Five Years Later:

Rana Plaza and the Pursuit of a Responsible Garment Supply Chain

Background Paper

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Background paper: executive summary

The collapse of the Rana Plaza building on 24 April 2013 in Savar, Bangladesh, left at least 1,134 people dead and over 2,500 others wounded, while survivors and the families of the dead continue to suffer trauma in the aftermath of the disaster. The tragedy triggered a wave of compassion and widespread feelings of guilt throughout the world as consumers, policy makers and some of the most well-known companies in Europe and North America were confronted with the mistreatment and abject danger that distant workers face in service of a cheaper wardrobe.

Partly in order to assuage this guilt, a number of public and private regulatory initiatives and legal responses have been instituted at the national, international and transnational levels. These legal and regulatory responses have variously aimed to provide compensation and redress to victims as well as to improve the working conditions of garment workers in Bangladesh. Mapping and reviewing how these responses operate in practice is essential to assessing whether they have been successful in remedying (at least partially) the shortcomings that led to the deaths of so many and the injury and loss suffered by scores more.

This briefing paper outlines and provides some critical reflections on the steps taken to provide redress and remedy for the harm suffered by the victims of the catastrophe and on the regulatory mechanisms introduced to prevent its recurrence. It broadly traces the structure of the panels of the event.

In line with Panel 1 (*Seeking Justice, Locating Responsibility*), the paper begins by focusing on litigation that has been conducted to secure justice and compensation for the victims, as well as to bring the relevant actors to account for their alleged culpability for the collapse. To this end, the paper examines the avenues that have been taken to hold corporations legally accountable in their home jurisdictions for their putative contributions to the collapse on the one hand, and individuals (particularly local actors) legally accountable before the courts in Bangladesh on the other; it then considers softer mechanisms aimed at compensating victims and their dependants.

In keeping with Panel 2 (*Never again! Multi-level regulation of the garment supply chain after Rana Plaza: Transnational Responses*), the paper then considers the transnational (public and private) regulatory responses following the tragedy, enacted by stakeholders including NGOs, industry associations, trade unions and governments and largely connected to issues surrounding labour standards and health and safety.

Finally, in line with Panel 3 (*Never again! Multi-level regulation of the garment supply chain after Rana Plaza: National Responses*), the paper looks at numerous (soft and hard) regulatory developments at the national level in response to the Rana Plaza collapse. It charts the

legislative response by the government of Bangladesh to attempt to shore up safety, working conditions and labour rights in garment factories. It also focuses on legislative and other arrangements instituted by certain national governments in the EU, and how these arrangements relate to the United Nations Guiding Principles on Business and Human Rights and the OECD Guidelines on Multinational Enterprises.

Rana Plaza: Legal and regulatory responses

This review charts the key legal and regulatory responses to the Rana Plaza factory collapse. It approaches the topic thematically from three perspectives: (i) actions and (soft) initiatives at the national and international levels aimed at securing justice and compensation for the victims; (ii) transnational regulatory and policy responses; and (iii) national legislative and regulatory responses.

1) Justice and compensation

a) Case law of national courts

This section discusses the outcomes of suits and prosecutions filed in certain jurisdictions to hold global brands and individuals to account for their alleged responsibility for and contributions to the collapse, and thus the results of these attempts to provide victims and affected families with a measure of justice and redress.

It firstly examines decisions relating to significant tortious actions that have been filed in the US and Canada aimed at bringing the multinational companies sourcing garments from the factories located in the building (whether directly or through intermediaries) to account in their home states. These illustrative cases arguably demonstrate foreign courts' reluctance to hold multinational companies liable for tortious wrongs committed overseas, and the ostensible rigidity of the applicable tort law to the detriment of victims of the collapse. This section then focuses on case law developments in Bangladesh – largely ongoing – which have aimed to bring individuals (mainly, though not exclusively, local actors including the building and factory owners and their affiliates) to account for domestic criminal and labour law violations in particular.

It should be noted that the following list of cases is partial and that other actions have been filed elsewhere.[1]

i) US

In May 2016, the Delaware Superior Court in *Abdur Rahaman v. JC Penny Corporation, Inc., The Children's Place and Wal-Mart Stores, Inc.*[2] granted a motion to dismiss claims of negligence and wrongful death brought in a putative class action, rebuffing efforts to bring

[1] See, for example, *Abdur Rahaman v. JC Penny Corp., Inc. et al.*, Civ. Action 15-cv-619 (D.D.C. April 23, 2015) filed before the US District Court for the District of Columbia.

[2] *Abdur Rahaman v. JC Penney Corporation, Inc., The Children's Place and Wal-Mart Stores, Inc.*, CA No. N15C-07-174 (Super. Ct. Del.).

litigation to the home jurisdiction of the relevant brands.[3] The plaintiffs comprised the personal representative and husband of a worker killed in the collapse and another worker who was injured. The defendants, J.C. Penney Corporation, The Children's Place and Wal-Mart Stores, argued that the claims should be dismissed as they were filed after the expiration of the one-year statute of limitations period under Bangladeshi law and because the plaintiffs failed to allege the existence of a duty of care owed to them under law.

