

**One step forward or more window-dressing? A legal analysis
of the recent CSR Initiatives in the Garment Industry in Bangladesh**

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Abstract

The Bangladesh ready-made garment industry has recently been affected by a number of terrible accidents, with the collapse of the Rana Plaza on 24 April 2013 as the deadliest garment-factory accident ever known. Under the pressure of renewed attention to the role and responsibilities of multinational corporations (MNCs) take responsibility for what happens in those factories, two initiatives have been adopted. These initiatives involve leading brands of European origin and North-American origin. With these initiatives the MNCs claim to strengthen their corporate social responsibility (CSR) regarding those factories. From a regulatory perspective, they represent cases of transnational private regulation (TPR). Although CSR and TPR have become increasingly popular, these initiatives have been perceived with mixed enthusiasm, since they are adopted in a legal vacuum. Consequently, they raise questions about their legal status, their legitimacy and their implementation and compliance mechanisms. These same questions will be discussed in this article concerning the Bangladesh initiatives, in order to discern if they have the potential to contribute to improving safety and working conditions in the Bangladeshi garment industry, or if they are rather forms of window dressing.

Key-words: corporate social responsibility, transnational private regulation, health and safety at work, ready-made garment industry Bangladesh.

1. Introduction

The Bangladesh garment industry (or Ready-Made Garment, RMG-industry) has recently been affected by a number of terrible accidents, with the collapse of the Rana Plaza on 24 April 2013, resulting in the loss of the lives of over 1,100 workers and many more injured, being the disastrous highlight. The Rana Plaza collapse was the deadliest garment-factory accident ever and has called world-wide attention to the problems the mainly female workers in this fast-growing industry are facing. On the one hand they need the jobs to feed their families but on the other hand they are confronted with unsafe and unhealthy working conditions, very low wages (a minimum wage of \$38 and an average monthly manufacturing wage of \$74) and long working hours. In the wake of the accidents protests have targeted the

Bangladeshi government, calling for a higher minimum wage and for improved safety standards as well as their enforcement.¹

Central to this article is another issue the accidents have drawn renewed attention to: the role and responsibilities of multinational corporations (MNCs) that directly or indirectly place their orders at the Bangladeshi factories. MNCs increasingly work with Bangladeshi suppliers and benefit from the lax safety standards and low wages in the country to strengthen their price competitiveness and increase their profits. However, they are now put under increasing pressure by trade unions, NGO campaigns,² the International Labour Organisation (ILO)³ and public opinion to take responsibility for what happens in the firms that form part of their supply chain. In response to these pressures, two transnational initiatives have been adopted, both aimed at improving the safety standards and working conditions in the garment industry in Bangladesh, focusing particularly on the fire and construction safety of the buildings.

One is the Accord on Fire and Building Safety in Bangladesh.⁴ The Accord is signed by a range of MNCs, trade unions and non-governmental organisations (NGOs). The MNCs are largely from European origin, including large retailers and brands like Carrefour, Tesco, Marks and Spencer, Benetton and H&M. From the trade union side the signatories include two Global Union Federations (GUFs), IndustriALL Global Union and UNI Global Union, as well as a number of Bangladesh garment unions. NGOs Clean Clothes Campaign, Workers' Rights Consortium, International Labor Rights Forum and Maquila Solidarity Network are witnesses to the Accord while the ILO acts as its independent chair. With the Accord the signatories agree to establish a fire and building safety programme in Bangladesh for a period of five years.

The second initiative is the Bangladesh Worker Safety Initiative of the Alliance for Bangladesh Worker Safety.⁵ This Alliance is a company-led undertaking and comprises mainly North-American companies, including Gap, Wal-Mart, Sears and J.C. Penney. It aims to establish collaboration with labour organisations and NGOs as well as the Bangladeshi government and factory owners. Its goal is to improve, in the coming five years, fire and building safety through the development of standards, inspections, training and worker empowerment.

With these initiatives the MNCs claim to strengthen their corporate social responsibility (CSR), i.e. the responsibility of companies for the negative social, societal and environmental impact of their activities and for the wellbeing of their workers and the workers in supplier- and other companies depending on the MNCs. From a legal or regulatory perspective, they represent cases of transnational private regulation (TPR), i.e. regulation by private actors that replaces (inter-)governmental regulations or that covers new areas that have not been regulated by either national or international public entities before. CSR and TPR have become increasingly popular in the governance of transnational labour issues. Notwithstanding their increasing popularity, however, as will be discussed in more detail below, these initiatives have been perceived with mixed enthusiasm. Judgements range from 'promising developments that truly aim to make a difference'⁶, to 'largely window-dressing to improve the reputation of companies and ease the mind of the consumers'.⁷ One of the reasons for

¹ <http://www.bloomberg.com/news/2013-09-23/two-hundred-bangladesh-factories-shut-on-labor-unrest.html>

² Among many others, e.g. <http://www.cleanclothes.org/action/current-actions/rana-plaza>.

³ http://www.ilo.org/global/about-the-ilo/media-centre/press-releases/WCMS_211999/lang--en/index.htm

⁴ <http://www.industriall-union.org/action-on-bangladesh>

⁵ <http://www.bangladeshworkersafety.org/initiative>.

⁶ Cf. M.P. Thomas, *Global Industrial Relations? Framework Agreements and the Regulation of International Labor Standards*, 36:2 Labor Studies Journal, 269-287 (2011).

⁷ G. Hanlon and P. Fleming, *Updating the Critical Perspective on Corporate Social Responsibility*, 3:6 Sociology Compass, 937-948 (2009); and E. Sternberg, *How Serious is CSR? A Critical Perspective*, in C.

these mixed views are the questions TPR initiatives raise about their legal status, their legitimacy and their implementation and compliance. These same questions will be discussed in this article concerning the Bangladesh agreements. They will be scrutinised concerning their legality, their legitimacy, and their mechanisms for implementation and compliance. The ultimate aim is to discern if they indeed have the potential to contribute to improving safety and working conditions in the Bangladesh garment industry, or if they are rather forms of window dressing. Because of the very recent nature of the initiatives, the paper offers a comparative legal analysis of their potential contribution, based on their governance structures, actors involved, implementation and compliance mechanisms foreseen, and their substantive content. It is too early to discuss the actual implementation and effects of the two initiatives. The structure of the paper is as follows. The next section discusses developments in TPR and CSR. Section 3 further develops the concepts legality, legitimacy and implementation and compliance mechanisms. Section 4 analyses the two Bangladesh initiatives using these concepts and section 5 presents conclusions.

