

2013

The Shirts On Our Backs: The Rana Plaza Disaster, Interdependence, and the Shifting Locus of Responsibility

Chios Carmody

The University of Western Ontario

Follow this and additional works at: <https://ir.lib.uwo.ca/lawpub>



Part of the [International Trade Law Commons](#)

Citation of this paper:

Chios Carmody, "The Shirts On Our Backs: The Rana Plaza Disaster, Interdependence, and the Shifting Locus of Responsibility", unpublished manuscript presented at the Canadian Law and Economics Association (July 2013)

**The Shirts On Our Backs:
The Rana Plaza Disaster, Interdependence, and the Shifting Locus of Responsibility**

By Chios Carmody
Associate Professor & Canadian National Director
Canada-United States Law Institute
Faculty of Law, University of Western Ontario
London, Ontario, Canada
N6A 3K7
Tel. (519) 661-2111 x 88437 email: ccarmody@uwo.ca

July 10, 2013

Draft – not to be circulated or quoted.

Abstract: The Rana Plaza Collapse at Savar, Bangladesh in April 2013 highlighted the immense power of global supply chains both to transform lives and imperil them. In the last decade Bangladesh has become a powerhouse of global garment manufacturing, largely through jobs shed by Chinese manufacturers. In the process, the identifiable nature of garments as a product, characteristics specific to the global garment industry, and growing consumer awareness, have all combined to permit corporate buyers in Europe and North America to dictate industrial standards. This article examines competing legal responses to the disaster as an example of the assumption of a degree of transnational legal responsibility by supply chains and their projected ability to effect change.

**The Shirts On Our Backs:
The Rana Plaza Disaster, Interdependence, and the Shifting Locus of Responsibility**

By Chios Carmody¹

1. Introduction
2. Background
3. Legal Responses to the Rana Plaza Disaster
4. Appraisal and Conclusion

1. Introduction

The Rana Plaza disaster in April 2013 now ranks as the world's worst garment factory accident, but is also pivotal for the way it represents a shift in legal responsibility. In classic thinking a state – here Bangladesh – is ultimately responsible to its population for ensuring worker safety and welfare. However, faced with abject state failure – the repeated inability of Bangladesh's building inspection administration to regulate and prevent industrial catastrophes from happening – a new set of stakeholders is proposing to assume responsibility for the task.

In the aftermath of the disaster, purchasers have come together under two Action Plans to oblige their Bangladesh-based suppliers to participate in inspection, remediation, health and safety and worker training activities. In the case of the first Action Plan, the Accord on Fire and Building Safety in Bangladesh (the "Accord"), purchaser signatories are required to contribute funding for related activities to a maximum of U.S. \$500,000. Disputes under the Accord are subject to binding arbitration and resulting awards are enforceable under the New York Convention.² In the case of the second Action Plan (the "Action Plan"), which is reportedly agreed to in principle by a number of U.S. and Canadian chains including Walmart, The Gap, Macy's, Canadian Tire and the Hudson's Bay Company, a U.S. \$42 million fund will be established that will go towards drafting domestic standards and boosting worker awareness of safety issues in Bangladeshi garment factories. The Action Plan reportedly differs from the Accord in that it is not legally binding, seeks to cap the derivative liability of buyers, and is more closely aligned with pre-existing Bangladesh government efforts in the field of worker safety. Participants in the Action Plan have contended that the Action Plan will allow them to address safety concerns with their Bangladeshi suppliers more quickly.

What both schemes illustrate, however, is the way that elements of the international supply chain are stepping forward to take on aspects of responsibility that have previously been within the purview of states. In essence, the supply chain becomes the locus of regulation and protection. This is of particular interest to Canada, which has been caught in the crosshairs of the two rival schemes. Following the Rana Plaza disaster the Toronto-based Loblaw grocery chain, which includes the popular Joe Fresh clothing label, signed on to and became an early supporter of the Accord, whereas in January 2013 the Canadian Apparel Federation and the Retail Council of Canada, along with four other U.S.-based apparel trade associations, created the 'Safer Factories Initiative' (SFI) that is now giving birth to the Action Plan. This article explores some of the prospects and problems that arise from these projected arrangements.

At the same time, the article aims to demonstrate that what is happening is not simply a response to the shortcomings of a government in some faraway developing country. The 'privatization' of standards is a familiar topic, one long-discussed in regulatory and academic literature, and one that is likely to increase as citizens demand more and more from capacity-constrained states.³ Governments

¹ Associate Professor & Canadian National Director, Canada-United States Law Institute, Faculty of Law, University of Western Ontario, London, Ontario, Canada N6A 3K7. email: ccarmody@uwo.ca.

² *The Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 330 U.N.T.S. 38, 7 I.L.M. 1046 (1968) (hereinafter New York Convention).

³ For an examination of this trend with respect to labour see Richard Locke, *The Promise and Limits of Private Power: Promoting*

are under fiscal pressure all over the world to withdraw from regulatory roles. In the domain of norm- and standard-setting they have reacted by leaving the regulatory function to private organizations. In the domain of physical infrastructure they have reacted by privatizing state assets, pursuing public-private partnerships, and engaging in build-operate-transfer (BOT) initiatives with private operators. The response to the tragedy at Rana Plaza highlights is the way that efforts by the supply chain are an imperfect – but inevitable – response to state failure, one that is likely to become more familiar worldwide in future.