(1) Choice of law and time-barred application under statute of limitations

Applying Delaware's choice of law rules, the Delaware Superior Court rejected the application of US law and found that Bangladeshi law – and its statute of limitations – should apply, thus barring the suit. As per Delaware's choice-of-rules, the Superior Court considered the facts of the case in accordance with the established "most significant relationship" test.[4] According to this test, the injury occurred in Bangladesh, the conduct causing injury occurred in Bangladesh, and the relationship between the parties was centred in Bangladesh – and thus Bangladeshi law (and its limitation rules) should apply.[5]

More specifically, when considering the four contacts to be taken into account when determining the applicable law, the Superior Court found that: (1) the place where the injury occurred was Bangladesh given the collapse of the Rana Plaza factory in Bangladesh; (2) the place of the conduct causing the injury was centred in Bangladesh given the defendants' failure to monitor Rana Plaza's construction and inspect the building to ensure compliance with local building codes; (3) the domicile, place, residence, nationality, place of incorporation and place of business of the parties did not tend towards either Delaware or Bangladesh (though the Superior Court indicated that the location of Bangladesh may be most pertinent given that this is where the consequences of the injuries and death would be felt most); and (4) the place where the relationship between the parties was centred was Bangladesh given the location of Rana Plaza, where the injuries occurred, and the fact that the production of the defendants' sourced garments occurred in Bangladesh (and notwithstanding the brands' incorporation in Delaware and the fact that garments were manufactured for the US market, which the Superior Court did not regard as providing a nexus to Delaware great enough for it to be regarded as where the relationship was centred). As a result, the test favoured applying Bangladeshi law.[6]

[3] Larry Catá Backer, "Are Supply Chains Transnational Legal Orders? What We Can Learn from the Rana Plaza Factory Building Collapse" (2016) 1(11) UC Irvine Journal of International, Transnational, and Comparative Law 11, 36.
[4] *Abdur Rahaman* (n 2) 8.
[5] *Abdur Rahaman* (n 2) 13.
[6] *Abdur Rahaman* (n 2) 11-13.

Accordingly, the Superior Court concluded that Bangladesh's Limitation Act 1908, dictating limitation periods for suits filed in Bangladesh, should apply.[7] On a "plain reading" of the statute, the relevant limitation periods under the act (for negligence and wrongful death, respectively) were each one year and, given that they were both filed two years after the collapse, the claims were time-barred.[8]

(2) Substantive claims: duty of care dispute

The Superior Court also explored issues surrounding the establishment of the duty of care (which both parties agreed was governed by Delaware law) in respect of the negligence and wrongful death claims. The Superior Court agreed with Wal-Mart, J.C. Penney and The Children's Place that no duty of care was owed to workers downstream in their supply chain.[9]

The first factor the Superior Court considered with respect to the construction of a duty of care required to be able to establish either claim concerned the nature of the relationship between the plaintiffs and defendants. The plaintiffs alleged that an exception to the "special relationship" (ordinarily required to establish a duty of care under Delaware law) applied, such that a duty of care was established by virtue of the operation of the "peculiar risk" doctrine, whereby the plaintiffs' employment within the defendants' supply chain as independent contractors, coupled with the known safety risks at Rana Plaza, gave rise to the duty.[10] Yet the Superior Court concluded that the plaintiffs, as employees of the garment factories in Rana Plaza rather than directly of the defendants, were explicitly carved out of the class protected by the peculiar risk doctrine under the relevant statutory provisions.[11] Moreover, the Superior Court concluded that the plaintiffs had not precisely identified a "peculiar risk" (viz. a special risk particular to the work to be done). The risks alleged, relating to the inadequacies of the construction of Rana Plaza, were not peculiar to the garment business and, as such, the defendants could not reasonably be expected, as required under Delaware law, to take precautions against building collapse when deciding to source from the factories in Bangladesh.[12]

Secondly, the Superior Court noted that it did not need to establish the existence of a general contractor/independent contractor relationship, as such a relationship would not, ordinarily,

[7] *Abdur Rahaman* (n 2) 13; moreover, according to Delaware law, where the limitation period for the relevant cause of action under the law of a different state/country is shorter than under Delaware law, or vice versa, an action cannot be brought in a Delaware court after the expiration of the shorter period (14-15).
[8] *Abdur Rahaman* (n 2) 18-19.
[9] Allie Robbins, "Outsourcing Beneficiaries: Contract and Tort Strategies for Improving Conditions in the Global Garment Industry" (2018), available at: <https://ssrn.com/abstract=3119968> accessed 10 April 2018.
[10] *Abdur Rahaman* (n 2) 21-22.
[11] ibid. 22-23.
[12] ibid. 23.