2. CSR and TPR

Central to this article are two developments that have taken place in the past decade or so. One is the rise of Corporate Social Responsibility (CSR) as a key dimension of corporate practices, in particular of MNCs. The other is the growth of various forms of Transnational Private Regulation (TPR).

Where CSR is concerned, increased attention has been paid to the role of major corporations in ensuring respect for human rights and decent labour standards. On the one hand this growing interest results from the ever-increasing weight of MNCs and their supply chains in the global economy and their respective (potential) influence on human rights and labour standards.⁸ On the other hand, it follows from the rising prominence of human rights and labour standards in the discourse of MNCs, often under the heading of CSR.⁹ MNCs generally present these initiatives as efforts to redefine and strengthen the social and ethical dimensions of corporate policies and as new, socially just ways to govern both the external relationships and responsibilities of firms, as well as the internal relations with the workers of the firm. They include initiatives to strengthen respect for international labour standards; to improve health and safety in the workplace; to strengthen workers' voice; and to find a better balance between corporate profits and workers' well-being. Hence, CSR represents a promise of better rights and conditions for workers. It takes different shapes like unilateral codes of conduct adopted by management; international framework agreements negotiated between management and trade unions or works councils; or certification schemes involving multiple MNCs that sign up to standards that have been formulated and advocated by a non-governmental organisation (NGO) such as ISO 26.000, SA8000 and the Ethical Trading

Crouch and C. Maclean (eds.), *The Responsible Corporation in a Global Economy* (Oxford University press 2011), at 29-54.

⁸ UNCTAD, *World Investment Report 2013: Global Value Chains: Investment and Trade for Development*, (United Nations, 2013).

⁹ This has triggered a broad interest in CSR in legal studies and especially labour law, as well as in sociology, business studies and political science. See e.g. J. Zerk, *Multinationals and Corporate Social Responsibility. Limits and Opportunities in International Law* (Cambridge University Press 2006); C. Crouch and C. Maclean (eds.), *The Responsible Corporation in a Global Economy* (Oxford University Press 2011); E. Garriga and D. Melé, *Corporate social Responsibility Theories: Mapping the Territory*, 53 *Journal of Business Ethics*, 51-71 (2004); and regarding Bangladesh in particular: A.R. Khan, M.B. Muttakin, and J. Siddiqui, *Corporate Governance and Corporate Social Responsibility Disclosures: Evidence from an Emerging Economy*, 114:2 *Journal of Business Ethics*, 207-223 (2013).

Initiative, or by submitting to the monitoring process of an NGO, like with the Fair Wear Foundation or the Fair Labor Association.¹⁰

At the same time, these CSR initiatives are subject to a series of criticisms. From an orthodox economic perspective they are seen as unnecessary and draining resources from ‘proper’ business activities.¹¹ Others are sceptical about the real motives and impact of CSR policies and qualify them as ‘ethical marketing devices’ and expressions of narrow business interests,¹² or as ways of engineering new sources of legitimacy, identity and social value of MNCs.¹³ Also, CSR instruments are regarded with scepticism because of their voluntaristic nature and the absence of a transnational legal framework that could give such instruments a more formal nature and could increase their enforceability.¹⁴

Much of the criticism of CSR has to do with the types of governance that it entails. CSR largely falls in the broad category of TPR. It is a rapidly growing area of experimentalist governance which constitutes a response to two developments: the increasingly transnational nature and impact of markets, services and production processes; and the difficulties national governments and intergovernmental organisations face in regulating this process of transnationalisation. TPR is argued to be able to fill this regulatory gap, to adapt rapidly to changes in the market, to mobilise stakeholders and to deliver expertise.¹⁵ However, TPR is also a heavily debated phenomenon with critics and supporters. Where weaknesses are concerned, TPR is often criticised for being a legally non-binding and voluntarist type of regulation (*soft law*), made by actors without any legislative or formal enforcement capacities and whose legitimacy is unclear, which leads to doubts about the implementation of and compliance with such forms of regulation.¹⁶ Supporters rather point to the innovative and positive sides of TPR and highlight the potential of such experimentalist types of governance to fill regulatory gaps.¹⁷ Hence, CSR and TPR are subject to a series of questions which concern four dimensions: their legality; their legitimacy; and their implementation and compliance mechanisms. In the next section these four dimensions will be discussed and developed in more detail.

3. Legality, legitimacy, and implementation and compliance mechanisms

¹⁰ On these different types of CSR, see among many others: R. Pearson and G. Seyfang (eds), *Corporate Responsibility & Labour Rights. Codes of Conduct in the Global Economy* (Earthscan 2002); K. Papadakis (ed.), *Shaping Global Industrial Relations. The Impact of International Framework Agreements* (ILO/Palgrave 2011); and A. Sobczak, *Ensuring the effective implementation of transnational company agreements*, 18:2 *European Journal of Industrial Relations*, 139-151 (2012).

¹¹ E.g. Sternberg, *supra* n. 7.

¹² S. Banerjee, *Corporate Social Responsibility: The Good, the Bad and the Ugly*, 34:1 *Critical Sociology*, 51-79 (2008).

¹³ Hanlon and Fleming, *supra* n.7.

¹⁴ E. Ales et al, *Transnational Collective Bargaining: Past, Present and Future, Final Report for the European Commission*, Directorate-General for Employment, Social Affairs and Equal Opportunities (2006); and M. Anner, *The Limits of Voluntary Governance Programmes: Auditing Labor Rights in the Global Apparel Industry*, working paper 01 ‘Project for Global Workers’ Rights’ (2011).

¹⁵ F. Cafaggi (ed.) *Enforcement of Transnational Regulation. Ensuring Compliance in a Global World*, (Edward Elgar 2012); and F. Cafaggi, *New Foundation of Transnational Private Regulation*, 38:1 *Journal of Law and Society*, 20-49 (2011); and the special issue of the *German Law Journal on Transnational Private Regulatory Governance: Regimes, Dialogue, Constitutionalization* (Vol. 13, issue 12, 2012).

¹⁶ Cafaggi 2011 *supra* n. 15; P. Zumbansen, *Transnational Private Regulatory Governance: Ambiguities of Public Authority and Private Power*, Osgoode CLPE Research Paper No. 45/2012.

