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Fundamental labour standards and the shift from international to transnational labour law: countervailing power in the globalised world of work

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5 | Transnational Private Regulation of Fundamental Labour Standards

5.1 INTRODUCTION

The last three chapters discussed frameworks that were concluded by public actors such as states and international organizations. However, private actors have been initiating programs of industry self-regulation since the 1990s as well. After the failure of the international community to agree on binding rules for MNEs, trade unions, NGOs and other social movements believed the existence of international norms and procedures established by the ILO were not sufficient to enforce labour standards, criticizing both (international) governmental agencies and MNEs.¹

MNEs themselves believed there was a need to construct a system for industry governance at a global level as well, albeit much softer than what trade unions and NGOs had in mind and for different reasons. When incidents of human and labour rights abuses in developing countries involving MNEs and their supply chains surfaced,² there was a spur of social protests that targeted companies directly.³ Following such incidents, and pressured by consumers, the media, shareholders and sources of capital, many companies chose a pro-active route and decided to draft their own (ethical or supplier) codes of conduct or join coalitions that would create forms of transnational private regulation to express their commitment to human, environmental and labour rights. Nonetheless, these codes of conduct are not legally enforceable and often limited to self-regulation. What is more, national courts in home states have in general declined corporate liability in their jurisdiction for violations of fundamental labour standards by the MNE itself, its subsidiaries or its supplier in host states.

In response to the absence of adequate public regulation that governs the negative social and environmental impacts of transnational companies, a diverse landscape of transnational private regulations has emerged. The number and scope of transnational private regulations have increased significantly since the 1990s, existing now in almost every sector and industry.

1 Marx & Wouters 2016, p. 436.

2 For example, it was revealed that products of Nike were produced by children working in factories in Asia. In India thousands were killed in an explosion of Union Carbide's pesticide plant.

3 Kolk, Van Tulder, Welters 1999, p.146 and Marx & Wouters 2016, p. 436.

Transnational private regulation endeavours to extend public regulations to a wide range of global corporate activities of which ‘the scope or effectiveness of national and international government authority is currently either weak, limited, or non-existent’.⁴ As a consequence, there are important linkages between transnational private regulations and public regulations. In addition to commitments to comply with host-country national laws, transnational private regulatory standards are based on the ILO, including the ILO 1998 Declaration, and the previously discussed UNGPs, OECD Guidelines and ILO MNE Declaration.⁵ Transnational private regulation thus aims to supplement public regulations, and is an important policy tool at the sectorial, national, and global level.⁶ Transnational private regulation needs to be considered when discussing the shift from international labour law to transnational labour law in the context of fundamental labour standards.

Although many scholars use the terms (or a mix of) voluntary standards, multi-stakeholder initiatives, private sectorial initiatives, global civil regulation, etc., this thesis uses the term transnational private regulation.⁷ Bartley explains that transnational refers to the fact that most of these initiatives operations transcend national borders and jurisdictions. Moreover, the term private reflects the fact that these initiatives are formally independent of government but not reducible to industry self-regulation. Lastly, Bartley holds that the term regulation is used because these frameworks set rules to enforce compliance with it standards.⁸

This chapter will analyse transnational private regulations in general and specific forms in practice. Paragraph 2 will first analyse the companies’ unilaterally declared codes of conduct, and explains why these programs of self-regulation are not an adequate supplement to public regulations. In addition, this paragraph discusses the so-called foreign direct liability cases. Via civil liability claims in home states’ jurisdictions, victims or survivors of corporate abuses in developing host countries have sought to hold companies accountable for violations of *inter alia* fundamental labour standards committed by the company itself, its subsidiaries or its subcontractors in host countries. These claims, however, were mostly unsuccessful but fear of litigation has been an important incentive for companies to participate in transnational private regulations.⁹ Paragraph 3 expounds the concept of transnational private regulation, and further clarifies the reasons why private actors have engaged in mixing coalitions of non-state, state, and UN actors to enhance the protection of fundamental labour standards. Two forms of transnational private regulation

4 Vogel 2010, p. 71-73.

5 Vogel 2010, p. 69.

6 Berliner & Prakash 2015, p. 116.

7 Bartley 2007.

8 Bartley 2007, p. 302.

9 Stephens 2020, p. 47.

will be discussed in more depth, i.e. voluntary standards, and International Framework Agreements (IFA). The reason why these two forms are analysed is because they have been one of the most used forms of transnational private regulation in the context of fundamental labour standards and have attracted a large amount of attention in the literature. Paragraph 4 explores the workings of a voluntary standard in practice, namely the United Nations Global Compact (UNGC). The UNGC has almost 15.000 signatory companies and over 3.800 non-business actors participating in the UNGC, and has been named the largest and most widespread voluntary corporate initiative in the world.¹⁰ The UNGC is a principle-based voluntary standard. Principles 3 to 6 cover four fundamental labour standards (occupational safety and health is promoted through different means by the UNGC). Paragraph 4 discusses the UNGC's origins, content, and monitoring mechanism and concludes with its potential and limits as discussed in the literature. Paragraph 5 analyses IFAs in practice by discussing the International Accord. The International Accord is the successor of the Bangladesh Accord and has been set up in the aftermath of the Rhana Plaza tragedy. The International Accord focuses on occupational safety and health in the textile and garment sector in Bangladesh and Pakistan by supporting workplace safety programs including regular inspections. In Bangladesh the accord covers over 190 brands, more than 1500 factories and over 2 million workers.¹¹ In Pakistan the accord covers over 120 brands, more than 500 factories and almost 600.000 workers.¹² Signatories that have signed one or all accords include brands such as H&M, Hugo Boss, and C&A.¹³ The origins of the International Accord, its content and its enforcement mechanism, including two disputes under the International Accord will be discussed in paragraph 5 before concluding on its potential and limits. Paragraph 6 concludes on the positive and negative characteristics of private transnational regulation towards the enforcement of fundamental labour standards. Finally, it analyses the impact transnational private regulation has had on the shift from international labour law to transnational labour law in the context of fundamental labour standards.

5.2 CODES OF CONDUCT AND FOREIGN DIRECT LIABILITY CLAIMS

In the absence of international mechanisms to challenge companies' transnational activities that have negatively impacted human rights, including fundamental labour standards, advocates for corporate accountability have

10 See for instance Rasche, Waddock & McIntosh 2013, p. 6 and Orzes 2018, p. 634.

11 <https://internationalaccord.org/countries/bangladesh/> (accessed on 23 July 2024).

12 <https://internationalaccord.org/countries/pakistan/> (accessed on 23 July 2024).

13 https://docs.google.com/spreadsheets/d/1TXqPmhwfFuhupTm2DqKfF_TsAq14FztTMPIxTwVTgx4/edit#gid=843332552 (accessed on 23 July 2024).

tried to use domestic legal systems in home states' jurisdictions to hold companies accountable for human rights violations in their supply chain.¹⁴ One of the avenues they pursued was to sue companies on the basis that they failed to enforce compliance by their suppliers with their code of conduct. Since the 1990s labour rights have been increasingly referred to in programs of industry self-regulation, via *inter alia* companies' (ethical or supplier) codes of conduct. Ethical codes of conduct have been defined by Schwartz as 'a written, distinct and formal document which consists of moral standards used to guide employee or corporate behaviour'.¹⁵ A supplier code is a set of prescriptions intended to guide present and future behaviour of the company and its suppliers.¹⁶

Companies have drafted unilaterally proclaimed ethical or supplier codes of conduct in response to external forces. Facing increased pressure of trade unions, human rights and labour advocates, consumer groups, student organizations, as well as socially oriented institutional investors, companies believed there was a need to construct a system for industry governance at a global level as well, albeit much softer than what these groups had in mind.¹⁷ The US companies that were the frontrunners were Levi Strauss (1992), Reebok (1993) and Starbucks (1995).¹⁸ In 2011, 95% of the US 100 and Fortune Global 100 had an ethical or supplier code of conduct.¹⁹ In 2023, 880 of the 1241 companies included in the S&P Global had adopted a supplier code of conduct. 90% of the supplier codes of conduct refer to forced labour, child labour and non-discrimination, but only 77% refers to freedom of association and occupational safety and health. What is more, nearly half of the supplier codes of conduct does not explicitly mention or refer to the related ILO core conventions or the ILO 1998 Declaration, and only 30% includes them as benchmarks for labour conditions throughout the supplier code of conduct.²⁰

In addition, many of these codes and their monitoring have been criticized for being too weak and not much more than 'window-dressing'.²¹ Codes of conduct are self-supervised and have proven impossible to legally enforce. For example, workers in Wal-Mart supplier factories in Bangladesh, China, Indonesia, Nicaragua, and Eswatini filed a class action suit against Wal-Mart in 2005. They argued *inter alia* that the retail chain failed to enforce its standards for suppliers' code of conduct, since its (foreign) suppliers violated

14 Stephens 2020, p. 60.

15 Schwartz 2001, p. 248.

16 Kaptein & Schwartz 2008 and Vandenbroucke, Kantorowicz & Erkens 2024, p. 472.

17 An ethical Code of Conduct refers to a company's commitments towards its direct employees. A supplier Code of Conduct applies across its entire value chain, see also Vandenbroucke, Kantorowicz & Erkens 2024, p. 472.

