real time on their dashboards, gradually building up a full picture of workers' perspectives on key issues. Worker surveys are an increasingly popular way to get workers' perspectives, and, increasingly, companies are making use of these tools. Results from a variety of studies of the ILO's Better Work programme emphasize how the involvement of workers in PICCs (performance improvement consultative committees) improves compliance. Ultimately, however, a key way of stimulating internalization of the goals of private regulation among workers, suppliers and other actors is for workers themselves to be the effective auditors – an idea highlighted by the newly formed Worker-Driven Social Responsibility Network (WSR)<sup>12</sup>. Most importantly, the forthcoming research emphasizes the failure of private regulation in improving freedom of association and collective bargaining in the global supply chain, which,

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12 WSR is a network of organizations that have come together to develop a new set of principles to advance labour rights in supply chains. These principles include, among others: regulation programmes concerning workers must be worker-driven; obligations for corporations should be binding; buyers should provide suppliers with the financial incentive to comply with buyer codes; the consequences for non-compliant suppliers must be mandatory; there must be measurable and timely gains for workers; and verification of workplace conditions must be independent. See <https://wsr-network.org/>.

if granted, is the best method of incorporating worker voice in the achievement of private regulations goals. The contemporary evidence in the forthcoming research reported here is that, where these rights exist, compliance improves substantially. In general, lessons from over 100 years of industrial relations research regarding the efficacy of freedom of association, collective bargaining and associated grievance and dispute resolution mechanisms appear to have been ignored in private regulation approaches.

### 3.3 Fostering a systemic mindset

A third pathway to improve private regulation is to foster a systemic mindset in the whole ecosystem. One way to do this would be for actors in the ecosystem to study the interconnections between actors and factors concerning a specific issue in CoCs, perhaps studying or simulating the effects of specific actions. For example, sustainability standards that limit both working hours and overtime (a provision found in most CoCs) often have the unintended consequence of encouraging supplier factories to subcontract production to less compliant factories – a routine occurrence in the apparel industry. It is also important to distinguish between the major and minor causes, and to identify the uncertain effects of important variables. Reducing causal complexity requires a careful consideration of the variables that matter in enhancing compliance, and an assessment of whether the effects of these variables are consistent across different institutional contexts, regions and factory types.

For this to happen, two conditions must be met. The first is increased transparency at all levels. There are many varieties of transparency. While transparency with global companies' external stakeholders (such as the customers) is a "hot issue" right now, it is actually transparency within the private regulation ecosystem itself that is more important to improve the coupling of private regulation practices with outcomes. Causal complexity could be reduced if global companies, multi-stakeholder initiatives and auditing firms publicly disclosed their data regarding the effects of their private regulation practices. This level of transparency does not currently exist in the private regulation field; most brands and MSIs do not publicly disclose any data. The second condition is that we make use of the huge amounts of data regarding private regulation that already exists with global companies and MSIs. Such data can be analysed to draw lessons, identify causes and effects, derive what works in different contexts and assist in creating predictive models that will enable actors within the private regulation ecosystem to make more evidence-based decisions (Kuruvilla forthcoming 2021). Today, not many companies or MSIs analyse and make public (at least to the rest of the ecosystem) the results of how their private regulations programmes are working.

Together, these three steps would do much to move the organizational field of private labour regulation from its current level of opacity to a more transparent field. In turn, this would lead to a greater degree of coupling between companies' private regulation programmes and actual improvement in workers' lives in global supply chains.

The contemporary research also points to important developments in the broader context of private regulation. The new legislation on the Duty of Vigilance Law in France and the Mandatory Human Rights Due Diligence legislation being considered at the European level also show promise in creating transparency within the private regulation ecosystem by the reporting requirements contained in the legislation. However, early evaluations (see this volume) show that the practices implemented by French multinational enterprises (MNEs) have changed very little and the logic of audits based compliance remains the same.

The forthcoming research also clearly highlights the utility of the ILO-IFC's Better Work programme (Robertson 2020; Pike 2020). The programme has been shown to be an effective way of improving working conditions and labour rights in the supply chain, in part because it facilitates social dialogue through advisory services and capacity building of supplier factories, and in part because it engages companies and governments as well. If scaled up, the programme could be an effective substitute to currently practiced private regulation approaches. The positive finding that collective bargaining significantly improves private regulation should spur transnational union activity to focus on sectoral bargaining to standardize working conditions within supplier countries beyond the focus on global framework agreements whose provisions do not always reach workers at the grassroots level.

## ► 4. Conclusion

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This essay is based on extensive empirical and conceptual research that will only be published later in 2020 and in early 2021. This new research has permitted us to gain a more comprehensive evaluation of the progress of private regulation over a decade in multiple countries and industries. It has presented a new explanation based on institutional theory on the overall lack of sustained progress, while also outlining some pathways to transform the organizational field from its current opacity to more transparency for an improvement in workers' lives in global supply chains.

Private regulation is not the elixir. Better regulatory approaches include national governments in supplier countries enforcing their labour laws,

encouraging countries to adopt and live by their commitments as members of the ILO, harmonizing labour regulation in regional economic governance arrangements and increasing FOA and CB rights in all countries. However, given the absence of progress on all of those pathways, private regulation is one “lever” at our disposal that could be improved, if best practices were to become clear enough so that companies would be stimulated to adopt what works rather than being stuck in the ritualistic exercise of CoC monitoring. This essay has highlighted how private regulation can be improved.

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# 7 The social responsibility of multinational enterprises vis-à-vis the State

## The case of the automotive and television industries in Mexico

Graciela Bensusán and Jorge Carrillo

### ► Introduction

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This chapter analyses the effectiveness of public and private standards in protecting the rights of workers in multinational enterprises (MNEs) in Mexico, in particular in the automotive and television industries. Both industries can be considered successful in terms of regional economic integration against a national context of vast disparities in the production structure and widespread and increasing precariousness of working conditions within the framework of the export model.

The export model, which was consolidated with the introduction of the North American Free Trade Agreement (NAFTA) in 1994, was based mainly on a high degree of labour flexibility, low wage costs and the proximity to consumers in the neighbouring country. These parameters, however, were not in agreement with the main labour standards that were governing the conduct of multinationals – regardless of whether they were public (such as national or international standards) or private (such as the codes of conduct of MNEs) –, especially with regard to freedom of association and collective bargaining. In general, Mexico has an institutional framework with broad recognition of individual and collective labour rights, and, in the cases studied here (the automotive and electronics industries), codes of conduct exist which should guarantee these rights. However, since the beginning of the economic opening in the 1980s, MNEs and their suppliers in the value chain, either through corporations or their subsidiaries, have had a great deal of autonomy in their decisions regarding the working and wage conditions of their workers. The main

exception to this existed in situations where this extensive autonomy was counterbalanced by a genuine dialogue with trade unions.

Hence, the argument underlying this chapter is that, in the absence of public policies aimed at creating a more level playing field for all those involved in trade liberalization and productive restructuring, the limits of the export model became clear. Its benefits were confined to attracting investment and creating jobs in sectors such as those discussed in this paper, while the major profits of the model were reaped by the MNEs.

However, external factors, such as the negotiation of the Trans-Pacific Partnership (TPP) and the renegotiation of the NAFTA that gave rise to the United States-Mexico-Canada Agreement (USMCA), placed the Mexican labour regulation model<sup>1</sup> at the very heart of the discussions. It led to a real structural reform in the world of work that revisited old demands of independent trade unionism. Its implementation is still in the early stages owing to a particularly uncertain economic backdrop due to the Covid-19 pandemic. However, as will be seen in this chapter, whether any change can be expected to lead to more balanced negotiations between labour and capital in MNEs – and thus overcome the obstacles to organizing workers into genuinely representative unions – will depend on maintaining a proactive labour policy that will put into effect the new democratic principles contained in the 2017 Mexican Constitutional reform and the amendments to the Federal Labour Law (FLL) promulgated in 2019.

In order to show the limitations of the social responsibility instruments of MNEs in Mexico and the role that public regulations can play, two cases of highly dynamic industries are analysed that operate within global value chains (GVCs) and are employment-intensive: the automotive industry, with high rates of trade union membership and active unions (which is quite exceptional); and the television industry, with low rates of union membership and passive unions. These industry case studies can be better understood in light of the transformations in the economic context linked with the trade liberalization, and the recent renegotiation of the NAFTA. The latter coincided with changes in the institutional framework of labour relations to promote union democracy, as it will be explained below. The contrast between industries differentiated by their high and low rates of union membership, as well as by the active or passive policies of their unions, reveals that collective action is more effective than the simple establishment company codes of conduct for the achievement of sustainable benefits for the workers. To facilitate our analysis, we have structured this chapter into six sections.

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1 The concept of the Mexican labour regulation model refers to aspects including the degree of State intervention; the means or instrument prioritized to improve working conditions; the level of inclusion and protection of workers; the level of protection afforded; and the type of relationship established between the State and the unions. On this subject, see Bensusán (2020), as well as a comparative analysis in Bensusán (2000, 312–366).

The first section presents the social responsibility instruments of MNEs, in particular their codes of conduct, with a view to demonstrating their limited effectiveness when they do not coexist with effective government regulation (as argued by a significant study reviewed in this section). The second section analyses the role of the Mexican State in the area of labour relations and the main changes that have taken place over more than 60 years. The purpose of this section is twofold: (i) to show how the institutional capacities and labour regulation are weakened by moving from the import-substitution industrialization model to the export model; and (ii) to illustrate the strengthening of the labour regulation and institutions within the framework of the NAFTA renegotiations through the adoption of an important labour reform in the areas of labour justice, freedom of association and collective bargaining, combined with an upward wage policy. In order to contextualize the industry cases that will be analysed, the third section presents aggregated data on national employment and wages for the production chains of the automotive and television industries, which indicate the increasingly precarious working conditions in the suppliers as compared to those in the final assemblers. The fourth section presents the case of the Mexican automotive industry: an emblematic sector in the country because of its economic significance, technological importance and employment-intensive nature, which has undergone productive restructuring processes that have resulted in the deterioration of the negotiation capacity of trade unions. The case study of the Volkswagen de México plant at Puebla (henceforth VWM) clearly demonstrates the marginal impact that its code of conduct – which is part of the enterprise's global policy demanding a strong commitment to social responsibility – actually has on the conditions in the supply chain. The fifth section discusses the situation of the television industry, particularly the Tijuana case. This example analyses the impact on employment of the changes experienced by the industry at the economic level: from expansion to loss of market share to China; at the technological level: from analogue to digital televisions; and in production models: from being original equipment enterprises (OEMs) to contract manufacturers (CMs).<sup>2</sup> The result was a move from early socio-labour progress to regression in this area, again accompanied by ineffective codes of conduct in electronics companies. Lastly, the sixth section presents the conclusions, underlining the limitations of the social responsibility instruments of MNEs and the need to consistently promote an active State labour policy.

This paper is the result of various investigations carried out by the authors, with different methodological approaches at different stages to make it possible to observe changes and continuities in labour relations. In the case of the automotive and electronics sectors, qualitative techniques were used that were based on visits to enterprises, including interviews with managers,

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<sup>2</sup> For the difference between OEMs and CMs, see footnote 8, below.

workers and trade unionists. Secondary sources of information were also employed, mainly official data from the National Institute of Statistics and Geography of Mexico (INEGI) and the Mexican Social Security Institute (IMSS). As far as possible, and in the context of the Covid-19 pandemic, efforts were made to update the data with new interviews.

## ► 1. The questionable effectiveness of the social responsibility of MNEs

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In view of the State's clearly weakening capacity to ensure compliance with labour rights and to attract, in parallel, investment in an era of globalization, other alternatives came to the fore in the 1990s that were based mainly on the commitments of MNEs to respect labour rights. Such MNEs were seen as the main driving forces behind trade liberalization. After the failed efforts in the 1970s to limit their power and influence on labour markets through national or international public standards, the voluntary commitments made by the companies to respect decent work and environmental protection generated great interest in academia and public opinion (Murray 2004, 1). This resulted in the popular idea that demanding social responsibility from MNEs – while, at the same time, strengthening respect for national legislation – could be a better way of globally expanding international labour standards than by more traditional means. Unlike the intergovernmental, and therefore public, declarations adopted by the International Labour Organization (ILO) and the Organisation for Economic Co-operation and Development (OECD) in the 1970s,<sup>3</sup> the idea of the social responsibility of multinationals resulted in private agreements – codes of conduct – that were linked to the issues of different stakeholders, such as workers, environmentalists and consumers, especially those who had the ability to call into question the reputations of the companies concerned (Dombois 2011, 262).

As Kuruvilla, Li, and Jackson argue in this volume, one of the most discussed aspects of these private instruments remains their effectiveness. While, for some companies, the main motivation for adopting voluntary commitments is to improve their image, for other enterprises, codes of conduct would be an even more effective instrument of labour regulation than national coercive

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<sup>3</sup> The ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (MNE Declaration) was adopted by governments, employers and workers at the international level in 1977, amended on two occasions (2000 and 2006) and revised in 2017. The OECD Guidelines for Multinational Enterprises, which were adopted in 1976 by OECD countries, are part of the OECD Declaration on International Investment and Multinational Enterprises.

standards. Sabel, O'Rourke and Fung (2000) even suggested that suppliers could compete in complying with legal labour standards and setting off a race to the top in terms of the quality of working conditions. However, two decades later, this has not yet occurred. On the contrary, in the context of globalization, labour precariousness has increased, both in the developed and the developing world (Olesker 2016; Gutiérrez 2016).

As Dombois (2011, 266) has warned, given the scant evidence of the capacity of codes of conduct to improve working conditions in value chains, "scepticism would seem most advisable". Although, in recent years, codes of conduct have evolved, and the issues relating to the ILO's fundamental rights have been increasingly addressed – and even if the networks and information available from groups promoting the defence of these rights have developed –, the adoption of such codes of conduct is no longer seen as a substitute for State intervention. At best, it is an added factor that could raise the level of national standards (Kuruvilla, Li, and Jackson, this volume).<sup>4</sup>

However, as Murray (2004, 9) suggests, and as will be illustrated in the case studies of two industries in Mexico examined in this chapter, one of the main problems is the way in which codes of conduct address the issue of freedom of association and the right to organize. In general, this issue is not only addressed more superficially in the codes of conduct than it is in the ILO's MNE Declaration and the OECD Guidelines for Multinational Enterprises; it is simply a dead letter and does not influence in any way the relations between MNEs and their suppliers in the value chain. Considering these limitations, Murray argues that, from her perspective, the establishment of codes of conduct is primarily a public relations exercise that can only work in the appropriate context: where trade unions, free media, non-governmental organizations (NGOs) and information flows through the Internet are established (Murray 2004, 17).

With regard to the role of codes of conduct in countries such as Mexico, where the eight ILO fundamental Conventions have been ratified (with the Right to Organise and Collective Bargaining Convention, 1949 (No. 98) ratified as the latest one in 2018), and where the labour legislation widely recognizes collective rights, the available evidence – albeit fragmented and based on research with considerable limitations regarding access to information – suggests that the result of these private instruments has not only been minimal but that they also have not been very effective. Even in sectors such as clothing brands, where the pressure from NGOs has been considerable and the issue of their image is at stake for MNEs and other large enterprises, empirical studies reveal that a great lack of knowledge of the existence and the content of the

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<sup>4</sup> In the same chapter, Kuruvilla, Li and Jackson also present a review of the limitations of codes of conduct and a summary of a concept and an empirical analysis of the conditions under which codes of conduct may have a positive impact on the working conditions in GVCs.

codes prevails among the suppliers. The monitoring of working conditions in the value chain has had little impact because of the existence of clandestine workshops and home-based work. Moreover, due to practices to avoid compliance with obligations among the suppliers, only a part of the production, in the best case scenario, is covered by the brand's code of conduct. Another adverse factor is the business model followed by these brands, which imposes harsh conditions on suppliers in terms of costs and production times, reducing their profit margins and leading to a deterioration in wage and working conditions (Anner, Bair and Blasi 2013; Bensusán 2007).

As will be illustrated in this chapter, the fact that, to MNEs, codes of conduct serve as a means of gaining publicity by propagating their commitments to the highest labour standards, while, at the same time, these are not respected by suppliers, is not unique to the type of low value-added production that characterizes the clothing or footwear industry. It is also apparent in the automotive industry, where the relations between the final assembly companies and suppliers in the value chain put great pressure on the latter in terms of costs and labour intensity – demands that end up being incompatible with the presence of representative trade unions and genuine collective bargaining (Bensusán and Martínez, 2012). This results in striking discrepancies in working conditions between final assembly companies and suppliers, and, with few exceptions, in the absence of workers' voices throughout the value chain. The same is the case in the electronics industry in Mexico (of which the television industry is a part), where, despite the prevailing code of conduct, freedom of association is non-existent. As will be seen below, there has been widespread repression (CEREAL 2006, 2007, 2009, 2016) of those who seek genuine union representation.

## ► 2. The Mexican State and its occupational responsibility

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### 2.1 Corporate agreements and the import-substitution industrialization model

At the end of the 1930s, a corporate agreement was established in Mexico that was aimed at following up on the social tenets of the revolution. Union corporatism arose as a form of workers' social representation, under the guardianship of the State, which would be beneficial to both parties. Broadly speaking, the State would be able to intervene in labour justice, strengthen workers' organizations and afford them legitimacy in exchange for their



political participation. This alliance had significant consequences for the autonomy of trade unions (Zamora 1995) and, even amidst significant conflicts, continued for 30 years in line with the import-substitution industrialization model. In this protectionist context, the Border Industrialization Programme, better known as the *maquiladora* programme,<sup>5</sup> was established in the mid-1960s. This programme offered a series of government incentives to attract foreign direct investment (FDI) to the border states, with a view to generating mass employment with a new workforce that had no previous work experience (generally unskilled women). In this context, Mexico's northern border became a *de facto* exemption regime by allowing 100 per cent of FDI in manufacturing operations, special tariffs and the existence of unions with a clear employer leadership (Carrillo and Hernández 2020).

## 2.2 Trade liberalization and labour flexibility

In the early 1980s, Mexico adopted policies that were aimed at opening up trade, privatizing important public sector enterprises and increasing flexible working conditions. These measures brought about significant FDI flows but also generated major challenges regarding labour. As shown by previous research in the clothing industry, investment flows did not bring advantages for workers for various reasons. Among them were the rules of origin of trade agreements, which favoured multinationals in the United States, as well as the institutional and macroeconomic features of the countries receiving the investments (Bair and Dussel Peters 2006). Moreover, as we set out in this paper, domestic conditions in Mexico not only prevented the opportunity for the trade liberalization strategy to benefit workers. They also led to a deepening of the previous trends in increasingly precarious employment and impediments to collective action as the main factor to attract investment.

In relation to the above, studies on other regions of the world have shown that, in order to achieve significant changes, labour agreements between workers and employers, supported by international labour laws and standards, have been necessary. This was the case, for example, with the clothing industry in Bangladesh in the wake of the Rana Plaza tragedy (Anner, Bair, and Blasi 2013). In this regard, the reach and achievements in work in globalized industries depend largely on pre-existing traditions and practices of labour regulation, as demonstrated by a study of the automotive, maritime and clothing industries in the United States, Europe and Latin America (Anner et al. 2006).

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<sup>5</sup> “An export maquiladora establishment is considered an economic unit that carries out part of the final production process of an article, usually assembly. It is located in the national territory [Mexico] and, through a maquiladora contract, is committed, to a parent company abroad, to performing a manufacturing process or service aimed at transforming, making or repairing goods from abroad, for which it temporarily imports parts, pieces and components, which, once transformed, are exported” (INEGI 2007).

Bensusán and Middlebrook (2012) state that, while Mexico's economic opening was not accompanied by formal changes in labour legislation, it did involve substantive changes in working conditions, especially for workers in MNEs. They resulted from lowering the workers' costs, minimizing union interference and increasing the flexibility of labour costs and conditions, mainly through the expansion of subcontracting processes. Independent unions that managed to establish themselves in the 1980s were dismantled along the northern border. These changes in the labour market dynamics required an urgent reform of the Mexican labour law, which did not occur about until 2012, when various provisions were adopted to reform the Mexican Federal Labour Law. These included new modalities or types of labour contracts; establishment and incorporation into the law of mechanisms to regulate labour subcontracting; strengthening of trade union transparency, albeit minimally; modernization of labour justice with changes in procedures; and incorporation of the "decent work" concept, in line with ILO statements (Government of Mexico 2013).

However, these reforms were based on a misdiagnosis of the problems of the labour market, where wide margins of flexibility and a restrictive wage policy already existed, with no protection mechanisms for workers, such as unemployment insurance, representative trade unions or State monitoring capacities. Consequently, the reforms led to growing levels of income insecurity, job instability and informality (lack of access to social security), which were exacerbated over the following years, especially with the limitless expansion of labour subcontracting (Bensusán 2013). The findings by Anner and Hossain (2014, 108) on the textile sector in Bangladesh and Honduras support this paradox between opening the economy and generating important flows of FDI and employment, but with precarious jobs.

Hence, the change in the Mexican labour institutions in relation to the country's trade negotiations with the United States and Canada, discussed below, assumed major importance.

### **2.3 Reforms affecting labour justice, freedom of association and collective bargaining**

Mainly as a result of demands by the United States during the negotiation of the TPP, the most important reform of the Mexican Constitution in the area of labour justice, freedom of association and collective bargaining in 100 years was adopted on 24 February 2017, when articles 107 and 123 were amended. This reform transformed the labour justice system in Mexico by eliminating the tripartite conciliation and arbitration boards, previously placed within the executive branch, and transferring their function to the judiciary, which strengthened the rule of law in the world of work. In addition,

it established guarantees regarding freedom of association and collective bargaining, creating the principle of representativeness of organizations as a condition for negotiations. It set up a new decentralized body, the Federal Labour Conciliation and Registration Centre, which was responsible for the registration of unions and collective bargaining agreements. Finally, almost three years after President Enrique Peña Nieto had sent the request for the ratification of ILO Convention No. 98 to the legislative body (in December 2015), the new legislature – formed as a result of the elections of July 2018 – produced the necessary majority, and the Senate ratified the Convention in September 2018.<sup>6</sup>

The regulation of the new principles in the Federal Labour Law entered into force on 1 May 2019. The FLA reform was a great legislative achievement for workers' rights, as it guaranteed secret and free votes in the election of the collective bargaining agreement and in the selection of the leadership (Bensusán, 2020).

## 2.4 State intervention

In Baja California, for example, there has been little government and private intervention with respect to labour policy. However, federal initiatives have been adopted that have directly influenced the labour market. The northern border has again become a policy focus with the new federal administration (2018–2024). As of 1 January 2019, the daily minimum wage was doubled in the Free Zone of the Northern Border (from \$88.36 to \$176.72 Mexican pesos), benefiting 20 per cent of workers in MNEs and domestic enterprises (Fuentes et al. 2020).<sup>7</sup> Certain practices by employers, such as non-payment of benefits, and the dismissal of workers, have been observed to avoid increases resulting from collective agreements – as in the case of the city of Matamoros, Tamaulipas (Quintero 2019).<sup>8</sup> Where state governments, mainly the economic development departments, did play an important role, was in strategies to attract FDI, since the benefits package included the possibility of supporting negotiations with pro-employer unions (Carrillo and Hernández 2020).

6 The deposit of the instrument of ratification of Convention No. 98 to the ILO took place on 23 November 2018 (Government of Mexico, Ministry of Labour and Social Welfare 2018).

7 In 2020 the minimum wages of this area was of \$186.56 Mexican pesos, while for the rest of the country is of \$123.22 Mexican pesos.

8 Several maquiladoras in Matamoros refused to comply with the payment of a negotiated clause in the collective agreement, considering excessive the payment given the legal increases in wages. This represented 20 per cent more in the worker's remuneration and a bonus of 32,000 Mexican pesos –known as the “20/32” benefit. About 100 workers from several maquiladoras went to a 45-day stoppage. This labour movement managed to form an independent union, get the “20/32” benefit and had a domino effect on other companies in Matamoros and other border towns.

Lastly, it should be noted that, alongside the previous reforms and the adoption of a wage policy aimed at recovering the purchasing power of minimum wages, the 2018–2024 administration has adopted a new inspection strategy. This strategy is aimed at achieving compliance with standards relating to general working conditions, at training and occupational safety and health, and at detecting and punishing any form of abusive subcontracting that violates the legal restrictions on its use. It was precisely the lack of inspections in previous administrations that had turned subcontracting into an instrument for more flexible hiring and working conditions; in addition, it had reduced costs by allowing employers to evade their responsibilities. One of the resources implemented as of 2019 to strengthen the inspection activities has been the coordination of the Labour Inspectorate with other bodies possessing monitoring powers, such as the IMSS and the Tax Administration System (Government of Mexico, Ministry of Labour and Social Welfare 2019).

## 2.5 Challenges to the implementation of the labour reform and the USMCA

Mexico is on the verge of two major processes of institutional transformation in the areas of labour and trade. The resulting challenges, however, have arisen in an extremely unfavourable context. The ILO (2020, 2) has argued that with this “massive economic disruption” originating from the Covid-19 pandemic, the “worst global crisis since the Second World War” is taking place. In the same vein, the United Nations Economic Commission for Latin America and the Caribbean (ECLAC) has emphasized that, before the pandemic, Latin America already had the lowest growth rate in several decades and was very vulnerable at the macroeconomic level. Hence, the combination of external and internal factors will lead to the worst economic downturn in the history of the region, as is happening in Mexico (ECLAC 2020, 7).

In addition, the country is facing multiple crises owing to the sharp drop in oil prices. This is compounded by the interruption of trade flows and GVCs as a result of the containment measures adopted in the countries to deal with the pandemic. In this context, a sharp fall in GDP is expected (-17.9 per cent from April 2019 to April 2020 according to INEGI), especially in the tourism sector and in the manufacturing industry, with losses estimated at around 1.4 million formal jobs in 2020 (Solís and Hernández 2020). The current Covid-19 pandemic clearly shows how government initiatives are not adhered to by all: a large number of *maquiladora* companies in northern Mexico, which were instructed to shut down their operations as they are non-essential activities and to continue paying workers' wages, continued to operate.<sup>9</sup>

9 On Covid-19-related infections and deaths in the *maquiladora* companies, see Gamboa 2020.

The multiple crises in Mexico are showing the consequences of having a labour market characterized by the vast expansion of misused labour subcontracting, widespread informality and precarious labour income, coupled with great labour flexibility that benefited MNEs for decades. Hence, in the face of the Covid-19 pandemic, a genuine joint effort between the public and private sectors will be necessary to overcome the effects on millions of workers and to succeed in restoring economic growth.

### ► 3. Data on jobs and wages in the automotive and television industries in Mexico

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After a brief analysis of the social responsibility of both MNEs and the Mexican State, we will now consider the performance of the highlighted sectors: the automotive and television industries. Before presenting the results of previous studies on these two industries in sections four and five, we deem it important to examine some of the national data on the labour behaviour patterns of these industries, particularly on employment and wages.

Both the automotive and television industries are labour-intensive and employ sizable numbers of workers in Mexico. According to IMSS data, in 2019, the automotive industry employed more than 1 million workers directly; around 125,000 people were engaged the television industry. The volume of employment is much higher in suppliers than in OEMs and CMs.<sup>10</sup> Likewise, a large percentage of these jobs are outsourced (see table 1).<sup>11</sup>

According to the INEGI Economic Censuses, the automotive industry directly employed almost 500,000 workers in 2004. Fourteen years later, this number stood at more than 1.2 million, with most workers employed in the auto parts

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10 Original equipment manufacturer (OEMs) are enterprises that produce under their own brand name with their own design and manufacture, while contract manufacturers (CMs) are service enterprises that take responsibility for part or all of the client firm's production process; this may include specialized functions such as engineering, product development and logistics. For example, an Apple cell phone is assembled at Foxconn (CM) and contains many components from other enterprises (CMs), while a Samsung TV (OEM) is designed and manufactured by this same South Korean company. This chapter exclusively analyses the relationship between final assembly companies (OEMs) and their close suppliers established in the same locality, i.e. the production chain from the final assemblers going backwards.

11 The figures on the development of employment and wages are based on two sources: the 2004, 2014 and 2018 INEGI Economic Censuses and IMSS microdata from 1997 to today.

► **Table 1**

Mexico: Total workers employed by contracting modality in the automotive and television industries, 2004–2018

Sector	Year	Number of employees	Contracting modality		OSI* (%)
			Remunerated staff dependent on the company	Staff supplied by another company	
Automotive final assembly	2004	44 067	41 727	2 319	5.3
	2014	75 023	62 979	12 039	16.0
	2018	139 244	111 583	27 661	19.9
Auto parts	2004	454 908	421 026	32 749	7.2
	2014	647 001	490 016	154 242	23.8
	2018	1 067 610	843 927	223 683	21.0
Television final assembly	2004	54 775	54 500	206	0.4
	2014	49 790	44 526	5 221	10.5
	2018	59 076	52 889	6 187	10.5
Electronic components**	2004	103 360	96 006	7 127	6.9
	2014	145 928	127 720	17 935	12.3
	2018	196 205	174 830	21 375	10.9
Total manufacture	2004	5 073 432	4 146 770	867 442	17.1
	2014	4 198 579	3 860 137	301 453	7.2
	2018	6 493 020	5 328 512	1 164 508	17.9
Mexico total	2004	16 239 536	14 849 873	1 002 697	6.2
	2014	21 576 358	17 998 111	3 018 127	14.0
	2018	27 132 927	22 447 571	4 685 356	17.3

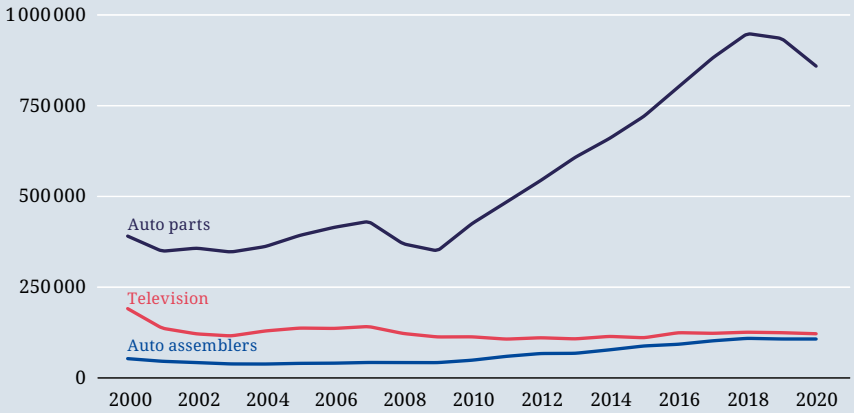
**Notes:** \* Outsource Staff Intensity (% of outsourcing staff / total of workers).

\*\* This classification of the NAICS (North American Industry Classification System) includes electronic components for different electronic products, therefore the volume incorporated into televisions is certainly smaller (around 40 per cent).

**Source:** Authors' elaboration based on INEGI Economic Censuses 2004, 2009, 2014 and 2018.

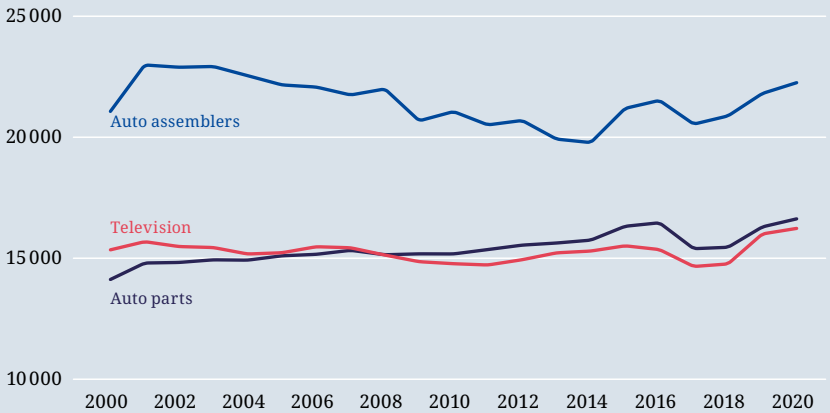
► **Figure 1**

Number of employees in the automotive and television industries by segment



► **Figure 2**

Monthly wages in the automotive and television industries by segment



**Note:** The data in the series correspond to the month of November of each year, except for 2020, which corresponds to June.