give rise to a duty of care to protect the independent contractor's employees under Delaware law. Moreover, no exception that might otherwise give rise to a general contractor's duty to protect an independent contractor's employees (predicated, broadly, on (i) control over the manner/method of the work; (ii) the voluntary assumption of responsibility for implementing safety measures; or (iii) possessory control over the work premises during work) could be said to exist.[13]

Thirdly, the Superior Court concluded that the defendants' ethical sourcing statements could not, contrary to the plaintiffs' claim, by themselves create a duty of care where none exists. Even if the defendants knew or should have known of the unsafe working conditions, this could not give rise to a legal duty of care.[14]

Next, although the plaintiffs alleged that the defendants owed a duty of care under an illegal conduct exception whereby liability is imposed on the employer of an independent contractor when the employer causes or knows of and sanctions illegal conduct, the Superior Court could find no evidence that the plaintiffs were required by the defendant (by way of its sourcing agreements with the factories, for instance) to actually engage in illegal conduct when manufacturing the garments to be sourced.[15]

Finally, the Superior Court addressed the plaintiffs' argument that the questions of fact remained (at the motion to dismiss stage) as to whether the defendants voluntarily assumed the responsibility to provide a safe workplace for the independent contractors' employees. Following the reasoning of the United States District Court of Appeals for the Ninth Circuit in *Doe I v. Wal-Mart Stores*, the Superior Court noted that the plaintiffs failed to allege any facts establishing that the defendants owed the plaintiffs a duty of care: the defendants could not be regarded as the plaintiffs' direct employer, and the plaintiffs did not demonstrate the existence of an exception to the normally operating rule regarding independent contractor liability. As such, the plaintiffs' allegations, even at this stage, were insufficient to prevent the dismissal of the case, having failed to state the *prima facie* case for negligence and wrongful death.[16]

In sum, the Superior Court rejected the notion that the defendants owed any duty of care to the plaintiffs under Delaware law. The plaintiffs were unable to demonstrate: (i) the existence of a "special relationship" or, excepting this, the operation of the "peculiar risk" doctrine, particularly given the lack of a direct employment relationship; (ii) an exception to the general rule protecting general contractors from liability for independent contractors' employees; or (iii) sanctioned illegal conduct. Nor was it the case under Delaware law that a duty of care

[13] ibid. 24.
[14] ibid. 25.
[15] ibid. 25-26.
[16] ibid. 26-27.

could be created by way of an ethical sourcing statement. Accordingly, the Superior Court did not regard the plaintiffs as having alleged a *prima facie* case for negligence and wrongful death.

ii) Canada

The Ontario Superior Court delivered *Das v. George Weston Limited*,[17] dealing with the responsibility of Canadian retailers for the factory collapse, in July 2017. In it, Justice Perell dismissed the $2 billion class action against the Loblaws group of companies and social auditing company Bureau Veritas. The named plaintiffs, three of whom were among those injured and one whose two sons and daughter-in-law died in the collapse, claimed that Loblaws' adoption of its corporate social responsibility (CSR) standards created a duty to protect workers involved in manufacturing products within its supply chain from structural and safety issues. Justice Perell dismissed the motion to certify the proceedings as a class action, finding that no duty of care could be said to exist under Bangladeshi law (which he concluded was the applicable law governing the action under the choice of law rules) or, in case it applied, Ontario law. In the event, no reasonable cause of action could be said to exist and, given the lack of any viable claims, the court was not able to certify the class.

The plaintiffs' main argument in tort was that, knowing of the notoriously dangerous conditions of workplaces in Bangladesh, Loblaws voluntarily took responsibility for ensuring the buildings in which vulnerable employees were producing its garments were "safe and structurally sound".[18] The first in the series of legal questions considered was whether an Ontario court has jurisdiction *simpliciter* to hear the case, with Justice Perell affirming that it does given the "real and substantial connection" to Ontario providing the existence of one of four "presumptive connecting factors", including that the defendants are resident and carry on business in Ontario. The second question addressed was whether Ontario or Bangladesh law should apply. The location of the activity causing the harm – the *lex loci* – was of relevance here. Justice Perell dismissed the plaintiffs' argument that the actions forming the basis of the legal wrongs alleged were committed in Ontario (even if the harm was suffered in Bangladesh), concluding that the harm occurred and the plaintiffs reside in Bangladesh and that a finding to the contrary would create an artificial link to Ontario. Justice Perell also dismissed the alternative argument submitted by the plaintiffs that exceptions to the *lex loci* rule apply so that Ontario should take jurisdiction on the basis that (i) Bangladesh tort law was insufficiently developed to be "proveable"; (ii) Bangladesh law did not permit punitive damages; and (iii) the application of Sharia law in Bangladesh was contrary to Canada's principles of gender equality. Justice Perell noted that Bangladesh has a long history of tort law so that the claim that the law was not proveable was incorrect. He also found that it could not be shown that punitive damages would not be awarded in Bangladesh, and that they were highly unlikely to be awarded in any case. Justice Perell also concluded that an Ontario court could sever (i.e. not apply) the relevant offensive Sharia law when applying Bangladesh law. Thirdly, Justice Perell