¹⁷ Ch. Sabel and J. Zeitlin, *Experimentalist Governance*, in: D. Levi-Faur (ed.), *The Oxford Handbook of Governance* (Oxford University Press 2012).

In this section we discuss in detail the four dimensions identified above as crucial for the (legal) effectiveness of CSR and TPR: legality, legitimacy and implementation and compliance mechanisms. These four dimension then make up the analytical framework to assess the (legal) potential of the two Bangladesh initiatives which will be presented in section four.

3.1 Legality

The principle of legality or lawfulness deals with the formal legal status of CSR and TPR initiatives. More precisely, it deals with the formal competence (the *de jure* authority) of the actors that adopt such initiatives. When actors lack *de jure* authority, they actually lack formal competence to adopt legally binding norms, which renders their initiatives without formal legal status, hence, leaves them legally non-binding: as *soft law*.¹⁸ In general only states have natural *de jure* authority to create legally binding norms through political processes. States can confer part of that authority to private actors like trade unions or to international organisations. As a result those actors possess *de jure* authority, albeit limited to the scope of the power conferred upon them. Thus, for private actors to gain *de jure* authority it is necessary that the competent national or international institutions empower them with such authority. However, regarding the transnational activities of MNCs both entities – states and international organisations – lack or have limited competences to bind MNCs to their rules or to transfer *de jure* authority on them.¹⁹ This ‘regulatory gap’ has been discussed in particular in the EU where the European Commission has in several occasions proposed (with no result yet) to create an optional legal framework for transnational collective agreements.²⁰

Still, in spite of the fact that MNCs and trade unions (and in particular GUFs) lack *de jure* authority to create legally binding norms, this does not mean that they operate without recognition. Organisations like the European Union and the ILO in many instances do promote and support their CSR initiatives. With that they provide these initiatives with *de facto* authority, *i.e.* recognition of competence and power in practice. Nonetheless, these initiatives remain voluntary in nature, which has raised doubts about their credibility and about their effectiveness, and hence about the legitimacy and *de facto* authority of the actors involved.²¹

3.2 Legitimacy

¹⁸ M.A. García-Muñoz Alhambra, B.P. ter Haar and A. Kun, *Soft on the Inside, Hard on the Outside: An Analysis of the Legal Nature of New Forms of International Labour Law*, 27:4 *The International Journal of Comparative Labour Law and Industrial Relations*, 337-363 (2011).

¹⁹ National norms can at best have extra-territorial effect or extended territorial effect. However, with the exception of some compelling examples with regard to market access and environmental issues in the context of the European Union, this is (still) limited, at least for labour standards. See more elaborately about this issue: J. Scott, *Extraterritoriality and Territorial Extension in EU Law*, 62:1 *American Journal of Comparative Law* (forthcoming 2014); and K van Wezel Stone, *Labor and the global economy: four approaches to transnational labor regulation*, 16 *Michigan Journal of International Law*, 987-1028 (1994-1995). On the limitations of international organisations, see: Y. Kryvoi, *Enforcing Labor Rights against Multinational Corporate Groups in Europe*, 46:2 *Industrial Relations*, 366-386 (2007).

²⁰ See e.g. R. Zimmer, *Establish a legal framework for transnational collective agreements in Europe: a difficult task*, 02/2012 Final report EUROACTA (chapter 2); I. Schönmann et al, *Transnational collective bargaining at company level. A new component of European industrial relations*. (ETUI 2012); A. Lo Faro *Bargaining in the shadow of ‘optional frameworks’? The rise of transnational collective agreements and EU law*, 18:2 *European Journal of Industrial Relations*, 153-165 (2012).

²¹ C. Crouch, *Collective bargaining and transnational corporations in the global economy*, 1:2 *International Journal of Labour Research*, 43-60 (2012).

Whereas the principle of legality is, among other things, concerned with the formal competence of the actors involved with the adoption of TPR (*de jure* authority), the principle of legitimacy is concerned with the competence or power of the actors as accepted in practice by those that are affected by those initiatives (*de facto* authority). In other words, it deals with the more political or sociological interpretation of the authority to adopt norms, which can only be as effective as this authority is accepted in practice. When authority is constructed by a legal framework (*de jure*), it implies also obedient behaviour, whereas obedient behaviour in practice could construct *de facto* authority.²² Three broad approaches can be discerned by which *de facto* authority can be created or enhanced: (i) building on existing norms and standards; (ii) through hierarchical relationships between the actors involved; and (iii) creating inclusive governance structures that include as many relevant stakeholders as possible.

The first approach, building on existing norms and standards, is considered to enhance *de facto* authority in CSR because it indicates that they are not just randomly chosen standards, rather they are developed by organisations that have *de jure* and/or *de facto* authority. Many CSR initiatives indeed do build upon labour standards that are defined either by international organisations like the ILO (core labour standards), the OECD (MNC guidelines) and UN Global Compact (ten principles), or by NGOs, including ISO26.000, SA8000, Fair Labor Association, Fair Wear Foundation or Clean Clothes Campaign.²³ In recent years, there is a tendency of convergence of these standards since many of them refer to each other. Moreover, most of these standards directly or indirectly refer to the standards of the ILO, in particularly the right of association and collective bargaining, the abolition of forced and child labour, and equal treatment. Besides these core labour rights it is not uncommon that the issue of health and safety at work is included.²⁴

Secondly, *de facto* authority can depend upon the power relationships between the actors involved in the adoption and implementation of the CSR initiative. This concerns especially power relations between MNCs and their supply chains (including subsidiaries, suppliers, subcontractors, licensees etc.) and, on the employees' side, between GUFs and lower levels of unions or other workers representation bodies. In the social-economic literature this relationship is often expressed by the level of asymmetry of power between actors. The higher the power asymmetry, the more hierarchical the relationship and the more likely it is that the authority of a lead-company over its supply chain or of a GUF over other unions and workers' representatives is accepted.²⁵

The level of power asymmetry or hierarchy between the lead-company and its supply chain can be expressed by the governance structure characterising their relationship.²⁶ In general high levels of power asymmetry are characterised by a culture of centralised decision making on business policies by the lead company that is executed by its subsidiaries, suppliers, subcontractors etc. Low levels of power asymmetry on the other hand are characterised by

²² <http://plato.stanford.edu/entries/legal-obligation/>; see also: C. Ku and P.F. Diehl, *International Law. Classic and Contemporary Readings*. (Rienner 2003), at 41-44.

