RETHINKING POST-RANA PLAZA TRANSNATIONAL LABOUR GOVERNANCE: A PROPOSAL FOR A TRANSFORMATIVE GOVERNANCE MODEL

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INTRODUCTION

On April 24, 2013, Rana Plaza, a commercial building located in Savar, Bangladesh, collapsed and killed approximately 1,134 ready-made garment (RMG) factory workers in Bangladesh.¹ By providing a large pool of low-cost, unskilled labour and a competitive investment policy, Bangladesh's economy consistently grew at the rate of about 6.5 percent per year over the past decade, while poverty dropped by nearly one-third due to increased "life expectancy, literacy rates and per capita food production."² Despite being the world's second largest garment supplier,³ in terms of purchasing power parity it offers the second lowest level of wages for labourers in the RMG sector.⁴ To

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¹ Jim Yardley, "Report on Deadly Factory Collapse in Bangladesh Finds Widespread Blame" (May 23, 2013), online: <nytimes.com/2013/05/23/world/asia/report-on-bangladesh-building-collapse-finds-widespread-blame.html> [perma.cc/6M4V-TZY6]. For the death toll, see Rana Plaza Coordination Committee, "The Rana Plaza Arrangement," online: <ranaplaza-arrangement.org> [perma.cc/Q2YE-5RYD].

² The World Bank, "The World Bank in Bangladesh," online: <worldbank.org/en/country/bangladesh/overview> [perma.cc/7PFX-HE6W] (since 2010, Bangladesh's GDP has grown consistently at a rate of 6.5%); Fair Wear Foundation, "Bangladesh Country Study 2018" at 3, online (pdf): <api.fairwear.org/wp-content/uploads/2019/03/Fair-Wear-country-study-Bangladesh-2018-new.pdf> [perma.cc/CPA2-3PXN].

³ International Labour Organization, "ILO, partners aim to improve conditions in Bangladeshi garment industry" (23 September 2013), online: <ilo.org/newyork/news/WCMS_222019/lang--en/index.htm>.

⁴ Anu Muhammad, "Wealth and Deprivation: Ready-Made Garments Industry in Bangladesh" (2011) 46:34 *Econ & Polit Wkly* 23; "Report: Ethiopia's Garment Workers Are World's Lowest Paid" (7 May 2019), online: <cnbc.com/2019/05/07/report-ethiopias-garment-workers-are-worlds-lowest-paid.html> [perma.cc/27X9-7GK2] (until Ethiopia became the garment-producing country that offers the lowest wage, Bangladesh was consistently known for the lowest wage level in the garment sector).

make matters worse, consistent patterns of poor working conditions and workplace accidents raise significant doubts about the sustainability of its remarkable economic growth. Bangladesh's consistent economic growth, the labour conditions in its RMG factories, and safety initiatives taken after the collapse of Rana Plaza provide an ideal setting to discuss emerging forms of transnational labour governance and ongoing challenges.

This paper analyzes the International Labour Organization's (ILO) Programme for "Improving Working Conditions in the Ready-Made Garments (RMG) Sector" (the ILO's RMG Programme) and two corporate safety initiatives, namely, the North American "Alliance for Bangladesh Worker Safety" (the Alliance) and the "Accord on Building and Fire Safety" (the Accord).⁵ Both corporate initiatives have formally ended their operations in Bangladesh.⁶ However, discussions on these corporate initiatives are important as both came in with their innovative models for transnational labour governance and undertook considerable commitments. This paper argues that these initiatives only allocated a limited space for overseeing the safety conditions of labourers engaged in a major exporting sector. Upholding the existing narrow conceptual understandings of labour and labour rights, these corporate initiatives paid negligible attention to deeper issues such as the inseparable connection between fundamental and redistributive rights of labour,⁷ the absence of effective corporate commitment for social

⁵ *Supra* note 3; "Alliance for Bangladesh Worker Safety" (2013), online: <bangladeshworkersafety.org> [perma.cc/4E88-2877] (the Alliance); "Accord on Fire and Building Safety in Bangladesh" (13 May 2013), online (pdf): <bangladesh.wpengine.com/wp-content/uploads/2018/08/2013-Accord.pdf> [perma.cc/7GDK-9TPW] (the Accord).

⁶ The initial five-year term periods for both corporate initiatives (i.e., the Alliance and the Accord) ended in December 2018. When the Accord wanted to extend its initial term through a transition Accord, its validity was challenged in the High Court of Bangladesh. Eventually the Supreme Court allowed the Accord to operate for 13 more months (starting from May 2019) after it reached a memorandum of understanding with the Bangladesh Garment Manufacturers and Exporters Association (BGMEA): see "Bangladesh Factory Safety Monitors Get Court Extension" (19 May 2019), online: <france24.com/en/20190519-bangladesh-factory-safety-monitors-get-court-extension> [perma.cc/N9MN-PJFK]. Shortly before this paper was published, the Accord formally ended its operations in Bangladesh: see Ibrahim Hossain Ovi, "Accord Closes Bangladesh Operations" (31 May 2020), online: <dhakatribune.com/bangladesh/2020/05/31/accord-closes-bangladesh-operations> [perma.cc/8894-TA8J].

In December 2018, the Alliance declared that its participating brand members would collaborate with a local organization for monitoring the safety conditions at their supplier factories: see "Alliance Announces End of Its Tenure" (14 December 2018), online: *New Age* <newagebd.net/article/58837/alliance-announces-end-of-its-tenure> [perma.cc/4ARP-XGFR].

⁷ I have discussed these narrow conceptual understandings and the differences between fundamental and redistributive rights of labour: see Zobaida Khan, "Transnational Labour Governance: A Critical Review of Proposals for Linkage through the Lens of the Rana Plaza Collapse in Bangladesh" (2018) 33:2 CJLS 177, DOI: <doi.org/10.1017/cls.2018.12> ("[t]he International Labour Organization's (ILO's)

compliance and for economic empowerment of workers, and the absence of labourers' collective rights.

By criticizing the narrow understandings that shape existing labour governance models, this paper proposes (1) resituating the questions that relate to regulatory complexities for addressing labour governance issues, (2) allocating more space and capacity to marginalized actors (i.e., the labourers in the emerging forms of labour governance), and (3) reconstructing transnational corporate responsibility in a different framework. In order to depict the ongoing challenges and possible solutions, this paper mostly borrows from economist and philosopher Professor Amartya Sen's capability approach,⁸ and relies on labour law Professor Adelle Blackett's "social regionalism" concept⁹ and the United Nations Guiding Principles on Business and Human Rights.¹⁰ While this paper in no way endorses a unique or one-size-fits-all type of response that can address labour governance and related institutional challenges, it suggests a pluralistic approach that connects law with the demands of social or distributive justice and searches for effective redistributive mechanisms that can address certain asymmetries in the labour-capital relationship.

The paper emphasizes three distinct yet connected issues in a transnational labour governance framework. First, borrowing from the capability approach and the social regionalism concept, this paper endorses broader conceptualizations of "the social" (i.e.,

Declaration on Fundamental Principles and Rights at Work, adopted in 1998, commits member states to respect and promote four fundamental principles and rights at work: freedom of association, effective recognition of the right to collective bargaining, elimination of forced or compulsory labour and abolition of child labour, and elimination of discrimination in respect of employment and occupation. These ILO-prescribed rights, widely referred to as core/fundamental labour rights, do not include redistributive rights, i.e. minimum wages, work safety, maximum work hours, job security, unemployment benefits, etc." at 179).

⁸ Amartya Sen, *Development as Freedom* (New York: Anchor Books, 2000) [Sen, *Development*]; Amartya Sen, "The Ends and Means of Sustainability" (2013) 14:1 J Hum Dev & Capab 6 [Sen, Sustainability].

⁹ Adelle Blackett, "Toward Social Regionalism in the Americas" (2002) 23:4 Comp Lab L & Pol'y J 901; Adelle Blackett & Christian Levesque, "Social Regionalism in the Global Economy" in Adelle Blackett & Christian Levesque, eds, *Social Regionalism in the Global Economy* (New York: Routledge, 2011) 1.

¹⁰ This is the first corporate human rights responsibility initiative that has been endorsed by the UN. The guiding principles were proposed by the UN Special Rapporteur Professor John Ruggie and, later the UN Human Rights Council endorsed the principles in resolution no. 17/4 of 16 June 2011. See *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* (New York & Geneva: United Nations Human Rights Council, Office of the High Commissioner, UN, 2011), online (pdf): <ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf> [perma.cc/5LTD-TX9W]; John Ruggie, "Protect, Respect and Remedy: A Framework for Business and Human Rights" (2008) 3:2 Innovations 189.

labour and labour rights).¹¹ More specifically, it stresses the need to protect labour engaged in both formal and semi-formal or informal sectors and the essential interconnections between fundamental and redistributive rights of labour. It is argued here that broader conceptualizations of the social should be the first step for bridging the gap between theoretical compliance with some fundamental labour rights and practically achieving better work conditions and entitlements. Second, criticizing the limited coverage and restrictive focus of the corporate initiatives and relying on the capability approach and the UN Guiding Principles on Business and Human Rights,¹² this paper demands an effective institutional framework. The paper argues that a stronger form of transnational corporate responsibility is needed to improve or strengthen existing labour governance. Moreover, there should be a greater focus on a wider range of related issues, such as the increase in labour productivity and the economic empowerment of workers. Third, borrowing from the capability approach, this paper steps beyond workplace rights and entitlements and argues for institutional strengthening and political empowerment of the working class; by connecting these important issues, this paper proposes a new model for transnational labour governance.

This paper starts with a short overview of the growth of the RMG sector in Bangladesh and then discusses some crucial labour problems in section I. Section II describes the distinctive features of the transnational safety initiatives (TSIs) that were implemented after Rana Plaza's collapse. By analyzing both the omissions and inclusions within the corporate initiatives in section III, this paper proposes a transformative governance model. Section IV elaborates the important features of the proposed model. The proposed model analyzes the capability enhancement of workers as an essential prerequisite and objective of future labour governance frameworks. It finds that this different lens would substantially change the existing attention to distributional problems in developing countries, allow reliance on broad conceptualizations of social or distributional issues (see below in section IV under the heading "Broader Conceptualizations of the Social"), and demand that appropriate labour governance require a stronger form of corporate responsibility (see below in section IV under the heading "Strengthened Forms of Transnational Corporate Responsibility (TCR)").

¹¹ Blackett, *supra* note 9. For discussions on the narrow conceptualizations of the social/distributional issues, see Kerry Rittich, *Recharacterizing Restructuring: Law, Distribution and Gender in Market Reform* (The Hague & London: Kluwer Law International, 2002); David M Trubek & Alvaro Santos, "Introduction: The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice" in David M. Trubek & Alvaro Santos, eds, *The New Law and Economic Development: A Critical Appraisal* (New York: Cambridge University Press, 2006) 1.

¹² *Supra* note 10.

I. THE GROWTH OF BANGLADESH'S RMG SECTOR AND ITS LABOUR PROBLEMS

From 1974 to 2004, the Multi-Fibre Arrangement (MFA), under the General Agreement on Trade and Tariffs, allowed developed countries to protect their local industries by imposing quotas on and licensing requirements for foreign garment exports.¹³ Under the MFA, although quota limits were imposed on garment-producing developing countries,¹⁴ newly independent Bangladesh enjoyed quota-free access to the markets of the European Union (EU) and an ever-rising quota for the market in the United States (US).¹⁵ When South Korean garment companies reached their quota limit, they started the first garment industry in Bangladesh. After that, garment manufacturing and trading businesses grew quickly.¹⁶ Finally, in 1986, when a quota was introduced for Bangladesh, it was “generous” compared with those for other potential competitors, such as India and Sri Lanka.¹⁷

During the Uruguay Round of trade negotiations, the Agreement on Textiles and Clothing (ATC) aimed to gradually abolish the quota restrictions within ten years (1995–2005) by establishing a duty-free, quota-free trading environment for textiles and garments.¹⁸ When the ATC finally expired on December 31 2004, the RMG sector in Bangladesh faced intense competition from neighboring countries. Yet, with low-cost labour, preferential access in the affluent markets of the EU,¹⁹ and highly qualified entrepreneurs, Bangladesh's RMG sector remained competitive in the global garment

¹³ Carl B Hamilton, ed, *Textiles Trade and the Developing Countries: Eliminating the Multi-Fibre Arrangement in the 1990s* (Washington DC: The World Bank, 1990), online (pdf): documents.worldbank.org/curated/en/794951468739235177/pdf/multi-page.pdf [perma.cc/6YEP-4XFJ].

¹⁴ *Ibid.*

¹⁵ Faisal Ahmed, Anne Greenleaf & Audrey Sacks, “The Paradox of Export Growth in Areas of Weak Governance: The Case of the Ready Made Garment Sector in Bangladesh” (2014) 56 *World Dev* 258, DOI: <doi.org/10.1016/j.worlddev.2013.11.001>; Sarah Labowitz & Dorothee Baumann-Pauly, “Business as Usual is Not an Option: Supply Chains and Sourcing after Rana Plaza” (New York: Centre for Business and Human Rights, New York University Stern School of Business, April, 2014), online (pdf): <stern.nyu.edu/sites/default/files/assets/documents/con_047408.pdf> [perma.cc/S4DY-39BJ].

¹⁶ Labowitz & Baumann-Pauly, *ibid.*

¹⁷ Tetsushi Sonobe & Keijiro Otsuka, *Cluster-Based Industrial Development: A Comparative Study of Asia and Africa* (London: Palgrave Macmillan, 2011) at 174. See also, Dean Spinanger, “Will the Multi-fibre Arrangement Keep Bangladesh Humble?” (1987) 10:1 *World Economy* 75, DOI: <doi.org/10.1111/j.1467-9701.1987.tb00083.x>.

