

ARBITRATION OF HUMAN AND LABOR RIGHTS:  
THE BANGLADESH EXPERIENCE

ISABELLE GLIMCHER\*

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\* JD, New York University School of Law, 2019, Institute for International Law & Justice Scholar; MSc in Refugee & Forced Migration Studies, Oxford University, 2014; BA in Social Studies, Harvard University, 2013. In the interest of full disclosure, I am now working for the Center for Business & Human Rights at NYU Stern School of Business, whose report I cite frequently throughout this paper. I would like to thank Professor Robert Howse for his invaluable guidance and advice in writing this paper, Sophia Nitzan Staley for her thoughtful edits and recommendations in reworking the paper, and the rest of their JILP team for their tireless efforts.

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I. INTRODUCTION

While the international system increasingly recognizes the rights and needs of individuals, violations and impunity still abound across the world.<sup>1</sup> The concept of individual rights originated within the state system, and is predicated upon government as the central enforcement mechanism.<sup>2</sup> Privatization, however, is growing—more and more governmental services are provided by corporations and non-governmental organizations (NGOs).<sup>3</sup> With this, individuals find themselves increasingly at the mercy of giant multi-national corporations (MNCs), and guaranteeing individual rights becomes more complex. As they grow in size and significance,<sup>4</sup> MNCs must be held to human and labor rights standards. The enforcement of such standards, many of which were not designed to be enforceable against private entities, thereby raises new challenges and questions. A private international dispute resolution mechanism could provide a meaningful solution. This note ar-

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1. See generally HUMAN RIGHTS WATCH, WORLD REPORT 2019 (2019) (detailing human rights abuses in countries across the world).

2. See generally MICHELINE ISHAY, THE HISTORY OF HUMAN RIGHTS: FROM ANCIENT TIMES TO THE GLOBALIZATION ERA (2008) (demonstrating the role of central government structures in enforcing human rights).

3. For example, see generally Harold Demsetz, *The Private Production of Public Goods*, 13 J.L. & Econ. 293 (1970) (analyzing the production of public goods through private means); Fazal Rizvi, *Privatization in Education: Trends and Consequences* (United Nations Educ., Sci. and Cultural Org. Educ., Research and Foresight Working Papers, Paper No. 18, 2016) (exploring the benefits, costs, and consequences of increasing privatization of traditionally governmental services).

4. In 2017, sixty-nine of the top 100 largest economic entities in the world were corporations, not states. *69 of the Richest 100 Entities on the Planet Are Corporations, Not Governments, Figures Show*, GLOBAL JUST. NOW (Oct. 17, 2018), <https://www.globaljustice.org.uk/news/2018/oct/17/69-richest-100-entities-planet-are-corporations-not-governments-figures-show>.

gues in favor of the use of binding arbitration as a mechanism to enforce human and labor rights on behalf of individuals.

International arbitration typically involves the use of a privately formed ad hoc tribunal to resolve disputes between corporations in different states, or between a corporation and a state itself. Tribunal decisions are enforceable through national legal systems under the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York Convention.<sup>5</sup> Through such arbitrations, contractual or treaty provisions can be made binding without the need for incorporation into domestic law, and without raising complex jurisdictional questions.<sup>6</sup>

Arbitration of human and labor rights agreements provides a meaningful mechanism with which to impose liability for violation. Such arbitration could provide better pathways to remedy than litigation, especially in countries without an independent or functioning judiciary, or where jurisdictional and other procedural limitations make meaningful access to remedy unrealistic. While arbitration is not a panacea for human rights enforcement, especially given its high costs,<sup>7</sup> it can be a useful tool with which to make human and labor rights commitments legally enforceable against MNCs. This note assesses some of the more specific benefits and costs of arbitration, focusing especially on potential regulatory chill and the internal challenges of balancing public and private interests, as well as some more practical takeaways, using the temporary Accord on Fire and Building Safety in Bangladesh (the Bangladesh Accord, or the Accord) and subsequent Bangladesh Accord Arbitrations (the arbitration) as a case study. This note argues that arbitration of human and labor rights violations, in which a corporation must appear as the respon-

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5. Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. 1, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention].

6. See, e.g., Philippe Cavalieros & Janet (Hyun Jeong) Kim, *Emergency Arbitrators Versus the Courts: From Concurrent Jurisdiction to Practical Considerations*, 35 J. INT'L ARB. 275, 277, 287–290 (2018) (exploring one jurisdictional question and the relative ease of arbitration award enforcement).

7. See, e.g., Martín Abregú, *Litigating Rights Carries Risks as Well as Rewards*, OPEN GLOBAL RTS. (Jan. 17, 2019), <https://www.openglobalrights.org/litigating-rights-carries-risks-as-well-as-rewards/?lang=English> (describing the limits of relying on litigation to enforce human rights).

dent, is an important mechanism with which to further rights protection around the world. However, arbitration is only one part of a larger constellation of enforcement mechanisms necessary for individual rights to be truly protected.

This note proceeds in four sections. Section II briefly charts the development of human and labor rights law and enforcement and describes the growing involvement of MNCs in rights protection efforts, arguing that these developments are important and beneficial to the individual. Section III explores the various ways human and labor rights protections have been imposed on, and taken up by, MNCs through non-binding and binding standards. Overall, Section III argues that arbitration brought by a state or an NGO against a corporation constitutes a valuable mechanism to enforce such obligations, and explores several concerns around its use. Section IV describes the Bangladesh Accord and subsequent arbitration as a useful case study with which to assess the viability of arbitration as a mechanism to enforce human and labor rights obligations. Looking at the Accord creation process, the arbitration itself, and the effects in the Bangladesh ready-made garment sector, Section IV identifies key values, concerns, and takeaways that will be important in future efforts to create rights agreements with binding arbitration provisions. Section V concludes.

## II. THE CHANGING NATURE OF HUMAN AND LABOR RIGHTS ENFORCEMENT AND REALIZATION

Human rights, and to a lesser extent labor rights, have gained broad international support throughout the twentieth century. In that time, both bodies of law have seen significant conceptual changes and a growing interconnection. This part of the note surveys that development, exploring the origins of these rights within the nation-state, the development of the concepts as supranational, the resulting tension with classical understandings of sovereignty, and the inadequacy of the state as enforcer. This part goes on to assess the growing role of NGOs and international organizations (IOs) in rights protection, and, given the inadequacy of all three sources of enforcement, the increasing involvement of MNCs. It is intended to serve as a brief historical introduction, highlighting the need for corporate involvement in rights protection efforts.

### A. *Conceptual Origins*

The modern conception of human rights originated within the state system itself. Over 150 years after the French Declaration of the Rights of Man and of the Citizen,<sup>8</sup> the newly-formed United Nations passed the Universal Declaration of Human Rights (UDHR) in 1948.<sup>9</sup> Fundamentally, the UDHR is nonbinding and far-reaching, enshrining a lofty set of goals for the Member States. Many of the UDHR's tenets were later codified in two legally binding conventions: the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Cultural, and Social Rights.<sup>10</sup> As Ruti Teitel summarizes, "human rights law . . . primarily engages state responsibility with respect to the rights that states owe their citizens. It is clear that most of the rights in the Covenants, and the manner in which they have been articulated, suppose the context of a domestic society in peacetime."<sup>11</sup> While the UDHR proclaimed these rights as deriving from personhood, thereby suggesting their existence independent of the state, "in the immediate post-World War II period, the guarantee of human rights protection continued to derive from the connection to the state, where it was undergirded by the principles of nationality and citizenship."<sup>12</sup> Indeed, states were, for many centuries, the only sites with sufficiently consolidated power to enforce and protect individual rights. Hannah Arendt summarized this succinctly in the context of stateless people when she wrote that citizenship is effectively the "right to have rights,"<sup>13</sup> and without such legally recognized membership, an individual finds herself without meaningful recourse for rights violation. This dependence on states, however, fun-

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8. Déclaration des Droits de l'Homme et du Citoyen [Declaration of the Rights of Man and of the Citizen] (Aug. 26, 1789) (Fr.).

9. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, pmbl. (Dec. 10, 1948) [hereinafter UDHR].

10. International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Exec. Doc. No. E, 95-2, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-19, 993 U.N.T.S. 3.

11. RUTI TEITEL, *HUMANITY'S LAW* 21 (reprint ed. 2013).

12. *Id.* at 50.

13. HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 296 (new ed. with added prefaces 1994).

damentally conflicts with a more modern human rights discourse, which asserts that human rights exist supranationally.

In the years since the Industrial Revolution, labor rights have also drawn greater attention domestically and internationally. According to Michael Trebilcock and Robert Howse, “[t]he idea of using international labor standards to protect workers from economic exploitation was first promoted by individual social reformers in Europe in the first half of the 19th century at the early stages of the Industrial Revolution.”<sup>14</sup> In the twentieth century, the International Labor Organization (ILO) has championed efforts to improve labor standards around the world.<sup>15</sup> As “a tripartite organization of government, employers and worker representatives,” the ILO sets minimum international labor standards and aims to achieve protection through “investigation, public reporting and technical assistance, but not formal sanctions.”<sup>16</sup> In 1998, the ILO passed the Fundamental Declaration on Principles and Rights at Work, outlining four categories of core labor rights: freedom of association and collective bargaining, the abolition of forced labor, the elimination of child labor, and freedom from discrimination.<sup>17</sup> As Kevin Kolben describes, the declaration and its four categories were motivated by efforts “to reinforce the notion that these rights are integral and unquestioned elements of the human rights corpus.”<sup>18</sup> Indeed, in recent decades, scholars, politicians, and advocates alike have increasingly recognized and highlighted the linkages between human and labor rights.<sup>19</sup>

Both the substance and enforcement of these human and labor rights come into tension with sovereignty as a fundamental building block of the international system. Classic Westpha-

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14. Michael J. Trebilcock & Robert Howse, *Trade Policy & Labor Standards*, 14 MINN. J. GLOBAL TRADE 261, 261 (2005).

15. See, e.g., *About the ILO*, INT’L LAB. ORG., <https://www.ilo.org/global/about-the-ilo/lang-en/index.htm> (last visited Sept. 14, 2019) (providing background on the ILO).

16. Trebilcock & Howse, *supra* note 14, at 262.

17. Int’l Labour Org. [ILO], *ILO Declaration on Fundamental Principles and Rights at Work*, art. 2, 37 I.L.M. 1237 (June 18, 1998) [hereinafter *ILO Declaration*], <https://www.ilo.org/declaration/thedeclaration/textdeclaration/lang-en/index.htm>.

18. Kevin Kolben, *Labor Rights as Human Rights?*, 50 VA. J. INT’L L. 449, 454 (2010).

19. *Id.* at 454–55.

lian sovereignty posits a sovereign's exclusive right to control internal laws, entities, and individuals.<sup>20</sup> Human and labor rights commitments interfere with this sovereignty by attempting to dictate a minimum set of guidelines for a state's treatment of its citizens. They also claim to emanate from an individual's very personhood or status as a worker, but still require enforcement from a consolidated source of power. These tensions have spawned enforcement issues throughout the twentieth century.<sup>21</sup> As Micheline Ishay explains, "we find ourselves pondering the role of the state as both the guardian of basic rights and as the behemoth against which one's rights need to be defended."<sup>22</sup> Indeed, states have proven themselves to be frequent violators of human and labor rights, both internally and internationally.

