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**A “Stick” in the World of “Sunshine and Carrots”: Using Binding
Arbitration in Global Framework Agreements to Regulate
Labour Standards and Multinational Corporations in Global
Supply Chains**

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Abstract

Many multinational corporations now use global supply chains to produce goods and services. Multinational corporations at the top of global supply chains exert significant control over actors lower in the chain, and thereby contribute to low labour standards in the companies they source goods from. The contractual structures in global supply chains make the multinational corporations that enjoy this control appear to be mere commercial buyers. Global supply chains make it difficult for states to effectively regulate labour standards and enforce them against the multinational corporations. Therefore a regulatory gap currently exists in which multinational corporations contribute to low labour standards within their global supply chains free from the controls of public labour regulation.

This paper examines attempts to fill the regulatory gap. It analyses attempts to regulate global supply chain labour standards through state level public law, private mechanisms (codes of conduct and global framework agreements), and international frameworks, and finds that these have failed to fill the regulatory gap. The paper proposes that global framework agreements that include binding arbitration clauses have the potential to hold multinational corporations legally responsible for contributing to low labour standards within global supply chains, therefore filling the regulatory gap. The Bangladesh Accord, the only existing agreement of this form, is shown to demonstrate this potential. The paper concludes that global framework agreements including binding arbitration clauses should be utilised, in combination with attempts to strengthen domestic law labour regulations and enforcement capabilities, to remedy the problem of low labour standards in global supply chains. The International Labour Organisation is shown to have potential to assist this approach.

Word count

The text of this paper (excluding abstract, table of contents, footnotes, and bibliography) comprises approximately 14,981 words.

Table of Abbreviations

<i>Abbreviation</i>	<i>Explanation</i>
ATCA	Alien Tort Claims Act (US)
COC	Code(s) of Conduct
GFA	Global Framework Agreement (<i>also referred to as International Framework Agreement</i>)
GSC	global supply chain
GUF	Global Union Federation
ILO	International Labour Organisation
MNC	multinational corporation (<i>used to refer to companies at the top of global supply chains – See Part II</i>)
SC	Steering Committee (<i>of the Bangladesh Accord</i>)
UNGP	United Nations Guiding Principles on Business and Human Rights

I Introduction

Globalisation has many benefits, but has also negative effects that the world is now challenged to recognise, ease and prevent. Globalisation has enabled the production of goods and services through fragmented global supply chains, providing benefits of affordable goods and increased employment across the world. But a recognised disadvantage of globalisation is a problem of low levels of labour standards for the workers at the bottom of global supply chains. This paper explores remedies for this problem.

Contractual structures within global supply chains, and enforcement gaps in state regulation, private corporate social responsibility and international frameworks, limit the ability to hold multinational corporations responsible for and prevent their contributions to low labour standards. However, including binding arbitration clauses within dispute resolution processes in the private approach of global framework agreements has potential to remedy this regulatory gap, hold multinational corporations responsible for labour standards within their global supply chains, and therefore ease and prevent the problem. These binding agreements provide a hard enforcement “stick” in contrast to other soft law focused “sunshine and carrots” mechanisms for improving global supply chain labour standards.

Part II of this paper explores the problem and causes of low labour standards in global supply chains, and states the methodology of this research paper. Part III illustrates a regulatory gap in state-level labour regulations in regards to multinational corporations. Part IV explores the private mechanisms that have been created in response to the problem through codes of conduct and global framework agreements, and the enforcement weaknesses of these. Part V introduces the Bangladesh Accord, a binding global framework agreement created after the Rana Plaza Disaster. It explores how the Accord illustrates the potential for binding arbitration clauses in global framework agreements to fill the regulatory gap at the multinational corporation level, and examines the benefits of arbitration for dispute resolution in these agreements. Part VI surveys the international mechanisms for implementing global supply chain labour standards and what normative implications their soft law and state focused nature may have for arbitration in global framework agreements. Part VII considers the creation of future Bangladesh Accord-style global framework agreements including binding arbitration, highlighting difficulties that may arise and specific aspects that should be included, and the ability of the International Labour Organisation to assist in pursuing this approach.

II A Problem: Globalisation, Global Supply Chains, Multinational Corporations, and Low Labour Standards

Globalisation, the weakening of international trade barriers, and technological developments have created a globalised and fragmented goods and services production market.¹ Goods and services are now produced through supply chains in which production is fragmented into elements and processes carried out by a variety of different suppliers and contractors. A supply chain encompasses all aspects of production from sourcing raw materials, production of component parts, manufacture of final products, sales and exports to global buyers and retailers, and the final sale to the consumer. It therefore encompasses a variety of actors including suppliers, manufacturers, logistics providers, corporate brands and buyers, and consumers. These constituent processes are organised by a network of contracts, thus creating a contractual supply chain.

Supply chains have become globalised in recent decades as each process may be outsourced to a variety of suppliers and contractors in many different countries.² In these global supply chains (GSCs) lower-value labour intensive production activities are outsourced to developing countries, while high-value capital intensive processes remain in developed countries.³ GSCs are now used in many production sectors including textiles, clothing and footwear, agriculture, electronics, and transport.⁴

The companies sitting at the top of GSCs (who sell goods to final consumers) appear to be mere purchasers of goods from suppliers and contractors through commercial contracts. However, due to their large financial capacity and contractual bargaining power, these companies exert control over all actors below them in the supply chain, even those they have no direct contract with. This control includes significant influence over labour standards within

¹ Bob Hepple “New Approaches to International Labour Regulation” (1997) 26 *Industrial Law Journal* 353 at 353; Jaakko Salminen “Contract-Boundary-Spanning Governance Mechanisms: Conceptualizing Fragmented and Globalized Production as Collectively Governed Entities” (2016) 23(2) *Indiana Journal of Global Legal Studies* 709 at 714.

² OECD “Promoting Sustainable Global Supply Chains: International Standards, Due Diligence and Grievance Mechanisms” (paper presented to 2nd Meeting of the G20 Employment Working Group, Hamburg, 15-17 February 2017) at 5.

³ ILO “Sustainable Supply Chains and Decent Work: Opportunities and Challenges for G20 Members” (paper presented to 2nd Meeting of the G20 Employment Working Group, Hamburg, 15-17 February 2017) at 2.

⁴ ILO, above n 3, at 1.

the GSC. The contractual boundaries between these companies and other actors in supply chains create difficulties in identifying the actors that have legal control over and responsibility for supply chain labour standards and failures to maintain standards. These companies at the top of GSCs are often multinational corporations with subsidiaries incorporated in different countries through which they influence contractors and suppliers lower down the supply chain. Corporate structures between entities within multinational corporations create legal boundaries, in addition to the contractual boundaries, that also obscure responsibility for supply chain labour standards.

Several terms can be used to describe these powerful companies that sit atop GSCs. The Bangladesh Accord, analysed in this paper, refers to ‘global brands’ to represent signatory companies that include apparel brands, retailers and importers who utilise and have acknowledged their positions of power within supply chain manufacture in the textile industry.⁵ However, for the purpose of this paper these companies will be referred to as multinational corporations (MNCs). A limitation in using this term must be noted as these actors do not always take the form of MNCs having a parent company and several subsidiaries incorporated in different countries. A single corporate entity incorporated in one country can exert and utilise control in GSCs that produce goods through multiple contracts that span geographical boundaries. Despite this limitation, the term MNC is used due to the frequency with which these powerful supply chain actors are truly multinational corporations, and to enable ease of discussion of the significant amount of literature referenced in this paper on supply chains and international labour standards that also refer to these actors as MNCs.

The development of GSC production has several benefits, mainly as a source of employment in developing countries, especially for women and in the apparel sector. The International Labour Organisation (ILO) estimates that GSC-related jobs increased by 157 million or 53 per cent between 1995 and 2013.⁶ However, the benefits of employment have been accompanied by significantly lower quality labour standards for workers towards the bottom of the chain.⁷ Though not solely attributable to GSC development, various forms of human rights and labour abuses including forced labour, child labour, violence and harassment, and unsafe working

⁵ “Accord on Fire and Building Safety in Bangladesh” (13 May 2013) <http://bangladeshaccord.org/wp-content/uploads/the_accord.pdf>

⁶ ILO, above n 3, at 3.

⁷ OECD, above n 2, at 4-5; ILO, above n 3, at 3.

conditions have increased.⁸ These low labour standards are the result of several compounding factors stemming from both the MNCs at the top of the chain and the host states to which production is outsourced.

A Host State Contributions to Low Labour Standards in Global Supply Chains

The host states in which the lower end of GSCs operate contribute to low labour standards within the chain by maintaining low levels of labour regulation in their domestic laws, which attract MNCs to take advantage of them.⁹ Even if states sufficiently protect labour standards in domestic legislation, these developing countries often lack the state capacity and resources to effectively enforce them, or choose not to enforce them to maintain MNC investment interests.¹⁰ Furthermore, many host states engage in a “race to the bottom” whereby they reduce labour regulations to remain competitive with other states and attract MNCs to expand GSC production there.¹¹

B Multinational Corporation Contributions to Low Labour Standards in Global Supply Chains

MNCs contribute to lower GSC labour standards by engaging in “social dumping” whereby they shift production processes to states with lower labour standards and weaker enforcement regimes to reduce production costs and increase profit margins.¹² MNCs place economic pressure on suppliers and contractors to meet certain quality levels, costs, and delivery times which leads the actors lower in the supply chain to reduce labour standards in order to meet demands.¹³ Suppliers are incentivised to maintain low labour standards to meet these demands by the threat of MNCs shifting production to other suppliers with lower costs. The low labour standards within GSCs therefore frequently stem from the trade practices and demands of

⁸ OECD, above n 2, at 6.

⁹ ILO, above n 3, at 7.

¹⁰ ILO, above n 3, at 7.

¹¹ Hepple, above n 1, at 355.

¹² Harry C. Katz, T. A. Kochan, and A. J. S. Colvin “Global Pressures: Multinational Corporations, International Unionism and NGOs”, Chapter in *Labour Relations in a Globalizing World* (ILR Press, New York, 2015); Hepple, above n 1, at 355; Salminen, above n 1, at 714.

¹³ Jenny Holdcroft and Adam Lee “Workers’ rights in global supply chains: holding companies accountable” (1 June 2016) IndustriAll Global Union <<http://www.industriall-union.org/workers-rights-in-global-supply-chains-holding-companies-accountable>>; Mark Anner “Stopping the Race to the Bottom: Challenges for Workers’ Rights in Supply Chains in Asia” (2015) Friedrich-Ebert-Stiftung <<http://library.fes.de/pdf-files/iez/12321.pdf>> at 7; ILO, above n 3, at 3.

MNCs at the top of the supply chain, even though they are not the direct employers of the suffering workers.¹⁴

C Research Paper Methodology

Given that both host states and MNCs contribute to low labour standards in GSCs, two main approaches can be taken to remedy the problem. Firstly, a public law approach on the state-level aiming to increase labour standards within host state domestic legislation and strengthen state enforcement capacity of these laws. Attempted mechanisms at the state level have included transnational regulation, social clauses in Free Trade Agreements, and international standard setting and monitoring through organisations such as the ILO.

Secondly, an approach at the MNC-level that recognises MNCs as a root cause of low labour standards in GSCs and aims to alter their practices and hold them directly accountable for their contributions to the problem. Attempted mechanisms in this approach have included private Codes of Conduct (COC) and Global Framework Agreements (GFAs), and voluntary non-binding international frameworks.

This paper views both state-level and MNC-level approaches to remedying low labour standards in GSCs as important and complementary, but currently facing weaknesses in enforcement mechanisms. State-level attempts to increase domestic regulation and state enforcement capacity are important for the long term advancement of developing states. Higher labour standards in domestic law will eventually filter throughout production sectors to prevent MNCs from exploiting low standards. However, given the prevalence of social dumping it can be assumed that as long as a state with lower labour standards exists, MNCs will shift production processes there to take advantage and reduce costs. These attempts to remedy the problem at the state-level would need to be universally effective to prevent the MNC contribution to the problem. Therefore, while host state public labour regulation and capacity building are an important goal in achieving universally decent labour standard, we should equally focus on MNCs at the same time to target both causes of the problem, rather than waiting for public law to eventually impact these private actors.

¹⁴ Holdcroft and Lee, above n 13, at 13.

While MNC contributions to and responsibility for low GSC labour standards are garnering more attention, this paper will demonstrate a lack of effective enforcement and accountability mechanisms in state, private and international initiatives targeting MNCs that requires a solution. Therefore, a full review of the public law state-level approaches is beyond the scope and not the focus of this research. Instead, this paper demonstrates a current regulatory gap in MNC-level enforcement of labour standards that allows MNCs to operate GSCs largely free from responsibility. It then illustrates how the recent Bangladesh Accord, a GFA including a binding arbitration clause, and similarly structured agreements have the potential to close this gap in MNC accountability and raise labour standards within GSCs.

III The State Regulatory Gap at the Multinational Corporation Level

The proliferation of GSCs by MNCs has created difficulties for both host states in which GSCs are operated, and the home states of MNCs, in regulating labour standards and holding MNCs accountable for their contributions to the problem of low labour standards. These difficulties have created a state regulatory gap in which MNCs operate GSCs free from the enforcement of public labour regulations.