²³ R. Locke, *The Promise and Limits of Private Power. Promoting Labor standards in a Global Economy*, Cambridge University Press 2013), at 178-179; and L. Fransen, *Corporate Social Responsibility and Global Labor Standards. Firms and Activists in the Making of Private Regulation*, (Routledge 2012).

²⁴ K. Papadakis (ed.), *Shaping Global Industrial Relations. The Impact of International Framework Agreements* (Palgrave MacMillan 2011) for IFAs in particular; and B.P. ter Haar, *Love, Flirt or Repel: Hybrid global governance of the ILO core labour standards*, European Journal of Social Law (forthcoming), more general.

²⁵ This is our interpretation and elaboration of the governance types as identified by G. Gereffi, J. Humphrey, and T. Sturgeon, *The governance of global value chains*, 12:1 Review of International Political Economy, 78-104 (2005); and the functional profiles as defined by T. Müller, H-W Platzer, and S. Rüb, *Global Union Federations and the Challenges of Globalisation*, International Policy Analysis (2010)..

²⁶ Gereffi, Humphrey, and Sturgeon, *supra* n. 25. See also: Khan, Badrul Muttakin, and Siddiqui, *supra* n. 7.

independent businesses working together as equal partners in non-hierarchical networks. Research in this field indicates that in general there is a tendency moving away from strong hierarchical structures towards non-hierarchical network structures.²⁷ Consequently, the natural *de facto* authority of the lead company over its chain is declining and weakening. Similarly, the internal relationship between the GUFs and the affiliated national and local trade unions can be expressed.²⁸ Research in this field indicate that most of the GUFs used to be characterised as decentralised networks in which the GUF functioned as secretariat and information platform. During the last decade though, most of the relationships between the GUFs and their affiliates have become more hierarchical in which setting the GUFs have been empowered with competences to coordinate objectives and provide guidance on how to achieve those objectives, and in some occasions GUFs have the power to adopt binding decisions that standardise operational objectives.²⁹ Despite this increase of the level of power asymmetry, in general GUFs too lack a natural *de facto* authority over their affiliates.³⁰ A third approach to enhance *de facto* authority is by involving as many relevant stakeholders as possible in the adoption and/or implementation of CSR initiatives. The involvement of stakeholders can be achieved by the creation of governance structures or networks based on a relationship of trust, co-operation and continuous negotiation/dialogue. In such networks relationships between actors are not, or only to a limited extent, hierarchical and free from any form of constitutional ordering, meaning that the actors involved engage freely (voluntarily) with one another across national borders.³¹ Also, legitimacy increases as the number of relevant stakeholders that are actively involved with the adoption, implementation and monitoring of the initiative grows.

3.3 Implementation and compliance mechanisms

Early attempts of MNCs to promote labour rights were faced with an unprecedented challenge, since they could not draw from experiences of their peers and had to experiment. Operating under uncertainty, the definition of general and open standards has proven to be a safe start, creating enough flexibility to define the scope and meaning of the norms according to what was achievable in practice. Also, it left enough room for civil society organisations to scrutinise the practice of MNCs. These early experiences made it clear that setting fixed rules and standards, and relying on traditional command and control structures for implementation and compliance thereof would not suffice, especially because often not hierarchical.³² And a variety of other obstacles concerning the effectiveness of CSR have emerged from research. One is that at the lower-levels of the supply chain the capabilities to implement norms properly are often limited. Hence, non-compliance is not necessarily a matter of will but also a matter of being able to. Another is that monitoring of implementation by means of financial-style audits, *i.e.* based on a long list of items to be inspected and verified. Such

²⁷ Gereffi, Humphrey, and Sturgeon, *supra* n. 25, at 90-96. See also: M. Fichter and J. Sydow, *Using Networks Towards Global Labor Standards? Organizing Social responsibility in Global Production Chains*, 9:4 *Industrielle Beziehungen*, 357-380 (2002).

²⁸ E.g. Müller, Platzer, and Rüb, *supra* n. 25, at 3 (table 1).

²⁹ *Ibid.*

³⁰ See for similar conclusions: P. Fairbrother and N. Hammer, *Global Unions: Past Efforts and Future Prospects*, 60:3 *Industrial Relations*, 205-431 (2005); and more generally on transnational trade unionism: P. Fairbrother, M-A Hennebert and Ch. Lévesque (eds.), *Transnational Trade Unionism. Building Union Power*. (Routledge 2013).

³¹ G. de Búrca, R.O. Keohane, and Ch. Sabel, *New Modes of Pluralist Global Governance*, 45:1 *New York University Journal of International Law and Politics* (2013).

³² *Cf.* Locke, *supra* n. 23, at 46-77 (which covers Chapter 3 Does Private Compliance Improve Labor Standard? Lessons from Nike).

audits are primarily based on factory records which are non-transparent and unreliable.³³ Also, suppliers or subcontractors can develop ‘audit fatigue’, in particular when they work for multiple lead companies which each have their own set of norms and monitoring schemes. Related to the latter is also the issue of monitoring manageability. Global supply chain networks span not only multiple countries around the world, they can also include very large numbers of suppliers and subcontractors, up to 1,000 or in some cases even to 10,000.³⁴ Consequently, simplifying strategies are needed to bring monitoring back into manageable proportions, for instance by focussing on the suppliers and subcontractors a real difference can be made or with which the MNC has close, cooperative relationships.³⁵ One way of selecting such suppliers and subcontractors is by dividing them into first, second, third, etc. tier-factories, i.e., by their distance to the lead company, and to emphasise the monitoring of suppliers and subcontractors that are closest related to the respective MNC since it is here that the lead company can be expected to have the highest impact.