¹⁸ *Agreement on Textiles and Clothing*, 15 April 1994, 1868 UNTS 14 (entered into force 1 January 1995), online (pdf): <wto.org/english/res_e/publications_e/ai17_e/textiles_all.pdf> [perma.cc/4S6D-7FSH].

¹⁹ “Global Forum on Responsible Business Conduct: Summary Report” (2013) at 10, online (pdf): *OECD* <mneguidelines.oecd.org/global-forum/2013GFRBC_SummaryReport.pdf> [perma.cc/9EMF-N4MM].

market. Bangladesh's RMG sector even grew as an important export-earning and job-creating economic sector, accounting for 80 percent of total exports from Bangladesh.²⁰ Starting with a 3.2 percent GDP growth in 1980s, Bangladesh's GDP has steadily grown over the last decade.²¹ With a 4.8 percent share in the global clothing export market,²² the RMG sector in Bangladesh employs 4.4 million people, mostly women, and contributes more than 11 percent to the GDP.²³ Even during the financial crisis of 2008, this growth remained resilient (falling at a 2 percent rate) as Western consumers were inclined toward low-priced garments, which are mainly produced in Bangladesh.²⁴

Despite huge economic and societal growth, wages in Bangladesh remained stagnant until the 1980s and later grew at a very slow rate, mostly due to intense protests from RMG workers.²⁵ Although the wage rate increased in 2006, 2010, 2013, and again in 2018, the average monthly wage of an RMG factory worker is the second lowest in the world.²⁶ Even with these increases, the minimum wage is far below the living wage and is not commensurate with the rate of inflation.²⁷

²⁰ "Bangladesh: Seeking Better Employment Conditions for Better Socioeconomic Outcomes" (2013) at 27, online (pdf): <ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_229105.pdf> [perma.cc/HQ2Z-JZEE] [ILO and ILS Study on Bangladesh].

²¹ *Ibid* at 1.

²² *Ibid*.

²³ *Ibid*; Nazila Fathi, "Safety First: Bangladesh Garment Industry Rebounds" (2019), online: <ifc.org/wps/wcm/connect/news_ext_content/ifc_external_corporate_site/news+and+events/news/insights/bangladesh-garment-industry>; International Labour Organization, "Rana Plaza, Two Years On: Progress Made and Challenges Ahead for Bangladesh RMG Sector" (21 April 2015) at 2, online (pdf): <ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-dhaka/documents/publication/wcms_317816.pdf> [perma.cc/9P7H-WD95] [Rana Plaza, Two Years].

²⁴ ILO and ILS Study on Bangladesh, *supra* note 20 at 1; Lianna Brinded, "Bangladesh Approves 77% Pay Rise for Garment Factory Workers" (1 July 2014), online: <ibtimes.co.uk/bangladesh-garment-industry-rana-plaza-wage-hike-524125> [perma.cc/EH7S-Q5GU].

²⁵ Muhammad, *supra* note 4 at 25 (this article detailed the garment worker's wage structure in 1993, 2006 and 2010; the author summarized the mobilization efforts by RMG workers at 26–27). See generally, Anu Muhammad, "Bangladesh—A Model of Neoliberalism: The Case of Microfinance and NGOs" (2015) 66:10 Monthly Rev 35, DOI: <doi.org/10.14452/MR-066-10-2015-03_3>.

²⁶ Muhammad, *supra* note 4 at 24. For a chart comparing wages in 2013 and 2018, see "Workers' Wages Rise in 6 Grades" (14 January 2019), online: <thedailystar.net/business/bangladesh-garment-workers-salary-structure-be-revised-1686979> [perma.cc/R6D2-S2WF].

²⁷ Fair Labor Association, "Wages Along the Supply Chain: Trends, Progress and Looking Ahead" (2011) at 7, online (pdf): <fairlabor.org/sites/default/files/wageforumreport_final.pdf> [perma.cc/5SE5-MHA3]; Remi Edwards, Tom Hunt & Genevieve LeBaron, "Corporate Commitments to Living Wages in the Garment Industry" (May 2019) at 9, online (pdf): *Sheffield Political Economy Research Institute* <speri.dept.shef.ac.uk/wp-content/uploads/2019/05/Corporate-Commitments-to-Living-Wages-in-the-Garment-Industry-SPERI-report.pdf> [perma.cc/VZ3M-JEFT].

Working conditions in Bangladesh “have been among the worst in the global garment industry.”²⁸ Labour issues, such as wages, working conditions, and the health and safety of workers, remain marginalized political issues. RMG factory owners constitute a powerful political lobby, both as parliamentarians and through their financial contributions to major political parties. According to one estimate, 10 percent of Bangladeshi legislators directly own garment industries or have financial interests in the RMG industry.²⁹ Other legislators maintain close financial ties with RMG manufacturers and traders. This factory owner–legislator nexus influences not only the distribution of rents from this sector, but also the monitoring of labour conditions.³⁰ The garment factory owners’ superior political power became blatantly apparent from the memorandum of understanding (MOU) reached between the Accord and the Bangladesh Garment Manufacturers and Exporters Association (BGMEA).³¹ After the Accord’s initial five-year term expired, the Supreme Court of Bangladesh accepted the MOU and allowed the Accord 13 more months to operate its Bangladesh office. It is alleged that under the MOU, the Accord would have a BGMEA unit at its office during the transition period and would lose its independent power to inspect and report on factory safety. The Accord would also need the BGMEA’s prior approval both to finalize safety requirements for newly inspected factories and to terminate any factory for inadequate safety remediation. The MOU also required the Accord to accept the inspections conducted by the

²⁸ ILO and ILS Study on Bangladesh, *supra* note 20 at 1.

²⁹ Jim Yardley, “Garment Trade Wields Power in Bangladesh” (24 July 2013), online: <nytimes.com/2013/07/25/world/asia/garment-trade-wields-power-in-bangladesh.html> [perma.cc/H667-39C5]; “Rags in the Ruins: A Tragedy Shows the Need for a Radical Improvement of Building Standards” (4 May 2013), online: <economist.com/news/asia/21577124-tragedy-shows-need-radical-improvement-building-standards-rags-ruins> [perma.cc/T6EL-B689]. For a report on how poverty wages trapped garment workers into a “cycle of poverty” and denied them a decent living, see S Nayeem Emran, Joy Kyriacou & Sarah Rogan, “Made in Poverty: The True Price of Fashion” (February 2019), online (pdf): *Oxfam Australia* <whatshemakes.oxfam.org.au/wp-content/uploads/2019/02/Made-in-Poverty-the-True-Price-of-Fashion.-Oxfam-Australia..pdf> [perma.cc/E5QK-5UAR]. Although the Oxfam report collected data from the workers employed by suppliers to major Australian brands, a similar grim picture prevails in most factories; see Naimul Haq, “Bangladesh’s Garment Industry Boom Leaving Workers Behind” (9 February 2018), online: *Inter Press Service News Agency* <ipsnews.net/2018/02/bangladeshs-garment-industry-boom-leaving-workers-behind> [perma.cc/J88H-VEU6].

³⁰ Labowitz & Baumann-Pauly, *supra* note 15 at 31–32; Dorotheé Baumann-Pauly, Sarah Labowitz & Nayantara Banerjee, “Closing Governance Gaps in Bangladesh’s Garment Industry—The Power and Limitations of Private Governance Schemes” (23 March 2015) at 4–5, online (pdf): <papers.ssrn.com/sol3/papers.cfm?abstract_id=2577535> [perma.cc/4UZZ-EU6V].

³¹ Clean Clothes Campaign, International Labor Rights Forum, Maquila Solidarity Network, and Worker Rights Consortium, “The Bangladesh Accord Continues to Operate But Its Independence May Be at Risk” (13 June 2019), online (pdf): *International Labor Rights Forum* <laborrights.org/sites/default/files/docs/Accord_witness_signatory_statement_20190613.pdf> [perma.cc/26PW-SJNP].

government's regulatory agencies, which have "demonstrated neither technical rigor nor administrative competence."³² Moreover, during the transition period, brands, unions, and the BGMEA would collaborate to establish a national safety monitoring system called the "RMG Sustainability Council."³³ It became questionable how effective, transparent, independent, and reliable the Council would be, as it would have representatives from brands, the BGMEA, and global and national trade unions.³⁴ When the Accord ended its extended term, the monitoring tasks were handed over to the RMG Sustainability Council.³⁵

In order to understand the persistent marginalization of labour as a political force, it is necessary to go back to the neo-liberal influences that shaped Bangladesh's trade-based economic growth policy. Since its independence in 1971, Bangladesh has followed the import-substitution policy by emphasizing domestic production and lessening dependence on foreign imports and maintained a protected trading regime. However, toward the end of the 1980s, facing serious macroeconomic imbalances and stagnating exports, Bangladesh adopted the structural adjustment policies prescribed by international financial institutions (IFIs).³⁶ Although the closure of large state-owned enterprises started during the first five years of Bangladesh's independence, acceptance of the IFIs' prescriptions toward the end of the 1980s expedited de-industrialization and introduced a wider range of policy reforms in trade and monetary and fiscal areas. The increase of privatization, promotion of foreign direct investment, and the weakening of existing trade unions became the main features of necessary institutional reforms.³⁷ At the national level, the gradual "co-option of labour leaders into the ruling elite," union leaders' rampant corruption, and the political abuse of union leaders and labour activists weakened the trade unions' credibility and union leaders' connection with general workers.³⁸ Eventually, these fractionalized, politicized unions were neither organizing for improved working conditions nor receiving any governmental attention.

These neo-liberal institutional reforms continued even after the military rule ended in 1990. Since then, two major political parties in Bangladesh have continued to

³² *Ibid.*

³³ "Questions Raised after Agreement Reached on Bangladesh Accord" (21 May 2019), online: <cleanclothes.org/news/2019/questions-raised-after-agreement-reached-on-bangladesh-accord> [perma.cc/8HMD-5ZXN].

³⁴ *Ibid.*

³⁵ Ovi, *supra* note 6.

³⁶ Selim Raihan & Bazlul Haque Khondker, "A Review of the Evolution of Trade Policies in Bangladesh" in International Labour Organization, *Bangladesh Country Report: Trade and Employment* (Dhaka: ILO, 2013) 1 at 1, online (pdf): <ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-dhaka/documents/publication/wcms_218028.pdf> [perma.cc/6LNS-8CE5].

³⁷ Muhammad, *supra* note 4 at 23.

³⁸ *Ibid.*

emphasize privatization and export-led economic growth. Neither offers any substantial pro-labour agenda. As a consequence, the labour ministry is under-funded and labour issues receive minimal government attention.³⁹ The government's lack of interest in effective labour regulation is reflected in the imbalanced ratio of labour inspectors to the number of factories and workers. Until the collapse of Rana Plaza, there were only 18 inspectors and sub-inspectors for approximately 100,000 factories, and this included the garment factories in Dhaka.⁴⁰ The inspectors are poorly paid and lack the tools and technical skills necessary to monitor multifaceted production systems.⁴¹ In 2013, after the collapse of Rana Plaza, the Bangladesh government's "National Tripartite Plan of Action for Fire Safety in the RMG Sector" announced plans to gradually increase the number of labour inspectors to 800.⁴² Of course, shortages in staffing and resources for labour regulation are not unique to Bangladesh. In many developing countries, these regulatory vacuums in labour regulation perpetuate through states' insufficient "power or will to enforce domestic labor laws, even if those laws are on their face compliant with international standards."⁴³

Despite such regulatory vacuums, Bangladesh has ratified 33 ILO conventions, including seven fundamental conventions of the ILO.⁴⁴ In Bangladesh, the *Labour Act* (2006) and the *Industrial Relations Ordinance* (1969) govern labour matters.⁴⁵ Labour law reform from July 2013 prescribes impressive health and safety-related improvements in the workplace and provides for compensation for work-related deaths and occupational diseases.⁴⁶ The reform also permits the formation of unions at the factory level and discards the earlier requirement that factory owners grant permission for workers to form

³⁹ Ahmed, Greenleaf & Sacks, *supra* note 15 at 268.

⁴⁰ Arun Devnath & Mehul Srivastava, "Bangladesh Factory Collapse: A Harrowing Survivor's Story" (26 April 2013), online: http://thestar.com/news/world/2013/04/26/bangladesh_factory_collapse_a_harrowing_survivors_story.html.

⁴¹ For more information see Department of Labour, Ministry of Labour and Employment, online: <http://mole.gov.bd>.

⁴² "The Rana Plaza Building Collapse ... 100 Days On" (5 August 2013), online: http://ilo.org/global/about-the-ilo/newsroom/news/WCMS_218693/lang-en/index.htm [perma.cc/28TK-3ZK5] [100 Days].

⁴³ Kevin Kolben, "Transnational Labor Regulation and the Limits of Governance" (2011) 12:2 *Theoretical Inquiries in Law* 403 at 427, DOI: doi.org/10.2202/1565-3404.1274.

⁴⁴ Hasina Begum, "An Overview of the Labour Market in Bangladesh" in International Labour Organization, *Bangladesh Country Report: Trade and Employment* (Dhaka: ILO, 2013) 36 at 49, online (pdf): http://ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-dhaka/documents/publication/wcms_218028.pdf [perma.cc/S2LE-SXZX].

⁴⁵ *Ibid* at 48.

⁴⁶ ILO, News Release, "ILO Statement on Reform of Bangladesh Labour Law" (22 July 2013), online: http://ilo.org/global/about-the-ilo/newsroom/statements-and-speeches/WCMS_218067/lang-en/index.htm [perma.cc/H89C-Q6UM].

trade unions.⁴⁷ Yet, there is a large gap between the national and international rules and standards and their enforcement.