### B. *Non-State Involvement*

In the face of state inadequacy and violence, IOs, such as the ILO and the U.N. High Commissioner for Human Rights, and NGOs of various sizes, have established a growing role for themselves in the protection of human and labor rights. IOs operate with mandates aimed at the enforcement and realization of human rights within a given state's territory and across the world.<sup>23</sup> With this, the twentieth century has seen a complex relationship between states and IOs as the two main enforcers and providers of human rights.<sup>24</sup> Complicating the matter further, both entities have violated such rights at various times and to varied extents.<sup>25</sup>

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20. See generally ALAN JAMES, *SOVEREIGN STATEHOOD: THE BASIS OF INTERNATIONAL SOCIETY* (1986) (providing background on classic conceptions of sovereignty).

21. See generally ISHAY, *supra* note 2 (acknowledging enforcement issues throughout the history of human rights).

22. *Id.* at 8.

23. See, e.g., UDHR, *supra* note 9 (establishing a role for the United Nations in human rights protection); *ILO Declaration*, *supra* note 17 (outlining the role of the ILO in labor rights protection).

24. See, e.g., ISHAY *supra* note 2, at 4 (describing the complex power play between states and IOs, especially in the modern era).

25. For example, see generally Scott A. Levin, *Sexual Exploitation of Refugee Children by U.N. Peacekeepers*, 19 N.Y.L. SCH. J. HUM. RTS. 833 (2003) (detailing abuse by U.N. peacekeepers); HUMAN RIGHTS WATCH, *supra* note 1 (describing human rights violations in individual states).

Along with IOs, the world has seen an astronomic rise in the number, size, and power of NGOs in the last century, as these organizations exercise increasing influence internationally and domestically.<sup>26</sup> On the international stage, “NGOs contribute to the development, interpretation, judicial application, and enforcement of international law.”<sup>27</sup> Domestically, NGOs also “play an important role . . . in pressing the government to meet its obligations under a ratified treaty.”<sup>28</sup>

Beyond these important efforts, NGOs are facilitating a broader shift in the nature of international law itself towards recognition of the individual. This is partially attributable to their internal structure, which enables voluntary participation by individuals across borders.<sup>29</sup> As Steve Charnovitz emphasizes, “[i]ndividuals join and support an NGO out of commitment to its purpose. That purpose plus organization gives NGOs whatever ‘authority’ they have, and it will be moral authority rather than legal authority.”<sup>30</sup> This relationship based on voluntary participation necessitates that an NGO remains responsive and relevant to the needs of its members. Beyond this, as Charnovitz summarizes, “NGOs can be more creative than government officials because NGOs are not burdened with the need to champion a particular national or governmental interest.”<sup>31</sup> Without national affiliation, NGOs are free to form transnational coalitions which can wield impressive power.

Many NGOs, in concert with IOs, have attempted to wield this power to ensure greater rights protection for individuals, but find themselves limited by structural realities in the international system itself.<sup>32</sup> Seeing the practical limits of relying on states to provide human and labor rights protection, IOs have

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26. See Elihu Root, *The Function of Private Codification in International Law*, 5 AM. J. INT’L L. 577, 583 (1911) (giving examples of international associations arising in the past half century and how they have contributed to law-making).

27. Steve Charnovitz, *Nongovernmental Organizations and International Law*, 100 AM. J. INT’L L. 348, 352 (2006).

28. *Id.* at 355.

29. *See id.* at 360–61 (noting that NGOs have helped humanize international law thanks to their focus on the rights of individuals).

30. *Id.* at 348.

31. *Id.* at 361.

32. *See* ISHAY, *supra* note 2, at xvi (describing the role of NGOs in humanitarian crises).

attempted to assume a leadership posture and NGOs have attempted to apply the pressure necessary to drive state enforcement.<sup>33</sup> These attempts, however, are inherently limited by the distribution of power, especially military capability and financial resources, on the international stage. Most of the powerful IOs are still comprised of member *states* whose actions “reflect continued liberal ambivalence about loyalty to the national interest versus solidarity with an international authority predicated on human rights.”<sup>34</sup> Many of the powerful NGOs still cannot marshal sufficient tangible resources or political capital to force a resolute state to end human and labor rights violations.<sup>35</sup>

The last seventy-five years have shown that states, IOs, and NGOs are insufficient to ensure human or labor rights protections when acting separately. This lack of efficacy, and the human cost it has exacted, has prompted other actors to step in. One such actor taking a growing role in human and labor rights protection is the MNC.

### C. *Growing Involvement by MNCs*

Over the last few decades, corporations have become more involved in the enforcement and realization of human and labor rights. In the years following World War II, the international human rights regime did not extend to corporations in any significant way.<sup>36</sup> However, as consumers have become increasingly educated about and invested in labor and envi-

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33. For example, see generally THOMAS G. WEISS ET AL., *THE UNITED NATIONS AND CHANGING WORLD POLITICS* (8th ed. 2017) (assessing the role of the United Nations in international relations and domestic policy); James C. Franklin, *Human Rights Naming and Shaming: International and Domestic Processes*, in *THE POLITICS OF LEVERAGE IN INTERNATIONAL RELATIONS* 43 (H. Richard Friman ed., 2015) (unpacking the role of NGOs in human rights enforcement, focusing especially on the name and shame model); Jonas Tallberg et al., *NGO Influence in International Organizations: Information, Access and Exchange*, 48 *BRIT. J. POL. SCI.* 213 (2018) (exploring the ways NGOs exert their influence within IOs).

34. ISHAY, *supra* note 2, at 107.

35. See, e.g., Nicola Banks et al., *NGOs, States, and Donors Revisited: Still Too Close for Comfort?*, 66 *WORLD DEV.* 707, 708 (2015) (exploring NGO weakness and failure to influence).

36. Ema Vidak-Gojkovic et al., *The Medium Is the Message: Establishing a System of Business and Human Rights Through Contract Law and Arbitration*, 35 *J. INT'L ARB.* 379, 381 (2018).

ronmental practices, corporations have had to take these issues more seriously. Major corporations, like Royal Dutch Shell, Union Carbide, De Beers, and Nike, have found themselves embroiled in scandals surrounding river pollution, toxic gas leakage, conflict diamonds, and labor standards violations, respectively, each of which has led to backlash from consumers.<sup>37</sup> As Kolben describes:

Corporations are often eager to drape themselves in the human rights cloth, signifying their status as good corporate citizens. Because of the popularity and positive view of human rights among the general population, MNCs realize that promoting human rights can be an effective marketing tool, and they are eager to both embrace human rights and avoid the stigma of being labeled a human rights violator.<sup>38</sup>

In accordance with this, corporations have gradually been subjected to, and taken on, human and labor rights commitments. Given their explosive growth, MNCs must play a larger and more central role in these efforts.

### III. ENFORCEMENT MECHANISMS: SOFT LAW VS. BINDING APPROACHES

Having discussed some of the challenges of human and labor rights enforcement above, this part turns to more tangible efforts to enforce rights obligations on MNCs. This section begins by surveying some nonbinding *soft* law provisions, and the advantages and disadvantages of the approach. Next, this part turns to the growing use of binding mechanisms to regulate corporate behavior, focusing especially on arbitration.

#### A. *Inadequacies of the Soft Law Approach*

Much of the content of human and labor rights commitments takes the form of nonbinding soft law, either externally imposed upon, or internally taken up by, MNCs.

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37. Jarrod Hepburn & Vuyelwa Kuuya, *Corporate Social Responsibility and Investment Treaties*, in SUSTAINABLE DEVELOPMENT IN WORLD INVESTMENT LAW 585, 597 (Marie-Claire Cordonier Segger et al. eds., 2011).

38. Kolben, *supra* note 18, at 465.

### 1. *External Mechanisms*

At the highest external level, the United Nations has established a set of “Guiding Principles for Business and Human Rights” (Guiding Principles).<sup>39</sup> The Guiding Principles are designed around three pillars: a state’s responsibility to protect against human rights abuses,<sup>40</sup> a corporation’s responsibility to respect human rights obligations,<sup>41</sup> and a general effort to ensure access to effective remedy for victims.<sup>42</sup> Within this scheme, corporations are only one part of a larger constellation aiming at human rights protection. Importantly, as Ema Vidak-Gojkovic points out, “[t]here is no general BHR [business & human rights] treaty to impose *binding* obligations on corporations, and equally no unequivocal indication that BHR obligations would be recognized as either customary international law or a general principle of international law.”<sup>43</sup> Still, the Guiding Principles provide an important common framework for MNCs and advocates alike, and serve to legitimize the entire idea of MNCs being responsible for human rights obligations. Despite these benefits, they are nonbinding and cannot provide an independent basis for corporate liability. While these principles could eventually crystallize into binding treaties or principles of customary international law, those processes would necessarily be long and complicated, and would raise other attendant enforcement issues. Until then, the Guiding Principle exist only as recommendations.

ILO conventions also constitute some of the most important external soft law mechanisms to support fair labor conditions. These conventions “depend on ratification by individual member states and are subject only to investigation and reporting by ILO organs and the provision of technical assistance to enable countries to build capacity to implement them.”<sup>44</sup> Without formal sanction mechanisms, the ILO norms rely “on a combination of public identification, embarrassment and

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39. Office of the U.N. High Comm’r for Human Rights, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, U.N. Doc. HR/PUB/11/04 (2011) [hereinafter U.N. Guiding Principles].

40. *Id.* at 3–12.

41. *Id.* at 13–26.

42. *Id.* at 27–35.

43. Vidak-Gojkovic, *supra* note 36, at 382 (emphasis added).

44. Trebilcock & Howse, *supra* note 14, at 274.

shaming (a mild stick), and technical assistance to promote compliance (a mild carrot).<sup>45</sup> With this, they follow a more common soft law approach, relying on tools often mobilized by human rights NGOs. Again, while the ILO's conventions establish recognized guidelines, much like the Guiding Principles they do not establish legal liability for violation.

National and intergovernmental entities have also increasingly included nonbinding corporate social responsibility (CSR) provisions in organization guidelines, bilateral investment treaties (BITs), and free trade agreements (FTAs).<sup>46</sup> The Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises provide CSR-related provisions for corporations doing business in any of the thirty-six member countries.<sup>47</sup> However, breaches of the guidelines are handled by "National Contact Points" established in each country that are mandated to carry out investigations of complaints and issue statements of their findings without any capacity to impose liability or sanctions.<sup>48</sup> This system, therefore, is predicated on peer review and information sharing in order to encourage and facilitate country compliance.<sup>49</sup> Again, it cannot provide a basis for corporate liability for rights violations. The Norway Model BIT requires state parties to *encourage* investors to adhere to the OECD Guidelines, but provides no remedy or liability for violation of the Guideline's provisions.<sup>50</sup> The Joint Declaration Concerning Guidelines to Investors attached to a 2002 Chile-EU agreement also states that the parties must "*remind* their multinational enterprises of their *recommendation* to observe the OECD Guidelines . . . wherever they operate."<sup>51</sup> Similarly reticent language is sometimes included in the precatory statements of BIT pream-

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45. *Id.*

46. Hepburn & Kuuya, *supra* note 37, at 599–601.

47. Org. for Econ. Cooperation & Dev. [OECD], *OECD Guidelines for Multinational Enterprises* (2011), <http://www.oecd.org/daf/inv/mne/48004323.pdf>.

48. *Id.* at 18.

49. *Id.*

50. AGREEMENT BETWEEN THE KINGDOM OF NORWAY AND \_\_\_\_ FOR THE PROMOTION AND PROTECTION OF INVESTMENTS art. 32 (2015), <https://www.regjeringen.no/contentassets/e47326b61f424d4c9c3d470896492623/draft-model-agreement-english.pdf>.

51. Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, of

bles, which emphasize the importance of human rights, CSR, and sustainable development without imposing binding obligations.<sup>52</sup> These efforts provide only recognition and guidelines without outlining a basis for liability in case of violation.