In light of these obstacles and challenges, case studies show that a shift in emphasis is taking place in CSR policies from the detailed formulation of the norms – the normative quality of the substance – towards procedures supporting implementation and compliance.³⁶ Hence, the adoption of a CSR initiative ‘does not mark the end of the negotiation process, but rather the starting point of an organizational learning process throughout the subsidiaries’.³⁷ The latter then comprises experiments with the exchange of good practices, capability building (training of management and workers and their representatives), continuous deliberation between stakeholders and the development of preventive measures. In regulatory terms, this shift qualifies as a move away from conventional command and control mechanisms that stress enforcement and compliance with fixed rules, towards proactive problem-solving that emphasizes the operation of multi-level networks and aims for preventive actions. The latter then stress the importance of experimentation and deliberation in order to internalise open-ended standards.³⁸ This tendency is in pace with the developments witnessed regarding legitimacy discussed above: from hierarchical principle agent governance structures towards non-hierarchical multi-centred governance modes. Consequently, the focus in these initiatives is becoming more sophisticated including conventional forms of norm-setting combined with (semi-)judicial review, and forms of experimental governance.

Furthermore, these forms of governance are characterised by the construction of hybrid structures with other modes of governance, that are either private or public of origin and stem from different regulatory levels (national, regional/supranational or international). In this context there are several authors that stress the need for in particular private-public constructions.³⁹ They argue that this would not only enhance *de facto* authority but also

³³ *Ibid.*, at 35-39; D. O’Rourke, *Outsourcing Regulation: Analyzing Nongovernmental Systems of Labor Standards and Monitoring*, 31:1 *The Policy Studies Journal*, 1-29 (2003); and Ch. Sabel, D. O’Rourke, and A. Fung, *Ratcheting Labor Standards: Regulation for Continuous Improvement in the global Workplace*, KSG Working Paper No. 00-010 (2000).

³⁴ Fichter and Sydow, *supra* n. 28, at 368-369.

³⁵ *Ibid.*, at 357-380.

³⁶ E.g. Sobczak, *supra* n. 10.

³⁷ *Ibid.* This is supported by many others, among which: Locke, *supra* n. 23 and Fichter and Sydow, *supra* n. 28.

³⁸ A tendency that is in particular apparent with the implementation and monitoring mechanisms developed and applied by NGOs: O’Rourke *supra* n. 43; and L. Fransen and B. Burgoon, *Global Labour-Standards Advocacy by European Civil Society Organizations: Trends and Developments*, *British Journal of Industrial Relations* (early online publication 2013); and concerning IFAs: D. Stevis, *The Impacts of International Framework Agreements: Lessons from the Daimler case*, in K. Papadakis (ed.), ‘Shaping Global Industrial Relations. The Impact of International Framework Agreements’ (ILO/Palgrave MacMillan 2011), at 116-142.

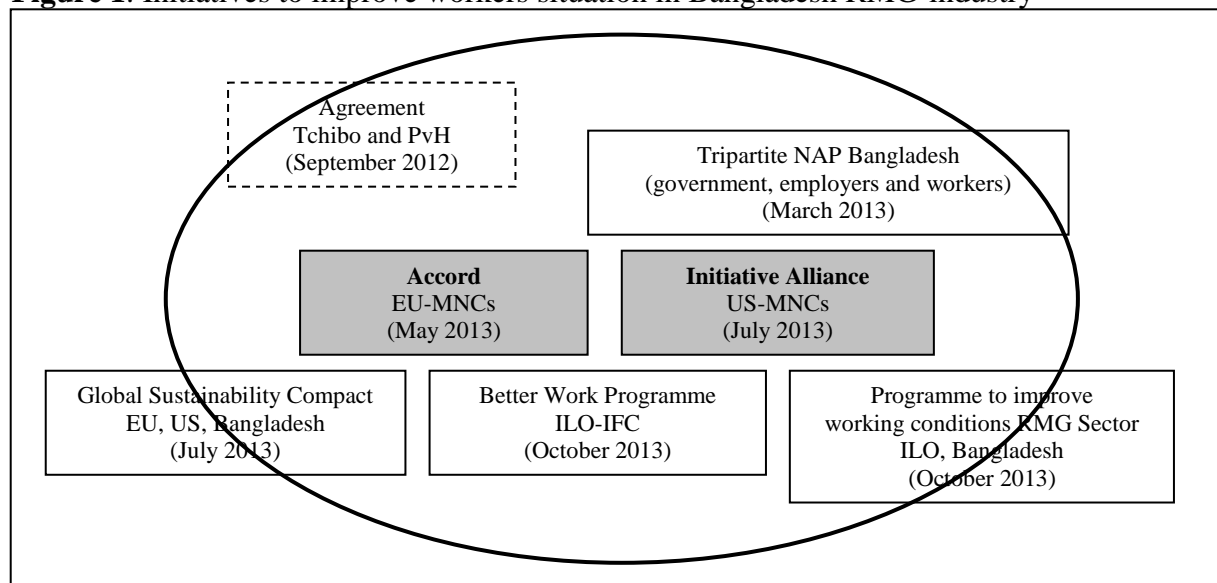
³⁹ Locke *supra* n. 23; and M. Weiss, *International Labour Standards: a Complex Public-Private Policy Mix*, 29:1 *International Journal of Comparative Labour Law and Industrial Relations*, 7-19 (2013).

strengthen compliance mechanisms since it could open paths to legally binding norms and/or judicial review by (national) courts.

4. Bangladesh Agreements

With the rising number of tragic accidents, societal pressure for change in the garment industry in Bangladesh has resulted in several initiatives. These include initiatives of public origin as well as private (see figure 1). Among them (marked grey in the figure) are the two private CSR initiatives that are under analysis in this paper: the ‘Accord on Fire and Building Safety in Bangladesh’ (further: the Accord) and the ‘Bangladesh Worker Safety Initiative of the Alliance for Bangladesh Worker Safety’ (further: the Initiative).