2. Background

Developments in communication, manufacturing, logistics and retailing over the last two decades have led to the globalization of production.⁴ For this most part, production now takes place in immense, highly sophisticated supply chains that span the globe and ensure the smooth flow of products from input suppliers to the ultimate consumer. Participants must be nimble and broad-minded. The conceptual modifications required are profound. Alan Waller has observed:

The difference in skill requirements in today's highly competitive fast-changing world is that we need to have visibility and control of our supply chain in order to compete. Manufacturers need to think upstream about supply and *be driven by the end customer*. Retailers need to satisfy their customers but need to think supply chain to achieve this. Wal-Mart sees their core skill as being 'A procurement agent for the consumer', hence their focus on supply chain management in all that they do.⁵

Other supply chain experts have pointed out that supply chain manufacturing requires participants to shift from mere 'interfacing' to integrating their production. Supplier selection becomes supplier collaboration. Arms length relationships are replaced by total commitment. Confrontational behaviour makes way for integrated forms of cooperation. Short-term planning exchanged for longer term thinking.⁶ In sum, a transactional perspective is replaced by a relational one that stresses the interdependence of the parties across time.⁷

Inevitably, this configuration requires the removal of barriers so that the entirety of production, which can involve many stages among a number of independent contractors, become a common enterprise. In this respect Stuart Emmett and Barry Crocker have observed that:

In a world-class supply chain ... barriers cannot remain. It cannot be that the flow of product, information and finances between the links in the chain are allowed to be compromised by the perception of company boundaries. Despite the fact that supply chains are made up of different companies and that there may be both legal restriction and operational difficulties, these must be overcome so that the supply

Labour Standards in a Global Economy (2013). See also Jennifer Clapp, "The Privatization of Global Environmental Governance: ISO 14000 and the Developing World" in 4:3 *Global Governance* 295 (1998); Steve Bernstein & Erin Hannah, "Non-State Global Standard Setting: Legitimacy and the Need for Regulatory Space" 11:3 *J. Int'l Econ. L.* 575 (2008).

⁴ Stephen Poloz, former Chief Economist of Export Development Canada (EDC) points out that 'globalization' has three separate dimensions: globalization of sales, production and distribution. Stephen Poloz, *The New Global Trade Game: Will Canada be a Player, or just a Spectator?* available at http://www.edc.ca/english/docs/speeches/2005/mediaroom_7001.htm.

⁵ Alan Waller, Foreword in Stuart Emmett & Barry Crocker, *The Relationship-Driven Supply Chain* 2 (2006) [emphasis added].

⁶ Stuart Emmett & Barry Crocker, *The Relationship-Driven Supply Chain* 32 (2006).

⁷ Interdependence has also been recognized at a political level by leading statespersons: see for instance See also Kofi Annan, "The Meaning of the International Community" U.N. Press Release, SG/SM/7133, PI/1176 (15 Sept. 1999) ("Ours is a world in which no individual, and no country, exists in isolation. All of us live simultaneously in our own communities and in the world at large ... We are connected, wired, interdependent."); Tony Blair, "What I've Learned" *The Economist* (31 May 2007) (referring to interdependence as "the defining characteristic of the modern world"); The White House, "Remarks on A New Beginning" made to students at Cairo University (4 June 2009) (Barack Obama observing that "Given our interdependence, any world order that elevates one nation or group of people over another will inevitably fail. So whatever we think of the past, we must not be prisoners to it. Our problems must be dealt with through partnership; our progress must be shared.").

chain is treated as a whole and is optimised as a whole.⁸

In some cases, this degree of unity and integration creates something new that one dominant participant is interested in holding on to because it aligns with a company's core functions. The supply chain is something of value that an enterprise is interested in preserving and exploiting over time. In other cases, the supply chain may represent an expense or a threat for a participant and so the pattern of relationships is ended.⁹ In still others, corporate reorganizations may spinoff part or all of the chain as one participant transitions to new operations under different conditions. The supply chain, now reconfigured, will draw on pre-existing patterns of relationships and behavioural memory to fulfill some new function.

Each of these possible supply chain outcomes depends upon the product in question, the actors involved, and a host of other factors that impact upon a supply chain's resilience and integrity. Like living organisms, supply chains exhibit distinct identities. They are adaptive. Very few are completely alike.

They are also sensitive. The need for smooth interaction of these many parts exposes supply chains to disruptions and makes them vulnerable to external shocks and opportunistic behaviour. A volcanic eruption in Iceland can wreck havoc on the supply infrastructure for fresh flowers in Europe for weeks.¹⁰ A tsunami off the coast of Japan can idle assembly lines in China, Southeast Asia and the United States for months.¹¹ Thus, the requirement for a 'unity' of operation can both be beneficial and detrimental.

The independent persona of the supply chain is, in addition, something that can have consequences in law. For legal purposes it can assume certain attributes of personality, which is especially important to those who are interested in differentiating their product from competitors. In environmental products, 'fair' trade and organic certification, for instance, the chain itself becomes the source of intellectual property, such as in a designation of 'traditional speciality guaranteed' or trademark.¹² Potential participants have to commit to meeting certain requirements in order to become involved.

Experts have also noticed a recurrent feature of supply chains. This is the fact that as they mature and their outputs become subject to greater competition, power shifts to the 'end' of the supply chain.¹³ Consumers and purchasers become more important, leading to a culture of "Just Say Yes".¹⁴ Walmart, like many other large retailers, routinely uses its enormous marketing clout to wrest continuous discounts from suppliers, a tactic that promotes a "race to the bottom" as upstream suppliers perennially scout for the most cost-effective option. In certain industries, this movement is offset to a degree by the desire to ensure quality control and preserve supplier ties.

⁸ Ibid., 8.

⁹ For instance, a particular type of customer with special needs may be one that the principal supplier decides not to cater to due to capacity constraints or shift in focus it would require of the business model. This dilemma is often encapsulated in the business adage, 'Do Not Serve Customers You Cannot Satisfy'. See John Mentzer, *Fundamentals of Supply Chain Management* 100 (2004).