A joint study by the ILO and the International Institute of Labour Studies (IILS) in 2013 explains that implementing fundamental principles and rights at work remains “challenging.”⁴⁸ For example, the labour law reform in 2013 does not extend freedom of association and collective bargaining rights to workers in export processing zones. In order to register factory-level unions, the law requires that unions have the support of only 30 percent of the company’s total workers (not the support of 30 percent of the workers from each factory) and that union leaders be from among the company’s permanent workers.⁴⁹ A recent audit found that only 5 percent of factories have registered unions.⁵⁰ Because the government has broad authority to verify compliance with burdensome registration procedures, including a detailed investigation of union leaders’ employment status, it has rejected a large number of union registration applications.⁵¹ It has also been alleged that factory owners and managers have blacklisted union leaders or organizers with the threat of job loss, and have also intimidated general workers not to join the union. This has effectively prevented the formation and registration of factory-level unions.⁵² A more recent report alleges that when general labourers tried to organize, a company that supplies reputed brands such as H&M, C&A, and Benetton responded with a mass dismissal of 701 workers and claimed that the “lawful” dismissals were made due to shortages of international orders.⁵³

The challenges to implement national labour laws and international standards are numerous, and some of these implementation challenges can be traced back to factory owner–legislator ties. Despite impressive legal reforms, in December 2018, when garment workers organized peaceful protests against the low minimum wage, government

⁴⁷ *Ibid.*

⁴⁸ ILO and IILS Study on Bangladesh, *supra* note 20 at 29.

⁴⁹ “Halfhearted Labor Reform in Bangladesh,” Editorial, *The New York Times* (17 July 2013), online: <nytimes.com/2013/07/18/opinion/halfhearted-labor-reform-in-bangladesh.html> [perma.cc/28LT-243H].

⁵⁰ “Bangladesh Country Study 2018,” *supra* note 2 at 27–29.

⁵¹ *Ibid.*

⁵² “Bangladesh: Protect Garment Workers’ Rights” (6 February 2014), online: <hrw.org/news/2014/02/06/bangladesh-protect-garment-workers-rights> [perma.cc/2QF6-J44Z]; “Bangladesh: Garment Workers’ Union Rights Bleak” (21 April 2016), online: <hrw.org/news/2016/04/21/bangladesh-garment-workers-union-rights-bleak> [perma.cc/JPV9-5XYD].

⁵³ See “Bangladesh: Union alleges 700+ garment workers dismissed from factory producing for C&A, H&M & Benetton were targeted for union activities; Incl. co. responses,” online: *Business & Human Rights Resource Centre* <business-humanrights.org/en/bangladesh-unions-allege-700-garment-workers-dismissed-from-factory-producing-for-ca-hm-benetton-were-targeted-for-union-activities-incl-co-responses> [perma.cc/9BPJ-WQCL].

security forces and suppliers to reputed Western brands and retailers retaliated brutally.⁵⁴ Although the government ultimately announced a revised wage structure in December 2018, reports on indiscriminate use of force, widespread arrests, criminal charges, systematic blacklisting of workers who helped to organize or participated in the protests, and *en masse* firings depict why workers' political empowerment is an absolute necessity for challenging the status quo.⁵⁵

II. DISTINCTIVE FEATURES OF TRANSNATIONAL SAFETY INITIATIVES

Every day, reports on factory accidents and life-threatening work conditions in Bangladesh expose the extreme vulnerability of economic growth that ignores social and distributive justice.⁵⁶ Despite the nation's rapid economic growth, earning levels and work conditions have not improved. At the national level, factories producing low-priced garments have remained competitive by offering low wages, poor working conditions, and negative social protections. At the global level, the upper-end of RMG distribution centres, situated mostly in the global North, excel at increasing sales and quick turnover of the latest fashions, using their superior technological capacity. Profits are concentrated for design and retail operations. At the lowest end, most production factories in developing countries remain at the mercy of sourcing brands and retailers for fluctuating orders. They must sell at a competitive price and thus rely on an abundant and low-cost labour force that struggles to meet the unrealistic supply deadline in unsafe and substandard workplaces.⁵⁷ After the collapse of Rana Plaza, the ILO's RMG Programme, the Alliance, and the Accord attempted to improve workers' safety and workplaces in the Bangladesh RMG sector. Despite being critical of the government's failure to regulate and inspect factories,⁵⁸ these TSIs involved multiple actors at diverse levels of

⁵⁴ "Banning Hope: Bangladesh Garment Workers Seeking a Dollar an Hour Face Mass Firings, Violence, and False Arrests" (April 2019) at 3, 8–13, online (pdf): <workersrights.org/wp-content/uploads/2019/04/Crackdown-on-Bangladesh.pdf> [perma.cc/2CK6-7N5Y] [Banning Hope]; Human Rights Watch, "Bangladesh: Investigate Dismissals of Protesting Workers" (5 March 2019), online: <hrw.org/news/2019/03/05/bangladesh-investigate-dismissals-protesting-workers> [perma.cc/2Y4R-TM8W] [HRW Report].

⁵⁵ *Ibid.*

⁵⁶ Before the collapse of Rana Plaza, a fire at Tazreen Fashions, another garment factory in Dhaka, caused the deaths of approximately 112 factory workers who were trapped in a locked premise when the fire started: see Julfikar Ali Manik & Jim Yardley, "Bangladesh Finds Gross Negligence in Factory Fire" (17 December 2012), online: <nytimes.com/2012/12/18/world/asia/bangladesh-factory-fire-caused-by-gross-negligence.html> [perma.cc/8Y7G-Z9ED].

⁵⁷ For a discussion on infrastructural problems in the garment sector, see Labowitz & Baumann-Pauly, *supra* note 15 at 9–11, 42–44.

⁵⁸ Apparently, the government's regulatory and inspection failures have caused these easily preventable accidents; see ILO and ILS Study on Bangladesh, *supra* note 20 at 2.

governance, promoted cross-border mechanisms for addressing the safety problems of labour engaged in an important economic sector, and prescribed innovative means to sustain the sector's growth. By emphasizing institution-building through financial, technical, and advisory assistance,⁵⁹ increasing factory monitoring capacity, making participating companies responsible for funding the operational costs of safety inspections, and sourcing from compliant producers,⁶⁰ a model of complex but promising partnership emerged at the transnational level. By innovatively connecting the labourers' safety with the RMG sector's sustainability and continued economic growth,⁶¹ the TSIs created an important searching ground for effective labour governance. Six distinctive approaches are noteworthy.⁶²

First, the TSIs allocated greater participatory space to non-state actors and allowed them to organize a distinct form of strategic response to deal with an urgent labour regulatory issue. Non-state actors were directly involved in drafting an elaborate and effective safety mechanism (the Accord), safety standards were higher than national standards (the Accord and the Alliance), and effective funding mechanisms were designed to realistically enforce safety inspections and safety trainings (the Accord and the Alliance). Uniquely, the Accord was signed by global and local unions and specifically involved non-state actors both in safety monitoring and in its dispute resolution process.⁶³ Some non-state actors actively worked to format and implement the Rana Plaza Coordination Committee, a joint collaborative effort involving the ILO, the labour ministry, the RMG manufacturers and exporters association, trade unions, brands,

⁵⁹ *Supra* note 3; the Accord, *supra* note 5, §§ 21–25; “Members Agreement of the Alliance for Bangladesh Workers Safety, Inc” (2013), §§ 2.2, 9.1, 9.2, 9.3, 10.6, online (pdf): <bangladeshworkersafety.org/files/Alliance-Member-Agreement-FINAL.pdf> [perma.cc/37AA-D2MA] [Alliance Member Agreement].

⁶⁰ The Accord, *supra* note 5, §§ 21–25.

⁶¹ After the collapse of Rana Plaza, the ILO initiated Better Work Bangladesh. See generally online: <betterwork.org/where-we-work/bangladesh> [BWB]; “Major ILO Programme Aims to Make Bangladesh Garment Industry Safer” (22 October 2013), online: <[ilo.org/dhaka/Informationresources/Publicinformation/Pressreleases/WCMS_226720/lang--en/index.htm](http://ilo.org/dhaka/Informationresources/Publicinformation/Pressreleases/WCMS_226720/lang-en/index.htm)> [perma.cc/DZ45-UMF4].

⁶² See Zobaida Khan, *Trade, Labour and Sustainable Development: An Integrated Perspective* (DCL Dissertation, McGill University, 2017) [unpublished], for a discussion on the forms of these TSIs.

⁶³ Clean Clothes Campaign & Maquila Solidarity Network, “The History behind the Bangladesh Fire and Safety Accord” (8 July 2013), online: <digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=2844&context=globaldocs> [perma.cc/3V6E-V2NN]. See also Julianne Reinecke & Jimmy Donaghey, “After Rana Plaza: Building Coalitional Power for Labour Rights between Unions and (Consumption-Based) Social Movement Organisations” (2015) 22:5 *Organization* 720, DOI: <doi.org/10.1177/1350508415585028>.

and retailers.⁶⁴ These actors persuaded brands that were not participating in the compensation fund and eventually met the target fund of US\$30 million for financial and medical support to the Rana Plaza survivors and/or their families.⁶⁵ It is encouraging to note that international standards were followed in calculating and disbursing necessary funds.

Second, both corporate initiatives (i.e., the Accord and the Alliance) developed elaborate structures for safety mechanisms and provided necessary financing and monitoring of participating brand or retailers' commitments. It is true that these initiatives focused only on the safety of workers formally engaged by the direct suppliers producing for signatory brands or retailers. Yet, these initiatives created a model for transnational governance that brings labour regulatory issues to the centre of sustainable economic development and can be replicated in the future.

Third, though political campaigns remain an important part of strategies to pressure companies to implement transnational norms, the Accord crafted an important space for legal strategies. The Accord reserved space for distinctive legal strategies to implement transnational safety norms, such as long-term sourcing and ethical pricing policies, independent factory inspections, and public reporting of inspection results. Although the Accord mandated independent monitoring, public disclosure of both inspection results, and detailed information on the progress of factory remediation, the Alliance offered controlled monitoring and selective reporting on safety remediation with no option for public scrutiny.⁶⁶

The Accord's legal enforcement obligations constituted an innovative solution, especially compared with previous efforts to establish corporate responsibility.⁶⁷ For example, the dispute resolution clause is equivalent to a standard dispute resolution clause in commercial agreements. However, the importance of the clause lies not in its form or content, but in its very inclusion within a legally binding agreement that aims to protect labour safety. At the very minimum, its inclusion strengthens the bargaining strategies of transnational actors aiming to improve labour rights and entitlements. Also, the arbitration disputes that had been brought under the Accord's dispute resolution clause

⁶⁴ "The Arrangement," online: *The Rana Plaza Arrangement* <ranaplaza-arrangement.org> [perma.cc/Q2YE-5RYD].

⁶⁵ *Ibid.*

⁶⁶ "Alliance for Bangladesh Worker Safety Overstates Progress While Workers' Lives Remain at Risk" (21 November 2016), online: <cleanclothes.org/news/2016/11/21/alliance-for-bangladesh-worker-safety-overstates-progress-while-workers-lives-remain-at-risk> [perma.cc/5PLA-RDYN].

⁶⁷ The Accord, *supra* note 5, § 5.

signified the emergence of a binding regulatory model in transnational labour governance.⁶⁸

Fourth, without tying attention to labour governance with increased market access, the ILO independently developed a holistic program that links improved labour regulations with the RMG sector's sustainable development. Involvement in the ILO's RMG Programme will certainly enhance the export potential of participating factories. However, workers not engaged by brand name suppliers or retailers (i.e., those not producing for major export markets) are also covered under the scheme.⁶⁹ The ILO's RMG Programme thus innovatively created the space needed to address labour problems of non-exporting and semi-formal factories and assist their entry into the formal market.

Also, there is an important difference between the ILO's Better Work Bangladesh (BWB) program⁷⁰ and the ILO's Better Work Cambodia program. The ILO's BWB program seeks to address multiple labour issues (e.g., working conditions, industrial practices, social dialogues, and so on). It does not use compliance with these as a prerequisite for preferential market access under bilateral or regional trade agreements or increased participation in the supply chains of reputed brands and retailers; rather, the BWB program innovatively embeds the objective of social progress and gender equality with the continued sustainability of the entire RMG sector.⁷¹ More recently, as part of its holistic program, the ILO and a global apparel brand, GAP, launched a three-year "ILO Bangladesh Social Dialogue Project" that aims to strengthen social dialogue and industrial relations in GAP's sourcing factories.⁷²

For the Better Work program in Cambodia, the ILO's monitoring and reporting function ensures that non-compliant garment factories eventually lose their export-

⁶⁸ See Richard Croucher et al, "Legal Sanction, International Organisations and the Bangladesh Accord" (2019) 48:4 Industrial LJ 549, DOI: <doi.org/10.1093/indlaw/dwz003>. The authors describe how the Accord transformed into a successful, replicable model for labour governance with its legally binding nature, transparent inspections, and involvement with global unions and the ILO. The authors elaborated how two arbitrations brought under the provisions of the Accord were initiated and resolved in a "pro-labour" manner.

For a strong critique that questions the enforceable and inclusive nature of the Accord, see Jaakko Salminen, "The Accord on Fire and Building Safety in Bangladesh: A New Paradigm for Limiting Buyers' Liability in Global Supply Chains?" (2018) 66:2 Am J Comp L 411, DOI: <doi.org/10.1093/ajcl/avy030>.

⁶⁹ 100 Days, *supra* note 42.