[17] *Das v. George Weston Limited* 2017 ONSC 4129.
[18] ibid. [121].

considered whether it was plain and obvious that the lawsuit cannot succeed under Bangladeshi law (the substance of foreign law being a "factual" question and to be determined on the basis of expert evidence and source legal materials). He concluded that it was plain and obvious: no duty of care had ever been established between a buyer of goods and workers employed by a subcontractor, nor was there reason to believe a Bangladeshi court would find that Loblaws owed such a duty. Justice Perell then concluded that the lawsuit could not succeed under Ontario law, in the event that the conclusions relating to the application of Bangladeshi law were incorrect; it would fail the relevant legal test, set out in the British case *Anns v. Merton London Borough Council* requiring foreseeability, sufficient proximity, and the absence of overriding policy considerations, thus negating any *prima facie* duty.[19]

David Doorey evaluates the judgment's implications for corporate social responsibility norms in practice in *Vacuousness of CSR on Display in Loblaws' Victory in Rana Plaza Class Action Lawsuit*.[20] To start with, Doorey engages in a detailed discussion of the complex legal reasoning behind the ruling, critiquing certain elements of Justice Perell's decision and demonstrating the ultimate vacuity of CSR norms. In particular, Doorey focuses on the foreseeability requirement under *Anns v. Merton*, noting that Justice Perell's reasoning was somewhat unclear. Doorey questions Justice Perell's conclusion that the harm suffered was a reasonably foreseeable consequence of Bureau Veritas' actions (or inaction) but not of Loblaws: if Bureau Veritas' failure to perform the auditing required by Loblaws' CSR standards would foreseeably result in the harm then, Doorey asks, should it not follow that harm is foreseeable if, as was the case, Loblaws "decides to ignore clear violations of those very standards reported" by Bureau Veritas? Doorey also remarks on the potentially incorrect application of the duty of care test within the context of a motion to dismiss by Justice Perell, who concluded it was "not plain and obvious that a purchaser of goods does or should have a legal duty of care to the employees of a manufacturer of those goods."[21] Doorey is left wondering whether the plaintiffs need to show that it was plain and obvious that a court could not find that such a duty exists or whether the defendants needed to show that it was plain and obvious that the court could not find such a duty, and the import of this distinction in a motion to dismiss. Whatever the case, neither defendant satisfied the requisite proximity test, with the relationship between Loblaws and subcontractor New Wave's employees too remote, such that imposing a duty of care on Loblaws for the Rana Plaza workers would be unfair or unjust. Lastly, Doorey examines Justice Perell's consideration that policy considerations augured against the recognition of a legal duty of Canadian corporations over workers of suppliers in other countries; such a duty would, Justice Perell argues, deter companies like Loblaws from taking any steps to help workers and effectively punish them for doing such good deeds as

[19] ibid. [505].

[20] David Doorey, "Vacuousness of CSR on Display in Loblaws' Victory in Rana Plaza Class Action Lawsuit" (2017) *Law of Work Blog*, available at <http://lawofwork.ca/?p=8992> accessed 10 April 2018; see also Doorey's flowchart of the legal issues involved: <http://lawofwork.ca/wp-content/uploads/2017/07/Rana-Flow-Chart.pdf> accessed 10 April 2018.

[21] *Das v. George Weston* (n 17) [524].

instituting CSR policies.[22] On this point, Doorey is notably circumspect, questioning how a company that did little more than "adopt a piece of paper listing standards" could be considered as carrying out a good deed. While a company can claim to do good deeds, it may well do the opposite – action is what matters. As such, Doorey concludes that there was no real requirement for any meaningful action to protect workers under CSR: "perhaps Justice Perell's reference to Loblaws' 'good deeds' simply reaffirms how very little we should expect from corporate social responsibility."

Agarwal, Beaulne and Schiff of Bennet Jones focus on the judgment's value as lying in its exploration of neighbour and proximity concepts in a globalised economy.[23] Like Doorey, they surmise that the judgment demonstrates that CSR policies aimed at improving labour standards in offshore factories may not in themselves be enough to bridge the proximity gap between Western brands and workers further down the supply chain. This is borne out by the assessment of Lam and Henderson, who, while largely eschewing discussion on the precise import of CSR standards, surmise that tort law has its "limits" in addressing such harms, even as business becomes more globalised.[24] Agarwal et al. also consider that a more broadly formulated CSR policy including a reference to the structural integrity of the suppliers' factories may well have caused Justice Perell to find that the proximity element was satisfied.