A Host State Regulatory Gap

1 Practical difficulties

Host states in which MNCs outsource production processes to suppliers and contractors are ineffective in enforcing adequate labour standards against MNCs for both practical and jurisdictional reasons. As noted, many host states are politically unwilling to legislate strong domestic labour protections due to economic incentives to attract MNCs through lower labour standards and production costs, a phenomena referred to as the “race to the bottom”. This deregulatory effect appears to occur despite attempts by the ILO to internationally harmonise labour laws through the ratification of Conventions on universal labour standards. This may be because of an apparent lack of strong ILO enforcement mechanisms and consequences for state non-compliance, as will be illustrated later.¹⁵ Furthermore, even if host states enshrine decent labour standards in their domestic legislation, many states lack the capacity, resources, or

¹⁵ Ian H. Eliasoph “A Missing Link: International Arbitration and the Ability of Private Actors to Enforce Human Rights Norms” (2004) 10 *New England Journal of International and Comparative Law* 83 at 92.

willingness to effectively enforce them throughout supply chains producers in their territory.¹⁶ Thus practical and political issues largely limit the ability of host states to enforce decent labour standards upon MNCs.

2 *Jurisdictional difficulties*

Jurisdictional limitations also affect host state abilities to enforce labour standards against MNCs. When MNCs use GSCs to manufacture and source goods from other countries the only legal link to the suppliers and sub-contractors in the host states is the commercial contract. The MNC often has no corporate presence, carries out no activities and has no employees in the host state, despite maintaining control and influence over the companies they contract with. Corporate veils have been pierced in some circumstances to impose liability on MNC parent companies for the acts and omission of subsidiaries, but the contractual boundaries in GSCs largely insulate MNCs from corporate liability and duties of care for acts or omissions of third party suppliers and contractors. The host state therefore lacks jurisdiction against the MNC for breaches. Furthermore, even if host states could pierce contractual boundaries in GSCs to target MNCs, they may need to rely on enforcement through foreign courts which would be prevented by international jurisdiction rules. The law of international jurisdiction prevents states from enforcing their domestic public law in foreign state courts *ratione materiae*, as it would constitute the exercise of host state sovereign authority within the foreign state, violating the foreign state's territorial sovereignty.¹⁷ States may seek enforcement in foreign state courts if the right pursued is one that could equally belong to an individual, but the public regulation of labour is an inherently sovereign act such that the foreign court lacks jurisdiction to determine or enforce claims for a breach of public labour law in a host state by a foreign MNC. Thus host states face significant jurisdictional barriers in enforcing domestic labour legislation against MNCs at the top of GSCs.

¹⁶ Anna Louise Vytopil *Contractual Control in the Supply Chain: On Corporate Social Responsibility, Codes of Conduct, Contracts and (Avoiding) Liability* (Eleven International Publishing, The Hague, 2015) at 27.

¹⁷ Campbell McLachlan "*The Claimant State*", Chapter in *Foreign Relations Law* (Cambridge University Press, Cambridge, 2014).

B Home State Regulatory Gap

1 Domestic legislation

The home states of MNCs likewise face difficulties in enforcing GSC labour standards against MNCs. Home states do not generally have legislative control over or the power to sue their domicile MNCs for actions in operating overseas supply chains.¹⁸ Some Western states have moved to legislatively regulate or provide guidelines for MNCs’ corporate social responsibility in respect of their GSCs. For example, the United Kingdom’s Modern Slavery Act 2015 or California’s Transparency in Supply Chains Act. However, most legislation that has been implemented in home states is based upon transparency and due diligence requirements for MNCs, rather than a clear duty of care or legal responsibility within the GSC.¹⁹ Furthermore, such extraterritorial regulation encounters difficulties regarding conflict of jurisdiction and laws. Widespread political hesitancy and unwillingness in home states to extraterritorially legislate the legal responsibility of domicile MNCs for their GSCs also largely undermines the viability of this approach.²⁰

2 Transnational tort claims

Two key forms of transnational tort claims by victims against MNCs for negligence may potentially hold MNCs liable for GSC labour violations in home state courts. Firstly, in the United States the Alien Tort Claims Act (ATCA) enables foreigners to claim against individuals or companies located in the United States (regardless of whether they have citizenship) for violations of the law of Nations or a treaty signed by the United States, whether or not the abuse occurred in American territory or elsewhere.²¹ While the Act was largely unused since its creation in 1789, since the 1990s it has been used to sue MNCs in the United States for human rights violations in other territories. Secondly, transnational tort claims for

¹⁸ Vytopil, above n 16, at 27.

¹⁹ Vytopil, above n 16, at 268-269.

²⁰ Surya Deva “Acting Extraterritorially to Tame Multinational Corporations for Human Rights Violations: Who Should ‘Bell the Cat?’” (2004) 5 *Melbourne Journal of International Law* 37 at 50; Vytopil, above n 16, at 34 and 41.

²¹ Jan Wouters, Leen De Smet, and Cedric Ryngaert “Tort Claims Against Multinational Companies for Foreign Human Rights Violations Committed Abroad: Lessons from the Alien Tort Claims Act?” (November 2003) Institute for International Law K.U. Leuven < <https://www.law.kuleuven.be/iir/nl/onderzoek/working-papers/WP46e.pdf>>; Paul Kenneth Kinyua “The Accountability of Multinational Corporations for Human Rights Violations: A Critical Analysis of Select Mechanisms and Their Potential to Protect Economic, Social and Cultural Rights in Developing Countries” (3 September 2009) Social Science Research Network <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1599842> at 179.

negligence against parent companies of MNCs operating subsidiaries overseas have also been used in the United Kingdom, Canada, and Australia.

These claims show potential to hold MNCs liable for human rights violations within their GSCs, but also suffer various difficulties, making success unlikely. Firstly, jurisdictional challenges of *forum non conveniens* (that host state courts are a more appropriate forum for the dispute) have arisen in both ATCA and UK cases, delaying proceedings for years. In the ACTA case *Re Union Carbide Corp. Gas Plant Disaster at Bhopal*, concerning a gas leak from a chemical plant in India owned by an Indian subsidiary of New York corporation Union Carbide, the New York court refused to hear the case based on *forum non conveniens* and required the case to be heard in Indian courts, though the case was settled by a compensation payment by the defendant.²² In the UK, *forum non conveniens* delayed several cases against MNCs for many years until *Connelly v RTZ Corporation* established that a claimant could proceed with a claim despite the host state courts being a more appropriate forum if substantial justice would be denied due to inability to pay for lawyers and experts in that forum.²³ *Connelly* was cited in *Lubbe v Cape plc* which concerned the liability of a UK parent company for employee injuries in asbestos manufacturing for a South African subsidiary. The UK House of Lords lifted a stay granted on the basis of *forum non conveniens* and allowed the case to proceed in English courts.²⁴ Though South Africa was a more appropriate forum, hearing the matter there would amount to a denial of justice as the plaintiff would have had no means for obtaining legal representation and expert evidence adequate for the magnitude and complexity of the factual and legal issues.²⁵ Whilst the *Connelly* approach was used to overcome the jurisdictional challenge in several other UK cases, the approach has not been accepted in other jurisdictions such as Canada or Australia thus the principle may prevent success in home states.²⁶ *Forum non conveniens* is not an issue in European Union cases as the law stipulates that defendant companies should be sued in their domicile states.²⁷

²² *In Re Union Carbide Corp. Gas Plant Disaster at Bhopal, India* 634 F Supp 842 (SD NY, 1986).

²³ Richard Meeran “Tort Litigation against Multinational Corporations for Violation of Human Rights: An Overview of the Position Outside the United States” (2011) 3(1) City University of Hong Kong Law Review 1 at 11.

²⁴ *Lubbe v Cape plc* [2000] 1 WLR 1545 (HL).

²⁵ *Lubbe v Cape*, above n 24, at [26].

²⁶ Meeran, above n 23, at 13.

²⁷ Meeran, above n 23, at 13.

The need to establish a duty of care upon the MNC also creates difficulties in transnational tort claims; this normally requires showing that the company had assumed responsibility over functions, had actual control over the events which lead to the injury, or had taken on a direct duty to the subsidiary’s employees.²⁸ The ability to establish the degree of control by the MNC in the GSC required for a duty of care will depend upon the facts of each case and may create difficulties in succeeding.

Furthermore, the applicable substantive law may create issues. ATCA claims require a breach of the law of nations or a treaty to which the United States is party. This has been interpreted to require a breach of international law rules that are specific, universal, and obligatory, and has included slavery and crimes against humanity.²⁹ It is unclear whether this includes labour standards violations that do not constitute grave violations of basic human rights. Depending on the particular matrix of facts, whether the home or host state law applies in other transnational tort claims may also create issues regarding limitation periods, barred claims, or the calculation of damages.³⁰ Costs may also be a significant impediment on transnational tort claims as these types of cases tend to be complex, lengthy, and strongly opposed by powerful and wealthy MNCs, which makes it difficult to find lawyers to represent claimants due to the sizable financial risk of pursuing such cases.³¹

Significant retrenchment in the coverage of the ATCA after the 2013 Supreme Court case *Kiobel v Royal Dutch Petroleum Co* should also be noted. This case concerned a claim by Nigerian citizens residing in the United States against Dutch and British petroleum companies and a Nigerian incorporated subsidiary for aiding and abetting the Nigerian Government in committing rape, murder, torture, destruction of property and crimes against humanity to suppress lawful protests opposing oil exploration.³² The Supreme Court initially granted certiorari on the issue of corporate tort liability under international law and the ATCA but the subject was changed to extraterritoriality, such that ATCA claims against corporate defendants

²⁸ Peter Muchlinski “The Changing Face of Transnational Business Governance: Private Corporate Law Liability and Accountability of Transnational Groups in a Post-Financial Crisis World” (2011) 18(2) *Indiana Journal of Global Legal Studies* 665 at 685; Meeran, above n 23, at 9.

²⁹ Wouters, De Smet, and Ryngaert, above n 21, at 26.

³⁰ Meeran, above n 23, at 15 and 17.

³¹ Meeran, above n 23, at 18.

³² *Kiobel v Royal Dutch Petroleum Co*. 569 US 108 (2013) at 2.

remain possible.³³ The Court held that the presumption against extraterritoriality applied and meant that federal laws would not apply outside of the United States unless there was clear authorisation from congress.³⁴ It was found that the text, history and purpose of the ATCA did not indicate intended extraterritorial effect such that the presumption will only be displaced and the Act applicable where the claims touch and concern United States territory with sufficient force.³⁵ Mere corporate presence in the United States would not suffice to displace the presumption.³⁶ The effect of this decision is to bar ‘f (foreign) cubed’ cases in which the three relevant elements of citizenship of the defendant and plaintiff and situs of the conduct are all foreign; a foreign plaintiff can no longer sue a foreign defendant for conduct that occurred outside United States territory. The case has been seen by some international human rights proponents as a death sentence for the ACTA.³⁷ However this reaction may be an overstatement; in reality the scope of the Act has just been significantly narrowed. F squared claims in which one of the three elements is substantially connected with United States territory, and liability for corporate defendants, remain possible under the ACTA.³⁸

Currently no transnational tort claim has established the direct responsibility of MNCs for human rights violations as all cases have been settled before trial or struck out for procedural reasons.³⁹ Thus there is yet to be a final binding determination on the liability of MNCs for their GSCs and there are currently only procedural precedents for such claims.

The difficulty of utilising transnational tort claims to hold MNCs liable for GSC labour violations is witnessed in relation to the Rana Plaza disaster (addressed later). Two class action tort claims in Canada and the United States on behalf of injured survivors and family members of victims of the disaster against companies who sourced products from the Rana Plaza factory have recently been dismissed. The United States case against J.C. Penney, The Children’s Place

³³ *Kiobel v Royal Dutch Petroleum Co.*, above n 32, at 3; Matteo M. Winkler “What Remains of the Alien Tort Statute after *Kiobel*” (2013) 39 North Carolina Journal of International Law and Commercial Regulation 171 at 183 and 188.

³⁴ *Kiobel v Royal Dutch Petroleum Co.*, above n 32, at 6.

³⁵ *Kiobel v Royal Dutch Petroleum Co.*, above n 32, at 13-14.

³⁶ *Kiobel v Royal Dutch Petroleum Co.*, above n 32, at 14.

³⁷ Elizabeth Holland “What Might Liability under the ATS Look Like Post-*Kiobel*?: The Example of Private Contractors” (17 June 2013) Corporate Social Responsibility and the Law <<https://www.csrandthelaw.com/2013/06/17/what-might-liability-under-the-ats-look-like-post-kiobel-the-example-of-private-contractors/>>; Winkler, above n 33, at 172.

³⁸ Winkler, above n 33, at 187-188.

³⁹ Kinyua, above n 21, at 182.

and Wal-Mart for negligence and wrongful death was dismissed as the Bangladeshi Limitations Act was held to apply such that the one year time limit meant the 2015 claim was time-barred.⁴⁰ Furthermore, there was no duty owed under Delaware law by the United States companies to the Bangladeshi workers; the defendants were not the direct employers and there was no special relationship, peculiar risk, sanctioned illegal conduct, or exception to the general rule protecting independent contractors from liability, as required for a duty of care.⁴¹

In the Canadian case against major retailer Loblaws, the Ontario court also found that the Bangladeshi Limitations Act applied and meant the claims were time-barred.⁴² There was held to be no duty of care to the Bangladeshi workers, and no viable cause of action in tort or breach of fiduciary duty, under either Bangladesh or Ontario law.⁴³ The Judge commented that “it certainly is not plain and obvious that a purchaser of goods does or should have a legal duty of care to the employees of the manufacturer of those goods. Loblaws may have had an ethical obligation to the employees, but to quote Lord Atkin in *Donoghue v. Stephenson*, “acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief.””⁴⁴

Though the potential for success is not entirely ruled out, it is clear that transnational tort claims are extremely difficult to pursue and are unlikely to succeed as a means of holding MNCs liable in home state courts for labour standards abuses within their GSC.