Some attribute the increasing use of soft law regulation to the growth of NGO oversight. Jarrod Hepburn and Vuleywa Kuuya suggest that “[a]s trade and investment liberalized over the last few decades and multinational corporations sought to move their operations offshore and tap into new sources of labour and mineral wealth around the world, NGOs travelled with them and began to report on their activities.”<sup>53</sup> As NGOs and media outlets worked in tandem to draw attention to human rights violations in supply chains and elsewhere, “[c]orporations realized that CSR compliance was not only a way to foster good public relations, but also a practical way to

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the other part, final act, Dec. 30, 2002, 2002 O.J. (L 352) 1, 1444 (emphasis added).

52. *See, e.g.*, TREATY BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF [COUNTRY] CONCERNING THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENT pmb. (2012), <https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf> (providing that objectives should be achieved “in a manner consistent with the protection of health, safety, and the environment, and the promotion of internationally recognized labor rights”); Agreement Between the Government of Canada and the Government of the Republic of Benin for the Promotion and Reciprocal Protection of Investments, pmb., Benin-Can., May 12, 2014, UNCTAD INVESTMENT POLICY HUB, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/438/download>; Agreement Between the Government of Canada and the Government of Burkina Faso for the Promotion and Protection of Investments, pmb. Burk. Faso-Can., Oct. 11, 2017, UNCTAD INVESTMENT POLICY HUB, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3460/download>; Accord entre la Confédération Suisse et la Géorgie Concernant la Promotion et la Protection Réciproque des Investissements [Agreement Between the Swiss Confederation and Georgia on the Promotion and Reciprocal Protection of Investments], pmb., Geor.-Switz., June 3, 2014, UNCTAD INVESTMENT POLICY HUB, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4814/download> (including references to the importance of human rights and sustainability in the preamble); *Belarus – United States of America BIT (1994)*, UNCTAD INV. POLY HUB, <https://investmentpolicy.unctad.org/international-investment-agreements/treaties/bilateral-investment-treaties/457/belarus—united-states-of-america-bit-1994> (last visited Sept. 17, 2019).

53. Hepburn & Kuuya, *supra* note 37, at 598.

manage risk.”<sup>54</sup> This contributed to the rise of internal mechanisms.

## 2. *Internal Mechanisms*

In response to pressure from consumers and civil society groups, many corporations have elected to self-regulate in nonbinding ways.<sup>55</sup> Often embodied in corporate codes of conduct stipulating adherence to human and labor rights protections, “companies have created these systems in order to provide some form of assurance to socially conscious consumers that the working conditions of the people manufacturing the products satisfy consumer demand for good labor conditions and to provide a degree of protection from exposé and scandal.”<sup>56</sup> Beyond avoidance of risk, many have argued in support of CSR commitments as favorable to a corporation’s profitability: “it demonstrates foresight and social awareness, it attracts talented and committed staff, and it may help to discourage stricter legal regulation from government.”<sup>57</sup> CSR commitments can thus provide a company with an advantage over competitors, especially as potential employees and consumers become increasingly committed to leveraging their employment or purchasing power to reward socially conscious corporate behavior.

While treating human and labor rights protection as a public relations concern arguably evinces MNCs’ insufficient commitment to the fundamental values of the movements, such corporate commitments still have the potential to effect real change for individuals. Some have argued that such corporate self-regulation can have positive effects not only on the corporation itself and those directly involved in its work, but also on the larger society as a whole. As Kolben suggests, “private regulation, if properly implemented, might facilitate the development of civil society, such as trade unions, which will in turn put pressure on democratic and perhaps even non-demo-

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54. *Id.*

55. *Id.* at 592–93.

56. Kevin Kolben, *Integrative Linkage: Combining Public and Private Regulatory Approaches in the Design of Trade and Labour Regimes*, 48 HARV. INT’L L.J. 203, 226 (2007).

57. Hepburn & Kuuya, *supra* note 37, at 593–94.

cratic governments to enact and enforce effective labor law.”<sup>58</sup> This potential is especially significant in exporting and producing countries with weak regulatory regimes.<sup>59</sup> As Kolben summarizes, “in light of the fact that developing countries often have highly dysfunctional labor regulatory systems and are ineffective enforcers of labor laws and workers’ rights, such a state-centric focus [as has historically been mobilized] is misguided.”<sup>60</sup> These states lack the capacity, and often the will, to create and enforce meaningful labor regulation, and an often underdeveloped civil society cannot put adequate pressure on the governments.<sup>61</sup> Seeing these weaknesses, corporate efforts towards systematic rights protection can contribute to the state’s capacity to enforce human and labor rights, and a functioning state system can help ensure corporate compliance in turn.<sup>62</sup>

Despite these important potential advantages, corporate self-regulation is not without its limitations. One concern lies in the potential instability of private regulation, “because it is dependent primarily on consumer preferences and the desire of companies to enforce it.”<sup>63</sup> The efficacy of such systems “turn[s] largely on market reactions . . . principally by consumers and to a lesser extent by investors.”<sup>64</sup> The success of these internal mechanisms is inherently limited by the extent to which consumers are willing to alter their spending behavior to favor corporations that maintain good human and labor rights records. Studies show that such willingness has been minimal to date.<sup>65</sup> Part of this is attributable to imperfect information, as many consumers have trouble staying fully informed about the externalities of their spending behavior.<sup>66</sup> Still, as Trebilcock and Howse lament:

[C]onsumers, even if fully informed about conditions under which imports are being produced and viola-

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58. Kolben, *supra* note 56, at 233–34.

59. *Id.* at 209.

60. *Id.* at 204.

61. *Id.* at 224.

62. *Id.* at 205.

63. *Id.* at 229.

64. Trebilcock & Howse, *supra* note 14, at 274.

65. *See, e.g., id.* at 276–77 (describing the unwillingness of consumers to alter spending behavior through an illustrative World Bank study).

66. *Id.*

tions of core international labor standards that particular modes of production may entail, in fact do not care enough about the intrinsic values reflected in these core labor standards (viewed as basic or universal human rights) to put their money where their mouth is.<sup>67</sup>

While consumers do seem committed to basic human and labor rights protections in theory, they “confront serious collective action problems” when trying to use their consumption to convey and enforce these standards.<sup>68</sup> This imperfect feedback loop limits the extent to which corporations will be incentivized to establish and uphold meaningful internal standards.

Another concern with corporate self-regulation lies in the quality and reach of the protections themselves. As Kolben describes, “[w]hile most codes do in fact conform to international and domestic law, codes do not necessarily always incorporate domestic or international norms, and companies can selectively enforce certain provisions over others.”<sup>69</sup> Beyond this, such codes are most often created without input from the workers themselves,<sup>70</sup> and therefore lack democratic accountability. Another weakness lies in the fact that “companies targeted by social movements, NGOs and the media are not necessarily those engaged in the most offensive and least responsible behaviour, but rather those most vulnerable to societal exposure.”<sup>71</sup> These campaigns will inevitably overlook various corporations and even whole industries, leaving them without such an incentive to adopt nonbinding internal regulations.

A final, and perhaps the most fundamental, concern with private regulation lies in the potential for ineffective implementation, without any legal liability or financial sanction attached. As all of these promises serve only as aspirations or recommendations, individuals must rely on corporations’ commitment to the values without any tangible external recourse

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67. *Id.* at 276.

68. *Id.* at 277.

69. Kolben, *supra* note 56, at 229–30.

70. *Id.* at 230.

71. Juliane Reinecke & Jimmy Donaghey, *The ‘Accord for Fire and Building Safety in Bangladesh’ in Response to the Rana Plaza Disaster*, in GLOBAL GOVERNANCE OF LABOR RIGHTS: ASSESSING THE EFFECTIVENESS OF TRANSNATIONAL PUBLIC AND PRIVATE POLICY INITIATIVES 257, 262 (Axel Marx et al. eds., 2015).

in cases of violation. Even with meaningful corporate buy-in, “most monitoring programs are unable to spend the kind of resources that are necessary to paint an accurate picture of what occurs inside factories.”<sup>72</sup> Problematically, as Kolben explains, “many employers strive to hide violations in their factories by implementing quick fixes during announced visits or coaching their employees to lie to inspectors when they arrive, making it very difficult to obtain real information.”<sup>73</sup> External and internal soft law approaches, are therefore helpful but insufficient.

### B. *An Alternative: Three Binding Approaches*

Seeing these limitations to the soft law approach, alternative approaches increasingly impose binding obligations on MNCs.<sup>74</sup>

#### 1. *Domestic Law*

One possible source of binding obligations lies in domestic law. As Hepburn and Kuuya describe, domestic law “operates both in a *regulatory* capacity, providing the background *ex ante* against which corporations must act, as well as in an *accountability* capacity, by providing for effective redress *ex post* of any harm caused by corporate activity.”<sup>75</sup> Reliance on extraterritorial application of domestic law can be especially useful to regulate MNCs working in host states with weak regulatory and legal systems.<sup>76</sup> Jurisdictional challenges, however, limit the efficacy of this mechanism. One example of the utility and the challenges of this approach, is the U.S. Alien Tort Statute (ATS).<sup>77</sup> The law enables U.S. federal courts to hear cases premised on a “modest number of international law violations” that foreign state officials and MNCs commit against non-nationals.<sup>78</sup> Importantly, the U.S. Supreme Court ruled that “the presumption against extraterritoriality . . . constrain[s] courts

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72. Kolben, *supra* note 56, at 230.

73. *Id.*

74. See Vidak-Gojkovic, *supra* note 36, at 387–88 (“[T]he law of BHR has witnessed a remarkable ‘hardening’ of soft law.”)

75. Hepburn & Kuuya, *supra* note 37, at 594.

76. *Id.* at 596.

77. Alien Tort Statute (ATS), 28 U.S.C. § 1350 (2001).

78. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004).

exercising their power under the ATS,”<sup>79</sup> thereby diminishing the extent to which it can be used to enforce human rights obligations on foreign corporations acting on foreign territory. While a full assessment of the ATS is beyond the purview of this note, it exemplifies some of the jurisdictional challenges that can arise with extraterritorial application of domestic law as a mechanism to enforce human and labor rights obligations.

## 2. *International Legal Personality*

Another development that could encourage the imposition of binding obligations on MNCs is the increasing recognition of corporations as having international legal personality independent from their home or host states. International legal personality is a capacity to possess rights and duties under international law.<sup>80</sup> While states were traditionally the only holders of international legal personality, “[w]ith the rise of international organisations and international human rights law . . . the small circle of subjects of international law gradually expanded.”<sup>81</sup> Recognition of the international legal personality of MNCs is “still nascent,” but could empower a wide variety of actors to hold corporations accountable for human and labor rights violations.<sup>82</sup> Again, a full assessment is beyond the reach of this note, but many scholars debate the appropriateness of international legal personality for MNCs,<sup>83</sup> suggesting that it will be some time before this approach is meaningfully useful.

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79. *Kiobel v. Royal Dutch Petroleum. Co.*, 569 U.S. 108, 117 (2013).

80. Jan Wouters & Anna-Luise Chané, *Multinational Corporations in International Law* 6 (Leuven Ctr. for Global Governance Studies, Working Paper No. 129, 2013).

81. *Id.* at 6.

82. Hepburn & Kuuya, *supra* note 37, at 599.

83. *See, e.g.*, Wouters & Chané, *supra* note 80, at 6–7 (summarizing scholars’ positions on the place of MNCs in international law); STÉPHANIE BIJLMAKERS, CORPORATE SOCIAL RESPONSIBILITY, HUMAN RIGHTS, AND THE LAW 46 (2018); Karsten Nowrot, *Reconceptualising International Legal Personality of Influential Non-State Actors: Towards a Rebuttable Presumption of Normative Responsibilities*, in INTERNATIONAL LEGAL PERSONALITY 369, 379 (Fleur Johns ed., 2016) (debating the changing nature of international legal personality and the potential recognition of international legal personality of MNCs).