**Source:** Authors' elaboration based on IMSS, Open data (data of staff affiliates) (<http://datos.imss.gob.mx/group/asegurados>)

sector (table 1). A considerable increase in the employment of subcontracted workers is notable. However, it is estimated that the trend in the growth of the automotive sector will be reversed by the impact of Covid-19: it will have the greatest negative variation with the loss of 321,000 jobs in 2020 (Solís and Hernández 2020). On the other hand, employment in the television industry also increased in the period of 2004–2018, although with considerable differences between assembly companies and suppliers: it rose slightly in the latter and increased a little in the former (table 1). The number of subcontracted staff in the television industry also increased considerably during this period, particularly in television manufacturing. The enterprises were becoming increasingly dependent on this type of staff, to the degree that its percentage exceeded double digit figures in 2018 in both OEMs and CMs, as well as in the suppliers for the automotive and television industries (table 1).

Based on the monthly IMSS data, a certain seasonality is noted in television industry employment.<sup>12</sup> With the exception of the period of the global economic recession in 2008–2009, employed personnel on a yearly basis significantly increased in both the automotive and television industries, particularly in the auto parts industry (figure 1), contrary to what happened in the United States.

According to the IMSS data, there was a very small increase in salaries in the 2000–2019 period for the automotive and television industries (figure 2).<sup>13</sup> While the salaries of the automobile manufacturers revealed a downward trend from 2001, it began to reverse as of 2014. Wages in automotive supplier plants increased slightly until 2016 and then decreased; however, in 2019, workers benefited from the doubling of the minimum wage on the northern border. The situation was very stable in the television industry until 2019, when wages rose by government decree. A comparison of the three segments analysed shows that vehicle producers pay about 70 per cent more in wages and benefits than automotive suppliers and television companies (figure 2).

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12 Events such as the Super bowl and the Thanksgiving Day increase the demand substantially.

13 Deflated quantities.



## ► 4. Labour relations in the Mexican automotive industry

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### 4.1 Productive restructuring and the deterioration of collective bargaining

The process of the economic integration of the Mexican Automotive Industry (MAI) with those of the United States and Canada was preceded in the 1970s by a series of exceptionally intense labour conflicts that had arisen from the intensification of work. It had ended in closures of plants, their relocations from the United States and Canada and the opening of new factories in northern Mexico. These plants adopted very flexible collective agreements, with lower wages and benefits than the previous agreements, while the old plants underwent a profound change in labour relations (more flexible collective agreements and expansion of outsourcing to suppliers in the auto parts sub-sector). This new phase led to the signing of the NAFTA and redirected the economic model towards exports based on low labour costs. From the late 1970s until today, there has been a delinking of wages with productivity in the automotive industry in Mexico, as has occurred at the global level (Carrillo 1991; Palma 2011; Pardi et al. 2018).

This transformation in the quality of jobs and labour relations in MNEs did not come up against enough impediments or counterweights in either public or private regulations – as we will illustrate by the case of VWM. This industry included innovation processes in work organization, technologies and products, generally without any correlation at the social level – that is to say, without benefits for workers (Carrillo, Bensusán, and Micheli 2017). It relied mainly on the weakening of corporate unionism and the isolation of the industry's few independent unions. This was possible because the CTM (Confederation of Mexican Workers, founded in 1936), which was allied with successive governments and committed to a downward wage policy and support for corporate policies, has continued to this day to control workers' representation in the industry. Thus, in 15 of the 18 automotive assembly plants (as well as a significant proportion of auto parts companies) unions affiliated with the CTM are responsible for the collective agreements. Paradoxically, despite the centralized structure at a higher level and collective agreements in all the final assemblers, the fragmentation at the level of the plants meant a very low – or even the total absence of – bargaining power in the establishment of these plants, especially in the northern part of the country, as illustrated in the case of Ford Hermosillo (Contreras and Díaz 2017).

One of the effects of this loss of bargaining power, in the context of a restrictive labour and wage policy, was the marked segmentation of working conditions within automotive plants between workers with job stability and temporary workers or, later, regarding newly recruited workers. Inequality in the prevailing working conditions in the final assemblers as compared to the suppliers (paying wages to the workers which are at least 50 per cent less) was also observed. A comparison of the conditions at VWM and Ford Hermosillo with global suppliers such as GKN-León and Magna-San Luis Potosi – with their preponderance of employer protection agreements<sup>14</sup> signed by unions associated with CTM usually before the plants started operating – exemplifies this situation of inequality (Bensusán, Carrillo, and Micheli 2017, 675–678).

Therefore, rather than being a mere instrument to obtain advantages for workers related with the enormous success of the Mexican automotive industry – which, in 2019, assumed the sixth place as a global producer (OICA 2020) –, the presence of collective bargaining in the assembly plants was an efficient mechanism to ensure the absence of strikes in a context of increasing concessions to the subsidiaries of the MNEs in terms of labour and wage flexibility. On the contrary, the few cases of disputes in which workers sought to contest the representation by the CTM and improve labour conditions – as in the Johnson Control auto parts company between 2010 and 2012 and in Honda-Jalisco between 2012 and 2015 – ended in defeats, including dismissals, company closures and production transfers to other countries (Pardi et al. 2018; Bensusán and Covarrubias 2016).

As previously indicated, it is notable that, of a total of 18, only three plants of the automotive industry – VWM, Nissan Cuernavaca and Audi San José Chiapa – have independent and active trade unions. In the case of VWM, a solid labour relations system has also been developed, which, after heightened disputes and ruptures in the late 1980s and early 1990s, enabled the union to maintain a substantial capacity for dialogue with the company, albeit with ups and downs. A particularity of the case is that, in VWM, genuine dialogue with the trade union is part of its DNA, even in contrast to other German companies that use “protection unions” (Covarrubias and Bouzas, 2016; Luévano 2016). Nevertheless, the limits of this arrangement lie, among other things, in the organization’s isolation from the subordinate and undemocratic characteristics of the rest of the trade union movement in the sector and the difficulties in moving forward with attempts to form broader coalitions. Thanks

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<sup>14</sup> Employer protection contracts are “... instruments agreed with the general secretary of the union which are not actually valid but are registered with the authority and accepted by the employer, aimed at enabling the employer to avoid genuinely bilateral relations when determining working conditions” (Bensusán, 2007a). Complaint No. 2694, presented to the ILO’s Committee on Freedom of Association against Mexico by various international and national trade union organizations in 2009, provides a comprehensive explanation of how these practices allow for the avoidance of genuine collective bargaining. ILO GB.310/8 2011.

to this dialogue, better wages and benefits, as well as a significantly larger representation through delegates were maintained at VWM than at other plants. However, even under these conditions, it was not possible to avoid the expansion of outsourcing to suppliers, the increase of high-ranking non-unionized staff or the division of working conditions within the plant that were based on seniority in the company (Bensusán and Gómez 2017).

## 4.2 Social responsibility of enterprises: a limited influence

Interviews performed at VWM to analyse the effect of social responsibility policies on the quality of jobs at different stages of the restructuring process and labour relations (with VWM management, union representatives and first-level suppliers in 2008, as well as with the first two again in 2014),<sup>15</sup> show that the adoption of the Declaration on Social Rights and Industrial Relationships at Volkswagen in 2002 did not have a perceptible impact on this enterprise or its suppliers.<sup>16</sup> According to the trade union members interviewed on these occasions, the Declaration has not been seen as an instrument that allows them to defend their rights or improve their working conditions. Nor does it ensure that freedom of association is respected by suppliers, since VW does not monitor what is happening down the supply chain, as one of the company's senior officials acknowledged. Despite the fact that VW's Declaration makes reference to ILO's efforts to promote decent work and "supports and expressly encourages its contractors to take this declaration into account in their own respective corporate policy", when it has been invoked, it has not improved workers' opportunities to organize independently and achieve genuine collective bargaining.<sup>17</sup> The VWM Code

15 The different stages of research, based on various sources and reports, on the labour relations system at VWM confirm the limited influence of the Declaration on Social Rights and Industrial Relationships at Volkswagen on the quality of jobs in the suppliers over this period. In 2008, 18 interviews were conducted: six of them with VWM human resources managers, five with VWM suppliers and seven with union representatives at VWM and the suppliers. The results of this study can be seen in Bensusán and Martínez 2012. In 2014, interviews were again conducted at VWM, two of them with senior officials of the enterprise (the Vice President of Human Resources and the Director of Manufacturing) as well as with three union representatives, who also answered a questionnaire (Bensusán and Gómez 2017). Lastly, in April 2020, an interview was carried out with a former trade union general secretary, whose term of office ended that same year and who confirmed that, as previous interviewees had indicated, that the Declaration continued to have no effect on VWM and its value chain.

16 This Declaration, signed jointly with the International Metalworkers' Federation, includes in its objectives the recognition of the right to join a trade union, zero tolerance of discrimination, free choice of employment and zero tolerance of child labour.

17 An example of this was the obstacles faced by the workers of the Johnson Controls company (a supplier in the automotive industry of car seats, batteries and electronic systems) to securing reparation for violations of their labour rights and a true union representation because of the existence of employer protection agreements. See ILO 2011, para. 799.

of Conduct is apparently not well known among VWM workers in Mexico and has little influence on the working conditions offered by suppliers.<sup>18</sup> According to representatives of the first level suppliers interviewed, compliance with the principles of the Declaration, which basically refer to respect for national labour and social security legislation, is not even a requirement for the development of good business relations with the assembly company. They even mentioned that their own codes of conduct are stricter than those of Volkswagen's Declaration. Although, in 2008, a senior VWM official argued the opposite, the other interviewees agreed that, in any case, the national labour legislation has more weight, as it more broadly recognizes collective rights, even though mechanisms for their implementation are lacking. In this sense, the internal labour policy that tolerated the existence of workers' representation without grassroots support and the signing of collective agreements that protected employers' interests was one of the factors that contributed to the ineffectiveness of the Declaration. Another senior official interviewed in 2014 argued that the quality of jobs in the automotive Mexican industry depended essentially on the unilateral decision of employers, since neither the unions nor the authorities were interested in improving it. He acknowledged that the Declaration had little influence, and that VWM could do little to improve labour relations at the GVC, claiming that, although rules (public standards) were in place to ensure that the workers' wishes with regard to the status of collective agreements were respected, these were not followed. He argued, however, that, in case of labour rights violations, what could have helped was for the international unions to become aware and to press for reparation and sanctions (Bensusán and Martínez 2012, 173; Bensusán and Gómez 2017, 205–209).<sup>19</sup>

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18 It should be noted that paragraph 2.1 of the Declaration on Social Rights and Industrial Relationships at Volkswagen sets out that: "The employees of Volkswagen will be informed about all of the provisions of this declaration. Within the context of the respective plant practice, unions or existing elected employee representatives will have the possibility to inform the workforce together with representatives of management".

19 VWM also has its own Code of Ethics, which aims to facilitate a synergy between national and global action to become the number one car manufacturer. This code seeks to promote proper conduct among the different actors involved in the development of the enterprise: collaborators, suppliers, dealers and customers. A characteristic of this code is the inclusion of a specific part to promote compliance with its principles and rules of conduct, although there is no provision referring to the respect of labour rights by its suppliers. It is mainly concerned with avoiding acts of discrimination, by committing itself to using worker recruitment and promotion procedures based on knowledge and skills, and fostering a culture of dialogue and respect for rights during disputes. Therefore, the main difference between the Code of Ethics and the Declaration on Social Rights and Industrial Relationships at Volkswagen is the inclusion only in the latter of the obligation to respect labour rights in the supply chain, even though there are no provisions for audits in either instrument. See VWM 2019.

### 4.3 From NAFTA to USMCA

The NAFTA was a trade agreement inspired by an acceptance of the extreme wage differences among the signatory countries, which, in the automotive industry, tended to widen over 25 years and led to a negative convergence (low road convergence) in working conditions. The renegotiation of a new agreement under the Trump administration positioned this industry at the centre of the discussions. After two years of immense uncertainty, in March 2020, the negotiation led to the signing of the USMCA by the executive and legislative powers of the United States, Mexico and Canada, the three countries involved in the agreement. With the precedent of the TPP negotiations, the stipulations of the USMCA included in chapter 23 and its annex led to the adoption of a Constitutional reform in Mexico. The reform was fully aligned with the principles of democracy, freedom of association and collective bargaining (Bensusán 2020).

In this way, the former NAFTA, under its new name of USMCA, lost the notion of free trade in its title to become one of the most regulated trade agreements, particularly in labour and the automotive industry. This is evidenced in the unprecedented inclusion, in order to benefit from the tariff reduction, of the obligation that 40–45 per cent of the labour value content of an automobile be made by workers who earned more than US\$16 per hour, far from the US\$3.50 that were paid in Mexico when the USMCA was ratified.<sup>20</sup>

The implementation of this reform, which is currently under way, undoubtedly opens a window of opportunity to reorder the trade union structure in the country, particularly in the automotive industry. However, it must not be overlooked that the context for this is extremely hostile, despite the fact that the domestic institutional framework is more conducive to independent trade union action. This is not only because the new technological revolution in the industry will reduce the importance of high wage costs, indicating that investment may well return to the United States. It is also to comply with the requirements of the USMCA – including the above-mentioned new wage rules and rules of origin – which rose from 62.5 per cent of the regional content to 75 per cent. The final assemblers and parts factories need to have to carry out a restructuring based on this new and complex system of measuring the content requirements, with unfavourable consequences for the workers (loss of jobs due to relocation to the United States, the acceleration of automation and the use of robots). In this context, the capacity of trade unions to negotiate better wages and, above all, to hold back the technological change or slow its pace may be quite limited.

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<sup>20</sup> See the full text of the USMCA, in Spanish, in Government of Mexico, 2019.

## ► 5. Labour relations in the television industry in Baja California

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### 5.1 Expansion and early socio-labour progress

MNEs in Tijuana dedicated to the assembly and manufacture of televisions have followed a labour policy in line with the demands of the labour market, i.e. competing by offering relatively higher wages and benefits in light of the strong need for labour, as will be seen below. These enterprises began operations in 1966 (Kenney 2004), but it was not until the early 1980s that Japanese companies arrived and began looking for large workforces. The wages and benefits paid by the enterprises were above the minimum wages and benefits stipulated in the FLL, and even above the average for Tijuana (Carrillo and Contreras 2003). This outcome, without the need for collective bargaining, stemmed from the intense competition in the labour market. In addition, their corporations' financial resources and the savings from the persistent and harsh devaluation of the Mexican currency against the dollar has enabled these subsidiaries to provide working conditions which other companies were unable to offer – such as modern cafeterias with subsidized meals, on-site doctors (Carrillo 1993), productivity and attendance bonuses, free transportation and child day-care centres (Carrillo, Mortimore, and Alonso 1999).

This limited socio-labour progress was closely related to a high turnover in work that began in 1983. Monthly turnover rates in the early 1990s reached double digits (12.5 per cent per month) (Carrillo and Santibañez 1993). The main reason for the high turnover rates was the arrival of dozens of companies in Tijuana, which saturated the labour market and, as a result, workers did not have to pay to move between plants. In addition, the vast majority of the new workers were young and many of them were starting families; however, having children was not compatible with the long working hours and the requirement of zero absences, which also led to high turnover rates (Carrillo and Santibañez 1993).

Virtually all television manufacturing companies from Japan and the Republic of Korea set up in Baja California. By 2000, more than 90,000 workers, including over 10,000 technicians and engineers, worked in the television production chain in northern Mexico, mainly in Baja California (Contreras and Carrillo 2002). The NAFTA helped in this agglomeration process as, with the strengthening of regional rules of origin, Japanese and suppliers from the Republic of Korea moved capacity to Baja California to supply television assembly companies and comply with the new rules.

## 5.2 Market loss to China

This situation began to change with China's entry into the World Trade Organization (WTO) in 2001, due to the significant increase in Chinese imports of electronic devices into the United States. While Mexico lost 17.3 per cent of the United States market between 2000 and 2004, China gained 22.3 per cent (Gereffi 2018). In the early 1990s, Tijuana was considered the world's television capital (Carrillo, Mortimore, and Alonso 1999), but, by the mid-2000s, China was already the leading television set producer.

By 2003, analogue television manufacturing was considered to be at a high point of the economic and social upgrading (Brito and Carrillo 2019). In the same year, companies in Baja California had 13 OEMs and employed 22,000 people. Their occupational structure was different from the typical *maquiladora*, as it had a higher proportion of both medium and highly skilled workers. It was, therefore, predicted that the work of operators would decrease to 30 per cent and the average annual salary would rise from US\$7,100 to US\$11,000 between 2003 and 2012 (ProduCen 2003); this increase, however, did not occur.

## 5.3 The technological transition and deterioration of working conditions

From 2000, final assembly companies began an important technological transformation, moving from production based on analogue technology (devices with heavy kinescopes) to digital (low-weight flat screens). This transition was finalized in less than a decade. According to the Ministry of Economy, while, in 2003, 97.1 per cent of televisions produced in Mexico were analogue, in 2012, 96.6 per cent were digital. This transformation had serious negative implications for suppliers established in the region, since parts, components and semi-products for the manufacture of analogue television were no longer required. The flat screens, and the race to improved technologies with increasingly slimmer and lighter screens, involved the entry of new suppliers that were generally located in Asia. By 2013, there were fewer workers, with an occupational structure in the television plants in Baja California that was closer to the "typical maquiladora" (69 per cent workers and 10 per cent technicians) but with much higher productivity (Brito and Carrillo 2019, 72).

In terms of the economic and social upgrading, the structure that it had taken more than two decades to build up in Baja California crumbled in just under ten years. Between 2003 and 2013, there was a decrease in the number of plants from 32 to 19, and in the number of jobs from 22,000 to 14,800. The change from a model based on Japanese OEMs and their close suppliers, under

the tiered system, to one with contract manufacturing based on Chinese enterprises implied a decline in the labour market, i.e. fewer jobs, more operators in relative terms and lower dollar wages (Brito and Carrillo 2019, 172–175).

In this respect, the experience of the Sony manufacturing facility in Tijuana is significant. Although it successfully transitioned from analogue to digital technology and combined the operations of its three plants in an industrial complex that included technological development and good labour practices, it decided in 2009 to sell its production capacity to Foxconn (Brito and Carrillo 2019). In the process of reorganizing the production associated with this purchase, the plant drastically reduced the engineering, design and development functions that were being carried out locally, concentrating those functions at the corporate level in China. The plant also reorganized the related local supply base to integrate more components of its international network; and, later, sought to become a multisector supplier of manufacturing services covering the automotive and medical device sectors. The transition from Sony (an OEM) to Foxconn (a CM) implied a decline in the level of locally performed functions. While many jobs are still being created, the higher specialization positions within the plant have been greatly reduced.

Except for the case of the Samsung industrial complex,<sup>21</sup> the Tijuana experience demonstrates that local technological and human capacity training is not sufficient to continue an upgrading process, as suggested by other studies (Bell and Pavitt 1995). The limits to the economic and social upgrading go beyond domestic conditions and local stakeholders, irrespective of the technological skills achieved. External conditions, such as the abandonment of an unprofitable business niche by Japanese multinational firms, determined the process of a regional agglomerate decline that was characterized as strategic (Carrillo and Hualde 2000).

## 5.4 The ineffectiveness of codes of conduct<sup>22</sup>

As in the case of the automotive industry, the deterioration of working conditions in the television industry and, more generally, in the electronics industry, was not prevented by the existence of a code of conduct for the entire sector. The 2016 report of the NGO Centre for Reflection and Action on Labour Issues (Centro de Reflexión y Acción Laboral, CEREAL) – as well as previous reports by the same organization and others, such as the Catholic

21 Samsung directly employed 4,000 workers in Tijuana in the low season and 8,000 in its supplying company; in high season, these figures rose to 7,000 and 13,000, respectively (interview with the CEO of Samex, Hiram Monsivais, 10 September 2019).

22 This section is based on the Seventh Report on working conditions in the electronics industry in Mexico, prepared by CEREAL 2016.



Agency for Overseas Development (CAFOD 2004) about the role of codes of conduct in the electronics industry established in Mexico – confirm their lack of effectiveness and question the quality of private audits as a tool to monitor compliance with standards. With few exceptions, these studies show that a large number of the companies evaluated performed poorly (CEREAL 2009, 2011, 2013) and sometimes even fell short entirely (CEREAL 2007). These results coincide with the findings noted by Kuruvilla, Li and Jackson (this volume).

As in other sectors, one of the problems which these codes of conduct have not helped to solve is the lack of respect by the enterprises for workers' freedom of association and collective bargaining. This problem was noted and indicated in reports by CEREAL for over a decade (2006–2017), without its recommendations taken into account by the vast majority of the companies evaluated. Although the code of conduct promoted by the Electronic Industry Citizenship Coalition (EICC, created in 2004) encouraged its members in 2014 to adopt international standards and go beyond national legislation in promoting social and environmental responsibility and business ethics, the report in question documents workers' rights violations.<sup>23</sup> This voluntary code – originally established by companies such as IBM, HP, Dell, Flextronics and others – includes among its standards the Universal Declaration of Human Rights, the ILO international standards and the OECD guidelines for MNEs, but, in reality, is a dead letter. Although, in 2015, the EICC strengthened the provisions on freedom of association and collective bargaining, the absence of truly representative trade unions and leaders elected by their members through democratic processes is a very widespread feature in the sector (CEREAL 2016). For example, CEREAL found that 99 per cent of the 420 workers interviewed in nine electronics plants in Guadalajara did not even know the name of the union to which they belonged (CEREAL 2017).

The problem with these voluntary codes is that “they are only as strong as their corporate members choose to make them”, which is in line with the opinion of a senior VWM official on the Declaration on Social Rights and Industrial Relationships at Volkswagen. In fact, their main function is to protect brand image, without changing the reality of work (CEREAL 2016). The evidence collected by CEREAL confirms that workers lack freedom of expression during inspections, and that there is a great deal of masquerading by brands to cover up labour rights violations. This is evidenced by the fact

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<sup>23</sup> The Coalition is currently named the Responsible Business Alliance and covers more sectoral branches. The background to the CEREAL study is the 2004 CAFOD report, which, based on interviews with workers in the electronics industry, illustrated that, despite the implementation of codes of conduct, working conditions were very poor. In line with the CEREAL reports that we accessed (2006–2017), the main observation is the poor performance of the electronics companies in Mexico, with few exceptions.

that the audits indicate that there are practically no problems relating to freedom of association, when all sources show that union membership is low and, when it does exist, the unions are chosen by the suppliers themselves.

The 2016 CEREAL report also reviews the work situation in enterprises in the *maquiladora* export industry established in Ciudad Juarez (automotive, electronics and medical devices) that are suppliers of MNEs, including Foxconn mentioned earlier. It was found that the salaries of these employees – many of whom are migrants and women – were among the lowest compared with the interior of the country and the northern border, while the salaries of managers and directors were among the highest. The labour movements that rose up in Ciudad Juarez focused precisely on the demand for freedom of association and collective bargaining, along with improvements in wages and health and safety. Over a decade earlier, the 2004 CAFOD report had found that the situation was considerably worse for Guadalajara’s electronics workers, because they were employed by employment agencies whose only concern was to reduce costs through lower wages, longer working hours and temporary contracts.

Among the cases studied, our attention focuses on Foxconn, a company that has been evaluated by CEREAL for several years. When this enterprise bought Cisco Systems’ set-top box factory in Ciudad Juarez, it caused the deterioration of working conditions, even though, as a supplier of a group of enterprises that had signed the code of conduct for the electronics industry, it was required to respect the standards included therein. In this case, the workers who were interviewed in various evaluations (CEREAL 2007, 2009, 2016) were also unaware of the existing union or the collective agreement in force at the plant, nor had they ever attended a union assembly, although they “assumed” that a union existed. Their complaints include virtually every aspect of decent work: low wages, sexual harassment, forced overtime, and safety and health problems, among others. The 2016 workers’ protests against this situation led to the dismissal of more than 120 workers and lawsuits before the Conciliation and Arbitration Board. It also resulted in a hunger strike by a worker who was employed for more than 14 years in the firm and who was reported at the labour, criminal and civil levels for having instigated the movement, since he was a high-ranking staff member (CEREAL 2016).

## ► 6. Conclusion

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This analysis of the automotive and television industries in Mexico demonstrates that public and private standards are converging, which should ensure a less uneven playing field in collective bargaining between labour and capital. The evolution of wages, jobs and labour relations in these sectors has instead shown a tendency of blatant unilateral policies on the part of MNEs in determining working conditions. As seen in this chapter, the absence of freedom of association and collective bargaining, despite being guaranteed by such regulations, is one of the main factors accounting for these discrepancies. The expectations created in various areas in recent decades regarding the capacity of codes of conduct to improve respect of workers' individual and collective rights in MNE value chains have not been met. The two examples studied confirm that these instruments have rather been used to improve the image of enterprises without changing reality, which is largely in line with the findings of other studies (Nova and Wegemer 2016; Appelbaum and Lichtenstein 2016; Kuruvilla, Li, and Jackson, this volume).

There is also agreement in the literature reviewed regarding the factors that explain the ineffectiveness of the codes of conduct, such as the shortcomings of private audits, workers' fear of reporting violations of their rights and the business model connecting multinationals with suppliers, with often unstable links that put strong pressure on the costs.

The two case studies presented in this paper also show the weakness of public standards, particularly the Mexican labour laws, as well as their inadequate implementation, which was used for 25 years to drive a competitive strategy based on low wages. When it became a central issue in the agenda of the NAFTA renegotiations (and before the negotiation of the TPP), it finally led to the adoption of a new institutional framework that offers the necessary guarantees for the full exercise of collective rights and access to an independent labour justice system, putting an end to the adoption of collective employer protection agreements.

However, the context in which the country will have to implement a new institutional labour and trade order is particularly uncertain. The future of employment in the MNEs in the country will depend on how the obstacles to initiating labour reform and undertaking the productive restructuring required by the new USMCA rules are resolved. The evidence gathered in this and other similar studies on the high social costs of the export model, based on the reduction of labour costs and its inability to generate formal employment in the numbers and quality required, should be sufficient to cause a radical shift in government policy in the upcoming phase of economic recovery.

As this chapter shows, government guidance in the world of work is already an ongoing process that must be maintained and strengthened by making people-centred public policies in an extremely adverse context of job losses generated by the Covid-19 pandemic. It includes the sustained implementation of a new inspection strategy aimed at detecting the misuse of labour subcontracting as a way of achieving wide margins of labour flexibility and cost reduction, together with other violations of labour rights in almost all economic activity sectors. It also includes the need to continue a wage policy aimed at accelerating the recovery of the purchasing power of minimum wages, with greater scope at the northern border, which will also benefit contract negotiations. At the same time, the implementation of the 2017–2019 labour reform, the first objectives of which have been met, will create a more level playing field for workers to have truly representative organizations and negotiate with their employers to link their incomes to increased productivity. To conclude, the new labour policy seeks to correct those internal factors that negated the effectiveness of public standards and collective organization as the main instruments to improve working conditions in the country and almost completely devalued private codes of conduct, preventing workers from benefiting from the trade opening and the country's integration into the north of the American continent.

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# 8 Better Work

## Lessons learned and the way forward for decent work in the global garment industry

Arianna Rossi<sup>1</sup>

### ► Introduction

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At the time of writing, the world is in the midst of the Covid-19 pandemic, a phenomenon with wide-ranging and unprecedented impacts on public health as well as all aspects of people's lives, including on their roles as workers and on businesses. From this latter perspective, the Covid-19 emergency has put into question many aspects of the globalization paradigm, affecting both the demand and the supply side of global supply chains (GSCs), especially for consumer products. In Bangladesh alone, more than 2.2 million workers have been affected by GSC disruptions, largely due to a huge drop in demand for clothing when many developed countries went into lockdown. For the last decades, the world economy was increasingly characterized by GSCs, which created opportunities and challenges for economic and social development, particularly for producing countries in the global South. From a labour perspective, GSCs have created formal employment opportunities for previously marginalized workers, including millions of young women, especially in labour-intensive sectors such as the garment industry. At the same time, the jobs created are often characterized by poor working conditions and by violations of fundamental labour rights. Past and present national development policies and institutions have been challenged by the mere existence of GSCs because of their transnational nature. GSCs have brought to the surface a

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1 The views expressed in this chapter are those of the author and do not necessarily represent those of the International Labour Organization, the International Finance Corporation or the Better Work programme.

global governance deficit (Mayer and Pickles 2014) that has seen the emergence of different labour regulation attempts, with various degrees of success.

What works to ensure that GSCs create more and better jobs for workers in producing countries? How can different GSC actors be best engaged to ensure decent work in GSCs? These questions are explored by focusing on the case of the Better Work programme, an innovative partnership of the International Labour Organization (ILO) and the International Finance Corporation (IFC) aimed at improving working conditions and promoting competitiveness in the global garment industry. The Better Work programme is a unique example of engaging a multitude of actors in the garment industry at all levels of the GSC, including, through harnessing market incentives, the support of the implementation and enforcement of labour regulation and the achievement of better working conditions (Polaski 2006; Posthuma and Rossi 2017). Evidence from an extensive body of research on the programme, discussed in this paper, shows that a combination of workplace interventions (compliance monitoring, facilitation of dialogue, training) and GSC engagement, especially through brands and retailers, have delivered significant benefits to garment workers and businesses alike in the factories that participate in the programme. Here, we analyse the modalities of intervention of the programme in the garment GSC, identifying the key components to its impact on garment workers within and outside of the workplace, as well as its effect on supplier firms.

The chapter is structured as follows. First, we examine the literature on the origins of the debate about labour and governance in GSCs, highlighting the different forms of governance put in place by private, public and multi-stakeholder actors to address deficits in decent work in those chains. The second section addresses the case study of this chapter, the Better Work programme. It starts by reviewing the genesis of the programme and its predecessor, Better Factories Cambodia, and illustrates its features and different layers of intervention. We assess the programme's impact at the factory level on workers' lives and on businesses. The programme's influencing and advocacy work at the policy level with national tripartite constituents is discussed next. We then move to analyse one of the distinctive features of Better Work, namely its engagement with GSC actors, such as global brands and retailers and global manufacturers. In the third and final section, we explore the potential for long-term sustainability of the programme and briefly reflect on the challenges posed by the COVID-19 emergency's disruption of GSCs, which could lead to a reconfiguration of the global garment industry.

## ► 1. The contested terrain of labour and governance in Global Supply Chains

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Since the 1990s, globalization of trade, investment, and production has been a defining feature of the world economy, especially through GSCs. These particular facets of GSCs may offer significant opportunities in terms of inclusive growth for developing countries, provided certain conditions are met.

The early global supply chain<sup>2</sup> literature, as well as mainstream neoliberalism of the same period, assumed that trade and global production would automatically translate into economic growth in the Global South if developing countries managed to increase the added value of their production through the process of (economic) upgrading. The same theory implicitly assumed that economic growth would automatically “trickle down” to workers. However, even when those upgrading gains did occur, their transmission to workers involved in GSCs did not automatically take place. Recent years have seen a wide range of empirical studies investigating the quality of jobs for workers involved in global production. Evidence is mixed on the implications of participation in GSCs for firms and workers: globalized production is often associated with employment growth in developing countries and an increase in labour force participation rates for certain types of workers, especially women workers, who had previously been excluded from formal employment, (Bernhardt 2014). At the same time, there is also evidence that globalized production is often associated with exploitation, vulnerability and insecurity, especially in labour-intensive production (Barrientos, Gereffi, and Rossi 2011; Locke 2013; Rossi, Luinstra, and Pickles 2014).