¹⁰ For a discussion of the eruption of the Eyjafjallajökull volcano in Iceland in April 2010 and its disruptive effect on European supply chains see Urs Uhlmann, "Eruption Disruption" *Canadian Underwriter* 18 (Aug. 2010).

¹¹ The March 2011 Great Tohoku Earthquake and Tsunami devastated the northeast coast of Japan with the most powerful natural disaster in Japan's modern history. Over 4 million units of vehicle production were lost because of the disasters in Japan, with 90% of them from Japanese automakers. Manufacturing in several sectors in China, southeast Asia and the U.S. was affected for several months thereafter because of northeastern Japan's linchpin status in global supply chain networks. Bill Canis, "The Motor Vehicle Supply Chain: Effects of the Japanese Earthquake and Tsunami", *Congressional Research Service* R41831 (23 May 2011).

¹² 'Traditional Speciality Guaranteed' (TSG) is a designation under EU legislation that refers to foods that either by virtue of raw materials, production method or processing features are distinctive and therefore protected. It has been in place since 1992. For discussion see Andrea Tosato, "The Protection of Traditional Food in the EU: Traditional Specialities Guaranteed", 19:4 *Eur. L.J.* 545 (2013).

¹³ William Copacino, *Supply Chain Management* 42 (1997).

¹⁴ "Most manufacturing companies today are being pressed by their customers to provide more for less – that is, lower prices, greater value, higher levels of customer service, and additional value-added services." Ibid., 39.

These features have a significant impact on the global garment industry, which has traditionally been both localized and dispersed. In the aftermath of World War II many countries took advantage of the GATT Multi Fibre Arrangement to protect their existing textile and garment industries by imposing quotas and import licencing requirements on foreign textiles and garments.¹⁵ The result was a thicket of restrictions on the international textile and garment trade that experts recognized as inefficient and as a barrier to developing country exports. During the GATT Uruguay Round of multilateral trade negotiations (1986-94) countries therefore committed to ‘normalize’ the sector by transitioning away from restrictions to a duty-free, quota-free trading environment, as is the case with other goods. The resulting Agreement on Textiles and Clothing (ATC), which became part of the WTO Action Plan concluded at the end of the Round, foresaw a 10-year conversion period from 1995-2005 away from existing restrictions. The promise of a transition in the sector was held-out as an important incentive to securing developing country agreement to the final Uruguay Round package.¹⁶

The ATC was duly implemented, although as many commentators have observed, a number of the ATC’s benefits were back-ended to coincide with developing country adherence to new intellectual property thresholds introduced in the TRIPS Agreement, also part of the new WTO Agreement. The game-changer in these developments was, however, the accession of the People’s Republic of China to the WTO in late 2001. China’s traditional strength in textile manufacturing and garment assembly made it a natural locale to source from. Over the next few years Chinese garment manufacturing gobbled up a considerable portion of the additional export room provided by the ATC, leaving garment manufacturers in traditional supplier countries like Vietnam, the Philippines and Mauritius with only incremental gains and a fiercely competitive export environment.¹⁷ The dominant response to the competition was to upgrade and specialize in production. Thus, the WTO Director-General Pascal Lamy has recently observed that the global textile value chain spans countries involved in the “mere assembly” of imported fabric for export, such as China, Romania and Vietnam, to “original equipment manufacture” where apparel products are manufactured in full, going beyond mere assembly, such as in Turkey, to “original design manufacture” where in addition to full product manufacture a country can create ready-made collections at different levels of sophistication, such as in Hong Kong, and all the way to “original brand manufacture” where a country becomes the buyer in the value chain and starts to manage the supply network, such as in the U.S. and Italy.¹⁸

All of these developments have taken place against the global emergence of “fast fashion” involving rapid-response manufacturing and tight inventory control.¹⁹ Major garment manufacturers like Benetton and Zara have adapted to the new environment by dying in one colour (to better allow for on-time dying that last-minute tastes), constantly updating product lines, global branding, and in some cases, “re-shoring” certain stages of production to permit higher value-added assembly closer to the point of final sale. Global garment sales have grown several-fold since 1995, but marketers describe an ever-more demanding retail environment that now relies on finely-tuned supply chains to deliver product to end-stage customers at ever-lower prices.²⁰ In this process consumers, and particularly corporate purchasers, have become adept at exercising power by wringing concessions from upstream manufacturers.

¹⁵ The MFA was introduced in 1974 as a short-term measure intended to allow developed countries to adjust to textile and clothing imports from the developing world. Developing countries had a natural advantage in textile production because it is labour intensive and they had low labour costs. According to a 1998 World Bank/IMF study, the system cost the developing world 27 million jobs and \$40 billion a year in lost exports.

¹⁶ Robert C. Cassidy & Stuart Weiser, “Uruguay Round Textiles and Apparel” in Terence Stewart (ed.), *The World Trade Organization: The Multilateral Trade Framework for the 21st Century and U.S. Implementing Legislation* 223 (1996).

¹⁷ See generally Lizette Smook, *The Competitiveness of the Chinese Textile Apparel Manufacturing Industry* (2nd ed.) (2004).

¹⁸ “What Cannot Be Counted Does Not Count” (speech by WTO Director-General Pascal Lamy to the Economic Development Foundation (IKV) and the Economic Policy Research Foundation of Turkey (TEPAV), Istanbul, 14 Mar. 2013).

¹⁹ Cara Kelly, “Cheap, Trendy ‘Fast Fashion’ Still a Hot Commodity” *The [Newark] Star-Ledger* 9 (7 July 2013).

²⁰ “The apparel industry has been skilled at chasing new low-cost production markets since import quotas sprang up in the 1960s, says Bob Kirke. Chasing available production became part of the industry’s DNA, adds the executive director of the Canadian Apparel Federation.” Wency Leung, “What Makes It So Cheap” *The [Toronto]Globe & Mail* A12 (27 April 2013).