18 Compa & Hinchliffe-Darricarrere 1995, p. 675-685.

19 Babri, Davidson & Helin 2021, p. 71 and Sharbatoghlie, Mosleh & Shokatian 2013.

20 Vandenbroucke, Kantorowicz & Erkens 2024, p. 479 and <https://db-business-ethics.org/>.

21 Marx & Wouters 2016, p. 436 and Wells 2007, p. 51.

inter alia fundamental labour standards such as forced labour, child labour, and discrimination. The court held that it could not judge in favour of the plaintiffs, since this would 'discourage American companies from undertaking voluntary efforts to improve employment conditions at the overseas factories of their foreign suppliers. Voluntary efforts at improving conditions in foreign countries should not make American companies the guarantors of the overseas working conditions they seek to improve nor should it subject them to class action litigation and liability in the courts of the United States'.²²

However, trade unions, NGOs and other advocates also pursued a different avenue to hold companies accountable for human rights violations before national courts. Through so-called foreign direct liability cases, victims or survivors of corporate abuses in developing host countries, often represented by NGOs based in the home countries, started civil liability claims in the country where the corporation had its seat. These claims were directed at the parent company of the MNE, and often the local subsidiaries that were in charge of carrying out the violation as well.²³

Up until now most of these cases have been brought before courts in the U.S. based on the eighteenth-century U.S. Alien Tort Statute.²⁴ These lawsuits began to target corporate defendants around the beginning of the 1990s and an extensive jurisprudence has developed over the years. Victims, human right and labour advocates, and NGOs held that corporations were legally liable for human rights abuses, including some of the fundamental labour standards such as child labour.²⁵ More than twenty claims based on the Alien Tort Statute against corporations were decided before 1996. However, most of them were dismissed for failure to state an international law violation.²⁶ This changed when in 1996 the appellate court in the *Unocal* case lowered the threshold by authorizing human rights litigation against corporations if the company provided 'knowing practical assistance or encouragement' that had 'a substantial effect on the perpetration' of human rights abuses.²⁷

Although the U.S. Supreme Court affirmed this application of the Alien Tort Statute in a 2004 decision, the Supreme Court significantly narrowed its scope in decisions issued in 2013 and 2018.²⁸ These rulings have limited the access to justice of those impacted by human rights violations of corporations

22 *Doe v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 680 (9th Cir. 2009) and Revak 2012, p. 1647 and 1667.

23 Enneking 2017, p. 39.

24 Enneking 2017, p. 39-40.

25 See for a case that involved child labour for instance *Flomo v Firestone Natural Rubber Co. LLC* 643 F 3d 1013 (7th Cir 2011) and Stephens 2020, p. 54.

26 Stephens 2020, p. 50.

27 *Doe v Unocal Corp* 295 F 3d 932 (9th Cir. 2002), *vacated* 395 F 3d 978 (9th Cir. 2003), para. 947 and Stephens 2020, p. 51.

28 The cases concerned were respectively *Kiobel v Royal Dutch Petroleum Co* 569 US 108 (2013) and *Jesner v Arab Bank, PLC* 138 S Ct 1386 (2018). See also Stephens 2020, p. 46-47.

and to hold these corporations accountable for two reasons. First, the Supreme Court held that a corporation could only be sued where it is either incorporated or has its principal place of business. Consequently, companies could no longer be sued where it is doing business other than its 'principal place', and foreign corporation generally are not subject to suit in the U.S. for events that occurred outside the U.S. Secondly, the Supreme Court required plaintiffs to state detailed facts in order to initiate a lawsuit. This is problematic when suing companies, since they are likely to control the evidence of its own internal decision-making process that led to the violations.²⁹ These rulings have largely decapitated the option to use the Alien Tort Statute in the case of civil proceedings against companies who have violated fundamental labour standards.³⁰

Despite the fact that corporate litigation has become increasingly difficult before U.S. courts, and that most efforts have been unsuccessful, a few individual cases have resulted in important settlements. These successes have contributed to the growth in the use of domestic courts in other countries to challenge corporate abuses.³¹ In recent years, foreign direct liability cases have also, and increasingly so, been brought before courts in other Western jurisdictions like Canada, the UK, Sweden, Italy, and the Netherlands. Up until 2017 around 40 of such cases have been pursued before national courts in the EU.³²

However, these jurisdictions lack a statute or legal mechanism such as the U.S. Alien Tort Statute. The claims before these courts are therefore often based on general principles of tort law and the tort of negligence in particular. As a result, these cases are often not about the question of whether an international (labour) right has been violated, and if so, whether a corporation can be held liable for this, but more often about whether the corporation has violated non-written norms of proper societal conduct and standard of care with respect to *inter alia* labour standards.³³ In this regard a ruling of the The Hague District Court in 2021 is particular interesting. In a climate case against Shell, this court defined these non-written norms on the basis of the UNGPs. The court held that:

'In its interpretation of the unwritten standard of care, the court follows the UN Guiding Principles (UNGP). The UNGP constitute an authoritative and internationally endorsed 'soft law' instrument, which set out the responsibilities of states and businesses in relation to human rights. The UNGP reflect current insights. They do not create any new right nor establish legally binding obligations. The UNGP are in line with the content of other, widely accepted soft law instruments, such

29 Stephens 2020, p. 47 and 55.

30 Stephens 2020, p. 47.

31 Stephens 2020, p. 59-61.

32 Enneking 2017, p. 39-40.

33 Enneking 2017, p. 41 and 367-369.

as the UN Global Compact (UNGC) ‘principles’ and the OECD Guidelines for Multinational Enterprises (the OECD guidelines). Since 2011, the European Commission has expected European businesses to meet their responsibilities to respect human rights, as formulated in the UNGP. For this reason, the UNGP are suitable as a guideline in the interpretation of the unwritten standard of care. Due to the universally endorsed content of the UNGP, it is irrelevant whether or not RDS [Royal Dutch Shell] has committed itself to the UNGP, although RDS states on its website to support the UNGP.³⁴

Shell appealed this decision, and, although rejecting the claims against Shell, the The Hague Court of Appeal confirmed the application of the The Hague District Court of *inter alia* the UNGPs and the OECD Guidelines when defining non-written norms:

‘In Dutch law, fundamental rights generally do not have horizontal effect. Fundamental rights have vertical effect, i.e. they apply in the citizen-government relationship. This does not alter the fact that the values embodied in fundamental rights are of such great importance to society as a whole that such rights can also be invoked, at least to some extent, by citizens in their relationship with a private company. Therefore, when dealing with private relationships, the court may include fundamental rights – or the values embodied in them – in its considerations when applying general private law concepts, such as conflict with what is proper social conduct according to unwritten law. [...] Although (treaty) provisions regarding human rights are primarily directed at the government, this does not alter the fact that they can have an impact on private law relationships by giving substance to open standards, such as the social standard of care. When defining the social standard of care, it comes down to the question of what action is required of a person or company, especially when that action is not prescribed by specific rules (under public law or otherwise). Whether the social standard of care is breached depends on a variety of factors. The severity of the threat of a particular danger, the contribution to the creation of the danger and the capacity to contribute to the combating of the danger are factors to be considered.’³⁵

Although this is a ‘climate case’, the courts’ interpretations of non-written norms on the basis of the UNGPs, and the significance it confers to the UNGPs in this regard, could be relevant in cases on corporate responsibilities towards fundamental labour standards as well.

These rulings show that a non-binding framework such as the UNGPs, can influence judicial rulings and become potentially binding obligations for companies. This marks a shift for non-binding transnational frameworks from voluntary corporate commitments to enforceable obligations before national

34 Rb. Den Haag 26 mei 2021, ECLI:NL:RBDHA:2021:5337 (Milieudefensie e.a./Royal Dutch Shell), par. 4.4.11.

35 Hof Den Haag 12 November 2024, ECLI:NL:GHDHA:2024:2100 (Milieudefensie e.a./Royal Dutch Shell), par. 7.18 and 7.24.

courts. Although this shift ostensibly conflicts with the principle of legal certainty, it should, firstly, be noted that these non-binding frameworks are not directly becoming binding on corporations but via non-written ‘open’ norms, which have and will always be subject to legal interpretation. Secondly, as the courts have pointed out, and as this thesis shows as well, the UNGPs (and other transnational frameworks) have been universally endorsed, including by the business community, one can therefore reasonably expect legal entities to respect these norms regardless whether they are explicitly protected in law or not. Thirdly, many corporations bind themselves standards on a voluntary basis, voluntary in this context does not necessarily mean that they then do not have to comply with these norms or can cherry pick the norms to comply with. If a corporation does not have the intention to comply with the norms in practice, or only when it suits it, it should not bind itself to these norms.