The outcomes and dynamics emerging from GSC participation – increases in value added, knowledge transfer, skill development, and improved working conditions and respect for labour rights – do not occur in a vacuum. Rather, all are shaped by institutions, actors and policies, as well as the incentives or barriers they create that together constitute the governance of GSCs. Adopting a GSC analytical framework<sup>3</sup> helps understand governance dynamics and

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2 Many different terms and definitions are used in the literature on this topic – global value chains, global supply chains, global commodity chains, global production networks. For simplicity’s sake, the term “global supply chain” is used in this paper, encompassing also literature and reflections usually cited under other terminology.

3 The GSC analytical framework allows understanding of how global industries are organized by examining the structure and dynamics of different actors involved in a given industry; mapping complex industry interactions and geographically dispersed activities and actors within a single industry; and determining the roles they play in developed and developing countries (Gereffi and Fernandez-Stark 2016).

identify institutional actors that can push for decent work from a regulatory perspective. These actors include national host governments, governments of lead firms' countries of origin, international organizations, lead firms (usually brands and retailers), trade union organizations, industry associations and civil society and advocacy groups. There is no single solution or driver for improving working conditions. Exploring the different configurations of external and endogenous incentives that drive supplier firms towards decent work – including by investing in and upholding labour standards compliance, as well as the intrinsic pressures and challenges they face due to the prevailing buyer-driven business model that characterizes the garment industry – is critical from both an analytical and a policy perspective.

We focus on the global garment supply chain, perhaps the most striking and most studied example of the challenges of respecting labour standards in GSCs, and of the related experimentations in labour governance. This GSC has often been seen as the epitome of globalized production and has long been subjected to scrutiny in terms of working conditions in manufacturing factories in developing countries (Locke 2013; Rossi, Luinstra, and Pickles 2014).

Reports of exploitative working conditions in developing country factories producing for well-known garment brands emerged in the 1990s. National legislation and public enforcement authorities were not equal in addressing the challenges that came with the new forms of sourcing and employment relationships in globalized and export-oriented production. In response to consumer and civil society pressure, private governance initiatives, unilaterally led by global brands and retailers through codes of conduct and auditing, were launched in an attempt to privately monitor compliance with labour standards. However, the effectiveness of such brand-led initiatives has long been called into question (Barrientos and Smith, 2007; Locke, 2013; chapter 6).

In more recent years, governance of labour in GSCs has moved towards multi-stakeholder initiatives, recognizing the role of each actor in the chain in upholding labour standards. These initiatives include sectoral approaches that bring together lead firms, local producers and civil society. More established formal agreements between different parties have also been signed (for example, International Framework Agreements between lead firms and global union federations or the Bangladesh Accord for Fire and Building Safety); and the UN Guiding Principles for Business and Human Rights have provided a framework for businesses and governments to protect, respect and remedy human rights violations in GSCs.

In the garment industry, we focus on the Better Work programme, which has the stated objective of improving working conditions and promoting competitiveness in the industry, as a critical case study to analyse in order

to understand how it has effectively created change in workers' lives and workplaces by engaging all GSC actors at different levels. The Better Work programme is unique in the landscape of labour governance of GSCs, as it is neither a private compliance initiative nor a multi-stakeholder initiative in the traditional sense. While the programme does engage with a variety of GSC stakeholders, it crucially involves national institutions (in particular, implementing countries' Ministries of Labour) as key partners. From this perspective, Better Work builds on the ILO's tripartite structure of engagement with national governments, employers' and workers' organizations and adds a strong partnership with GSC actors, such as global brands and retailers and global manufacturers in the garment industry. The programme is analysed to understand its strategy of fostering a culture of compliance with labour standards while promoting competitive business and to assess its long-term scalability and sustainability options.

## ► 2. Better Factories Cambodia and Better Work

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### 2.1 From Better Factories Cambodia to Better Work

The garment industry can be a crucial opportunity for industrialization in developing countries due to its low entry barriers, high labour intensity and low skill requirements (Lopez-Acevedo and Robertson 2012). In the 1990s, investment in the garment industry became a central development strategy in the post-civil war reconstruction process in Cambodia. However, the growth of the industry was accompanied by concerns for working conditions. In 1999, still under the Multi-Fibre Arrangement (MFA) trading regime, the United States negotiated the US-Cambodia Bilateral Textile Trade Agreement with Cambodia, granting increased quotas for Cambodian garment exports in exchange for improvements in compliance with labour standards. Such improvements were to be monitored by a new ILO project, Better Factories Cambodia (BFC), designed to provide neutral and reliable information on compliance with labour standards to further the implementation of the trade agreement. BFC was established in 2001, marking the first time in which the ILO became directly involved in factory-level monitoring of labour standards compliance. This step was significant for the ILO taking up a new role beyond its traditional engagement with national tripartite constituents in the wake of the transnational nature of GSCs, which, as discussed above, poses governance challenges and often hinders the effectiveness of traditional labour inspections (Polaski 2006, 922).

To this day, BFC covers all exporting garment and footwear factories in Cambodia, as participation is linked to export licenses issued by the government, making the programme industry-wide. Even in the aftermath of the MFA phase out in 2005 and the global financial crisis in 2008, overall labour compliance in Cambodia consistently improved over time (Ang et al. 2012; Brown, Dehejia, and Robertson 2013). Given these encouraging outcomes and stakeholders' commitment to BFC's model, the Better Work programme was launched in 2007. As of June 2020, Better Work had expanded its activities to nine garment-producing countries (Bangladesh, Cambodia,<sup>4</sup> Egypt, Ethiopia, Haiti, Indonesia, Jordan, Nicaragua and Vietnam),<sup>5</sup> covering more than 1,700 garment supplier factories and 2.4 million workers.

## 2.2 Factory-level engagement and impact

Originally, the main factory-level service performed by BFC was monitoring compliance at the factory level in accordance with the role foreseen in the US-Cambodia trade agreement, and this continues to be a central offering of all Better Work country programmes to this day. It is in this respect that the Better Work model is most similar to private compliance initiatives by multi-stakeholder actors or by lead firms. Assessments are unannounced, take an average of four person-days per factory and are carried out once a year by a team of two. Using a checklist of approximately 250 questions<sup>6</sup> and triangulating information from managers, workers and union representatives, the programme monitors factories' compliance with the ILO core labour standards<sup>7</sup> and with national labour law covering compensation, contracts, occupational safety and health, and working time. After each assessment is completed, a report is shared with the factory management and with global brands and retailers who subscribe to the programme. At the time of expansion to the Better Work programme in 2007, there were already significant lessons learned on the limitations of private compliance initiatives through social audits and their limited scope for sustainable improvements (Barrientos and Smith 2007; Mamic 2003; O'Rourke 2003; Merk 2009). These shortcomings are due to the need to invest in building the capacity of managers and workers,

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4 BFC continues to maintain its original name even after the establishment of Better Work because of its well-known brand in Cambodia. The main remaining difference between BFC and the rest of the Better Work country programmes is that BFC continues to cover a number of factories just with its compliance monitoring services, whereas all factories participating in Better Work receive a bundle of compliance assessments, advisories and training services.

5 Expansion to new locations is driven by feasibility and needs criteria (Rossi 2015).

6 Better Work's compliance assessment tools are country-specific and are regularly updated to reflect changes in the labour laws in each country. The tools are publicly available on the Better Work website.

7 The ILO core labour standards are the elimination of child labour, non-discrimination, the eradication of forced labour, and freedom of association and collective bargaining.



as well as creating the foundation for workplace cooperation and dialogue as the engine for sustainable change. As a result, the design and implementation of the Better Work programme significantly expanded BFC's scope by providing a range of advisory and training services for remediation built on the emphasis of social dialogue as a foundation for change.<sup>8</sup>

Better Work's advisory services are built on the principle of factory-level social dialogue. The programme facilitates factory-level meetings aimed at establishing a Performance Improvement Consultative Committee (PICC) composed of equal numbers of factory management and workers' representatives, who meet regularly to prioritize the changes to be implemented at the workplace. Evidence from a multi-year impact evaluation study covering more than 15,000 worker survey responses shows that the establishment and well functioning of the PICC leads to higher wages, lower verbal abuse, lower perception of supervisors being obstacles to promotion, and an increased perception of supervisors being fair and respectful (Brown, Dehejia, and Robertson 2014), as well as improved workplace communication on the whole (Pike 2020). A well-functioning PICC is understood as a committee that meets regularly, has women represented in a share proportionate to their share in the workforce, and workers' representatives are fairly elected (Brown et al. 2016; Anner 2017b).

The central role of industrial relations at the workplace – mostly overlooked in private compliance initiatives – is embedded in the programme's strategy beyond the bipartite committees, through gathering comprehensive information on existing unions and joint committees, on awareness levels related to freedom of association, collective bargaining agreements, grievance mechanisms and so forth. This is also due to the fact that despite improvements in compliance with freedom of association and collective bargaining, significant challenges for upholding these standards remain (see Arnold and Shih 2010; Rossi and Robertson 2011; Oka 2016 for the case of Cambodia).

Factory assessments and advisory services performed by Better Work staff lead to the identification of capacity building and learning needs. Training programmes are targeted to workers, line supervisors and managers on subjects such as occupational safety and health, supervisory skills, industrial relations, gender equality (including sexual harassment prevention), workers' rights and responsibilities and human resource management.

Brown et al. (2016) provide a comprehensive impact evaluation of the Better Work programme in Haiti, Indonesia, Jordan, Nicaragua and Vietnam, based on firm-level data collection through worker and manager surveys and interviews. Their findings indicate that Better Work has several direct impacts on

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<sup>8</sup> This was still also applicable in Cambodia, where the factory service model was also adapted to include a training component in 2004 and an advisory offering as of 2008 (Kotikula, Pournik, and Robertson 2015).

compliance with labour standards, on workers' well-being and livelihoods, and on firm performance in terms of labour productivity and profitability. The results presented in this section are based on Brown et al. (2016), unless otherwise specified.

Factory-level evidence shows that the Better Work programme is having a significant and positive impact on working conditions. Compliance with international labour standards and national labour law has consistently increased in participating factories across all Better Work countries (Brown et al. 2016; Kotikula, Pournik, and Robertson 2015; Robertson 2020). The impact of the programme includes reducing the prevalence of abusive workplace practices, such as verbal abuse and sexual harassment. For example, Better Work Jordan decreased workers' concerns about workplace sexual harassment by 19 per cent by the fourth year of operations. Researchers have also identified a programme effect on reducing the amount of hours which workers log per week. In Vietnam, workers saw a reduction in weekly hours from 59 to 55 on average, an effect identified after five years of programme operation. In Cambodia, BFC is identified as reducing overtime work by up to six hours per week after three years of factory exposure to the programme's bundled services, that is the combined assessment, advisory and training package (Antolin et al. 2020). Similar reductions in excessive hours have been identified and attributed to Better Work by researchers in the context of Indonesia (3.3 fewer hours per week by year four). Workers in Better Work factories see their take-home pay increase, while also seeing their working hours decrease due to higher compliance with wage legislation and, in particular, with paying wages as promised. The programme also has an impact on reducing the gender pay gap: at baseline, a gender pay gap of US\$0.19 per hour was found in Better Work Vietnam factories. This was reduced by 85 per cent by the fourth Better Work compliance assessment (Djaya, Brown, and Lupo 2019).

Greater compliance with core labour standards improves the life satisfaction and well-being of workers. Workers report higher levels of these properties in factories with greater compliance with core labour standards, such as child labour, workplace discrimination and forced labour (Adler et al. 2017). Similarly, worker well-being is higher in factories where workers report better working conditions and work environment. As measured by the perception of worker themselves, having a safe work environment, being satisfied with wage levels and having access to health facilities are the workplace conditions that have the most impact on worker well-being (Adler et al. 2017).

The programme has had a statistically significant effect in Jordan on workers' reported experience with fatigue, headaches, thirst and hunger, and on access to prenatal health care and maternity protection in Haiti, Jordan, Vietnam and Indonesia. Beyond the workplace, the programme has a measurable positive impact on the education opportunities of workers' children, children's health

(particularly for girls) and on the use of remittances towards health and education expenses. There is also evidence that the programme supports women's empowerment and has an impact on improving gender balance at the household (Pike and English 2020).

Brown et al. (2016) crucially show that there is strong evidence demonstrating that improving working conditions is not a financial burden for a factory, but that there can be a “business case” for improved compliance. This is central in ensuring buy-in to a programme like Better Work, since the commitment of factory managers to implement improvements in working conditions on the factory floor relies to some extent on business logic. Abusive treatment, such as verbal abuse or sexual harassment, are not only morally deplorable but also associated with poor business performance (Rourke 2014; Brown and Lin 2014).

Several empirical studies based on Better Work factories show that, where workers report better working conditions, where compliance is higher and where supervisors are well equipped for their jobs, there is a positive effect on productivity (Antolin et al. 2020; Asuyama and Neou 2014; Brown et al. 2016). After five years of programme participation, workers, on average, reached production targets in 1 hour and 18 minutes faster as compared to the baseline. In Cambodia, researchers estimate an average cumulative productivity improvement of up to approximately 30 per cent for factories that receive the full package of Better Work services. (Antolin et al. 2020). Supervisory Skills Training offered by Better Work has been shown to increase line productivity by up to 22 per cent for lines supervised by women who had undertaken the training (Babbitt 2016).

Similar results are found on profitability (Brown et al. 2015). Vietnamese factories where workers do not have concerns about whether their wages were paid correctly and about verbal and physical harassment are likely to show higher profits (Brown et al. 2015). Furthermore, factories where workers perceive improvements in their sense of physical security and assurance in wage payments witness a 5.9 per cent boost in profitability. Similarly, profitability increases by 7.6 per cent in factories where workers are comfortable raising workplace concerns, where workers express greater satisfaction with water and air quality, and where there is greater satisfaction with restrooms, canteens and health services provided within the factory. Brown et al. (2016) argue that the profitability results are linked to supplier firms' relationship with global brands and retailers, and, in particular, to longer term contracts that allow for better production planning, less uncertainty and higher margins that can be translated into skills upgrading and compliance investment. These results are consistent with the conclusions of Oka (2012) and Amengual and Distelhorst (2019), who show how reputation-sensitive brands invest in longer term relationships with more compliant suppliers.

► **Box 1. Transparency and compliance in the apparel GSC**

Better Work's monitoring function is reinforced by its approach to transparency reporting, which started in 2013 and, at the time of writing, covers Cambodia, Haiti, Jordan, Indonesia and Vietnam. The programme publishes factory names and their associated non-compliance findings on a selection of 27 "critical issues" covering core labour standards and key working condition indicators on its website. The objective of this approach is to equip GSC actors (in particular labour inspectors, trade unions and civil society groups) with factory-level evidence of non-compliance that can inform their own activities and interventions. Ang et al. (2012) show that reporting transparently lowered the probability of non-compliance by an average of 4.7 per cent. This development is critical in terms of Better Work fitting into the theoretical model of "Ratcheting Labour Standards" developed by Fung, O'Rourke, and Sabel (2001). This model suggested industry-wide participation, independent monitoring of labour standards compliance, public disclosure and pressures by consumers and investors as the key ingredients needed to foster better working conditions. Re-introduction of public disclosure is associated with a reversal of trends in deteriorating compliance levels among firms. Overall and across different countries, transparency has been effective in increasing compliance for key issues, and factories' backsliding once compliant is rare. Public disclosure has a particularly strong effect on compliance points related to occupational safety and health, and on working time (Robertson 2019; Robertson 2020; Hollweg 2019).

It is the combination of Better Work's interventions at the workplace level – compliance assessments, advisory and training services – that drive as a whole the impact described above. This is a critical finding, as it confirms the need for a holistic approach to workplace improvements beyond the mere monitoring of labour standards.

### 2.3 National- and Industry-level engagement

Given the complex web of relations between the various actors in GSCs and the different institutional and regulatory environments in which Better Work operates, there is need for a concerted approach that goes beyond the factory level. Multi-stakeholder initiatives aimed at improving conditions in the global garment industry have proliferated since the 1990s, bringing together

different configurations of actors, in particular brands, trade unions, NGOs and employers' associations in supplier countries (Barrientos and Smith 2007; O'Rourke 2003; Everett, Neu, and Martinez 2008). However, these initiatives often engage mainly with the commercial and social actors of the supply chain, without directly encompassing public authorities and local institutions. This undermines the efforts for sustainable change, since public labour administration and inspection services, local industry associations and trade unions are responsible for enforcement of national labour laws, collective bargaining, dispute resolution and social dialogue.

The direct engagement with national institutions is one of the key factors differentiating the Better Work programme from private compliance initiatives and multi-stakeholder efforts (Wetterberg 2011). In particular, being a partnership programme of the ILO provides an institutional anchor in its tripartite structure which comprises governments, workers' organizations and employers' organizations. As such, Better Work is not a private compliance initiative, it is tripartite in structure, including public actors. It is also not a traditional multi-stakeholder initiative, since, as mentioned above, they tend to skirt the presence of public governance actors as well. By including global brands and retailers and global manufacturers in its theory of change and in its governance, Better Work also goes beyond the traditional tripartite structure of the ILO, which involves only national-level constituents (Posthuma and Rossi 2017). Arguably, as will be discussed later, this is also one of the factors that shape the programme's long-term sustainability, as engagement of stakeholders at the national level is a critical dimension of achieving solutions that are locally embedded.

To this end, each Better Work country programme is advised by a project advisory committee composed of members of the government (from ministries of labour and sometimes ministries of trade) and employers' and workers' organizations.<sup>9</sup> These committees have the objective of creating a platform to foster a consultative and inclusive dialogue at the national level and to ensure that the national stakeholders have full ownership of the process of improvement. This is particularly important in places where dialogue among social partners in the industry has been weak, not representative, or not existing prior to the establishment of the programme. In these specific contexts, the structure of the Better Work programme can provide an avenue for more effective social dialogue by stimulating the different actors' political will and commitment. Furthermore, the close relationship with the government, employers' and workers' organizations in such a committee also allows the

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<sup>9</sup> This model of engagement also builds on BFC's experience, where the regular consultations of its project advisory committee have been critical to supporting its objectives (Polaski 2006). It is composed of the Royal Government of Cambodia, the Garment Manufacturers Association in Cambodia (GMAC) and the country's trade unions. For an account of the negotiations among stakeholders and how the project design was finalized, see Kolben (2004).

programme, together with the ILO more broadly, to identify areas for capacity development and for knowledge sharing.

Indeed, the programme's strategy over the years has evolved into putting significant more focus on policy-level engagement with national constituents. The Better Work programme often emerges in highly contested political spaces where the capacity of stakeholders is limited, or where the legal and institutional framework constitutes an impediment to effective social dialogue. This is particularly crucial when it comes to the respect of the right of freedom of association and collective bargaining, one of the core labour standards as foreseen by ILO Conventions No. 87 and 98. Challenges in this respect have been at the core of national- and industry-level engagement in Vietnam and Jordan, where workplace-level experience from the programme has contributed to labour law reforms especially in terms of trade union rights (Posthuma and Rossi 2017). In 2012, Better Work Vietnam developed pilot projects with the Vietnam General Confederation of Labour (VGCL) to establish methodologies for more effective worker representation, based on the experience gained through factory-level elections of worker representatives for the programme's bipartite committees. In the implementation decrees for the revised Labour Code and Trade Union Law, a new institution, the "Dialogue Group", was introduced to undertake regular bipartite dialogue at the workplace level, requiring regular meetings and elected workers' delegates at all enterprises. This is an example of how the Better Work programme can act as an incubator for policy changes spanning beyond the garment industry. In Jordan, Kolben (2015, 2019) demonstrates that Better Work has been a critical broker of social dialogue at the sectoral and national levels and that its presence helped stabilize the industry and ensure its success. From the perspective of legislative change, at the time of the programme's establishment in Jordan, migrant workers – who constitute the vast majority of the labour force in the garment sector – were prevented from joining and forming trade unions. In 2010, amendments to the Jordanian labour law were approved, including the elimination of language that specifically forbade migrant workers from joining unions. In subsequent years, Better Work Jordan coordinated efforts to negotiate an industry-wide collective bargaining agreement for the garment industry between the employers' associations and the garment union (Kolben 2019).

In terms of the programme's interaction with public governance, the programme in Jordan has collaborated closely with the Ministry of Labour from the onset, including through joint training and service delivery, secondments of labour inspectors to Better Work Jordan and information sharing to enable enforcement action in the event of human rights abuses. This latter component, exemplified by the signing of Zero Tolerance Protocols that trigger the direct involvement of the Ministry of Labour upon non-compliance findings with core labour standards, is present in all Better Work country programmes.

Kolben (2019, 42) argues that Better Work, as a “hybrid form of private governance program” well placed to engage with the state, has excelled in this interaction in Jordan, leading the Ministry of Labour and its inspectorate to move towards a strategic, evidence-based compliance approach.

Similarly, in Indonesia, the programme has been proactively engaging in regulatory processes. Dupper, Fenwick, and Hardy (2016) find that the public labour inspectorate has been strengthened as a result of its interactions with Better Work. They show that, while the interplay of Better Work Indonesia and the labour inspectorate was based on largely informal and ad-hoc relations, it led to a more strategic management of the labour inspection process, demonstrating that there is complementarity between the two regulatory regimes at the national and transnational levels. The role of Better Work in influencing labour regulations in Indonesia, in particular on minimum wage setting at the district level and on fixed-term contract regulations, was also illustrated in the study by Amengual and Chirot (2016). They demonstrate that Better Work resolved ambiguities in labour laws and regulations by liaising with public regulators at different administrative levels, allowing for greater clarity and ultimate higher compliance by supplier firms. These interactions between Better Work Indonesia and the Ministry of Labour and labour inspectorates support the hypothesis that transnational governance initiatives such as Better Work can reinforce and empower state actors.

The role of the Better Work programme in facilitating dialogue at the national level leading to changes in national legislation is an important factor for its sustainability. The programme is not a panacea to address poor working conditions in the garment industry in the long term – as it does not constitute an alternative to state regulation and enforcement (ILO 2013) nor to effective dialogue between management and worker representatives at the workplace or at the industry and national levels – but rather a complementary and supporting driver (Amengual and Chirot 2016).

## 2.4 Engaging the GSC

Further to establishing a robust evidence base for Better Work’s impact at the workplace, Brown et al. (2016) also provide evidence on the need to engage all GSC actors to achieve sustainable change. For example, the authors show that, despite targeted interventions, the programme still has limited impact on excessive overtime. They argue that this is due to the buyer-driven nature of the garment industry and to the pressures that suppliers receive from lead firms in terms of cost, flexibility and speed of production. This echoes many recent empirical studies in GSCs showing the pressures posed by the business model in the garment GSC (Anner, Bair and Blasi 2013; Locke 2013; Vaughan-Whitehead and Pinedo Caro 2017). Anner (2017a) further confirms that social

dialogue in Better Work's PICCs can be jeopardized by heightened buyer pressure and pricing squeeze.

However, as discussed above, global brands and retailers in the garment industry have been first-movers in responding to the regulatory challenges of GSCs, albeit with limitations, and are critical agents for change at the core of the Better Work model and for its success. From a GSC perspective, the establishment of the programme in any given country context is usually driven by two sets of incentives: a trade-based and/or a market-based incentive (Rossi 2015). Trade-based incentives follow the original BFC model described above, where there is a specific trade provision, often supported by a national legislative framework, linking factory participation in the programme to trade benefits. This is the case for the Better Work programme in Cambodia, Haiti and Jordan. Market-based incentives, which drive Better Work participation in all the other countries, rely on the relationship that the programme has with global brands and retailers, and their ability in turn to compel factories in their supply chains to participate in the programme. Indeed, the partnership that Better Work established over the years with global brands in the garment industry is a key strategic factor.

This relationship, however, is not limited to brands' role in creating incentives for participating in the programme and for increased compliance. The programme has been active in establishing dialogue opportunities bringing together global brands, vendors and suppliers to discuss labour challenges along the GSCs through regular global and regional buyers' fora. Since 2012, the programme established a systematic and legally binding partnership model with global brands. This entails close communication and policy coordination on specific issues. For example, buyer partners<sup>10</sup> commit to avoiding audit duplication and to continuing sourcing relationships even when labour rights violations are found, provided that there is a commitment by the factory to undergo advisory and training services. Such partnership also aims at addressing contradictory buyer demands on their suppliers, in terms of labour compliance on one side and pressures on cost, speed and flexibility of production on the other (Anner, Bair, and Blasi 2013; Amengual, Distelhorst, and Tobin 2020). More recently, the programme also organizes regular Vendors' Fora and has developed an engagement model to work closely with global manufacturing groups, who operate across different Better Work country programmes and play a critical role in the garment GSC, but may not have the same brand recognition or reputation sensitivity as international brands.

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<sup>10</sup> The new partnership model introduced two categories of engagement: buyer partners (referenced here), who sign the partnership memorandum of understanding (MOU); and buyer participants, who continue an arms' length relationship with Better Work by limiting their engagement to subscribing to factories' individual service reports. The latter type of engagement is typical of brands and retailers that have only a handful of supplier factories covered by the programme.



### ► 3. The way forward: scalability and sustainability of Better Work

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Globalization of apparel production has brought about opportunities for firms and workers in developing countries as well as challenges in terms of the quality of these jobs. Concerns over working conditions in apparel factories producing for global brands and the vulnerability of apparel workers have received significant media attention, in particular in the wake of significant external shocks – the 2008 financial crisis and its demand impact, the 2013 Rana Plaza building collapse in Bangladesh, and, most recently, the GSC disruptions on both demand and supply sides due to the Covid-19 pandemic. The question of what works to enable apparel factories and workers in developing countries to reap the benefits of their participation in GSCs, ensuring that these fulfil their potential in terms of economic and social development, is central to this chapter. This question was explored focusing on the case study of the Better Work programme, which aims at improving working conditions and promoting competitiveness in global garment supply chains. The workplace and community impact of the programme is well documented; however, the question of how to scale and sustain these impacts in the long term is critical.

With regard to scalability, the scope and limitations of the programme in terms of scale need to be acknowledged: Better Work still has a limited coverage of the apparel supply chain,<sup>11</sup> as, due to its incentive structure, it largely focuses on first-tier suppliers and not on subcontractors (despite some coverage of lower tier factories in Cambodia and Jordan). As a result, it tends to target larger factories in the formal sector, where working conditions are better than average. The most vulnerable workers, working on a casual basis in informal workplaces or in their homes, are not covered by Better Work interventions. Also, the overall coverage of the programme with respect to the 60+ million apparel workers globally is quite small, due its geographical scope, its time-intensive factory level intervention, and, relatedly, its cost. This limitation was already acknowledged in the programme's current 2018–2022 strategy (Better Work 2018), which strongly articulates the case for sustainability and ownership of the improvement process by all GSC stakeholders. Kolben (2019), describing the case of Better Work Jordan, argues that the programme is well under way in establishing a new model of “collaborative governance and

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11 Several feasibility studies to apply a Better Work-like model to other GSCs have been carried out over the years. At the time of writing, the conclusions have always pointed to the unique dynamics in the apparel industry, established relationships with industry stakeholders and specialized technical knowledge as the rationale for the programme to stay focused on the apparel and footwear sectors only.

regulatory embeddedness”, bringing together public and private institutions to drive improvements in working conditions in the garment industry. This strategic vision is reflected by the programme’s design at the global level, where questions of sustainability of Better Work are strongly associated with the ultimate goals of strengthening institutions and empowering all GSC actors to drive change.

Sustainability has been a changing concept in the Better Work context. Originally, the Better Work programme was conceived to be a financially sustainable intervention within five years of its establishment in any given country, relying on revenue from factory fees and buyers’ subscriptions (ILO 2012). The only country programme that has implemented this policy is Indonesia, where it operates a Better Work Foundation, which is financially independent and delivers the programme’s workplace-level interventions. However, more recently, the emphasis placed on financial cost recovery has shifted towards a more comprehensive definition of sustainability encompassing capacity building and buy-in from local institutions.

The experience of the implementation of the Better Work programme in different country contexts shows that external incentives linked to trade, market access or brand relationships are needed to initiate efforts towards labour compliance. However, the long-term sustainability of these improvements needs to be anchored on endogenous factors. Such factors entail actions at the factory level, such as establishing the competitive gains deriving from compliance with labour standards and respect of workers’ rights. It must be noted, though, that the achievement of the objectives of improving working conditions in the global garment industry cannot be addressed solely by factory-level interventions. Local institutions and contexts, as well as global dynamics, play a pivotal role in driving compliance with labour standards. This is more evident than ever in the wake of the dramatic GSC disruptions driven by the Covid-19 pandemic. As Anner (2020) clearly demonstrates, the fragility of the existing GSC model in the garment industry was made evident within a few weeks from the outbreak of the pandemic, and it shows that this global supply chain is only as strong as its weakest link – namely, the vulnerable workers operating within it who are at risk of falling back into extreme poverty. When thinking of a post-Covid-19 global garment industry, it is clear that robust labour governance of the GSC and effective social dialogue are critical. Both need to be built on strong institutional actors and on capable and independent employers’ and workers’ organizations, as well as on the political will to engage in social dialogue. In this context, and as exemplified by the programme’s convening role in the Garment Industry Global Call to Action<sup>12</sup> in response to the Covid-19 pandemic, the Better Work programme

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12 [https://www.ilo.org/global/topics/coronavirus/sectoral/WCMS\\_742343/lang-en/index.htm](https://www.ilo.org/global/topics/coronavirus/sectoral/WCMS_742343/lang-en/index.htm).

can be leveraged as an opportunity to convene and engage national and global stakeholders such as government agencies and labour inspectorates, employers' associations and trade unions, to build their capacity, facilitate and strengthen social dialogue, and thereby ensure sustainable change when shaping the future of the global garment industry.

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# 9 Access to justice after Rana Plaza

## A preliminary assessment of grievance procedures and the legal system in the apparel global supply chain

Youbin Kang<sup>1</sup>

### ► Introduction

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On 24 April 2013, the second deadliest industrial disaster in the world – resulting in the death of 1,134 workers – occurred with the collapse of the Rana Plaza building in Savar, Bangladesh, numerous floors of which had been occupied by unauthorized sewing facilities. The disaster was a critical juncture that resulted in increased attention to garment workers and introduced multiple overlapping interventions. This paper asks how Rana Plaza and ensuing developments in the garment sector have affected the extent of access to justice for workers. Access to justice<sup>2</sup>, for the purposes of this paper, includes the access to courts and adjudication, as well as other means of dispute and grievance resolution; the right of individuals to have their cases heard and adjudicated with fairness and justice; and the access of individuals to legal aid when socioeconomic barriers affect access to the

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1 I am grateful for the generosity and hospitality of Barrister Sara Hossain and the panel lawyers of the Bangladesh Legal Aid and Services Trust, as well as to other activists and workers who have given me their time. I also thank members of the Research Department at the International Labour Organization (ILO) for their detailed comments, as well as Professors Gay Seidman, Jane Collins, Joseph Conti, Mitra Sharafi, Heinz Klug, Myra Marx Ferree and Marc Galanter for their insightful feedback on earlier versions and presentations of the paper. I would also like to acknowledge Mahiratul Jannat Nabia for her assistance with the research. Funding and support from the Center for South Asia and the Institute for Legal Studies at the University of Wisconsin–Madison were crucial for carrying out this research.