### 3. *Arbitration*

A third approach to imposing rights obligations on MNCs relies on the use of binding arbitration provisions in BITs, FTAs, and investment contracts. Arbitration provisions in such governing agreements allow states to bring claims against corporations whose behavior violates the terms of their agreements, and similarly allow corporations to bring claims against a state whose regulations interfere with their investments. When human and labor rights obligations are included as binding terms of the agreement, their violation can be the basis of arbitration. This approach typically places responsibility on the host state to bring arbitration proceedings in an attempt to impose legal liability for rights violations. Importantly, some arbitration provisions, including the one in the Bangladesh Accord, also empower actors beyond states to enforce human and labor rights obligations on MNCs through arbitration. This is a significant development and will be considered in greater detail below.

The inclusion of such provisions in governing agreements is increasingly common. According to a recent OECD report, the 1990 Polish-US BIT was the first to include provisions on labor rights and stipulate that violations of such provisions would be submitted to binding arbitration.<sup>84</sup> Since then, greater efforts have been made to include similar provisions encompassing a growing number of rights in more recent BITs.<sup>85</sup> In 2014, the U.N. Human Rights Committee (UNHRC) adopted a resolution creating an intergovernmental working group whose mandate was to create a legally binding instrument addressing the arbitration of human and labor rights violations that by businesses.<sup>86</sup> In June 2019, the Draft Hague Rules on Business and Human Rights Arbitration was published online for a public consultation period ending in late August 2019, with the final version to be published on De-

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84. ORG. FOR ECON. COOPERATION & DEV. [OECD], *INTERNATIONAL INVESTMENT LAW: UNDERSTANDING CONCEPTS AND TRACKING INNOVATIONS* 136 (2008).

85. *See e.g.*, U.N. CONFERENCE ON TRADE & DEV., UNCTAD SERIES ON ISSUES IN INTERNATIONAL INVESTMENT AGREEMENTS: SOCIAL RESPONSIBILITY, at 24, U.N. Doc. UNCTAD/ITE/IIT/22, U.N. Sales No. E.01.II.D.4 (2001) (describing obligations in certain “intergovernmental instruments”).

86. Human Rights Council Res. 26/9, U.N. Doc. A/HRC/RES/26/9 (July 14, 2014).

ember 10, 2019.<sup>87</sup> While a full consideration is beyond the scope of this note, the draft rules recognize the utility of arbitration to enforce human and labor rights, and implicitly call for an increased reliance on binding mechanisms.<sup>88</sup>

While arbitration of human and labor rights questions is not unprecedented, reliance on arbitration is likely to increase as the use of binding arbitration provisions becomes more common and privatization increases.<sup>89</sup> The decisions of these arbitrations are especially significant, as their effects reach beyond the parties to “impact the rights and welfare of those individuals and communities where an investment is located.”<sup>90</sup> Beyond the immediate communities, such arbitrations can also have a significant influence on future agreements and practices, as corporations and states aim to avoid liability and ensure human rights protections worldwide.

The use of international arbitration to enforce human rights obligations thus raises several concerns—this note will consider two main issues: the effect binding arbitration of human and labor rights violations could have on host state regulation and foreign direct investment (FDI), and challenges within the arbitration itself surrounding the necessary balancing of public and private interests, especially the role of the arbitrators and the degree of transparency.

#### a. Chilling Potential

The inclusion of human rights obligations in BITs subject to binding arbitration provisions has the capacity to depress host state regulation or foreign investment. So-called *regulatory chill* refers to a long-standing concern that FDI under BITs will disincentivize the host state from passing regulations that

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87. Diane Desierto, *Why Arbitrate Business and Human Rights Disputes? Public Consultation Period Open for the Draft Hague Rules on Business and Human Rights Arbitration*, EUR. J. INT’L L.: EJIL: *Talk!* (July 12, 2019), <https://www.ejiltalk.org/public-consultation-period-until-august-25-for-the-draft-hague-rules-on-business-and-human-rights-arbitration>.

88. *Id.*

89. Fan Kun, *Expansion of Arbitral Subject Matter: New Topics and New Areas of Law*, in THE EVOLUTION AND FUTURE OF INTERNATIONAL ARBITRATION 299, 299–300 (Stavros Brekoulakis et al. eds., 2016).

90. MIGUEL SOLANES & ANDREI JOURAVLEV, REVISITING PRIVATIZATION, FOREIGN INVESTMENT, INTERNATIONAL ARBITRATION, AND WATER, at 12, U.N. Doc. LC/L.2827-P, U.N. Sales No. E.07.II.G.151 (2007).

could serve the goal of protecting human and labor rights but would impact an investor's conduct or return on the investment in violation of the governing agreement, thereby opening the host state up to arbitration.<sup>91</sup> While broader literature on FDI and BITs considers this issue extensively,<sup>92</sup> the addition of human rights obligations effectively widens the reach of any investment treaty, and thus the reach of arbitration provisions. Especially given the increasing "privatization of public services, States may be trapped in a dilemma between violating human rights and investment protection treaties."<sup>93</sup> While one could argue that binding human and labor rights requirements would serve to further justify and thereby encourage regulation, the increased chance of arbitration alone could dissuade a state from taking positive regulatory steps which could affect an investor and subject the state to arbitration. Thus, one basis on which to prefer voluntary CSR commitments made by the corporation and encouraged by the home state and its population of consumers is the concern that merely expanding the range of arbitral issues would serve to exacerbate regulatory chill.

Such provisions could also have a chilling effect on the corporation considering FDI. From a risk management standpoint, a corporation is less likely to be willing to commit resources in a foreign country if such a commitment opens them up to legal and financial liability for human and labor rights violations. In this way, binding arbitrational provisions could chill foreign investment. While this is a meaningful concern,

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91. See generally Julia G. Brown, *International Investment Agreements: Regulatory Chill in the Face of Litigious Heat?*, 3 W. J. LEGAL STUD. 1 (2013) (describing regulatory chill issues more generally).

92. For example, see generally Ashley Schram et al., *Internalisation of International Investment Agreements in Public Policymaking: Developing a Conceptual Framework of Regulatory Chill*, 9 GLOBAL POL'Y 193 (2018) (developing a conceptual framework of how international investment agreements lead to regulatory chill); Kyla Tienhaara, *Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement*, 7 TRANSNAT'L ENVTL. L. 229 (2017) (proposing that fossil fuel corporations might use investor-state dispute settlement to induce cross-border regulatory chill); Henrik Horn & Pehr-Johan Norbäck, *A Non-Technical Introduction to Economic Aspects of International Investment Agreements* (Research Inst. of Indus. Econ., IFN Working Paper No. 1250, 2018) (assessing, discussing, and debating regulatory chill in the context of international investment arbitration); *id.*

93. Kun, *supra* note 89, at 314.

the growing dependence on FDI in an increasingly globalized world assuages some of this concern. As the number and reach of corporations grow, competition necessitates efficient use of global resources; as such, corporations must increasingly rely on foreign capital. This growing reliance on foreign capital counteracts the dissuading effect of binding human and labor rights obligations, as a corporation could be forced to accept such obligations or lose access to low wage workers and high-volume production.

#### b. Complex Balancing

Within the arbitration itself, the enforcement of human rights obligations calls for complex balancing of private and public interests by arbitrators. Importantly, “[w]hile judges operate as part of the public sphere and are bound to protect the unrepresented public interest, private arbitrators are not.”<sup>94</sup> Indeed, arbitrators are significantly disconnected from the general public of the host state, but their decisions can have profound effects on domestic human rights protection. This potential raises long-standing questions about the appropriateness of such judicial review. Some arbitrators faced with such questions have mobilized the Guiding Principles to locate the appropriate balance between public and private interests,<sup>95</sup> as the Guiding Principles themselves aim to outline the extent to which businesses must adhere to human and labor rights requirements.<sup>96</sup> Others have relied on the decisions of human rights courts: in the *Tecmed* decision,<sup>97</sup> the Tribunal referenced the European Court of Human Rights (ECHR) proportionality test to determine the appropriateness of abridging an individual’s human right to achieve “a legitimate aim.”<sup>98</sup> There exist, therefore, some bases to guide an arbitrator’s eval-

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94. *Id.* at 316.

95. *Id.* at 315–16.

96. U.N. Guiding Principles, *supra* note 39.

97. *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, ¶ 122 (May 29, 2003), 10 ICSID Rep. 130 (2004); *see also* *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Award, ¶¶ 311–12 (July 14, 2006), 43 I.L.M. 262 (2004).

98. *James and Others v. United Kingdom*, App. No. 8793/79, 8 Eur. H.R. Rep. 123, ¶ 50 (1986).

uation of the appropriate balance between public and private interests, but the task should not be underestimated.

One specific instance of this complex balancing surrounds questions of transparency. While corporations often prefer arbitration over litigation for its confidentiality, arbitrations that turn on human rights protections arguably should not be kept secret from those directly affected by the eventual decision. Host state citizens whose human rights are the subject of an arbitration should be aware of the existence of such an arbitration, and arguably have their voices heard to ensure meaningful protection of their interests. Otherwise, as Fan Kun points out, “public-welfare issues can in effect be decided secretly between corporations and high-powered plaintiffs’ attorneys who represent unsophisticated victims.”<sup>99</sup> Without a set of ethical standards guiding representation in international arbitration, victims cannot be guaranteed to have their best interests served. And this can be costly, especially as “decisions against states with monetary damages will likely be paid out of tax payers’ money.”<sup>100</sup> Seeing this, transparency is the subject of a broader debate in the field<sup>101</sup> and a movement is developing toward greater transparency in investor-state arbitrations especially.<sup>102</sup> Such transparency can benefit the host state “based on their interests related to disclosure of important official information to their citizens” and their desire to appear responsive to the needs of their people.<sup>103</sup> Importantly, transparency can also benefit investors by “expanding the potential for amicable settlement . . . , by exposing misconduct or corruption by elites in host States, or prompting internal political dynamics among economic interests.”<sup>104</sup> This debate around transparency is especially significant in regards to arbitration

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99. Kun, *supra* note 89, at 312.

100. *Id.*

101. See, e.g., Cindy G. Buys, *The Tensions Between Confidentiality and Transparency in International Arbitration*, 14 AM. REV. INT’L. ARB. 121, 121 (2003) (arguing that a more nuanced approach to confidentiality in arbitration might balance between the values of confidentiality and the values of transparency); Catherine A. Rogers, *Transparency in International Commercial Arbitration*, 54 U. KAN. L. REV. 1301, 1302 (2006) (exploring the assumptions underlying the transparency debate and practical consequences, as well as the prospects for transparency in international commercial arbitration).

102. Kun, *supra* note 89, at 312–13.

103. *Id.* at 313–14.

104. *Id.* at 314.

of human and labor rights violations, as the stakes are higher for the individuals affected and excluded.

Despite these challenges—especially around potential chilling effects on host states and corporations, and the complicated balancing of public and private interests—arbitration appears to be a fruitful tool to enforce human and labor rights obligations against corporations. It provides a mechanism with which to make such obligations legally binding without reliance on host state litigation, extraterritorial application of home state domestic law, or full recognition of the international legal personality of MNCs. Section IV will consider one prominent example of the use of arbitration to enforce human and labor rights obligations and punish violations: the Bangladesh Accord Arbitrations.