C Overall State Regulatory Gap

MNCs therefore currently operate GSCs in a state-level regulatory gap free from the effective enforcement of public law and international labour standards by both host and home states. In light of the role that MNCs play in creating and maintaining low labour standards in GSCs, this gap is of great concern and highlights the need to ensure greater MNC responsibility.

⁴⁰ *Abdur Rahaman v J.C. Penney Corp.* (Superior Court Del, CA No. N15C-07-174, 4 May 2016) slip op 27.

⁴¹ *Abdur Rahaman v J.C. Penney Corp.*, above n 40, slip op 28.

⁴² *Das v George Weston Limited* 2017 ONSC 4129 at [5].

⁴³ *Das v George Weston Limited*, above n 42, at [5].

⁴⁴ *Das v George Weston Limited*, above n 42, at [524].

IV Private Multinational Corporation Level Mechanisms and Enforcement Weaknesses

A new generation of private corporate social responsibility mechanisms to ensure MNC responsibility for labour standards within GSCs have resulted from recognition of MNCs' role in creating low labour standards, and the state level regulatory gap that impedes the ability of both host and home states to hold MNCs directly responsible and remedy the problem. While state-level efforts targeting domestic regulation and enforcement capacity have the potential to increase labour standards and indirect regulation of MNC practices in GSCs, these private mechanisms directly target MNCs. These private mechanisms have taken the form of codes of conduct (COC) established by MNCs, and GFAs between MNCs and Global Unions Federations (GUFs). The common form of both of these private approaches at the MNC level suffer a lack of effective enforcement mechanisms that undermine their ability to effectively close the regulatory gap. However, it will also be illustrated that the addition of binding arbitration clauses to GFAs may remedy this enforcement deficit, and have great potential to act as a gap filling mechanism in the regulation of GSC labour standards at the MNC level.

A Private Codes of Conduct

Since the 1980s many MNCs have voluntarily created private, unilateral, self-regulatory codes of conduct (COC) to maintain labour standards within the individual MNC's GSC.⁴⁵ There are no legislative requirements for COC content so the substantive labour rights protected by them are widely varied and chosen by the MNC actors to be held accountable to them, creating legitimacy concerns.⁴⁶ Many private COC do not enshrine core ILO labour standards that are internationally accepted minimum standards. The ILO's core labour standards were identified in the 1998 Declaration on Fundamental Principles and Rights at Work. There are four core labour standards enshrined in eight ILO Conventions: freedom of association and effective recognition of the right to collective bargaining (Convention 87 and 98), elimination of all forms of forced or compulsory labour (Convention 29 and 105), effective abolition of child labour (Convention 138 and 182), and elimination of discrimination in respect of employment

⁴⁵ Vytopil, above n 16, at 30.

⁴⁶ Barbara J. Fick "Corporate Social Responsibility for Enforcement of Labour Rights: Are There More Effective Alternatives" (2014) 4 *Global Business Law Review* 1 at 4; Richard M. Locke, Ben A. Rissing and Timea Pal "Complements or Substitutes? Private Codes, State Regulation and the Enforcement of Labour Standards in Global Supply Chains" (2013) 51(3) *British Journal of Industrial Relations* 519 at 523; Owen E. Hernstadt "Corporate Social Responsibility, International Framework Agreements and Changing Corporate Behaviour in the Global Workplace" (2013) 3(2) *Labour & Employment Law Forum* 263 at 264.

and occupation (Convention 100 and 111).⁴⁷ The 1998 Declaration recognises these core standards as universally applicable to all people in all states and requires all ILO member states to respect, promote, and realise the principles whether or not they have ratified the relevant Conventions.⁴⁸

Many private COC suffer a notable absence of protections for the core standards of freedom of association and collective bargaining rights, which undermines the role of unions in representing GSC workers and ensuring compliance with labour standards outside of momentary inspections.⁴⁹ A 2012 study of 600 publicly traded companies in footwear, apparel, food and beverage, retail, and technology hardware sectors revealed that only 38 per cent had COCs referring to core ILO standards including freedom of association and collective bargaining.⁵⁰

The main weakness of private COC in ensuring decent labour standards at the MNC level appears to be a lack of effective monitoring and enforcement mechanisms. Compliance monitoring in private MNC schemes is made difficult by large numbers of suppliers within some GSCs, and overlaps in suppliers between various supply chains.⁵¹ Furthermore, compliance monitoring may provide a snapshot of one point in time when standards may be significantly different even the next day. Both self-monitoring and external auditing models for COC compliance suffer credibility and transparency issues. Many audits provide aggregate data rather than identifying violations by specific suppliers.⁵² Industrial factory disasters in Pakistan and Bangladesh occurred despite the factories being audited and certified shortly prior.⁵³ Lastly, there appears to be a lack of effective consequences for violations of COC to ensure that MNC practices change. The effectiveness of reputational mechanisms is hard to measure but appears weak and influenced by various factors; businesses that sell directly to consumers and companies with brand names appear more susceptible to reputational damage.⁵⁴ It is also very rare for MNCs to terminate contracts with suppliers for non-

⁴⁷ ILO ‘ILO Declaration on Fundamental Principles and Rights at Work’ (18 June 1998), art 2.

⁴⁸ ILO, above n 47, art 2.

⁴⁹ Fick, above n 46, at 3.

⁵⁰ Fick, above n 46, at 3.

⁵¹ Fick, above n 46, at 4.

⁵² Fick, above n 46, at 4.

⁵³ Fick, above n 46, at 5.

⁵⁴ Vytopil, above n 16, at 30.

compliance with the COC so there appears to be a lack of real consequences stemming from the framework.⁵⁵

Third party claims against MNCs in home states for COC violations are theoretically possible but appear unlikely to succeed. Victims of supply chain labour violations may claim for breach of contract as a third-party beneficiary of the COC contract between MNC and suppliers.⁵⁶ Alternatively, consumers could claim against MNCs for false advertising if a COC advertised compliance with certain standards that were breached. A study of England, the United States and the Netherlands found that case law on these types of claims is rare and success appears difficult; no positive legal obligations on MNCs have resulted from these types of actions.⁵⁷ Most COC instruments established in these three jurisdictions did not include clear or strong obligations on the MNCs that would give rise to legal claims if they were violated. Many COC are carefully worded to negate any legal obligations or liability for the MNC in respect of violations in the GSC.⁵⁸ MNCs therefore appear unlikely to be legally liable for COC violations in the supply chain unless they accept obligations beyond those normally expected in buyer-supplier relationships and current COC practices.⁵⁹

Thus while private COC are a positive indication of MNCs acknowledging their influence over and responsibility for labour standards within their GSC, these mechanisms suffer various weaknesses, especially in enforcement, and have proven largely unsuccessful in overcoming the MNC-level regulatory gap in GSC labour standards.

B Global Framework Agreements

Global Framework Agreements (GFAs) have emerged in recent decades as alternative private mechanisms for regulating GSC labour standards at the MNC level.⁶⁰ GFAs are private, multilateral governance agreements entered through bilateral negotiation between MNCs and Global Union Federations (GUFs).⁶¹ These agreements specify the responsibility of signatory

⁵⁵ Vytopil, above n 16, at 7.

⁵⁶ Vytopil, above n 16, at 141.

⁵⁷ Vytopil, above n 16, at 235 and 267.

⁵⁸ Vytopil, above n 16, at 235 and 266.

⁵⁹ Vytopil, above n 16, at 267.

⁶⁰ Felix Hadwiger *Contracting International Employee Participation: Global Framework Agreements* (Springer, Cham, 2018) at 1.

⁶¹ Fick, above n 46, at 12.

MNCs to maintain certain labour standards throughout their GSCs.⁶² They present a complementary bottom-up approach to the international regulation of labour standards which has traditionally been the exclusive domain of states and international organisations.

GFAs largely fill the two gaps in GSC labour regulation analysed above. Firstly, they attempt to overcome the public law state-level regulatory gap in which MNCs operate due to the inability of both host and home states to effectively regulate.⁶³ Secondly, they fill credibility gaps in self-regulating, unilateral private COC through the inclusion of GUFs.⁶⁴

The common substantive contents of GFAs is developing over time with provisions becoming more detailed and agreements addressing additional and more complex issues.⁶⁵ Though there is no precise definition of GFAs or general template for their content, there is general consensus that the agreements should include the four core ILO standards identified in the 1998 Declaration on Fundamental Principles and Rights at Work as a minimum.⁶⁶ Hadwiger’s study of the 115 GFAs concluded or renewed between 2009 and 2016 across 24 countries indicated that agreements generally include the core ILO standards.⁶⁷ The inclusion of GUFs in bargaining and agreements ensures that GFAs include and respect core freedom of association and collective bargaining rights which strengthens the role of unions within GSCs, unlike most private unilateral COC.⁶⁸ In addition to core standards, many GFAs now include provisions concerning health and safety, wages and working hours.⁶⁹

Hadwiger’s analysis also highlighted a trend towards explicit inclusion of other pre-existing international rights instruments such as the UN Universal Declaration on Human Rights, the

⁶² Felix Hadwiger “Global framework agreements: Achieving decent work in global supply chains?” (2015) 7 *International Journal of Labour Research* 75 at 90.

⁶³ Hadwiger, above n 60, at 20.

⁶⁴ Hadwiger, above n 60, at 19.

⁶⁵ Hadwiger, above n 62, at 7.

⁶⁶ Ian Graham “Global labour agreements: A framework for rights” *ILO World of Work* (Geneva, December 2002) at 7; IndustriALL “Global Framework Agreements and Trade Union Networks to promote workers’ rights in the Global Supply Chain” (presented to Regional Seminar for Strengthening Governance in Global Supply Chains by Promoting Global Framework Agreements and Other Instruments, Jakarta, 29-31 May 2017);

⁶⁷ Hadwiger, above n 60, at 22.

⁶⁸ Fick, above n 46, at 12 and 25; Hadwiger, above n 62, at 6.

⁶⁹ International Labour Office Sectoral Policies Department (SECTOR) *International Framework Agreements in the food retail, garment and chemical sectors: Lessons learned from three case studies* (International Labour Office, Geneva, 2018) at 36; Fick, above n 46, at 11; Hadwiger, above n 62, at 16.

UN Global Compact, or the OECD Guidelines for Multinational Enterprises.⁷⁰ This indicates increasing willingness to formally recognise fundamental international labour and human rights standards amongst MNCs. GFAs are a form of private ordering aiming to transfer international standards that primarily address states to apply directly to the MNC. Hadwiger also noted GFAs increasingly ensure global scope that applies to all GSC operations, subsidiaries and suppliers; a majority (69 per cent) apply to suppliers and contractors within the GSC, and about 80 per cent now include a reference to the GSC.⁷¹

The enforceability of GFAs is an issue of concern regarding their effectiveness in implementing GSC labour standards at the MNC level and ensuring GFAs do not become ‘window-dressing’ as many COC have. The extent to which GFAs are legally enforceable lies with the bargaining partners. Many GFAs state that neither party considers the agreement legally binding or derive any legally enforceable rights from it.⁷² The judicial enforceability of the agreements in specific domestic jurisdictions is unclear and there are no reported cases of litigation regarding GFAs.⁷³ Discussion of potential judicial enforcement of these agreements is seen to be of little practical relevance given the parties simply choose not to enforce GFAs in court.⁷⁴ Instead the wording of most GFAs indicates that they are intended to be ‘soft’ arrangements and appears to rule out judicial enforcement by providing for private, international, cooperative enforcement and dispute resolution mechanisms.⁷⁵ The motivation of this dispute resolution approach is largely to avoid domestic adversarial dispute resolution and to make the agreements more flexible.⁷⁶

In anticipation of disputes regarding the interpretation or implementation of the agreement, most GFAs address dispute resolution mechanisms to some extent.⁷⁷ Hadwiger’s analysis of GFAs illustrated that over 90 per cent addressed dispute resolution in some way, though there was significant variety amongst agreements with some simply indicating willingness to cooperatively resolve disputes while others provide specific dispute resolution systems.⁷⁸ While the overall desire for enforcement is a hierarchical system beginning with local

⁷⁰ Hadwiger, above n 60, at 44.

⁷¹ Hadwiger, above n 60, at 54; Fick, above n 46, at 11.

⁷² Hadwiger, above n 60, at 67.

⁷³ Fick, above n 46, at 12; Hadwiger, above n 60, at 412.

⁷⁴ Hadwiger, above n 60, at 2.

⁷⁵ Fick, above n 46, at 12.

⁷⁶ Hadwiger, above n 60, at 5.

⁷⁷ Hadwiger, above n 60, at 58.