Figure 1. Initiatives to improve workers situation in Bangladesh RMG-industry⁴⁰



4.1 Analysis of the Accord on Fire and Building Safety in Bangladesh

The ‘Accord on Fire and Building Safety in Bangladesh’ was the first private agreement to be adopted after the Rana Plaza collapse, namely at 13 May 2013. This is merely three weeks later which is a remarkably short time given the fact that the conclusion of agreements involving multi-stakeholders is a complex process concerned with the alignment of different and sometimes conflicting interests. That it only took about three weeks is because the Accord is in fact a ‘rename’ of an agreement that was signed on 20 September 2012 by two MNCs (the German chain Tchibo and PvH/Tommy Hillfiger) with the GUF IndustriAll Global Union and four NGOs – Clean Clothes Campaign (CCC), International Labor Rights Forum (ILRF), Worker Rights Consortium (WRC) and Maquila Solidarity Network (MSN), together

⁴⁰ See for further information about these initiatives: <http://www.industrialunion.org/tchibo-joins-agreement-on-garment-factory-safety-in-bangladesh> (Agreement Tchibo and PvH/Tommy Hillfiger); http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-dhaka/documents/genericdocument/wcms_209285.pdf (tripartite NAP Bangladesh); http://europa.eu/rapid/press-release_IP-13-667_en.htm (Global Sustainability Compact); <http://betterwork.org/global/?p=3694> (Better work programme ILO and IFC); http://www.ilo.org/dhaka/Informationresources/Publicinformation/Pressreleases/WCMS_226720/lang--en/index.htm (Programme to improve working conditions RMG-Industry ILO-Bangladesh).

with several Bangladeshi trade unions and labour rights groups.⁴¹ This agreement had not taken effect yet because it needed at least two more MNCs to sign up to it to initiate its activities. Unfortunately two more tragic accidents were needed in order for other MNCs to join the agreement. At the moment of the 're-launch' of the agreement by the name of Accord, 24 MNCs had signed to it. It remained open for more MNCs to join which has resulted in over a hundred MNCs signing the Accord.⁴² These MNCs are largely from European origin. On the workers' side, IndustriAll Global Union is joined by UNI Global Union and also national trade unions affiliated to IndustriAll Global Union have co-signed the Accord.⁴³ The Accord is endorsed by the earlier involved NGOs who have signed as witness and is supported by public organisations, including the OECD national contact points,⁴⁴ the European Commission,⁴⁵ and in several ways by the ILO.

In brief the Accord aims to improve the fire and building safety by safety inspections. By the inspection defined risks need to be remediated, for which financial support will be raised by the signatory companies and others. Factory managers, workers and security staff will be trained to enable them to voice concerns and to actively participate in activities to ensure their own safety. The Accord covers a five-year period.

Legality and legitimacy

The Accord deals with fire and building safety in Bangladeshi RMG-Industry which are part of the supply chain of the signatory MNCs. Since the Accord is adopted by private actors only it qualifies as TPR. The Accord states that the Accord is legally-binding, however, since it is a form of CSR by TPR, it lacks per definition a legal framework to give it a formal legally-binding status, hence it lacks *de jure* authority.

From a regulatory point of view, the following can be noticed with respect to the legally-binding status it is claimed to have. Being an agreement between MNCs and GUFs and national trade unions, it can be binding based on contract law. This means that it is only binding between the parties and regarding the obligations and rights that apply to them. For as far as rights and obligations are concerned for third-parties, in this situation the individual workers and the supplier factories, the Accord cannot create *de jure* legally-binding norms. However, this does not mean that it cannot create legal facts, in particular when authority to create norms for third-parties is accepted in *de facto*. As suggested in section three, in many cases governance relations between MNCs and their supply chain, and between GUFs and their affiliates are not very hierarchical, include limited levels of power asymmetry and hence a limited level of natural *de facto* authority.

Concerning the Accord this problem is partly solved with regard to the governance relationship between the GUFs involved, in particular IndustriAll, and their national Bangladeshi affiliates. Firstly, IndustriAll is, according to Müller, Platzer and Rüb, one of the few GUFs that has developed in the direction of steering body, implying a relatively strong *de facto* authority over its affiliates. Secondly, the relevant Bangladeshi trade unions have co-signed the Accord and are therefore directly bound by the Accord. This does not apply to the question of *de facto* authority of MNCs towards their Bangladeshi suppliers. Still, the Accord does address legitimacy in several ways.

⁴¹ Bangladesh Fire and Building Safety Agreement <http://www.industrialunion.org/tchibo-joins-agreement-on-garment-factory-safety-in-bangladesh>.

⁴² <http://www.industrialunion.org/bangladesh-signatory-list>

⁴³ These are: the National Garments Workers Federation (NGWF), Bangladesh Independent Garment Workers Union Federation (BIGUF), plus the Bangladesh Independent Garments Workers Federation (BIGWF) and Bangladesh Revolutionary Garment Workers Federation (BRGWF).

⁴⁴ <http://www.industrialunion.org/oecd-national-contact-points-support-bangladesh-accord>

⁴⁵ http://europa.eu/rapid/press-release_IP-13-667_en.htm

The first way to strengthen legitimacy (and therewith *de facto* authority) is through the promotion of norms and standards defined by other, more authoritative, organisations and initiatives. The Accord deals with fire and building safety that is part of the issue of health and safety at work and which is promoted by the NGOs that signed the Accord as witness and the ILO that supports the Accord in several ways. One of the ways the ILO supports the Accord is with a special programme on working conditions, including health and safety (see figure 1 above).

Secondly, a substantial part of the Accord deals with governance structures to ensure its implementation. It creates several bodies, of which the steering committee and the advisory body are the most important ones. Both include the main stakeholders: the steering committee includes representatives of the signatory MNCs and the trade unions; the advisory body covers a considerably wider range of stakeholders, including the Bangladeshi government, national trade unions, supplier representatives, MNC representatives and representatives of national and international NGOs. The ILO is involved in both as independent chair. The steering committee is responsible for the execution of the Accord, whilst the Advisory Body foresees the former with input and feedback. Hence the Advisory Body's main aim is to ensure a constructive dialogue among all stakeholders (article 6 of the Accord). Via both bodies network structures are created which enhance the *de facto* authority of the Accord. Furthermore, these bodies not only create governance structures between the stakeholders, they also signal a multi-centred coordination process. Not only is there a wide variety of stakeholders involved with the adoption of the Accord, but also with its implementation.