#### IV. CASE STUDY: THE BANGLADESH ACCORD ARBITRATIONS

This part will mobilize the Bangladesh ready-made garment sector as a case study to assess the utility of arbitration as a mechanism to enforce human and labor rights law. This part will begin with a brief introduction to the garment manufacturing sector in Bangladesh and several attempts to regulate the sector through nonbinding measures. Seeing the inadequacy of such attempts vivified by the Rana Plaza tragedy, this part will then chart the establishment of the Bangladesh Accord and consider several elements of the Accord itself. Finally, it turns to the recent arbitrations under the Accord, considering the challenges discussed in Section III, before assessing the effects of the Accord in Bangladesh, and takeaways for future efforts.

##### A. *Bangladesh Background*

After China, Bangladesh is the second largest textile producer in the world.<sup>105</sup> While the exact number has proven elusive to establish, factories number in the thousands.<sup>106</sup> The garment sector generates roughly eighty percent of the country's export revenue and employs almost five million peo-

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105. Reinecke & Donaghey, *supra* note 71, at 262.

106. *Id.*

ple,<sup>107</sup> predominantly women, to produce garments for the developed world.<sup>108</sup> According to an April 2018 study conducted by the New York University Center for Business & Human Rights (the NYU Report), “[l]argely because of the garment industry, the portion of Bangladeshis living below the poverty line has fallen from more than 44 percent in 1991 to less than 13 percent.”<sup>109</sup> While the sector has thus contributed substantially to the development of the country as a whole, workers in the factories “are mostly illiterate and have very limited knowledge of human rights, working conditions, and labor standards.”<sup>110</sup> Studies suggest informal recruitment and hiring practices contribute to job insecurity,<sup>111</sup> and according to the Workers’ Rights Consortium, the Bangladeshi garment sector has one of the lowest minimum wages for garment workers anywhere in the world.<sup>112</sup>

While these conditions existed in the shadows for many years, they were brought to the attention of the outside world by several tragedies. In 2005, the so-called Spectrum disaster “killed 64 and injured 80 when illegally-built floors on top of an existing building collapsed.”<sup>113</sup> Then, in December 2010, twenty-nine people died in a fire at the That’s It Sportwear factory, which produced for GAP, Abercrombie & Fitch, and Target, among others.<sup>114</sup> In November 2012, the “Tazreen fire” caused the deaths of 112 garment factory workers.<sup>115</sup> These are but three examples of an ongoing problem. While these tragedies cost many lives, they were dwarfed by the collapse of the Rana Plaza factory building.

On April 24, 2013, in the Savar suburb of Dhaka, the Rana Plaza building complex collapsed.<sup>116</sup> The previous day, workers had “noticed deep cracks forming in the building’s walls

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107. PAUL M. BARRETT ET AL., FIVE YEARS AFTER RANA PLAZA: THE WAY FORWARD 7 (2018).

108. Reinecke & Donaghey, *supra* note 71, at 262.

109. BARRETT ET AL., *supra* note 107, at 7.

110. Md Zillur Rahman, *Accord on “Fire and Building Safety in Bangladesh”: A Breakthrough Agreement?*, 4 NORDIC J. WORKING LIFE STUD. 69, 69–70 (2014).

111. Ferdous Ahamed, *Improving Social Compliance in Bangladesh’s Ready-Made Garment Industry*, 13 LAB. & MGMT. DEV., 2012, at 1, 6.

112. Reinecke & Donaghey, *supra* note 71 at 262.

113. *Id.* at 264.

114. *Id.*

115. *Id.*

116. BARRETT ET AL., *supra* note 107, at 5, 7.

and support pillars.”<sup>117</sup> A local engineer declared the building unsafe, and the police ordered it evacuated, but the owner “ordered employees to return the next day or risk losing their jobs.”<sup>118</sup> Four additional floors had been added to the top of the building without planning permission<sup>119</sup> and without necessary support walls.<sup>120</sup> The building as a whole “was originally built as a shopping complex and office block—not a factory hub housing 3,000 workers and their machines,”<sup>121</sup> and it “rested on swampy ground that compromised its integrity.”<sup>122</sup> When the building collapsed, 1,134 workers, mostly young women, died in the collapse and subsequent fires, and roughly 2,500 were injured, making it “the worst accident in the history of the apparel industry and one of the deadliest industrial disasters of any kind.”<sup>123</sup>

B. *The Accord on Fire and Building Safety in Bangladesh*

Buoyed by media coverage and activist commitment, outrage followed the disaster. After earlier efforts to encourage corporations to take responsibility for the unsafe working conditions in Bangladesh,<sup>124</sup> the Rana Plaza collapse constituted a tragic “opportunity to act on plans previously thwarted by corporate intransigence.”<sup>125</sup> With no legal responsibility imposed on the global brands, “public opinion in the developed world became sensitised to what was happening in the supply chains,”<sup>126</sup> and “pressure grew on these companies to take responsibility for the incident.”<sup>127</sup> According to the NYU Report, the Rana Plaza tragedy,

raised anew questions first posed in the 1990s about the global garment industry’s responsibility for working conditions in places like Dhaka: By driving down prices they pay to suppliers, do corporations such as

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117. *Id.* at 5.

118. *Id.*

119. *Id.*

120. *Id.*

121. Reinecke & Donaghey, *supra* note 71, at 257.

122. BARRETT ET AL., *supra* note 107, at 5.

123. *Id.*

124. *Id.* at 11.

125. *Id.*

126. Reinecke & Donaghey, *supra* note 71, at 257.

127. *Id.*

Gap, Walmart, and Inditex create incentives for factory owners to scrimp on safety and put worker lives at risk.<sup>128</sup>

Facing such pressure, several global clothing brands joined two “unusual initiatives”: H&M, Primark, “and other European companies joined with trade union partners to create the Accord,” while “Walmart, GAP, and other North American companies set up the Alliance for Bangladesh Worker Safety [(the Alliance)].”<sup>129</sup> Both temporary mechanisms mandated factory inspections and remediation for five years with an option to renew, and members agreed to terminate contracts with Bangladeshi manufacturers who refused to comply with the newly-developed safety standards.<sup>130</sup> However, the Alliance and the Accord differ substantially in one central enforcement mechanism: only the Accord includes a binding arbitration provision regarding the resolution of disputes and the violation of enshrined rights obligations. Because this note focuses on the use of binding arbitration to enforce human and labor rights, this part proceeds with a nearly-exclusive focus on the Accord.

The Accord, signed on May 13, 2013, commits the parties to a broad and fundamental “goal of a safe and sustainable Bangladeshi Ready-Made Garment . . . industry in which no worker needs to fear fires, building collapses, or other accidents that could be prevented with reasonable health and safety measures.”<sup>131</sup> While this statement implicitly extends the Accord’s reach to all workers across Bangladesh, the scope is actually limited to “all suppliers producing products for the signatory companies.”<sup>132</sup> These suppliers are then subdivided into three tiers, based on the volume of their production as a percentage of the signatory company’s annual production in Bangladesh, and subjected to inspections, remediation, and fire safety training requirements to varying extents.<sup>133</sup> The Ac-

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128. BARRETT ET AL., *supra* note 107, at 6.

129. *Id.* at 2.

130. *Id.* at 11–13.

131. Accord on Fire and Building Safety in Bangladesh pmbl., May 15, 2013, <https://admin.bangladeshaccord.org/wp-content/uploads/2018/08/2013-Accord.pdf> [hereinafter, 2013 Accord].

132. *Id.*

133. 2013 Accord, *supra* note 131, ¶¶ 8–11, 12–15, 16–17.

cord also established a Steering Committee<sup>134</sup> responsible for, among other things, regular publication of “information on key aspects of the programme,” including an “aggregated list of all suppliers in Bangladesh (including sub-contractors) used by the signatory companies” and their Tier designation; written inspection reports; public statements by safety inspection officials identifying factories with undue remediation delays; and quarterly aggregate reports.<sup>135</sup>

Beyond these reporting requirements, the Accord envisions enforcement and realization in three ways. First, the Accord calls for the establishment of a worker complaint process designed to ensure “workers from factories supplying signatory companies can raise in a timely fashion concerns about health and safety risks, safely and confidentially, with the Safety Inspector.”<sup>136</sup> Second, the Accord requires signatory companies to “promptly implement a notice and warning process leading to termination of the business relationship” if a supplier fails to adhere to the safety requirements established by the Accord.<sup>137</sup> Third, and most significant for the purposes of this note, the Accord establishes dispute resolution procedures which culminate in binding arbitration.<sup>138</sup>

This last enforcement mechanism is one of the most important and novel features of the Accord. Article 5 of the Accord empowers all parties to bring disputes “to a final and binding arbitration process.”<sup>139</sup> As Benjamin Hensler and Jeremy Blasi, writing for the Worker Rights Consortium, summarize, “the Bangladesh Accord is a major breakthrough because it is the first initiative involving multiple brands and retailers in which the companies have made detailed, legally enforceable commitments to implement international labor rights pro-

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134. The Steering Committee is the central governance body of the Accord, with representatives from the signatory companies and trade unions, and is chaired by an ILO representative. *About, ACCORD FIRE & BUILDING SAFETY BANGL.*, <https://bangladeshaccord.org/about> (last visited Sept. 17, 2019).

135. 2013 Accord, *supra* note 131, ¶ 19.

136. *Id.* ¶ 18.

137. *Id.* ¶ 21. *See* discussion *infra* Section IV(D)(4)(b) (detailing the inadequacies of the funding provisions regarding remediation requirements).

138. 2013 Accord, *supra* note 131, ¶ 5.

139. *Id.*

tections.”<sup>140</sup> Indeed, unlike nonbinding CSR commitments embodied in “Corporate Codes of Conduct and IFAs, the Accord is a legally binding agreement where all signatories agree that arbitration awards or enforcement of fees may be pursued in their national legal system”<sup>141</sup> under the New York Convention.<sup>142</sup> In this way, private arbitration of the kind envisioned by the Accord has the capacity to transform human and labor rights violations into meaningful bases for corporate liability.

This liability is hugely significant. According to a report from the Brussels European Employees Relations Group and Morgan, Lewis & Bockius LLP, the Accord constitutes the first time “multinational companies have signed with global trade union federations what looks like a legally binding agreement, enforceable through the courts, under which these companies commit to a range of measures aimed at transforming the working conditions at the premises of offshore suppliers who manufacture ready-made garments for them.”<sup>143</sup> The reticence of many brands and retailers who refused to sign onto the Accord also evinces this significance. For the most part, “American brands and retailers refused to join the Accord, complaining that they did not want to be exposed to what they perceived as open-ended liability.”<sup>144</sup> As Hensler and Blasi assess, “the enforcement provision is one of the defining attributes of the agreement. . . [It is] the feature most distinguishing the Accord from the litany of voluntary programs that have failed.”<sup>145</sup> The Accord thus stands apart from other similar agreements on the basis of its binding arbitration provision.

While Article 5 does not provide a choice of governing law, or an arbitral seat, it establishes that “[t]he process for binding arbitration . . . shall be governed by the UNCITRAL [United Nations Commission on International Trade Law] Model Law on International Commercial Arbitration 1985

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140. BENJAMIN HENSLER & JEREMY BLASI, MAKING GLOBAL CORPORATIONS’ LABOR RIGHTS COMMITMENTS LEGALLY ENFORCEABLE: THE BANGLADESH BREAKTHROUGH 2 (2013).

141. Reinecke & Donaghey, *supra* note 71, at 263.

142. New York Convention, *supra* note 5.

143. TOM HAYES, ROBBIE GILBERT & NICK THOMAS, BRUSSELS EUR. EMPS. RELATIONS GRP., THE ACCORD ON FIRE AND BUILDING SAFETY IN BANGLADESH: AN ANALYSIS 1 (2013).