⁷⁸ Hadwiger, above n 60, at 55.

workplace management, then national level representatives, some disputes may require resolution at the international level between MNCs and GUFs. At the international level the parties’ desire for cooperative enforcement is often reflected in dispute resolution provisions including non-judicial private enforcement bodies. Hadwiger found that eighty-five per cent of GFAs in the sample provided for ongoing forums to meet annually and hear appeals of disputes that cannot be resolved at workplace or national levels.⁷⁹ If disputes arise and are not resolved through these private mechanisms it tends to result in reputational sanctions, such as publicity campaigns, or sanctioning by ceasing cooperation with the MNC.⁸⁰ However, in light of the increasing complexity of these agreements and evidence of lacking implementation throughout GSCs, there is a need for robust dispute resolution mechanisms to resolve disputes and enforce the agreement beyond these reputational, social dialogue and sanctioning methods and ensure the agreement’s value is not reduced.⁸¹

This need is recognised in a growing second generation of GFAs that reference alternative dispute resolution and provide stronger implementation, monitoring, and dispute resolution mechanisms beyond private internal enforcement bodies.⁸² Hadwiger finds that roughly 10 per cent of GFAs now include a reference to mediation or arbitration procedures.⁸³ Alternative dispute resolution, particularly arbitration, appears to have great potential to provide stronger implementation of GFAs and thus GSC labour standards at the MNC level, while maintaining the desired cooperative approach. However, most GFAs continue to lack alternative dispute resolution provisions, those that do include mediation or arbitration often lack sufficient procedural provisions within the GFA, and there is no external procedural alternative dispute resolution framework for resolving GFA issues to strengthen these mechanisms.⁸⁴ Furthermore, scholarly discussion of alternative dispute resolution in GFAs is limited.⁸⁵

Therefore GFAs without strong dispute resolution clauses and mechanisms appear to be of limited benefit in increasing GSC labour standard responsibility at the MNC-level as they lack effective enforcement mechanisms. Inclusion of mediation and arbitration clauses illustrate the

⁷⁹ Hadwiger, above n 60, at 411.

⁸⁰ Hadwiger, above n 60, at 411.

⁸¹ Hernstadt, above n 46, at 269 and 277; Fick, above n 46, at 14; Hadwiger, above n 60, at 2 and 411.

⁸² Hadwiger, above n 62, at 6 and 56; Fick, above n 46, at 13; Hadwiger, above n 60, at 409.

⁸³ Hadwiger, above n 60, at 409.

⁸⁴ Hadwiger, above n 60, at 421.

⁸⁵ Hadwiger, above n 60, at 409.

potential to overcome the enforcement weaknesses of GFAs, however difficulties in ensuring their procedures operate effectively remain. The Bangladesh Accord, a GFA with a binding arbitration clause, demonstrates the potential for GFAs to strengthen their enforcement through external alternative dispute resolution, and thereby overcome the governance gap in enforcing GSC labour standards against MNC at the state-level and through past private COC and GFAs.

V Global Framework Agreements Including Binding Arbitration Clauses

A The Rana Plaza Disaster

On April 24 2013 the Rana Plaza, an eight story building in Bangladesh, housing five garment factories, collapsed killing at least 1,129 and injuring more than 3,000 workers.⁸⁶ The Rana Plaza disaster was the most deadly industrial disasters to occur in the global garment industry and one of the worst in the history of workplace disasters generally.⁸⁷ The disaster followed several previous mass casualties in fires in similar garment factories in Bangladesh and Pakistan. Five months prior to the Rana Plaza Disaster at least 112 workers were killed in a fire in the Tazreen Fashions garment factory in Bangladesh, caused by an alleged electrical short circuit.⁸⁸ Similar garment factory fires killed and injured hundreds in Pakistan in 2012 as well.⁸⁹

The Rana Plaza collapse reportedly occurred due to heavy machinery being operated on a top floor that was built without permission, the entire factory having been built on unstable ground.⁹⁰ The collapse occurred despite years of private corporate social responsibility auditing. An audit of the factory concerned just months prior indicated no issues.⁹¹ The collapse also exposed egregious deficits in Bangladeshi state labour regulation as, despite ratifying

⁸⁶ Mark Anner, Jennifer Bair and Jeremy Blasi “Toward Joint Liability in Global Supply Chains: Addressing the Root Causes of Labour Violations in International Subcontracting Networks” (2013) 35 *Comparative Labour Law and Policy Journal* 1 at 1.

⁸⁷ Anner, Bair and Blasi, above n 86, at 1.

⁸⁸ ILO “The Rana Plaza Accident and its aftermath” (2018) <https://www.ilo.org/global/topics/geip/WCMS_614394/lang--en/index.htm>.

⁸⁹ ILO “Victims of 2012 Ali Enterprises factory fire receive additional compensation” (20 May 2013) <http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_629839/lang--en/index.htm>.

⁹⁰ Judith Levine and Kashpee Wahid “Business and Human Rights: A “New Frontier” for International Arbitration?” (2017) 5(2) *The ACICA Review* 35 at 38.

⁹¹ Sadequl Islam “Labour Standards in the Bangladesh Garment Industry: A Political Economy Perspective” (2015) 1 *Asian Studies International Journal* 1 at 2; Holdcroft and Lee, above n 13.

seven of the eight core ILO Conventions, the state lacked the political will, technical capacity, and resources to effectively enforce building codes and labour standards that could have prevented the disaster.⁹² State protection of collective bargaining and freedom of association rights remain weak; union formation was prohibited in the garment sector until 2013 and remains prohibited in export-processing zones.⁹³ Government corruption also threatens garment sector labour standards as 10 per cent of parliamentarians have garment sector investments, which has been shown in transparency reports to influence sector regulation.⁹⁴ The disaster therefore illustrated the regulatory gap affecting GSC labour standards created by the failure of public state law and private MNC level COC. It emphasised the importance of and need to ensure MNC responsibility for their role in maintaining sufficient labour standards within their GSCs.

B The Bangladesh Accord

With the ILO’s assistance, and attempting to remedy the regulatory gap that enabled the disaster to occur, in May 2013 a five-year binding GFA was entered between two GUFs, eight Bangladeshi trade unions, and over 200 apparel brands, retailers, and importers.⁹⁵ The bilaterally negotiated agreement between MNCs and GUFs thus brings together actors in GSCs that would not otherwise be in a direct contractual relationship.⁹⁶ Significantly, the Accord on Fire and Building Safety in Bangladesh (the Accord) is the first multilateral agreement including multiple MNCs and GUFs that imposes legally enforceable commitments.

The Accord makes MNCs at the top of GSCs jointly responsible with contractors below for labour standards within garment factories. It commits the signatory companies to disclose all of its Bangladeshi supplier factories and require the factories to submit to publicly disclosed inspections and implement safety remediation deemed necessary, or else the MNC must cease business with the supplier.⁹⁷ The MNCs must fund the administration of the Accord and pay

⁹² Dorothee Baumann-Pauly, Sarah Labowitz and Nayantara Banerjee “Closing Governance Gaps in Bangladesh’s Garment Industry – The Power and Limitations of Private Governance Scheme” (12 March 2015) Social Science Research Network < <https://dx.doi.org/10.2139/ssrn.2577535>> at 3; Islam, above n 91, at 3.

⁹³ Baumann-Pauly, Labowitz and Banerjee, above n 92, at 3.

⁹⁴ Baumann-Pauly, Labowitz and Banerjee, above n 92, at 5.

⁹⁵ Reingard Zimmer “Corporate responsibility in the Bangladesh Accord: Which Regulations are transferable to other supply chains?” (2016) Friedrich-Ebert-Stiftung < <http://library.fes.de/pdf-files/id-moe/13072.pdf>> at 3; Levine and Wahid, above n 90, at 38.

⁹⁶ Salminen, above n 1, at 724.

⁹⁷ Levine and Wahid, above n 90, at 38.

suppliers prices that enable them to afford factory remediation and safe operations, thus acknowledging the responsibility of companies to address the costs of safe buildings and the financial pressure their practices place upon suppliers.⁹⁸ Other efforts to ensure compliance include an independent inspection programme, democratically elected health and safety committees within all factories to identify and act on risks, and worker empowerment through training, complaints mechanisms and a right to refuse unsafe work.⁹⁹ Most importantly, the Accord is legally binding via a dispute resolution process including a binding arbitration clause, thereby imposing binding obligations in contrast to those under most previous COC and GUFs.¹⁰⁰ It also takes into account the Bangladeshi government’s national laws and action plan to address fire safety, and integrates the ILO as an important part of its implementation framework.¹⁰¹

1 Dispute Resolution Clause

The Accord, like many other GFAs, establishes an internal dispute resolution process under Article 5. Any dispute between signatory parties must first be presented to and decided by the Steering Committee (SC).¹⁰² The SC is appointed by the signatories with equal representation chosen by GUF signatories and company signatories (3 seats each) and a neutral chairperson from and chosen by the ILO.¹⁰³ The SC must make a decision on any dispute by a majority vote within 21 days of the petition being filed. Either party may request to appeal the SC decision to a final and binding arbitration process governed by the UNCITRAL Model Law on International Commercial Arbitration with awards enforceable under the New York Convention. In April 2014 the SC adopted a more detailed Dispute Resolution Process to deal with alleged violations of the Accord.¹⁰⁴ The Accord does not deny recourse to national courts but indicates that the dispute resolution process should take priority.¹⁰⁵

⁹⁸ Anner, above n 13, at 7; Anner, Bair and Blasi, above n 86, at 31.

⁹⁹ Accord on Fire and Building Safety in Bangladesh “About the Accord” <<http://bangladeshaccord.org/about/>>.

¹⁰⁰ Benjamin Hensler and Jeremy Blasi “Making Global Corporations’ Labor Rights Commitments Legally Enforceable: The Bangladesh Breakthrough” (18 June 2013) Worker Rights Consortium <<https://cleanclothes.org/resources/recommended-reading/making-global-corporations2019-labor-rights-commitments-legally-enforceable-the-bangladesh-breakthrough>> at 1-2; Zimmer, above n 95, at 2; Anner, above n 13, at 7.

¹⁰¹ “Accord on Fire and Building Safety in Bangladesh”, above n 5; Zimmer, above n 95, at 3.

¹⁰² “Accord on Fire and Building Safety in Bangladesh”, above n 5, art 5.

¹⁰³ “Accord on Fire and Building Safety in Bangladesh”, above n 5.

¹⁰⁴ Accord on Fire and Building Safety in Bangladesh “Dispute Resolution Process as agreed by the Steering Committee on 10th April 2014” (20 April 2014) <<http://bangladeshaccord.org/2014/04/dispute-resolution-process-agreed-steering-committee-10th-april-2014/>>.

¹⁰⁵ Zimmer, above n 95, at 5.

2 2016 Arbitral Proceedings

The Accord’s arbitration procedure has been utilised in two disputes since its creation when two parallel arbitrations were initiated against global fashion brands in 2016. The proceedings were administered by the Permanent Court of Arbitration under the UNCITRAL Rules. The claims were for failure of the signatory companies to require suppliers to remediate factories within deadlines and failure to negotiate commercial terms making it financially feasible for suppliers to carry out required remediation.¹⁰⁶ The dispute was submitted to arbitration by the two claimant GUFs because the SC was “unable to reach a decision on the merits of the charge” in both cases due to the ILO chairperson declining to vote.¹⁰⁷

The Respondent companies denied the alleged failure to meet Accord obligations and asserted the claim was inadmissible under Article 5. It was claimed that Article 5 required the SC to decide disputes by majority vote such that the failure to reach a majority view, and the lack of any documentation illustrating deliberate or methodical assessment or detailed analysis of the arguments, evidence and claim, meant that no requisite appealable decision had been made.¹⁰⁸ They also argued that the de novo nature of the arbitral proceedings did not constitute an appeal provided for under Article 5 which expresses “clear and unambiguous intention to limit the scope of the tribunal’s role to that of an appellate body” providing “an additional layer of scrutiny if the SC’s decision results in any kind of legal or financial consequences”.¹⁰⁹ Admitting the claims wrongly allowed the arbitral tribunal to be a first-tier decision maker when the intention was for arbitration to be an exceptional mechanism with disputes being resolved internally and consensually by the SC who are best placed to make findings on technical and factual issues.¹¹⁰ The Respondents also claimed that Article 5 suffered “significant deficiencies that potentially render it unworkable as a valid mechanism to arbitrate,” though both respondents agreed to allow the arbitral tribunal to hear the claims for the purposes of the current dispute.¹¹¹ The 2014 Dispute Resolution Process was argued to be

¹⁰⁶ *IndustriALL Global Union and Uni Global Union v Respondent (Decision on Admissibility Objection and Directions on Confidentiality and Transparency)* PCA 2016-36 & 2016-37, 4 September 2017 at [15].

¹⁰⁷ *IndustriALL Global Union and Uni Global Union v Respondent*, above n 106, at [20] and [25].

¹⁰⁸ At [36].

¹⁰⁹ At [37].

¹¹⁰ At [37].