⁷⁰ BWB, *supra* note 61.

⁷¹ *Ibid.*

⁷² "ILO, Gap Launch Project to Improve Bangla RMG Sector Ties" (22 July 2019), online: <fibre2fashion.com/news/apparel-news/ilo-gap-launch-project-to-improve-bangla-rmg-sector-ties-250833-newsdetails.htm> [perma.cc/LJD2-MWMR].

oriented business.⁷³ In contrast, the ILO's BWB program does not require participation in the program as a condition for market access. Rather, BWB aims to build a competitive garment industry that "provides decent jobs to workers, good business for factories and brands, and economic development for the country."⁷⁴ By involving diverse stakeholders, BWB offers multidimensional services: advisory services include advising national government on aligning national labour law with international standards; capacity building services include organizing training for labour productivity increase, effective labour-management dialogue, empowering women workers, and increased factory inspection; and finally assessment services include encouraging factory-level compliance with international labour standards on working conditions.⁷⁵

Fifth, the Accord and the Alliance distinctively clarified that companies should not simply claim that they are complying with low national standards.⁷⁶ Both initiatives harmonized safety standards, required uniform application of these safety measures, and prescribed a timeline within which the inspection procedures will end.⁷⁷ The prescribed safety standards were higher than national standards and signatory retailers committed to fund the necessary operational costs.⁷⁸ Thus, instead of waiting for changes in national building or safety standards, these initiatives indicated that compliance with national laws and standards provides the "regulatory floor"⁷⁹ on top of which corporate codes must build and improve.

Sixth, the ILO's BWB program focused on building effective industrial relations through its advisory, capacity-building, and safety assessment services. Improved industrial relations not only monitor compliance with national or international labour laws and standards, but also ensure the long-term development of effective labour institutions. Effective labour regulatory institutions and industrial relations address labour issues

⁷³ Sandra Polaski, "Harnessing Global Forces to Create Decent Work in Cambodia" (2009) at 8–10, online (pdf): <ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_193763.pdf> [perma.cc/C6XM-TDFE].

⁷⁴ "Better Work Bangladesh: Our Programme," online: <betterwork.org/where-we-work/bangladesh/bwb-our-programme> [perma.cc/74FB-YLD5].

⁷⁵ *Ibid.*

⁷⁶ Labowitz & Baumann-Pauly, *supra* note 15 at 38; Steven Greenhouse, "Major Retailers Agree to Inspection Standards in Bangladesh" (21 November 2013), online: <nytimes.com/2013/11/21/business/international/major-retailers-agree-to-inspection-standards-in-bangladesh.html> [perma.cc/T8PD-DQYW]. See also Standards & Inspections, Alliance for Bangladesh Worker Safety, online: <bangladeshworkersafety.org/what-we-do/standards-inspections> [perma.cc/2UZJ-MB52].

⁷⁷ Labowitz & Baumann-Pauly, *supra* note 15 at 38.

⁷⁸ *Ibid* at 56.

⁷⁹ See César A Rodríguez-Garavito, "Global Governance and Labor Rights: Codes of Conduct and Anti-Sweatshop Struggles in Global Apparel Factories in Mexico and Guatemala" (2005) 33 *Politics & Society* 203 at 211, DOI: <doi.org/10.1177/0032329205275191>.

irrespective of producing firms' participation in the export market and distribute societal opportunities that arise from market expansion. This perspective of labour development is much wider than market-based labour governance, which promotes effective labour governance only at the exporting firm level.

With their sector-specific setting, context-sensitive analysis of labour concerns, and capacity to strengthen or improve domestic labour standards and regulatory capacity, these transnational safety initiatives attempted to provide important market-complementary interventions such as redressing the negative externalities of market or inabilities of national government.

III. A PROPOSAL FOR A TRANSFORMATIVE GOVERNANCE MODEL

In this section I argue that despite possessing distinctive features, the Accord and the Alliance did not substantially contest the existing restrictive approaches to labour governance. Borrowing from Amartya Sen, I identify that a purposive inquiry—that is, an inquiry that connects labourers' capability enhancement (objective) with the institutional framework (form) of governance—would produce a more compelling and effective labour governance model. Based on the purposive inquiry, this paper argues that Sen's capability enhancement objective⁸⁰ helps to connect related labour regulatory issues in a more holistic manner, challenge the restrictive approaches to governance, and, finally, substantially widen the existing understandings of labour, labour rights, and transnational corporate responsibility.

Labourers' Capability Enhancement as an Essential Organizing Principle of Labour Governance

Increasingly, law's role in protecting labour rights is at the centre of scholarly debates. Various interrelated areas of law (i.e., social or distributive justice, corporate social responsibility, labour law, and fair trade) are analyzed to search for ways to develop an effective and strategic response to confront the expansive nature of a globalized production and distribution system that links brands and retailers in the North with low-skill labourers in the South.⁸¹ An important question in this regard is how to deal with the challenges of globalization that affect labourers' wellbeing, capabilities, and dignity and create competitive pressures on working conditions. While improvement of national regulatory capacity and global institutional reforms are necessary, having regard to the globalized nature of production, this paper discusses why and how one ought to design an effective transnational labour governance model that addresses these complex

⁸⁰ Sen, *Development*, *supra* note 8 at 4, 72–75, 86, 112–45, 288.

⁸¹ Blackett, *supra* note 9; Rittich, *supra* note 11; Trubek & Santos, *supra* note 11; Khan, *supra* note 7.

challenges. The objective is to offer some alternative thoughts on the development of law and policy, the role of corporate actors, and linkage between economic growth and appropriate labour standards.

What happens when capability enhancement of labourers is the purpose or organizing principle of labour governance? In the remainder of this paper, I argue that capability enhancement helps in designing an effective transnational governance model by emphasizing broader conceptualizations of labour and labour rights, and deeper connection between different types of labour rights, and by requiring an effective institutional framework (e.g., transnational corporate responsibility) for its implementation. I elaborate on some crucial aspects of the capability approach and discuss how it modifies the prevalent concepts of labour, labour rights, and corporate responsibility.

Sen describes the capability approach in his several publications.⁸² Borrowing from his ideas, I describe how effective labour governance is intimately connected with the demands of capability enhancement. Focusing on human wellbeing and quality of life (rather than income or commodities),⁸³ the capability approach emphasizes the mutually reinforcing connection between human capability, effective market mechanisms, and labour governance. Although economic development and liberalized market are useful mechanisms to enhance human freedom and capability, these are not the only means for capability enhancement. Rather, an integrated perspective is taken to evaluate and assess related social, political, and economic institutions and arrangements.⁸⁴ A market is valued for the “results it ultimately generates” for society and not just for its efficiency or utility.⁸⁵ Thus, with a holistic perspective, capability requires that it is important to consider the conditions of labourers who, as an essential factor of production, manifest diverse distributional problems.

Sen’s capability approach also challenges the processes and institutions that contribute to human unfreedom or incapability. For example, comparing the “utilities” of slave labour with absence of freedom, Sen reminds us of the importance of freedom and

⁸² See Sen, *Development*, *supra* note 8 at 4, 72–75, 86, 112–45, 288; Amartya Sen, *The Idea of Justice* (Cambridge: The Belknap Press of Harvard University Press, 2009) at 231–38, 244–47 [Sen, *Idea of Justice*].

⁸³ Sen, *Idea of Justice*, *ibid* at 231–34, 244–47.

⁸⁴ Sen, *Development*, *supra* note 8 at xii, 142. See also Dani Rodrik, “The Past, Present, and Future of Economic Growth” (2014) 57:3 *Challenge* 5, DOI: <doi.org/10.2753/0577-5132570301>. Though not relying on the capability approach, Rodrik emphasizes that the success of future growth strategies lies in developing complementary growth strategy and social policies. Rodrik states that to establish a healthy world economy it is more important to focus on the correct mix of all the necessary policies and institutions, rather than to “shoehorn countries” into “ill-fitting rules” at 37.

⁸⁵ Sen, *Development*, *supra* note 8 at 112.

capability on aspects that might cause “loss of freedom” or incapability.⁸⁶ It is the denial of freedom or capability that explains the prevalence of child labour, labour bondage, poor work conditions, and lack of entitlements.⁸⁷ Capability thus entails a broadened understanding of the rights, dignity, and entitlements of labour and requires societal and institutional obligations to ensure fulfillment of these.⁸⁸ As a result, capability requires not only fundamental labour rights, such as freedom of employment and the abolition of child and forced labour, but also a broader version of “political and social liberties,” such as the right to participate in labour regulation and express voice against exploitative work conditions.⁸⁹

Capability also provokes a wider concept of labour governance. Although not referring to capability enhancement, Sen discusses the ILO’s vision of decent work and argues why a comprehensive approach to dealing with labour and the conditions of work is superior to other restrictive approaches that focus only on labour legislation.⁹⁰ A comprehensive approach covers distinct classes of workers (formal and informal workers, workers engaged in exporting sectors, and those who are not) and addresses a wider range of rights.⁹¹ Sen finds that with necessary political and social arrangements, both employment conditions and unemployment can be dealt with so that one is not “traded-off” to address the other, and the notion of decent work “situates the conditions of work and employment within a broad economic, political and social framework.”⁹² As an example of the deeper connection between labour governance and appropriate political and social arrangements, Sen directly connects the vulnerabilities in working conditions with labourers’ lack of democratic participation and influence in policy-making and regulatory frameworks.⁹³ This means that improving working conditions depends on the labourers’ capacity to influence policy-making and regulatory frameworks, and to engage in social dialogue that enables them to communicate their concerns.

⁸⁶ *Ibid* at 113.

⁸⁷ *Ibid*.

⁸⁸ Sen, *Idea of Justice*, *supra* note 82 at X. See also John M Alexander, *Capabilities and Social Justice: The Political Philosophy of Amartya Sen and Martha Nussbaum* (Aldershot, England: Ashgate Publishing, 2008) 53.

⁸⁹ Amartya Sen, “Work and Rights” (2000) 139:2 Intl Labour Rev 119 at 125–27 [Sen, *Work and Rights*]; Sen, *Development*, *supra* note 8 at 112–45.

⁹⁰ Sen, *Work and Rights*, *supra* note 89 at 120.

⁹¹ *Ibid*.

⁹² *Ibid* at 125.

⁹³ *Ibid*.

Critics argue that Sen's capability approach only accommodates "substantive freedoms" and, thus, cannot address the "process aspect of freedom."⁹⁴ According to Professor Judy Fudge, the capability framework has an individualistic approach that "tells us little or nothing about the fairness or equity of the processes involved or about the freedom of citizens to invoke and utilize procedures that are equitable."⁹⁵ She continues, "Sen's account does not tell us much about either the distribution of power in a society, or the type of deliberative mechanisms needed to determine the set of human functionings that a society values."⁹⁶

In my opinion, however, it is not possible to confine capability enhancement within individual aspirations and opportunities. It is necessary to connect these aspirations and opportunities with surrounding economic and social conditions and institutions and consequent power relationships. For example, freedom from forced or child labour (at an individual level) cannot be realized without challenging the socio-political and economic institutions and/or processes that allow the continuation of these unfreedoms. Additionally, the capability to influence decision-making for labour rights through participating in unions, national political processes, or building transnational strategies is inevitably tied to particular socio-political relations and economic realities.

Sen also refutes the idea that capabilities are concentrated in individuals by claiming that a "deep and pervasive ... social influence" frames not only the contents of a person's values, but also the "operation" of the value.⁹⁷ The power of capability enhancement lies in underscoring the importance of substantive freedoms that allow an individual (e.g., a labourer) to pursue multiple objectives, such as "freedom (of association/from forced labour, discrimination and child labour), well-being (at the work place and through social protection), social change (the political and technical role of trade unions, employers' associations, social dialogue institutions)."⁹⁸ The essential interconnections between individuals, institutions, and society becomes so apparent in realizing and continuing the process of capability enhancement and in challenging the existing notions of development that these negate the possibility of an individualistic approach.

⁹⁴ Judy Fudge, "The Cartography of Transnational Labour Law: Protection, Scale and Symbolism" in Adelle Blackett & Christian Levesque, eds, *Social Regionalism in the Global Economy* (New York: Routledge, 2010) 299 at 309.

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

⁹⁷ Sen, *Idea of Justice*, *supra* note 82 at 244–47.

⁹⁸ Anne Trebilcock, "Using Development Approaches to Address the Challenge of the Informal Economy for Labour Law" in Guy Davidov & Brian Langille, eds, *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work* (Portland, Oregon: International Institute for Labour Studies, 2006) 63 at 63–86.

Sen strongly resists using his capability approach in an all-or-nothing form and clearly acknowledges that the

possibility of using an explicitly freedom-based approach may be relatively limited. Yet even there it is possible to make use of the insights and informational interests involved in a freedom-based approach—without insisting on ignoring other procedures when they can be, within particular contexts, sensibly utilized.⁹⁹

Incorporating a wider range of “informational bases” such as “utilitarianism’s interest in human well-being, libertarianism’s involvement with processes of choice and the freedom to act and Rawlsian theory’s focus on individual liberty and on the resources needed for substantive freedoms,” the capability approach’s focus is not on “achieved functionings,” but on the “freedom and opportunity” to choose a particular kind of life.¹⁰⁰ As a result, Sen’s capability approach accommodates a “broad informational base” (consisting of both choice and opportunity) for evaluating and shaping a particular social or economic policy or system, rather than providing a “specific formula” for using the information or for making policy decisions.¹⁰¹ This wider informational base allows one to question the existing power relationships within and between societies and nations and helps in evaluating whether a particular governance framework or its process allows for the facilitation and enhancement of capability.¹⁰²

Using Sen’s ideas in a context-sensitive manner, I analyze and assess the failures or exclusions of labour governance models of the TSIs, evaluate whether a particular governance model or its process allows for labourers’ capability enhancement, and identify the responsibilities and obligations of related institutions. The remainder of this paper explores these queries by gathering some important insights (i.e., the informational base) to determine how we can design a more compelling and effective model of transnational labour governance. More specifically, I critically analyze the limitations or exclusions of the corporate initiatives, describe the essential features of the proposed model, and conclude how adverse distributional effects of market opening and weakened capacity of labour create a situation in which existing governance models based on voluntary responses or soft rules become questionable or ineffective.