2 Goal 16 of the Sustainable Development Goals of the United Nations (UN) echoes this normative practice as a facet of human rights, calling for UN members states to “[p]romote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.” See <https://sustainabledevelopment.un.org/sdg16>.

first two principles (Francioni 2007). Through an analysis of longitudinal data on garment workers' utilization of legal services, the paper contributes an understanding of how the dynamics relating to the combination of judicial reforms, transnational initiatives and increased legal consciousness play out for garment workers in Bangladesh.

Since 2013, multiple new bodies and mechanisms of grievance redress for garment workers have been introduced. A "body" indicates the forum, institution or meeting that can determine resolutions of grievances. A "mechanism" refers to the process that can result in the resolution of grievances, including litigation, mediation or consultations. The introduction of several parallel extrajudicial grievance mechanisms in Bangladesh highlights the complementary role that non-state actors can play in providing access to justice for workers, especially when the law and its implementation and enforcement are not well equipped for this purpose.

Longitudinal changes in the types, outcomes and award amounts of grievances are examined using a database of cases that were tried through a prominent NGO, the Bangladesh Legal Aid and Services Trust (BLAST).<sup>3</sup> The data show three emerging trends. First, all workers using legal aid services from BLAST have demonstrated higher levels of legal consciousness since 2013 – for example, more workers have filed cases related to unfair dismissal after Rana Plaza. Second, the data reveal that the number of industrial relations cases filed individually has not increased, despite the large amount of attention that the issue had received in amendments to the Bangladesh Labour Act (BLA) after Rana Plaza. Third, the data also show that, after Rana Plaza, women plaintiffs filing through BLAST have received higher monetary settlements<sup>4</sup> compared to men in the courts in wage-related lawsuits. The amount doubled for women and increased by 50 per cent for men between the periods of 2009–12 and 2013–17. Given that the female plaintiffs in courts have decreased over the years, the enhanced legal consciousness of lawyers and judges in relation to the gendered labour force of the garment industry is a potential explanation of this trend.

The paper proceeds as follows: After this introductory section, section 1 outlines the literature and the background that addresses strategies to strengthen the access to justice for workers in Bangladesh. Section 2 discusses the data

<sup>3</sup> BLAST is a pro bono legal service organization founded in 1993 and the largest legal services NGO in the country, specializing in labour law, family law and criminal law. The organization provides legal services, engages in public interest litigation for policy reforms and conducts legal education, research and joint programmes with other NGOs. Workers are introduced to legal aid services provided by BLAST through awareness campaigns, their trade unions, networks of lawyers, former clients and other NGOs. Some of the cases were tried in court with a judgment issued, while the majority of cases were settled during trial or outside of court through mediation.

<sup>4</sup> In real 2006 US dollars.

sources and methodology, while section 3 examines how dispute resolution has changed before and after Rana Plaza. Section 4 describes how the patterns of access to justice have been transformed after Rana Plaza through a descriptive statistical analysis of the changes in outcomes and the types of grievances that workers have filed through BLAST. Finally, section 5 concludes the paper by discussing further research and implications for practitioners.

## ► 1. Access to justice for garment workers in Bangladesh

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Access to justice for garment workers in Bangladesh is closely tied to the organization of the global supply chain, a dominant and growing sector in Bangladesh (Rahman 2014; Anner and Bair 2016; Labowitz and Baumann-Pauly 2015). According to the Bangladesh Garment Manufacturers and Exporters Association (BGMEA), in the years 2018 and 2019, ready-made garment (RMG) exports comprised 84.21 per cent of all export earnings of the country (BGMEA 2019). Scholars have noted that the further integration of a developing country in global supply chains may lead to economic upgrading, but is not always accompanied by social upgrading (ILO 2016b; Barrientos, Gereffi, and Rossi 2011; Rossi, Luinstra, and Pickles 2014). Most developing countries participate in global supply chains because the domestic value-added created from their participation contributes to the gross domestic product (GDP) per capita growth rates and increased employment (UNCTAD 2013; WTO 2019).<sup>5</sup> However, this period of the exponential growth of the industry has been punctuated by a series of industrial disasters that killed and injured many workers (Hasan et al. 2017).<sup>6</sup> The juxtaposition of economic upgrading without the social upgrading reflects the “governance gap” in those subcontracted workplaces where the reach of the law and its enforcement are

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5 According to the United Nations Conference on Trade and Development (UNCTAD), developing economies with the highest participation in global supply chains demonstrate a median rate of GDP per capita growth of 3.3 per cent compared to 0.7 percent for those with the lowest participation in global supply chains (UNCTAD 2013, 152). In Bangladesh, the participation of the country in the apparel value chain has led to significant economic upgrading, through both process and product upgrading of faster sourcing abilities and the diversification of products of Bangladeshi manufacturers (Moazzem and Sehrin 2016). Between 2005 and 2018, the GDP per capita in Bangladesh doubled from US\$617 to US\$1,203.

6 The collapse of Spectrum Sweater factory killed 64 workers and injured 74 others. In 2010, the boiler explosion at Eurotex killed 2 and wounded 62, while, in the same year, an electrical fire at That’s It Sportswear killed 29 and injured 25. In 2012, a fire at Tazreen Fashion Factory killed 112 and injured 300. In 2013, a fire at Smart Export Garments killed 8 and injured 50. The Rana Plaza collapse killed 1,134 and injured more than 2,400 workers (Hasan et al. 2017).

limited, and corporate liability of the end users in the supply chain does not cross jurisdictional borders (Posthuma and Bignami 2014). This means that the legal responsibility for labour law violations lies with subcontractors, rather than the buyers that capture the greatest economic profits in the supply chain. The problem of the governance gap is compounded by the fact that, generally, the have-nots face complex social, financial and institutional challenges to accessing the law (Galanter 1974). Given these obstacles, three different bodies of literature have proposed different solutions to increasing access to justice for workers, which has motivated multiple policy initiatives in Bangladesh.

The first school of thought promotes the strengthening of the judicial system at the national level, in order to extend the universal goals of international labour standards (Posthuma 2010; Seidman 2007; Rubya 2015; ILO 2016a; Weil 2014). Labour courts and government-based legal aid are public resources that should be able to provide access to justice, under equal opportunity and with fair trials guaranteed to all (Francioni 2007; Rhode 2005). Compared to a more universal approach to transnational human rights law, implemented through international organizations and NGOs, the logic behind a strengthened domestic judicial system follows the idea that labour rights are contextually specific and should be implemented by governments locally. As workplaces have globalized, institutions such as the International Labour Organization (ILO) have sought to universalize labour rights through the 1998 Declaration on Fundamental Principles and Rights at Work (FPRW)<sup>7</sup>, but have not lost their focus on the strengthening of local labour laws and the judicial system. Labour rights have been historically framed in locally-specific repertoires with the intention of protecting “vulnerable members of a local community, often invoking local norms and citing the need to protect one’s neighbors.” (Seidman 2007, 18). Many scholars have emphasized that the ways by which the universal rights discourse can be translated into effective local practice require the active mobilization of civil society and constant work to situate these rights in local contexts (Unnithan and Heitmeyer 2014; Seidman 2007; Merry 2009).

In Bangladesh, a variety of approaches were taken to reform and strengthen the judicial system after Rana Plaza. The first set of reforms comprised amendments to the Bangladesh Labour Act (BLA) of 2006, which occurred in 2013, 2015 and 2018, taking into account the comments of the ILO’s supervisory bodies (ILO CEACR 2016, ILO CEACR 2019), benefitting from the ILO’s

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<sup>7</sup> This includes the freedom of association and the effective recognition of the right to collective bargaining, the elimination of forced or compulsory labour, the abolition of child labour and the elimination of discrimination in respect of employment and occupation. See <https://www.ilo.org/declaration/lang-en/index.htm>.

technical assistance<sup>8</sup> and profiting from the input of various civil society groups, including BLAST<sup>9</sup>. Changes include: the elimination of the practice of identifying union leaders' names at the time of trade union registration; the provision to allow outside experts to assist during collective bargaining; safety-related laws that mandate the creation of safety committees in workplaces; and shorter turnaround times for compensation related legal proceedings (Rubya 2015; ILO 2013). These reforms were complemented by a lawsuit, through a consortium of NGOs,<sup>10</sup> against the owners of the sewing factories housed in the Rana Plaza building, who were tried on the violation of criminal laws regarding health and safety, building safety, corruption and culpable homicide. The building's owner, Sohel Rana, was also convicted on charges of murder and corruption (Hossain 2017). These efforts resulted in an order for the immediate arrest of the owners of the five factories in the building and Sohel Rana, the building owner, to be produced before the court and their accounts to be frozen (Hossain 2017). BLAST also petitioned the High Court to serve a motion of contempt against four Government ministries for failing to comply with the court's 2010 judgment calling for the establishment of a building code enforcement agency (International Commission of Jurists 2013; Hossain 2017). However, the criminal case and the recommendations on the compensation for the victims are still awaiting final consideration in the court. In the meantime, however, following calls by activist organizations and labour unions, compensation to the victims has been paid through an ILO-supervised and privately funded initiative, the Rana Plaza Arrangement (see Diller 2020). This development, then, leads to the logic behind the second school of thought.

The second set of scholarship calls for a stricter regulation of, and greater participation by, transnational corporations in the implementation of union rights, health and safety practices and the quality of work principles, in order to increase the access to justice for workers in global supply chains (Nova and Wegemer 2016; Appelbaum and Lichtenstein 2016; Anner, Bair, and Blasi 2013). The logic behind this argument is based on the assumption that multinational companies intentionally choose suppliers in countries that offer low production costs, which are often made possible by the absence of strong labour protection policies (Huq 2019; Alamgir and Banerjee 2018; Anner 2019). The authors emphasize the weakness of the judicial systems in these countries, which certainly holds true in the case of Bangladesh. Various accounts

8 For example, through a training of judges and lawyers on International Labour Standards by the ILO: [https://www.ilo.org/dhaka/Whatwedo/Eventsandmeetings/WCMS\\_551585/lang--en/index.htm](https://www.ilo.org/dhaka/Whatwedo/Eventsandmeetings/WCMS_551585/lang--en/index.htm).

9 A detailed explanation and critique of the amendments of the BLA can be found in Rubya (2015).

10 BLAST, along with another legal aid NGO, Ain o Salish Kendra (ASK), and other organizations petitioned the High Court Division of the Supreme Court to order investigations and prosecution of parties responsible for the deaths at Rana Plaza.

point to the limitations that impede access to justice through the court system itself – including high litigation costs, backlogs and corruption (Laskar 2007; Hossain 2017). Service providers, such as legal NGOs and lawyers, often see that workers cannot afford to be part of an effective dispute process, and extrajudicial procedures are favoured over judicial procedures due to the lack of resources for legal aid (Hossain 2017). While the courts are presumed to hold the mandate for fair and just trials to enforce the labour laws that are on the books, the literature points out the weaknesses of this mandate and, instead, calls on multinational companies to adopt a more active role in providing access to justice for workers.

Multinational entities in Bangladesh – transnational activist groups, transnational unions and private company-initiated programmes – have introduced parallel procedures allowing workers to find legal redress through private initiatives, training programmes and donations to NGOs. These initiatives have launched additional bodies that provide opportunities for workers to have their cases heard in a fair manner and that give them access to legal aid. Prominent initiatives include the Global Framework Agreements (GFAs)<sup>11</sup> in the garment industry, signed between IndustriALL and four multinational brands, Inditex, H&M, Esprit, and Tchibo; the Rana Plaza Arrangement mentioned above; and the Bangladesh Accord on Fire and Building Safety (hereafter: the Accord), which monitors and regulates the safety concerns in supplier factories of more than 190 brands. Yet, critics of the private approach note that, without the active participation of workers, any change is unlikely to be sustainable (McCallum 2013; Siddiqi 2015; Zajak 2017).

The third school of scholars calls for increased legal and rights consciousness of workers and legal practitioners as a means towards achieving social change (Chua and Engel 2019; Unnithan and Heitmeyer 2014; Albiston 2006; Merry 1990; Nielsen 2000; Nguyen 2018; Smith 2005). Legal consciousness, defined as “the ways in which people experience, understand, and act in relation to law” (Chua and Engel 2019, 336), is a way of mobilizing groups to utilize the law towards achieving individual and collective justice. The legal consciousness approach compels us to understand the ways that individuals’ identities, hegemonic structures and mobilizing actions affect their ability to act on their rights. The legal consciousness scholars point out that gendered and other subordinate attributes of individuals’ identity – often formed through relational mechanisms such as group membership and social interactions – have the ability to influence individuals’ utilization of the law (Merry 2006; Nielsen 2000; Liu and Halliday 2016). This discussion is particularly relevant to the

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11 Global Framework Agreements, or International Framework Agreements, according to Konstantinos Papadakis, are “negotiated agreements between multinational enterprises (MNEs) and global union federations (GUFs) representing workers at the global level by sector of activity” (Papadakis 2011, 2).

heavily gendered and classed workforce of the garment industry. Chaumtoli Huq points out how the gendered discourse surrounding the neoliberal introduction of the garment industry had been impeding workers from fully accessing their identities as workers, while Dina Siddiqi describes how barriers coming from multiple, competing logics of framing workers' issues to a transnational audience may obstruct the way that workers may voice their concerns in a genuine manner (Huq 2019; Siddiqi 2015).

In the aftermath of Rana Plaza, the Government of Bangladesh, along with the governments of supplier countries, multinational brands, and local and international trade unions have initiated a variety of governance initiatives to actively address legal consciousness. Programmes and funding for legal consciousness training were prominent in Bangladesh after Rana Plaza through increased aid and technical cooperation projects from international actors and NGOs. The Government also introduced a legal aid cell in the labour courts that provides free legal advice to workers in need. This will be discussed in detail in the following sections.

The three sets of literature discussed above are relevant to Bangladesh, as it offers policy recommendations as well as theoretical tools to analyse the agents involved and initiatives introduced to further the access to justice for workers in the garment industry. Given the multiple recommendations that scholars, policymakers and activists have proposed to increase the access to justice in the industry, this paper allows an exploration of how the combination of strengthening the state, demanding an active participation of transnational companies and increasing legal consciousness among workers and legal practitioners have played out for workers' access to justice in today's Bangladesh.

## ► 2. Methodology

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This paper uses descriptive statistics from internal documents of various private and national programmes for legal aid, a dataset of grievances filed through BLAST, and process-oriented factual interviews.

The descriptive statistics comparing the private and public bodies that provide resolution to grievances and legal services to aid in the legal procedures were compiled through internal documents shared with the author during fieldwork in January 2019 by administrators of the BGMEA, the IndustriALL Global Union, the Bangladesh Legal Aid Cell, the Accord and a prominent local trade union federation. Of the more than 70 federations active in the industry, only one trade union federation agreed to provide its data on the

number of grievances that it had processed.<sup>12</sup> The trade unions that are lacking representative statistics in this paper did not keep a digital record of their grievance data or did not feel comfortable sharing their data. Five other trade unions with activities in legal services were interviewed for information on the process and the perspectives on access to justice.<sup>13</sup> Due to the unavailability of publicly accessible and comprehensive data, the interpretation resulting from their comparison must be subject to several caveats.<sup>14</sup> Further research, combined with policy action to harmonize the data collection, would result in more robust studies in the future.

The second source of data is a more comprehensive dataset of garment industry labour grievance from BLAST. The administrative dataset was digitalized in Bangla by BLAST staff, then translated and coded by a research assistant. The dataset lists 1,929 grievances brought by workers, registered through the BLAST panel and staff lawyers in the three labour courts of Dhaka in the garment industry from 2004 to 2017. The dataset includes information on the date of receiving the grievance, the date of filing the grievance in court, the gender of the applicant, the name of the employer, the type of grievance filed, the outcome of the grievance, and, if there was a monetary award, the amount received. Missing values in the dataset are not missing at random. The missing values on the types of grievances are disproportionately high between 2004 and 2007; the missing values in case outcomes are proportional for most years but are higher in 2016. These trends seem to point to biases in administrative record-keeping and are considered in the interpretation of the data. Missing values in the outcome of the grievance are proportionate to the total number across types of grievances, indicating a low likelihood of a structural bias in the missing values related to the relationship between the types of cases and their outcomes. Appendix A and B include details about the coding procedure used for this dataset.

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12 The trade union requested that its name be kept anonymous.

13 The sampling for these interviews followed a snowball sampling method, as well as purposive sampling of unions that were listed as affiliates of IndustriALL. The unions interviewed include: the National Garment Workers Federation (NGWF), the Bangladesh Garment and Industrial Workers' Federation (BGIWF), the Bangladesh Center for Workers Solidarity (BCWS), the Socialist Labour Front (SLF), the Bangladesh Apparels Workers Federation (BAWF) and the Bangladesh Revolutionary Garment Workers Federation (BRGWF). Examples of questions asked include: "Can you tell me about the legal services you provide to your workers?"; "What types of legal services outside the union do you refer your workers to?"; "How do you fund your legal services?"; "What are your opinions of the effectiveness of the litigation approach?"

14 One concern is the possibility that the same worker may approach different actors, and that cases may thus be double-counted. However, informational interviews suggest that there is a small chance that workers "shop around", given the low levels of worker participation in the legal system. Another problem is the comparability of data collected at different levels and with different variables.



Informational interviews on procedural steps and perceptions of access to justice mechanisms were conducted by the author with 30 individuals in 23 interviews in January 2019. Sources include a judge at the labour court, ten lawyers/jurists working at the labour court, six trade union leaders, three ILO officials, two workers who received legal aid from BLAST, two factory owners, two lawyers handling the GFA process at IndustriALL Bangladesh Council, the executive director of the Accord, the executive director of BLAST, an official overseeing the BGMEA arbitration committee and a sustainability officer of a multinational brand involved with the GFA.<sup>15</sup> All those providing information were guaranteed anonymity, and all gave their consent to publish quotes for the purposes of this study. The data are supplemented by interviews and ethnographic fieldwork completed by the author in mid-2017, when additional workers and trade unions leaders had been consulted.

### ► 3. Dispute resolution before and after Rana Plaza

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After a brief introduction of the mechanisms of the labour court and extra-judicial dispute resolution processes, the following sections discuss various parallel judicial and extrajudicial mechanisms in detail. Since Rana Plaza, new efforts for providing justice have been established in Bangladesh.

The judicial system is a central way by which workers access justice. By statute, the BLA establishes a labour court to adjudicate cases under labour law. It consists of seven courts based on geographical jurisdiction (Sajal 2017). According to section 214 of the BLA, the chairman of the labour court is appointed by the Government from among the district judges, and his/her term and conditions of appointment are determined by the Government. The chairman of each labour court appoints a worker and employer representative to hear cases relating to industrial disputes. In collective cases, trade unions and employer groups can represent parties. Otherwise, the chairman adjudicates alone. According to the BLA section 218, appeals against judgments of the labour court go to the Labour Appellate Tribunal that consists of a chairman appointed by the Government from a panel of former judges of

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15 Examples of questions asked include: “What is the grievance mechanism process”; “How does the process interact with parallel mechanisms such as ...?”; “Have amendments to the BLA affected your grievance mechanism procedures?”; “Have you noticed any changes in the courts/procedures after Rana Plaza? If so, what explains these changes?”; “Could you tell me about the strategies you might use for different types of cases?”; “When do you advise workers to settle or litigate?”.

the Supreme Court. The decision made by the Labour Appellate Tribunal is final. According to a clerk at one of seven labour courts, approximately 2,100 cases are filed every year. Those involving women comprise 30 per cent of the cases, and those relating to garment workers cover 90 per cent of the total number of cases.<sup>16</sup>

Mediations resulting in settlements largely operate extrajudicially when a case is filed by an individual. When a case is filed by a representative through section 210, an arbitration and conciliation process is specified in the BLA. For individual applicants, there is no requirement of having tried to gain a settlement prior to filing a case in court, although almost all those interviewed stated that settlement is the best first course of action for individual cases. For settlement or bipartite dispute resolution processes, section 222 of the BLA stipulates that a settlement made outside court proceedings is binding on the parties, although there is no known, clear mechanism that would ensure its enforcement. When a case is filed through a collective bargaining agent such as a trade union, section 210 of the BLA mandates that the employers and workers meet within 15 days of filing an industrial dispute. If no resolution is reached, the issue may be passed on to a Government-appointed conciliator. At the conciliation stage, the Director of Labour may take over the proceedings. If this process does not produce a settlement, the dispute escalates to an arbitrator. However, similar to section 222, no effective institution has been established in Bangladesh to conduct arbitration as a legally binding mechanism.<sup>17</sup> When resolution is not reached through the arbitrator, the issue arrives at court. Unfortunately, the data in this paper do not incorporate the number and scope of collective cases filed through the section 210 mechanisms.

Table 1 outlines the judicial and extrajudicial entities that provide legal aid to the workers, the bodies that receive the grievances, the mechanisms for dispute resolution and the possible routes for remedy. The table distinguishes between processes that existed prior to Rana Plaza and those that were introduced afterwards.

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<sup>16</sup> Handwritten note sent by email to the author by a labour court clerk on 29 January 2019.

<sup>17</sup> Multiple interviews with labour lawyers and ILO officials, Dhaka, 12 January 2019, 13 January 2019, 16 January 2019

► **Table 1**

Dispute resolution processes pre-existing to and instituted after Rana Plaza

	Legal aid provision	Bodies	Mechanisms	Remedy
Pre-Rana Plaza	None	Labour Court	Litigation & Consultations	Judgment/ Settlement
		Bipartite meeting between factory and worker	Informal discussion	Settlement (Compensation/ Reinstatement)
	Trade unions	BGMEA Conciliation-Cum-Arbitration Committee (BGMEA-CAC)	Non-binding arbitration	Compensation
		Bipartite meeting between factory and worker	Mediation	Settlement (Compensation/ Reinstatement)
		Labour Court	Litigation & Consultations	Judgment/ Settlement
	NGO-provided legal services	Bipartite meeting between factory and worker	Mediation	Settlement (Compensation/ Reinstatement)
Labour Court		Litigation & Consultations	Judgment/ Settlement	
Introduced Post-Rana Plaza	Trade unions	Global Framework Agreements (if worker of a GFA-brand contracted factory)	Mediation	Settlement (Compensation/ Reinstatement)
	Legal-aid cell (Government)	Bipartite meeting between factory and worker	Mediation	Settlement (Compensation/ Reinstatement)
		Labour Court	Litigation & Consultations	Judgment/ Settlement
	Accord	Bipartite meeting between factory, worker, Accord staff (if the grievance is safety/ health related)	Mediation	Settlement (Compensation/ Reinstatement)
Rana Plaza Arrangement	Rana Plaza Coordination Committee (RPCC) (for workers and dependents of factories in Rana Plaza)	Approval of compensation awards	Compensation	

### 3.1 Dispute resolution pre-existing Rana Plaza

Prior to Rana Plaza, there had been mainly two sources of legal aid (trade unions and NGO-provided legal services) through which workers could file grievances on matters related to the workplace, and three bodies – labour courts, the BGMEA-CAC mechanism (see below) and bipartite meetings – that made decisions on these grievances.

*Direct litigation at labour court:* The workers could go directly to court or try to resolve the matter through an informal meeting with their employers, although both opportunities were rare given the resource constraints and the low chance of success.

*Local Trade Union Federations:* Workers could file their grievances with a local trade union federation. The trade union federation provides three mechanisms for dispute resolution: non-binding arbitration through the Bangladesh Garment Manufacturers and Employers Association Conciliation-Cum-Arbitration Committee (BGMEA-CAC); a mediated bipartite meeting with the factory; and litigation and consultations at labour court.

A select number<sup>18</sup> of trade union federations can use the BGMEA-CAC mechanism.<sup>19</sup> Although it is called an arbitration panel, the decisions made on this platform are not legally binding.<sup>20</sup> The CAC was established in 1998 by the BGMEA through an agreement between the BGMEA and a small group of labour leaders. The president of the BGMEA appoints the chief arbitrator, who is paid by the BGMEA and is usually a retired district judge. The panel is comprised of an equal number of BGMEA and labour leaders who are also compensated by the BGMEA. The committee meets biweekly. Most complaints are received through the labour federations; if a worker approaches the CAC individually, he/she is referred to a union federation to speak on his/her behalf.<sup>21</sup> Most cases are related to payment of wages, and a few of them concern unfair dismissal or maternity benefits.<sup>22</sup> The employers are usually made to pay compensation, except for cases relating to compensation for deaths, which the BGMEA settles through a government-run, tripartite (government, employers, trade unions) central fund.<sup>23</sup> The CAC does not deal with cases relating to trade union registrations.<sup>24</sup>

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18 Approximately 13 to 14 out of 70 trade union federations active in the garment industry, according to an ILO official interviewed in Dhaka, 13 January 2019.

19 Interview with ILO officials, Dhaka, 13 January 2019.

20 Interview with a BGMEA official of the CAC, Dhaka, 19 January 2019.

21 Ibid.

22 Ibid.

23 Ibid.

24 Ibid.

The trade union federation may try to settle a case in a bipartite meeting with the factory owner. This is usually the first course of action for the union federation, especially when the trade union has a longstanding relationship with the factory.<sup>25</sup> The bipartite dispute resolution is usually favoured by the trade unions for its short turnaround time. With these dynamics in mind, the ILO has also been promoting the development of factory-level grievance procedures.<sup>26</sup> If the factory owners are not responsive, either the CAC or the third mechanism, the labour courts, are resorted to in efforts to gain redress.<sup>27</sup>

When cases go to court through the union federations, the unions charge a percentage fee (from 10 per cent to as high as 40 per cent) or a flat fee (100 takas or 1.2 US dollars<sup>28</sup>) to file the complaints in court.<sup>29</sup> Those federations that are well endowed with resources are able to hire their own lawyers or seek help in resolving the issue through partner NGOs or foreign trade unions.<sup>30</sup>

*NGO-provided legal services:* Workers could also seek the help of a free service – for example, through a legal aid NGO such as the BLAST. Other NGOs, such as the Ain-o-Salish Kendra (ASK), also provide these services. BLAST usually prefers to settle out of court before pursuing litigation because of the high financial and time-related costs in receiving a legal judgment.<sup>31</sup> BLAST employs several trained in-house mediators to carry out this work.<sup>32</sup>

### 3.2 Dispute resolution after Rana Plaza

The number of bodies and mechanisms of grievance redress for garment workers has been expanded since 2013, particularly through the active intervention of multinational companies and global trade union federations.

*Global Trade Union Federations:* The GFA signed between the global union federation IndustriALL and various multinational brands, of which H&M, Inditex, Tchibo, and Esprit operate in the garment industry in Bangladesh, have a separate grievance mechanism for workers in factories that produce for these four companies. After Rana Plaza, with prior and newly signed GFAs becoming highly important, the IndustriALL Bangladesh Council (IBC) hired

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25 Interview with a trade union official, Dhaka, 14 January 2019.

26 Interview with ILO officials, Dhaka, 13 January 2019.

27 Ibid.

28 2018 exchange rate.

29 Multiple interviews with trade union officials, Dhaka, 14 January 2019, 15 January 2019, 17 January 2019, 18 January 2019.

30 Ibid.

31 Interviews with the executive director of BLAST and two panel lawyers, Dhaka, 14 January 2019.

32 Ibid.

a labour lawyer and a dedicated staff member to handle these cases.<sup>33</sup> In 2018, the IBC received 169 cases from the 538 factories<sup>34</sup> that produce for the four brands. The IBC affiliated trade union federations receive the complaints, and, when they see that any of their factories are included among them, the complaint is passed to the IBC staff or directly to the brands.<sup>35</sup> H&M, for example has its own arrangement, called the National Monitoring Committee (NMC), to address workers' complaints. Other brands do not have this kind of mechanism. H&M's NMC consists of an eight-member panel, four from the workers' side and four from H&M's management, which has its own standard operating procedure to remedy complaints.<sup>36</sup> When the IBC receives a complaint, the staff engages in its own legal and fact-checking procedure and forwards the information to the brands and to factory management. If these do not agree with the terms put forward by IBC staff, representatives of the brands and the factory managers meet to resolve the issue.<sup>37</sup> While the GFA is a reliable process for dispute resolution, a trade union official commented that it may take up to two months to set up a meeting, and trade unions, therefore, do not always resort to this process if it concerns a minor grievance.<sup>38</sup>

*Legal Aid Cell:* After Rana Plaza, the Prime Minister of Bangladesh established a legal aid cell within the labour court system to provide free legal counseling to workers. This cell was established as part of the "Justice Sector Facility Project" funded by the Department for International Development (DFID) of UK and the United Nations Development Programme (UNDP) from 2013 to 2015. The cell provides information services through a hotline that workers can call. If the worker qualifies for assistance, he/she may receive help in the process of informal mediation or litigation in court.<sup>39</sup> In 2018, the cell provided oral counseling to 1,642 workers (272 women and 1,370 men) and information services through the hotline to 2,453 workers (413 women and 2,040 men). It also gave legal support to 350 workers. A total of 219 cases were filed in labour court, and 117 were settled out of court. Seventeen workers were directly reinstated, and one case resulted in a dismissal order being cancelled.<sup>40</sup>

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33 Interview with IBC staff, Dhaka, 19 January 2019.

34 According to a document compiled and shared amongst IBC trade union affiliates, this includes 274 factories for H&M, 210 factories for Inditex, 8 factories for Tchibo, 38 factories for H&M and Inditex, 7 factories for H&M and Tchibo, and 1 factory for Inditex and Tchibo.

35 Interview with IBC staff, Dhaka, 19 January 2019.

36 Ibid.

37 Ibid.

38 Interview with a trade union official, Dhaka, 14 January 2019.

39 Interview with administrator of Legal Aid Cell, Dhaka, January 14, 2019.

40 Internal document, "Legal service recipient statistics by labor legal aid cell–Dhaka and Chittagong 2013–2018 (November)" translated into English from Bangla, Legal Aid Cell. Received by the author on 14 January 2019.

*The Accord for Building Safety in Bangladesh:* The Accord provides a mechanism for building and fire safety complaints only. The complaints mechanism was developed by a working group of representatives of global unions and signatory brands and was endorsed by its steering committee in February of 2014. The procedure was then taught to unions, trainers and outreach personnel.<sup>41</sup> Approximately half of the 660 complaints raised in 2018 were not safety- and health-related and were thus withdrawn (these grievances were then redirected to trade unions or other mechanisms).<sup>42</sup> Those complaints that are safety- and health-related are resolved through the Accord mechanism. When a complaint is received, an engineer or a trained inspector is sent to the factory to check for violations. He/she is then introduced to the remediation process of the factory following the requirements of the Accord. An allegation of reprisal by the employer against the worker who reported the issue would lead to a separate investigation by the Accord. It would examine the complaint process, and, if warranted, meet with the factory management to demand reinstatement of the worker concerned or the award of back pay.<sup>43</sup> Many complaints are processed through the local trade union federations that are involved in the factory and have a relationship to the Accord. Most of the complaint mechanism stays within the Accord, and only special cases relating to environmental contamination go to the Ministry of Labour.<sup>44</sup>

*The Rana Plaza Arrangement*<sup>45</sup>: The Rana Plaza Coordination Committee (RPCC) was established in September of 2013 to ensure that injured workers and surviving dependents of those killed in the disaster were compensated for their financial losses. A Rana Plaza Donors Trust Fund was launched with the ILO as the trustee to collect donations. The funds have been distributed through the Rana Plaza Claims Administration.<sup>46</sup> Unlike the disbursement under other mechanisms, the payment of claims is contingent upon donations from private entities, and only workers and dependents involved with Rana Plaza are eligible to make claims. By October 2015, a total of US\$30 million had been raised and paid out to 2,854 victims and dependents.<sup>47</sup>

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41 Interview with Rob Wayss, executive director of the Accord, Dhaka, 19 January 2019.

42 Ibid.

43 Ibid.

44 Ibid.

45 <https://ranaplaza-arrangement.org/>.