The rise of China's garment industry has been both impressive and imposing. However, it has also come at time of steadily increasing competition for China's labour supply. The tentacles of global supply chains do not simply extend to China's garment industry, but now reach into virtually every part of its industrial infrastructure. With a shrinking Chinese workforce, garment manufacturing, which traditionally relies on low-skilled labour drawn from further and further afield, has to compete for labour with other, higher-paying industries. This has resulted in the re-direction of some China-based apparel production to other countries like Bangladesh, Vietnam, Pakistan and Sri Lanka.

The outward movement of garment assembly from China to Bangladesh has been substantial recently. Bangladesh has always had a textile and clothing industry to process local cotton and other materials, but in the last few years the Bangladeshi apparel industry has grown explosively as Chinese wages have risen.²¹ Whole factories full of garment making equipment have moved from the Chinese mainland to textile hubs around Dhaka, the Bangladeshi capital.

The Bangladeshi apparel industry is worth some \$20 billion, nearly double its size in January 2011 when the European Union relaxed its trade rules to allow the poorest countries to import fabric (rather than produce it domestically) to be stitched into garments that are sold duty-free in the EU.²² Textiles and clothing are the largest single source of economic growth in Bangladesh's economy and its principal source of foreign exchange earnings. It is hard to understate the sector's importance for a country which has a population of 163 million people and the highest population density in the world.²³ This is particularly true of women, for whom jobs in the garment industry are attractive relative to other local employment opportunities.²⁴ Though working conditions in garment factories are often abysmal and the minimum wage is the equivalent of \$38 per month (or about one-fifth the wage in China), positions in the textile sector provides a modicum of empowerment and independence.²⁵

Nevertheless, the nature of the apparel industry in Bangladesh continues to evolve. About 60% of export contracts are with European buyers. The remaining 40% is with American and other purchasers. At the same time, foreign investment in the garment sector is low. It is estimated that only 5% of textile factories are owned by foreigners. Most garment production is locally controlled, meaning that health and safety standards are minimal. Even prior to the Rana Plaza disaster, a few Western companies such as Disney had indicated that they were leaving Bangladesh due to concern over factory conditions.²⁶

²¹ A 2011 report by Achim Berg, a consultant with McKinsey & Co., has estimated that Bangladesh's ready-made garment exports could double between 2011-15 and nearly triple by 2020. See Marina Strauss & Joanna Slater, "A Retailer's Dilemma: the line between cost and safety" *The [Toronto] Globe & Mail* B1 (4 May 2013).

²² "Disaster in Bangladesh: Rags in the Ruins" 950 *The Economist* 3 (4 May 2013).

²³ Bangladesh's physical size of approximately 147,000 square kilometres is slightly more than the provinces of New Brunswick, Nova Scotia and Prince Edward Island combined, but its population is about 100 times greater.

²⁴ "Yes, Bangladesh's garment industry is ridden with appalling labour practices ... But cheap clothes have helped fuel a social and economic revolution in Bangladesh, and Bangladeshis do not want that to end. ... Ms. Akhtan and her friends gave off a palpable sense that their life is different than it was five years ago – and a certainty that it will be quite different five years from now than it is today. Will they be rich? No. But maybe their kids will be at the private school. Ms. Akhtan is the first person in her family ever to have a formal job; her son, she said with total confidence, will be an engineer." See Stephanie Nolen, "More Disasters, Greater Unease" *The [Toronto]Globe & Mail* A12 (27 April 2013).

²⁵ An interview with Nazma Akhter, a Bangladeshi union leader, emphasizes the importance of garment industry work for Bangladeshi women: "I was 11 years old, I began working in a factory alongside my mother. I had been working in the garment industry for seven years when I started working for workers rights and improving working conditions. When I was working in the factory, we faced lots of problems and difficulties: on-time payments, job security, maternity issues, freedom of association. But there was one good thing. In Bangladesh, women from very poor families in the countryside, where there were no job opportunities for female workers who were not educated, could earn money. Although the wages are low, they can now make decisions in the family, and it's a respectable job for women. Unskilled workers come here as apprentices, then day by day, they gradually become sewing machine operators and earn some more money. There are more than 4,000 factories in Bangladesh and about 4 million workers, 80 percent of whom are single women workers." "A View from the Sweatshop Floor", *World Policy Journal* (27 June 2013).

²⁶ Disney reportedly wrote to vendors and licencees in March 2013 to begin transitioning production out of the "highest-risk countries" such as Bangladesh in an effort to raise safety standards in its supply chain. It will also pull out of Ecuador, Venezuela, Belarus and Pakistan by April 2014. See Steven Greenhouse, "Some Retailers Rethink Roles in Bangladesh" *The New York Times* A1 (2 May 2013).

Work in the Bangladeshi garment sector takes place against grim regulatory conditions generally. Bangladesh has ratified 33 ILO Conventions, including 7 of the 8 fundamental conventions.²⁷ In addition the 2006 *Labor Act* seeks to protect and promote rights of the workers. Although legal provisions exist to uphold the fundamental principles and to protect rights at work, a 2012 ILO Report indicated that “their implementation and enforcement remain challenging.”²⁸ Under the Act trade unions are allowed but must be approved by factory owners. While unions existed in many other industries in Bangladesh, most garment factory owners have not permitted them to operate, asserting that they would lead to a lack of worker discipline. In addition, union activists in the sector have often been subject to beatings and harassment. In 2010 the Bangladeshi government also launched an Industrial Police force to crush street protests by workers demanding better pay and working conditions.²⁹ A consultative tripartite process is envisaged for a new legislative scheme, but until the recent tragedies there has been little progress. Many existing unions are deeply politicized and enjoy close ties with factory owners and bureaucrats. In the meantime, “[p]artly due to privatization and economic reforms, the trade unions’ role in protecting the rights of the workers has been severely impacted and has caused a decline in union membership compared to the rapid expansion of the private sector.”³⁰