144. BARRETT ET AL., *supra* note 107, at 11.

145. HENSLER & BLASI, *supra* note 140, at 4.

(with amendments as adopted in 2006).<sup>146</sup> Vidak-Gojkovic writes that she is “not familiar with any other arbitration clause which recognizes the UNCITRAL Model Law as a framework for arbitration,” noting this as an “unusual choice.”<sup>147</sup> The renewed version of the Accord, passed in 2018, altered the framework slightly by providing “[t]he process for binding arbitration . . . shall be governed by the UNCITRAL Arbitration Rules (as in its last revision) unless otherwise agreed by the parties,” and that the arbitration “shall be seated in the Hague and administered by the Permanent Court of Arbitration.”<sup>148</sup> Vidak-Gojkovic suggests that while the updated version “still remains regrettably imprecise, which could lead to various procedural issues down the road . . . it is an improvement on the first iteration.”<sup>149</sup> Despite the improvement, neither the 2013 Accord nor the 2018 Accord provide explicit sources of law on which a tribunal can rely.<sup>150</sup> This would be an important element to consider in future agreements. Binding arbitration provisions can do more to protect human and labor rights when they explicitly establish that disputes can be governed at least in part by international human rights law, labor law, or even public international law more broadly. This would enable arbitrators to consider and rely on a broader corpus of law beyond the agreement itself. Such a provision would also likely empower tribunals to recognize a broader range of issues as subject to arbitration under the agreement.

Another important element of the arbitration provision in Article 5 is the pre-arbitral requirement it imposes. According to the provision, disputes must first be submitted to the Steering Committee whose “decision” can then be “appealed to a final and binding arbitration.”<sup>151</sup> While pre-arbitration requirements are not novel, the provision seems to intend “a serious examination of a complaint in the first instance by actors with knowledge of, and a stake in, the success of the Ban-

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146. 2013 Accord, *supra* note 131, ¶ 5.

147. Vidak-Gojkovic, *supra* note 36, at 394.

148. Accord on Fire and Building Safety in Bangladesh, ¶ 3, June 21, 2017, <https://admin.bangladeshaccord.org/wp-content/uploads/2018/08/2018-Accord.pdf> [hereinafter 2018 Accord].

149. Vidak-Gojkovic, *supra* note 36, at 395.

150. 2013 Accord, *supra* note 131, ¶ 5; 2018 Accord, *supra* note 148, ¶ 3.

151. *Id.*

gladesh Accord.”<sup>152</sup> Beyond that, because the Steering Committee involves participants from international organizations like the ILO, the provision seems to demand consideration of BHR standards and labor rights, before turning to international arbitration.

One of the most significant features of the binding arbitration provision is the access it gives all signatories, including labor unions and NGOs, to arbitration. As discussed above, most binding arbitration provisions in BITs, FTAs, and investment contracts empower only states to bring claims against corporations.<sup>153</sup> Under the Accord, however, all signatories are empowered to institute arbitration once the pre-arbitral requirements have been met.<sup>154</sup> This serves to increase the chance of arbitration in cases of violation, as unions have greater incentives to arbitrate and fewer potential political costs in doing so than states. While this is innovative, it is not without precedent: in recent decades, NGOs have enjoyed growing influence before the world’s international tribunals. Beginning in 2001, the *Methanex* tribunal held that it had the power to accept written amicus submissions from NGOs.<sup>155</sup> Beyond serving as amici, NGOs are increasingly recognized as litigants, despite their mercurial international legal personality: the African Commission on Human and Peoples’ Rights allows NGOs with observer status to submit allegations of a violation of the African Charter,<sup>156</sup> and the European Court of Human Rights permits an NGO to bring a case in which it claims to be a victim.<sup>157</sup> Considering the limitations of state enforcement explored in greater depth above, this expansion in NGO access to arbitration proceedings is one of the most meaningful ways the Accord furthers human and labor rights protections.

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152. Vidak-Gojkovic, *supra* note 36, at 396.

153. For the discussion of this, see *infra* pp. 249.

154. 2013 Accord, *supra* note 131, ¶¶ 4–5; 2018 Accord, *supra* note 148, ¶¶ 1–3.

155. *Methanex Corp. v. United States*, Decision of the Tribunal on Petitions from Third Persons to Intervene as “Amici Curiae,” ¶¶ 33, 53 (NAFTA Ch. 11 Arb. Trib. Jan. 15, 2001).

156. Nsongurua J. Udombana, *So Far, So Fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human and Peoples’ Rights*, 97 AM. J. INT’L L. 1, 2 (2003).

157. Charnovitz, *supra* note 27, at 354.

### C. *Arbitration Under the Accord*

The Accord's arbitration provision was utilized for the first time when IndustriALL Global Union and UNI Global Union brought complaints against two respondent MNCs before the Permanent Court of Arbitration (PCA). While the identity of the respondents has been kept confidential, the unions charged that the first respondent "failed to require suppliers to remediate facilities within the mandatory deadlines," and "failed to negotiate commercial terms to make it financially feasible for their suppliers to cover the costs of remediation."<sup>158</sup> These complaints were submitted to the Steering Committee, which concluded that it was "unable to reach a decision on the merits of the charge."<sup>159</sup> The claimants commenced arbitration against the first respondent on July 8, 2016, seeking a declaration that the respondent "is in violation of its obligations under the Accord" and an award ordering the respondent "to place remediation costs in escrow," and "to pay hazardous duty pay to workers," "costs for these proceedings," and interest.<sup>160</sup> The claimants made similar charges against the second respondent, and when the Steering Committee again could not "reach a decision on the merits of the charge,"<sup>161</sup> the claimants commenced arbitration against the second respondent on October 11, 2016.<sup>162</sup>

The Tribunal was formally constituted on February 3, 2017,<sup>163</sup> and it issued its first Procedural Order on April 19, 2017, which provided that the two cases would be heard together by the same tribunal, along with other procedural mat-

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158. *In re* Arbitration Commenced Pursuant to the Accord on Fire and Building Safety in Bangladesh and the United Nations Commission on International Trade Law Arbitration Rules, Case Nos. 2016-36, 2016-37, Procedural Order No. 2, Decision on Admissibility Objection and Directions on Confidentiality and Transparency, ¶ 19 (Perm. Ct. Arb. Sept. 4, 2017), <https://pca-cpa.org/en/cases/152> [hereinafter Procedural Order No. 2].

159. *Id.* ¶ 20.

160. *Id.* ¶ 21.

161. *Id.* ¶ 25.

162. Press Release, Permanent Court of Arbitration, Arbitrations under the Accord on Fire and Building Safety in Bangladesh between IndustriALL Global Union and UNI Global Union (as Claimants) and Two Global Fashion Brands (as Respondents) (Oct. 16, 2017), <https://pca-cpa.org/en/news/pca-press-release-bangladesh-accord-arbitrations>.

163. *Id.*

ters.<sup>164</sup> On September 4, 2017, the Tribunal issued its second Procedural Order, deciding that the preconditions to arbitration had been met such that the claims were admissible and within the Tribunal's jurisdiction, and addressing concerns related to confidentiality and transparency.<sup>165</sup>

The respondents objected to the admissibility of the claims, arguing that because there was no majority vote and decision by the Steering Committee on the charges, no appealable final decision had been made.<sup>166</sup> Without such a decision, the respondents argued, the preconditions to arbitration established by the Accord were not fulfilled, and so the dispute was beyond the Tribunal's jurisdiction.<sup>167</sup> The claimants countered this argument on four grounds: first, that a majority decision is not a mandatory precondition, as the Accord allows either party to appeal a decision and the Accord was not designed to "deprive putative claimants of access to arbitration simply because the Steering Committee failed to act by majority";<sup>168</sup> second, that subsequent Governance Regulations clarify that "arbitration [should] be available if a dispute cannot be satisfactorily resolved at the [Steering Committee]";<sup>169</sup> third, that the Steering Committee "characterized its own actions as 'decisions' that they had reached no agreement on the merits of the charge,"<sup>170</sup> thereby fulfilling the pre-arbitration conditions; and fourth, that the dismissal of the claims "would serve no legitimate interest."<sup>171</sup>

In weighing these arguments, the Tribunal identified three loci of disagreement: "(i) any form and content requirements of a Steering Committee 'decision;' (ii) the effect of the reference to 'majority vote' [in Article 5 of the Accord]; and (iii) the meaning of the term 'appeal.'"<sup>172</sup> Regarding the

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164. *In re* Arbitration Commenced Pursuant to the Accord on Fire and Building Safety in Bangladesh and the United Nations Commission on International Trade Law Arbitration Rules, Case Nos. 2016-36, 2016-37, Procedural Order No. 1, ¶ 104 (Perm. Ct. Arb. Apr. 19, 2017), <https://pca-cpa.org/en/cases/152>.

165. Procedural Order No. 2, *supra* note 160, ¶¶ 2–3.

166. *Id.* ¶¶ 35–36.

167. *Id.*

168. *Id.* ¶¶ 42–43.

169. *Id.* ¶ 44.

170. *Id.* ¶ 45.

171. *Id.* ¶ 46.

172. *Id.* ¶ 50.

“form and content of a decision,” the Tribunal maintained that the text of the Accord does not require any documentation of a reasoned decision by the Steering Committee, as the respondents suggested, and the Tribunal found “no warrant for reading into Article 5 specific requirements that the Accord signatories did not adopt.”<sup>173</sup> Beyond this, the Tribunal lauded the efforts undertaken by the Steering Committee in response to the charges,<sup>174</sup> maintaining that the process enabled the Steering Committee to arrive at a decision regarding the charges within the meaning of Article 5.<sup>175</sup>

Regarding the majority vote requirement that the respondents highlighted in Article 5 of the Accord, the Tribunal maintained:

As a matter of the plain language of Article 5, there is no reason to interpret the prescription in the first sentence of Article 5 that the Steering Committee take decisions by majority vote to require a reading of the second sentence that would disallow any other kind of decision from being brought to arbitration.<sup>176</sup>

In support of this reading of the text, the Tribunal also emphasized the purpose of the provision. The Tribunal asserted that the purpose of the Steering Committee decision-making process “is neither achieved nor compromised in any way” by whether or not a majority vote is reached.<sup>177</sup> Beyond that, the Tribunal pointed to “the pointless consequences that would follow from the rule urged by the Respondents,” under which an inability to reach a majority vote would leave the claimants without any options “to pursue their petition except to refile it with the Steering Committee.”<sup>178</sup> Taken together, the Tribunal rejected the respondents’ argument that a majority vote was a necessary precondition to arbitration.

Finally, regarding the use of the term “appeal,” the Tribunal insisted that the term “means simply some form of review

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173. *Id.* ¶ 51.

174. *See id.* ¶¶ 52–56 (discussing the various investigative steps taken by the Steering Committee).

175. *Id.* ¶ 57.

176. *Id.* ¶ 59.

177. *Id.* ¶ 60.

178. *Id.* ¶ 61.

of an initial determination; without more, it connotes simply an application by one party to a higher decision-making body for a review or reversal of a decision of a lower decision-making body.”<sup>179</sup> Going further, the Tribunal suggested that “considering the non-legal, industry-based character of the first level of decision-making, there is every reason to believe that the Accord signatories considered that the ‘arbitration’ to which that initial decision could be ‘appealed’ would involve the full fact-finding and law-deciding authority of standard arbitral processes.”<sup>180</sup> With this, the Tribunal rejected the respondents’ narrower interpretation of the use of “appeal” in Article 5, focusing instead on the broader purpose of the provision.

Taken all together, the Tribunal determined that all of the Accords’ preconditions had been fulfilled and the arbitration could proceed. Throughout its assessment, the Tribunal centralized the larger animating purpose of the Accord and seemed committed to making space for the unions to commence arbitration against the brands on behalf of the Bangladeshi workers.