46 Ibid.

47 Ibid.

## ► 4. Patterns in access to justice

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Noteworthy shifts have accompanied the expanded legal landscape for access to justice after Rana Plaza. Section 5.1 describes the trends in legal activity among garment workers through comparable data on the number of grievances and the average compensation received through the different bodies mentioned in section 3. Sections 4.2 and 4.3 describe changes to the types of cases and outcomes through the dataset obtained through BLAST.<sup>48</sup> Although BLAST data cannot be generalized to indicate how workers may interact through other mechanisms for grievance redress, the comprehensive and longitudinal data offer valuable insight as a case study of changing trends in legal activity.

### 4.1 How many? How much?

The number of grievances received by the different channels shows institutional differences among the various bodies. The number of grievance filings<sup>49</sup>, defined as cases that are opened by the receiving “body” (as opposed to legal advice only), has increased after Rana Plaza. The BGMEA-CAC and the Accord register the most grievances, while the least are processed through the GFA mechanism. This reflects the scope and coverage of the GFA trade union mediated mechanisms, which receives a smaller number of cases, since the data reflect the activities of only one trade union federation.<sup>50</sup> Further research is needed to approximate the scope of trade unions’ legal activity, as labour court personnel have mentioned that cases brought by trade unions are the most common to be found in court, followed by those of BLAST and other NGOs.<sup>51</sup>

The enlarged number of bodies and mechanisms for redressing grievances in Bangladesh after Rana Plaza, as well as the increase in numbers of grievances filed, suggest not only a wider availability of the capacity of various institutions but also the multiple avenues of judicial and privately-funded

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48 The dataset provided by BLAST has been the most comprehensive dataset I could access in Bangladesh. The Bangladeshi labour courts do not publish any information of labour cases online, and it is even harder to find a sector-disaggregated set of cases from governmental data.

49 It is unclear from the data given, except those that were given by BLAST and the Legal Aid Cell, whether the numbers reflect all cases that have been accepted or also include those that have been dismissed.

50 Unofficially, this particular trade union is known to register the most cases in court, according to an interview with a labour lawyer, Dhaka, 12 January 2019.

51 Interview with administrator of Legal Aid Cell, Dhaka, 14 January 2019.



► **Table 2**

Number of worker grievances filed by select bodies & mechanisms, select years

Legal Aid Provision	Trade Unions			BLAST		Legal Aid Cell <sup>1</sup>		Accord	Rana Plaza Arrangement
Bodies & Mechanisms	CAC arbitration	Settlement through bipartite meetings such as CAC arbitration, GFA, and litigation at Labour Court <sup>3</sup>	GFA	Settlement through bipartite meetings	Litigation at Labour Court <sup>2</sup>	Settlement through bipartite meetings	Litigation at Labour Court	Bipartite mediation	Compensation through RPCC
1998	82	– <sup>4</sup>		–	–				
2003	192	–		–	–				
2008	686	–		35	81				
2012	803	–		77	49				
2013 (Rana Plaza)	1 154	–		30	92	1	26		
2014	837	–	–	18	136	7	114	–	2 798
2015	959	–	–	26	78	14	90	–	56
2016	1 176	106	–	4	35	16	29	–	No further complaints received
2017	1 396	83	–	–	–	44	141	–	
2018 <sup>5</sup>	874	109	89	–	–	117	219	660	

**Notes:** <sup>1</sup> These numbers include cases in Dhaka and Chittagong labour courts and are not restricted to garment workers, while all other bodies and mechanisms are specific to the garment industry. <sup>2</sup> This number includes the number of cases that were withdrawn due to absence or dismissal, the number of ongoing cases, and those that received a judgment in court and secured remediation. It does not include cases with missing values in outcome. <sup>3</sup> The data from the trade union federation only includes the name of complainant, date and award received. This number may be double-counted with cases that go through the GFA and the CAC, although it is hard to verify the double counting. <sup>4</sup> Indicates that no data was available. <sup>5</sup> The figures for 2018 might reflect a partial number of cases, given that the data were gathered in early 2019.

**Sources:** Trade union: internal databases of the BGMEA, a trade union federation, and IndustriALL, respectively; BLAST: from BLAST database; Legal aid cell: data from internal document translated to English; Accord: communicated in an interview with the executive director; Arrangement: <https://ranaplaza-arrangement.org/>.

ways by which workers can access justice. The BGMEA-CAC data, with the most consistent figures, show steady increases in workers utilizing the mechanism over time. Workers are also able to file grievances on issues that were sufficiently covered before 2013. Safety-related complaints and compensation for industrial accidents are provided by the Accord and the Rana Plaza Arrangement, while the GFA is appropriate for quick resolution of cases or for cases that would benefit from the involvement of multinational companies.

Figure 1 lists the amounts of compensation for grievances received by workers, averaged by the number of cases (in 2006 inflation-adjusted US dollars), through the different types of dispute resolution processes. Overall, there is an increasing trend in compensation awarded after Rana Plaza through mechanisms that existed prior to 2013. This effect is most noticeable in grievances that went to trial through BLAST, but the BGMEA data also demonstrate a slight increase. The highest compensation is received through litigation by BLAST, a legal-aid NGO, and the lowest through the BGMEA arbitration cell. This seems to reflect the procedure of the respective settlement processes. The BGMEA largely settles on the basis of cash awards through quick decisions of the arbitration panel, while BLAST often resorts to litigation and extrajudicial mediation.<sup>52</sup> The average amounts of compensation received by workers through the legal aid cell and a trade union federation are comparable; they are higher than the amounts received through the BGMEA mechanism but lower than the average compensation award received through BLAST. This could be the result of the lower number of cases that BLAST takes on, as well as BLAST's more active utilization of labour court processes vis-à-vis other mechanisms. Further research and systemic data collection by parallel mechanisms are needed for a more comprehensive and accurate comparison.

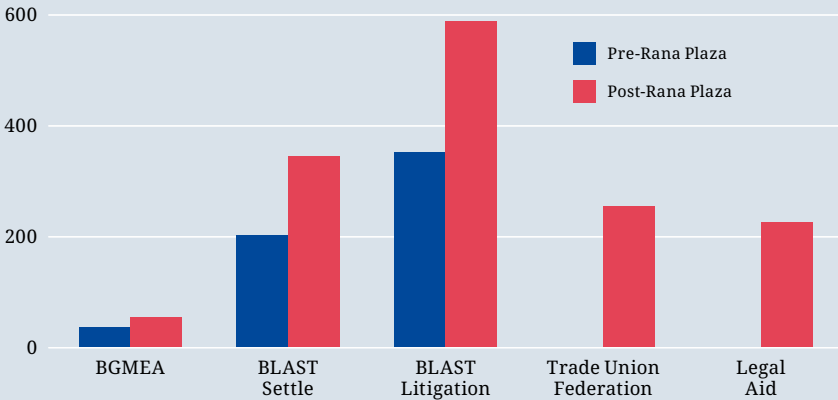
Private, transnational and NGO-provided legal services seek to extend the capacity of the rule of law for garment workers. The increased presence of newer bodies and mechanisms responding to calls for an active participation of transnational companies seems to have a ratcheting effect in providing additional avenues and increased legal presence in the Bangladeshi garment industry. The next two subsections explore substantive changes in the types of cases filed through BLAST as demonstrated by the BLAST dataset.

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<sup>52</sup> Interview with panel lawyers at BLAST, Dhaka, 15 January 2019.

► **Figure 1**

Average compensation for grievances received by workers



**Notes:**Pre-Rana Plaza data: BGMEA (1998–12), BLAST Settle & Litigation (2004–12); Post-Rana Plaza data: BGMEA (2013–18), BLAST Settle (2013–17), BLAST Litigation (2013–15) Trade Union Federation (2016–18), Legal Aid Cell (2018)

## 4.2 Types of cases filed

Disaggregating the data by years and gender, table 3 lists the type of cases that were handled by BLAST in both settled and litigated scenarios.<sup>53</sup> The approximate distribution of the cases is similar to the figures of all cases that come to court, according to information provided by a clerk of a labour court. At a labour court in Dhaka, around 2,100 cases on a wide range of issues are filed each year, of which wage issues comprise between 1,200 and 1,300 cases, compensation and maternity involve 20 cases each, and unfair dismissals result in between 10 to 15 cases.<sup>54</sup> The distribution of types of cases are also consistent with the approximate numbers available from the BGMEA's CAC mechanism.<sup>55</sup>

<sup>53</sup> Comparable data have not been made available or disaggregated by type by other bodies and mechanisms that the author had consulted, leaving these conclusions specific to NGO-provided legal services.

<sup>54</sup> Handwritten note sent by email to the author by a labour court clerk on 29 January 2019.

<sup>55</sup> Interview with a BGMEA official of the Conciliation-Cum-Arbitration Committee, Dhaka, 19 January 2019.

► **Table 3**

Type of case by years and gender (BLAST data)

	2005–08	2009–12	2013–17	All years
<b>All applicants</b>				
Wages	455	484	424	1 363
Unfair dismissal	1	9	47	57
Enforcement of judgment	150	219	76	445
Industrial Relations	28	0	11	39
Misc (Benefits & Compensation, Sexual Harassment)	15	10	4	29
<b>Total</b>	<b>649</b>	<b>722</b>	<b>562</b>	<b>1 933</b>
<b>Female</b>				
Wages	161	137	75	373
Unfair dismissal	1	1	13	15
Enforcement of judgment	39	27	16	82
Industrial Relations	4	0	0	4
Misc (Benefits & Compensation, Sexual Harassment)	5	2	0	7
<b>Total</b>	<b>210</b>	<b>167</b>	<b>104</b>	<b>481</b>
<b>Male</b>				
Wages	294	347	349	990
Unfair dismissal	0	8	34	42
Enforcement of judgment	111	192	60	363
Industrial Relations	24	0	11	35
Misc (Benefits & Compensation, Sexual Harassment)	10	8	4	22
<b>Total</b>	<b>439</b>	<b>555</b>	<b>458</b>	<b>1 452</b>

► **Table 4**

Unfair dismissal-related cases by outcome

	2005–12	2013–17
Absence	6	2
Dismiss	–	4
Withdrawn	–	–
Remedy secured through settlement	1	16
Remedy secured through court	2	3
Ongoing	–	8
(Missing)	1	14
<b>Total</b>	<b>10</b>	<b>47</b>

The data show that there was a wider variety in the types of cases that workers filed after Rana Plaza. While wage-related cases<sup>56</sup> have traditionally been the most frequently cited issues, the BLAST data demonstrate an increase in unfair dismissal cases.<sup>57</sup> Unfair dismissal-related cases increased from 9 cases in 2009–12 to 47 cases in 2013–17. The figures show early indications of this development, and the interviews confirm this trend. An administrator of the BGMEA's CAC mechanism also mentioned that unfair dismissal- and maternity-related cases have been on the rise in the past few years.<sup>58</sup> Most unfair dismissal cases are filed by men. Yet, in terms of the ratio, unfair dismissals constituted 12.4 per cent of all cases filed by female applicants and 7.4 per cent by male applicants, demonstrating increasing trends for all applicants. Disaggregating this data by court judgments, most cases relating to unfair dismissal from 2005 to 2012 were dismissed due to the absence of the petitioner. In the 2013–17 period, there have been more varied outcomes, with most cases resulting in a remedy through settlement or court judgments (table 4).

56 Wage claims are specific to cases regarding the deduction of wages or delay in payments of wages and the method of calculating wages. (Appendix B)

57 There may be a relationship of this trend to the trend in decreasing industrial relations-related cases, but this is hard to verify given the data constraints.

58 Interview with a BGMEA official of the Conciliation-Cum-Arbitration Committee, Dhaka, 19 January 2019.

According to the individuals interviewed, the increase in grievances of unfair dismissals reflects a growing level of legal consciousness of the BLA among workers. As a trade union organizer pointed out, “the accidents of Rana Plaza and Tazreen actually opened the eyes of workers to know about their rights.”<sup>59</sup> The official at the BGMEA’s CAC interviewed in 2019 also noticed that, since Rana Plaza, workers have become much more aware of their rights. For example, in recent years many workers knew their exact overtime rate and came up with the proper calculations, while this had not been the case before.<sup>60</sup> Many observers attributed the changes to the increased awareness training that was being carried out by the trade union federations and the NGOs. A labour lawyer observed that, “after Rana Plaza, we have seen that workers have become conscious. A lot of trade union federations and organizations are working in the ready-made-garment sector.”<sup>61</sup> ILO officials echoed these thoughts, pointing to the frequent training sessions on grievance procedures conducted in the factories.<sup>62</sup> Many garment industry actors, such as the ILO<sup>63</sup>, trade unions and BLAST<sup>64</sup> have been implementing know-your-rights sessions for workers, by legal professionals.

There was a significant decrease in the enforcement of judgment-related cases, from 150 cases in 2009–12 to 76 cases in 2013–17 (see table 3). The change in the enforcement of judgment cases during this period could be explained by an increased compliance of employers, reflected in the BLAST data, with settlement agreements and court rules in comparison to the years before Rana Plaza. Qualitative data from interviews with lawyers confirm this explanation.

Many panel lawyers from BLAST<sup>65</sup> interviewed in 2019 noticed that factory owners were much more compliant with labour law after Rana Plaza as compared to before the event. Although this trend is noticeable in the BLAST data, there is reason to believe that the trend may apply to cases governed by other mechanisms. Other lawyers and trade unionists pointed out that factories were faster and better prepared to pay remediation secured through

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59 Interview with a female organizer at the National Garment Workers Federation, Dhaka, 14 July 2017.

60 Interview with a BGMEA official of the Conciliation-Cum-Arbitration Committee, Dhaka, 19 January 2019.

61 Interview with a trade union leader, Dhaka, 17 January 2019.

62 Interview with ILO officials, Dhaka, 13 January 2019.

63 The ILO’s “Promoting Social Dialogue and Harmonious Industrial Relations in the Bangladesh Ready-Made Garment Industry Project” (SDIR Project), funded by Sweden and Denmark, includes training on grievance handling procedures at the factory level: [https://www.ilo.org/dhaka/Informationresources/WCMS\\_583272/lang-en/index.htm](https://www.ilo.org/dhaka/Informationresources/WCMS_583272/lang-en/index.htm).

64 BLAST implemented a project from 2016 to 2019 that organized weekly sessions on the BLA, which were carried out by legal professionals, with each session attended by 25–30 workers.

65 BLAST panel lawyers represent trade unions as well as employers.

courts after Rana Plaza. As one lawyer maintained: “I think that the factory authorities are now more aware and conscious in comparison to earlier. [...] The factory authorities want to satisfy the buyer. So, in most cases, they try to ensure the proper implementation of labour law.”<sup>66</sup>

Most industrial disputes are filed through the collective procedure specified in section 3. But none of the people interviewed noticed a significant change in industrial relations-related cases in court. Collective industrial disputes occur when there are instances of discrimination or violence towards trade unionists, or when employers decide to pursue legal action against an employee for belonging to two or more unions. While there was a slight increase in these numbers from 2009–12 to 2013–17, only 11 individually filed BLAST cases between 2013 and 2017 were industrial relations-related cases compared to 27 in 2005–08. Although the author was not able to collect data on the number and scope of collectively filed industrial disputes through the mechanism of BLA section 210 discussed in section 3, practitioners have noted the weakness of amendments introduced to the BLA regarding trade union registrations and industrial disputes (Rubya 2015). ILO officials and BLAST panel lawyers also noted this impression, commenting that industrial relations-related provisions of the BLA require significant strengthening to be utilized more widely.<sup>67</sup>

Increased legal consciousness in the industry of workers and factory owners, promoted through private initiatives and awareness raising efforts, were reflected in the increased instances and wider variety of laws through which workers expressed their grievances. Yet, the paucity of industrial relations cases signal that an active strengthening of the judicial system must parallel these approaches to make wider mechanisms of legal mobilization available to workers.

### 4.3 Wages and gender difference in compensation

The gender distribution of compensation for wage claims in the BLAST data has been reflected in the legal system. It points to emerging trends<sup>68</sup> in relational and gendered legal consciousness on the part of lawyers and judges, rather than that of female workers.

Female plaintiffs have received higher monetary rewards after Rana Plaza. Table 5 lists the average amount received through redress secured by

<sup>66</sup> Interview with labour lawyers at Labour Court, Dhaka, 16 January 2019.

<sup>67</sup> Interview with ILO officials, Dhaka, 13 January 2019; Interview with BLAST panel lawyers, Dhaka, 14 January 2019.

<sup>68</sup> The findings in this section are called “emerging trends” because of the high number of ongoing cases in more recent years, and the long time it takes to resolve a case in court.

► **Table 5**

Average compensation for wages by gender (inflation-adjusted 2006 US dollars)

		2005–08	2009–12	2013–17
Female	Remedy secured through settlement (#)	US\$123.90 (42)	US\$200.59 (24)	US\$313.26 (14)
	Remedy secured through court (#)	US\$313.78 (7)	US\$340.87 (7)	US\$808.51 (7)
	<b>Total average</b>	<b>US\$151.02</b>	<b>US\$232.26</b>	<b>US\$478.35</b>
Male	Remedy secured through settlement (#)	US\$242.14 (75)	US\$268.89 (116)	US\$355.53 (33)
	Remedy secured through court (#)	US\$430.11 (22)	US\$323.20 (39)	US\$531.78 (26)
	<b>Total average</b>	<b>US\$284.77</b>	<b>US\$282.56</b>	<b>US\$433.20</b>

**Note:** The total number is different from table 3 because of missing values in outcomes and compensation amounts.

settlement or court litigation, by gender, for wage claims between 2005 and 2016. The increase was twofold for women and 50 per cent for men between the periods of 2009–12 and 2013–17. Women received an average of US\$478.35 and men US\$433.20 per case in 2013–17, compared to US\$232.26 for women and US\$282.56 for men in 2009–12 in inflation-adjusted 2006 US dollars.<sup>69</sup>

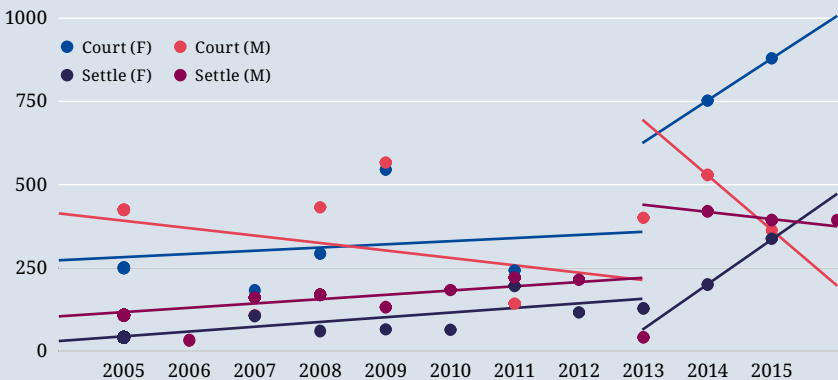
For remedies secured through court and settlements outside court, the steep changes in the linear trend is positive for women after 2013 and negative for men after 2013 (figure 2). The higher awards that were secured through courts compared to the awards secured through settlement may be explained by the

<sup>69</sup> Missing values on compensation amounts were also not missing at random, for reasons mentioned in the methodological section above. Regarding missing values for compensation amounts, missing values were prominent in 2010, and from 2013–17. Regarding missing values in outcomes for wage-related cases, 17 per cent of wage-related cases were missing information on whether the outcome of the case resulted in remediation either through settlement or through court. The years 2005 and 2010 were the only ones where there were more missing values than non-missing values, pointing to errors in administrative recordkeeping during these years.



► **Figure 2**

Average US dollars received in wage claims, by gender at BLAST  
(adjusted for inflation, in 2006 US dollars)



**Notes:** Discontinuity for linear trends is at the year 2013 considering the effects of Rana Plaza.

higher stakes for women to engage in litigation. For women, only the cases with the highest potential for awards may go to court. As a labour lawyer noted: “Actually, for the women workers, there are many hassles. Their families opposing them to not go to court, et cetera. So many just leave it at mediation. The attitude of workers’ family is often that it is not necessary to get benefit from the law.”<sup>70</sup> While there may be a selection bias of women with winnable cases going to court, assuming that gendered barriers are constant over time, the sharp increase in the linear trend line seems to be attributable to Rana Plaza effects.

The data do not suggest that the higher awards for women as compared for those for men is attributable to an increased legal awareness or the eagerness of female plaintiffs to access justice. While female workers constituted around a third of the litigants of wage claims prior to 2013, they formed less than a fifth of those in the period between 2013 and 2017. This trend reflects the general decrease of female participation in the courts, from 35.4 per cent in 2005–08 to 28.3 per cent in 2009–12 and to 17.7 per cent in 2013–17 (table 6).<sup>71</sup> Correspondingly, many of those interviewed noted that, despite the relevant

<sup>70</sup> Interview with a labour lawyer, Dhaka, 15 January 2019.

<sup>71</sup> Statistically significant with Pearson’s chi-squared test at <0.05.

► **Table 6**

## Participation by gender

	2005–08	2009–12	2013–17	Total
Female	161 (35.4%)	137 (28.3%)	75 (17.7%)	373 (27.4%)
Male	294 (64.6%)	347 (71.7%)	349 (81.3%)	990 (72.6%)
<b>Total (#)</b>	<b>455</b>	<b>484</b>	<b>424</b>	<b>1 363</b>

efforts, commensurate changes were not observed in increasing the legal consciousness of female workers. Women generally face more barriers and are less aware of the rewards that could come from going to court.<sup>72</sup> According to a lawyer, “women are not concerned about labour rights. Most of the time, [a woman] does not know what her rights are according to law, which amount of salary she is able to get. That’s why the opposite party [in court] has the opportunity to ignore the rights. In court, the court is able to enforce the legal amount of pay.”<sup>73</sup>

A testimony of a female worker’s experience in court highlights these dynamics.<sup>74</sup> As she described: “When I went to court the first time, I got terribly scared to see the police. I thought that I would never come to court again and I didn’t want any money anymore. After a few months, I managed to overcome the fear, and now I am happy that the court ruled in my favour.”<sup>75</sup> Her palpable fear reflects her emotionally charged relationship to the law. Yet, this is not to say that the court system did not reward her bravery. She received her legally owed back wages, five years after her initial appearance in labour court, and was able to open her own business with those funds. When asked about how the experience changed things for her in the workplace, she remarked: “I am an independent woman now. After I lost my job, I decided to open my own tailoring shop. I have been doing this business for more than five years now and despite the challenges and obstacles, I have not given up hope to

72 Interview with labour court lawyers, Dhaka, 12–19 January 2019.

73 Interview with a labour lawyer at labour court, Dhaka, 15 January, 2019.

74 Interview with workers who received legal aid from BLAST, 16 January, 2019.

75 Ibid.

succeed. Personally, I believe perseverance, even in times of trouble, is what has kept me going.”<sup>76</sup>

On the other hand, the legal consciousness of legal professionals, including lawyers and judges in labour courts – formed in relation to, and in reflection of, the gendered and classed labour force of the garment industry – is a possible explanation in line with how scholars have described the relational and co-constitutive process that formulates legal consciousness (Chua and Engel 2019). Gendered sympathies of docile, hard-working female garment workers were very much prevalent among lawyers, judges, trade unions and NGOs in the sector. A lawyer mentioned that “female workers, they are very soft in the factory premises, but the male workers are always protesting.”<sup>77</sup> Another lawyer expressed that he was fascinated whenever women came to court. He felt respect for those women who were taking up the challenge. He would request the judge to finish the case as early as possible so that the woman did not have to appear in court as frequently, which is often hard to do while balancing family obligations, work and societal pressures against women traveling alone into the city.<sup>78</sup> A judge in the labour court did not admit to gender bias in his rulings but did acknowledge the aforementioned view of female workers. “In my court,” the judge stated, “man employees, they are coming the most, but women employees, they are coming less. They are not normally dismissed or ousted [from the factory] because they are law-abiding to rules and regulations compared to men.”<sup>79</sup>

Increased gender-focussed transnational interventions after Rana Plaza may explain the ways in which the gendered transnational discourse affects the gendered and classed ways that legal professionals view workers, rather than this influencing the workers themselves. For example, the ILO is obliged to incorporate a certain percentage of female participants in its programmes through a gender mainstreaming initiative, which is required in training courses for lawyers and judges.<sup>80</sup> Other post-2013 interventions in the industry have been explicitly geared towards women, whether they are for workers or legal professionals. The World Bank, for example, unveiled a programme for gender empowerment in the garment industry, with a funding of US\$29 million coordinated by the Bangladesh Export Processing Zone Authority<sup>81</sup>, and the C&A Foundation invested 1.5 million euros to achieve gender justice in

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76 Ibid.

77 Interview with a labour lawyer, Dhaka, 15 January 2019.

78 Interview with a former jurist of the labour court, Dhaka, 12 January 2019.

79 Interview with a labour court judge, Dhaka, 14 January 2019.

80 Interview with ILO officials, Dhaka, 13 January 2019.

81 See <http://www.worldbank.org/en/news/feature/2017/02/07/in-bangladesh-empowering-and-employing-women-in-the-garments-sector>.

the ready-made garment (RMG) industry.<sup>82</sup> The World Bank programme facilitates access to formal sector employment through technical skills training for women living in rural areas, while the C&A foundation's funding supports training programmes for gender-based violence awareness. These programmes have the potential to signal latent effects on the legal professionals' perception of inequalities faced by women in the garment sector, even if the women workers themselves are not taking the initiative to claim this distinction in relation to the law through BLAST. Further research that investigates the incentive structures and legal cultures of lawyers and judges to incorporate gendered strategies would be important to better understand the ways in which gendered transnational intervention is incorporated into the rule of law.

The findings of this section support the notion that all three types of interventions – strengthening the court system, increasing the participation and responsibility of transnational corporations and raising legal consciousness – have been important in the ways that improved access to justice for workers in Bangladesh after Rana Plaza.

## ► 5. Conclusion

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How did the critical moment of Rana Plaza transform the access to justice for workers? Through what types of interventions did this happen? In the aftermath of Rana Plaza, various legal and institutional reforms were introduced in the garment industry with the intention of enhancing labour justice: strengthening the domestic judicial system, introducing increased responsibility of and contributions from transnational corporations and raising legal consciousness among workers, factory owners and legal professionals. Three bodies of literature suggest three courses of action to increase access to justice for workers in the global supply chain: through strengthening the domestic legal system; through inviting the active participation of multinational corporations; and through bolstering the legal consciousness of workers and legal professionals. The findings and early indications of trends on how workers utilize the law through the help of legal professionals illustrate that the combination of the three approaches led to transformations in workers' access to justice in the industry. This paper has illustrated how transnational pressure after Rana Plaza led to the emergence of multiple judicial and extrajudicial initiatives, including the amendment and strengthening of the judicial system

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<sup>82</sup> See <https://www.candafoundation.org/latest/press/2016/12/collaboration-to-end-gender-based-violence-in-the-garment-industry>.

and the extrajudicial initiatives that broadened the reach of labour rights in Bangladesh. Illustrative of this development are initiatives explicitly oriented towards safety and compensation such as the Accord and the Rana Plaza Arrangement. The paper also argues that the co-constitutive emergence of legal consciousness is critical for understanding possible ways of translating international labour standards into local labour rights.

After Rana Plaza, the introduction of additional bodies and mechanisms for workers to access justice illustrates the importance of providing extrajudicial legal services and transnational initiatives in areas such as compensation for workplace accidents where the national judicial system falters. Policies to encourage the complementarity, rather than substitution – for example, increased attention to strengthening the implementation and execution of the law; training and funding for pro-bono legal services; and supporting the active participation of transnational corporations in the legal process – would ensure that access to justice in certain aspects of the law does not rely on privately-funded efforts alone.

This chapter has also argued that legal consciousness is a helpful conceptual tool and a promising policy recommendation in interpreting the changes in legal behaviour that have occurred to workers, employers and courts. BLAST data show an increase in workers' filing of cases related to unfair dismissal after Rana Plaza, indicating that workers are exposed to and claiming more varied types of grievances. Furthermore, the decrease in enforcement of judgment cases signals increased compliance with the law on the part of employers, and the gendered differences in the amount of remuneration rewarded to workers demonstrate the influence of gendered legal consciousness on the part of legal professionals. Policies that encourage know-your-rights training and incentives to introducing a wider array of cases and more extensive demographic of workers to the legal system would be important to extend the reach of the labour law and to effectively translate international labour standards to domestic labour practice. Rather than relying on the gendered sympathies of legal professionals, programmes aimed at female workers encouraging their utilization of the law, as well as policy changes that mitigate the structural barriers that women face in leveraging legal services, would be paramount for improving access to justice.

However, the lack of comparable success in strengthening collective rights through industrial relations law points to the need for improved laws and judicial procedures, as well as data collection for further study (Rubya 2015; Bair, Anner, and Blasi 2020). Intervention devised to provide funding and technical cooperation projects for reforms of the local judicial system, as well as incentives for the Bangladeshi government to be proactive in enforcing those provisions, would be crucial companions to the activities of transnational bodies and private companies in the garment industry.

Future research and robust record keeping of administrative data would extend lessons learned from the tragic wake-up call of the Rana Plaza disaster. Additional research could be conducted to develop a deeper historical understanding of labour law in terms of colonial histories and on legal analyses of how international labour standards have been reflected in the Bangladesh Labour Act and related legislation. Finally, robust empirical analyses of the scope and distribution of grievance and redress mechanisms are important potential scholarly endeavours that would help broaden the access to justice for workers in the global garment supply chain.

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## ► Appendix A. Coding Procedures

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The dataset mentions one representative BLA section that was claimed in court, for each plaintiff. The section listed is the main clause that was argued in court. I coded these into general categories, based on the substantive area of the BLA: benefits, industrial relations, wages, compensation for accidents, compensation for fatal accidents, enforcement of judgment, sexual harassment and unfair dismissals (which are argued through the grievance procedure clause of the BLA). The coding process results from reading a translated version of the BLA and identifying the main substantive topic. I identified the codes from the respective headings of the law. For example, if the heading says “Claims arising out of deductions from wages or delay in payment of wages”, the clause was coded as “wages” (Appendix B).

The dataset notes the outcome of the case with relevant information on the next scheduled court date, with some additional remarks. I coded this information into the following categories: dismiss, absence, settle, win, ongoing, and withdraw. “The petitioner received 7,000 BDT and withdraw the case” would be coded as “remedy secured through settlement”, while “The court order to give 41,678 Tk to the petitioner within 30 days” would be coded as “remedy secured through court”. Many cases were dismissed due to the absence of the petitioner, thus I created an additional category of “absence”, because I thought there would be theoretical value in disaggregating the reasons for dismissal. Most other dismissals were related to due process rules. Some of the other cases were described as “withdrawn by the petitioner with compensation.” I coded these cases as “remedy secured through settlement”, rather than withdrawn, while leaving the “withdrawn” category for instances in which the petitioner withdrew the case without mention of a formal mediation process. For example, “14/09/17 Case Withdrawn” would be coded as withdrawn. Further information on the coding rules are displayed in Appendix B.

The coding reliability of these two variables was tested through an inter-coder reliability test. A randomly selected sample of 149 cases was taken from the dataset. I use Krippendorff’s alpha, as it allows for measuring disagreements that relate to the properties of units as well as those that relate to chance (Krippendorff 2004). The alpha statistic is applicable to two observers. It is also commonly used to measure reliability for nominal levels of measurement with missing data for large and small samples alike. The alpha for types of cases is 0.951, and the alpha for outcomes of cases is 0.953. The high reliability signals that the coding process was quite straightforward.