Agarwal, Beaulne and Schiff further note the wider lessons of the decision for class action litigants in this type of claim; they should be cognisant of judges' inclinations to conduct detailed appraisals of statements of claim, checking for material facts and whether asserted clauses of action have been artificially characterised to survive preliminary scrutiny. They should also be aware, at an early stage, of whether a meaningful connection between the matter and any foreign country exists, and which, if any, laws can be proved through expert evidence.

iii) Select case law developments in Bangladesh

(1) Criminal cases

(a) Construction code violations:

A case alleging construction code violations and illegally adding floors to the building was launched in April 2013. The charge sheet was filed in June 2015, alleging breaches of the

[22] ibid. [525], [536].

[23] Ranjan K. Agarwal, Gannon G. Beaulne and Ethan Z. Schiff, "Corporate Social Responsibility and the Rana Plaza Class Action" (2017) *Bennet Jones* <https://www.bennettjones.com/en/Publications-Section/Updates/Corporate-Social-Responsibility-and-the-Rana-Plaza-Class-Action> accessed 10 April 2018.

[24] Jessica Lam and Nicole Henderson, "Who Is My Neighbour? Ontario Court Rejects a Duty of Care to Employees of Foreign Suppliers" (2017) <http://www.blakesbusinessclass.com/who-is-my-neighbour-ontario-court-rejects-a-duty-of-care-to-employees-of-foreign-suppliers/> accessed 10 April 2018.

Building Construction Act against 18 people,[25] including Rana Plaza owner Sohel Rana. 17 of those facing these charges are also facing murder charges in a separate case (detailed below).[26] Following the last hearing held in March 2016, the case was accepted for trial at the Chief Judicial Magistrate Court in Dhaka.[27]

(b) Murder:

In December 2015, charges relating to murder in connection with the collapse (upgraded from culpable homicide following allegations that workers were forced to enter the building despite the appearance of major cracks)[28] were accepted against 41 people including Sohel Rana, seven owners of the factories operating in the building, and twelve government officials responsible for safety and inspections.[29] Of the 41, 38 have formally been charged with murder, while three have been charged with helping Rana flee after the incident.[30] Originally 24 of those charged absconded before trial and a senior judicial magistrate has issued warrants for their arrest.[31] 35

[25] Al Jazeera and Agencies, "Rana Plaza court case postponed in Bangladesh" *Al Jazeera* (23 August 2016) <https://www.aljazeera.com/news/2016/08/rana-plaza-tragedy-bangladesh-puts-18-trial-160823051641161.html> accessed 10 April 2018; Clean Clothes Campaign, *Rana Plaza 3 Years On: Compensation, Justice, Workers' Safety* (April 2016) <https://cleanclothes.org/resources/publications/rana-plaza-three-years-on-compensation-justice-and-workers-safety-full-report/view> accessed 10 April 2018, 9; "Rana Plaza victims demand justice, compensation" *The Daily Star* (Dhaka, 24 April 2016) <https://www.thedailystar.net/business/rana-plaza-victims-demand-justice-compensation-1213810> accessed 10 April 2018; "Rana Plaza owner, 17 others indicted" *The Daily Star* (Dhaka, 15 June 2016) <http://www.thedailystar.net/frontpage/rana-plaza-owner-17-others-indicted-1239742> accessed 10 April 2018.

[26] Chaitanya Chandra Halder and Tuhin Shubhra Adhikary, "41 face murder charge over Rana Plaza building collapse in Bangladesh" *The Daily Star* (Dhaka, 2 June 2015) <https://www.thedailystar.net/frontpage/41-face-murder-charges-91069> accessed 10 April 2018.

[27] Clean Clothes Campaign, *Rana Plaza 3 Years On: Compensation, Justice, Workers' Safety* (n 25), 9.

[28] "Bangladesh court accepts murder charges in factory collapse case" *Aljazeera America* (21 December 2015) <http://america.aljazeera.com/articles/2015/12/21/bangladesh-court-accepts-murder-charges-in-factory-collapse-case.html> accessed 10 April 2018; Chandra and Adhikary (n 26) <https://www.thedailystar.net/frontpage/41-face-murder-charges-91069> accessed 10 April 2018.

[29] Clean Clothes Campaign, *Rana Plaza 3 Years On: Compensation, Justice, Workers' Safety* (n 25), 10; "Court accepts Rana Plaza murder charge sheet" *The Daily Star* (Dhaka, 21 December 2015) <https://www.thedailystar.net/country/court-accepts-rana-plaza-murder-charge-sheet-190420> accessed 10 April 2018; "Rana Plaza: 24 murder suspects abscond before trial" *Agence France-Presse* (Dhaka, 21 December 2015) <https://www.theguardian.com/world/2015/dec/21/rana-plaza-24-suspects-abscond-before-trial> accessed 10 April 2018.

[30] "Rana Plaza collapse: 38 charged with murder over garment factory disaster" *Reuters* (Dhaka, 18 July 2016) <https://www.theguardian.com/world/2016/jul/18/rana-plaza-collapse-murder-charges-garment-factory> accessed 10 April 2018.