Current regulatory efforts must be understood against the background of two major industrial tragedies. The Tazreen Fashions factory fire in November 2012 resulted in the death of 112 garment workers. The Bangladesh Government’s official response was a National Action Plan on Fire Safety (NAP) released in March 2013 which, because it focused on fire safety, did *not* foresee building inspections. This was followed by the Rana Plaza building collapse in late April 2013 that led to the loss of more than 1,120 lives, making it the deadliest garment factory accident in history and the deadliest accidental structural failure in modern human history. Since then the Bangladeshi garment industry has continued to be convulsed by labour unrest, reports of garment industry influence in Bangladesh’s political parties, and industrial accidents.³¹

A visit by a high-level ILO delegation in the immediate aftermath of the Rana Plaza disaster called for the hiring of 200 additional building inspectors within six months and a budget increase adequate to recruit a minimum of 800 inspectors, as well as skills and retraining for injured workers. Perhaps most importantly, the post-disaster package agreed to between the government and the ILO “would improve protection, in law and practice, for the fundamental rights to freedom of association and collective

²⁷ The Governing Body of the International Labour Office has identified eight Conventions as fundamental to the rights of human beings at work, irrespective of the level of development of individual member States. These rights are regarded as a precondition for all the others in that they provide a necessary framework from which to strive freely for the improvement of individual and collective conditions of work. The ILO Declaration on Fundamental Principles and Rights at Work, adopted in June 1998, highlights this set of core labour principles endorsed by the international community. Embedded in the ILO Constitution, these principles and rights have been expressed and developed in the form of specific rights and obligations in Conventions recognized as fundamental both within and outside the Organization. These ILO Conventions have been identified as fundamental, and are at times referred to as the core labour standards: Freedom of Association and Protection of the Right to Organise Convention, 1948 (Convention No. 87), Right to Organise and Collective Bargaining Convention, 1949 (Convention No. 98), Forced Labour Convention, 1930 (Convention No. 29), Abolition of Forced Labour Convention, 1957 (Convention No. 105), Minimum Age Convention, 1973 (Convention No. 138), Worst Forms of Child Labour Convention, 1999 (Convention No. 182), Equal Remuneration Convention, 1951 (Convention No. 100), Discrimination (Employment and Occupation) Convention, 1958 (Convention No. 111). Bangladesh has ratified all of the above apart from the Minimum Age Convention, 1973 (Convention No. 138).

²⁸ International Labour Organization, *Bangladesh: Decent Work Country Programme 2012-2015* 2 (Nov. 2012).

²⁹ Farid Hossain, “Bangladesh will Allow Garment Workers to Form Unions Without Factory Owners’ Consent” (13 May 2013). The same source notes that “[s]ince 2005, at least 1,800 garment workers have been killed in factory fires and building collapses in Bangladesh, according to research by the advocacy group International Labor Rights Forum.”

³⁰ International Labour Organization, *Bangladesh: Decent Work Country Programme 2012-2015* 6 (Nov. 2012).

³¹ “Disaster in Bangladesh: Rags in the Ruins” 950 *The Economist* 3 (4 May 2013). “Bangladesh’s garment business has growing clout. The [Bangladesh Garment Manufacturers and Exporters Association]’s 4,000 members account for four of every five dollars earned from exports. And the industry is tied to the corrupt political system: at least 25 MPs have investments in the garment business. After the [Tazreen Fashions] fire, the BGMEA sent inspectors to some of its members’ factories. Four buildings had structural flaws or violated construction or labour laws. Who were the owners? The lobby group’s president, Atiqul Islam, his predecessor and a former vice-president of the association. None was prosecuted.”

bargaining, as well as occupational safety and health.”³² Subsequently, in mid-May 2013 the Bangladesh government agreed to allow garment workers to form trade unions without prior permission and announced a plan to raise the minimum wage.³³

The Bangladeshi government has also pledged more building inspectors, but as of early July 2013 had not been able to follow through on this commitment. Sheikh Hasina, Bangladesh’s Prime Minister, has indicated that 90% of Bangladesh’s buildings meet no particular building code.³⁴ It is estimated that more than 9,000 buildings across the country will have to be inspected to achieve minimal standards, a process which may take as long as two years to complete. Abroad, condemnation of the Bangladesh government’s failure to regulate and inspect has been virtually unanimous. This culminated in late June 2013 with Bangladesh’s suspension of benefits under the U.S.’s Generalized System of Preferences (GSP).³⁵

3. Legal Responses to Rana Plaza Disaster

Following the Rana Plaza Disaster, a number of competing schemes were unveiled to deal with the disaster and prevent its recurrence. Two of these – the Accord and the Action Plan – were previewed above and will be discussed below.

As if to foreshadow further involvement, a few Western companies that purchased Bangladesh-made garment products also acknowledged an indirect role in the Rana Plaza disaster by offering the compensation to victims and their families. The amounts involved varied from retailer to retailer, although full details are difficult to obtain.³⁶ The issue of compensation has been complicated by varying attitudes of foreign purchasers to worker and trade union involvement in any response.

Also worthy of mention is the consumer response to the disaster. A number of retailers appear to have been motivated to act, at least in part, by fear of consumer fallout from both the Tazreen Fashions fire and the Rana Plaza disaster, although the formal consumer response was muted. Media reports stressed that continued garment production in Bangladesh is an important development issue, particularly for Bangladeshi women.