Implementation and compliance mechanisms

The above aspects, in particular the creation of governance structures that include multiple stakeholders and a multi-centred coordination process, emerge from the literature as essential for the creation of auditing and training systems that uses mutually recognised incentives and sanctions. The Accord also has a well-designed architecture for implementation and compliance. First of all, it defines a clever 'monitoring strategy': articles 1-3 of the Accord define the personal scope by connecting the intensity of inspections and level of remediation requirements to the production volumes of the supplier factories for the signatory MNCs. By dividing the supplier factories in Tier 1, 2 and 3, respectively high to low production volumes, it not only brings the inspections back into manageable numbers, but it also focuses on supplier factories that are more likely to make a substantial difference in the Bangladeshi RMG-Industry. A qualified, independent Safety Inspector will conduct inspections in the Tier 1, 2 and 3 factories. Based on the reports of the safety inspector – which are disseminated among the stakeholders and partly made public – remediation measures need to be taken by the supplier factory. The inspection norms will be based on the Bangladesh tripartite national action plan⁴⁶ and further developed in co-operation with the Bangladeshi government. The signatory MNCs are made responsible for their supplier factories to comply. Therefore they can use incentives (mainly financial support and the guarantee of orders for at least the duration of the Accord, which is five years) and sanctions (via a warning system ultimately resulting in the termination of the business relationship) (articles 21-25 of the Accord). The Accord also foresees in a training programme on fire and building safety to be established by a Training Coordinator. The training will be offered for workers, managers and security staff of Tier 1 factories. Local trade unions and specialised staff are to be involved. The aim of this training is to enable workers to voice concerns and participate in activities to ensure their own

⁴⁶ Which was adopted in March 2013: http://www.ilo.org/dhaka/Informationresources/WCMS_209285/lang--en/index.htm.

safety, preferably via Health and Safety Committees that function in accordance with Bangladeshi law.

Although the Accord is adopted in order to fix a problem (reactive), the just described mechanisms show more resemblance with the pro-active problem solving actions using experimentation and deliberation to internalise open-ended standards. The Accord also provides more traditional command-control structures. The first is the use of a hotline for workers to alert the Safety Inspectors about health and safety risks (article 18 of the Accord). More significantly, article 5 of the Accord provides for a dispute resolution ‘between the parties to, and arising under, the terms’ of the Accord. The dispute resolution knows two instances: the steering committee and a binding arbitration process based on the New York Convention. An arbitration award is enforceable in a court of law of the domicile of the signatory against whom enforcement is sought. The latter is unique and unprecedented in CSR (or TPR) initiatives. The fact that the signatory parties are willing to submit their actions to binding third party dispute resolution enhances the credibility significantly and consequently the effectiveness of the Accord. Hence, it is argued that this provision was the main reason for many North-American based MNCs not to sign the Accord out of fear for risking excessive undefined legal liability.⁴⁷ This is in particular the case when article 5 is read in conjunction with article 20, which provides in the establishment of a protocol that i) supports and motivates the employer to take remediation efforts in the interest of the workforce and the sector and ii) expedite prompt legal action where the supplier refuses to undertake the remedial action required to become compliant with national law.

To conclude, the Accord applies a mixture of traditional command and control mechanisms combined with experimentalist pro-active problem-solving mechanisms. Together they construct credible mechanisms for effective implementation of the Accord.

4.2 Analysis legal dimension Bangladesh Workers Safety Initiative

The ‘Bangladesh Worker Safety Initiative’ of the Alliance for Bangladesh Worker Safety dates from 10 July 2013.⁴⁸ It recognises that the individual CSR efforts of the allied MNCs have not resulted into safe enough working circumstances. Therefore a collective effort is required, to which end the Alliance is founded and the Initiative is launched. The twenty MNCs that joined the Alliance are of North-American origin. The Alliance is supported by several (mainly North-American) employers’ associations and by BRAC⁴⁹ (an international NGO founded in Bangladesh). Furthermore, it seeks cooperation with other interested parties and key-stakeholders, among which the Bangladeshi government, RMG-Industry and its workers, as well as other international organisations.

The Initiative of the Alliance is a five-year programme to improve factory safety by means of inspections, safety training for factory management and workers (both activities are monitored by a third party) and a ‘hotline’ to empower workers to report safety concerns. The programme is supported by a financial fund and provided with access to substantial low-cost capital for factory improvements.

Legality and Legitimacy

The Initiative deals with safety of the factories in the Bangladeshi RMG-Industry that are suppliers of the signatory MNCs. As such it qualifies as a form of TPR. In the introduction of

⁴⁷ B. Hensler and J. Blasi (2013), ‘Making Global Corporations’ Labor Rights Commitments Legally Enforceable: The Bangladesh Breakthrough’, *Worker Rights Consortium*.

⁴⁸ <http://www.bangladeshworkersafety.org/>

⁴⁹ Bangladesh Rural Advancement Committee.

the Initiative it is stated that it is a legally binding commitment among the founding Alliance members. This means that it is only binding between the signatory MNCs, and hence does not aim to attribute legally binding rights that can be claimed by for instance the workers covered by the Initiative against the signatory MNCs. Consequently, the legal bindingness of the Initiative is clearly limited to claims between the signatory MNCs in order to keep each other equally committed to the programme. This involves in particular commitments concerning contributions to the worker safety fund and sharing of information on the factories the MNCs use and the safety inspection reports concerning those factories. Actions on claims of non-compliance can be brought for arbitration either in New York or in Toronto (article 5(1)(a)(vii) of the Alliance Bylaw). Although with its limits, this is an important aspect. The case study of Robertson on the effectiveness of the Chiquita IFA, for instance, has illustrated the vulnerability and risk of failing of TPR when a significant part of the market actors is not committed.⁵⁰

Secondly, even though it is claimed to be legally binding for the signatory MNCs only, the Initiative does create rights and obligations for Bangladeshi supply factories and their workers. When reading the Initiative it gives the impression that it relies on a presumed hierarchical internal governance structure between the MNC and its suppliers – the provisions in the Initiative consequently address either the Alliance or the Alliance Members (i.e. the MNCs). However, such governance structures are rare in the garment industry, therefore, if the Initiative is to be taken as a credible attempt to improve the factory safety it ought to include mechanisms to enhance natural *de facto* authority.

Regarding the subject matter of the Initiative, it can be noted that factory safety is part of health and safety at work, which is the subject of many an initiative of NGOs and the ILO. However, these organisations are not as intensively involved in the Initiative as they are in the Accord. For example, no reference is made to any of the initiatives of these organisations. Moreover, none of these organisations nor the Bangladeshi government have a guaranteed formal position or representation in the governance bodies that are established to execute the Initiative. The Board of Directors is composed of four company representatives and four stakeholder representatives and an elected chair. The stakeholder representatives could be NGOs and/or the ILO, but can also be anyone else with qualifications in the areas of workers safety, human rights or labour (article 5(2)(d)(ii) of the Alliance Bylaw). Consequently, quite different from the Accord, the core group of stakeholders involved in the adoption as well as the implementation of the Initiative concerns mainly the allied MNCs. Moreover, little effort is made to strengthen *de facto* authority by broadening the range of actors involved, either in the governance of the Initiative or in its implementation. As a result, certain key stakeholders have a limited role or are simply absent. For example, there is no mentioning of the involvement of trade unions or other of workers' representatives. As a result, the Initiative remains weak in its *de facto* authority.