[31] "Rana Plaza: 24 murder suspects abscond before trial" *Agence France-Presse in Dhaka* (Dhaka, 21 December 2015) <https://www.theguardian.com/world/2015/dec/21/rana-plaza-24-suspects-abscond-before-trial> accessed 10 April 2018.

of those charged have since appeared before court and pleaded not guilty.[32] Precise trial dates are difficult to identify and the extent to which these cases have progressed at court is unclear.

(c) Corruption:

In August 2017, the owner of Rana Plaza, Sohel Rana, was sentenced to three years imprisonment and fined BDT 50,000 for not submitting his wealth statement to the Bangladesh Anti-Corruption Commission (ACC) in a corruption case before Special Judge Court-6 in Dhaka.[33] In March 2018, the court sentenced Rana's mother to six years imprisonment for amassing wealth illegally and concealing her wealth.[34] Another Dhaka court has framed charges in a separate graft case filed by the ACC against Rana, his parents and seven others.[35] The ACC alleges that Rana had built two commercial buildings – including the Rana Plaza – with illegally acquired money.[36]

(2) Labour Court actions

In 2013, eleven cases were filed against Sohel Rana, the factory owners and other responsible persons before the Labour Court for infringements relating to the failure to give notice of an accident and contravention of law leading to death/grievous harm/harm. The violations carry a prison sentence, and only Rana has been held in prison, with the remainder either on bail or having failed to surrender to court (including Spanish CEO David Mayer Rico).[37]

[32] "Rana Plaza collapse: 38 charged with murder over garment factory disaster" *Reuters* (Dhaka, 18 July 2016) <https://www.theguardian.com/world/2016/jul/18/rana-plaza-collapse-murder-charges-garment-factory> accessed 10 April 2018.
[33] "Rana Plaza owner jailed for graft" *The Daily Star* (Dhaka, 30 August 2017) <http://www.thedailystar.net/frontpage/rana-plaza-owner-jailed-graft-1456033> accessed 10 April 2018.
[34] "Rana's mother jailed for 6yrs for amassing wealth illegally" <https://www.thedailystar.net/country/rana-plaza-owners-mother-morzina-begum-jailed-for-6-years-1555207> accessed 10 April 2018.
[35] Md Sanaul Islam Tipu, "Rana Plaza collapse: Order on charge framing against Sohel Rana, others May 8" *Dhaka Tribune* (Dhaka, 19 April 2017) <http://www.dhakatribune.com/bangladesh/court/2017/04/19/rana-plaza-charge-framing-may-8/> accessed 10 April 2018; Md Sanaul Islam Tipu, "Verdict against Sohel Rana in ACC case on Aug 29" *Dhaka Tribune* (Dhaka, 19 April 2017) <http://www.dhakatribune.com/bangladesh/court/2017/08/23/acc-case-verdict-sohel-rana-aug-29/> accessed 10 April 2018.
[36] Md Sanaul Islam Tipu, "Verdict against Sohel Rana in ACC case on Aug 29" *Dhaka Tribune* (Dhaka, 19 April 2017) <http://www.dhakatribune.com/bangladesh/court/2017/08/23/acc-case-verdict-sohel-rana-aug-29/> accessed 10 April 2018.
[37] Clean Clothes Campaign, *Rana Plaza 3 Years On: Compensation, Justice, Workers' Safety* (n 25), 10.

(3) Public interest litigation

Two public interest litigation cases were filed in April 2013 before the High Court. The first case was meant to establish which government departments were accountable for failings leading to the collapse. The High Court ruled that a Committee should be established to propose compensation criteria for those affected and their families, and, in September 2014, the Committee submitted its recommendation to the High Court that BDT 1,451,000 (EUR 18,400) should be provided as compensation to the family of each dead and missing worker and a further payment of BDT 500,000 (EUR 5,600) should be made as a payment for pain and suffering.[38] The second case included a request that the assets of the owners of the building and five factories should be frozen.[39] The Bangladesh Bank issued a circular to all banks shortly thereafter to restrict the withdrawal or transfer of monies of the six named owners and the High Court has since rejected the release of funds from Sohel Rana's bank account, though no decision has been made by the court on the utilisation of the frozen assets or the distribution of compensation.[40]

b) Soft mechanisms

i) Rana Plaza Arrangement and the Trust Fund

On 20 November 2013, actors from different groups of stakeholders agreed on an arrangement, the Rana Plaza Arrangement (Arrangement),[41] regarding the payment of compensation to victims of the disaster and their families and dependents. The Coordination Committee of the Arrangement comprised the Ministry of Labour and Employment, the Bangladesh Garment Manufacturers' Association (BGMEA), the Bangladesh Employers Federation (BEF), the National Coordination Committee for Workers' Education (NCCWE), IndustriALL Bangladesh Council, IndustriALL Global Union, Bangladesh Institute of Labour Studies (BILS), nominated brands (El Corte Ingles, Loblaw, Primark) and the Clean Clothes Campaign alliance. A claims process under the Arrangement was established and a range of local organisations and international experts implemented the process. Its aims were to support the victims and their dependants in filing their claims, calculate the amount to be paid to each claimant and provide future support if needed.