¹¹¹ At [23] and [27].

incompatible with the Accord’s Article 5 process and did not constitute a valid standalone arbitration agreement or an amendment to Article 5.¹¹²

The Claimants rejected these views on four bases. Firstly, that Article 5 did not set requirements on the form or content of the “decision” so a majority decision is not a precondition to arbitration.¹¹³ Secondly, the post-Accord Dispute Resolution Process does not alter Article 5 but clarifies the Accord’s intention that arbitration be available where disputes cannot be satisfactorily resolved by the SC.¹¹⁴ Thirdly, the SC made statements that they considered their result amounted to a “decision” and confirmed the Unions’ right to arbitrate the dispute.¹¹⁵ Lastly, dismissal of the claim would not serve the purposes or interests of the Accord and efficient administration of justice as there was no guarantee that if the dispute was re-submitted to the SC (as the Respondent’s arguments require) that they would be able to resolve the dispute by a majority decision.¹¹⁶

The Tribunal rejected the respondent companies’ objection to admissibility in September 2017, finding that there was an admissible appeal from a decision under Article 5 for three reasons. Firstly, Article 5 did not prescribe requirements for the content or methodology of SC decisions and the Tribunal could not read these in; the SC had made an appealable decision through a deliberative process.¹¹⁷ Secondly, plain language interpretation of Article 5 did not exclude arbitral appeals of non-majority decisions; the consequence of the Respondents’ approach is that the only option for the Claimants would be to resubmit the issue to the SC which is unlikely to come to a different result, and would limit access to arbitration to when the claimant lost by majority or unanimous vote which the parties would not have intended.¹¹⁸ Thirdly, the Tribunal held that the term “appeal” simply connotes some form of review or reversal of an initial decision by a higher decision-making body and on its own does not imply any limits to the scope of the appellate body’s review.¹¹⁹ The use of “appealed” in Article 5 did not inherently prevent de novo appraisal of the matter, rather the non-legal, industry based character of the

¹¹² At [39].

¹¹³ At [42].

¹¹⁴ At [44].

¹¹⁵ At [45].

¹¹⁶ At [46].

¹¹⁷ At [51] and [56].

¹¹⁸ At [59].

¹¹⁹ At [62]-[63].

SC indicated that the parties had intended arbitral “appeals” to involve full fact-finding and law-deciding processes.¹²⁰ This procedural order also gave instructions on confidentiality and transparency of the proceeding, addressing the need to balance between protecting the business information and reputation of the Respondents and ensuring transparency for relevant stakeholders and the wider public.

The dispute was settled by the parties after a 2 year arbitral process before proceeding to the merits phase. The settlement provided for the Respondent brands to pay \$2,000,000 for remediation of issues in more than 150 factories, and \$300,000 to be paid to the GUFs’ joint supply chain worker support fund.¹²¹ Whilst the arbitral proceedings did not proceed fully, the success of the process in assuring that the Accord could be enforced against MNCs when the GFA’s internal dispute resolution process did not produce a satisfactory result illustrates the significant potential for arbitration to remedy enforcement weaknesses in GFAs, and overcome the wider regulatory gap in which MNCs operate.

C Benefits of Arbitration in Global Framework Agreements

Arbitration has several beneficial attributes that make it a preferable form of dispute resolution for GFAs. Firstly, arbitration may resolve GFA disputes quicker than other dispute resolution processes, therefore ensuring decent labour standards are implemented in GSCs faster. The procedural flexibility of arbitration allows the parties to agree on a procedure that is best suited to their mutual needs and the issues relevant under the GFA. Arbitration may also be a more cost effective means of dispute resolution, particularly beneficial for GUFs in relation to the often large financial capacity of MNCs.¹²² Furthermore, arbitration may allow decision making by a tribunal with greater relevant expertise in labour disputes, for example if arbitrators were provided through the ILO. Arbitration is good for inherently cross-border GFA disputes as, by enforcing internationally accepted labour standards enshrined in the GFA, differences in domestic state labour laws are overcome and minimum standards can be guaranteed in states with inadequate labour regulations and legal systems.¹²³

¹²⁰ At [63].

¹²¹ Dominic Rushe “Unions reach \$2.3m settlement on Bangladesh textile factory safety” *The Guardian* (online ed, New York, 22 January 2018).

¹²² Hadwiger, above n 60, at 191.

¹²³ Hadwiger, above n 60, at 190.

Lastly, arbitration can ensure an appropriate balance between confidentiality and transparency in GFA labour disputes. Confidentiality of proceedings protects the business information and reputation of MNCs, thereby reducing transaction costs of enforcement through alternative reputational sanctions.¹²⁴ In the 2016 Bangladesh Accord arbitral proceedings the Tribunal recognised the need to balance the signatory companies' confidentiality requirements regarding certain information (such as financial data and trade secrets) with the need for transparency and public communication, to build trust and confidence amongst those affected by the Accord's implementation (such as workers).¹²⁵ The Tribunal exercised discretion in light of the Accord's transparency and confidentiality framework, and established a Protocol on Confidentiality and Transparency through a Procedural Order after consultation between the parties to establish a draft.¹²⁶ The ability in arbitration for parties to cooperate in regards to confidentiality and transparency is beneficial in maintaining the relevant interests and underlying agreement and, when used within a wider internal dispute resolution process, may better preserve the relationship between MNC and GUF parties to ensure future cooperation than litigation would.¹²⁷

D Benefits of Global Framework Agreement Arbitration Compared to Individual/Domestic Employment Arbitration

The unique nature of GFAs as agreements between MNCs and GUFs means GFA arbitration may not encounter many of the difficulties faced in arbitration of individual employment and other labour issues. There has been hesitancy and differing state views on whether employment disputes should be subject to arbitration; many have excluded employment disputes from arbitration in national legislation.¹²⁸

Arbitration is inherently based upon the consent of both parties, but consent is often questionable in employment arbitration as there is an inherent power imbalance between employers and employees. Employers tend to have greater bargaining power; in a competitive

¹²⁴ Hadwiger, above n 60, at 191.

¹²⁵ *IndustriALL Global Union and Uni Global Union v Respondent*, above n 106, at [14].

¹²⁶ *IndustriALL Global Union and Uni Global Union v Respondent (Protocol on Confidentiality and Transparency)* PCA 2016-36 & 2016-37, 9 October 2017.

¹²⁷ Hadwiger, above n 60, at 191.

¹²⁸ Catherine A. Rogers "The Arrival of the "Have-Nots" in International Arbitration" (2007) 8 Nevada Law Journal 341 at 364; Eliasoph, above n 15, at 92.

labour market employees are unlikely to turn down jobs on the basis of an arbitration clause.¹²⁹ While an employer probably received legal advice in drafting a standard employment contract including an arbitration clause, the employee is unlikely to have legal advice, understand the arbitration clause, or even have read it.¹³⁰ In light of this power imbalance, scholars have criticised employment arbitration as “mandatory arbitration” in which there is no genuine consent.¹³¹

The issue of mandatory individual employment arbitration has been highlighted recently in the United States where employers have increasingly included composite arbitration/class-action waiver clauses in employment agreements. These clauses require employees to take any claims to arbitration on an individual basis thus preventing multiple claimants from banding together in a class action case. This is problematic where individual claims may be too small for the employee to justify the expense of arbitration but multiple employees cannot collectively vindicate their rights through class actions so claims are simply not brought. In May 2018 the United States Supreme Court, hearing appeals from three Court of Appeal cases, held that employment arbitration agreements including class action waivers must be enforced under the Federal Arbitration Act.¹³² The employees’ arguments that these clauses were invalid due to unconscionability and irreconcilable statutory conflict with employee rights under the National Labour Relations Act (NLRA) were rejected on the basis that prohibitions on class actions did not violate the claimed employee rights to unionise and collectively bargain and the NLRA did not override the Federal Arbitration Act.¹³³ The decision greatly benefits employers by enabling them to avoid the risk of collective employee actions through waivers in arbitration agreements, leaving many employees effectively without remedy against employers due to the large and often insurmountable financial burden of individual arbitration.

However, the power imbalance that undermines genuine consent in individual employment arbitration and concerns about the exclusion of class actions appear largely inapplicable in GFAs. The parties to the GFA (MNCs and GUFs) appear to have more equal bargaining power so neither will enter an arbitration clause they do not truly consent to. Furthermore, the

¹²⁹ James B. Boskey “The Resolution of Disputes in Transnational Employment: Arbitration and Its Discontents” 3(1) *Journal of Small and Emerging Business Law* 189 at 198.

¹³⁰ Boskey, above n 129, at 198.

¹³¹ Rogers, above n 128, at 352.

¹³² *Epic Systems Corp. v Lewis* 584 US ___ 16-285 (2018) at 1.

¹³³ *Epic Systems Corp. v Lewis*, above n 132, at 2.

inclusion of GUFs ensures collective representation for all workers in the GSC, enabling actions against MNCs that individual workers or even national unions may be unable to take.

Labour and employment arbitration also raises procedural concerns as repeat players (which are often employers) have systemic advantages and often have greater success and recovery rates than one shot players (which are normally employees), just as in litigation.¹³⁴ While employees have been shown to prevail in 63 per cent of overall employment cases, the success rate is significantly lower than average for employees against repeat player employers, and employee success increases if they are represented by unions (who are repeat players).¹³⁵ Furthermore, the recovery rate of employees' demands significantly differs depending on whether the employer is a repeat player (11 per cent) or a non-repeat player (48 per cent).¹³⁶ Not only do repeat players benefit by being better versed with procedures, employers have the ability to draft strategic arbitration clauses in employment contracts that undermine the employee's substantive or procedural rights. Arbitration may also disadvantage employees by removing access to litigation procedures that may have benefitted them, such as broader discovery processes or appellate reviews.¹³⁷ These concerns appear inapplicable to GFA arbitration as both MNC and GUF parties are more likely to be repeat players with experience in arbitration, thus removing any systemic advantages, and equal bargaining power ensures the process negotiated in the arbitration clause is acceptable to both parties.

Lastly, one of the main concerns about individual employment arbitration, particularly in domestic employment, is that arbitration allows employers to privatise adjudicatory law-making and avoid the application of national labour laws implemented to protect employees, having a deregulatory effect on employment standards usually controlled by the state.¹³⁸ GFA arbitration has the opposite aim and effect as it may mediate conflicts between MNC home and host state labour laws,¹³⁹ and ensures the enforcement of international labour standards enshrined in the GFA when sufficient domestic labour laws do not exist or cannot be enforced. Arbitration thereby illustrates great potential as an enforcement forum for transnational regulation, rather than having a deregulatory effect. Overall, arbitration in GFA disputes

¹³⁴ Eliasoph, above n 15, at 84.

¹³⁵ Rogers, above n 128, at 352.

¹³⁶ Rogers, above n 128, at 352.

¹³⁷ Rogers, above n 128, at 348.

¹³⁸ Rogers, above n 128, at 348.

¹³⁹ Rogers, above n 128, at 361.

appears largely unaffected by concerns that have been raised regarding the use of arbitration in individual and domestic employment disputes, further justifying its use as an enforcement mechanisms against MNCs.

VI International Frameworks for Multinational Corporation Responsibility and Normative Implications

Attempts to remedy low GSC labour standards and increase MNC responsibility for their contributions to the problem have also been made at the international level through frameworks created by international organisations. The current international frameworks on GSC labour standards, analysed below, illustrate a notable voluntary and non-binding character which may have implications for attempts to bind MNCs through GFA arbitration.

A The International Labour Organisation

The International Labour Organisation was established in 1919 by the signatory nations to the Treaty of Versailles. It has an integral tripartite structure including representatives of employers, workers, and member states and became a specialised UN agency in 1946.¹⁴⁰ The ILO aims to promote international labour standards in the global economy through labour standards Conventions and Recommendations, to ensure social justice, prosperity and peace are protected alongside economic progress.¹⁴¹ Several key ILO Declarations have recognised the importance of establishing international labour standards; the 1944 Declaration of Philadelphia recognised that “labour is not a commodity”,¹⁴² the 1998 Declaration on Fundamental Principles and Rights at Work recognised several core labour standards and Conventions to be strengthened by member states regardless of whether they have ratified them,¹⁴³ and the 2008 Declaration on Social Justice for a Fair Globalisation emphasised and strengthened the ILO’s mandate and capacity to target the labour challenges of a globalised era.¹⁴⁴

¹⁴⁰ International Labour Office *Rules of the Game: A brief introduction to International Labour Standards* (3rd ed, International Labour Office, Geneva, 2014) at 14.

¹⁴¹ International Labour Office, above n 140, at 9.

¹⁴² International Labour Office, above n 140, at 10.

¹⁴³ International Labour Office, above n 140, at 116.

¹⁴⁴ International Labour Office, above n 140, at 118.

1 State Level Mechanisms

The ILO has traditionally focused on implementing international labour standards at the state level through Conventions and Recommendations. Conventions are legally binding international treaties ratified by member states. Recommendations are non-binding guidelines that are either autonomous or supplement and provide guidelines on implementing certain Conventions. Both are written by tripartite representatives and adopted by a two third majority vote of representatives at the annual International Labour Conference.¹⁴⁵ The ILO's tripartite nature ensures that the standards are accepted by all relevant actors in the global economy. Conventions must be ratified by member states before coming into force one year later.¹⁴⁶ The core ILO standards and Conventions, recognised in the 1998 Declaration, have become a comprehensive set of internationally accepted minimum labour standards; these eight Conventions have been ratified by 91.7 per cent of ILO member states with 125 more ratifications required for their universal application.¹⁴⁷

Conventions and Recommendations are primarily tools for governments to draft labour laws and social policies in line with internationally accepted labour standards;¹⁴⁸ they therefore aim to achieve international harmonisation of national labour laws. Though only binding upon ratifying states, Conventions are often used as internationally accepted minimum labour standards in other instruments such as private COC, GFAs or in Free Trade Agreements.