As a result of this shift, companies will have to integrate fundamental labour standards – which are referred to in principle 12 of the UNGPs – into their corporate policy, including that of their subsidiaries and value chain, irrespective of whether they have or have not endorsed voluntary frameworks such as the UNGPs and OECD Guidelines. The Dutch courts’ reliance on the UNGPs as an interpretive source for non-written norms and general principles of tort law potentially sets a precedent for other jurisdictions. This ruling may therefore impact jurisdictions beyond the Netherlands, and could open doors to pursue corporate accountability in other jurisdictions as well.³⁶

Nonetheless, and despite that this ruling may indicate a gradual shift, European judges have accepted civil liability for parent companies in general only in strict conditions. The possibility to hold corporations and their local subsidiaries accountable for violations of human rights, including fundamental labour standards, through foreign direct liability cases has so far been a long, and not very successful winding road.³⁷ Although this may constitute a breach of the third pillar of the UNGPs, i.e. access to remedy, which states that an example of a legal barrier to justice is ‘where claimants face a denial of justice in a host State and cannot access home state courts regardless of the merits of the claim’,³⁸ national courts in home states have proven to be a difficult forum to hold corporations to account for violations of fundamental labour standards in developing host countries. This reality has been one of the factors of the emergence of transnational private regulations to improve compliance with fundamental labour standards globally.

36 This may depend on what the Dutch Supreme Court may rule in this case in the future. At the time of writing (27 January 2025) it is not yet clear whether the parties will appeal the decision of the Court of Appeal.

37 Verbruggen 2023, p. 8-9 and Enneking 2017, p. 43.

38 UNGPs, commentary principle 26.

5.3 TRANSNATIONAL PRIVATE REGULATION: VOLUNTARY STANDARDS AND INTERNATIONAL FRAMEWORK AGREEMENTS

There are different forms of transnational private regulations, such as voluntary standards, International Framework Agreements, and other multi stakeholder initiatives (MSIs).³⁹ These diverge in governance structure (e.g. public, private, multi-stakeholder etc.), purpose (e.g. principle based, reporting, certification), geographic scope (e.g. global, regional, national),⁴⁰ sector (e.g. garment, agriculture, etc.), and in monitoring or enforcement (e.g. soft or hard).

Transnational private regulation is different from traditional forms of self-regulation, such as codes of conduct, in two regards. Firstly, transnational private regulations require companies to invest and commit to the normative standards referenced in the framework. The company can thus not ‘cherry-pick’ the standards. Secondly, the governance of transnational private regulatory frameworks is likely to be more transparent and involves (international) stakeholders from outside the firm as well.⁴¹ What is more, the EU, and many European governments have regularly relied on private actors to develop and enforce *inter alia* fundamental labour standards via transnational private regulations.⁴²

The reason why NGOs participate in transnational private regulations is logical. Many NGOs have been unable to influence stronger and more effective international treaties and national laws. Transnational private regulations have on the other hand proven to be an important source of leverage over MNEs global activities, changing, for example, their procurement policies and practices. In addition to ‘naming and shaming’ of MNEs, NGOs nowadays cooperate with MNEs and industry association on a regular basis to develop transnational private regulations and participate in their monitoring and enforcement. According to Vogel, this willingness to enter into coalitions with MNEs has been essential to the emergence, legitimacy and relative effectiveness of many transnational private regulations.⁴³

For corporations the reasons to participate in transnational private regulatory initiatives are more complicated. Some have adopted or accepted private transnational regulations to avoid additional public regulation. However, this is only part of the answer as due to successful lobbying and lack of appetite by governments (see previous chapters), there has been little prospect of

39 Marx & Wouters 2016, p. 436.

40 Rasche 2022, p. 162-168.

41 Vogel 2010, p. 70.

42 The attractiveness of transnational private regulation for the EU lies in the fact that WTO rules only apply to regulations formally adopted by governments. Transnational private regulations can therefore not be considered as technical barriers to trade. See Vogel 2010, p. 75.

43 Vogel 2010, p. 74.

additional regulation being enacted or enforced regardless, especially at the international level.

Most transnational private regulatory initiatives originate from citizen campaigns directed at particular companies, industries and business practices. These have been public campaigns of naming and shaming and have been directed at highly visible European and American based companies and damaged their reputations. Although this did not affect the company's share price or commercial performance, many companies chose to respond to public criticism by subscribing to transnational private regulations. The reason for this is that they value public approval. What is more, business organizations frequently adopt structures and practices similar to that of competitors in their industry as they do not wish to be regarded as less 'responsible' than their peers.⁴⁴ This is what scholars have referred to as the *market-based approach* of companies.⁴⁵ This theory holds that companies may cooperate to constrain themselves for a variety of reasons: (i) for altruistic reasons, (ii) in response to incentives, risks, and uncertainties in the market, (iii) cooperation-for-collective-benefits, i.e. that rules are needed to provide collective benefits, which would be unattainable through individual action.⁴⁶ Another theory is grounded in a more political view of transnational private regulation. In this theory, transnational private regulation is not a result of corporate strategies, but rather a negotiated settlement that arises out of conflicts involving states, NGOs and other non-market actors, as well as firms.⁴⁷

As stated in the introductory paragraph, this chapter will discuss two forms of transnational private regulations, i.e. voluntary standards and international framework agreements (IFAs).

5.3.1 Voluntary Standards

Voluntary standards are defined by Brunsson, Rasche, and Seidl as follows: 'a rule for common and voluntary use, decided by one or several people or organizations'.⁴⁸ According to Rasche, standards are voluntary in nature and cannot be enforced through legal sanctions. However, some standards are enforced via third parties, e.g. pressure from investors to comply with them (e.g. the Global Compact) or through leverage from market actors, which make standards a condition for suppliers to do business. The second characteristic that Rasche deducts from the definition is that standards stipulate rules that

44 Vogel 2010, p. 76-78.

45 See e.g. Bartley 2007.

46 Bartley 2007.

47 Bartley 2007, p. 299.

48 Brunsson, Rasche & Seidl 2012, p. 616.

are deliberately decided by people or organizations, often after consultations with experts and stakeholders.⁴⁹

Since 2000, there has been a significant increase and proliferation of voluntary standards. These vary *inter alia* in governance structure, purpose, geographic scope, and sector or specific commodities.⁵⁰ From a legal point of view the governance structure underlying the standards, i.e. who has set the rules of the standard and who governs it, and the purpose of the standards, e.g. certification, reporting or principle-based,⁵¹ are the most interesting characteristics.

The idea behind voluntary initiatives is that businesses produce beyond the requirements of the law. The assumption is that stakeholders compensate businesses for their 'stewardship' through goodwill, regulatory relief, higher market shares, customer loyalty, and higher product prices. Businesses, by participating in a voluntary initiative, thus belong to an 'excludable "club good"'.⁵² Firms are motivated to join voluntary standards for different reasons. Some join to gain benefits such as reputation and goodwill; others join pressured by their supply chains, customers and even regulators. Even though firms join on a voluntary basis, it is unclear whether they are also motivated to fulfil the initiative obligations. Non-compliance undermines the efficacy of voluntary initiatives and has raised concerns on voluntary initiatives as public policy tools.⁵³

Enforcement of voluntary initiatives is generally designed in two ways. First, there are norm-based standards, which induce members to comply with the standards through social mechanisms, such as norms, persuasion, and learning. Actors, who might not have the capacity or lack the knowledge to comply, can learn and be embedded in appropriate social networks through the voluntary standard. Second, there are incentive-based approaches, which incorporate mechanisms to detect and punish non-compliant participants. Compliance can be costly, but this is counterbalanced by incentives leading to compliance.⁵⁴

5.3.2 International Framework Agreements

Another instrument of transnational private regulation, are the International Framework Agreements. IFAs are considered as a trade union response to codes of conduct, and have the fundamental ILO conventions as 'a common

49 Rasche 2022, p. 163-164.

50 Rasche 2022, p. 162-164.

51 Rasche 2022, p. 164-166.

52 Berliner & Prakash 2015, p. 117.

53 Berliner & Prakash 2015, p. 116.

54 Berliner & Prakash 2015, p. 115-118.

denominator of their content'.⁵⁵ In the early days of the codes of conduct, the majority of global union federations (GUF), an international federation of national trade unions in a specific sector or industry, had little interest in these frameworks. The ILO was considered as the tripartite arena where labour standards were defined, and decent work was a product of collective bargaining. GUFs were therefore not interested in direct discussions with the management of businesses on what they considered corporate social responsibility topics.⁵⁶ This changed when companies started to proclaim more and more unilateral codes of conduct that contained social standards. From around 1998, GUFs wanted to get involved and started to negotiate global agreements with transnational companies to protect labour standards, the so-called International (or Global or Transnational) Framework Agreements (IFA).⁵⁷ From the start these IFAs contained (and were largely limited to) references to the ILO core conventions and fundamental labour standards, and were mostly global in scale.⁵⁸ Since then IFAs have been further developed, covering a wider set of labour standards, often including provisions for proper implementation and an enforcement mechanism. This was the result of a shifting focus of GUFs from a quantitative approach (to conclude as many IFAs as possible) towards a more qualitative approach, focusing more on actual and effective implementation.⁵⁹

There are currently 321 IFAs in place of which the scope goes beyond national, and often regional borders.⁶⁰ Transnational agreements are considered a European phenomenon, deriving from European industrial relations. Recent numbers still reflect this: 87% of the IFAs are concluded with companies based in Europe, and only 13% with companies outside of Europe.⁶¹ These European Framework Agreements are more narrow in scope than IFAs (as it has European scope of application), but were traditionally broader in content (covering more labour standards).⁶² In recent years a new type of IFAs has been developed. These agreements can focus on a specific sector in one or more countries, but the scope of the IFA's commitments can extend to more than one multinational, principal, buyer or importer, thus in fact going beyond the specific countries they apply to. A well-known example is the Accord on Fire and Building Safety in Bangladesh, which will be discussed in more depth below.