[38] Clean Clothes Campaign, *Rana Plaza 3 Years On: Compensation, Justice, Workers' Safety* (n 25), 8.
[39] ibid.
[40] Clean Clothes Campaign, *Rana Plaza 3 Years On: Compensation, Justice, Workers' Safety* (n 25), 8 (as at April 2016).
[41] Understanding for a Practical Arrangement on Payments to the Victims of the Rana Plaza Accident and their Families and Dependents for their Losses (Rana Plaza Arrangement) (adopted 20 November 2013).

To finance the Arrangement, on 28 January 2014, the Rana Plaza Donors Trust Fund was established. Any organization, company or individual could contribute to the Trust Fund. Although it was initially estimated that US$40 million was needed to cover the expected claims, this number was revised to approximately US$30 million. The donors of the Trust Fund range from global textile companies to trade unions and NGOs. In June 2015, it was announced that the target amount of US$30 million had been reached after a large anonymous donation.

Although the ILO was not a party to the Arrangement, it was invited by the parties to serve as the neutral and independent chair of the Coordination Committee to provide technical information when requested by the Committee. As the neutral chair, ILO provided advice and assistance to the Committee on how to design and run the compensation scheme in accordance with the 1964 ILO Employment Injury Benefits Convention (No.121). After the design of the scheme was set, the ILO developed software to calculate the amount of compensation that should be paid to each victim or dependant.

ii) Mediations before OECD National Contact Points

The Organization for Economic Cooperation and Development (OECD) has proved to be an important actor propagating soft law initiatives that aim to ensure responsible business conduct and to help enterprises identify and prevent their potential averse human rights impacts. One pertinent initiative in this respect is the Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector (Guidance)[42] released on 8 February 2017. By providing recommendations for companies on the way in which they should exercise due diligence, the Guidance attempts to uphold a general understanding of due diligence in the garment and footwear sector. The Guidance is addressed to all enterprises in the garment sector, be they producers, manufacturers, brands or retailers, and regardless of whether the enterprise is multinational or national. It is based on the general principles and standards of the OECD Guidelines on Multinational Enterprises (Guidelines). These Guidelines are the most comprehensive set of recommendations available today which are backed by the adhering states and directed at multinational enterprises (MNEs) operating in or from these states. Although the implementation of the Guidelines is voluntary, states can make implementation compulsory, and the Guidelines are also supported in their implementation by the representatives of business, worker organisations and non-governmental organisations. The Guidance is not intended to replace the domestic laws of states and it provides recommendations to companies in the garment and footwear sector on how to address and mitigate their negative impacts on human lives and environment throughout their manufacturing and sourcing processes.

[42] OECD, *OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector* (OECD Publishing, 2017).

The OECD National Contact Points (NCPs) offer their good offices to the parties of a complaint submitted to them and try to facilitate settlement of disputes which form the basis of the complaint. Labour rights violations in the RMG sector can be a ground for submission of a complaint if all the conditions to file a complaint are met.

There have been various complaints filed to NCPs in different countries following the Rana Plaza disaster in respect of various business operations in Bangladesh:

- The first of the complaints relates to the Ready-Made Garment (RMG) sector in Bangladesh (though in respect of another disaster, the Tazreen factory fire), and was submitted to the German NCP by a member of the German Bundestag in May 2013. In that complaint, the German MNEs KiK Textilien, C&A and Karl Rieker were accused of not complying with the general policies and some provisions of the human rights chapter of the OECD Guidelines in Bangladesh. C&A's case was later forwarded to the Brazilian NCP since the subsidiary of the company that had business relationships with the Tazreen factory was registered in Brazil. The NCP considered that the complaint deserved further consideration and invited all the parties for mediation talks. The remaining two companies engaged in mediation and the parties eventually agreed on a settlement, requiring companies to take measures to prevent similar future disasters.
- Another case related to the Tazreen fire after the Rana Plaza collapse was handled by the Brazilian NCP. On 4 December 2013, a German MP submitted a claim to the Brazilian NCP about C&A, alleging that it did not observe the OECD Guidelines when buying from this factory. Throughout the process, the company indicated that, after the factory fire, it took some measures and initiated a fire safety program to be applied in all of its suppliers' factories. After a lengthy procedure, due to some practical difficulties, the NCP concluded the case with recommendations to promote decent work conditions in line with the Guidelines.
- The first case directly involving Rana Plaza was submitted by Clean Clothes Campaign to the Danish NCP on 12 December 2014, claiming that PWT Group**,** a Danish MNE which sourced from a garment factory in Rana Plaza, did not exercise due diligence with respect to this supplier. Although the MNE claimed that it monitors its suppliers and monitored that specific supplier from Rana Plaza in 2012 as well, it did not cooperate with the NCP fully and did not submit requested documents or submitted documents with missing information. As a result, after determining that the MNE did not exercise due diligence and more specifically, failed to request from its supplier to take measures concerning occupational safety and health (OSH), the NCP concluded the case with recommendations to the MNE regarding the exercise of due diligence and adoption of policies that will ensure fulfilment of corporate social responsibility.
- The most recent case (still in progress) submitted to an NCP concerning the collapse of Rana Plaza was submitted to the German NCP on 2 May 2016. In the submission, NGOs together with the victims of the collapse and trade unions claimed that TÜV Rheinland, a German auditing company, and its subsidiary in India did not take