The second Procedural Order also addressed transparency and confidentiality issues. The respondents argued that “preserving confidentiality aligns with the terms of the Accord and the Parties’ practice under it, which both make clear that there is to be transparency as to inspections and remediation data for *factories*, while information about the *signatory companies*’ activities are to be kept confidential.”<sup>181</sup> In support of their argument, the respondents highlighted Article 19 of the Accord, which establishes that publication efforts are to be focused on factory information, while “volume data and information linking specific companies to specific factories will be kept confidential,”<sup>182</sup> and Article 20,<sup>183</sup> which maintains that efforts should be taken “to ensure that suppliers which participate fully . . . shall not be penalised as a result of the transparency provisions.”<sup>184</sup> The respondents also argued that UN-

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179. *Id.* ¶ 62.

180. *Id.* ¶ 63.

181. *Id.* ¶ 74.

182. 2013 Accord, *supra* note 131, ¶ 19(a); *id.*

183. Procedural Order No. 2, *supra* note 158, ¶ 74.

184. 2013 Accord, *supra* note 131, ¶ 20.

CITRAL Rules calling for a “fair and efficient process” would be violated by the claimants’ use of “media attention” to cause “irreparable reputation damage that would outstrip any actual damages that could be awarded.”<sup>185</sup>

On the other side, in calling for full transparency, the claimants emphasized the broad reach of the arbitration’s effects beyond the parties directly involved, as well as “the character of the Accord as a ‘quasi-public agreement’ with ‘far reaching public interest implications.’”<sup>186</sup> The claimants also emphasized the Accord’s intent to make “compliance-related matters accessible to all interested stakeholders.”<sup>187</sup> In sum, “[c]onsistent with the tenets of the Accord, its quasi-public nature, and the strong public interest in its enforcement, the Claimants argue[d] that the Tribunal should exercise its discretion in line with the current trend toward greater transparency in international arbitration proceedings.”<sup>188</sup>

In weighing these arguments, the Tribunal explicitly considered the extent to which the proceedings defied simple categorization. The Tribunal emphasized that “this case cannot be characterized either as a classic ‘public law’ arbitration (involving a State as a party) or as a traditional commercial arbitration (involving private parties and interests), or even as a typical labor dispute.”<sup>189</sup> Instead, they outlined eight features of the arbitration that contributed to its defiance of categorization: the Accord’s creation in the aftermath of Rana Plaza; the large number of signatories; the large number of supplier factories affected; the large number of workers that the Accord protects; “the involvement of international organizations in the negotiation and governance of the Accord”; the involvement of states and their representatives in negotiations and oversight; the involvement of NGOs; and “the public nature of the Accord itself.”<sup>190</sup> According to the Tribunal, “[t]hese factors give rise to a genuine public interest in the Accord.”<sup>191</sup>

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185. Procedural Order No. 2, *supra* note 158, ¶ 76.

186. *Id.* ¶ 82, quoting Claimants’ Submission ¶¶ 37–40; Claimants’ Reply ¶¶ 32–33.

187. Procedural Order No. 2, *supra* note 158, ¶ 83.

188. *Id.* ¶ 86.

189. *Id.* ¶ 93.

190. *Id.*

191. *Id.* ¶ 94.

Such a meaningful interest disinclined the Tribunal from imposing “a blanket confidentiality order of the nature sought by the Respondents,” but rather necessitated a more detailed analysis by the Tribunal of the Accord’s language and practice.<sup>192</sup> Noting the Accord’s commitment to protecting the identity of the brands, the Tribunal determined it was “appropriate to balance both sets of interests emphasized by the Parties by disclosing certain basic information about the existence and progress of the arbitration proceedings, while at the same time keeping confidential the identity of the Respondents,” and established guidelines to maintain such balance.<sup>193</sup> The guidelines, in brief, allow the publication of the Tribunal’s awards, decisions, and orders, subject to redactions requested by either party and determined appropriate by the Tribunal.<sup>194</sup> With this, the Tribunal meaningfully balanced the competing private and public interests, based in large part on the language of the Accord itself, despite the Accord’s failure to stipulate the applicable choice of law as including public international law.

On December 15, 2017 and January 18, 2018, the parties informed the Tribunal and the PCA that they had entered into settlement agreements and had agreed to suspend the arbitration.<sup>195</sup> On June 26, 2018, the parties wrote to the Tribunal “to inform them that the Respondent in each case had fulfilled its obligations pursuant to the respective settlement agreements,” and to request that the arbitration be terminated.<sup>196</sup> On July 17, 2018, the Tribunal formally concluded the proceedings pursuant to Article 35 of the UNCITRAL Rules.<sup>197</sup>

#### D. *Takeaways*

While the Tribunal did not render a final decision, the existence, conduct, and preliminary orders of the arbitration

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192. *Id.*

193. *Id.* ¶¶ 97, 99–102.

194. *Id.* annex I, §§ B.4–B.5.

195. Press Release, Permanent Court of Arbitration, Arbitrations under the Accord on Fire and Building Safety in Bangladesh between IndustriALL Global Union and UNI Global Union (as Claimants) and Two Global Fashion Brands (as Respondents) (July 17, 2018), <https://pca-cpa.org/en/news/pca-press-release-settlement-of-bangladesh-accord-arbitrations>.

196. *Id.*

197. *Id.*

provide a useful early case study to assess arbitration as a mechanism to enforce human and labor rights obligations. This assessment will focus on the tangible effects of the Accord in Bangladesh, the specific challenges of arbitration surveyed in Section II, and some broader takeaways for future agreements. While it is challenging to assess the effects of the arbitration in Bangladesh without a meaningful study that isolates the time since the arbitration was initiated, the broader effects of the Accord are still indicative of the influences of the arbitration provisions.

### 1. *Tangible Progress in Bangladesh*

Overall, the Accord seems to have succeeded, to some extent, in encouraging positive changes in Bangladesh. Ninety-seven percent of the factories that the Accord covered “lacked a safe means of escape in case of fire” when the Accord was signed.<sup>198</sup> Further, “[n]ine out of ten factories lacked adequate fire-detection and alarm systems, if they had any at all,” seventy-five percent of factories “had electrical cables draped dangerously from ceilings and walls, creating yet another fire hazard,” and roughly two-thirds of the facilities “had deficient circuit breakers and unsafe grounding systems for electrical equipment.”<sup>199</sup> Over seventy percent of these factories also had “undocumented structural additions,”<sup>200</sup> and almost seventy percent “lacked a load management plan or were poorly implementing one.”<sup>201</sup> Overall, Accord inspectors found 130,211 safety problems in 2,024 factories,<sup>202</sup> “for an average of 64 violations per factory.”<sup>203</sup>

Since the Accord took effect, the situation has improved. According to the NYU Report, many factories “have installed fire doors, added fire extinguishers and sprinkler systems, improved electrical wiring, instituted fire-safety training programs, and made structural upgrades that protect workers’ lives.”<sup>204</sup> Statistically, improvements have been mixed: “96% of

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198. BARRETT ET AL., *supra* note 107, at 13.

199. *Id.*

200. *Id.*

201. *Id.* at 14.

202. *Id.*

203. *Id.*

204. *Id.* at 3.

factories with unsafe dust on electrical equipment have removed it,” and “84% that had inadequate protection and support for electrical cables have remedied the problem,” as have “82% with deficient circuit breakers.”<sup>205</sup> While “96% of factories with lockable gates [blocking fire exits] have removed them, . . . only 41% that had inadequate fire detection and alarm systems have installed and verified suitable replacements.”<sup>206</sup> Regarding structural integrity:

Of the Accord factories lacking a load management plan, 66% now have one; 34% do not. Sixty-one percent of facilities with undocumented structural additions and inconsistencies with building plans have updated their blueprints; 39% have not. And of factories vulnerable to lateral instability from severe wind, 56% have corrected the vulnerability; 44% have not.<sup>207</sup>

Thus, while the results have not been ideal, discernable improvement seems attributable to the Accord.

## 2. *Chilling Effects*

By explicitly requiring remediation efforts under the terms of the agreement, the Accord has incentivized, rather than penalized or chilled, improvements that would be the subject of human and labor rights regulation by the Bangladeshi government. This suggests that concerns about typical regulatory chill—premised on the possibility that host states will avoid passing important regulation for fear of being held accountable for violation of the BIT if the regulation negatively impacts the investment—are misplaced here. Rather than typical regulatory chill, perhaps the Bangladeshi government’s *motivation* to regulate has been chilled by the existence of an international agreement that oversees and mandates improvements in the ready-made garment industry. Under the Accord, the Bangladeshi government has less incentive to pass safety and other workplace regulations, not for fear of costing investors and facing arbitration, but because signatories and supplier factories share such responsibility.

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205. *Id.* at 16.

206. *Id.*

207. *Id.*

Evidence of the government's chilled incentive to regulate is clear in the juxtaposition between factories covered by the Accord and the Alliance, and those left out. While the Accord and the Alliance apply to all factories producing for signatory MNCs, an estimated 2,300 factories, many subcontracting and smaller factories, are not explicitly required to remediate safety risks under the terms of the two agreements.<sup>208</sup> Instead, any improvements in these factories would require intervention by the factory owners or the Bangladeshi government. Indeed, the Bangladeshi government separately retains oversight for another 1,650 factories, including many which do subcontracting work for the signatory corporations.<sup>209</sup> As the U.S. Senate Committee on Foreign Relations acknowledged, “[u]nauthorized sub-contracting is a significant challenge in Bangladesh’s [garment] industry,” and “unknown factories that operate in the shadows [are] often the most dangerous in terms of worker safety.”<sup>210</sup>As the NYU Report summarizes:

[P]rogress on safety [under the Accord and the Alliance] has widened the bifurcation of the industry. An elite segment of suppliers can afford to make improvements and continues to enjoy relationships with international brands and retailers. Much of the rest of the industry either cannot or will not make expenditures and, as a result, workers . . . remain at risk.<sup>211</sup>

Such bifurcation illustrates this other form of regulatory chill: the government's *motivation* to regulate is chilled by the knowledge that other entities—labor unions, MNCs, and factory owners—will take responsibility for ensuring necessary human and labor rights protections for Bangladeshi workers. This form of regulatory chill constitutes a more reasonable concern as an unintended consequence of the Accord, than does the more typical form of regulatory chill discussed above.

Another concern about the imposition of binding arbitration provisions lies in the potential to chill FDI more broadly,

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208. *Id.* at 13.

209. *Id.* at 7.

210. U.S. CONG. S. COMM. ON FOREIGN RELATIONS, 113TH CONG., WORKER SAFETY AND LABOR RIGHTS IN BANGLADESH'S GARMENT INDUSTRY 6 (Comm. Print 2013).

211. BARRETT ET AL., *supra* note 107, at 3.

as corporations might avoid investing if doing so opens them up to legal liability for human and labor rights violations. This seems to be a fairly straightforward and reasonable concern, but it can be assuaged by three countervailing trends. First, consumers are increasingly inclined to reward corporations who make meaningful commitments to human rights values, suggesting the acceptance of binding provisions could be one such basis for reward. Second, the arbitrators' careful balancing of the competing public and private interests of the parties involved demonstrates that corporate interests will not necessarily be unceremoniously sidelined when these arbitrations arise. If the arbitrators had demonstrated a willingness to reject corporate interests in unquestioning favor of human rights norms, the arbitration could have had stronger dissuading effects on other corporations considering agreements with similarly binding provisions. Instead, the arbitrators demonstrated a nuanced understanding of corporate decision-making and an intent to remain faithful to the terms of the agreement without unduly penalizing either side. This reasoned decision-making should decrease any impact the arbitration may have had to disincentivize corporations from signing on to similar agreements. Third, corporations' dependence on the Bangladeshi garment industry, and global supply chains more broadly, potentially necessitates an ongoing relationship. This dependence minimizes the extent to which the imposition of binding obligations could dissuade MNCs from maintaining or forming contracts with suppliers, and gives unions, NGOs, and workers leverage to impose binding obligations in those contracts.