55 Hennebert, Roberge-Maltais & Coiquaud 2023, p. 242.

56 With the sole exception of the agreement between IUF/IUL and BSN (Danone) in 1988.

57 Zimmer 2020, p. 179-184.

58 Schomann 2012, p. 203.

59 Zimmer 2020, p. 179-184.

60 Database on transnational company agreements, available at: <https://ec.europa.eu/social/main.jsp?catId=978&langId=en> (accessed on 22 July 2024).

61 Zimmer 2020, p. 184.

62 Telljohann et al. 2009a, p. 505-525 and Telljohann et al. 2009b.

According to Drouin and Zimmer, IFAs can be characterized by the following three points: (i) a GUF is involved in the negotiations and conclusion of the agreement. (ii) The IFA is based on social rights derived from ILO-standards. (iii) It contains a mechanism to monitor its implementation. In addition, more recent IFAs often include (direct) suppliers in their scope of application as well.⁶³

The exact content of IFAs varies. Whereas most IFAs focus on all fundamental labour standards, there are some that are limited to one, e.g. the Bangladesh Accord (occupational safety and health) or the Indonesian Freedom of Association Protocol. There is also differentiation between IFAs in their wording. There are IFAs that use precise wording, implicating strong commitment. Others are vague and can be considered as mere declarations of intent.⁶⁴ In IndustriAll's global union guidelines for IFAs, strong language on the application of fundamental labour standards has been incorporated, e.g. 'the Core Labour Standards and relevant jurisprudence of the ILO must take precedence over national laws in case the latter are less favourable than the respective ILO Conventions'.⁶⁵ Strong language has been held to be important, since empirical studies at the beginning of the 2010s revealed that, although more generic IFAs facilitate companies to agree with an IFA, in practice such IFAs gave precedence to national laws. In the circumstance in which (fundamental) ILO conventions are not ratified, and national laws are incompatible with its provisions, IFAs are undermined.⁶⁶

The scope of application of an IFA is to the entire group of a company. This means that not only the parent company that has negotiated the IFA is covered by the IFA, but also all of its subsidiaries worldwide. Hence, all the workers employed by the company's group are also covered by the IFA. Whereas older IFAs do not mention the problem of labour rights violations at suppliers and subcontractors, more recent IFAs also cover the upstream and downstream value chains of a company in the IFAs. Nonetheless, the entire value chain is rarely covered, since the scope of the majority of such IFAs is limited to direct business partners (thus excluding the (sub-)sub-contractors). What is more, direct business partners sometimes only have to be informed about the content of the IFA or encouraged to adhere to it. In the case of Ikea, for example, suppliers should be 'influenced' and 'supported' to adhere to the Ikea group's code of conduct, to which the applicable IFA is attached. As a consequence, subcontractors are rarely covered by IFAs.⁶⁷

63 Drouin 2015, p. 222 and Zimmer 2020, p. 181-183.

64 Niforou 2012, p. 353.

65 IndustriAll, 'IndustriAll Global Union's Guidelines for Global Framework Agreements (GFAs)' (2014), p.1.

66 Niforou 2012, p. 354.

67 Zimmer 2020, p. 185-186.

Most IFAs provide a system to monitor the implementation of the IFA. This system foresees in the creation of a monitoring committee, sometimes referred to as global joint company-union structures. The committee is responsible for both the implementation of the IFA, and its monitoring. The composition of a monitoring committee differs. In certain cases representatives of the company and the GUF have seats, and in others they can be joined by trade unionist from the country where the company is registered, by delegates from the European works council, or trade union representatives from a major geographical area. Representatives from trade unions in production countries rarely participate in meetings of a monitoring committee, let alone be part of the committee. According to various scholars, this leads to problems for not only GUF legitimacy, but also for the improvement of working conditions at a global level. Regular and quality exchanges within transnational union networks facilitate top-down and bottom-up interactions, which provides a cross-border context (the local context can diverge drastically) and local consent, but also alter local practice. This enhances GUF legitimacy towards companies, and enables the improvement of working conditions globally.⁶⁸

In some cases violations of the IFA have to be reported not just to the monitoring committee, but also to the executive board or senior management of the company. Contrary to certain voluntary standards and Codes of Conduct, external auditors do not play a role in the monitoring of IFAs. The reason for this is that in general, workers themselves play a central role in the monitoring of IFAs. By organizing and establishing trade unions and remaining in close contact with the relevant GUF, they can transmit alleged violations of the IFA to the monitoring committee or occasionally to other bodies responsible for the implementation and enforcement of the IFA. Such monitoring, however, falls short when workers are not properly unionized or where they lack knowledge of the rules and procedures. The latter is often the case in production countries. In these circumstances, the monitoring commission will hardly receive any information or complaints on violations of the IFA.⁶⁹ It is for this reason that IFAs often contain provisions on the translation of its content, and the rights of workers, in local languages. Moreover, some IFAs provide for training of the workforce to further support the correct implementation and monitoring of an IFA. The IndustriAll's guidelines for IFAs holds the following in this regard: 'The multinational company concerned must ensure that the GFA [IFA, red.] is disseminated in the appropriate local languages to workers, managers, suppliers and sub-contractors, and that

68 Barreau, Havard, Bah 2020, Helfen & Sydow 2012, Helfen & Fichter 2013, and Sydow et al. 2014.

69 Zimmer 2020, p. 186-188.

education and training about its contents and implementation is organized for all these groups.⁷⁰

According to research from 2017, 85% of the IFAs have to set-up a monitoring committee on parity basis, and meets annually, bi-annually or on demand.⁷¹ The implementation of the IFA and cases of non-compliance are presented and discussed during these meetings.⁷² Despite the existence of a monitoring committee, case studies discussed in the literature around the turn of the last decade have shown that IFAs are not implemented correctly, sometimes only along the value chain, but in certain cases not at all.⁷³ For this reason, the implementation and monitoring procedures of IFAs have been further developed in the last decade. Elements that have progressed are provisions in certain IFAs on plant visits, the preparation and realization of the agenda of the monitoring committee, and last but not least, provisions on complaint or grievance mechanisms. These provisions contain information on how a complaint can be filed, its processing, the eventual decision-making process, and its implementation and evaluation. Up to now, many IFAs still only oblige companies to create a complaint or grievance mechanism, without prescribing its content and process.⁷⁴ And despite the fact that still only 10% of the IFAs contain provisions on dispute resolution (either arbitration or mediation), a rising trend is visible. Such IFAs foresee in the possibility to appoint a jointly defined arbitration board or an arbitration mechanism with binding decisions.⁷⁵

The literature holds that there are some elements that can enhance the positive effects of IFAs on fundamental labour standards: (i) the inclusion of local stakeholders in the process of negotiating and implementing an IFA has been held essential for the correct implementation in practice. Training for local trade unions and management on the provisions of the IFA further enhance this. (ii) Stronger elaborated dispute resolution mechanisms, including binding mechanisms. (iii) Involving the ILO as a neutral party in the process of monitoring, mediation and dispute settlement of IFAs, as suggested by the Committee on Decent Working in Global Supply Chains at the International Labour Conference in 2016.⁷⁶

70 IndustriAll, 'IndustriAll Global Union's Guidelines for Global Framework Agreements (GFAs)' (2014), p.2.

71 Hadwiger 2017, p. 411.

72 Zimmer 2020, p. 189.

73 Royle & Ortiz 2009, and Stevis & Fichter 2012, and Zimmer 2020, p. 189.

74 Zimmer 2020, p. 189.

75 Zimmer 2020, p. 190.

76 Zimmer 2020, p. 191.

5.4 VOLUNTARY STANDARDS IN PRACTICE: THE UNITED NATIONS GLOBAL COMPACT

After the failure to reach an agreement on a binding UN Code of Conduct, the UN restarted negotiations on binding rules for transnational corporations with the UN Norms in 1999 (see chapter three). Nonetheless, a legally binding framework was unlikely to emerge. At the same time, the UN, facing questions on its relevance on the global stage, had to reinvent itself, and was reaching out to non-state actors.⁷⁷ It had become apparent that the UN could not attain its ambitious goals on human rights and fundamental labour standards solely with the support of states. Cooperation with corporations became pivotal.⁷⁸ For this reason the then UN Secretary General Kofi Annan initiated a voluntary multi-stakeholder initiative in which companies and the UN would work together to ‘embrace, support and enact a set of core values in the areas of human rights, labour standards, and environmental practices’.⁷⁹ In his speech in 1999 at the World Economic Forum in Davos, Annan proposed a Global Compact on human rights, labour and environment. He explained that these three areas were chosen because these are areas where businesses can make a real difference, and because they are areas in which universal values have already been defined by international agreements, such as the ILO 1998 Declaration.⁸⁰ According to Vogel, however, the UNGC provided the UN ‘with a vehicle to address some of the criticisms of the social impact of economic globalization voiced by many activists and some developing countries – without engaging in the much more challenging task of enacting legally binding business regulations’.⁸¹

With the renewed attention for social responsibilities for corporations, as explained above, companies found the offer of a voluntary public-private partnership interesting. A partnership with the UN was believed to be able to function as a counterweight to the pressure from anti-capitalism, anti-WTO, and anti-globalization movements that companies were facing.⁸² The Global Compact was thus perceived as a win-win situation for both parties.⁸³ Much in line with the corporate motives to join transnational private regulatory frameworks discussed in paragraph 5.3, studies have suggested that the five main incentives for companies to join the UNGC are: (i) pressure from NGOs, trade unions, citizens, governments, media, customers, competitors, employees, investors. (ii) Reputation (improvement of corporate brand thanks to the UN name/ label). (iii) Network (being part of a CSR community). (iv) Company

77 Nolan 2005, p. 445.

78 Deva 2006, p. 109.

79 <https://press.un.org/en/1999/19990201.sgsm6881.html> (accessed on 23 July 2024).