Implementation and compliance mechanisms

Although the content of the Initiative is very similar to that of the Accord in terms of activities to be promoted – inspections, remediation and training for factory workers and management – from a regulatory point of view they differ considerably. Whilst the Accord pays much attention to governance and implementation mechanisms, the Initiative focuses on the formulation of norms and on things that at some point 'will be done'. For example, the Initiative states that the Alliance will appoint a Training Committee to develop a uniform set

⁵⁰ P.K. Robinson, *International Framework Agreements: Do Workers Benefit in a Global Banana Supply Chain?* in K. Papadakis (ed.), 'Shaping Global Industrial Relations. The Impact of International Framework Agreements' (ILO/Palgrave MacMillan 2011), at 164-178.

of fire and building safety educational standards. When a factory fails an inspection it is required to take the training programme within 30 days. This sounds reasonable, however, the same section of the Initiative immediately continues to state that Alliance members (thus the MNCs) 'have pledged to work only with factories that ensure a safe working environment' and that they have committed 'not to source from any factory that the members find is unsafe'. Furthermore, regarding the remediation of unsafe situations, the Alliance 'will develop a process for validation and accountability'. Although this seems fair, from a regulatory point of view this means that norms will be set that the factories have to comply with (command and control approach). It leaves little room for a process in which the supplier company can gradually improve the safety situation by learning, by identifying the underlying problems, and by developing the necessary capabilities (through increased knowledge and understanding as well as financial means) to tackle these problems (problem solving approach). Similar to the Accord, the Initiative also provides financial support for the factories to remediate unsafe situations as identified in the safety reports. However, the focus lies on the obligations of the MNCs to contribute, rather than on creating financial incentives for supplier factories to participate in the programme, even though the Initiative recognises the difficulties local companies face in accessing affordable investment capital.

5. Conclusions

This article presents a comparative analysis of two initiatives that have been adopted in response to a series of accidents in the Bangladeshi RMG-Industry, with the collapse of the Rana Plaza at 24 April 2013 as disastrous highlight. The first is the Accord, adopted by mainly European MNCs jointly with two GUFs and a series of national trade unions, and the second the Initiative, launched by an Alliance of mainly North-American MNCs. With these two initiatives the MNCs involved respond to the pressure from society and workers in the Bangladeshi RGM-Industry to take their social responsibility, hence these initiatives are a form of CSR. Since these initiatives are adopted by private actors and have a transnational scope, they also qualify as TPR. Hence, they raise questions about their nature and effectiveness: are they business driven 'ethical marketing devices' (window-dressing) or are they serious human rights driven efforts to redefine and strengthen the social and ethical dimensions of corporate policies? And, from a legal point of view, considering that these initiatives are legally non-binding and voluntarist types of regulation (*soft law*), do they have the potential to effectively address the fire and construction safety problems in the Bangladeshi garment industry?

What stands out regarding both initiatives is that they have both been adopted in a rather short period of time after the disastrous collapse of Rana Plaza – the Accord within three weeks and the Initiative within 14 weeks. Something that would not have been possible when the route of public measures would have been taken, that is, if there would have been a public regulator on the transnational level. Secondly, what positively distinguishes these initiatives from most other CSR initiatives is that they involve a substantial number of market-leading MNCs and cover a substantial part of the Bangladeshi supplier factories active in the garment industry (somewhere between 35% to 50%).

When comparing the two initiatives on the four dimensions they differ considerably. It is inherent to the TPR nature of both initiatives that they lack legality or *de jure* authority. This can partly be compensated for by legitimacy or *de facto* authority and effective implementation and compliance mechanisms. The Accord seems to better accomplish this than the Initiative. Indeed the Initiative relies on traditional command and control mechanism and monitoring by means of financial-style auditing, with little attention for the capabilities of the Bangladeshi factories and workers to identify and address problems, or the dangers of

unreliable or false information supplied to audits. As such, it shows strong resemblance with the early period unilateral CSR codes which were often not very successful in practice. Hence, the setup of the Initiative seems to limit its potential effectiveness from the outset.

The Accord on the other hand provides an interesting mix of traditional command and control mechanisms, especially the arbitration procedure, and forms of experimentalist governance. The emphasis is on developing the capabilities of the factories and workers, and on constructive deliberation with all relevant stakeholders, including the Bangladeshi government, trade unions and NGOs. The Accord accommodates therefore many aspects that have been indicated in the literature as contributing positively to the effectiveness of the CSR and TPR. The setup of the Accord therefore is more promising as to its expected effectiveness in practice and in making a difference where the improvement of fire and construction safety is concerned. However, the proof of the pudding is in the eating and it will depend on the actual use actors make of the two, still very recent, initiatives which one will be most effective in the end. The Accord however seems to offer the best architecture and instruments in this sense and seems most likely to offer a real step forward.

Finally, some shortcomings of both initiatives should be pointed out. First, although the initiatives have no intention to be rivals or to fight for dominance, they are also not complementary. They just coexist. This overcomplicates the situation, especially for the supplier factories, whose suppliers relations are often not limited to factories that have signed up to only one of the initiatives. Consequently they could be confronted with confluence of obligations and processes following from both initiatives. Even when this would be forestalled with determination rules, it remains sub-optimal since two different sets of standards and incentives are set. Another negative aspect is the temporal limitation of five years. Although it is admirable that the aim of the initiatives is to remediate the unsafe fire and building situations within a period of five years, considering the magnitude of the problems it is unlikely that this can be achieved in such a short period. Also, it remains unclear what happens after those five years: will the actors involved learn lessons, adjust the content and renew the initiatives for another period of five years? Or will they be abandoned if the pressure from public opinion and workers has lessened?

Finally, the major limitation of both initiatives is their material scope. Both only address the issue of fire and building safety and even though this is a major issue that indeed needs urgent attention, the workers in the Bangladeshi garment industry are also confronted with very low wages, bad working conditions, minimal employment and social security and severely limited voice. One wonders what has to happen for MNCs to accept their corporate social responsibility on these equally important and urgent issues as well and to more comprehensively start to guarantee decent work for all.