Before elaborating the features of the new framework or model of labour governance, it is necessary to situate capability enhancement as the objective or organizing principle of labour governance and assess how it helps to challenge, modify, or broaden the focus or coverage of existing labour governance models. Sen did not

⁹⁹ Sen, *Development*, *supra* note 8 at 86.

¹⁰⁰ *Ibid* at 85–86.

¹⁰¹ *Ibid*.

¹⁰² Sen, *Idea of Justice*, *supra* note 82 at 231–34.

elaborate on this issue. With a distinct focus on capability, my proposed model requires significant changes in existing labour governance ideas and practices. As a first step, the proposed model endorses some different ideas on labour governance: it prioritizes labour issues while designing trade and economic policies; emphasizes collective rights of labour; and finally recognizes the developmental challenges and realities of developing countries. In two important areas (transnational governance and the stronger role of non-state actors), the proposed model endorses the existing model of the TSIs. I discuss the relevant ideas below.

First, with respect to labour rights, the proposed model acknowledges the unconditional mobility and superior capacity of capital to set the prices and standards of production (either directly or indirectly) and nation states' incapacities or failures to deliver the redistributive functions of labour laws. Relying on capability enhancement, the proposed model finds it more feasible to search for effective labour regulation at a transnational level and specifically seeks to avoid binary solutions, as the latter concentrates on reforms in national and/or international labour/trade regulation.¹⁰³

Second, the capability approach helps in challenging the subordinated role of labour as a factor of production. In a market-based labour governance system, corporate codes and voluntary standards treat labour concerns as equivalent to other production processes such as environmental impacts, and tend to correct poor work conditions if these are cost-effective and would enhance business opportunity and reputation. This restrictive focus is significantly different from the traditional functions of national labour laws, which improved labourers' bargaining capacity and offered necessary protection and dignity to labourers by blending public policy and distributional questions into law-making.¹⁰⁴ Focusing on capability enhancement, the proposed model seeks to elevate the role of labour in trade or economic governance sites and prioritizes social/distributional questions in the design and working of both labour and trade/economic regulatory policies and institutions.¹⁰⁵ It also recognizes the essentiality of the collective rights of

¹⁰³ Bob Hepple, *Labour Laws and Global Trade* (Oxford and Portland, Oregon: Hart Publishing, 2005) at 13–24; David Trubek, Jim Mosher & Jeffrey S Rothstein, "Transnationalism in the Regulation of Labour Relations: International Regimes and Transnational Advocacy Networks" (2000) 25:4 *Law & Soc Inquiry* 1187; Janelle M Diller, "Pluralism and Privatization in Transnational Labour Regulation: Experience of the International Labour Organization" in Adelle Blackett & Anne Trebilcock, eds, *Research Handbook on Transnational Labour Law* (Cheltenham, UK: Edward Elgar Publishing, 2015) 329.

¹⁰⁴ Adelle Blackett, "Codes of Corporate Conduct and the Labour Regulatory State in Developing Countries" in John J Kirton & Michael J Trebilcock, eds, *Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment and Social Governance* (London: Routledge, 2004) 121.

¹⁰⁵ Some scholars identify the need for centrality of distributive justice beyond borders within regional and global economic and trade cooperation mechanisms: Blackett & Levesque, *supra* note 9; Hepple, *supra* note 103 at 266–75; Marion Jansen & Eddy Lee, "Trade and Employment: Challenges for Policy Research" (2007), online (pdf): *Geneva World Trade Organization and International Labour Office* <wto.org/english/res_e/booksp_e/ilo_e.pdf>; César A Rodríguez-Garavito & Boaventura de Sousa

labour. For example, it endorses that labourers' capability enhancement depends on realizing both individual freedoms (freedom from forced labour, right to a living wage) and collective freedoms (freedom of association). These interconnections between individual and collective freedoms not only accommodate a wider variety of labour rights, but also pave the way for broader and more substantial social and political change by challenging the unequal power relationship between capital and labour.

Third, with a capability-enhancement approach, the proposed model requires not only standard-setting and/or independent inspection of labour standards, but also continued attention to build mechanisms that accommodate multiple yet overlapping social or distributional issues in a context-sensitive manner.¹⁰⁶ It acknowledges the changing realities of the developmental process and the challenges faced by developing countries in adopting necessary redistributive mechanisms. It opposes the analyses that there is no correlation between *racing toward the bottom* in respect of labour rights and increasing levels of foreign investment. The "varieties of capitalism" approach establishes a link between fundamental labour rights and economic development by proving that the "institutional advantages" offered by the particular market economy (coordinated or liberal) play a role in shaping the preferences of investors; the investors do not just exclusively focus on the social regulations of the investment-receiving state.¹⁰⁷ It is also argued that "competition did not prevent the main industrialized countries of Europe from adopting the first labor laws."¹⁰⁸

However, while comparing the institutional advantages, the varieties of capitalism approach only focused on major industrial economies. This approach did not consider the developmental challenges and realities faced by developing countries. Moreover, when European countries started their labour-intensive industrialization processes, they benefitted from cheap supplies of raw materials and labour from their colonies. Preferential access to markets in the colonies for products manufactured in metropolitan territories allowed them to "build up embedded liberal policies."¹⁰⁹ Also during this time, open migration to the US actually absorbed European countries' surplus labour. For low-

Santos, *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge, UK: Cambridge University Press, 2005).

¹⁰⁶ Hepple, *supra* note 103 at 19.

¹⁰⁷ Peter A Hall & David W Soskice, *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (Oxford: Oxford University Press, 2001).

¹⁰⁸ International Labour Organization, "Standard Setting and Globalization: Report of the Director-General, 85th Session" (Paper delivered at the International Labour Conference, 85th Session, 10 October 1997).

¹⁰⁹ Adelle Blackett, "Trade Liberalization, Labour Law, and Development: A Contextualization" (2007), International Institute for Labour Studies Discussion Paper Series No 179 at 1, online (pdf): <ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_193514.pdf> [perma.cc/PGT9-HZTS].

income developing countries who aspired toward trade-based economic growth, the situation was entirely different. These countries never had the privilege of building their comparative institutional advantages beyond supplying raw materials and low-cost labour during the period of colonial occupation.¹¹⁰ Additionally, although goods and capital achieved mobility through liberalized trade, this is not the case for the movement of labour. These countries needed to absorb their abundant labourers in their export economy, which is dependent either on commodity export or on low-skill manufacturing processes.¹¹¹ Fluctuations in commodity pricing or the emergence of competitors for low-cost, low-skill manufacturing profoundly affect not only the economies of poor developing countries, but also the lives, security, and livelihoods of millions of workers.

The changing realities under which developing countries pursue their economic development involve not only substantive distributional questions such as minimum labour standards that should apply to trade or economic cooperation arrangements, but also the procedural means of addressing some overlapping distributional concerns, such as channeling benefits toward disadvantaged social groups, narrow regulatory space, and inadequate domestic capacity to address labour problems and fund necessary institutional development.

Fourth, with a capability-enhancing approach, the model emphasizes the formation of effective “transnational advocacy networks” to address labour conditions.¹¹² In the TSIs, non-state actors not only influenced transnational norm-making (setting safety standards above national standards), but also increased the initiatives’ visibility and mobilized pragmatic methods to enforce those norms (especially in the Accord).

¹¹⁰ Ha-Joon Chang, *Kicking Away the Ladder: Development Strategy in Historical Perspective* (New York: Anthem Press, 2003); Joseph E Stiglitz & Andrew Charlton, *Fair Trade For All: How Trade Can Promote Development* (Oxford: Oxford University Press, 2005); Mario Cimoli, Giovanni Dosi & Joseph E Stiglitz, eds, *Industrial Policy of Development: The Political Economy of Capabilities Accumulation* (Oxford: Oxford University Press, 2009).

¹¹¹ Arthur Lewis, *Growth and Fluctuations, 1870–1913* (London: George Allen & Unwin Ltd, 1979). In this seminal work, noted economist Sir Arthur Lewis connected the pattern of trade with labour and migration. During the period of industrialization between 1870–1913, the manufacturing bases in industrialized countries like the US, the UK, Germany, and France were trading with the commodity exporting countries situated in “temperate regions of recent settlement” such as Australia, New Zealand, Canada, and Argentina, and with “tropical regions” consisting of countries that are now the least developed countries, with unlimited supplies of labour. The suppliers in temperate countries enjoyed favourable terms of trade. The differences in wage level between European migrant labour in temperate regions and Indian and Chinese labour in the tropical regions was in the order of 10 to one. Eventually, the unfavourable terms of trade for suppliers and “subsistence” wages for labour in tropical regions affected the process of industrialization and import substitution in those regions.

¹¹² Margaret Keck & Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics*. (Ithaca, NY: Cornell University Press, 1998).

Although the strategies of these actors include both “confronters” and “collaborators,”¹¹³ they still maintain a greater preference for collaborative negotiation with corporate brands/retailers. Ultimately, all their strategies resulted in specific commitments with detailed timelines in order to upgrade safety standards for garment-producing factories in Bangladesh. Similar to the TSIs, my proposed model emphasizes transnational actors’ strong negotiation and monitoring power, their ability to engage corporate brands/retailers situated in different parts of the world, and their capacity to pursue diverse strategies and devise innovative enforcement mechanisms to address country/sector-specific labour concerns.

In summary, the proposed model acknowledges the asymmetrical power relationships within which developing countries have to pursue their development path, seeks to accommodate broader conceptualizations of labour and labour rights, and argues for a stronger form of transnational corporate responsibility. Relying on these ideas on labour governance, I elaborate the particular features of the proposed model. This paper does not describe or endorse a particular form of labour governance mechanism; rather, it identifies some crucial features of effective labour governance at a transnational level. I use each feature to assess the approaches used in the transnational corporate initiatives. As mentioned before, the idea is to provide a broad informational base with which future labour governance mechanisms can be shaped and evaluated.

IV. FEATURES OF THE PROPOSED MODEL

Broader Conceptualization of the Social

Similar to the concept of social regionalism, the inherent relationship between social and economic policy remains the fundamental basis of the proposed model.¹¹⁴ Instead of acknowledging the link between the social and the economic or simply focusing on the social dimensions of trade and economic integration, social regionalism considers social and distributive justice as an inherent and essential part of trade and

¹¹³ César A Rodríguez-Garavito, “Nike’s Law: The Anti-Sweatshop Movement, Transnational Corporations, and the Struggle Over International Labor Rights in the Americas” in Boaventura de Sousa Santos & César A Rodríguez-Garavito, eds, *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge: Cambridge University Press, 2005) 64. For a fascinating discussion on how social movement organizations provided the important “public campaigning” to strengthen unions’ collective bargaining and negotiating powers, see Reinecke & Donaghey, *supra* note 63. Using the Accord as a case study, the authors describe how coordinated research and “coalitional” “interface” among social movements and industrial relations scholars and actors could create consumer awareness, impart reputational burden on non-negotiating companies, engage companies into accepting broader frameworks of responsibility, and ultimately “foster” labour rights in global supply chains.

¹¹⁴ Blackett & Levesque, *supra* note 9.

economic arrangements.¹¹⁵ In relation to labour, the model places a heightened emphasis on increasing labourers' and workers' political and institutional power and endorses not only the fundamental rights that enable workers to adapt with the market realities, but also rights that are redistributive.¹¹⁶ Yet, the specific idea of capability enhancement of labour both as a component and objective of an effective labour governance mechanism remains largely unexplored. Capability provokes broader conceptualizations of both labour and labour rights as the starting point in order to ensure effective labour governance. Instead of confining labour entitlements to some abstract and generalized fundamental labour rights, capability helps to insist on the essential connections between formal and semi-formal labour and between fundamental and redistributive rights.

Despite robust commitments to ensure workers' safety, the corporate initiatives covered only the formal workers engaged in 1,894 factories out of the 5,000 to 6,000 garment factories in Bangladesh.¹¹⁷ Subcontractors to the suppliers, who did not have direct and formal contractual relationships with brands/retailers, were excluded from both initiatives. Such a narrow focus ignores the socio-economic reality of the production process in low-income countries where semi-formal or informal workers constitute a high percentage of the total labour force and indirect sourcing through subcontracting is a regular practice.¹¹⁸

It is true that brands/retailers do not authorize subcontracting, but they deliberately avoid a direct contractual relationship with subcontractors and continue to insist on the lowest possible price without considering its direct or indirect impact on working conditions.¹¹⁹ Using multiple outlets through subcontracting and re-subcontracting, supplier factories manage a large volume of orders with low prices. At

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*

¹¹⁷ Labowitz & Baumann-Pauly, *supra* note 15 at 39. At the time of writing this article, 2,390 factories were covered by both the Accord (1,600 factories) and the Alliance (790 factories). Some corporate brands and retailers joined the initiatives later and brought some additional factories within the coverage of both safety initiatives. For the total number of factories covered by the Alliance and the Accord, see *supra* note 5.

¹¹⁸ Labowitz & Baumann-Pauly, *supra* note 15 at 6, 22.