80 <https://press.un.org/en/1999/19990201.sgsm6881.html> (accessed on 23 July 2024).

81 Vogel 2019, p. 75.

82 Deva 2006, p. 110.

83 King 2001, p.483, and Deva 2006, p. 110

performance (improving sales, reducing costs, improving productivity, and increasing stock prices. (v) Ethical sensitivity.⁸⁴ The UNGC has been described as the most successful private voluntary initiative in the world. In 2024, almost 15.000 companies and over 3.800 non-business actors were participating in the UNGC, representing nearly any size and sector.⁸⁵

5.4.1 Content of the United Nations Global Compact

The UNGC was launched in July 2000, first with nine principles in the areas of human rights, labour standards, and the environment, and in 2004 anti-corruption was added as a tenth principle. Since its inception, the UNGC has changed, evolved, and grown, which has been described in detail by many scholars already.⁸⁶ This chapter discusses merely the situation as it is today. Principles 3 to 6 cover four fundamental labour standards, i.e. the freedom of association and the right to collective bargaining, the elimination of all forms of forced and compulsory labour, the effective abolition of child labour, the elimination of discrimination in respect of employment and occupation. Although occupational safety and health is not covered by one of its ten principles, the UNGC in collaboration with the ILO have identified nine business practices to improve safety and health in supply chains.⁸⁷

The UNGC translates international law, such as the ILO 1998 Declaration, which in principle addresses governments, into business obligations that businesses should respect regardless of where they are incorporated or operate. To ensure compliance, the UNGC promotes sharing of knowledge and norm diffusion by embedding participants in local networks.⁸⁸ The UNGC has local presence in 101 countries.⁸⁹ The entry requirements of the UNGC are low, allowing firms to easily sign-up. The UNGC thus promotes *inter alia* fundamental labour standards through learning, dialogue, and partnerships. The UNGC is, however, not a seal of approval or code of conduct to which compliance can be measured, nor can it be legally enforced.⁹⁰ Companies are expected to voluntarily pledge to operate responsibly, in alignment with the aforementioned principles and should commit to these efforts from the organization's highest level. They have to take actions that support the society around the company and engage locally where it has a presence. What is more, members have to make an annual financial commitment to the UN Global Compact (this can be up to USD 30.000, depending on the size and country

84 Orzes et al, 2018. p. 636-637.

85 <https://unglobalcompact.org/participation/join> (accessed on 23 July 2024).

86 See for instance, Kell 2003, King 2001, or Deva 2006.

87 <https://unglobalcompact.org/take-action/safety-andhealth> (accessed on 23 July 2024).

88 Berliner & Prakash 2015, p. 115-116.

89 UN Global Compact 2022, p. 9.

90 Rasche 2021, p. 204.

location of the company). Lastly, the company has to report annually on its on-going efforts.⁹¹

Rasche summarized the UNGC by the following four characteristics: (i) principle-based: business and non-business actors can join the initiative on a voluntary basis to improve their business operations to ten principles that are derived from existing UN Conventions and treaties (such as the ILO 1998 Declaration and the fundamental ILO Conventions). (ii) Learning-based: businesses engage in dialogue, learning and partnerships to enhance the implementation of the ten principles in their business operations. (iii) Global-local: Participants can join these local networks in countries where they operate. Local networks are 'clusters of participants who come together voluntarily to advance the Global Compact and its Principles at the local level'.⁹² (iv) Public-Private: it is a multi-stakeholder initiative in which public actors collaborate with private actors. Actors that participate in the UNGC vary from national governments, and UN organizations to academia, NGOs, and businesses and business associations.⁹³

5.4.2 ENFORCING THE UNITED NATIONS GLOBAL COMPACT: COMMUNICATION ON PROGRESS POLICY

The obligation to report annually on the company's on-going efforts to implement the UNGC is key to the only enforcement option the UNGC has. If a company does not report annually on its implementation activities, the UNGC can de-list the company. The UNGC has created a Communication on Progress Policy (COPP), which outlines the topics a company has to report on. In 2023 the COPP was enhanced. According to the UNGC website, participating companies of the UN Global Compact are now expected to: (i) measure and demonstrate progress to stakeholders and the public on the ten principles and the Sustainable Development Goals in a consistent and harmonized way. (ii) Build credibility and brand value by showing their commitment to the ten Principles and the Sustainable Development Goals. (iii) Receive insight, learn and continuously improve performance by identifying gaps, accessing guidance and setting sustainability goals. (iv) Compare performance against peers with access to one of the largest sources of free, public and comparable corporate sustainability data.⁹⁴

If a participant fails to submit the annual report and communicate on its progress within the deadline, it will first be labelled 'non-communicating' for 12 months. If within these 12 months it still has not submitted a report, it will

91 <https://unglobalcompact.org/participation/join/commitment> (accessed on 23 July 2024).

92 Whelan 2010, p. 318.

93 Rasche 2021, p. 202-203.

94 <https://unglobalcompact.org/participation/report/cop> (accessed on 23 July 2024).

be officially delisted. The UNGC lists all the delisted participants on its website, over 16.000 companies by July 2024, which means that more companies have been delisted than that are currently member to the UNGC.⁹⁵

5.4.3 POTENTIAL AND LIMITS OF THE UNITED NATIONS GLOBAL COMPACT

The potential and limits of the UNGC have been the subject of considerable debate in the scholarly literature. Firstly, the framework has been described as the largest corporate voluntary initiative in the world.⁹⁶ When focusing solely on the numbers, this is true. As stated, around 15.000 companies and over 3.800 non-business actors participate in the UNGC. An important reason for the high number of business signatories is the low entry requirements of the UNGC. As a consequence, the UNGC has contributed to the CSR agenda in two important ways according to Rasche. First of all, the UNGC has familiarized many firms with the business and human rights discussion (e.g. the need to design human rights, including fundamental labour standards, and environmental policies for internal business affairs and their suppliers). Secondly, the UNGC legitimized the business and human rights agenda at a time when other policy frameworks (e.g. the UNGPs) were not yet available.⁹⁷ At the same time, the low entry requirements have led to an exceedingly large number, almost 16.000, of delisted companies. As a consequence, the UNGC has attracted criticism that the conditions to join the UNGC should be higher.⁹⁸

Secondly, the UNGC has been criticized on its perceived lack of bite.⁹⁹ According to Deva, the UNGC lacks an enforcement and independent monitoring mechanism, and can therefore be misused by companies as a marketing tool. This is rightly countered by Rasche, who has held that the UNGC is not meant as an initiative to which compliance can be measured. According to him, the UNGC's criticism is based on a misunderstanding of its nature, its mandate, and the goals it tries to achieve.¹⁰⁰ He has argued that the UNGC uses a softer way to enforce its ten principles, including fundamental labour standards. Although Rasche acknowledges that the UNGC cannot ensure that all participants continuously improve their sustainability performance, his analysis shows that the COPP is mostly not complied with by smaller firms (with less than 250 employees), which as a consequence have been delisted. He argues that this is due to the fact that smaller companies, in contrast to

95 See: <https://unglobalcompact.org/participation/report/cop/expelled> (accessed on 23 July 2024).

96 See for instance Rasche, Waddock & McIntosh 2013, p. 6 and Orzes 2018, p. 634.

97 Leisinger, Cramer & Natour 2010, p. 10.

98 See for example Orzes et al. 2018, p. 640 and Berliner & Prakash 2015.

99 See for example Deva 2006 and Sethi & Schepers 2014.

100 Rasche 2009.

large firms, often do not have the capacity for and experience with the non-financial reporting requirements of the UNGC. Another argument for these numbers is that the 'naming and shaming' element of delisting can have more negative consequences for large enterprises, since they are more visible for stakeholders, thus making it less attractive for these firms not to comply with the UNGC COPP.¹⁰¹ Ruggie and Kell have agreed with Rasche. They have argued that the UNGC should be seen as a framework for dialogue, stimulating best practices, and to bring about convergence in corporate practices around shared values.¹⁰² Lastly, Rasche believes that the UNGC would be a misfit of an initiative to monitor:

'Monitoring would be difficult because the swiftly changing nature of corporate strategies, structures and processes and the scope of UNGC participants makes the ex-ante definition of a full range of performance criteria nearly impossible. Further, even if the UNGC would opt for a monitoring approach, there would still be the question of (a) whether sufficient political support for such a move existed, and (b) whether the UN itself would have necessary logistical resources to monitor, large, often network-based, companies. Both issues seem unlikely given the current political climate as well as the financial and non-financial resources available within the UN system.'¹⁰³

Thirdly, empirical studies into the impact of the UNGC have also suggested a two-sided image. According to Prakash et al., UNGC participants perform worse than non-participants on crucial but costly matters. According to that study, they perform better on superficial but low-cost actions. As a result, participating non-compliant businesses take advantage of the reputational benefits of compliant participants without incurring the costs of compliance. UNGC participants are thus free riding on the efforts and investments of other participants. Berliner & Prakash conclude that: 'the UNGC, a voluntary program lacking stringent monitoring and enforcement mechanisms, does not adequately motivate its participants to comply with program obligations.'¹⁰⁴

In contrast, Orzas et al. found that UNGC member have significantly better ESG performances. This thus supports Rasche's argument that the UNGC indirectly, and positively influences the business and human rights agenda. Lastly, Orzas et al. held that UNGC membership results in a significant positive impact on sales growth and profitability.¹⁰⁵ They have argued that the main weaknesses of the UNGC were related to (i) the selection of participants (or lack of), (ii) lack of attention to gender equality, and (iii) the risk of decoupling, i.e. companies joining the UNGC without really modifying their processes,

101 Rasche 2021, p. 207.

102 Ruggie & Kell 1999, p. 105.

103 Rasche 2021, p. 204.

104 Berliner & Prakash 2015, p. 132.

105 Orzas et al. 2020, p. 4.

mainly due to the absence of external audits and stringent reporting criteria.¹⁰⁶

In summary, the UNGC has shown that voluntary standards can have positive effects on the corporate social performances of large companies. Yet, its reporting requirements indicate that it can be too burdensome for smaller companies. The UNGC lacks a hard monitoring and enforcement mechanism, and should be seen to be a framework of persuasion and peer learning. Consequently, it cannot enforce its members to comply with its reporting requirements, let alone to comply with its principles in practice such as fundamental labour standards. Studies have shown that the UNGC has had a positive impact on members' reputation and networks, and in some circumstances their commercial performance and benefits related to ethics.

5.5 INTERNATIONAL FRAMEWORK AGREEMENTS IN PRACTICE: THE INTERNATIONAL ACCORD

This paragraph analyses a recent, and much evolved IFA: the International Accord (formerly known as the Bangladesh Accord on Fire and Building Safety). Although there have been discussions in the literature on whether the International Accord is in fact an IFA or not, it does match the four characteristics of an IFA set out above.¹⁰⁷ The reason why the International Accord is discussed, is because it is a voluntary private regulation, and contrary to the UNGC, one with a strong enforcement mechanism. Hence, it shows a different side of voluntary private regulation, and specifically an IFA.

The International Accord finds its origin in a tragedy. On 24 April 2013, Rana Plaza, an eight-story building in an outskirt of Dhaka, Bangladesh collapsed, killing 1.134 people, and leaving thousands injured. The large majority of those killed and injured that day were workers of the garment factories located on the top floors of Rana Plaza. Rana Plaza also housed other shops and a bank. However, none of their workers were killed. The day before the collapse large structural cracks were discovered in the building. In response the shops and bank closed, ordering their workers not to come in. By contrast, the owners of the garment factories pressured their workers to return to their work the following day, ignoring the warnings.¹⁰⁸

The disaster led to a storm of international media attention and campaigns by NGOs that pressured international fashion brands to react. The combination of media scrutiny and the pressure from NGOs resulted eventually in the signing on 15 May 2013 of the Bangladesh Accord. The Bangladesh Accord is an independent legally binding agreement between, on the one hand, 223

106 Orzes et al. 2018, p. 640.

107 Zimmer 2020, p. 198-199.

108 <https://cleanclothes.org/campaigns/past/rana-plaza> (accessed on 23 July 2024).

global brands and retailers as signing party, and on the other hand, two GUFs (IndustriAll Global Union and UNI Global Union) as the other signing party.¹⁰⁹ Eight Bangladeshi trade unions were co-signatories and four NGOs were witness signatories. The Bangladesh Accord's mandate was to improve the occupational health and safety (OSH, a fundamental labour standard) of garment factory workers in Bangladesh. It covered 1,645 garment factories and over 2 million workers. At the end of May 2018 the Bangladesh Accord expired, but its terms were extended by three years through the 2018 Accord on Fire and Building Safety in Bangladesh (also known as the Transition Accord).¹¹⁰ The amount of global brands that were signatories to the Transition Accord decreased with almost 14% compared to the Accord, to 192 signatory firms (and eventually 196 brand signatories by February 2020).¹¹¹ That same year, the Bangladeshi government filed legal charges to transfer the functions of the Accord's Bangladesh offices to the Ready-made Garment Sustainability Council (RSC). This eventually happened in June 2020.

After the three-year period of the Transition Accord, the International Accord for Health and Safety in the Textile and Garment Industry (the International Accord) succeeded the Bangladesh Accord and the Transition Accord in September 2021. It renewed commitment to the Bangladesh Accord until 31 December 2026. The International Accord had only 77 company signatories at the beginning. The idea behind the accord was to expand safety programs to at least one other country than Bangladesh.¹¹² The Bangladesh Accord was annexed to the International Accord as an addendum. In December 2022, the International Accord announced to expand its program to Pakistan, and in January 2023 the Pakistan Accord on Health & Safety in the Textile & Garment Industry (Pakistan Accord) came into effect for a period of three years, and is a Country Specific Safety Program (CSSP) Addendum under the International Accord.¹¹³ Currently the Bangladesh Accord covers over 190 brands, more than 1,500 factories and over 2 million workers.¹¹⁴ The Pakistan Accord covers over 120 brands, more than 500 factories and almost 600,000 workers.¹¹⁵ Signatories that have signed one or all accords include brands such as H&M, Hugo Boss, and C&A.¹¹⁶

109 As alternative to this Accord mainly North-American companies, such as Gap, Sears and Wal-Mart, have signed another international initiative, i.e. the Bangladesh Worker Safety Initiative of the Alliance for Bangladesh Worker Safety. Pietrogiovanni 2018, p. 272. See for more information on this initiative: Ter Haar & Keune 2014 and on a comparison between the two initiatives Donaghey & Reinecke 2018.

110 Collin & Yates 2023, p. 641-642.

111 <https://internationalaccord.org/about-us/> (accessed on 23 July 2024).

112 Bangladesh Accord 2023, para. 33.

113 <https://internationalaccord.org/countries/pakistan/> (accessed on 23 July 2024).

114 <https://internationalaccord.org/countries/bangladesh/> (accessed on 23 July 2024).

115 <https://internationalaccord.org/countries/pakistan/> (accessed on 23 July 2024).

116 https://docs.google.com/spreadsheets/d/1TXqPmhwfFuhupTm2DqKfF_TsAq14FztTMPIxTwVTgx4/edit#gid=843332552 (accessed on 23 July 2024).

5.5.1 Content of the International Accord and the CSSPs

The International Accord is an agreement, which commits parties to continue the health and safety programs in Bangladesh and Pakistan (the so-called Country Specific Safety Programs (CSSPs)), and to potentially expand to additional countries. It is governed by the law of the Netherlands,¹¹⁷ and expires at the end of December 2026, but will be automatically renewed for another term of three years.¹¹⁸ Although signatories of the International Accord agree to develop CSSPs that continue the respect of fundamental labour standards and the relevant fundamental conventions, it focuses mainly on Occupational Safety and Health and the relevant core conventions. The International Accord's signatories have agreed that safe workplaces cannot be assured in the long term without the active participation of the people who work in them. Hence, the goal of the International Accord is a safe and sustainable garment and textile industry in which no worker needs to fear fires, building collapses, or other accidents that could be prevented with reasonable health and safety measures. Another goal is that each CSSP eventually develops into or is handed over to a national regulatory body.¹¹⁹

The International Accord is considered a framework agreement for each CSSP. The terms of each CSSP are stipulated in individual addendums, but will be in accordance with the principles, standards and protocols of the International Accord. According to the preamble, the signatories welcome a strong role for the ILO in the effective implementation of the specific programs that are developed under the CSSPs, through their worker protection efforts and international programmes.¹²⁰

5.5.2 Scope

Within the scope of the International Accord fall all Cut-Make-Trim, i.e. all Ready-Made Garment, facilities that produce products for the signatory companies in countries with a CSSP.¹²¹ Thus the International Accord currently covers facilities in Bangladesh and Pakistan that produce read-made garment products for signatory companies. What is more, the steering committee (see below) can agree on a country-specific basis to include other related products and industries that are within the supply chain of signatories. Examples are home textile, fabric and knit accessories suppliers, fabric mills and other