ILO Conventions and Recommendations are enforced upon states through a mixture of “sunshine, carrots and sticks”, or promotion and supervision, technical assistance, and complaints and sanctions.¹⁴⁹ “Sunshine” enforcement through promotion and supervision has taken precedence in the ILO's approach. Under article 22 of the ILO Constitution, ratifying states must report regularly to the ILO, as well as employer and worker organisations, on measures taken to implement labour standards.¹⁵⁰ Governments report every three years on the

¹⁴⁵ International Labour Office, above n 140, at 17.

¹⁴⁶ International Labour Office, above n 140, at 15.

¹⁴⁷ International Labour Office, above n 140, at 15.

¹⁴⁸ International Labour Office, above n 140, at 21.

¹⁴⁹ Kimberly Ann Elliott “The ILO and Enforcement of Core Labour Standards” (July 2000) Peterson Institute for International Economics <<https://piie.com/publications/policy-briefs/ilo-and-enforcement-core-labor-standards>> at 2.

¹⁵⁰ Constitution of the International Labour Organisation (adopted 1 April 1919, entered into force 28 June 1919), art 22.

eight fundamental and four key governance Conventions, and every five years for other Conventions, unless they are shelved and no longer reported on.¹⁵¹

The Committee of Experts on the Application of Conventions and Recommendations, established in 1926, examines government reports and may make observations on fundamental questions raised by the particular state’s application of the Convention.¹⁵² The Committee may make direct requests asking technical questions, requesting further information from the government, or highlighting problems with implementation, and will give countries time to respond to the issue before the Committee publishes its report. The Committee also produces an annual General Report on its observations on the application of international labour standards and a General Survey on one or more specific themes chosen by the Governing Body.¹⁵³ The ILO provides “carrots” through the International Labour Office, providing technical assistance in drafting and revising legislation to ensure international labour standard compliance.¹⁵⁴

The ILO has 2 “stick” mechanisms for enforcing standards against breaching states. Under articles 24 and 25 industrial associations representing employers or workers may make Representations to the ILO Governing Body when a member state fails to effectively observe a ratified Convention in its legislation.¹⁵⁵ Representations, and responses from the government concerned, are examined by a three member tripartite committee who provide Recommendations. If the government response to the Recommendation is unsatisfactory the Governing Body may publish the Recommendation and response, and lay a complaint under article 26.¹⁵⁶

Complaints under Article 26 against member states for non-compliance with ratified Conventions can be laid by other member states who have ratified the relevant Convention, any ILO delegate, or by the Governing Body itself.¹⁵⁷ If a state is accused of a persistent and

¹⁵¹ ILO “The Standards Initiative: Joint report of the Chairpersons of the Chairpersons of the Committee of Experts on the Application of Conventions and Recommendations and the Committee on Freedom of Association” (29 February 2016) GB.326/LILS/3/1, at 5.

¹⁵² International Labour Office, above n 140, at 102.

¹⁵³ ILO, above n 151, at 6.

¹⁵⁴ International Labour Office, above n 140, at 105.

¹⁵⁵ Constitution of the International Labour Organisation, above n 150, art 24 and 25.

¹⁵⁶ International Labour Office, above n 140, at 106.

¹⁵⁷ Constitution of the International Labour Organisation, above n 150, art 26.

serious violation and repeatedly refuses to address the issue the Governing Body may implement a Commission of Inquiry to investigate and make recommendations to resolve the problem.¹⁵⁸ A Commission of Inquiry is the ILO's highest level of investigative procedure and since its creation 12 have been established.¹⁵⁹ Complaints and resulting recommendations may be appealed to the International Court of Justice for final decision.¹⁶⁰ State failure to fulfil Commission of Inquiry recommendations may result in the Governing Body making a recommendation to the Conference on the required action to ensure compliance under article 33, including potential sanctions.¹⁶¹ Article 33 does not empower the ILO to impose sanctions, but allows it to make recommendations that member states and UN organisations should.

In 1951 the ILO established the Committee on Freedom of Association (CFA) to implement a separate procedure for complaints about breaches of freedom of association and collective bargaining to recognise the importance of and need for compliance with these principles, especially for the ILO's tripartite structure.¹⁶² These complaints can be made regardless of whether the concerned state has ratified the relevant Conventions (87 and 98) on the basis that the states are bound by the ILO Constitution and Declaration of Philadelphia to respect fundamental principles contained in the Constitution, especially freedom of association.¹⁶³ The CFA has tripartite membership (3 members from each group) and an independent chairperson.¹⁶⁴ Only industrial associations can make complaints to the CFA against member states. Complaints must contain specific allegations supported by evidence and must not be purely political in character.¹⁶⁵ If fact finding identifies a violation the CFA will issue a report and make recommendations on which the Government is requested to report regarding their implementation.¹⁶⁶ The CFA may send complaints to the Fact-Finding and Conciliation Commission on Freedom of Association (FFCC), a neutral body that examines complaints in a similar way to a Commission of Inquiry.¹⁶⁷ The FFCC process is rarely used because

¹⁵⁸ ILO, above n 151, at 8.

¹⁵⁹ International Labour Office, above n 140, at 108; ILO, above n 151, at 8.

¹⁶⁰ Constitution of the International Labour Organisation, above n 150, art 29, 31 and 32.

¹⁶¹ International Labour Office, above n 140, at 108.

¹⁶² ILO "Committee on Freedom of Association" <<https://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-on-freedom-of-association/lang--en/index.htm>>.

¹⁶³ David Tajzman and Karen Curtis *Freedom of association: A user's guide* (International Labour Office, Geneva, 2000) at 58.

¹⁶⁴ Tajzman and Curtis, above n 163, at 2.

¹⁶⁵ ILO, above n 151, at 10.

¹⁶⁶ ILO, above n 162.

¹⁶⁷ Tajzman and Curtis, above n 163, at 57.

government consent is required for an investigation and is often difficult to obtain, and because the CFA often has sufficient information to examine the issue itself.¹⁶⁸ By 2016 the CFA had examined over 3,100 complaints whilst the FFCC had reviewed only six.¹⁶⁹ The CFA may initiate a direct contact mission to the state by an ILO representative, however these also require government consent.¹⁷⁰ If the state has ratified the relevant Conventions the case may also be referred to the Committee of Experts.¹⁷¹

Statistics indicate that the ILO’s general complaints and sanction mechanisms are rarely used. Article 26 avoids imposing penalties except for flagrant and persistent state failures. Between 1919 and 1960 only one complaint was laid, and complaints since have averaged six per decade.¹⁷² Twelve Commissions of Inquiry have been established.¹⁷³ The ICJ appeal mechanism has never been instigated.¹⁷⁴ The Article 33 power to recommend actions to secure compliance has been used once in 2000 regarding the use of forced labour in Burma.¹⁷⁵ These statistics indicate that in enforcing labour standards and Conventions upon states the ILO has preferred to focus on sunshine and carrots, through positive promotional efforts, social dialogue, and technical assistance, rather than sticks and binding legal enforcement. This has led to criticisms that the ILO’s enforcement of labour standards upon states is weak and lacks teeth.

2 *The MNE Declaration*

In 1977 the ILO adopted the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (MNE Declaration).¹⁷⁶ The MNE Declaration is a voluntary set of principles and recommendations primarily for national and multinational enterprises,

¹⁶⁸ Tajgman and Curtis, above n 163, at 57; ILO, above n 151, at 19.

¹⁶⁹ ILO, above n 151, at 20.

¹⁷⁰ Tajgman and Curtis, above n 163, at 64.

¹⁷¹ ILO, above n 162.

¹⁷² Elliott, above n 149, at 5.

¹⁷³ International Labour Office, above n 140, at 108.

¹⁷⁴ Elliott, above n 149, at 5.

¹⁷⁵ Elliott, above n 149, at 1.

¹⁷⁶ ILO ‘Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy’ (November 1977, amended March 2017).

encompassing core international labour standards to highlight how enterprises can contribute to the realisation of economic and social progress and decent work for all.¹⁷⁷

There are three implementation procedures for the Declaration. Firstly, the Subcommittee on Multinational Enterprises receives periodic surveys from states, and employer and workers groups, on the implementation of the Declaration by MNEs; however these surveys fail to identify breaches by particular MNCs or hold them accountable.¹⁷⁸ Secondly, the Subcommittee receives requests for interpretation of the Declaration under the MNE Dispute Procedure when there is disagreement about its meaning.¹⁷⁹ However, this procedure does not enable complaints regarding breaches of national laws or international labour standards by MNCs. Lastly, there is a promotional system to improve awareness of the Declaration amongst concerned actors.¹⁸⁰

Thus the enforcement of the Declaration upon MNCs appears weak as there is no mechanisms for laying complaints of Declaration breaches. The Declaration reflects obligations that may be owed by MNCs under national laws, but it does not bind MNCs directly.¹⁸¹ This reaffirms the primary role of states in regulating labour standards, and means that the Declaration is qualified by the relevant states legal regimes, which is illustrated by the current regulatory gap to be weak in many cases.

3 *ILO Reviews and Developments*

When labour abuses occur in GSCs the ILO is often criticised for failing to fulfil its role, raising questions of whether their current approach of controlling labour practices through binding member states to Conventions is sufficient and whether the ILO has the capacity to change to better address modern practices in the global economy.¹⁸² In 2013 the ILO's Director General recognised that the rapid development of GSCs, and the importance of private actors within

¹⁷⁷ Jernej Letnar Cernic "Corporate responsibility for human rights: Analyzing the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy" (2009) 6(1) *Miskolc Journal of International Law* 24 at 27.

¹⁷⁸ Cernic, above n 177, at 29.

¹⁷⁹ Cernic, above n 177, at 29.

¹⁸⁰ Cernic, above n 177, at 32.

¹⁸¹ Cernic, above n 177, at 28.

¹⁸² Director-General of the ILO *Towards the ILO centenary: Realities, renewal and tripartite commitment* (International Labour Office, Geneva, 2013) at [16], [75] and [141].

them, present challenges to the ILO. It was said that state responsibilities have not been diminished or supplanted, but that there are additional opportunities for the ILO to promote decent work in GSCs through private MNC actors.¹⁸³

In 2016 the ILO reviewed its state level supervisory mechanisms, recognising the need to continuously evaluate and enhance them in light of changing social, geopolitical and economic dynamics within the ILO and wider world.¹⁸⁴ The current system of cooperative reporting, monitoring, complaint and technical assistance procedures was seen as very successful and functioning adequately to fulfil the purpose of effective observance of international labour standards at the state level.¹⁸⁵ The ILO’s focus on soft enforcement at the state level was reinforced by recognition that the supervisory procedures are intended to be persuasion based and avoid the imposition of sanctions except in the last resort where states have flagrantly and persistently failed to fulfil their obligations.¹⁸⁶ The review noted weaknesses and made recommendations for improvements in several areas: transparency, visibility and coherence; mandates and interpretation of Conventions; and workload, efficiency and effectiveness.¹⁸⁷ However, the review did not consider the application of the existing enforcement system to non-state actors or GSCs.

The ILO addressed the difficulties of and various available approaches to regulating GSC labour standards in a 2016 report to the International Labour Convention. The ILO was recognised as a particularly well-placed and powerful actor for addressing labour standards in GSCs due to its mandate, expertise and experience in the world of work and tripartite structure, enabling them to bring together actors and stakeholders to bridge governance gaps at sectoral, national, regional and global levels.¹⁸⁸ The report suggested the International Labour Conference consider an innovative and holistic approach including various recommended elements to strengthen its promotion of decent work in GSCs. The benefits of GFAs in regulating GSC labour standards were recognised and it was recommended that the ILO (on request) play a greater role in relation to GFAs, including supporting and facilitating GFA

¹⁸³ Director-General of the ILO, above n 182, at [75].

¹⁸⁴ ILO, above n 151, at iii-vii.

¹⁸⁵ ILO, above n 151, at iii-vii.

¹⁸⁶ ILO, above n 151, at 13.

¹⁸⁷ ILO, above n 151, at 42-46.

¹⁸⁸ International Labour Office *Report IV: Decent work in global supply chains* (International Labour Office, Geneva, 2016) at [10] and [197].

development, providing guidance, capacity building and technical advice on content and follow-up mechanisms and provisions, and playing a role in monitoring, mediation and arbitration in implementation.¹⁸⁹ It was also recommended that the ILO help close governance gaps by supporting, facilitating, administering and hosting other public, private and social governance systems; however it was stated that governance systems for GSCs should be based on the primary role of states in ensuring enforcement of legislation and fundamental rights.¹⁹⁰

The Resolution concerning decent work in GSCs consequently adopted at the Conference noted that GSC actors have complementary but differing responsibilities in relation to labour standards. States have a duty to adopt, implement and enforce national laws and regulations that ensure labour standards, while businesses have only a responsibility to respect labour rights in their GSCs. It was stated that initiatives of non-state stakeholders, such as GFAs, can support but not replace the effectiveness and efficiency of public governance systems.¹⁹¹ Thus, although adopting the Report's recommendations that the ILO support and facilitate GFA formation and implementation,¹⁹² the ILO clearly believes that states remain (and should remain) the dominant actors in regulating and enforcing labour standards in GSCs.