¹¹⁹ Kevin Kolben, "Transnational Private Labour Regulation, Consumer-Citizenship and the Consumer Imaginary" in Adelle Blackett & Anne Trebilcock, ed, *Research Handbook on Transnational Labour Law* (Cheltenham, UK: Edward Elgar Publishing, 2015) 361; Mark Anner, "Workers' Power in Global Value Chains: Fighting Sweatshop Practices at Russell, Nike and Knights Apparel" in Peter Fairbrother, Marc-Antonin Hennebert & Christian Leveque, eds, *Transnational Trade Unionism: Building Union Power* (London: Routledge, 2013) 23 at 36; Mark Anner & Jakir Hossain, *Multinational Corporations and Economic Inequality in the Global South: Causes, Consequences, and Countermeasures*, vol 9 (Berlin: Global Labour University Conference, 2014); Baumann-Pauly, Labowitz & Banerjee, *supra* note 30 at 12–14.

the lowest end, these indirect sourcing factories compete for fluctuating orders with a slim margin of profit and are the least concerned with workplace and labour conditions.¹²⁰

By contrasting these market-centric approaches and taking the ILO's RMG Programme in Bangladesh as an example, the proposed model prescribes an alternative governance mechanism where labourers' capability enhancement is neither based on their connection to the export market nor confined to addressing selective labour governance issues. The model recognizes that problems of the labour force are diverse and must be viewed beyond the lens of formal industrial relations.¹²¹ Although workplace safety and dangerous work conditions require urgent attention, labour governance initiatives should also be contextualized to encompass diverse labour problems. For example, approximately 80 percent of garment workers in Bangladesh are women.¹²² Yet, both corporate initiatives focused on fire and building safety, and disregarded pay differences, unequal treatment, and even sexual harassment issues that are closely related to workers' physical safety and wellbeing.¹²³ Although some of the factories covered by the Alliance and the Accord had anti-harassment committees and adopted policies against sexual harassment, two Human Rights Watch reports illustrate how workers, especially women, faced sexual abuse or threats when they tried to organize or join factory-level unions.¹²⁴ In this regard, the ILO's BWB program's focus on workers' gender equality could be an interesting learning point for all relevant stakeholders. The ILO's BWB program focuses on four connected aspects of gender equality: improving women labourers' skills and wages; ensuring improved maternity rights for pregnant and breastfeeding labourers; preventing sexual harassment and discrimination at workplaces; and increasing women labourers' representation in factory-level committees.¹²⁵

¹²⁰ Edward Bearnot, "Bangladesh: A Labor Paradox" (2013) 30:3 World Policy J 88, DOI: <doi.org/10.1177/0740277513506386>.

¹²¹ Hepple, *supra* note 103 at 18–19, 63, 271–75.

¹²² "In Bangladesh, Empowering and Employing Women in the Garments Sector" (7 February 2017), online: <worldbank.org/en/news/feature/2017/02/07/in-bangladesh-empowering-and-employing-women-in-the-garments-sector> [perma.cc/6YPS-SR6M]. The participation of women workers in the RMG sector has declined significantly: see Better Work Bangladesh, "Progress Brief" (September 2019) at 4, online (pdf): <betterwork.org/wp-content/uploads/2020/01/Progress-Brief_revised.pdf> [perma.cc/5K6B-PHQR].

¹²³ See generally Nidhi Khosla, "The Ready-Made Garments Industry in Bangladesh: A Means to Reducing Gender-Based Social Exclusion of Women?" (2009) 11:1 J Intl Women's Studies 289.

¹²⁴ *Supra* note 52; see also "Bangladesh Country Study 2018," *supra* note 2 at 24, in which a recent audit found that anti-harassment committees are mostly ineffective as general workers are not aware of their existence, members, or activities.

¹²⁵ For details see Better Work Bangladesh, "Newsletter: Stories From the Supply Chains & Beyond" (2019) at 2, online (pdf): <betterwork.org/wp-content/uploads/2020/01/BWB-Newsletter-Jan-May-2019.pdf> [perma.cc/D3EA-8R24].

It is necessary to realize that a set of connected labour issues—such as low wages, a high level of inflation, long working hours (in gross violation of national and international labour standards, a typical 66- to 70-hour work week can increase up to 80 to 90 hours in peak season),¹²⁶ child labour, forced labour, sexual harassment, unequal pay for women, and the freedom to form effective unions—are the pre-conditions that determine workers’ power or ability to refuse to work in an unsafe place. The potential to identify violations of labour rights and safety would increase with enhanced domestic regulatory capacity and/or independent inspections. However, without realizing the integral connections between fundamental and redistributive rights of labour, the effectiveness of labour governance mechanisms would be judged by the presence of independent monitoring or data on compliance. Achieving better work conditions in a safe place depends on identifying the root causes of poor compliance and remedying them. The following examples further clarify the integral relationship between fundamental and redistributive rights of labour.

First, it is alleged that inspections and audits by corporate retailers may not offer any productive change, as some garment suppliers maintain two different books relating to wages, working hours, work conditions, and indirect sourcing policies.¹²⁷ It is therefore difficult to monitor compliance with the brands/retailers’ suggestions that prohibit unauthorized subcontracting.¹²⁸

Second, the Alliance established a 24-hour helpline called “Amader Kotha,” which allowed workers to express their safety concerns directly to retailers; however, it is reported that 53 percent of the calls received focused on both urgent and non-urgent non-safety related issues, such as compensation, termination, physical abuse, worker unrest, bribery, and corruption.¹²⁹

Third, nowhere is the issue of linkage between fundamental and redistributive rights of labour more apparent than in Cambodia. In the Thirtieth Synthesis Report issued by Better Factories Cambodia, the ILO reports that “child labor, discrimination, and

¹²⁶ Louis Vanegas, “Time to Put Excessive Apparel Work Hours to Bed” (13 November 2016), online: <thedailystar.net/business/time-put-excessive-apparel-work-hours-bed-1313890> [perma.cc/NP2N-HMSA].

¹²⁷ Richard Bilton, “Bangladeshi Factory Workers Locked In on 19-Hour Shift” (23 September 2013), online: <bbc.com/news/business-24195441> [perma.cc/PUG7-2WHG].

¹²⁸ Labowitz & Baumann-Pauly, *supra* note 15 at 29; Dina Mahnaz Siddiqui, *Sexual Harassment of Industrial Workers: Strategies for Intervention in the Workplace and Beyond* (Dhaka, Bangladesh: Centre for Policy Dialogue, 2003).

¹²⁹ Amader Kotha Worker Helpline, “Our Voice,” Special Edition (2018) 5:2 Amader Kotha Newsletter 2, online (pdf): <bangladeshworkersafety.org/files/newsletters/AmaderKotha_Q22018.pdf> [perma.cc/N7EE-C8PY]. After the transition of the Alliance, from July 2019 the helpline has been operated by a local NGO named Phulki: see “Alliance Fifth Annual Report 2018” (11 December 2018), online: <bangladeshworkersafety.org/488-2018-annual-report-press-release;> [perma.cc/99NW-QKVN].

freedom of association violations in Cambodia persisted even after 12 years of auditing.”¹³⁰

Finally, despite labour law reform, the challenge of establishing effective unions at the factory level remains acute in Bangladesh. Although national labour organizations would like to involve labourers in the RMG sector, only a few trade unions are active.¹³¹ Although the amendment of the *Bangladesh Labour Act* in 2013 eased the formation of factory-level unions and prohibited “unfair labour practices” (such as threats, dismissal, or removal from employment because of union activities),¹³² anti-union abusive practices by factory owners and managers are still prevalent. Either workers are threatened if they attempt to join or support a union, or management-chosen worker representatives form management-dominated or management-influenced yellow unions.¹³³ In the absence of real unions, an express or implicit threat of losing one’s job or even one’s life demoralizes a potential union movement. There are widespread allegations of detention, killing, torture of union representatives, and mass firings of general workers who organize to demand better pay or improved working conditions.¹³⁴ At the same time, the absence of a living wage and other redistributive rights helps to corrupt and intimidate union leaders and activists. These illustrations depict not the failure of factory-level independent monitoring systems, but the urgent need to focus on the deeper and integral connections between fundamental and redistributive rights of labour.

Strengthened Forms of Transnational Corporate Responsibility (TCR)

The second important feature of the model is its reliance on a strong form of transnational corporate responsibility (TCR). Professors Kerr, Janda, and Pitts describe a fundamental shift in the voluntary nature of corporate responsibility. In their book, the authors argue that despite containing both formal and informal rules or mechanisms,

¹³⁰ Labowitz & Baumann-Pauly, *supra* note 15 at 37; Bilton, *supra* note 127; Marta Kasztelan, “Striking a Balance in Cambodia: International Brands Can No Longer Ignore Human Rights Abuses in Their Supply Chains” (11 January 2014), online: <thediplomat.com/2014/01/striking-a-balance-in-cambodia> [perma.cc/F24Q-PC3R].

¹³¹ Ahmed et al, *supra* note 15 at 266.

¹³² See “Bangladesh: Protect Garment Workers’ Rights” (6 February 2014), online: <hrw.org/news/2014/02/06/bangladesh-protect-garment-workers-rights> [perma.cc/EU2F-UH2B].

¹³³ HRW Report, *supra* note 54; Christa Luginbühl & Bettina Musiolek, *Stitched Up: Poverty Wages for Garment Workers in Eastern Europe and Turkey* (2014), online (pdf): <digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=2842&context=globaldocs> [perma.cc/8EKM-FHF9].

¹³⁴ Bearnot, *supra* note 120. For more recent reports see Banning Hope, *supra* note 54 at 6, 13, 15–18. See also Julfikar Ali Manik & Vikas Bajaj, “Killing of Bangladeshi Labor Organizer Signals an Escalation in Violence” (9 April 2012), online: <nytimes.com/2012/04/10/world/asia/bangladeshi-labor-organizer-is-found-killed.html?_r=0> [perma.cc/E4V6-Z7M2].

practical impacts of soft law and quasi-regulatory initiatives have transformed the nature of corporate responsibility; it has become a “legal concept” and thus “legal analysis” is possible.¹³⁵ One practical example of such transformation are the TSIs. The corporate initiatives prescribed certain responsibilities, which to some extent supersede the existing boundaries and forms of corporate responsibility. Beyond addressing the direct impacts of business activity or protecting direct and supply chain employees or individuals directly harmed by their operation, these initiatives tackled regulatory deficiencies and failures that can primarily be attributed to the national government and/or the producing firms. This broad and strengthened notion of TCR attempts to challenge the complex socio-political and economic processes and institutions that, although indirectly or remotely connected with corporate sourcing and investment policies, continuously help to marginalize labour issues and weaken necessary social development. For example, instead of shifting responsibility to the immediate supplier companies that forced the factory workers at Rana Plaza to work in the dangerous building, or to the national government whose regulatory and inspection failures caused the illegally-constructed building to operate as an industrial site, the corporate initiatives created a novel form of transnational responsibility that connects multiple businesses and other non-state actors to address the indirect institutional influences of corporate activity and operations.¹³⁶

Moving away from the negative duty of not to harm, the corporate initiatives therefore undertook a number of positive and constructive duties, such as drafting inspection standards, mandatory financing for inspections, and establishing a thorough safety mechanism. Although, in the area of private standard-setting, various corporate responsibility programs are already developing specific social standards with strict deadlines, most of these institutional changes or capacity-building projects address only changes “*within* individual companies or networks.”¹³⁷ The corporate initiatives, in contrast, addressed broader institutional changes, such as corporate sourcing and pricing policies, public reporting, corporate policies in strengthening labour relations, and

¹³⁵ Michael Kerr, Richard Janda & Chip Pitts, *Corporate Social Responsibility: A Legal Analysis* (Markham, ON: LexisNexis, 2009).

¹³⁶ See Gunther Teubner, “Hybrid Laws: Constitutionalizing Private Governance Networks” in Robert A. Kagan, Martin Krygier & Kenneth Winston, eds, *Legality and Community: On the Intellectual Legacy of Philip Selznick* (Lanham, MD: Rowman & Littlefield, 2001) 311. For corporate responsibility, Teubner identifies an emerging regime of *network share liability* where *pro-rata liability* is attributed to the network for damages not clearly attributable to one of the participants, but that can certainly be connected to the network as a whole. See also Anne Trebilcock, “Due Diligence on Labour Issues—Opportunities and Limits of the UN Guiding Principles on Business and Human Rights” in Adelle Blackett & Anne Trebilcock, eds, *Research Handbook on Transnational Labour Law* (Cheltenham, UK: Edward Elgar Publishing, 2015) 93.

¹³⁷ Kate Macdonald, “Re-thinking ‘Spheres of Responsibility’: Business Responsibility for Indirect Harm” (2011) 99 J Bus Ethics 549 at 560, DOI: <doi.org/10.1007/s10551-010-0668-x> [emphasis in original].

improving occupational health and safety (OHS) awareness. Of course, there is a narrow focus on fire and building safety improvements in the TSIs, but by committing corporate brands and retailers to a certain institutional framework, a novel form of transnational responsibility emerges that accommodates the pressures and expectations of a wider range of political and social actors (consumers, trade unions, and civil society actors). Moreover, the emerging approach to labour regulation not only signifies a transition toward transnational legal responsibility,¹³⁸ it also offers itself as a useful tool in the continuous struggle against the pressures of hegemonic globalization.