117 International Accord 2023, X. Duration of the Agreement, para. 69-70.

118 International Accord 2023, VIII. Dispute Resolution, para. 66.

119 International Accord 2023, I. Preamble and International Accord 2023, V. Country Specific Safety Programs, para. 44.

120 International Accord 2023, I. Preamble.

121 International Accord 2023, II. Scope, para. 1.

production processes.¹²² A company has to ensure that its agents and other intermediaries also fulfil the obligations of the International Accord if they are part of a company's business model, and regardless if they are signatories themselves.¹²³

The signatories have also committed to explore the expansion of the scope of the International Accord to include other human rights due diligence responsibilities. However, the participation of brands will only be required and binding if its explicitly specified in a CSSP Addendum.¹²⁴

5.5.3 Governance

The governance structure of the International Accord is as follows. The responsibilities of the signatories are monitored and enforced by a Steering Committee (SC). The SC has an equal representation of members by the trade union signatories as well as the brand signatories. The maximum representatives are three each. The ILO also chooses one representatives that will act as a neutral chair. The Witness Signatories can participate merely as observers, and thus have no voting power. Nonetheless, the SC strives to reach decision by consensus.¹²⁵ The SC is entrusted with overall management of the International Accord,¹²⁶ and can set up technical committees for each CSSP to ensure consistency and share lessons learned across CSSPs.¹²⁷

The secretariat of the International Accord, which falls under the SC, plays an important role as well. It oversees the compliance of signatories, including their effective management and implementation. It takes steps to ensure worker safety. It reports on a quarterly basis to the SC for the purpose of implementing signatory obligations of both the International Accord and the CSSPs, and lastly it supports the signatory companies and trade union in their representative roles.¹²⁸

5.5.4 Principles

The main principles that underlie the International Accord are:

- i) credible inspections. An experienced, qualified, and independent Civil Society Organization (CSO) is appointed for each CSSP and responsible for the inspection and remediation programs of the CSSP. The inspections

122 International Accord 2023, II. Scope, para. 1.

123 International Accord 2023, II. Scope, para. 3.

124 International Accord 2023, II. Scope, para. 2.

125 International Accord 2023, III. Governance, para. 4.

126 International Accord 2023, III. Governance, para. 5.

127 International Accord 2023, III. Governance, para. 6.

128 International Accord 2023, III. Governance, para. 9 and 10.

are based on internationally recognized workplace health and safety standards and/or national standards, and they assess fire, structural, electrical and boiler safety of facilities that fall within the scope of the International Accord and CSSPs. Specific risks to occupational health and safety can be further defined by a CSSP. If the CSO identifies a severe and imminent danger to worker safety, the factory management, the factory's Safety Committee, worker representatives, the Secretariat, responsible governing bodies, the signatory companies' operations in the factory, and the signatory unions and their relevant affiliates, will all be immediately informed by the CSO and the latter will direct a remediation plan.¹²⁹

- ii) Remediation. In the remediation plan the CSO identifies corrective action to bring a factory into compliance with OSH standards, including a mandatory timeline. The signatory company or companies that have that factory as their supplier will (a) require it to implement the corrective actions according to the timeline, and (b) to maintain workers' employment relationship and income during the period that a factory is (partially) closed for safety reasons and/or renovations for a maximum of 6 months. If delays occur that are beyond the control of the factory, the remediation timeline can be revised. If a worker's employment contract is terminated, because the factory is closed or relocated as a result of the Accord's activities, the signatory companies have to make reasonable efforts to offer the worker employment with safe suppliers.¹³⁰
- iii) Complaints process. An independent, qualified and experienced CSO is appointed to execute the CSSP workplace programs. A complaint process – that is in accordance with the UNGPs – is part of these programs, and needs to ensure that workers can timely, safely, and confidentially raise concerns about OSH risks. Signatories and their suppliers have to support the complaints process, ensure it operates independently and without interference, and comply with the outcomes. The Accord also includes a pilot program that considers a future expansion of the scope to include additional fundamental principles and rights at work of the workers complaint mechanism. The results of this pilot are not yet available. Complaints received that are outside the scope of the Accord have to be forwarded to other relevant complaints mechanisms.¹³¹
- iv) Training. The Accord also foresees the adaption and implementation of OSH training programs. These programs have to cover *inter alia* basic OSH procedures and precautions, as well as the ILO fundamental principles and rights at work, including the importance of Freedom of Asso-

129 International Accord 2023, IV. Principles of the International Accord, para. 11-15.

130 International Accord 2023, IV. Principles of the International Accord, para. 16-20.

131 International Accord 2023, IV. Principles of the International Accord, para. 22-25.

- ciation, and the role of industrial relations. This should enable workers to voice concerns and actively participate in activities to ensure their own safety.¹³²
- v) Transparency and reporting. The SC will provide a regularly updated list of all suppliers (including sub-contractors) who produce products for the signatory companies in each CSSP(s). However, information that links specific companies to specific factories is kept confidential. Inspection Reports are disclosed, and public statements are issued about those factories that are ineligible to produce for the signatory companies, because they have not implemented the remedial recommendations. Lastly, quarterly reports are published that summarize the aggregated industry compliance data as was at the review of findings, remedial recommendations, and progress on remediation and training for all factories at which inspections and training have been completed.¹³³
 - vi) Supplier incentives. A signatory company must require its suppliers to participate in the above stated principles. It can do this by obtaining assurances from its suppliers as a condition for doing business, and by negotiating commercial terms that make it financially feasible for the factory to comply with principles of the International Accord, e.g. by providing loans or investing directly. If a supplier fails to comply, the signatory company has to implement the required notice and warning process immediately. As a last resort it can terminate the business relationship in accordance with the agreed Escalation Protocol.¹³⁴
 - vii) Capacity-building. The Accord supports local government capacity in building an effective national body on inspections, remediation, and training.¹³⁵
 - viii) Release of responsibility. A signatory company is no longer responsible for a factory if the factory has committed a 'zero tolerance' violation of a signatory's policy, it has not sourced from the factory for 18 months, or if the factory has been made ineligible. This process of disengagement has to be executed responsibly.¹³⁶

132 International Accord 2023, IV. Principles of the International Accord, para. 26-27.

133 International Accord 2023, IV. Principles of the International Accord, para. 29.

134 International Accord 2023, IV. Principles of the International Accord, para. 30-31.

135 International Accord 2023, IV. Principles of the International Accord, para. 33.

136 International Accord 2023, IV. Principles of the International Accord, para. 34-35.

5.5.5 Dispute Resolution

Any dispute that arises under the International Accord and/or any CSSP Addendum is decided by the SC.¹³⁷ The SC follows the Dispute Resolution Process, which specifies the timelines and procedures involved. The first step is an initial investigation to seek a resolution of the matter among the disputing parties. If this fails, the SC tries to find a mutually agreeable solution. If this fails as well, the SC will decide on the merits and an adequate remediation measure.¹³⁸ This decision of the SC can be appealed to a final and binding arbitration process, or the parties can decide to participate in a mediation process.¹³⁹ If an arbitration award has been issued, it will be enforceable in a court of law of the country where the signatory has its seat and against whom enforcement is sought, subject to the so-called New York Convention.¹⁴⁰ The process for binding arbitration is governed by the UNITRAL Model Law on International Commercial Arbitration 1985. The arbitration is seated in The Hague and administered by the Permanent Court of Arbitration.¹⁴¹ The CSSPs of Bangladesh and Pakistan mostly have the same content as the International Accord or refer to it, with some relatively minor differences. These will therefore not be discussed separately.

5.5.6 Disputes under the Bangladesh Accord

So far, two disputes have been settled under the dispute resolution of the predecessor of the International Accord, i.e. the Bangladesh Accord of 2013. In 2016, IndustriAll Global Union and UNI Global Union started arbitration against two international fashion brands before the Permanent Court of Arbitration (PCA) on the basis of what is now paragraph 65 of the International Accord (see above).¹⁴² According to the Global Unions, the two companies had failed to require suppliers to bring their factory into compliance with OSH standards in a timely manner, thus leaving workers in dangerous conditions. Secondly, the companies did not negotiate commercial terms with their suppliers to make it financially feasible for the suppliers to fix the on-going

137 International Accord 2023, VIII. Dispute Resolution, para. 63.

138 International Accord 2023, VIII. Dispute Resolution, para. 64.

139 International Accord 2023, VIII. Dispute Resolution, para. 65.

140 International Accord 2023, VIII. Dispute Resolution, para. 66.

141 International Accord 2023, VIII. Dispute Resolution, para. 66.

142 The dispute resolution procedure under the International Accord 2023 is substantially the same as that in the Bangladesh Accord of 2013, although the International Accord provides for a mediation process as a step before arbitration when the SC cannot resolve the dispute. According to Croucher et al, this is likely to avoid the high costs that are involved with arbitration. See also Croucher et al. 2019, p. 565.

safety issues.¹⁴³ The companies were thus violating respectively articles 12 and 22 of the 2013 Bangladesh Accord, now articles 16 and 31 of the International Accord.