### 3. *Complex Balancing*

As discussed above, the conduct of the arbitration itself evinces arbitrators' ability to carefully balance public and private concerns. Throughout the procedural orders, the Tribunal demonstrated an attunement to the unique nature of the Accord and the subsequent arbitration. Regarding confidentiality and transparency concerns, the Tribunal demonstrated a meaningful commitment to the value of transparency given the public nature of the arbitration and its wide-reaching effects. However, the specific nature of the balance struck turned primarily on the provisions of the Accord itself. This demonstrates the importance of these agreements and the spe-

cific wording used. The arbitration as a whole suggests arbitrators are capable of balancing competing ends, and that the use of arbitration to enforce human and labor rights obligations can be fruitful. Importantly, however, this would reasonably vary with the individual arbitrators selected, and should be taken seriously by the parties selecting them in any future arbitration.

#### 4. *Practical Takeaways for Future Agreements*

The Bangladesh Accord and subsequent arbitration also highlight several practical elements to consider when attempting to create agreements like the Accord in the future.

##### a. Choice of Law Provisions

While the arbitrators in this case did not hesitate to consider the public ramifications of their decision, future agreements should reference international human rights and labor law, or even public international law more broadly, in their choice of law provisions. Doing so would further empower arbitrators to include human and labor rights principles, and international public law sources, in their decision-making. Explicit and justified reliance on international human rights and labor law by arbitrators would make arbitration more fruitful as a mechanism to enforce these rights.

##### b. Funding Issues

While the Accord explicitly requires MNCs to terminate contracts with suppliers who fail to adequately ensure the safety of their workers, it fails to employ such definitive language with regard to the financing of remediation efforts. The Accord calls on “participating brands and retailers” to “negotiate commercial terms with their suppliers which ensure that it is financially feasible for the factories to maintain safe workplaces and comply with upgrade and remediation requirements.”<sup>212</sup> However, responsibility for such remediation still lies with the supplier.<sup>213</sup> The Accord also provides that signatory companies will maintain “order volumes comparable to or greater than those that existed in the year preceding the in-

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212. 2013 Accord, *supra* note 131, ¶ 22

213. *Id.*

ception of this Agreement,” but such a requirement is avoidable if the business is no longer “commercially viable” or the supplier fails to “meet the company’s terms and comply with the company’s requirements.”<sup>214</sup> With this, the Accord enables signatory companies to penalize suppliers for failing to implement remediation, without imposing any substantive responsibility on the companies themselves to enable remediation through higher purchase prices.

Unsurprisingly, remediation costs remain high: “[b]ased on extrapolations from existing per-factory remediation expenses,” the NYU Report “estimate[s] that it would cost \$1.2 billion to remediate remaining dangerous conditions in the industry.”<sup>215</sup> The cost is prohibitive for some suppliers, and, without a dedicated funding stream from corporations or the government, many factory owners are simply incapable of making the necessary changes. Future agreements, therefore, must be more deliberate and explicit in their creation of a funding stream to enable and distribute responsibility for the improvements required.

### c. Impact of Tragedy

An important element that enabled the creation of the Accord is the influence of the Rana Plaza disaster itself, and the public condemnation MNCs faced as a result of the tragedy. This public outrage made signing onto the Accord more rewarding, and failure to do so more punishing, for the companies involved. As Juliane Reinecke and Jimmy Donaghey recount, “[t]he threat of negative campaigns was a powerful factor in pushing companies to sign up to the Accord initially as well as increasing the number of corporate signatories.”<sup>216</sup> Indeed, unions and NGOs “at various points threatened or actually started campaigns to force companies to sign up.”<sup>217</sup> In more detail, “[c]ampaigners explained their strategy as being to focus attention on one visible brand name company. Other brands would witness what happened to their competitor and try to avoid a similar exposure.”<sup>218</sup> This suggests that a highly-

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214. *Id.* ¶ 23.

215. BARRETT ET AL., *supra* note 107, at 3.

216. Reinecke & Donaghey, *supra* note 71, at 268.

217. *Id.*

218. *Id.*

publicized disaster can serve as a tragic impetus for necessary change.

d. Public Relations History

The individual corporations' public relations history also factored significantly into their willingness to sign onto the Accord. As Reinecke and Donaghey describe, "campaign groups leveraged existing brand vulnerabilities to push H&M to sign. The company had been the subject of a year-long campaign over its failure to pay a 'living wage' in Cambodia, leading to H&M being called to answer questions in the Riksdag, the Swedish parliament."<sup>219</sup> This history made H&M more vulnerable to public condemnation as a pattern was emerging, and made the public more receptive to the issue as a meaningful and ongoing concern.<sup>220</sup> Groups like Avaaz, "a progressive global campaign group," leveraged this and "collected over 1.2 million signatures to pressure H&M to sign the agreement."<sup>221</sup> This suggests that corporations with problematic human rights records might be more susceptible to pressure in support of a more ambitious agreement. Conversely, this also suggests that voluntary CSR commitments, meaningfully upheld, may serve to insulate a corporation from the public pressure necessary to drive participation in agreements with binding provisions.

e. Role of Unions

The role of unions constitutes another significant element in the creation of the Accord, and perhaps in the creation of future agreements like it. As Reinecke and Donaghey write, "[i]t is . . . notable that the first companies to sign, H&M followed by Inditex, Tesco and Primark, all recognised and had pre-existing relationships with unions."<sup>222</sup> These unions were able to leverage their relationships with the corporations to push for binding protections for their workers. As Reinecke and Donaghey summarize, "among non-state actors, unions remain the only representatives of economically-based and institutionally organized labour, with a potentially important role

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219. *Id.* at 270.

220. *Id.*

221. *Id.*

222. *Id.* at 267.

in the production of global labour governance institutions.”<sup>223</sup> Md Rahman concurs, writing, “[t]he international character of the agreement with IndustriALL and UNI Global Unions signing an agreement with leading transnational corporations and local garment unions is an industrial relations breakthrough that possibly could be setting precedence for future agreements.”<sup>224</sup> The unions played a crucial role in the Accord<sup>225</sup> and constitute strong focal points around the world for similar future agreements.

f. Role of the Host State Government

As discussed above, the Bangladeshi government was largely sidelined from the remediation process envisioned under the Accord. With encouragement from the Accord and its signatories, the Bangladeshi government instituted “a new standardized checklist” for factory inspection,<sup>226</sup> but even with this checklist, “overstretched government inspectors—drawn from the same bureaucratic ranks that didn’t flag the failings of Rana Plaza—lacked the resources, training, and determination to police the garment industry aggressively.”<sup>227</sup> Beyond this checklist, the government had little involvement in the remediation efforts made under the Accord: the government was not given representation in the Steering Committee, and was not vested with significant responsibilities under the terms of the agreement.<sup>228</sup>

Instead, the Accord designed an oversight system which largely excluded the government. This sidelining of the Bangladeshi government has fomented significant conflict between the government, the MNCs, and the unions involved;<sup>229</sup> has led to bifurcation in the safety of factories across Bangladesh;<sup>230</sup> and has perhaps contributed to the motivational

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223. *Id.* at 260.

224. Rahman, *supra* note 110, at 72.

225. *Id.*

226. BARRETT ET AL., *supra* note 107, at 11.

227. *Id.*

228. *Id.*

229. See Michelle Chen, *6 Years After the Rana Plaza Collapse, Are Garment Workers Any Safer?*, THE NATION (July 15, 2019), <https://www.thenation.com/article/rana-plaza-unions-world> (discussing the absence of government action in support of union safety).

230. BARRETT ET AL., *supra* note 107, at 3.

chill discussed above. Future agreements should attempt to carve out a larger role for the government of the host state.

## V. CONCLUSION

The Bangladesh Accord and the subsequent arbitration demonstrate the growing utility of international arbitration to enforce human and labor rights obligations, as well as the benefits, costs, and lessons associated with such an approach. The Accord was endorsed by the Secretary General of the United Nations, the ILO, and the OECD, among others,<sup>231</sup> and workplace accidents and deaths are down in Bangladesh since 2013.<sup>232</sup> However, the Accord and its binding arbitration provisions are not a panacea.

Perhaps the most significant flaw in the Accord was its failure to meaningfully involve the Bangladeshi government. By excluding the Bangladeshi government from the improvement efforts taken across the country, the Accord left many factories in the dark and failed to incentivize or require the government to regulate improvements in the ready-made garment sector. This sidelining is especially problematic given the temporary nature of the Accord itself.

Indeed, the Accord was always conceptualized as a temporary mechanism, and responsibility for all factories will soon shift back to the government. After a long-standing conflict between the Accord leadership and the Bangladeshi government, the parties reached an agreement that Accord operations will be transferred to the Ready-Made Garment Sustainability Council (RSC) in May 2019.<sup>233</sup> According to a statement by UNI Global Union, the RSC will “operate within the regulatory framework of the relevant Government department, but will be separate from Government,” and “will continue with factory inspections, remediation, follow up inspections, worker training, and the independent grievance mechanism.”<sup>234</sup> Despite these assurances, questions abound as to the Bangladeshi government’s commitment and ability to imple-

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231. Rahman, *supra* note 110, at 70.

232. BARRETT ET AL., *supra* note 107, at 15.

233. *Bangladesh Accord Achievements Secured*, UNI GLOBAL UNION (May 20, 2019), <https://www.uniglobalunion.org/news/bangladesh-accord-achievements-secured>.

234. *Id.*

ment and maintain the trend towards improvement, in part because the government had little involvement in the progress already made.<sup>235</sup>

Instead, human and labor rights enforcement is likely to be most successful when it involves coordinated efforts by states, corporations, NGOs, and consumers. Relying only on governments to enforce human rights protections implicates all the questions and challenges considered in Section II, but governments are still a necessary part of the efforts. States can impose binding human rights commitments on MNCs through BITs and investment contracts, and they can use arbitration to hold corporations accountable when their behavior violates these obligations. Corporations can require human rights adherence from suppliers and states by wielding their massive economies to provide resources, training, and motivation. They can also inspire improvements across the field by making binding commitments and drawing negative attention to other MNCs that refuse to do so. NGOs can continue to shine a light on violations occurring around the world, and can mobilize their resources and supporters to compel corporate compliance. Unions, more specifically, can represent workers and leverage corporate dependence on low-cost labor and consumer commitment to human rights values in order to force corporations to sign on to agreements that impose legal liability for human and labor rights violations. As Teitel writes, “[w]hat distinguishes these institutions and processes is their capacity to assert authority across traditional jurisdictional lines and substantive doctrinal boundaries or divides—such as public/private, state/nonstate, and so on—in essence, rendering humanity itself their compass.”<sup>236</sup> Consumers can hold corporations accountable for the policies they design and the practices they implement, as well as the way they respond to failure and catastrophe. When all four groups work in concert, and binding arbitration makes human and labor rights obligations legally enforceable, all are incentivized to position “humanity itself [as] their compass.”<sup>237</sup> As the latest addition to this effort, MNCs must take a leadership role in ensuring

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235. BARRETT ET AL., *supra* note 107, at 3.

236. TEITEL, *supra* note 11, at 63.

237. *Id.*

human and labor rights protections or face the costs of failing to do so.