My proposed model builds on this reconstructed form of TCR and borrows from UN Special Rapporteur Professor Ruggie's "protect, respect and remedy" framework,¹³⁹ which seeks to deal with governance gaps in addressing and remedying corporate-related human rights abuses. Ruggie's framework comprises three principles: the State duty to protect against human rights abuses by third parties including business; the corporate responsibility to respect human rights; and the need for more effective access to remedies.¹⁴⁰

The corporate responsibility to respect human rights is elaborate: first, responsibility exists *independently* of states' duties; second, instead of doing "no harm," companies have to undertake *positive steps* to prevent harm; third, companies have to exercise *due diligence* in preventing and addressing human rights violations that result from their business relationships or activities; and fourth, it is essential for companies to *avoid complicity* for human rights violations that they could reasonably be expected to know about under the circumstances.

Relying on this expanded concept, the model proposes a stronger form of corporate responsibility that can accommodate some of the broader conceptualizations of labour and labour rights. The model requires effective corporate commitment in three areas: economic empowerment of labour; improvement of labourers' productive capacity; and strengthening the organizational capacity of labour.

¹³⁸ Anner, *supra* note 119; Michael Fichter & Dimitiris Stevis, "International Framework Agreements in the United States: Escaping, Projecting, or Globalizing Social Dialogues?" (2012) 33 Comp Lab L & Pol'y J 667; Catia Gregoratti & Douglas Miller, "International Framework Agreements for Workers' Rights? Insights from River Rich Cambodia" (2011) 2 Global Labour J 84, DOI: <doi.org/10.15173/glj.v2i2.1098>; Owen Herrnsstadt, "Are International Framework Agreements a Path to Corporate Social Responsibility?" (2007) 10 U PA J Bus L 187.

¹³⁹ *Supra* note 10.

¹⁴⁰ *Ibid* at 13–26 (UN Guiding Principles 11–24 elaborate the corporate responsibility to respect).

Economic Empowerment through Improving Corporate Sourcing and Investment Policies

The proposed model demands effective corporate sourcing and investment policies to promote labour's economic empowerment. It connects the improvement of factory working conditions and the increase in workers' wage levels with the sourcing and pricing practices of supply chains, and acknowledges that without changing retailers' capacity to put downward pressure on prices and their freedom to source from the lowest-price supplier, bare commitment to corporate social responsibility would be another form of showcasing labour rights.¹⁴¹ The model demands binding corporate commitment with detailed analysis. For example, it requires a detailed description of the living wage and minimum floor of rights that the corporate codes intend to protect. A number of initiatives by certain corporate retailers (e.g., H&M, Puma, Nike, and Adidas) that raise wages in their supplier factories provide a crucial example of the connection between sourcing practices and workers' wages and working conditions.¹⁴² By establishing a strong sourcing relationship (a commitment to buy 100 percent of the supplier's products for five years) and ethical pricing, H&M intended to ensure workplace safety and a fair living wage for the workers employed by their strategic suppliers.¹⁴³ Initially, H&M intended that its roadmap toward a fair living wage would operate for a small group of model factories in Cambodia and Bangladesh. As the supplier factories would solely produce for a single brand/retailer, it would be easier for the brand/retailer to manage these incentives and effectively monitor compliance with corporate codes;¹⁴⁴ however, it is suggested that without adopting a specific standard or benchmark for determining a living wage, and without ensuring the factory-level bargaining capacity of labour and union representatives' voices in managing these incentives, corporate sourcing and pricing commitments may not produce tangible, long-term benefits for workers.¹⁴⁵ A recent study of 32 major clothing brands in the UK found that although 84 percent of the brands made commitments to provide a living wage to the workers in their supply chain, none had any

¹⁴¹ Anner, *supra* note 119.

¹⁴² Mark Anner, Jennifer Bair & Jeremy Blasi, "Toward Joint Liability in Global Supply Chains: Addressing the Root Causes of Labor Violations in International Subcontracting Networks" (2013) 35:1 Comp Lab L & Pol'y J 1 at 35–36; Sarah Labowitz, "H&M has Given Suppliers a Major Incentive to Actually Pay Workers More" (4 December 2013), online: <qz.com/153659/hm-just-handed-suppliers-major-incentive-to-actually-pay-workers-more> [perma.cc/JS7G-3SDK].

¹⁴³ Labowitz, *supra* note 142.

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*

“documented evidence of a living wage being paid to any workers” and only eight brands used specific standards to follow up on their commitments.¹⁴⁶

Contrasting the short-term, vague commitments of the corporate safety initiatives, the proposed model realizes that without a stronger form of corporate investment commitment and a long-term assistance policy, it might not be possible to generate the huge funding necessary to improve workplace conditions. For example, the ILO’s Better Work program in Cambodia requires modest expenditure: limited costs are incurred through hiring mostly local personnel to undertake the monitoring and reporting functions.¹⁴⁷ However, safety inspection and factory remediation in the Bangladeshi RMG sector require substantial investment because all safety equipment is imported and requires professional installation and certification.

Although both corporate initiatives financed the operational costs of safety inspections, worker training on OHS, and worker empowerment processes so that workers can express their concerns on safety,¹⁴⁸ little attention has been paid to financing long-term infrastructure needs and industrial capacity building in the Bangladeshi RMG sector.¹⁴⁹ It is true that large-scale infrastructure developments and industrial projects require huge commitments and greater intervention and assistance from the government and donors; however, even with regard to safety-related factory renovations, both the Alliance and the Accord prescribed limited responsibility. Neither had any direct responsibility in undertaking or funding factory renovations. While confusion grew as to the nature of retailer/brand responsibility for renovation costs, the Accord’s executive director in Bangladesh made it clear that suppliers may, *at their option*, assist factory owners in finding the necessary funds either through effective sourcing policy and/or through various financing mechanisms.¹⁵⁰ Under the bilateral supplier finance program, Alliance members had the choice to offer a low-cost loan facility or change their existing terms of payment.¹⁵¹ For supplier factories not covered by the bilateral program, the Alliance developed a low-interest-based credit program in partnership with international and local financing institutions.¹⁵²

¹⁴⁶ Anna Bryher, “Tailored Wages UK 2019: The State of Pay in the Global Garment Industry” (June 2019) at 6, online (pdf): <labourbehindthelabel.net/wp-content/uploads/2019/06/TailoredWagesUK-FP.pdf> [perma.cc/TC7V-D9SP].

¹⁴⁷ Polaski, *supra* note 73 at 14–15.

¹⁴⁸ The Accord, *supra* note 5, §§15–18, 21–23; Alliance Member Agreement, *supra* note 59, §§ 3.1, 3.2, 9.1–9.3, 10.6.

¹⁴⁹ Labowitz & Baumann-Pauly, *supra* note 15 at 10.

¹⁵⁰ *Ibid* at 40, 56.

¹⁵¹ *Ibid* at 56.

¹⁵² Alliance for Bangladesh Worker Safety, “Alliance 18-Month Update” (9 March 2015) at 4, online (pdf): <s2.q4cdn.com/056532643/files/doc_downloads/ESG/Alliance-18-Month-Update-March-2015.pdf> [perma.cc/3RPC-HGJR].

Under both corporate initiatives, there was no unified system or neutral third-party representative to oversee these credit arrangements.¹⁵³ For determining the terms and conditions or the disbursement of the credit facility, retailers' influence remained a questionable issue. Ultimately, the sole responsibility to incur the huge costs for factory remediation belongs to the factory owners, although both initiatives lasted for only five years with limited responsibility for safety compliance.¹⁵⁴

Additionally, not many improvements were seen in the sourcing or pricing policies of the brands/retailers. Evaluating the purchasing practices of the brands/retailers, a 2018 survey by the Center for Global Workers' Rights found "a decline in nominal prices paid per unit [garment]."¹⁵⁵ Lawyer and activist Kashyap writes tellingly,

[b]etween 2011 and 2016, the price drop for garments exported to the US was about 11 percent, in comparison to a 9 percent decline for EU apparel exports. Bangladeshi manufacturers are right to feel outraged by the hypocrisy brands display when they demand expensive improvements while insisting on cut-rate prices, and in that they will find support from workers and labor advocates.¹⁵⁶

The continuance of "cut-rate," unfair, unrealistic sourcing policies and practices by foreign brands, and the limited nature and duration of corporate commitment for improving workplace conditions or even the safety of workers do not provide any clue as to why and how factory owners would undertake extensive factory remediation.¹⁵⁷

¹⁵³ For a critique on the procedural fairness of these funding arrangements, see Labowitz & Baumann-Pauly, *supra* note 15; Baumann-Pauly, Labowitz & Banerjee, *supra* note 30 at 10–11.

¹⁵⁴ Labowitz & Baumann-Pauly, *supra* note 15 at 54; Baumann-Pauly, Labowitz & Banerjee, *supra* note 30 at 6–7.

¹⁵⁵ Quoted in Aruna Kashyap, "Looming Accord Closure a Risk to Bangladesh Sourcing" (22 November 2018), online: <hrw.org/news/2018/11/22/looming-accord-closure-risk-bangladesh-sourcing> [perma.cc/HV37-KFE6].

¹⁵⁶ *Ibid.*

¹⁵⁷ See Sarah Labowitz, "The Cost of Garment Factory Repairs in Bangladesh" (28 October 2014), online: <nytimes.com/2014/10/23/opinion/garment-factory-repairs.html> [perma.cc/KWJ5-R82A]. For an excellent analysis on how sourcing practices affect decent work conditions despite the presence of elaborate corporate social responsibility programs, see Mark Anner, "Binding Power: The Sourcing Squeeze, Workers' Rights, and Building Safety in Bangladesh Since Rana Plaza," Research Report (22 March 2018), online (pdf): <ler.la.psu.edu/gwr/documents/CGWR2017ResearchReportBindingPower.pdf> [perma.cc/CZ54-WXML]. See page 2 of this research report, where it finds that the price paid by lead firms declined 13 percent from 2011 to 2016, which directly contributed to lower wages, unsafe work conditions, and violations of freedom of association rights.

Retaining Existing Competitive Advantage

While it is important to focus on improving labour regulatory institutions, the proposed model specifically emphasizes mobilizing mandatory financial and technical assistance and business commitments from corporate retailers to improve labour's productive capacity. It recognizes that effective corporate commitment to increase labour productivity is required to buttress an alternative form of governance. This form of labour governance is attentive to maintaining the existing competitive advantages of important economic sector(s) that enjoy preferential access in markets in developed countries. It also stresses the need to "purposefully build" competitive advantage for related products.¹⁵⁸ Focused, mandatory, and long-term corporate commitment to improving labour productivity can crucially balance the overwhelming influence of market-led development and ensure that appropriate labour considerations reinforce the process of sustainable development, and vice versa.

The importance of retaining competitiveness in the garment export sector is critical for the Bangladeshi economy. Contrary to economies that are exclusively dependent on exporting primary commodities and face declining terms of trade, low-skill manufacturing has been found to offer a better option for addressing poverty and inequality, and as a first step in the process of economic development.¹⁵⁹ In Bangladesh, approximately two million families escaped poverty by working in the garments sector,¹⁶⁰ and the share of manufacturing in employment rose from 12 percent in 1985–86 to 24

¹⁵⁸ See generally Erik S Reinert, "Emulation versus Comparative Advantage: Competing and Complementary Policies in the History of Economic Policy" in Mario Cimoli, Giovanni Dosi & Joseph E Stiglitz, eds, *Economic Development and Environmental Sustainability: New Policy Options* (Oxford/New York: Oxford University Press, 2006). Analyzing 500 years of economic policy history, Reinert observes that without successful emulation it was neither possible for developed and emerging industrialized countries, nor would it be possible for developing countries, to benefit from market opening. He argues that without technological advancement and reduction of the productivity gap with richer countries, developing countries would engage in asymmetrical trade exchanging commodities produced under "non-increasing returns conditions" with industrial goods "produced under increasing returns." This pattern of trade, even if increasing in quantity, would continue to benefit the industrialized partners and ultimately cause "gigantic market failures" in developing countries. Reinert argues tellingly that without a period of successful emulation (i.e., technical change, productivity growth, and production of goods/services with increasing returns), free trade under the *Malthusian formula* would sustain poverty forever by rendering the economy vulnerable to external shocks and price fluctuations, increasing unskilled labour supply and the unemployment rate, lowering wages, lessening the bargaining capacity of labor, and diminishing returns. On the other hand, the *Schumpeterian formula* allows sufficient space for rebuilding a productive structure, lessening the productivity gap between poor and rich countries, and increasing skill and wages for labour. Thus, the idea should be to build comparative advantage "purposefully," and not to rely on a "revealed comparative advantage" that a country possesses naturally.

¹⁵⁹ John Glenn, *Globalization: North-South Perspectives* (London: Routledge, 2007) at 91, 132, 154–86.

¹⁶⁰ *Ibid* at 181.

percent in 2010.¹⁶¹ Yet, earning levels have not improved enough to lead to “sustained improvements” in lowering poverty.¹⁶² Additionally, the vulnerabilities associated with low-value-added garments production systems are enormous. Since profits in garments export are generated mostly for designers and retailers, producing firms compete for orders by continuously lowering production costs. With low-cost labour as the primary determinant of competitiveness, the terms of trade for the RMG sector in Bangladesh “are falling at around 2 per cent a year”¹⁶³ and the sector faces fierce competition from other low-cost countries such as India and Vietnam.¹⁶⁴

When measured from the perspective of increasing labour productivity and retaining competitiveness in garment production, the corporate initiatives ignored the economic empowerment of workers through skill-improvement training. A top-down approach is manifest in both corporate initiatives. Only the ILO’s BWB program focuses on increasing the competitiveness of the participating RMG factories.¹⁶⁵ If similar collaborative attempts had been taken in the corporate initiatives, more firms could have been covered within a shorter period of time. Reducing the labour productivity gap with competing garment exporting countries not only offers the option to retain the competitive advantage of an exporting sector, but also provides the long-term potential to increase workers’ bargaining capacity with respect to wages and work entitlements.¹⁶⁶

Political Empowerment of Labour

The proposed model acknowledges the existing power imbalances between capital and labour that tend to sustain the political isolation of labour and positions itself with demands for labour empowerment at both local and transnational levels. Citing how dominant theories of labour governance focus on “collaborative networks” and sideline the “risks of governance failures stemming from power differentials,”¹⁶⁷ Rodríguez-Garavito asserts aptly that

¹⁶¹ ILO and ILS Study on Bangladesh, *supra* note 20 at 2.