## ► Appendix B. Coding Rules

Law	Text	Code
Industrial Relation Ordinance 1969	34. Application to labour court	Industrial Relations
	34A. Raising of industrial dispute by federation	
Payment of Wages Act, 1936	20. Penalty for offences under the Act	Wages
	15. Claims out of deductions from wages or delay in payment of wages and penalty for malicious or vexatious claims	Wages
Bangladesh Labour Act 2006	33. Grievance procedure	Unfair dismissal
	131. Payment of undisturbed wages in cases of death of workers	Compensation & Benefits
	132. Claims arising out of deductions from wages or delay in payment of wages	Wages
	136. Conditional attachment of property of employer or other person responsible for payment of wages	Wages
	150. Employer's liability for compensation	Compensation & Benefits
	155. Distribution of compensation	Compensation & Benefits
	152. Method of calculating wages	Wages
	158. Power to require from employers statements regarding fatal accidents	Compensation & Benefits
	166. Reference to labour courts	Enforcement of Judgment
	193. Restriction on dual membership	Industrial Relations
213. Application to labour court	Enforcement of Judgment	
216. Procedure and power of labour courts in any matter other than trial of offences	Enforcement of Judgment	

Law	Text	Code
Bangladesh Labour Act 2006	278. Relief from income tax, etc	Compensation & Benefits
	283. Penalty for non-compliance of labour court's order under section 33	Enforcement of Judgment
	293. Penalty for failing to implement settlement etc.	Enforcement of Judgment
	307. Penalty for other offences	Enforcement of Judgment
	310. Power of courts to make orders	Enforcement of Judgment
	332. Conduct towards female workers	Sexual harassment
Bangladesh Labour Act Amended in 2013	33. Grievance procedure	Unfair dismissal
	151. Amount of compensation	Compensation & Benefits
	213. Application to labour court	Industrial Relations

Judgment	Code
"Case was dismissed"	Dismiss
"Case was dismissed because of absence"	Absence
"Withdrawal of case"	Withdrawn
"Case was withdrawn with compensation" "mutually settled"	Remedy secured through settlement (Also please put the cash amount in next cell)
"Petitioner won" "Court declared ... in favour of petitioner"	Remedy secured through court
"Case is ongoing" "-----"	Ongoing
"Case is pending for hearing"	

# 10 Labour governance initiatives in the Costa Rica–EU pineapple supply chain and their impact on social dialogue

Deborah Martens and Annelien Gansemans

## ► Introduction

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In this chapter, the labour conditions at the bottom of an agricultural supply chain – the production of Costa Rican pineapples – are linked to the trade policy level of the European Union (EU) by analysing four labour governance initiatives aimed at improving labour issues. The Costa Rica–EU pineapple supply chain is an interesting case, because it involves a sector confronted with many of the environmental and social challenges that booming export regions have faced worldwide, and it problematizes the impact of labour governance mechanisms.

The initiatives covered in this study operate at different levels in the supply chain – at the company, national and transnational levels. They include the ethical collaboration model between Bama and Dole<sup>1</sup>, the Ethical Trading Initiative (ETI), the National Platform for the Responsible Production and Trade of Pineapple (hereafter: “the Platform”) and the Civil Society Mechanisms (CSMs) within the EU–Central America Association Agreement (EU–CA AA). At the time of data collection, these four initiatives were the only operational ones that involved trade union participation and a link to the Costa Rican pineapple trade with the EU.

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<sup>1</sup> Bama Gruppen AS is Norway’s largest privately-owned distributor of fresh fruits and vegetables; Dole Food Company is an American agricultural multinational company and the world’s largest producer of fresh fruits and vegetables.

The objective of this chapter is to assess the impact of these initiatives as well as the roles of their initiators. For this purpose, two research topics are introduced. First, an analysis of the indirect and direct impact of the initiatives on the improvement of social dialogue; second, building on the concept of brokerage, a study of the roles of the public and private initiators and their impacts.

This chapter is based on the results of an interdisciplinary research project integrating political science and rural development insights and draws on previously published work by the authors (Martens 2019; Gansemans 2019). A mixed methods approach was developed for the collection and inductive analysis of the data.<sup>2</sup> Empirical data was collected from 2015 to 2018<sup>3</sup> through 122 (mostly semi-structured) interviews conducted in Belgium and Costa Rica with trade union members, business representatives, civil society representatives, officials from governments and international organizations, and academic experts<sup>4</sup>; eight focus groups with Costa Rican trade union delegates; a socio-economic survey of 385 Costa Rican pineapple plantation workers; 11 non-participant observations of civil society meetings in Brussels and Honduras (where the annual civil society meetings took place in 2016); and five meetings with union members during capacity-building activities. In addition, the publicly available sources of the initiatives were assessed through document analysis.

The chapter is structured as follows: At first, the conceptual background section introduces the topic of labour governance and the research framework that will be applied. Next, the main labour issues in the Costa Rican pineapple sector are described, followed by an analysis of each initiative. The subsequent section combines and discusses these findings and is followed by the conclusions.

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2 The limitations of this study are: First, due to the focus on trade unions (from the workers' perspective) and the limited willingness of business actors to meet for interviews on sensitive labour issues, the subgroup of employers is under-represented. Second, in most cases, we relied on the memories of respondents to reconstruct certain aspects of the dialogue process and impact, since we were not able to observe the given process from the start. Third, the selected cases are embedded in the Costa Rican institutional environment and a particular agricultural sector with its own peculiarities; hence, it put limits on the ability to generalize the findings.

3 Data concerning the CSMs was updated in 2020 through desk research and two interviews with members of the EU and Costa Rican domestic advisory groups of the EU-CA AA.

4 For a list of interviews used for this study, see the Annex.

## ► 1. Conceptual background

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### 1.1 General background

As indicated in the introduction of this compendium, global labour governance has become a comprehensive concept incorporating different tools to deal with labour rights issues. It comprises various kinds of initiatives: public (such as labour laws, ILO Conventions, soft law); private (for example, voluntary standards, codes of conduct and international framework agreements negotiated between multinational companies and global union federations); and hybrid initiatives (that is, combinations of both private and public arrangements) (Meardi and Marginson 2014). The initiatives covered in this study range from private (Bama and Dole) to hybrid (ETI; the Platform) and to public schemes (CSMs). They involve different stakeholders and can, therefore, be referred to as multi-stakeholder initiatives. They all aim at addressing sustainable development in general, and labour issues in particular.

This study focusses on the impact of the initiatives advancing social dialogue, which includes “all types of negotiation, consultation and exchange of information between or among representatives of governments, employers and workers on issues of common interest relating to economic and social policy” (ILO 2018, 3). Social dialogue can occur at different levels: tripartite at the national level with governments, employers and unions; bipartite at the sector level with employers and unions; or at the company level. The implementation of the ILO Core Labour Conventions on Freedom of Association and Protection of the Right to Organise, 1948 (No. 87) and the Right to Organise and Collective Bargaining, 1949 (No. 98) is essential for social dialogue and therefore central to this study.

Freedom of Association and Collective Bargaining (FACB) are considered particularly important as they are “enabling” rights for all other rights at work (ILO 2019). FACB allows workers to be represented by an independent workers’ organization in industrial relations between management and workers, ensuring participation in discussions and negotiations. The development of workers’ organizations in the agricultural sector to represent and defend rural workers’ rights is also encouraged in the ILO Rural Workers’ Organisations Convention, 1975 (No. 141). The focus on the agricultural sector is relevant, as rural workers are vulnerable to precarious working conditions and face difficulties to independently organize themselves (ILO 2018, Hurst 2007).

## 1.2 Research framework

The research framework to analyse the initiatives comprises three components: trade union participation, impact and the initiator's brokerage role (see figure 1). The first component, trade union participation, is explored by looking into procedural as well as substantial participation (see Delputte and Williams 2016). The former refers to the actors' physical attendance and continuity of their participation, while the latter covers their actual contribution to the debates. The focus on trade unions is due to the fact that, on the one hand, they are less powerful actors since they face obstacles in getting established and functioning properly. On the other hand, their participation reveals interactions with other stakeholders that are relevant to the advancement of social dialogue.

The second component of our research framework is the impact of the initiative. Here, we make a distinction between indirect and direct impact. For the latter, concrete changes to the social dialogue process and working conditions generated by the initiatives are examined. Due to the Costa Rican labour context (see below), this study focusses mainly on bipartite social dialogue. The scope is thus limited to collective bargaining and workplace cooperation.

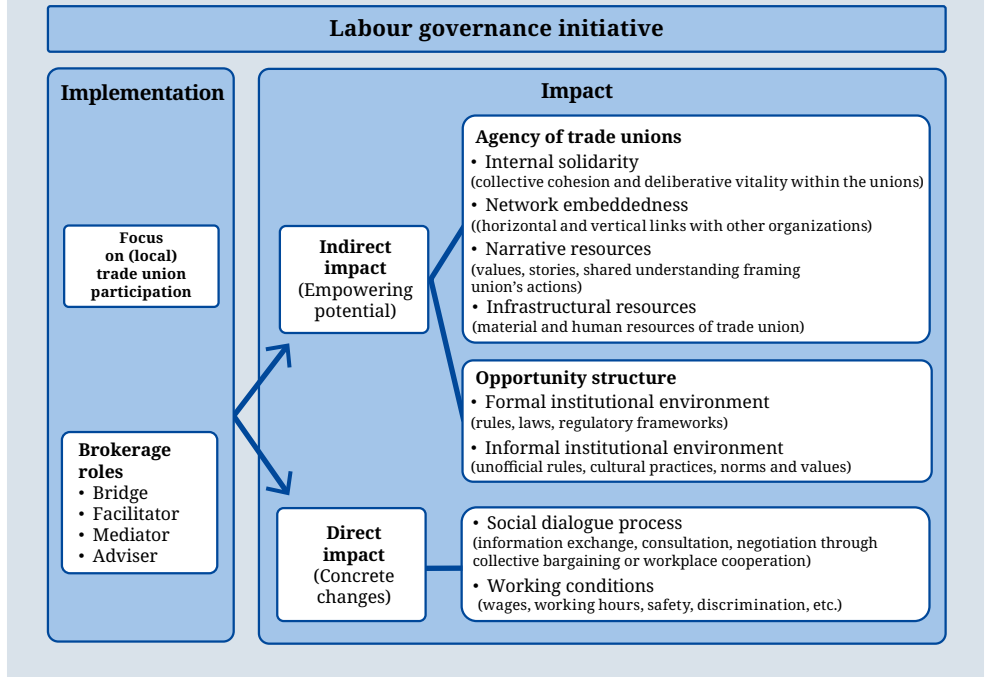
However, indirect impact allows considering not only concrete changes on the ground but also potential effects in terms of empowerment. For the analysis of the indirect impact or empowering potential of the initiatives, the definition of empowerment by Andersen and Siim (2004) has been adapted to this research context. As a result, trade union empowerment is considered to be a "process of awareness and capacity-building, which increases the participation and decision-making power" of trade unions and which may "lead to transformative action which will change opportunity structures in an inclusive and equalising direction". Drawing on the analytical framework by Alsop, Bertelsen, and Holland (2006) to assess empowerment, we focus on the impact on trade unions' agency and opportunity structure, as they are the two main ingredients of empowerment.

Agency refers to the ability and capacity of an actor to choose and act. In this study, we focus on collective labour agency in the form of union organization (Coe 2012). Agency is assessed by looking into unions' resources to use economic, social and political opportunities. Lévesque and Murray (2010) identified four types of such power resources that trade unions can mobilize: First, internal solidarity assesses collective cohesion and deliberative vitality within the trade unions. Second, network embeddedness refers to the horizontal and vertical links with other unions, community groups and social movements. Third, narrative resources are the values and stories that provide shared understandings and frame the way union members think and act. Finally, infrastructural resources indicate the material and human resources of trade unions.



► **Figure 1**

Research framework



Opportunity structure comprises the institutional context that influences an actor's ability to transform agency into action (Alsop, Bertelsen, and Holland 2006). Opportunity structures, establishing the "rules of the game", can be either formal (rules, laws, regulatory frameworks) or informal (unofficial rules, cultural practices, norms and values) and exist at different levels (for instance, at company and national levels).

The indirect impact or potential of the initiatives to empower trade unions will thus be assessed by considering whether they increase trade unions' power resources, on the one hand, and/or affect the rules of the game in favour of trade unions or social dialogue, on the other hand.

The third component of the research framework is the initiator's brokerage role. Brokerage is usually defined as a structural pattern where brokers build bridges between disconnected actors (Burt 2004). Moreover, a broker can also mediate supply chain relations, translate certain norms and help to rebalance power inequalities (Reinecke et al. 2018). For example, brokers may empower

workers' organizations by creating leverage opportunities (Bartley and Egels-Zandén 2016). The brokerage role is often assumed by (international) civil society actors forming cross-border alliances, for example non-governmental organizations (NGOs) advocating workers' rights in campaigns (Zajak 2017) or global unions negotiating international framework agreements with multinationals (Riisgaard 2005). How private actors, such as powerful international buyers, and public actors, such as the EU, can act as brokers to stimulate social dialogue has received less attention in the literature.

Gansemans, Louche, and D'Haese (2020) examined how an international buyer changes its brokerage role over time to promote social dialogue. This study expands their findings by adding insights on the brokerage roles of other actors at different levels in the supply chain to create a more comprehensive picture. The following four brokerage roles identified inductively by Gansemans, Louche, and D'Haese (2020) will be applied to our cases. First, when the broker links the disconnected parties, it acts as a **bridge**. Second, by stimulating dialogue between the parties and provides support (capacity-building, resources, etc.), the broker acts as a **facilitator**. Third, when the broker tempers resistance and assists in resolving conflicts, it acts as a **mediator**. Fourth, the broker acts as an **adviser** when it gives advice from the sidelines and does not actively intervene.

## ► 2. Labour issues in Costa Rica and its pineapple sector

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### 2.1 Social dialogue in Costa Rica

Costa Rica performs relatively well in terms of working conditions compared to its Central American neighbours (Sepúlveda Malbrán and Frías Fernández 2007). Nevertheless, the country has a negative reputation when it comes to social dialogue, as it remains fragmented and weak, especially in the private sector (Interviews 1, 2, 3; OECD 2017). A number of tripartite councils exist at national level, such as the National Salary Council, which sets minimum wages, and the Superior Labour Council, which discusses various social and economic problems (Sepúlveda Malbrán and Frías Fernández 2007). However, the latter body has been inactive, and a proposal in 2003 to establish an Economic and Social Council to fill the social dialogue gap was vetoed by the country's president (OECD 2017).<sup>5</sup>

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<sup>5</sup> For more details on trade unionism in Costa Rica, see Sepúlveda Malbrán and Frías Fernández (2007).

Despite the ratification of the ILO fundamental Conventions on FACB in 1960, less than 1 per cent of all private sector workers are unionized, compared to 30 per cent of workers in the public sector (OECD 2017). The employer–employee relationship system is complex owing to the prevalence of alternative workers’ organizations (*solidarismo*, see below) in an anti-union culture (Mosley 2008; Riisgaard 2005). Anti-union practices (for example, discrimination and dismissal of trade union members) have been subject to comments by the ILO’s Committee of Experts on the Application of Conventions and Recommendations (CEACR) and the examination of the case at the Conference Committee on the Application of Standards (ILO CEACR 2020b; ILO CEACR 2020a; ILO CEACR 2010).<sup>6</sup> In 2016, the CEACR requested the government “to ensure that the labour inspectorate carries out inspections in the pineapple and banana sector to ensure the respect of trade union rights, including in plantations where there are solidarista associations” (ILO CEACR 2017a; see also ILO CEACR 2020a).

After more than a decade of complaints, a historic labour reform bill was adopted in 2016. The major changes included simplified and shortened judicial proceedings, additional resources for the labour inspectorate, trainings for lawyers, a more lenient strike regulation and reduced sanctions for illegal strikes (ILO CEACR 2017a). This reform could provide a conducive setting for trade union activity (Interview 4). However, the ability of the Labour Ministry to thoroughly change the situation remains inferior to the national political economic strategy that prioritizes export competitiveness (Interviews 1, 5, 6, 7). In addition, better coordination is needed between the different departments involved in labour issues, and formal institutions that foster (tripartite) social dialogue are lacking (OECD 2017). More importantly, these changes in Costa Rica’s formal opportunity structure are currently offset by the more popular alternative “solidarist” associations.

Costa Rican labour law contains a particular feature that permits the formation of solidarist associations, known as *solidarismo* and defined in the Solidarist Associations Law No. 6970 (1984). Solidarist associations are co-financed by management and mainly provide tangible benefits, such as saving and credit schemes, in contrast to the protection of labour rights pursued by

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<sup>6</sup> The latest CEACR observations (2020b) relate to registration of trade unions and the restriction on foreigners exercising authority in trade unions. Previous allegations concerned anti-union discrimination (union leader persecution, trade union immunity, trade union dismissals, legal shortcomings with regard to strikes and collective bargaining) and unequal treatment of trade unions and “solidarist” associations (ILO 1981; ILO 1995a; ILO 1995b). On Convention No. 141, the Committee urged the government to take the necessary measures to guarantee the right of trade union representatives to have access to farms and plantations and to meet with workers (ILO CEACR 2012). Six cases were handled by the National Directorate for Labour Inspection in the period of 2014–2016 regarding violations of trade union rights in agriculture (ILO CEACR 2017b).

trade unions (Abdallah Arrieta 2008). Although they are not permitted by law to negotiate working conditions and labour rights (Castro Méndez 2017; ILO CEACR 2010), the solidarist associations advance an alternative approach to solving labour disputes, namely through the creation of a permanent workers' committee and the use of direct agreements with companies.<sup>7</sup> However, the committees have no independence from company management and no legal means to engage in collective bargaining (Mosley 2008; Sawchuk 2004). Due to the low unionization rates, as of 2018, there was an enormous disproportion between the number of direct agreements (155) and collective bargaining agreements (32) in the private sector (United States Department of State 2019).

Moreover, a highly negative public opinion concerning trade unionism persists in Costa Rica. This public view has been fuelled by employers and by an important sector of the Catholic Church since the 1980s (Interviews 1, 10, 11, 12, 13, 14; Alexander 2008; Sawchuk 2004; Abdallah Arrieta 2008). That decade had detrimental consequences for trade unions in Costa Rica. The current anti-union culture stems from a context of deregulation and austerity measures in which private employers created evasive structures and adopted a strong anti-union attitude (Frundt 2002). Since then, a serious decrease in unionization has been observed, coinciding with a rise of solidarist associations (Sawchuk 2004).

## 2.2 Issues in the pineapple sector

Since the 1980s, Costa Rica's pineapple sector has been expanding remarkably, thanks to the introduction of the new MD-2 variety – the “golden” pineapple – by the banana multinationals already operating in the country (Ferreira, Fuentes, and Ferreira 2018). This variety gained in popularity, because it is sweeter and higher in vitamin C; it provides higher yields and lasts longer than the Smooth Cayenne variety – the common variety back in the 1980s (Interviews 11, 15). Costa Rica's ideal agro-ecological conditions, the available logistic infrastructure and commercialization channels established by banana multinationals and their know-how and investment in technology – combined with the readily available labour supply – explain the international success of Costa Rican pineapples (Interviews 11, 12, 15; Acuña Gonzalez 2009; Guevara, Arce, and Guevara 2017). From 2000 onwards, the country's pineapple industry began to grow rapidly. In 2017, pineapples accounted for 9 per cent of the country's exports, or US\$941 million, and

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<sup>7</sup> Direct agreements between an employer and workers (or a permanent workers' committee) are used to solve a particular labour dispute in a direct, quick way without judicial involvement (see labour code art. 615). The judicial nature of direct agreements differs from collective bargaining agreements negotiated by trade unions, since direct agreements are a means of conflict resolution and not of collective bargaining (Castro Méndez 2017).

were its second most important agricultural export product after bananas (PROCOMER 2018).

Nevertheless, as criticized by a number of civil society campaigns, this expansion has had a detrimental environmental impact, and precarious working conditions in some pineapple plantations persist (ILRF 2008; Oxfam 2016; ICCO 2009). The environmental concerns mainly relate to the long-term sustainability of large-scale monoculture production, the application of controversial chemicals such as “paraquat”. Soil erosion, the contamination of water supplies and pollution of natural areas are additional negative consequences, along with deforestation, biodiversity loss, residual waste and potential negative effects on human health (Interviews 16, 17, 18, 19; Ingwersen 2012; Llaguno et al. 2014).

More than 30,000 workers, mostly migrant men from Nicaragua, are directly employed on the 45,000 hectares (more than 110,000 acres) of pineapple fields, and 120,000 indirect jobs have been created by the industry (CANAPEP 2018; Guevara, Arce, and Guevara 2017). Field workers are engaged in a variety of tasks: soil preparation, maintenance, planting, chemical application, quality and growth monitoring, harvesting and transport. Although a harvesting machine is used to transport the pineapple, the fruit is cut manually with a machete from the crown of the plant (Interviews 15, 20; see also Arias Flores and Montalbán Lazo 2019). During this physically intensive task, workers are exposed to harsh conditions, including heat, humidity, chemicals, insects, sharp plant spines and repetitive movements (Focus Group 1; Acuña Gonzalez 2009).

In line with the labour issues described above, the main labour governance deficits in the Costa Rican pineapple industry are the limited workers’ representation, weak employment protection, the vulnerability of migrant workers and insufficient enforcement of the labour code.

First, unionization density in the relatively young pineapple sector is extremely low because of its negative repute and the historically developed anti-union practices (Voorend, Robles Rivera, and Venegas Bermúdez 2013). Trade unions in pineapple plantations are a rare phenomenon. Six trade unions exist in the northern pineapple region, where the majority of the Costa Rican pineapple plantations is located, with between eight and 80 members per firm. At the time of data collection, collective bargaining agreements in the sector did not exist, because unions did not reach the minimum number of unionized workers to pass the legal threshold of 33 per cent. In addition, the unions only existed at plantation level, and there was little collaboration among them. They were fragmented in the sector and not affiliated to the same national federation.

Second, weak employment protection in Costa Rica is reflected in the lax rules for contract termination, which make it easy to fire workers without a cause and to re-hire them consecutively (OECD 2017). The practice of hiring and firing workers before they complete their probation period of three months – with the objective of preventing them from accumulating labour rights – creates a high degree of employment instability (Interviews 16, 21; Focus Group 1, 2, 3; Smith 2006; Aravena and Carazo 2016; Lee 2010). Moreover, casual employment impedes any unionization efforts since it is harder for unions to mobilize temporary workers.

Third, estimates of the Costa Rican Labour Ministry (MTSS 2013) indicate that 47 per cent of the pineapple workers are migrants. Migrant workers are vulnerable because they risk falling into the hands of a subcontractor. Subcontracting is a common practice to save labour costs and avoid social responsibilities (Interview 6, 22, 23; Voorend, Robles Rivera, and Venegas Bermúdez 2013; Arias Flores and Montalbán Lazo 2019). Subcontracted migrant workers face difficulties to register as union members and have few avenues to improve their precarious working situation (Acuña Gonzalez 2011, 2009). To tackle the problem of undocumented migrant workers, the Labour Ministry initiated a programme to facilitate the registration for a working permit (Ganseman and D’Haese 2019). The system is based on the establishment of a quota for temporary workers in every sector. However, this quota system has rarely been used. Most companies are unwilling to complete the administrative procedures and to bear the costs involved. Delays during the applications were reported due to limited resources of the regional Migration Office.

Finally, Costa Rica’s labour inspection system lacks qualified staff and resources (such as cars, up-to-date maps, digital records) to properly enforce the labour law (OECD 2017). Moreover, inspectors are not entitled to collect fines on site, which impedes the effective execution of the law (Interview 21).

## ► 3. Findings

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This section presents the findings of the four labour governance initiatives. For each labour initiative, a brief description of its functioning and objective is given (see table 1). The initiatives are considered according to the level on which social dialogue takes place –transnational (EU-Central America), national (sector) and company – as well as the governance type (public, hybrid, private). The introduction to each initiative is followed by a brief assessment of trade union participation. Finally, the impact of the initiative is evaluated, and the brokerage roles are analysed. The findings are summarized in table 2.

► **Table 1**

General characteristics labour governance initiative

	CSMs	Platform	ETI & Fyffes*	Bama & Dole
<b>Initiators</b>	EU	United Nations Development Programme (UNDP)	Select group of UK retailers, NGOs, trade unions, UK government	Norwegian buyer (Bama)
<b>Duration</b>	2014–ongoing	2011–2017	1998–2019	2006–ongoing
<b>Funding</b>	Limited EU funding	UNDP, Dutch NGO, Dutch public-private partnership IDH (Sustainable Trade Initiative)	Start-up grants UK government, membership fees	Norwegian development cooperation (NORAD), private company funding
<b>Objective</b>	Advise and make recommendations on implementation of trade and sustainable development (TSD) chapter of EU-CA AA	Improve social and environmental performance	Promote respect for workers' rights	Ensure continuous improvements in working conditions and the environment at their suppliers
<b>Scope</b>	Trade-related aspects of sustainable development	Costa Rican pineapple production and trade	Global value chains in general	Direct partnership with supplier
<b>Actors involved</b>	Economic, social, environmental stakeholders	Business, civil society, academia, government	Business, trade unions, NGO members	Norwegian buyer (Bama), multinational supplier (Dole), local unions, Norwegian union (LO) and employers' organization (VIRKE)
<b>Level dialogue</b>	Transnational	National	Company	Company
<b>Governance type</b>	Public	Hybrid	Hybrid	Private

**Note:** \* Fyffes plc is fruit and fresh produce company headquartered in Dublin, Ireland. It was sold to the Japanese Sumitomo Group in 2016.

### 3.1 Civil society mechanisms in the EU–Central America Association Agreement

The trade pillar of the Association Agreement (EU–CA AA) between the EU and six Central American countries (Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama) has been applied since 2013. As is the case with all new generation EU trade agreements since 2011, the agreement contains a chapter on trade and sustainable development (TSD), which refers to labour and environmental standards that should be respected. The implementation of the chapter is overseen by an intergovernmental body, the Board of TSD. In addition, civil society mechanisms (CSMs) are established to follow up on, give advice and monitor the commitments made in the TSD chapter.

The CSMs include a domestic and transnational mechanism. The domestic mechanism, called Domestic Advisory Group (DAG), is membership-based. The EU–CA AA stipulates a balanced representation in these DAGs of economic, social and environmental stakeholders, including employers' and workers' organizations, business associations, NGOs and local public authorities. The transnational component is an annual meeting called the Civil Society Dialogue Forum, which alternates between convening in Brussels and Central America.<sup>8</sup> It is not member-based and, therefore, more open and less structured than the DAGs. In this meeting, the TSD Board reports on the implementation of the agreement, and there is space for civil society representatives to ask questions and express their views. The agreement does not envision a separate meeting between the different DAGs (which was nevertheless organized in 2016 and 2019), nor between the DAGs and the TSD Board. The latter has been requested by the EU DAG but was not granted by the governments (Interview 24). Civil society from both sides of the Atlantic regretted the decision, as there is no formal interaction between the governments and the DAGs (Central American & European Union Advisory Groups 2019).

The DAGs have in general experienced a slow start and have had difficulties in generating an internal dynamic (Orbie, Martens, and Van den Putte 2016). In Central America, the Costa Rican DAG is functioning relatively well in the sense that an independent DAG with civil society members actually exists and meets. The official list of Costa Rican DAG members contains representatives of business (mainly national chambers of commerce, including those of bananas, coffee and pineapples), labour (mainly national trade union federations) and environmental organizations (mainly academic experts) (Título VIII Comercio y Desarrollo Sostenible Implementación del AdA UE-Centroamérica 2019). When the mechanisms were established in 2014, the government created

<sup>8</sup> The first transnational meeting took place in 2014 in Nicaragua, followed in 2015 in Brussels, 2016 in Honduras, 2018 in Brussels and finally 2019 in Guatemala; no meetings were held in 2017.



the list, and some members were not even aware of their membership (Interview 25). Since then, membership has evolved, as some members left, while others requested to join (Interviews 25, 26, 27). The Costa Rican DAG used to operate in three subgroups on business, labour and environment. However, this division was criticized, and the groups merged in 2019 (Interview 27). In general, the Costa Rican DAG, as most other Central American DAGs, is still figuring out how this mechanism should best be organized.

DAG membership, moreover, does not equal active participation. For instance, CANAPEP, the chamber of the pineapple producers, is a member of the Costa Rican DAG, even though it has not attended any meetings since 2014. Similarly, while seven trade unions are Costa Rican DAG members, only two of them, the Central del Movimiento de Trabajadores Costarricenses (CMTC) and the Bloque Unitario Sindical y Social Costarricense (BUSSCO), participate actively (Interviews 25, 27). The possibility of including representatives of solidarist associations has been brought up but was rejected by the trade unions (Interview 27).

Turning to the content of the DAGs' activities, the most substantial work performed so far has been on the development of three brief working documents on Corporate Social Responsibility (CSR), Decent Work and Business Opportunities and Challenges, especially for microenterprises as well as small and medium enterprises. The EU and Central American DAGs were interested in collaborating on these topics, and the documents were to represent a common position and starting point for the work of the DAGs. Two rapporteurs, an EU and a Central American DAG member, were appointed for each paper. Costa Rican trade unions approved the documents but did not participate in their development (Interview 27).

The process of drafting these working documents revealed serious tensions between business and non-business DAG members. Shortly before the documents should have been presented to the TSD Board in 2018, two Central American business organizations opposed the content of the documents on CSR and Decent Work (Interview 28). In the end, the working documents were presented to the TSD Board during the transnational meetings in 2019. They were only signed by the EU DAG, and, therefore, do not represent a common position (EU Advisory Group created pursuant to the EU–Central America Association Agreement 2018c, 2018b, 2018a). However, in the joint declaration of the EU and Central American DAGs (2019), the documents were advanced as containing the concerns of all the sectors represented. This course of events reveals the subjacent apprehension of several of DAG's business representatives that the CSMs would become "another ILO" or a platform for the denunciations of labour right violations (Interview 27).

In fact, the Costa Rican DAG pursues a positive agenda that advances best practices; it does not bring up concrete complaints or denunciations. Although the atmosphere in this DAG is not confrontational, members are not on the same page concerning the substantive agenda (Interview 27). In general, dialogue has been limited and superficial. Trade union participation has been extremely low, both in attendance and with regard to substantial contributions (Interview 25).

## Impact

Turning to the **indirect impact** of the CSMs, we found empowering potential for the agency of trade unions through two power resources: network embeddedness and infrastructural resources. The network embeddedness has been strengthened mainly by the EU DAG trade union members. First, European trade unions have stimulated the participation of Central American trade unions through informing them of upcoming meetings and by insisting on their attendance. Second, the transnational meetings provide a useful occasion to coordinate between the European and Central American trade unions. Third, the CSMs have exposed the weak coordination among Central American trade unions. Encouraged by EU trade unions, the regional *Consejo Sindical Unitario* has recently started to address this situation (Interviews 24, 26).

Concerning the infrastructural resources, travelling costs to attend the meetings have been raised as an important barrier. The EU launched a three-year project in 2019 to support the implementation of TSD chapters through increased participation of civil society (European Commission 2018c). The project provides assistance with the logistics of organizing meetings and supports the travelling costs for DAG members. In addition, the funding can also be used to commission studies and organize workshops. So far, the funding has had a positive influence on the attendance of Central American DAG members and the regional coordination among DAGs (Interview 27).

The TSD chapter of the EU–CA AA and the monitoring mechanisms it created are a recent addition to the Costa Rican formal opportunity structure. However, this initiative has not challenged the adverse informal opportunity structure for social dialogue in Costa Rica. So far, the EU attitude has been soft and cooperative, also pursuing a positive agenda. The EU certainly does not want to act as “a police” (Interview 29). This is reflected during the inter-governmental meetings, where countries mainly give an update on relevant changes in their legislation and where the EU has been, until recently, rather lenient towards the lack of implementation of the commitments made in the TSD chapter (Interview 30).<sup>9</sup>

<sup>9</sup> This lenient attitude has been reconsidered after a period of reflection within the European Commission (European Commission 2017a, 2018b). In 2018, it presented a 15-point plan to increase the effectiveness of the TSD chapters.