Nevertheless, the need to provide something beyond compensation in the form of a legal framework became apparent due to the apparent inability of the Bangladeshi government to respond to repeated industrial disasters. The NAP did not have enough time to get underway prior to the Rana Plaza disaster and was seen as tainted by its association with ineffectual governance. No prosecutions followed from the NAP’s initiation when ownership of non-compliant buildings was linked to Bangladeshi political figures. The Accord, and to an uncertain extent Action Plan, appear to aim to reinforce the capacity of Bangladesh’s civil service to deal with worker health and safety issues over the long term. Given the early indications, the prospects for this happening remain uncertain.

³² See “Conclusions of the ILO’s high level mission to Bangladesh: Joint statement issued by the tripartite partners at the conclusion of the ILO’s high-level mission sent to Dhaka, Bangladesh, following the Rana Plaza Building collapse” (4 May 2013).

³³ Syed Zain Al-Mahmood & Patrick Barta “Bangladesh to Raise Workers’ Pay” *Wall Street Journal Abstracts* (USA) B4 (13 May 2013).

³⁴ *Ibid.*

³⁵ Doug Palmer, “Obama Cuts Off Trade Benefits with Bangladesh” *The [Toronto] Globe & Mail* A11 (28 June 2013). The article refers to the U.S. move as “a mostly symbolic response to dangerous conditions” in the Bangladeshi garment industry since suspending Bangladesh from the GSP program will increase U.S. duties on an array of non-garment products the country exports to the U.S. such as tobacco, sporting equipment, porcelain china, plastic products and a small amount of textile products. The report adds that the suspension “will not directly affect Bangladesh’s main export – clothing – since garments are not eligible for duty cuts under the program, which was created in 1976 to help economic development in the world’s poorest countries and to reduce import costs for U.S. companies.”

³⁶ See Marina Strauss et al., “Loblax to compensate victims of Bangladesh Building Collapse” *The [Toronto] Globe & Mail* (29 April 2013). Retailers which had indicated they were prepared to compensate included Primark and Loblax (part of the Weston Family Group of companies – Canada/UK), El Corte Inglés (Spain), PVT (Denmark) and Matalan. See “Cautious Welcome to Brand Compensation, Rana Plaza” *Clean Clothes Campaign* (1 May 2013).

What does the Accord do? The Accord is a 5-year limited term agreement which is designed to build on the NAP and to parallel the program and its activities with NAP “to ensure a close collaboration, including for example by establishing common programme, liaison and advisory structures.” The principal commitment is made by signatory purchasers – now numbering 70 – to finance a program of garment factory inspections and remediation efforts during the term of the Accord. Other signatories, including trade unions and NGOs, participate “at their own election” but have no direct financial obligation. In effect, participants in the garment supply chain are stepping in to fulfill functions that presumptively belong to the government. In July 2013 the signatories announced that 1,000 garment factories would be inspected over the first nine months of the Accord.³⁷

To prioritize the inspection scheme, the Accord establishes a classification system for Bangladeshi garment plants involving three tiers. Those in Tier 1 are facilities representing not less than 30% of each signatory company’s annual production in Bangladesh. Those in Tier 2 are facilities representing any “remaining major or long-term suppliers to each signatory, with the aggregate of Tier 1 and 2 together not falling below 65% of each signatory company’s annual production in Bangladesh”. Finally, those in Tier 3 are Bangladesh facilities with occasional orders, one-time orders, or facilities for which a signatory’s orders represent less than 10% of the factory’s production by volume, so long as Tier 3 facilities do not exceed more than 35% of a signatory’s production in Bangladesh by volume. The difference between tiers lies in their exposure to the supply network as well as the level of priority and attention they are to receive. Facilities in Tier 1 are to receive safety inspections, remediation and fire safety training, whereas those in Tier 2 will receive inspections and remediation. Those in Tier 3 will be subject only to limited initial inspections “to identify high risks”.³⁸

The Accord establishes a governance structure composed of a Steering Committee (SC) composed of equal representation from corporate and union signatories and headed by a neutral chair appointed by the International Labour Organization (ILO). SC decision-making is to be effected by consensus, or where this is not possible, by majority vote. The SC is supplemented by an Advisory Board involving brands, retailers, suppliers, government institutions, trade unions and NGOs which is to ensure that all participants “can engage in constructive dialogue with each other and provide feedback and input to the SC ...” Administration of the program are to be developed by the SC in consultation with a “High-Level Tripartite Committee” established to implement the NAP and joined by the Bangladeshi Ministry of Labour, the ILO, and a German labour institute, the *Deutsche Gesellschaft für Internationale Zusammenarbeit* (GIZ).

The centerpiece of the Accord is an Implementation Plan, which is backed up by a legally binding dispute resolution clause. Dispute settlement is an aspect of the Accord that, understandably, has received perhaps the most media attention. Architects of the Accord have employed an extraterritorial approach, given that it would be hopeless to enforce the Accord against overseas purchasers through the creaky Bangladeshi justice system. Many purchasers operate through “intermediaries” and have only a token presence in Bangladesh itself.³⁹ For administrative purposes, it recalls other recent attempts at ‘hybridization’.⁴⁰ The underlying idea is that such hybridization brings administrative expertise closer to recipients and is useful in terms of capacity-building so that experience can be shared and ultimately indigenized.

Article 5 of the Accord provides that any dispute between the parties is to be presented for resolution

³⁷ Anne d’Innocenzio, “Retailers Set Spring as Deadline for Factory Inspections” *The [Toronto] Globe & Mail* B7 (9 July 2013).

³⁸ Facilities in Tier 3 determined to be high risk “shall be subject to the same treatment as if they were Tier 2 factories.” See Accord Art. 3.

³⁹ “Intermediary costs are paid to third parties to manage contracts between brands and factories ... The world’s largest intermediary is Hong Kong-based Li & Fung Ltd. [D]ealing with intermediaries means factories and labourers receive a smaller cut ...” Wency Leung, “What Makes It So Cheap” *The [Toronto]Globe & Mail* A12 (27 April 2013).