¹⁶² *Ibid* at 3 (76 percent of the population lives on less than US\$2 a day).

¹⁶³ Glenn, *supra* note 159 at 181. For a comparative chart on falling terms of trade in general and in the context of RMG, see Muhammad, *supra* note 4 at 24.

¹⁶⁴ ILO and ILS Study on Bangladesh, *supra* note 20 at 9.

¹⁶⁵ BWB, *supra* note 61.

¹⁶⁶ For a detailed discussion on how Bangladesh’s RMG sector can retain competitiveness by improving social compliance and increasing productivity, see Dirk Willem te Velde, ed, *Enhancing Productivity in Bangladesh’s Garment Sector: Current Policy and Research Debates* (2014), online (pdf): <assets.publishing.service.gov.uk/media/57a089dfed915d622c000435/60970_Bangladesh_garment_sector_essays.pdf> [perma.cc/67EH-2EXE].

¹⁶⁷ Rodríguez-Garavito, *supra* note 79 at 227.

when there is no countervailing power, governance systems can become deregulatory strategies that, while serving the needs of image-sensitive TNCs, are deleterious to the task of protecting workers' rights in the global economy.¹⁶⁸

The proposed model acknowledges that the real needs of labour in developing countries require not only a progressive analysis of a wider range of labour rights but also accommodation of these rights within national and transnational redistributive policies and mechanisms. As a result, questions relating to effective labour governance transcend beyond quick-fixes like drafting the ILO-assisted labour code, increasing the number and quality of factory inspections, and improving workplace conditions. These are important, but from a capability enhancement perspective the model underscores the essential link between economic and political empowerment of labour and effective corporate commitment.¹⁶⁹ The proposed model realizes that it is necessary to strengthen the weakened capacity of workers to resist, shape, or recreate labour governance initiatives that are prescribed or designed by corporate actors, and to challenge their exclusion from these initiatives. Only with strong organizational strength and voice at local, national, and transnational levels can labour groups challenge the power asymmetries between capital and labour, the division of labour, and employers' restricted responsibilities, and can they translate codified rights or standards into practice. The anti-sweatshop movements that unite labour groups and other transnational activists (e.g., students, consumer organizations, and NGOs)¹⁷⁰ offer a prime example of the connection between labour movements and stronger forms of corporate responsibility.¹⁷¹

When assessed from the perspective of labour empowerment, both the Alliance and the Accord precluded any possible collective strategic response from garment factory workers. The Alliance Member Agreement mentioned that “worker empowerment is a critical element in achieving meaningful building and fire safety in Bangladesh”¹⁷² and called for the creation of “Worker Participation Committees” in all of its supplier factories.¹⁷³ When the Alliance ended its term in Bangladesh in December 2018, there

¹⁶⁸ *Ibid.*

¹⁶⁹ For an empirical analysis (covering 85 developing countries) that connect low state capacity in protection of labour rights with political disempowerment of labour see Daniel Berliner et al, “Building Capacity, Building Rights? State Capacity and Labor Rights in Developing Countries” (2015) 72 *World Dev* 127, DOI: <doi.org/10.1016/j.worlddev.2015.02.018>.

¹⁷⁰ Valeria Pulignano, “European Works Councils and Trade Union Networking: A New Space for Regulation and Workers’ Solidarity in Europe” in Blackett & Levesque, eds, *Social Regionalism in the Global Economy*, *supra* note 9 at 111.

¹⁷¹ See Anner, *supra* note 119.

¹⁷² Alliance Member Agreement, *supra* note 59, § 3.1.

¹⁷³ *Ibid.*, § 3.2.

were 181 active worker safety committees,¹⁷⁴ which allowed employees to raise safety concerns and resolve safety issues through discussion.¹⁷⁵ The Accord obliged the supplier factories to establish joint worker–management OHS committees in order to monitor health and safety risks on a day-to-day basis.¹⁷⁶ It also required establishment of safety and health “worker complaint process[es] and mechanism[s]” that enabled workers to report probable health and safety risks to an independent safety inspector in a confidential manner.¹⁷⁷ Yet, none of the corporate initiatives provided any space for discussion between factory-level labour representatives and retailer representatives, nor allowed for information sharing between different labour representatives working with different suppliers.

Even from the limited perspective of achieving workplace safety, the importance of labour empowerment became apparent from a worker baseline survey conducted by the Alliance.¹⁷⁸ After receiving OHS training, only 2 percent of workers correctly identified potential safety hazards, 17.2 percent reported safety-related concerns to their union representative, and 73 percent mentioned that fatal fire accidents were not preventable.¹⁷⁹ The survey starkly revealed the limited impact of safety training. While the survey emphasized that understanding the technical materials related to safety training was difficult for the workers, it also found that a majority of the representatives from factory-level health and safety committees are not elected.¹⁸⁰ These committees are often inactive and potential safety concerns often do not receive appropriate attention from company representatives or management. A combination of low literacy, low organizational capacity, selection of committee members, and workers’ lack of access to management caused a large percentage of workers to believe that they do not have any role in preventing safety hazards and that fatal accidents are not preventable. Since the survey, the Alliance has undertaken significant reforms in its safety training contents and process, and required that the safety committee comprise an equal number of elected members from management and workers.

¹⁷⁴ Alliance Fifth Annual Report, *supra* note 129.

¹⁷⁵ Alliance Member Agreement, *supra* note 59, §§ 3.1–3.2.

¹⁷⁶ The Accord, *supra* note 5, §§ 17–18.

¹⁷⁷ *Ibid.*, § 18. For a detailed discussion on the lack of local industry (the Accord) and local labour (the Alliance) representation in the corporate initiatives, see Baumann-Pauly, Labowitz & Banerjee, *supra* note 30 at 9–10.

¹⁷⁸ Alliance for Bangladesh Worker Safety, “Baseline Worker Survey Report” (19 February 2014), online (pdf): <bangladeshworkersafety.org/files/Alliance%20Baseline%20Worker%20Survey%20Report%20Final.pdf> [perma.cc/QDD5-Z7R3].

¹⁷⁹ *Ibid.* at 4, 11–12, 24. Of the 625 participating factories, workers from 28 factories were covered by the survey. For more information, see generally Alliance for Bangladesh Worker Safety, online: <bangladeshworkersafety.org> [perma.cc/4LW9-8XJ5].

¹⁸⁰ *Ibid.*

The urgent need to focus on labour's political empowerment is also visible from the recent developments that occurred after the Accord ended its five-year term. At the beginning of this paper, I discussed how the Accord's continued operation faced challenges. An important turning point occurred, however, when seven local garment workers' unions alleged that they were not even consulted while the transition arrangement with the BGMEA was being designed.¹⁸¹ While the focal point of the arrangement was to oversee the safety and security of garment workers, the exclusion of local unions from the discussion reveals why labour's political empowerment is crucial for achieving better working conditions.

The proposed model emphasizes that it is necessary to build not only appropriate labour regulatory institutions, but also adequate social and political arrangements that strengthen the labour empowerment process (e.g., by informing the labourers of their rights and responsibilities, increasing workers' access to both sectoral and factory-level communications, increasing worker-outreach programs, and increasing labourers' ability to challenge and recreate governance arrangements that address their concerns). The model realizes the limitations of addressing the problems of a huge majority of labourers who are not directly engaged in the exporting sector through corporate commitments, as the latter applies only to exporting firms. Yet, within the limited sphere of corporate responsibility, the model demands that labourers employed in export-based industrial firms be allowed to effectively participate and challenge intra-company labour governance mechanisms and to connect themselves with others working with different suppliers (including subcontractors) in order to form effective labour relations.

CONCLUSION

By taking examples from the TSIs implemented for Bangladeshi garment workers and critically analyzing some of their features, this paper proposes a model of labour governance and argues that it is necessary to reconstruct the existing ideas on labour governance and corporate responsibility. Relying on labour's capability enhancement as an organizing principle or objective of labour governance, the proposed model criticizes some of the features of these recent forms of transnational labour regulation. The model acknowledges that the capability enhancement of labour in low-income countries involves intricate and wider questions of infusing social or distributional issues within trade, development, and labour governance policies. While it builds on the labour regulatory initiatives implemented for Bangladeshi garment workers, it requires specific

¹⁸¹ Ruma Paul & Serajul Quadir, "Bangladesh Garment Unions Say New Factory Oversight Deal Risks Worker Safety" (21 May 2019), online: <[reuters.com/article/bangladesh-garments-accord/bangladesh-garment-unions-say-new-factory-oversight-deal-risks-worker-safety-idUSL4N22W1WY](https://www.reuters.com/article/bangladesh-garments-accord/bangladesh-garment-unions-say-new-factory-oversight-deal-risks-worker-safety-idUSL4N22W1WY)> [perma.cc/Y73Y-UY7E].

attention to a state's development level, the importance of the economic sector, and other context-specific issues. Similar to the TSIs, the proposed model endorses transnational labour governance mechanisms that operate at multiple economic governance sites and connect state and non-state actors in a context and sector-sensitive manner. Going beyond the TSIs, however, the proposed model stresses a greater participatory space for labour and strong activism from diverse non-state actors both in economic governance mechanisms (e.g., sourcing from compliant firms) and in labour governance mechanisms (e.g., participating in factory inspection, building or strengthening national labour regulatory capacity). Specifically, the proposed model stresses that improved labour governance is neither a routine result of increased export performance, nor should it be a short-term component of development policy. Rather, the realization of labourers' freedom and capability and the sustaining and enhancing of those freedoms and capabilities requires ongoing attention to improving labour entitlements, productivity, and empowerment.

In contrast to the corporate initiatives—that is, the Accord and the Alliance—the proposed model stresses more than just complying with labour standards in selected matters. For example, the model acknowledges that although the safety of workers requires urgent attention, the challenge lies in addressing the existing narrow conceptualizations of labour and labour rights. More specifically, the model argues for the inclusion of a broader version of labour rights as opposed to selective attention to certain fundamental rights. It seeks to connect multidimensional issues relating to labour governance (i.e., instituting a living wage, fundamental rights, redistributive rights, and an increase in labour productivity) in a holistic framework. Taking the broad conceptualizations of labour and labour rights as the starting point, the proposed model not only emphasizes the types of labour rights, but also the types of labour to be covered. It argues that the capability enhancement of labour—formal, semi-formal, or informal—certainly involves crucial questions on long-term institutional development to distribute social gains from increased trade and economic growth.

Finally, the proposed model insists on a strengthened form of corporate responsibility. It proposes utilizing the overwhelming force, capacity, and responsibility of transnational corporate actors in addressing diverse distributional concerns arising out of economic development and trade liberalization policies. As a result, the model requires a stronger form of corporate responsibility to address the appalling inequality and distributional problems.

The suggestion to pay attention to the organizing principle or objective while designing a labour governance mechanism does not dislodge the need for nation states to be involved in labour regulation. On the contrary, the model emphasizes the necessity of effective transnational and international assistance and coordination among diverse actors and institutions to strengthen nation states' labour governance capacity and their capacity

to identify and fund their redistributive priorities. This became obvious when the Accord ended its initial term in Bangladesh. Considering the challenges that transnational regulatory forces face while operating within a national regulatory framework, an important way forward would be to find the areas where these two forces can collaborate and then find viable and effective regulatory space and solutions.

Finally, the model understands that it is necessary to look beyond market-centric governance to develop a common platform that unifies formal, semi-formal, and informal workers' divergent demands and to bridge the gaps between them. Only an effective partnership among divergent labour groups can effectively confront the existing hegemonic neo-liberal regulation and the narrow conceptualizations of the social. From a long-term perspective, market-centric governance approaches fail to answer the following questions: What will prevent workers in semi-formal/informal sectors from competing with each other when employment opportunities become limited or competition becomes fierce? What will prevent producing or supplying firms, desperate to retain existing competitive advantage, from indirect sourcing through subcontractors who engage low-cost, semi-formal, or informal workers? Market-centric labour governance systems might cover unionized labour engaged in exporting sectors, but these will certainly exclude a large majority of the labour force engaged in the informal and semi-formal sectors. Thus, a governance system focusing on labourers' capability enhancement might offer the greater potential to hold together the complex alliances between formal, semi-formal, and informal workers, strengthen their power struggles, and redefine their objectives and priorities.

The model neither claims that the prescribed features of governance would remain static, nor does it require that all of these features should be present in a single governance mechanism. Considering the labour conditions, the importance of the economic sector, and other context-sensitive issues, certain proposed features might require more attention than others. This paper attests to the variable nature of transnational labour governance and recognizes that continuous shaping and reshaping of law and economic and social policy at multiple trade, economic, and social regulatory sites produces immense challenges for infusing social or distributional issues through cross-border policies and institutions and demands ongoing work on the possible design and features of effective labour governance.

AFTERWORD

At the time this article was in press, COVID-19 severely affected the jobs and health of millions of garment workers all over the world. Because many brands and retailers unilaterally cancelled their orders, workers absorbed the economic shock by losing their only means of livelihood. Some returned to work with heightened risk to their health. Only a robust search for an alternative to existing labour governance can address

the dire need for greater coherence between the political and social liberties of labour and for stronger forms of corporate responsibility.