To reduce cost and time, it was decided to hear both cases (PCA Case No. 2016-36 and PCA Case No. 2016-37) at the same time.¹⁴⁴ The first two disputes the PCA had to tackle were on the admissibility of the disputes and what information was to be publicly disclosed. On the latter, the PCA held that on the matter of confidentiality and transparency, the interest of both parties had to be balanced, taking into account the language of the Bangladesh Accord 2013 on promoting transparency and reporting but also the express limitation that information that can link specific companies to specific factories has to be kept confidential.¹⁴⁵ On this basis, the Tribunal ordered that certain basic information about the case can be made public, and that other document can be disclosed following a redaction process. However, the identity of the companies involved was to be kept confidential.¹⁴⁶

On admissibility, the Tribunal also rejected the position of the companies, which held that a the preconditions to arbitration under article 5 of the Bangladesh Accord 2013 were not met, because a joint-investigation was not carried out since the SC did not produce a majority decision on the matter (in the SC the global unions voted in favour, the companies' representatives against, and the chair, an ILO representative, declined to vote). The Tribunal, however, dismissed the appeal of the companies and held that a joint investigation had been carried out, since the SC, although lacking majority on the 'merits', did agree on certain aspects of each of the charges that was brought forward by the unions, e.g. by appointing an Investigation Committee to assess the charge.¹⁴⁷ The cases of the unions were thus held admissible, and could proceed to the merits phase.

Before the hearings were to take place in March 2018,¹⁴⁸ the PCA Tribunal issued several procedural orders on e.g. document production. However, in December 2017, the global unions reached a settlement with the company in one of the cases. A second settlement followed closely afterwards in January 2018. The exact content of the settlements remain confidential, however, the global union federations have communicated that the companies paid 2 million

143 Permanent Court of Arbitration, 2017, Case No. 2016-36 & 37, Procedural Order 2 (4 September 2017), para. 19.

144 Permanent Court of Arbitration, 2017, Case No. 2016-36 & 37, Procedural Order 1 (19 April 2017), I.1, I.2.

145 Permanent Court of Arbitration, 2017, Case No. 2016-36 & 37, Procedural Order 2 (4 September 2017), para. 89-98.

146 Permanent Court of Arbitration, 2017, Case No. 2016-36 & 37, Procedural Order 2 (4 September 2017), Annex IV, PCA press release.

147 Permanent Court of Arbitration, 2017, Case No. 2016-36 & 37, Procedural Order 2 (4 September 2017), para. 48-68.

148 Permanent Court of Arbitration, 2017, Case No. 2016-36 & 37, Procedural Order 7 (1 December 2017), para. 2.

USD towards remediation of unsafe working conditions in more than 150 ready-made garment factories in Bangladesh. The companies paid another 300.000 USD into the Joint Supply Chain Worker Support Fund that support the work of global unions in improving pay and conditions of workers in global supply chains.¹⁴⁹ According to IndustriAll and UNI, these cases show that the Bangladesh Accord works.¹⁵⁰ What is more, the mere initiation of the arbitration panel has had positive effects on compliance with the Bangladesh Accord.¹⁵¹

5.5.7 Potential and Limits of the International Accord

In the past the International Accord has mainly attracted criticism on its limited scope, because it covers only two countries (Bangladesh and Pakistan); just one sector (textile and garment), and it mainly focuses on occupational safety and health, and not on other fundamental labour standards. At the same time, the International Accord has evolved throughout the years, and is increasingly considered as a framework that is applicable to other countries, or CSSPs, as well. The CSSP of Pakistan and key findings of studies conducted on potential countries to expand by the Accord's secretariat (which identified Pakistan, Sri Lanka, Morocco and India as priority countries to expand) confirms this.¹⁵² Secondly, the International Accord now explicitly covers the other fundamental labour standards as well, although its main focus remains on OSH. Thirdly, by covering over 190 brands, more than 1.500 factories and over 2 million workers in Bangladesh,¹⁵³ and over 120 brands, more than 500 factories and almost 600.000 workers in Pakistan,¹⁵⁴ it is hard to argue that the International Accord's coverage is limited.

The hard and effective enforcement mechanism, as the two discussed cases have shown, is one of the International Accord's best assets, and unique in the context of transnational private regulation. In combination with the extensive coverage in the textile and garment sector, the International Accord has the ability to progress fundamental labour standards in the everyday life of workers in Bangladesh and Pakistan.

149 Croucher et al. 2019, p. 564 and <https://uniglobalunion.org/news/bangladesh-accord-arbitration-cases-resulting-in-millions-of-dollars-in-settlements-officially-closed/> (accessed on 23 July 2024).

150 <https://uniglobalunion.org/news/bangladesh-accord-arbitration-cases-resulting-in-millions-of-dollars-in-settlements-officially-closed/> and <https://www.industriall-union.org/bangladesh-accord-arbitration-cases-resulting-in-millions-of-dollars-in-settlements-officially#:~:text=The%20tribunal%20hearing%20the%20case,Bangladesh%20ready%2Dmade%20garment%20factories> (both accessed on 23 July 2024).

151 Croucher et al. 2019, p. 564.

152 <https://internationalaccord.org/countries/other-countries/>

153 <https://internationalaccord.org/countries/bangladesh/> (accessed on 23 July 2024).

154 <https://internationalaccord.org/countries/pakistan/> (accessed on 23 July 2024).

In conclusion, the International Accord shows that if pressure is high enough, and companies, states, and other actors are willing to commit themselves, transnational private regulation can be an effective tool to enforce compliance with fundamental labour standards.

5.6 CONCLUSION

Since the 1990s labour rights and fundamental labour standards have been increasingly referred to in programs of industry self-regulation, via *inter alia* companies' (ethical or supplier) codes of conduct, and transnational private regulation, in which mixing coalitions of non-state, state, and UN actors monitor, and sometimes enforce companies' compliance with *inter alia* fundamental labour standards. Companies have thus knowingly committed themselves to fundamental labour standards, but many have so far not been able or have failed to sufficiently act to comply with these standards.

Trade unions, civil society organizations and human rights advocates have sought means to hold companies accountable for human rights violations and to deter further abuses. Individual cases before domestic courts in several countries challenged corporate abuses by lead firms, their subsidiaries and subcontractors. This has led to a fear of litigation among transnational corporations, which, together with ethical motivations, pressure from media and NGOs, and negative publicity, have been an important incentive for private actors to participate in transnational private regulations.¹⁵⁵

There is a complex multi-dimensional context in which the negotiations, implementation and enforcement of voluntary private regulation is embedded. The different transnational frameworks, configuration of actors, as well as different modes of governance and regulation have led to diverging outcomes.¹⁵⁶ This chapter has analysed two forms of transnational private regulation that promote the respect for fundamental labour standards: voluntary standards and international framework agreements. By discussing the UNGC and the International Accord it has shown both the potential as limits of transnational private regulation in general, and voluntary standards and international frameworks in particular.

With around 15.000 companies and over 3.800 non-business actors participating in the UNGC, it is indeed the most successful private voluntary initiative in the world from a quantitative perspective. What is more, the UNGC has been an excellent principle based framework to inspire corporations to implement policies to respect these principles, including fundamental labour standards. Through its global and local presence and public and private members, the UNGC has had positive effects on the corporate social perform-

¹⁵⁵ Stephens 2020, p. 47.

¹⁵⁶ Dehnen & Pries 2014, p. 347.

ances of large companies in particular. Lastly, through its reporting criteria the UNGC has added to increased transparency of its members' policies vis-a-vis the UNGC's principles, including fundamental labour standards.

However, the UNGC is clearly limited as well, since it has no hard enforcement mechanism besides delisting in case of non-compliance with COP. So far over 16.000 companies have been delisted, which is illustrative of the low entry requirements of the UNGC. Other than reputational risks, there are no other consequences for companies in practice if they are delisted. What is more, research has shown that UNGC participants perform worse than non-participants on crucial but costly matters related to the implementation of the UNGC principles. As a result, it has been argued that participating non-compliant businesses take advantage of the reputational benefits of compliant members without incurring the costs of compliance.¹⁵⁷

The International Accord has shown a different side of transnational private regulations. Although relatively limited in scope – normatively, geographically, and sectorial – the International Accord is one of the few transnational frameworks that has directly progressed the respect for fundamental labour standards in the daily life of workers. The discussed disputes have led to a satisfying outcome for the victims. What is more, the Bangladesh and Pakistan Accords nowadays covers around 2.6 million workers, and includes references to the other fundamental labour standards too, thus rebuking at least partially the criticism it has attracted on its alleged limit in scope.

Concluding, transnational private regulation has become an important form in the context of fundamental labour standards, at a global, regional, and local level. It has supplemented existing international regulations and frameworks with the direct participation of private actors and with sometimes-hard enforcement powers. The ILO 1998 Declaration has been accepted as the authoritative framework of workers' human rights and hence set the norm on what labour standards should be protected. Private transnational frameworks refer to either the declaration itself or its fundamental conventions, in which the ILO 1998 Declaration provides the necessary guidance on what minimum level of labour standards should be protected, and have actively endeavoured to protect these rights via *inter alia* both voluntary standards and international framework agreements. This chapter has shown that private transnational regulations have contributed to the shift of international labour law to transnational labour in the context of fundamental labour standards.

157 Berliner & Prakash 2015, p. 132.