⁴⁰ In broad outline recalls hybrids, which has been attempted with some success in other international institutional settings, such as hybrid tribunals in Sierra Leone, Lebanon, East Timor and Cambodia. See Elaine Skinnider, “Experiences and Lessons from Hybrid Tribunals: Sierra Leone, East Timor and Cambodia” (Feb. 2007).

to the SC, which is to decide the dispute by majority vote within 21 days. Upon request, the SC's decision is appealable to a "final and binding" arbitration process and awards resulting from it "shall be enforceable in a court of law of the domicile of the signatory against whom enforcement is sought" pursuant to the New York Convention. The Accord is silent as to exactly *which* arbitration process is to be accessed. It is also questionable which actors under the Accord would pursue enforcement.⁴¹ At the same time, given the domestic realities in the case of Bangladesh, the expatriate nature of purchasers and the fact that the Accord has a strong capacity-building aspect to it, an arbitration procedure is about the best that could have been hoped for.

The Accord goes on to project action in three fields: inspection, remediation and training. With respect to inspection, the Accord requires the SC to appoint an independent Safety Inspector (SI) who will oversee inspections by "skilled personnel ... based on internationally recognized workplace safety standards and/or national standards ..."⁴² Inspections will be a challenging task given that, as mentioned, building standards are currently notional or non-existent in Bangladesh. Inspections are to be followed by a written inspection report. Where the inspection identifies a "severe and imminent" danger to worker safety, the SI is to inform the factory management, its health and safety committee, worker representatives and the SC and unions signatory to the agreement, and is to direct a remediation plan.⁴³ Notably, signatories are to require their supplier factories that are inspected to continue workers' employment relationship and income during any period that a factory is closed for renovation to a maximum of six months. Failure to do so can trigger a notice, warning or termination of business relationships.⁴⁴

The crux of the above arrangement is to leverage the garment supply chain so that foreign buyers pressure their Bangladeshi suppliers to comply. However, buyers have a continuing responsibility to ensure that this occurs by negotiating commercial terms with their suppliers "which will ensure that it is financially feasible for factories to maintain safe workplaces" and to comply with upgrade and remediation requirements. Article 22 of the Accord goes on to indicate that:

Each signatory company may, at its option, use alternative means to ensure factories have the financial capacity to comply with remediation requirements, including but not limited to joint investments, providing loans, accessing donor or government support, through offering business incentives or through paying for renovations directly.

The Accord is also notable for its provisions concerning worker training. It mandates that the SC appoint a Training Coordinator who is to "establish an extensive fire and building safety training program". The program is to be delivered by skilled personnel at Tier 1 facilities "with the involvement of trade unions and specialized local experts." The term "Extensive" is notable for its failure to reference international standards.

The Accord is also noteworthy for its time-limited character. To ensure a degree of permanence and stability in the fluid world of supply chains, signatories have agreed to a continuity clause in Art. 23 which states that signatories "are committed to maintaining long-term sourcing relationships with Bangladesh." To this end, signatories "shall continue business at order volumes comparable to or greater than those that existed in [2012]" during the pendency of the Accord.

⁴¹ It is unlikely, for instance, that frail Bangladeshi unions and NGOs would go to the expense of seeking enforcement in a foreign jurisdiction. To this extent, the dispute resolution mechanism appears largely cosmetic. Bangladeshi suppliers are also not signatories to the Accord and therefore avoid its reach. Instead, the remedy for a non-compliant supplier is defined in Accord Art. 21 as "a notice and warning process leading to termination of the business relationship if these efforts [i.e. to participate fully in inspection, remediation, health and safety and, where applicable, training activities] do not succeed."

⁴² Accord Art. 9.

⁴³ Accord Art. 11.

⁴⁴ Accord Art. 13.

In sum, the Accord appears aimed at dealing with immediate issues in a manner that promotes local capacitation. At the same time, a number of its provisions seem to rest on the effort of unions which, as indicated, have had a difficult time organizing in the Bangladeshi garment industry. For this reason, the Accord's success cannot be instantly assured.

A second effort to address issues arising from the Rana Plaza collapse has been undertaken by Walmart, the Gap and a number of other American and Canadian purchasers in conjunction with the Bipartisan Policy Center, a Washington, D.C.-based think-tank.⁴⁵ This agreement – which grows out of a process begun in January 2013 by five North American retail federations and dubbed the “Safer Factories Initiative” (SFI) – is also foreseen to last for 5 years and is said to feature a contain a safety plan. Development was facilitated by two former U.S. senators, George Mitchell and Olympia Snowe.

Acting under the umbrella of what has been termed the “Alliance for Bangladesh Worker Safety”, the SFI released an Action Plan in July 2013 detailing what the Alliance hopes to accomplish. The Action Plan is said to “complement” the Accord and represents a substantial and important consensus among its signatories in the U.S. and Canada that buy Bangladesh-made garments. Like signatories to the Accord, members of the Alliance are also making a five-year commitment, which involves initial direct funding of at least U.S. \$42 million. Alliance members will also provide at least U.S. \$100 million in access to low-cost capital funding for factory improvements. Of critical importance, due to the urgent need for inspections and safety training, is the fact that the Alliance is committing to inspect all of the factories in which they do business and train all of their workers in Bangladesh within one year.

Key elements of the Action Plan reportedly include training and educating workers in fire and building safety, working with the Bangladeshi government and other interested stakeholders to develop and implement a common standard for assessing factory fire and building safety, and expanding fire and safety programs of inspections and remediation. In addition, the Action Plan aims for the creation of sustainable funding mechanisms to meet the above objectives which incorporate independent mechanisms for transparency and third party verification so that the public will be able to determine if the program is working. Finally, the Action Plan seeks the establishment a capital fund that will provide low cost loans to expedite required factory remediation.