The EU has prioritized pressing labour issues raised by the ILO, especially concerning El Salvador and Guatemala (European Commission 2017b, 2018a, 2019). Even though Costa Rican labour issues have been discussed during the meetings, violations concerning FACB and the prevalence of *solidarismo* have, to our knowledge, not been addressed (Board of Trade and Sustainable Development 2016, 2018, 2019). In addition, no evidence was found that the EU engages with sectoral differences within the countries. Moreover, the annual implementation reports published by the European Commission do not contain any references to environmental or social consequences of trading particular goods. We therefore conclude that labour issues in the pineapple industry have not been discussed, either. A focus on particular supply chains could, however, be very useful in providing an improved understanding of the impact of the trade agreement on sustainable development (Interview 24).

Similarly, the CSMs have not been able to address constraints in the informal opportunity structure, as they are struggling to move towards substantial discussions. There is a serious accountability deficit as a result of the barely existing communication and follow-up between the DAGs and governments in Central America (Martens 2019; Harrison et al. 2018). At best, the TSD chapter can be evaluated as a recently opened door through which, for now, not much concrete change has passed. Consequently, no **direct impact** has been observed.

### Brokerage

Through the establishment of CSMs, the EU acts as a bridge, convening stakeholders from the EU and its trade partners. Depending on the domestic context, these stakeholders might have very few platforms (or none at all) where – in principle – deliberation and collaboration is pursued. In addition, the EU also intervenes as a facilitator, providing resources and stimulating dialogue. The European Economic and Social Committee was appointed as the secretariat for the EU DAG. Since 2019, the EU also provides funding to ensure the participation of non-EU DAG members in CSMs (see above). It has made efforts to promote a substantial debate on labour issues by organizing additional seminars on CSR and Decent Work in Central America in 2017 and 2018 (European Commission and COMEX 2017, European Commission and EEAS 2018). The funding intended for studies or workshops is also an element of this brokerage role. Even though the EU is the main broker, EU trade unions have also assumed a brokerage role. As described above, EU trade unions have acted both as a bridge, by insisting to EU officials and Central American trade unions on the latter's participation, and as a facilitator, by continuously supporting the development of the capacity of Central American trade unions.

## 3.2 National platform for the responsible production and trade of pineapples

In 2011, the Green Commodities Programme of the United Nations Development Programme (UNDP) established a Platform to improve the sustainability of Costa Rican pineapple production (INSP 2018). The objective of the Platform was to develop a national strategy with concrete actions and clear responsibilities of the government and industry players (CABEI 2014).

Trade unions saw the Platform as a unique opportunity to share their viewpoint with business and government (CABEI 2014). However, there was resistance from the producers' side to include trade unions. As a result, trade unions were heavily underrepresented. A representative of the plantation trade union (SITRAP) tried to put FACB on the table during the first annual meeting (Interview 31). However, attempts to facilitate dialogue between government, employers and trade unions failed due to irreconcilable opinions (Interviews 7, 14). Industry players refused to address any of the labour issues, and, ultimately, trade unions decided to withdraw (Interviews 12, 20). Consequently, they were not involved in the final decision-making process of the action plan.

### Impact

In terms of **indirect impact**, the trade unions' network embeddedness was consulted to pressure the inclusion of unions in the Platform, but the initiative failed to strengthen the unions' agency. Moreover, no resources were made available to ensure their participation. This negative evaluation can be extended to the opportunity structure. Although a national dialogue on labour rights was initially included in the proposed action plan (UNDP 2016), industry players successfully replaced this action line by an invitation to the government to promote the international recognition of alternative labour organizations – namely *solidarismo*. (PNUD Plataforma Piña Costa Rica 2016, 2015). In the final decree that formalized the action plan, any reference to a dialogue on labour issues was removed. The rules and decisions regarding labour issues at national level are thus not affected by the initiative.

The **direct impacts** of the initiative are the withdrawal of the trade unions from the failed dialogue process and the failure to negotiate concrete improvements in working conditions.

### Brokerage

The UNDP created the multi-stakeholder Platform and identified a range of environmental and social challenges in the pineapple sector. It acted as a bridge, convening about 900 participants (businesses, NGOs, communities,

academic experts, government officials, trade union representatives, ILO) over the entire period. Four annual plenary meetings, 30 thematic working groups and several panel debates were organized (Interview 7). Nevertheless, there was never a neutral moderator, and power inequalities were replicated in the Platform, which prioritized commercial and environmental issues (Interviews 7, 14, 31).

### 3.3 Ethical Trading Initiative and Fyffes

The ETI is a membership-based multi-stakeholder initiative bringing together companies, trade unions and NGOs to improve working conditions in global value chains. It was established in 1998 with the support of the government of the United Kingdom (UK) and has developed a Base Code for corporate members to support continuous improvement regarding decent work (Knudsen and Moon 2017). The ETI is governed by a tripartite board which reviews the performance of companies with regard to their working conditions, may hold them accountable in case of complaints and follow by disciplinary actions (ETI 2009). In 2016, the NGO Bananalink and the International Union of Foodworkers (IUF), both ETI members, filed a complaint against Fyffes, another ETI member, for labour rights violations in its subsidiaries' pineapple (ANEXCO in Costa Rica) and melon (Suragroh in Honduras) plantations (Watts 2016). The violations concerned a disregard of freedom of association, as Fyffes refused to recognize independent trade unions. The company was suspended from the ETI in 2017 due to a lack of progress on the accused labour right violations in Honduras, and it finally lost its ETI membership in 2019 (Moyo 2019). The attitude of Fyffes is unusual, since the company did not really seem to care about its reputation and its loss of membership from the ETI. Fyffes is continuing to claim that its practices are in agreement with national labour laws and compliant with independent audits (Interview 33).

The participation of Costa Rican trade unions in the ETI–Fyffes dispute settlement case occurred mainly indirectly. The local union contributed to the preparation of the case by providing evidence of violations and performing the legwork for the complaint filed at the ETI as well as the “Make Fruit Fair” campaign (Interviews 32, 33). Bananalink was a partner in this EU-funded campaign (2015–2018), which advocated fair and sustainable working conditions in banana and pineapple supply chains. The campaign targeted labour rights violations at the Costa Rican and Honduran Fyffes subsidiary plantations, calling for “freedom and fairness for Fyffes workers” (Make Fruit Fair 2017). A petition was signed by more than 40,000 people and sent to UK supermarkets that sourced from Fyffes. Although the supermarkets did not change their business relationship with Fyffes, the campaign did trigger a response from the ETI through its dispute settlement procedure.

The ETI produced an internal report which recommended, among other things, that training session for unions and management be held. This training took place in late 2016, financed by the ETI, which provided independent consultants to facilitate the dialogue. However, the participation of most union representatives had to be cancelled, since their employers refused to grant them the leave necessary to attend the training sessions (Interviews 32, 33).

## Impact

Turning to the **indirect impact** of the initiative, the ETI case against Fyffes increased the Costa Rican pineapple unions' agency through reinforcing their network embeddedness and also – albeit to a lesser extent – their infrastructural resources. Regarding the network embeddedness, this case solidified the existing relations between the local unions, Bananalink and the IUF. It allowed local trade unions to be heard beyond their usual reach – namely in an international multi-stakeholder initiative and at the Fyffes management level – and to strengthen their clout (Interviews 32, 34). Through specific interventions, Bananalink also increased the local unions' infrastructural resources by, for instance, covering the costs of translating relevant documents on the progress of the complaint into the language of the affected workers (Interviews 32, 33).

This case also could have presented a chance to affect the opportunity structure in which Costa Rican (and Honduran) trade unions operate. The Costa Rican Ministry of Labour, however, failed to provide a space in which local unions could negotiate with the ANEXCO and Fyffes managements (Make Fruit Fair 2017). The formal opportunity structure was not affected at national level. The expulsion of Fyffes from the ETI can be considered a “nuclear option”, as it resulted in the suspension of all dialogue between the relevant parties. With the expulsion of Fyffes, the workers are no longer covered by the objectives of the ETI. Regarding the informal opportunity structure, *solidarismo* was denounced by the ETI, and the expulsion of Fyffes has sent a strong signal to other ETI members. In 21 years, it was only for the second time that a member had been expelled. Apart from the failed mediation attempts by the Labour Ministry in 2016 and 2017 (Interviews 32, 33), the initiative did not influence the rules and decisions regarding labour issues at national level.

The **direct impact** of these actions, however, remained low, as the plug was pulled from the dialogue, and the preference of workers and employers for *solidarismo* over trade unionism remains unchanged. In the end, the working conditions for the farm labourers of the ANEXCO plantation did not improve (Interview 32; Focus Group 5).

## Brokerage

The ETI pursued two brokerage roles. First, it lived up to its *raison d'être* of acting as a bridge to convene stakeholders throughout supply chains. Second, by visiting the field, producing a report with recommendations and organizing a workshop for unions and management, it attempted to act as a facilitator. However, since there was a considerable margin of manoeuvre for local management to prevent trade union participation, this effort was undermined. While the ETI successfully acted as a bridge, it was actually one of its member, Bananalink, that was the most active broker. It assisted the local union, together with IUF, by filling a complaint to the ETI, since only member organizations are allowed to do so. Moreover, Bananalink also acted as a facilitator. It supported the local unions' capacity, assisting in the translation of the necessary documents and pressuring both the ETI and Fyffes by directly addressing Fyffes' chairman and setting up a petition against Fyffes (Interview 33).

### 3.4 Ethical collaboration model: Bama and Dole

In 2006, a major Norwegian fruits and vegetables importer (Bama Gruppen AS) decided to take action in response to a consumer campaign regarding anti-union practices at the plantations of the Standard Fruit Company, a subsidiary of the multinational Dole Food Company (Feral et al. 2006). As one of Dole's largest buyers in Scandinavia, the company pressured Dole to respect social dialogue and threatened to stop buying from Dole. Based on the principles of its ethical collaboration model that was seeking to continuously improve the working conditions at their suppliers, Bama triggered a long process of change, which slowly opened the doors to social dialogue. The participation of trade unions in this process gradually increased, as they were allowed to enter the plantation and mobilize workers. They could provide substantial contributions in the meetings with management and negotiate improvements in working conditions (Interviews 1, 10, 32, 35, 36, 37, 38, 39).

## Impact

Regarding the **indirect impact**, union agency was strengthened, and they benefited in terms of internal solidarity, network embeddedness, narrative and infrastructural resources. First, the internal solidarity within the unions at the plantations was reinforced through training, where members learned more about collective organization, leadership and negotiation tactics. They improved their skills and built confidence in defending their rights (Focus Groups 3, 4). Second, the network embeddedness expanded through vertical linkages with Norwegian partners and horizontal linkages

with SINTRASTAFCOR (Sindicato Industrial de Trabajadores Agrícolas, Transporte Agrícola y Afines de Costa Rica), the stronger Dole logistics union (Interviews 1, 10, 32, 35, 39). Third, the initiative positively influenced the narrative resources, because the union invited management and workers to attend awareness raising activities about social dialogue. Local consultants helped the unions to develop recruitment strategies and share success stories (Interviews 1, 10, 39). Finally, more infrastructural resources were available to the unions due to the funding of capacity-building workshops by Norwegian partners (Interviews 1, 35, 36).

The initiative also had an impact on the formal and informal opportunity structure. A symbolic framework agreement was signed in 2007 to formalize Dole's commitment to respect FACB. This agreement was renewed in 2012 with clauses about internal relations, capacity building and a complaint mechanism (Interview 37). This more coordinated, institutionalized approach was a positive change to the formal institutional opportunity structure at company level. Yet, the non-binding initiative did not have an impact on the industry-wide dialogue practices and rules at the national level outside the Dole plantations.

The initiative also created opportunities for unions to influence the informal norms and values in the plantations. They distributed flyers in the plantations and organized meetings to explain the benefits of joining a union and their differences from *solidarismo* (Interviews 35, 36, 37). This opportunity empowered the unions to act as legitimized workers' representatives. However, it takes time to overcome the informal barriers and build respect for social dialogue. Despite the efforts, trade union membership did not increase sufficiently to reach the legal threshold to sign a collective bargaining agreement in the plantations (Interviews 1, 37; Focus Group 3).

In terms of **direct impact**, concrete improvements were made to the union–management relationship and the dialogue process compared to the conflictual situation that had existed before the initiative. The framework agreement recognized unions as dialogue partners, and an enabling environment for regular dialogue was gradually created. This resulted in concrete improvements of working conditions, such as a reduction of maximum working time for pesticide applications and the reinstatement of dismissed union members (Interview 10).

### Brokerage

Bama engaged in various actions to connect the parties and create space for the development of new social dialogue practices, strengthen capacities, establish rules and procedures for social dialogue and ensure compliance (Interview 36). These activities received support from Norwegian partners,



local union consultants, representatives of the ILO in Central America and Costa Rica’s Ministry of Labour (Interviews 1, 5, 10, 35, 39).

The role of the buyer as a broker evolved over time. First, Bama’s brokerage role focused on acting as a bridge, establishing the local union–management relationship and connecting the parties. Once the parties had acknowledged each other, Bama acted as a facilitator and involved external support for capacity building. As the relationship developed towards a more regular communication between the unions and Dole, Bama started to act as a mediator, tempering Dole’s internal resistance against trade unions. Finally, dialogue started to take place independently of Bama. In 2016, the time was ripe for Bama to slowly withdraw and give more space to the two parties to develop their own ways of collaboration. It kept an advisory role and only intervenes as a last resource (Interview 36).

► **Table 2**

Summary of findings

	CSMs	Platform	ETI & Fyffes	Bama & Dole
<b>(1) Trade union participation</b>	Intermediate	Very low	Low	High
<b>(2) Impact</b>				
– Indirect impact (Empowering potential)	Agency: yes Opportunity structure: no	Agency: no Opportunity structure: no	Agency: yes Opportunity structure: no	Agency: yes Opportunity structure: yes
– Direct impact (Concrete change)	No	No, counterproductive	No improvements in dialogue & working conditions, Fyffes expulsion	Dialogue & improvements of working conditions
<b>(3) Brokerage role</b>	EU & EU trade unions as bridge & facilitator	UNDP as bridge, failed to facilitate and mediate dialogue	ETI & Bananalink as bridge & facilitator, ETI failed to mediate	Norwegian buyer as bridge, facilitator, mediator & adviser

## ► 4. Discussion

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In this section, the findings are analysed, addressing our two initial research topics. First, the indirect and direct impact of four labour governance initiatives in the Costa Rica–EU pineapple trade are discussed. This is followed by an analysis of the brokerage roles of the public and private initiators and the nature and extent of the impact of the initiatives.

### 4.1 Impact of the labour governance initiatives

Regarding the **indirect impact**, we observe that most efforts were put into the strengthening of trade union agency, especially their network embeddedness. In contrast, the opportunity structure is either not thoroughly questioned at (inter)national and sectoral levels or only improved to a certain extent at company level.

The main achievements in terms of agency concerned vertical connections with international allies. In addition, horizontal linkages were expanded to a certain extent in the Costa Rican pineapple industry by Bama and across the Central American region through the CSMs. In most cases, infrastructural resources were also addressed. It should, however, be pointed out that financial support remains mainly ad hoc, and infrastructural resources are, therefore, not affected in a sustainable way. The two other resources, internal solidarity and narrative resources, were barely considered. Only the Bama case attempted successfully to improve them.

Our cases show that it appeared much more difficult to address the opportunity structure in which trade unions operate at national level. The initiatives did not influence national regulation. The government interventions were limited to (failed) mediation attempts by the Costa Rican Labour Ministry in the case of the ETI and Fyffes/ANEXCO. In the Platform and CSMs, labour issues are often labelled as sensitive and untouchable “domestic matters”. When the opportunity structure was challenged, the most obstructive elements, *solidarismo* and the general anti-union attitude, remained intact.

Turning to the **direct impact** of the initiatives, the only concrete change encountered in the study was in the Bama case, which, over a period of ten years, paved the way for social dialogue at plantation level. However, the impact did not go beyond the plantation, because the structural deficits and fragmented union landscape at national level were not addressed. Even though the CSMs have encountered a slow start, they are showing some positive prospects for dialogue. However, there is no focus on labour conditions in Costa Rica or any supply chain prone to labour rights violations, and no push

for concrete changes in working conditions or regulations is to be expected anytime soon. The Platform, on the other hand, has reinforced existing power imbalances, and the ETI has not managed to obtain improvements concerning FACB at the Fyffes plantations.

## 4.2 Brokers and their impact

Regarding brokerage, the evolution in brokerage roles is discussed first, followed the importance of the brokers' leverage power, the involvement of other stakeholders as brokers, the differences in private and public brokers' approaches and, finally, the (missing) coordination between the different initiatives.

First, the brokerage role "to act as a bridge" is obviously an essential role, because the core element of brokerage is to connect previously disconnected actors. Indeed, all initiators attempted to convene relevant stakeholders. Whether this brokerage role was successful, and whether it evolved into other roles, depended on the capacity and willingness of the broker and the stakeholders involved. The cases demonstrate that merely creating a bridge is not sufficient to ensure impact. In addition, each successive brokerage role requires more commitment and investment of the broker, which does not always exist. A large gap between facilitating and mediating roles is observed, because mutual understanding about what social dialogue means has to be created before moving to mediating of concrete disputes.

Second, the deployment of the brokers' leverage or power plays an important role, especially if obstacles occur. For instance, buyers have an important commercial power; NGOs can mobilize citizens, raise consumers' awareness and affect the reputation of producers; and international organizations usually have a combination of hard and soft power in their toolbox. In our cases, the brokers had different levels of leverage to pursue their objectives, or they employed these differently. The use of incentives and (potential) sanctions throughout the supply chain influences the impact of the initiatives. Bama and the ETI both threatened to end their collaboration with the producers. This approach was less successful for the ETI, as Fyffes did not respond to the ETI's pressure, and no evidence has been found that Fyffes' suspension and eventual expulsion from the initiative has had an impact on the company's sales. By contrast, Bama's commercial power was key to applying pressure for social dialogue at the plantation. The EU, on the other hand, tends to punch below its weight. It employs a soft approach that aims at stimulating dialogue rather than actually enforcing the TSD chapter and has, so far, been reluctant to act firmly. Finally, the UNDP did not have concrete leverage to influence the participation at the Platform. In sum, when there is no incentive to respect social dialogue, little changes for workers occur.

Third, in addition to the main brokers, other stakeholders involved played a constructive or obstructive role. In the case of the CSMs and the ETI, other participants in the initiatives – EU trade unions and ETI members, respectively, Bananalink and the IUF – took up bridging and facilitating brokerage roles. These roles were in line with the objectives of the organizations they represent. This being said, the main brokers were receptive to the organizations' efforts, which, in the end, were decisive for the impact of the initiative. The willingness of other participants to cooperate also proved to be crucial. Dole, for instance, was accommodating to Bama's initiative, whereas the pineapple producers themselves endeavoured to exclude labour issues and trade unions from the Platform.

Fourth, we also observed that the more tailor-made the broker's approach is, the more impact it will have. This was evident in the ETI and Bama cases, which both operated at company level. The other brokers, which are located at a higher and inevitably less concrete level, could have adapted their approach to identify sensitive supply chains (in the case of the EU) and to take into account particular anti-union contexts (EU and UNDP). In our cases, we see a distinction between the approaches of public and private brokers, as the former are characterized by a hands-off approach. They are less strongly involved, do not prioritize critical sectors, focus on general environmental and social issues and leave much more space and discretion to other actors for the implementation of initiatives. While they play an important role in initiating most initiatives, the "traditional" public actor role as regulator and enforcer does not materialize during the implementation of the initiatives. In turn, other, non-public, actors enter the scene, taking up brokerage roles.

Fifth, brokers and their initiatives are never a panacea for resolving social dialogue issues. Although much of the impact of an initiative depends on the commitment and willingness of the broker and other actors involved, the example of Bama shows how there are also limitations to what they can actually achieve. One cannot force workers to unionize, only persevere in continuously increasing the capacity of trade unions and contributing to a conducive environment for social dialogue.

Finally, the cross-learning and coordination between the different initiatives were quite limited. Instead of pooling resources and efforts, they operated in isolated silos. The initiatives had similar objectives of improving the working conditions in supply chains and dealt with a similar opportunity structure. However, there was a friction in their focus – for instance, the CSMs and the Platform also target environmental issues, and the CSMs do not pay attention to particular supply chains – which could partly explain their limited interaction. There was also a disconnect between local trade unions at plantation level and trade union federations at national level. It remains unclear to what extent the grievances experienced at grassroots level found their way up to higher levels.

## ► 5. Conclusion

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This chapter has examined the indirect and direct impact of four labour governance initiatives in the Costa Rica-EU pineapple trade on social dialogue and highlighted different facets of brokerage by the public and private initiators of the initiatives. Establishing social dialogue in an anti-union context is a long-term process and requires willingness and capacity from the involved actors along the supply chain.

We conclude that the support of international actors acting as brokers, the leverage power and commitment of the broker and a formalized opportunity structure at company level are enabling conditions for social dialogue. By contrast, an anti-union local informal structure, lack of political will and government resources, limited interaction between public and private initiatives and low, fragmented unionization constrain the possibility for social dialogue.

The fragmented union landscape and the lack of inter-firm collaboration hampered the potential for cross-learning between the initiatives. In addition, no linkages were made between the initiatives, which limited the scalability of social dialogue. Further research should examine how collaboration can be stimulated, with particular attention paid to the role of brokers (especially at higher levels) that can look for synergies to create spillover effects between company, sectoral, national and transnational levels. Since the field of hybrid forms of governance is emerging, additional research is required on how collaboration between private and public actors can take place to improve social dialogue and working conditions in plantations. Moreover, cross-country and multiple sector comparisons – as well as process or longitudinal studies to examine how social dialogue evolves over time and what type of capacity building and conditions are necessary in other sectors – can also help to derive more general conclusions about the advancement of social dialogue in plantations.

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## ► Annex. Overview of in-text references to interviews and focus groups

N°	Interview	Date	Place	N°	Interview	Date	Place
1	Expert	15/11/2016	San José	24	EU DAG member	26/02/2020	Virtual
2	Expert	19/01/2016	San José	25	Costa Rican DAG member	3/08/2018	Virtual
3	Expert	31/05/2016	Heredia	26	EU DAG member	25/09/2018	Brussels
4	Trade union	3/08/2018	Virtual	27	Costa Rican DAG member	15/05/2020	Virtual
5	Government	21/01/2016 & 8/11/ 2016	San José	28	EU DAG member	13/09/2018	Brussels
6	Government	22/06/2016	San José	29	European Commission official	4/08/2016	Brussels
7	Government	4/05/2016	San José	30	Honduran official	11/06/2016	Tegucigalpa
8	Government	17/06/2016	San Carlos	31	Trade union	12/01/2016	San José
9	Government	20/06/2016	San José	32	Trade union	8/11/2016	San José
10	Expert	9/11/2016	San José	33	NGO	27/09/2018	Virtual
11	Business/employer	5/02/2016	Veracruz	34	Business/employer	23 & 25/02/2016	San Rafael
12	Business/employer	27/05/2015	San José	35	Trade union	13/01/2017	Virtual
13	Business/employer	27/05/2015	San José	36	Business/employer	12/04/2017	Virtual
14	Business/employer	2/06/2015	San José	37	Business/employer	14/11/2016	San José
15	Business/employer	19/01/2016	San José	38	Expert	7/11/2016	San José
16	NGO	2/05/2016	San José	39	Trade union	17/11/2016	Limón
17	NGO	8/06/2016	San José				
18	Government	8/06/2016	San José	<b>Focus groups</b>			
19	Trade union	14/05/2016	Medio Queso	1	13 plantation union members	24/05/2015	Sarapiquí
20	Business/employer	21/01/2016	San Carlos	2	7 irregular migrant workers	10/03/2016	Zapote
21	Government	8/06/2015	Limón	3	5 plantation union members	13/03/2016	Santa Rosa
22	Business/employer	15/02/2016	Santa Elena	4	3 plantation union members	11/03/2016	Sarapiquí
23	Business/employer	1/05/2016	Medio Queso	5	6 plantation union members	5/03/2016	Santa Rita



# 11 Building transnational social dialogue

## A process-based analysis of the effectiveness of international framework agreements

Rémi Bourguignon and Marc-Antonin Hennebert

### ► Introduction

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Following their hesitant emergence at the end of the 1980s, international framework agreements (IFAs) developed in the 1990s and 2000s, often as part of European transnational negotiations, and accordingly took their place in the spectrum of the various mechanisms for the private regulation of global value chains (GVCs).<sup>1</sup> These agreements concluded between multinational enterprises and international trade union federations were rapidly challenged by observers in terms of their regulatory potential. On the one hand, IFAs recognize transnational social dialogue and the role of trade unions and therefore, in this respect, appeared more promising than traditional unilateral approaches grouped under the heading of corporate social responsibility (CSR). On the other hand, the voluntary and non-binding nature of these initiatives placed them *de facto* in the realm of soft law. It is not therefore surprising that the question of their effectiveness has become the cornerstone of analyses of IFAs, particularly as empirical analyses reveal a certain diversity in their trajectories. The basic question is whether this new form of regulation should be grasped as a supplementary aspect of corporate social responsibility, with the same potential and limitations, or whether it might support greater ambition for the social regulation of global value chains. What rights do IFAs address? Are the commitments that are made applied in practice? What conditions have to be met for that to happen?

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<sup>1</sup> The concept of global value chains was coined to describe the relations between the various enterprises which, throughout the world, contribute to the production of goods. It was developed in a context of globalization that was resulting in the fragmentation of production, with high-added-value activities being controlled by multinational enterprises, and lower-added-value work being entrusted to a sometimes very complex network of subcontractors. Despite certain differences, the concept can be considered equivalent to that of “global production networks” or, as preferred by the International Labour Office, “global supply chains”. For further information, see Park, Nayyar and Low (2013, 42-44) and Lakhani, Kuruvilla and Avgar (2013).

In recent years, the literature on these issues has undoubtedly grown in intensity and has shown how difficult they are to understand in both conceptual and empirical terms. In practice, IFAs coexist with other forms of regulation and there are methodological hurdles to identifying effects that can be specifically attributed to them. A central issue therefore arises throughout the literature concerning the respective roles of unions and management. In the view of Fichter, Helfen and Sydow (2011), the specificity of IFAs lies in the involvement of an external actor, international union federations, in the organizational processes of multinational enterprises. The effects of IFAs would therefore depend mainly on the manner in which this external actor is involved. In a recent article, Gansemans, Louche and d'Haese (2020) refer to the case of pineapple plantations in Costa Rica to show that this role of *broker*, in the sense of an actor capable of bringing together the various components of global value chains, can also be played by the lead enterprise. Success factors are related less to the mobilization of a trade union network coordinated by international federations, and more to the sound articulation, by the lead enterprise, of its commercial power and the resources that it can provide to its suppliers. A mid-way point is assumed by others who argue that the cooperative approach adopted by IFAs does not prevent more traditional union action (for example, Williams, Davies and Chinguno 2015), and that what is at issue is a re-articulation of management and union approaches.

The multiplicity of management and union initiatives, which can be accumulated, compete or be combined, makes it very difficult, if not impossible, to identify a specific effect of IFAs on the regulation of global value chains. For this reason, empirical research has mainly taken the form of in-depth monographic analyses to capture the varying roles played by IFAs in complex environments. These analyses have not failed to give rise to controversy, as focusing attention on process-based aspects would tend, in the view of critics of transnational social regulation, to ignore the lack of effectiveness of IFAs, or even to be complicit in a certain managerial rhetoric (Tsogas 2018). Questioning the effectiveness of IFAs therefore makes it necessary to go beyond this contrast between a sometimes ideological public debate that seeks a substantive evaluation (in terms of their effect on everyday working conditions) and empirical works confined to a monographic analysis of implementation processes. It is from this perspective that it seems to us to be necessary to come back to the very notion of effectiveness, which has been the subject of particularly useful social and legal reflection. Consideration of the effectiveness of an IFA cannot be limited to measuring the sound application of the social norms that it recognizes, but must involve consideration of a greater diversity of effects, including the transformation of social relations between management and unions at the local level.



This chapter is intended to contribute to this objective. A first section reviews the specific characteristics of IFAs and the various definitions that can be adopted of their effectiveness as a framework for analysis. A second section, based on this analytical framework, consists of the presentation of the three illustrative cases of Carrefour, Danone and Orange (see the methodological note). Finally, a third section makes use of the concept of strategic capabilities to analyse the balance of power that lies at the heart of the development of IFAs.

## ► 1. International framework agreements and the question of their effectiveness

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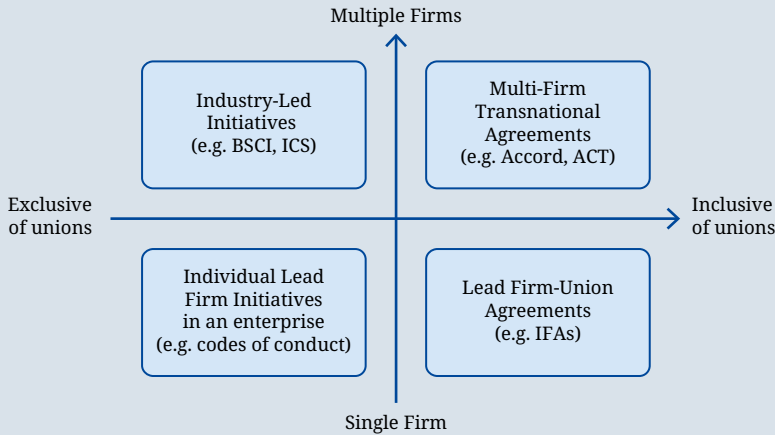
The emergence of IFAs around the beginning of the 2000s gave rise simultaneously to curiosity and scepticism. In practice, they could seem to be a strict extension of the corporate social responsibility approaches adopted over several decades in multinational enterprises. However, the issue of their superiority in terms of effectiveness rapidly emerged. A review of these reflections first requires placing IFAs among the various forms of private regulation of global value chains and examining the various meanings of effectiveness present in the available social and legal literature.

### 1.1 A social regulation mechanism for global value chains

The fragmentation of value chains, under the effects of globalization, combined with the difficulties of developing a framework at the global level for the regulation of working conditions and observance of fundamental workers' rights, has led to increased interest in the concept of global value chains (Gereffi, Humphrey and Sturgeon 2005). This approach calls for consideration of the relations of dependency existing between multinational enterprises, which play the lead role, and the enterprises which, in various countries throughout the world, carry out a number of their activities, generally those that create the least value. This change of perspective on the organization of economic activity at the global level has resulted in a rethinking of international social regulation based on private forms of regulation that tend to place responsibility on multinational enterprises for practices throughout their global value chain. This approach has, more recently, found explicit form in the French Duty of Vigilance Act (Barraud de Lagerie et al. 2020).