However, in the global economy state power to regulate and enforce labour standards, and states' position as the actors with greatest control over and moral responsibility for labour standards, has been eroded. Dahan, Lerner and Milman-Sivan have suggested that in light of this development, and the growth of MNCs' influence over GSC labour standards, the ILO's underlying statist conception of legal responsibility is outdated and needs to be reformed to reflect modern realities.¹⁹³ They suggest that the ILO adopt a concept of shared responsibility that allocates responsibility for remedying unjust working conditions to a complex set of agents and institutions that includes states as well as private non-state actors such as MNCs.¹⁹⁴ Shared responsibility for labour conditions in specific circumstances would be determined through

¹⁸⁹ International Labour Office, above n 188, at [201].

¹⁹⁰ International Labour Office, above n 188, at [199].

¹⁹¹ "Resolution concerning decent work in global supply chains" (resolution adopted at General Conference of the ILO 105th Session, Geneva, 10 June 2016) at [15].

¹⁹² "Resolution concerning decent work in global supply chains", above n 191, at [23].

¹⁹³ Yossi Dahan, Hanna Lerner and Faina Milman-Sivan "Chapter 13: The International Labour Organization, multinational enterprises, and shifting conceptions of responsibility in the global economy" in Axel Marx, Jan Wouters, Glenn Rayp and Laura Beke (ed) *Global Governance of Labour Rights: Assessing the Effectiveness of Transnational Public and Private Policy Initiatives* (Edward Elgar Publishing, Cheltenham, 2016) at 282.

¹⁹⁴ Dahan, Lerner and Sivan, above n 193, at 283.

four principles.¹⁹⁵ The connectedness principle, under which direct employers and the states in which abuses occur have greater responsibility. The capacity principle based on the actors’ ability to rectify the situation as determined by their scope of influence, number of workers, and political and economic power. The beneficiary principle under which actors who gain greater economic benefits from a situation bear greater responsibility. Lastly, the contribution principle based on the extent to which the actor has contributed to bringing about the unjust labour standards. It is said that under an ILO system of shared responsibility states would remain the key actors responsible for labour standards within their territories, but responsibility could be shared amongst other actors such as MNCs in appropriate cases.¹⁹⁶

Extending responsibility to MNCs at the international level through the ILO may be beneficial in accounting for MNCs’ growing influence in the global economy and closing the current governance gaps. Business representation in the ILO’s current tripartite structure and processes can be seen to provide the foundations for shared responsibility for GSC labour standards including MNCs. However, implementing this reform would require extensive changes to the ILO’s operational and institutional structure, and the ILO’s 2016 reviews and reports on GSCs and enforcement illustrated strong commitment to a state-level focused soft law approach and no consideration of movement towards hard law enforcement or liability amongst a wider set of actors that would include MNCs.¹⁹⁷ Implementing this reform to increase MNC responsibility for GSC labour standards would therefore be radical and remains purely aspirational and unlikely. Thus, although the ILO illustrates reflexivity and willingness to adapt its approach to supervision and enforcement of labour standards, the underlying approach to GSC labour standards remains focused on predominantly soft law “carrot” mechanisms at the state level.

Despite this, the ILO clearly recognise the benefits of private, multilateral initiatives such as GFAs in implementing GSC standards, and appear willing to be significantly involved in the creation and implementation of such agreements, as they did in relation to the Bangladesh Accord. The Bangladesh Accord illustrates that ILO involvement in GFA formation and dispute resolution systems has great potential for success. The ILO appears to support private mechanisms such as GFAs (particularly in dispute resolution procedures which may include

¹⁹⁵ Dahan, Lerner and Sivan, above n 193, at 290-293.

¹⁹⁶ Dahan, Lerner and Sivan, above n 193, at 294.

¹⁹⁷ Dahan, Lerner and Sivan, above n 193, at 283 and 304.

mediation and arbitration) illustrating readiness to help legally bind MNCs to GSC labour standards, but only as secondary regulatory mechanisms to support soft law enforcement at the state-level for failure to implement domestic public law labour regulation. Thus the ILO appears to be moving towards the multilateral approach of this paper that sees MNC level and state level GSC regulations as complementary, but should increase its support for the creation and implementation of hard law private mechanisms like legally binding GFAs which currently require greater attention.

B The United Nations

The United Nations has likewise recognised the role and lack of responsibility of MNCs for GSC labour standards and implemented frameworks to address the issue.

1 The Norms

Throughout the 1970s and 1980s the UN established several Commissions and working groups to create an international code of conduct for businesses to fill the regulatory gap and provide access to remedies against MNCs.¹⁹⁸ Many proposals failed but the most successful, despite never becoming binding, was the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights (the Norms). The Norms were the first non-voluntary international initiative to remedy the failure of the international human rights system to address the responsibility of MNC's for labour standards.¹⁹⁹ The Norms provided for companies to internally adopt prescribed rules and be subjected to periodic independent and transparent monitoring. It is unclear whether MNCs would have been legally bound beyond an obligation to only do business with Norm adhering companies and a requirement to provide reparation to anyone harmed by non-compliant conduct.²⁰⁰

The Norms were seen to be radical as they imposed international human rights obligations directly on MNCs, rather than requiring states to legislatively regulate the MNCs within their jurisdictions.²⁰¹ This radical nature, and departure from traditional voluntary approaches to

¹⁹⁸ David Weissbrodt and Muria Kruger “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights” (2003) 97 *American Journal of International Law* 901 at 903.

¹⁹⁹ Pini Pavel Miretski and Sascha-Dominik Bachmann “The UN ‘Norms on the Responsibility of Transnational Corporations and Other Business Enterprises with Regard to Human Rights’: A Requiem” 17(1) *Deakin Law Review* 5 at 13.

²⁰⁰ Miretski and Bachmann, above n 199, at 26.

²⁰¹ Miretski and Bachmann, above n 199, at 20.

MNC responsibility, was one of the key reasons the Norms were rejected in 2005.²⁰² States and business actors fervently opposed the Norms largely because they bypassed the medium of the state and made MNCs the subject of international law by providing explicit and direct international law duties on them, thereby blurring the lines between public and private law and undermining the states’ role as the key actors in international law and labour standards regulation.²⁰³ While the Norms appeared to substantively reflect internationally accepted labour standards and fill the need for MNC responsibility, the nature of a non-voluntary and binding international framework was rejected in favour of maintaining the voluntary, soft-law approach to MNC labour standard compliance.

2 *The UN Guiding Principles on Business and Human Rights*

Following the failure of the Norms, the UN created the Guiding Principles on Business and Human Rights (UNGP) in 2011 aiming to provide “a global standard for preventing and addressing the risk of adverse impacts on human rights linked to business activity.”²⁰⁴ The UNGP incorporates the ‘Protect, Respect and Remedy’ framework established by author of the Principles and Secretary-General’s Special Representative on human rights and transnational corporations, John Ruggie. The ‘Protect, Respect and Remedy’ framework incorporates three pillars: a state duty to protect human rights, a corporate responsibility to respect human rights, and a duty for states to ensure access to remedy.²⁰⁵ The Guiding Principles are non-binding and are structured by providing foundational and operational principles on the three pillars. The UNGP does not provide a framework for enforcing the substantive Principles, but emphasises state duties to ensure access to remedy, and provides guidelines for effectively implementing state and non-state judicial and non-judicial grievance mechanisms.

The United Nations Global Compact is another voluntary, non-binding initiative under which companies agree to implement ten universal sustainability principles and support other UN goals. The ten principles cover the areas of human rights, labour standards, the environment, and anti-corruption.²⁰⁶ The UNGP reinforce and provide conceptual and operational clarity to

²⁰² Miretski and Bachmann, above n 199, at 9.

²⁰³ Miretski and Bachmann, above n 199, at 10, 24 and 38.

²⁰⁴ Miretski and Bachmann, above n 199, at 6.

²⁰⁵ *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework* HR/PUB/11/04 (2011) at 1.

²⁰⁶ United Nations Global Compact “The Ten Principles of the UN Global Compact” <<https://www.unglobalcompact.org/what-is-gc/mission/principles>>.

the two human rights principles under the Global Compact and how companies should uphold their responsibilities.²⁰⁷ The UN Global Compact has a mandatory disclosure framework under which signatory companies must annually communicate their progress in implementing the ten principles, or else be downgraded within or removed from the Compact. However, the Compact does not assess or make judgements on performance or provide any certification mechanisms, and is said to be “more like a guide dog than a watch dog,” highlighting a clear lack of teeth.²⁰⁸

Under the UNGP framework international human rights law does not apply directly to businesses, rather the duty continues to lie with states. The UN Global Compact has a MNC focus but also lacks hard enforcement mechanisms. Thus United Nations’ approach maintains state dominance in labour regulation and reflects the voluntary and largely non-binding nature of the current international frameworks for MNC labour standard responsibility. However, there are indications that this approach may change. In 2014 the UN Human Rights Council created an Open-ended Intergovernmental Working Group considering binding transnational corporation human rights standards to investigate an international legally binding instrument to regulate the human rights activities of MNCs and other enterprises. This working group has held three sessions and have requested comments on a draft treaty by the end of 2018.²⁰⁹ The draft requires states to ensure domestic legal liability and access to remedies for human rights violations in transnational business activities, thus stressing the primary responsibility of states to promote, respect and fulfil human rights, including by third parties within their jurisdictions.²¹⁰ While the draft may potentially fill the state level regulatory gap, the current position remains that no international framework legally binds MNCs for labour standards and other human rights violations within GSCs.

²⁰⁷ United Nations Global Compact “The UN Guiding Principles on Business and Human Rights: Relationship to UN Global Compact Commitments” (June 2014) <https://www.unglobalcompact.org/docs/issues_doc/human_rights/Resources/GPs_GC%20note.pdf>.

²⁰⁸ United Nations Global Compact “About the UN Global Compact: Frequently Asked Questions” <<https://www.unglobalcompact.org/about/faq>>.

²⁰⁹ *Report on the third session of the open-ended intergovernmental Working Group on transnational corporations and other business enterprises with respect to human rights A/HRC/37/67* (2018).

²¹⁰ Intergovernmental Working Groups on Transnational Corporations “Zero Draft Legally Binding Instrument to Regulation, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises” (16 July 2018) United Nations Human Rights Council <<https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf>>.

C The OECD Guidelines for Multinational Enterprises

In 1976 the industrialised states of the OECD created the Guidelines for Multinational Enterprises (OECD Guidelines), a non-binding set of guidelines aiming to ensure multinational enterprises “identify, avoid and address adverse impacts throughout their supply chains”.²¹¹ The OECD Guidelines are the only comprehensive code for responsible business conduct multilaterally promoted by governments and are the broadest framework targeting MNCs as, in addition to workers’ rights and human rights, they also address issues including the environment, bribery, and information disclosure.²¹²

Most notably, the OECD Guidelines are the only international framework for MNC responsibility that includes a built in grievance mechanism in the form of National Contact Points (NCP). NCPs are the only state based non-judicial mechanism for stakeholders to submit complaints and resolve disputes regarding MNC non-observance of the Guidelines in GSC conduct.²¹³ There are now 48 NCPs which have handled over 400 non-observance grievance cases (called “specific instances”) between 2000 and 2016.²¹⁴ The dispute resolution process is focused on consensual mediation between the disputing parties to agree to a solution, with approximately 50 per cent of all cases between 2011 and 2015 reaching an agreement.²¹⁵ However, NCP statements and recommendations are non-binding and there is no enforcement mechanism, though some NCPs will follow up on the implementations of recommendations.²¹⁶ Thus the OECD Guidelines approach, whilst going further than other mechanisms in providing dispute resolution processes, maintains a voluntary and non-binding focus on MNC labour standards enforcement.

²¹¹ Andreas Georg Scherer and Marc Smid “The Downward Spiral and the US Model Business Principles – Why MNEs Should Take Responsibility for the Improvement of World-Wide Social and Environmental Conditions” 40(4) *Management International Review* 351 at 359; OECD, above n 2, at 11.

²¹² OECD ‘OECD Guidelines for Multinational Enterprises’ (27 June 2000).

²¹³ OECD, above n 2, at 15.

²¹⁴ OECD Guidelines for MNEs “National Contact Points for the OECD Guidelines for Multinational Enterprises: Frequently Asked Questions” <<http://mneguidelines.oecd.org/OECD-Guidelines-for-MNEs-NCP-FAQ.pdf>>.

²¹⁵ OECD, above n 2, at 16.

²¹⁶ Shelley Marshall “OECD National Contact Points: Better Navigating Conflict to Provide Remedy to Vulnerable Communities” (2016) *Corporate Accountability Research* <https://static1.squarespace.com/static/57e140116a4963b5a1ad9780/t/580d7b7bb3db2b51a441a6e8/1477278601503/NJM16_OECD.pdf> at 15.

D Normative Implications of International Frameworks for Global Framework Agreements Binding Through Arbitration

Current attempts to regulate MNCs' GSC labour standard practices through the ILO MNE Declaration, the UN Guiding Principles and Global Compact, and OECD Guidelines demonstrate international recognition that MNCs contribute greatly to low labour standards in GSCS and there is a need to increase their responsibility for their contributions to overcome the current regulatory gap. However, these frameworks all illustrate that the international approach has focused on voluntary non-binding enforcement mechanisms and shown significant opposition to imposing direct legal obligations on MNCs. The regulatory gap and lack of effective and binding labour standard enforcement upon MNCs can therefore be seen to extend beyond state level public law and private mechanisms to the international plane.