Reports of the Action Plan indicate that while foreign purchasers of garments agree on further actions to enhance worker safety, the Alliance believes the government of Bangladesh must intensify enforcement. In this sense, the Alliance appears somewhat more government-oriented, despite the government's previous record of footdragging over worker health and safety. The Action Plan also states that “[w]hile major international brands can undertake their own factory inspections, there is also no substitute for a government that steps in to protect its workers across the board, in all its factories and workplaces.”⁴⁶ The Alliance's Action Plan is said to represent “important steps in advancing the global effort to protect all those working in Bangladeshi garment factories through swift, specific, and measurable” steps. However, achieving the ultimate goal will require building “a broad, sustainable safety infrastructure and safety culture” across all Bangladeshi garment factories.

At a glance, the Alliance's Action Plan appears to differ from the Accord in several key ways. First, the Action Plan puts a sum of money for remediation up front whereas the Accord will subsist on funds raised from signatories to the U.S. \$500,000 cap. It is not clear what additional obligations Accord signatories may have to backstop or guarantee remediation efforts beyond the committed

⁴⁵ Major North American brands are involved in the process are Canadian Tire Corporation Limited; Carter's Inc.; the Children's Place Retail Stores Inc.; Gap Inc.; The Hudson's Bay Company; Innovative Fashion Group; J.C. Penney Company Inc.; The Jones Group Inc.; Kohl's Department Stores; L. L. Bean Inc.; Macy's Inc.; Nordstrom Inc.; Public Clothing Company; Sears Holdings Corporation; Target Corporation; VF Corporation; and Wal-Mart Stores Inc.

⁴⁶ George Mitchell & Olympia Snowe, “A Shared Responsibility: North American Alliance of Retailers and Brands Reach Agreement on a Bangladesh Worker Safety Program” (10 July 2013).

amounts. None appears contemplated in reports of the Action Plan. Second, reports of the Action Plan make no mention of its enforceability whereas the Accord is at least nominally enforceable under the dispute resolution clause of Art. 5. Third, the Action Plan appears to emphasize normativity in a way that the Accord does not. Reports of the Action Plan indicate that the Alliance understands the importance of working with the Bangladeshi government to design new laws. By comparison, the Accord says only that inspections will take place “based on internationally recognized workplace safety standards and/or national standards” but does indicate not how Accord signatories will work to influence the Bangladeshi government’s adoption of and adherence to international standards. Fourth, reports of the Action Plan make little reference to unions, and indeed, the entire idea of a separate scheme appears designed, at least in part, to allow Action Plan signatories, some of whom have been hostile to unions, to avoid having to deal either with unions or what they perceive to be a union-dominated ILO. The Accord does reference unions, but as indicated, how vigorous a role they will be able to play is questionable given their organizational handicaps.

4. Appraisal and Conclusion

Recent disasters in the Bangladeshi garment industry are both a stark and salutary reminder of the workings of global supply chains, as well as the power of contemporary interdependence to act as a force of change. Shifting patterns of industrial geography have suddenly made Bangladesh a leading destination in the global garment industry as goods make their way from input supplier to producer to buyer to consumer. They reveal that mercurial changes in modern manufacturing can transform lives, but also to imperil them in catastrophic proportions if the relevant standards are not put in place.

At the same time, what has happened in Bangladesh in the last decade reveals the ability of certain key actors – in this case, end-supply buyers – to leverage their influence in order to improve standards and to get other actors in the chain of supply to comply with those standards. This is an example of an adaptive supply network. What this experience reveals about global supply chains is that their unity can be used in some innovative ways to spread the benefits of corporate social responsibility more widely. A race to the bottom can become a race to the top, or at least in some instances, an effort to attain certain internationally recognized standards. The notional ‘unity’ of the chain also creates, for some purposes, a transnational legal person with the ability to bear certain obligations. In the case of the Rana Plaza disaster, this assumption is evident in proposals for victim compensation and the duty to fund the Accord. Competing with this vision is one of stricter normativity, as reportedly contained in the scheme of the Action Plan.

There are many unanswered issues going forward. One is the interplay between the Accord and the Action Plan. It is also hard to claim that this is the first attempt by a supply chain to respond flexibly to an externality caused by the chain, but what has happened in Bangladesh is certainly a graphic example, and perhaps the most evident at the moment. In other instances employers in extractive industries have provided health-care for locally engaged staff, as in the case of diamond mining companies in South Africa. Companies like De Beers employ thousands of workers and are notable for the efforts they have made to provide hard-to-access medicines such as anti-retroviral therapies as a matter of corporate policy. The difference in such cases is that a large, integrated multinational is usually the *direct* employer and purchaser of what is produced. In the case of the Bangladesh garment industry, the link between foreign buyers and domestic workers is much more tenuous. Nevertheless, the ubiquity of clothing sales and the fact that most product ends up in customers’ hands which, due to labeling requirements, are identifiably from a particular source, gives the ultimate buyer a visible connection that the purchaser of a computer chip made with rare earth minerals or a diamond ring might not have.

Bangladesh garment industry workers have enjoyed the ‘Klieg lights’ of global attention in recent months. Inevitably, this will fade. At that point, new efforts will have to be made to revive interest and promote attention in what is, at the end of the day, a matter of responsibility. For all that was

preventable, there appears to be little impact on the Bangladeshi political system. As the English periodical, *The Economist*, noted coolly, “[p]olitical fallout [from the Rana Plaza disaster] will probably be limited. Voters and the opposition soon forgot previous disasters.”⁴⁷

⁴⁷ “Disaster in Bangladesh: Rags in the Ruins” 950 *The Economist* 3 (4 May 2013).