► **Figure 1**

Four types of private regulation



**Source:** Ashwin et al. (2020).

Based on the typology proposed by Ashwin et al. (2020), it is possible to identify four forms of private regulation. The authors propose consideration of approaches based on whether or not they include trade union organizations and approaches relying on a single or multiple employer dynamic. The intersection of these two dimensions reveals four mechanisms (see figure 1). The most common and the oldest consists of management initiatives taken within an individual enterprise. This corresponds to the corporate social responsibility approach as it emerged starting in the 1970s. It is a voluntary approach which traditionally takes the form of adopting codes of conduct and carrying out social audits in subsidiaries or among suppliers. The second approach is relatively similar, but differs from the first insofar as it is organized at the level of multiple employers, including the sectoral level. This is the case, for example, of the Business Social Compliance Initiative (BSCI), which proposes a code of conduct and a common methodology for enterprises that adopt it. It is also the case of the Initiative for Compliance and Sustainability (ICS), created in France in 1998 by the Retail and Distribution Federation, which proposes to large-scale retail enterprises the sharing of audits undertaken among suppliers. In contrast with these management initiatives, normally described as unilateral, other forms of regulation are based on the inclusion of trade unions. In the same way as for management initiatives, it is possible to identify multiple and single employer initiatives. The former are not very common and

one of the most widely known is probably the Accord on Fire and Building Safety (the Accord) signed in Bangladesh in response to the collapse of Rana Plaza (Donaghey and Reinecke 2018). There is also the Action Collaboration Transformation (ACT) initiative signed in the apparel industry (Ashwin et al. 2020). IFAs are part of a single enterprise approach involving unions.

Emerging at the beginning of the 1990s, with a significant acceleration in the 2000s,<sup>2</sup> these agreements progressively attracted attention. In practice, they showed that they had greater potential for integration than the management initiatives then in force, and particularly codes of conduct. On the one hand, as they are based on the conclusion of agreements, they are subject to debate concerning their legal status (Sobczak 2007; Moreau 2017), which some consider to be higher than a strictly unilateral commitment. On the other hand, the mobilization of unions has been seen as a potential response to the clearly identified shortcomings of managerial approaches of the social audit type (Egels-Zandén and Hyllman 2007; Barreud de Lagerie 2016). In other words, the issue of the effectiveness of IFAs and their capacity to ensure social regulation of global value chains, is central in the academic literature, of which three phases may be identified.

At first, the academic literature sought to describe IFAs, which were then an emerging phenomenon. It explored their more or less binding nature in legal terms (Drouin 2006; Sobczak 2007), the rationale of the signatories (Egels-Zandén 2009) and the institutional dynamic giving rise to them (Béthoux 2008). Ultimately, what mattered was assessing the potential of IFAs to promote transnational social dialogue and protect workers' rights (Riisgaard 2005; Papadakis 2008). A second phase consisted of the empirical examination of the agreements. Many of the contributions at that time endeavoured to characterize the bargaining process involved to examine the extent to which it allowed the real ownership of IFAs by the local actors of multinational enterprises (Seignour and Vercher 2011; Barreau and Ngaha 2012; Sobczak 2012). These studies broadly emphasized the gap between the cooperative nature of bargaining at the central level and the sometimes conflictual relations at the local level (Niforou 2012; Fichter and McCallum 2015). Addressing more directly the question of the effectiveness of IFAs, there was then a third phase focusing on the implementation of IFAs from the viewpoint of their impact (Papadakis 2011), the involvement of administrators (Williams, Davies and Chinguno 2015), the organization of union representation (Helfen and

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2 IFAs made their appearance with the signature in 1988 of the “joint understanding” between Danone (formerly BSN) and the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations (IUF). In a note in 2015, Hadwiger identified 112 multinational enterprises that are signatories to at least one IFA. These enterprises are mainly located in Europe, and particularly in Germany, the leading signatory country with 25 enterprises, followed by France with 15 signatory enterprises. He also noted that enterprises based in Europe sign a higher number of IFAs per enterprise.

Fichter 2013; Hennebert et al. 2018) and the control mechanisms established (Bourguignon et al. 2020).

These three phases in the development of the scope of research bear witness to the growing interest in the question of the effectiveness of IFAs. They also reflect fairly faithfully the development of IFAs themselves, which can be understood as a transformation of the terms in which the actors viewed the notion of effectiveness. To explore this hypothesis, it is necessary to review the various meanings attributed to this notion.

## 1.2 The different approaches to effectiveness

Because they are considered to have greater “regulatory potential” than managerial corporate social responsibility approaches, the effectiveness of IFAs was therefore rapidly discussed in works on management, industrial relations and law. Nevertheless, paradoxically, the concept of effectiveness was still addressed relatively loosely. Behind the apparent simplicity of the notion of effectiveness lie differing meanings that need to be examined to develop a relevant analytical model. The literature on law and the sociology of law is valuable in this respect, as it regularly discusses the concept, particularly in the works of Jean Carbonnier (1958). To the dominant conception in terms of the application of the social norm, it is possible to add two major conceptual refinements taking into account interpretation mechanisms and transformations in labour relations.

In practice, the dominant meaning when referring to the effectiveness of IFAs tends to define it as action that conforms to the commitments set out in the agreements. An IFA will be described as effective if the commitments made by the signatories are respected in practice. Conversely, if management practices in the enterprise, and even the global value chain, are not in conformity with the conditions set out in the agreement, it will be described as ineffective. In this sense, effectiveness tends to be confused with efficacy, as the emphasis is on measuring the achievement of objectives. Leroy (2011) refers, in this respect, to an understanding of effectiveness as “application” in the sense that the social norm comes first and should then be applied. The assessment of effectiveness therefore consists of measuring “gaps between practice and law” (Lascoumes and Serverin 1986).<sup>3</sup> This approach places central importance on the system of sanctions accompanying the social norm, with lack of effectiveness consequently being explained by the failure or shortcomings of control and/or sanctions mechanisms. This approach is widespread in law studies focusing on the effectiveness of IFAs.

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<sup>3</sup> For application in relation to ILO fundamental and priority standards, see the report by Kenoukon (2007), and for more direct application to IFAs, see Moreau (2017).

Without claiming to review exhaustively the social and legal analyses which call for a move away from this traditional conception, two conceptual distinctions would appear to be particularly useful in investigating the effectiveness of IFAs. As recalled by Lascoumes and Serverin (1986), it is important in the first place to recognize that not all social norms are seen as being directly applicable. As indicated by Portalis in his introductory speech on the French Civil Code, emphasis should be placed on the fact that the law is not intended to “foresee everything” and that, between the social rule as drawn up and its application, there is a process of interpretation that allows it to be adapted to new situations. The law is therefore necessarily incomplete and its effectiveness is based on the existence of jurisprudence that carries out this work of interpretation. This analysis applies particularly well to the case of the social rules contained in IFAs. In literal terms, IFAs are *framework* agreements, or in other words, agreements which set forth general objectives and principles that are intended to be specified in various contexts, in subsidiaries and the value chain. The rules that they recognize are not always directly applicable and the effectiveness of an IFA is therefore based on the existence of adaptation mechanisms. This is the case, for example, for freedom of association, which is recognized in IFAs, but which may come up against difficulties of application in countries where trade unionism is dependent on the political authorities. Accordingly, effectiveness cannot be exclusively confined to assessing the compliance capacity of control mechanisms, but also the likelihood of the development of interpretation and adaptation mechanisms, both to resolve disputes and to promote local action.

A second conceptual difference is related to the more sociological analysis of law. From this perspective, it is possible to broaden the concept of effectiveness to take in the various social effects of the social rule. Evaluation of the effectiveness of the social rule does not only consist, based on its content, of measuring the extent of application through the identification of gaps, but also takes into account the changes resulting from the social rule in labour relations. The effects taken into consideration may therefore differ from those intended by the signatories of the IFA. Indeed, above and beyond strict compliance with the commitments made (the fundamental rights of employees...), an IFA modifies relations between the employer and unions and produces medium- and long-term effects that are not formally set out in the agreement. Along these lines, Leroy (2011) recalls that the sociologist, Guy Rocher, called for consideration not only of the diversity of the intentional and other effects, but also “the channels through which these effects pass and the mechanisms that produce them”. An assessment of effectiveness therefore consists of considering the transformation of industrial relations from a process-based perspective.

## ► 2. A process-based analysis of international framework agreements and their effectiveness

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These different approaches are clearly not mutually exclusive, and even offer evident complementarity. Nevertheless, emphasizing an approach to effectiveness in terms of application, interpretation and labour relations has significant implications, and primarily on any final judgement that may be made on the effectiveness of IFAs. But there are also, and in particular, implications in terms of methodology, as the view of the observer shifts significantly. It is proposed below to examine the process dimension of the effectiveness of IFAs. Less importance will be given to the measurement, at time T, of the observance or otherwise of the clauses of the agreement, than to describing the manner in which, over the longer term, the agreements develop and the extent to which such developments relate to changing labour relations, both between enterprise headquarters and international union federations and, at the local level, during the course of the implementation of IFAs.

### 2.1 Contrasting development trajectories

This approach would appear to be particularly relevant, as the literature on IFAs constantly highlights the diversity of the trajectories that they can take. Once again, the aim is not to be exhaustive, although reference may be made to the observations of Helfen and Fichter (2013) who identify possible differences in the evolution of the transnational union networks involved in the context of IFAs. Depending on whether such networks are coordinated by an enterprise body (European Works Council, group committee, unions in the country of origin...) or by an international union federation, IFAs will have different ambitions. As demonstrated more recently by Barraud de Lagerie et al. (2017), the form taken by such agreements (their degree of sophistication, thematic scope and the types of follow-up procedures) may not only vary from one enterprise to another, but may also develop, in a given enterprise, based on the intent of the signatories. They draw a distinction, in this respect, between so-called *instituting* IFAs, in the sense that their primary aim is to institute a relationship with a global union actor within the framework of a globalization strategy. These agreements are characterized by a focus on fundamental rights and limited procedural precision concerning the measures for their implementation and control. In contrast, so-called *constitutional* IFAs address a broader number of subjects and, in practice, integrate various enterprise policies on social protection, safety and health, and even the environment. Their ambition is to

define the principles to be followed throughout the group. Finally, other IFAs are *instrumental* in conception. They are more specific, as they only address one subject and are more directly thought through from the perspective of efficacy and implementation. In the case of constitutional and instrumental agreements, the control mechanisms are intended to be more precise, either in terms of defining the role of the various bodies or in establishing indicators.

It is because this diversity reflects different trajectories that process-based approaches have already found expression in management and industrial relations works. For example, Seignour and Vercher (2011) show, based on the case of Rhodia, that the regulatory scope of the IFA depends on the provisions for its implementation and the relations built up between the various actors. It is also related to the capacity of international union federations to “create the conditions during the negotiation process for the representation and ownership of the instrument by national and local unions”. When this condition is not achieved, the authors consider that the counterweight instituted by the IFA will be “as centralized and disassociated from local dynamics as the economic power that it is intended to regulate”. Mustchin and Martínez Lucio (2017), however, place emphasis on informal mechanisms, such as the reference made by local unions to the IFA as a framework for new negotiations accompanying the implementation of the agreement. They show that, despite weak formal influence, IFAs concluded in four multinational enterprises based in the United Kingdom have made it possible to strengthen the influence of unions in countries where their rights are limited. Ashwin et al. (2020), along the same lines, highlight the spillover effects associated with international collective agreements. For example, the authors point out how the existence of IFAs has contributed to transforming relations between unions and employers through the face-to-face meetings to which they have given rise. They have therefore served as platforms from which new forms of governance have developed, particularly at the multi-enterprise level.

## 2.2 The sub-processes of the effectiveness of international framework agreements

Our own observations are along the same lines and suggest that, to understand the development of transnational social dialogue in an enterprise, it is necessary to consider three dimensions which take the form of different sub-processes and types of interaction. Although the three sub-processes need to be distinguished in conceptual terms, in practice they coexist throughout the lifespan of the IFA. To illustrate this, we propose to refer to the cases of three French multinationals – Carrefour, Danone and Orange – which already have a long history of transnational social dialogue and are therefore interesting cases to study the process dimension.

The sub-processes in question take on meaning in relation to the various approaches to effectiveness sketched out above. The first consists of defining the objectives or subjects covered by transnational social dialogue irrespective of the issue of effectiveness. The second sub-process is based on a conception of effectiveness in terms of application and as a channel for the actors to build up control bodies and tools. Finally, the third introduces a form of greater complexity into the notion of effectiveness. The implementation procedures are designed to mobilize local actors.

► **Box 1. Methodological note**

With a view to examining the monographs from a longitudinal perspective, the present work is based on public documentation (the agreements themselves, press releases...) and on the empirical findings of various research works.

With reference to the cases of Danone and Orange, our work is based firstly on the complementary articles of Barreau and Ngaha published in 2012 and 2013. Their data was collected between 2008 and 2011 and consists of in-depth documentary analysis and semi-directed interviews (11 in the case of Danone and 19 for Orange) with management and union executives.

For Carrefour, our work is based on empirical research undertaken between 2010 and 2014, as well as documentation, observation and a series of semi-directed interviews.

To describe the most recent developments in the three enterprises, we took as a basis research carried out in 2016-2017 which gave rise to the publication of a report for the ILO Office for France in 2017 (see Bourguignon and Mias 2017). This research was based once again on documentary analysis and interviews (eight for Carrefour, nine for Danone and nine for Orange).

The choice of the cases of these three enterprises is not based on criteria of representativity and we do not claim that they offer a basis for an assessment of IFAs. The cases were selected more for their history and development, as they offer an opportunity to test the relevance of three sub-processes of transnational social dialogue described below. More than the specific development of each of the three cases, we consider that the analytical framework offered in terms of processes and capabilities can be generalized and may be useful in understanding the dynamics of IFAs.



## Defining the purposes of transnational social dialogue

Through the conclusion of an IFA, a multinational enterprise officially recognizes transnational social dialogue, of which the intent may be redefined. As has been broadly emphasized in the literature on IFAs, the first agreements were particularly concise. Examples include the first IFAs concluded by Danone (formerly BSN) and Carrefour, which were pioneers when they signed IFAs in 1988 and 2001, respectively. In the case of Danone, the first agreement, known as a *common view*, is a half-page document in which four principles are set out, but without details on any implementation or control mechanisms. It was then developed in four agreements between 1989 and 1994, and resulted in the establishment of an international social dialogue body in 1996, the Committee for Information and Consultation (CIC). The first IFA signed by Carrefour came later in 2001, but was still one of the first. Also less than a page in length, it is very evasive, and indeed silent, on control mechanisms. In both cases, the IFA was essentially symbolic in scope, as it did not really create new rights. As recalled by Barreau and Ngaha (2013), the then CEO of Danone considered that it reaffirmed the continuity of an innovative social policy, while in the case of Carrefour, the management saw the 2001 agreement as a crystallization of a social policy that was already in operation. It should be noted that, in both cases, the premises of transnational social dialogue preceded the signature of the IFA. While, in the case of Carrefour, it took place through the European Committee on Information and Consultation, in the case of Danone, it was more informal and had taken the form of meetings since 1986 between the IUF, enterprise unions and the management. In this respect, the IFA served to make transnational social dialogue official. It was a form of mutual recognition by the actors based on relatively vague commitments and without any real implementation mechanisms. When a multinational enterprise signs an IFA for the first time, and therefore recognizes transnational social dialogue, it is frequently limited to respect for fundamental rights. However, subsequently, the stated ambition may change as social dialogue is extended to other subjects. This was indeed the case of the three enterprises under examination, as shown by Barraud de Lagerie et al. (2017): while the first IFAs signed by each of them were based on an instituting conception, the following revealed a constitutional (Carrefour) or instrumental intent (Orange and Danone).

## Structuring of control bodies and tools

The first IFA signed by Orange (formerly, France Telecom) was already in a very different context. Although it was only signed five years after the Carrefour IFA (in 2006), it was based on the experience of the IFAs concluded in the meantime in various enterprises. Indeed, the negotiators indicated that they had taken as a model the IFA signed by EDF (Barreau and Ngaha 2012, 85). While this agreement, as in the cases of Danone and Carrefour, was intended to

make official the transnational social dialogue which had already commenced (recognition of the trade union alliance by the management in 2004) and which formed part of the extension of enterprise social policy, a clear concern can be seen for its implementation and control. Six-monthly meetings between the unions and the management were envisaged to assess implementation based on indicators established by the management. This shows an understanding of effectiveness in terms of implementation. The implementation mechanisms are, in practice, control mechanisms designed to measure gaps between the objectives set out in the agreement and the real situation. A similar concern for application would emerge in the cases of Danone and Carrefour, leading the actors to adjust their practices. This development is perceptible in the case of Danone, with the signature of the Joint Understanding in the event of changes in business activities affecting employment or working conditions of 9 May 1997. This understanding appears to be much more detailed in terms of the content of the commitments made, but also strengthens control procedures by indicating that it has appeared “necessary to jointly redefine the most significant social indicators. These indicators, intended for the members of the CIC and unions affiliated with the IUF, illustrate the desire to measure the progress achieved in key areas of the social policy of the Danone Group”. In the case of Carrefour, it was among the unions that the desire emerged to strengthen the control capacity of the main actors. Faced with the refusal by the management to establish a control mechanism for the labour practices of subsidiaries in the group, the union representatives in the IFA follow-up body felt unable to assess implementation in practice, which was a cause for concern for them particularly during the period of restructuring of the group at the end of the 2000s. They therefore sought to develop a trade union channel, which involved the creation of an alliance in 2009, with a view to producing independent information to verify the implementation of the understanding. Whether based on management *reporting* tools or the trade union network responsible for indicating any dysfunctions, an increased concern can be seen at this stage for the implementation of control mechanisms with a view to guaranteeing the effectiveness of IFAs. This concern is clearly related to implementation and leads the actors to develop control mechanisms.

### Involving local actors in implementation

In their most recent forms, the three agreements appear to be adopting a more complex understanding of effectiveness that takes into consideration the issues of interpretation and the transformation of industrial relations. The agreement signed by Carrefour in 2015 is undeniably more substantive than the initial 2001 agreement, which was set out in a few lines. The 2015 agreement is 18 pages in length and specifies implementation procedures. The idea of effectiveness of application is found at this stage, as two follow-up meetings a year are envisaged between the management and representatives

of UNI Global Union to “evaluate implementation” and “manage any difficulties of application”. Chapter 6 covering the settlement of disputes also confirms that such follow-up is based less on formal control through *reporting* or *social audits*, than on dealing with complaints. For the signatories, the concern is to deal with complaints as they arise, or in other words, with the gaps noted in relation to the commitments made, as a priority at the local level. In the view of the industrial relations director who negotiated it: “We do not want to exercise control in our countries. That is not our policy. We want to convince our country directors, our country human resources directors, and therefore, naturally we place our trust in them. We don’t need to audit them on that. We are well aware, in any case, that if there is a problem somewhere, we will hear about it”. In practice, another logic is recognized and advanced by the actors. In the view of the CSR director, one key to success is to develop a “local territorial multipartite” dynamic in dealing with the issues recognized in the IFA. The incomplete nature of this type of agreement is accepted openly and leads to recognition of the need for the interpretation of the text, which is not directly applicable: “the agreement in its form, in its wording, was not necessarily very complete: there were slightly vague clauses which required interpretation”. It is not therefore merely a case of dealing with complaints, but of promoting local social dialogue to take on the task of interpretation. In a certain manner, the task of specifying the social norm is delegated to local bodies. For the director of industrial relations, it is this dynamic, promoted by the IFA, that has led to the establishment of a diversity committee in Belgium, as a voluntary social dialogue body not envisaged in the national legislation. Similarly, UNI Global Union has been involved with the management in the creation of a common “dialogue forum” in Argentina and Brazil. This social dialogue body ensures the interpretation and adaptation of the IFA at the regional level.

This meaning of effectiveness, from the standpoint of interpretation and adaptation mechanisms, can be seen even more explicitly in the case of Orange. Although the actors were satisfied with the 2006 IFA during its first years, transnational social dialogue went through a “very dark period”, in the words of one trade unionist, between 2010 and 2013. The agreement follow-up committee admittedly continued to meet, but only in formal terms, based on information provided by the management, while the union teams found it all the more difficult to take ownership, as they had the feeling that the power of the body was limited. In 2014, the negotiation of a new IFA on health and safety issues offered the opportunity to give a new impetus to industrial relations at the transnational level. Although the agreement maintains the system of supervision established in 2006, a change can also be seen in terms of an acceptance that the IFA is not complete. Moreover, there is specific reference to the concept of continuous improvement. The commitments made are not intended to be directly applicable and are to be specified based on the findings of an assessment envisaged by the agreement during

the first year of implementation. More specifically, the agreement provides that the principles that are recognized, the “common floor”, are to be subject to “local adaptation” through “action plans”. Accordingly, the attention of the negotiators was focused less on control mechanisms to measure gaps in the implementation of the norm than on the relevant resources required to undertake the process of local adaptation and to limit any eventual dilution of the objectives set out in the agreement. At the institutional level, that will involve the establishment of local safety and health committees responsible for drawing up action plans. The committees must be composed of a balance of representatives of the staff and the management. Learning resources are to be provided to them by the group in the form of training and the delivery of an assessment. These resources are intended to stimulate the active participation of all members and contribute to the transformation of relations between management and unions.

While the issue of local adaptation also led Danone to the flexible application of the IFA by conceding a margin of manoeuvre to local actors, a more centralized operational application can be seen than with the other two enterprises. For example, the desire to reinforce the capacity of the union network to influence social policy has led Danone to finance, since 2005, a permanent post of a trade unionist responsible for enterprise follow up in the IUF (Barreau and Ngaha 2013). Similarly, while control in Orange and Carrefour is based on *reporting* by the central management and the capacity of the unions to communicate complaints, Danone has a more centralized mechanism in the form of joint visits, which was established in 2009. Every year, a joint team composed of representatives of the management and of the IUF visits at least three countries, allowing a more qualitative evaluation that takes specific local conditions into consideration. The actors involved also see it as an educational opportunity to promote local dialogue and develop the union network. The desire to mobilize local actors and develop their capacity for action has led the enterprise to strengthen the coordinating capacity of the IUF. While this approach differs appreciably from that of Orange, which consists of organizing local dialogue and providing resources, its intent is comparable and focuses on building local capacity for action. This confirms that the third sub-process can take on different forms in practice. The joint visits also played an important role when the IUF focused negotiations for the 2016 IFA on sustainable employment. Although the management was particularly reluctant to address such a sensitive subject, the IUF, through its Asia delegate, managed to convince the enterprise by organizing four joint visits that revealed the disparity of employment practices and definitions. The complexity of the notion of effectiveness can be seen in these approaches, which are still not formally envisaged in the agreements (local committees, joint visits...). In the enterprises examined, it clearly involves the recognition of interpretation mechanisms and the transformation of industrial relations at the local level.

### ► 3. An analytical framework to assess the effectiveness of IFAs

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The identification of the three sub-processes that characterize the development of transnational social dialogue in a multinational enterprise is of interest in several respects. On the one hand, it helps in understanding the diversity of the trajectories of IFAs. Over and above a one dimensional reading, which would attempt to qualify such development in terms of strengthening or weakening, or the degree of effectiveness, it shows that development can vary from one sub-process to another, and that development within each sub-process can take different forms. The observations made indicate, for example, that the extension of the scope of transnational social dialogue has resulted in an IFA covering a growing number of subjects in the case of Carrefour or the multiplication of IFAs on more specific themes, as for Danone and Orange. Similarly, the desire to mobilize local actors has involved the strengthening of the international union federation in its coordinating role in the case of Danone, but has involved the structuring of local social dialogue for Orange and ad hoc initiatives in Carrefour. Finally, it also demonstrates that multiple levers are available to the actors in transnational social dialogue. On the other hand, this analytical framework helps to link such developments more closely to the concept of effectiveness, of which the various meanings have been outlined.

Although the cases used in support of our analysis are characterized by a certain extension of transnational social dialogue policies, which admittedly take different forms, it should not be concluded that IFAs necessarily have this outcome. It is certainly not impossible that an IFA may run out of steam or remain merely symbolic. The identification of the three sub-processes must essentially serve as an analytical framework, but the issue is to explain the conditions for their development and the links between the sub-processes. Moving forward from earlier works (Lévesque et al. 2018; Bourguignon et al. 2020), we would suggest that an analysis at the level of micro-political games is particularly pertinent. Micro-political analysis, as it is developed in organizational research, groups together approaches with the common characteristic of focusing on the balance of power between individuals from a process perspective. The issue is therefore to place the construction of these relations at the heart of the analysis. The addition of the prefix “micro” also bears witness to a desire not to confine this analysis to the framework of formal structures. Such analysis has been successful, for example, in the field of international management in examining relations between headquarters and subsidiaries by revealing the strategies adopted. When applied to IFAs, it tends to suggest that transnational social dialogue can be understood as a

de facto alliance between, on the one hand, international union federations and central enterprise unions and, on the other, the central enterprise services responsible for industrial relations or corporate social responsibility, with a view to the implementation of a joint policy (Bourguignon et al. 2020). However, that does not mean the disappearance of the balance of power, as there is no consensus on the scope and forms of the partnership. Similarly, each of the parties in this partnership is subject to its own constraints, which limits its margin for manoeuvre.

The mobilization of the concept of strategic capability gives body to this micro-political approach and, more specifically, means that consideration can be given to the evolution of transnational social dialogue (Lévesque et al. 2018). Strategic capability is distinct from the resources that are mobilized by the actors in their own strategies and it reflects the capacity of the actors to mobilize the resources available to them. The importance of strategic capability has been put forward in relation to management action (Fenton-O’Creevy et al. 2011) and trade union action (Frost 2001; Lévesque and Murray 2013). The literature has placed emphasis on three such strategic capabilities:

- ▶ the capability of linking actors at the various levels of global value chains, known as *bridging capability*;
- ▶ the capability of giving meaning to action, called *framing capability*; and
- ▶ the capability to create collective action, known as *mediating capability*.

These strategic capabilities play a central role, not only because they form the basis for the influence of the actors engaged in the partnership, but in particular because the value of such partnerships lies in the exploitation of the capabilities of the actors. In other words, a central industrial relations or corporate social responsibility department in an enterprise may find it interesting to develop transnational social dialogue if it sees in the union an ally capable of helping it in the implementation of its policy. That is, at least, demonstrated by the cases examined here:

And the unions, we are aware that they are being given some responsibility to be able to challenge their management: “You see, your CSR department said we should look into that” (Orange).

And what also interests us is that this international union federation, which has affiliates in each country, can also sometimes raise the alarm, draw attention to issues, and sometimes act as a warning light, which suits us (Carrefour).

And indeed, for those managers, the value of IFAs lies in the capability of the union network, especially under the aegis of international union federations, to link together the different levels of the enterprise. This mobilization is intended to make up for the weakness of their own resources to mobilize managerial policy.

It is difficult for management to estimate this capability of the union network at the outset. If it is overestimated, this may result in a certain apathy in the implementation of the IFA and its limitation to a purely formal instrument. In other cases, in contrast, the union network can engage fully in the process and breathe life into it. In practice, the capabilities of the actors come to light through the action that they take, which will guide the development of the transnational social dialogue policy. The initiatives taken by the partners on the basis of their capabilities will confirm the partnership, or not, and indicate the way in which it will develop. This can be seen when considering the global union networks that are recognized in each of the three enterprises. These networks have provided new information which has led to reconsideration of the concept of effectiveness. With regard to Orange, Barreau and Ngaha (2013) report the words of a trade unionist from Mali as illustrating the importance for unions of passing on information: “It is our role, as employees and members of UNI, to pass on information to UNI, as we did by writing to the Secretary-General of UNI, and it is through this exchange that pressure was exerted on France Telecom (Orange)”. Similarly, the creation of the alliance in the case of Carrefour was intended to reinforce the capacity of the union network to collect information and, in the end, it enabled the union network to expand by demonstrating its capacity to resolve local disputes. By exploiting their capacity for articulation, unions have managed to develop control structures and tools (second sub-process). It should be noted that, by engaging in control, the unions concerned have developed the union network and strengthened the capacity of their coordinators to intervene. This example shows that the sub-processes do not develop independently, but interact through the exercise of strategic capabilities.

It also shows that the actors’ view of the effectiveness of an IFA develops as they become more closely engaged in its implementation. The case of Orange offers a further illustration with the assessment that the enterprise proposed in the context of its 2014 safety and health agreement. This assessment was initially intended to develop the capability of union teams to analyse safety and health issues (framing capability) with a view to preparing action plans for the achievement of the standards set out in the enterprise policy. However, following the assessment, slippage was noted in relation to the principle of a common floor, which was nevertheless clearly set out in the objectives of the agreement: “after three years, we can now see the difficulties of having a common floor”. Although conceived as part of a control logic (second sub-process), the assessment, by developing the strategic capabilities of local actors (framing capability), opened the way to an extension of the concept of effectiveness through the delegation of responsibility for the interpretation (third sub-process) of general principles to take local risks more fully into account: “We realized that the approach of the common floor for everyone doesn’t necessarily correspond to the needs of countries, and we are therefore working

on it with UNI and the country human resources departments with the local UNI affiliate to see whether things can be advanced or not” (management representative). In this case, the idea is found once again that engagement in one sub-process can lead to the development/mobilization of strategic capabilities leading to the advance of another sub-process. Conversely, it also shows that the desire to mobilize local actors can lead to a dilution of the commitments made in the IFA and a limitation of control mechanisms. To reduce this risk, it is important to develop the strategic capabilities of union representatives.

## ► 4. Conclusion

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In the cases studied, the IFAs have made a significant contribution to the institutionalization of transnational social dialogue through different trajectories. As a function of the strategic capabilities that they have succeeded in exploiting and developing, the actors concerned have been able to engage in varying ways in each of the sub-processes of transnational social dialogue and have been able to extend the scope of such dialogue and its means of implementation. These observations appear to confirm the potential of IFAs for regulation and emphasize the importance of the strategic capabilities of the actors.

They also confirm that several approaches may be adopted to assessing the effectiveness of IFAs. While certain place more emphasis on the impact of the agreements on working conditions and respect for fundamental rights, others adopt a broader perspective, viewing the conclusion of an IFA as the beginning of an evolutionary process between the social partners which can have organizational impacts at various levels. These approaches are complementary, as they respond to different objectives. By following the first option, there is a tendency to produce a normative assessment of an IFA by seeking to ascertain whether or not its principles have been put into practice at a specific time. Although it raises methodological issues, this assessment is useful in guiding the actors involved in social regulation, including the leaders of multinational enterprises and of international union federations, in their strategies for the implementation or renewal of agreements by indicating whether they have been effective tools in improving the conditions of workers in the global value chain. However, it has the limit of offering a globally restrictive judgement that does not encourage understanding of the broader scope of IFAs in terms of industrial relations and social dialogue in the organization. The second option is based on a qualitative analysis that not only places emphasis on one type of indicator in assessing the effectiveness of IFAs, but seeks to take into account the potential diversity of the effects of such agreements on global



value chains. Such an approach allows a better understanding of the place occupied by IFAs in a specific organizational environment, a dynamic description of their development and a more precise identification of the elements that facilitate or impede their effectiveness. In this sense, this approach leads to a better understanding and assessment of the contribution of IFAs to the social regulation of global value chains.

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**Advancing social justice,  
promoting decent work**

The International Labour Organization is the United Nations agency for the world of work. We bring together governments, employers and workers to drive a human-centred approach to the future of work through employment creation, rights at work, social protection and social dialogue.

Globalization, technological change, and governments' policy choices continue to provoke massive structural changes in the world of work. These transformations pose unprecedented challenges for established institutions and modes of the governance of work. Unsurprisingly, they have been accompanied by a growing complexity and "hybridization" of regulatory modes and mechanisms. While governance remains a central responsibility of governments, *public governance* increasingly co-exists with *private governance* and *social governance*.

The hybridization and proliferation of forms and mechanisms of governance is a consequence of the fragmentation of production across national boundaries. As previously pointed out by the International Labour Organization, the emergence of global supply chains has provided new opportunities for many developing countries to participate in global trade, diversify their economies and generate employment. At the same time, production for global supply chains has raised new concerns about working conditions and the protection of workers' rights.

This volume is the result of a collaborative effort involving recognized research experts from different disciplines. It aims to review current knowledge on developments in the governance of work in global supply chains. It also presents several in-depth case studies that analyse public, private or hybrid governance arrangements.

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