This apparent preference for voluntary, non-binding, soft-law enforcement of labour standards, against both MNCs and states, raises a normative question of whether labour standards should be legally enforced on MNCs through GFA arbitration, or whether labour standard regulation should remain the sole domain of states. The lack of binding force upon MNCs in international labour standards initiatives appears to be due to state reluctance to relinquish their sovereign control over labour regulation and their position as the key actors in international law. This concern may be valid. An approach focusing solely on directly enforcing labour standards against MNCs, independently of domestic legal systems, may fail to undertake state capacity building and legislative development that is necessary for long term universal improvements in labour standards. However, we must not ignore the apparent failure of both home and host states to effectively control MNC's GSC operations by maintaining a desire for state sovereignty in international labour regulation.

This suggests that a multilateral approach targeting both state level legislation and capacity and MNC level responsibility, and including both voluntary soft approaches and binding mandatory obligations, may be the most effective in long term improvement in GSC labour standards. As noted earlier, this paper therefore takes the perspective that state and MNC level approaches are complementary and both of great importance, though the paper focuses on expounding the relevance and benefits of MNC level enforcement. This multilateral approach appears to be increasingly accepted internationally as at the third session of the UN Open-ended Working Group it was recognised that for 40 years "soft law instruments and voluntary principles had not been enough" to close the MNC accountability gap and a mandatory regulatory framework

is needed in addition to ensure accountability and access to justice.²¹⁷ “Creating a legally binding instrument would be complementary to, and not in opposition to, the Guiding Principles”.²¹⁸

When approached from a wider perspective, GFAs including binding arbitration may be able to fill the regulatory gap that spans state, private and international levels without creating normative conflict between the preference for soft mechanisms that maintain state regulatory control and direct legal enforcement against MNCs. GFAs with binding arbitration clauses are private law mechanisms that require the consent of both parties (MNCs and GUFs) thus, although imposing labour standards which are normally regulated and legally enforced through state legislation based upon internationally accepted ILO standards, the lines between public and private law are not blurred as they are in international law approaches. The state can maintain dominance in national and international labour regulations, which may be strengthened through additional state level mechanisms such as ILO Conventions, while jurisdictional and practical difficulties that currently create a state level regulatory gap are overcome as arbitration legally enforces the labour standards against MNCs.

Furthermore, enforcing GFAs through binding arbitration clauses is not entirely inconsistent with apparent international preferences for voluntary soft law approaches as parties voluntarily consent to the GFA itself, and binding arbitration is included as a last line of enforcement when internal, dialogue-based soft dispute resolution mechanisms are ineffective. Thus GFAs with binding arbitration clauses illustrate the potential to fill regulatory enforcement gaps at the private, state, and international level, whilst navigating around the issues of jurisdiction, political willingness, and state centred doctrine that created the gap.

The debate between ensuring responsibility amongst MNCs and maintaining state dominance in regulation and international law highlights a wider issue that globalisation increasingly undermines the Westphalian world order, making a state centric approach to regulation inadequate as states are no longer the only actors recognised in international law. The regulatory gap affecting labour standards in MNCs’ GSCs illustrates that a new supranational

²¹⁷ *Report on the third session of the open-ended intergovernmental Working Group on transnational corporations and other business enterprises with respect to human rights*, above n 209.

²¹⁸ *Report on the third session of the open-ended intergovernmental Working Group on transnational corporations and other business enterprises with respect to human rights*, above n 209.

regulatory framework has not yet been established to control the wider variety of actors in the globalised world. What development would be required to instigate this paradigm change in global regulation, and whether this would be desirable or not, is far beyond the scope of this paper. However, by self-regulating through private mechanisms like GFAs, MNCs are taking on regulatory roles usually occupied by states, and when binding arbitration is utilised in enforcing these mechanisms they present an effective form of regulation and governance in the modern globalised world.

VII Creating Global Framework Agreements with Binding Arbitration Clauses in the Future

A Difficulties and Requirements

The Bangladesh Accord illustrates the potential to include binding arbitration clauses in GFAs to legally enforce obligations to maintain decent labour standards in their GSCs against MNCs, thereby closing current regulatory gaps in which MNCs operate due to enforcement weaknesses in home and host states and past private COC and GFA mechanisms. The Bangladesh Accord, and arbitral proceedings pursuant to it, establish a new benchmark for the effective implementation of labour standards within GSCs at the MNC level. Recreating similarly structured GFAs may therefore have a significant impact in overcoming the current problem of low GSC labour standards.

However, the Bangladesh Accord is unique and has several aspects and limitations that may make it difficult to create similar agreements in the future. Firstly, the Bangladesh Accord is a solution-oriented agreement created after global public outrage at the Rana Plaza disaster.²¹⁹ The binding arbitration clause may have been included due to both MNC and GUF parties recognising the need to ensure effective implementation of the agreement to ensure similar events do not occur again given the large loss of life in the disaster. However, the role of the disaster and the subsequent media attention and public pressure, raises a question of whether similarly binding GFAs could be proactively created in other contexts when there has not been a large scale tragedy to spark action.²²⁰

²¹⁹ Zimmer, above n 95, at 6.

²²⁰ Fick, above n 46, at 1.

Secondly, the scope of the Bangladesh Accord is limited to fire and building safety within Bangladeshi garment factories the signatory companies source goods from. Future GFAs would need to be much wider in scope to ensure adequate labour standards in all aspects of GSCs.²²¹ This may present a practical difficulty in expanding binding GFAs as it is unclear whether parties would be willing to negotiate agreements including a wider set of labour standards and rights that do not necessarily garner the same media attention or public interest, such as wages or work hours. While these agreements may bind MNCs to the most basic and fundamental labour rights, it is potentially problematic if they fail to enshrine other labour standards that do not evoke such visceral public reactions when they are violated, but none the less are extremely important in ensuring decent standards for GSC workers.

Furthermore, GFAs and arbitration clauses are dependent upon party consent thus the ability to utilise binding GFAs to remedy GSC labour standards at the MNC level depends upon the willingness of MNCs to sign on. It may be difficult to see why MNCs would agree to GFAs in light of an apparent loss of competitiveness, increased labour costs, and the general tendency for “social dumping”.²²² However, several incentives for MNCs to enter GFAs exist and can be organised into four groups of benefits: reduction and privatisation of conflicts; public relations; promotion of equal competitive conditions; and exogenous requirements and avoidance of public regulation.²²³ Ensuring that future binding GFAs appeal to these incentives may encourage MNCs to sign on.

While 200 (mostly European) companies signed the Bangladesh Accord, many others, mostly in the United States, were reluctant and refused to sign due to the Accords’ binding nature.²²⁴ American company Gap stated it was willing to sign the Accord if one thing was changed, the binding dispute resolution process; however this change would have undermined the most defining attribute of the agreement.²²⁵ A group of seventeen North American companies, led by Wal-Mart and Gap, refused to sign the Accord citing concerns about excessive undefined legal liability for MNCs, and created a rival framework in the Alliance for Bangladesh Worker Safety.²²⁶ The Alliance provides no obligations for MNCs to contribute to remediation (beyond

²²¹ Salminen, above n 1, at 724.

²²² Hadwiger, above n 60, at 85.

²²³ Hadwiger, above n 60, at 88.

²²⁴ Hensler and Blasi, above n 100, at 4.

²²⁵ Hensler and Blasi, above n 100, at 3-4.

²²⁶ Anner, Bair and Blasi, above n 86, at 29.

an optional loan scheme), no union or worker representation thus suffering credibility concerns similar to private COC, and most importantly has no enforcement provisions (the only penalty for abandoning the Alliance is an administration fee).²²⁷ It therefore lacks the key elements that make the Bangladesh Accord so progressive and effective. The alleged undefined legal liability resulting from the Accord claimed to justify the non-binding Alliance is seen to be negated by the fact that numerous highly-sophisticated leading garment industry brands and retailers (including H&M, Tesco, and Inditex), who are some of Gap's main competitors in the United States market, have signed the Accord.²²⁸ This European/American split appears to be due to different cultures regarding union participation and collective bargaining. The majority of past GFAs have been concluded with European companies, with few non-European signatories, as part of a European trend towards decentralised collective bargaining on company rather than industry levels.²²⁹ Therefore global differences in union and collective bargaining practices and attitudes may produce difficulties in creating similar agreements to bind MNCs worldwide.

Lastly, although the Tribunal in the 2016 proceedings rejected the Respondent brands' arguments regarding the interpretation of the Bangladesh Accord's dispute resolution process, the raising of these arguments illustrates an important practical aspect of creating future binding GFAs is ensuring arbitration clauses and dispute resolution provisions are clearly and precisely worded to operate effectively in enforcement against MNCs. The Accord's arbitration clause suffered procedural deficiencies as it lacked a governing law clause or seat of arbitration, though the parties eventually decided that the PCA would administer proceedings with The Hague as the seat of arbitration. The updated 2018 Accord attempts to remedy this by expressly incorporating the most recent UNCITRAL Rules, and providing The Hague as the seat of arbitration, the PCA as the administering institution, and Netherlands law as the choice of law governing the Accord.²³⁰ The Accord's initial deficiencies illustrate another potential difficulty affecting future GFAs that there is no external framework providing alternative dispute resolution procedures for GFAs so, even if agreements provide for mediation or arbitration, provisions may lack the procedural details required for them to operate effectively in practice.²³¹

²²⁷ Anner, Bair and Blasi, above n 86, at 30.

²²⁸ Hensler and Blasi, above n 100, at 4.

²²⁹ Fick, above n 46, at 12; Hadwiger, above n 60, at 20.

²³⁰ "2018 Accord on Fire and Building Safety in Bangladesh: May 2018" (21 June 2017) <<http://bangladeshaccord.org/wp-content/uploads/2018-Accord-full-text.pdf>>.

²³¹ Hadwiger, above n 60, at 417.

The debate in the 2016 Bangladesh Accord proceedings regarding whether the “appeal” to arbitration constituted a *de novo* appraisal with fact-finding and law-deciding powers, or had the limited scope of an appellate body, also highlights the need for clearly worded arbitration clauses. Arbitration clauses in future binding GFAs should clearly provide for full *de novo* hearings to ensure the arbitration constitutes a last resort hard law enforcement mechanism to support an underlying internal cooperative and non-legal dispute resolution process. These arbitration clauses should also clarify which types of disputes can be appealed to binding arbitration. Arbitration should be used for GFA disputes about rights (the interpretation or application of existing rights under the GFA), but compulsory arbitration of disputes about interests (the determination and modification of rights and obligations of parties) should potentially be avoided as it is contrary to the labour standard of voluntary negotiation of collective agreements and risks international arbitration becoming a substitute for national collective bargaining mechanisms.²³²

B ILO Assistance

As noted, the ILO has expressed a desire for increased involvement in the creation and implementation of future GFAs,²³³ which could help overcome the various difficulties that may arise in creating future binding GFAs. The ILO’s tripartite structure enables them to bring together Union and MNC representation in a forum for discussion and proactive creation of GFAs, therefore overcoming difficulties regarding party motivation and consent. The ILO could utilise its Conventions and Recommendations as a basis to include a wider scope of rights in the agreements. The ILO could also provide technical assistance in drafting arbitration and dispute resolution provisions to ensure they are clear about the disputes they apply to and the appeal procedures and rights they provide. Furthermore, the ILO can play a neutral role in internal dispute resolution bodies (as it did in the Bangladesh Accord’s SC) and support mediation and arbitration procedures as a hard law enforcement backup. Thus although difficulties may arise in creating binding GFAs, the ILO demonstrates significant potential and willingness to assist in both creation and implementation, and overcome these challenges.

²³² Hadwiger, above n 60, at 192.

²³³ “Resolution concerning decent work in global supply chains”, above n 191, at [23].

VIII Conclusion

The problem of low GSC labour standards and the causative role of MNCs is now widely recognised, and many mechanisms to overcome this problem have been created in response. Despite this, various gaps remain in the enforcement of labour standards against MNCs through state, private and international mechanisms. Soft law based approaches to the problem are not to be completely discredited, but continuing evidence of labour abuses in GSCs, such as the Rana Plaza Disaster, illustrate the need for a hard enforcement mechanism to ensure MNCs are held accountable for violations and take action to prevent future abuses. The Bangladesh Accord has illustrated the potential to include binding arbitration clauses in GFAs to provide a hard enforcement mechanism against MNCs, filling the enforcement gap in GSC labour standard regulations.

Creating binding GFAs similar to the Bangladesh Accord will not be a simple task. Because the Bangladesh Accord is currently the only agreement of its kind, the practical challenges of creating future agreements, and their effectiveness, is somewhat uncertain. GFAs including binding arbitration may not be a silver bullet in the struggle against low labour standards in GSCs. However, they provide a “stick” that can be used to close the current regulatory gap and legally enforce labour standards against MNCs when the wider regulatory system of “sunshine and carrots” does not provide the required result. This form of GFA appears to be an effective mechanism for labour standard regulation at the MNC level, with a largely unutilised potential. These agreements should be increasingly utilised in practice, in conjunction with equally important state-level mechanisms to improve public labour regulation and capacity in host states, to remedy the problem of low labour standards in GSCs. In addition to its efforts to improve labour standards at the state-level, the ILO has the potential to provide assistance in the initial formation of binding GFAs, and in their implementation and dispute resolution procedures.

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