professional auditing standards into consideration and the audit report failed to provide a full account of child labour, gender discrimination, lack of trade unions, and forced overtime which were taking place in a factory they audited in Rana Plaza. They questioned the reliability of the certifications and further claimed that the way in which factory certifications are made should be changed, considering that the very factory whose construction quality was described as good in the audit report of the company collapsed a few months after the social audit. The complainants are now expecting the NCP to accept the complaint for further examination and enter into mediation proceedings to discuss these issues with the company.

2) Transnational regulatory and policy responses

Parallel to litigation, a host of initiatives enacted by stakeholders such as NGOs, industry associations, trade unions and governments have appeared on the transnational stage. These responses mostly address issues connected to labour standards and labour's health and safety. Although the governance structures, institutional mechanisms and the substantive provisions vary considerably, common elements are the overlap between these regulatory regimes and the need for coordination between them.

a) The Accord on Fire and Building Safety in Bangladesh

To address the root problems at the origin of the Rana Plaza and previous disasters, efforts of a coalition of labour rights advocates concentrated on signing a legally binding agreement on worker safety in the RMG sector in Bangladesh between labour unions, apparel brands and retailers. On 15 May 2013 the Bangladesh Accord on Fire and Building Safety (Accord), covering more than 2 million garment workers and with H&M becoming the first international brand signing the agreement, was adopted in response to the global outcry to stop business-as-usual in Bangladesh's RMG sector. This was followed by the establishment of the Bangladesh Accord Foundation in the Netherlands in October 2013. To date, more than 200 apparel brands, retailers and importers from more than 20 countries in Asia, Australia, Europe and North America, along with two global unions – IndustriALL and UNI Global – and 14 Bangladeshi trade union federations have signed the Accord. In addition to these, four international labour rights NGOs – Clean Clothes Campaign, Worker Rights Consortium, International Labour Rights Forum and the Maquila Solidarity Network – have signed the Accord as international witnesses.

The key features of the Accord are:

- a five-year legally binding agreement between the signatories to create better working conditions in the RMG sector in Bangladesh;

- independent inspections performed by engineers concerning fire, structural and electrical issues;
- disclosure of these inspection reports, corrective action plans (CAPs) and regular progress updates;
- a commitment by the signatory brands to finance remediations in RMG factories and not to terminate their ongoing relationships; and
- offering training programs, establishing effective complaint mechanisms and recognition of the right to refuse unsafe work of workers (the lack of such a right a contributing factor to the dramatically high number of casualties in Rana Plaza collapse).

The Accord is governed by a steering committee composed of an equal number of representatives from trade unions and companies and a neutral chair held by the ILO. Such a binding agreement was an unprecedented development for the RMG sector in Bangladesh. It is a five-year agreement which can be legally enforced between the signatory brands and trade unions. Arising disputes from the Accord are first considered by the Accord's steering committee for adjudication and its decision may then be appealed in a process of binding arbitration, subject to the UNCITRAL Arbitration Rules.

The last quarterly aggregate report of the Accord shows that since the Accord was adopted in May 2013, more than 2,000 factories have been inspected for fire, electrical and structural issues. Also, CAPs are released for each factory indicating what actions should be taken by the factory to address the issues identified during the inspections. The progress status of each CAP is made public on the website of the Accord so that every stakeholder can know how much a factory is doing to fix its safety problems. As of 1 January 2018, more than 130,000 issues have been identified in the factory inspections and made public in the published CAPs. Moreover, throughout the implementation of the CAPs, the Accord engineers monitor the progress and check whether the corrective actions were taken correctly. It is also possible that in these follow-up inspections, engineers could add new findings to their original findings that they spotted in their first inspection of that factory. 83% of all the issues pointed out in the CAPs have been reported and verified as fixed. That percentage comprises, both original and new findings of, 52,516 out of 65,266 electrical issues, 30,878 out of 44,327 fire issues and 11,225 out of 20,618 structural findings.

The Accord makes it clear that the signatory corporations need to ensure that the factories they supply from complete all required remediation,[43] and the signatory brands need to ensure that the factories are financially able to do so by providing financial assistance for the funding of remediation when necessary.[44] However, since the Accord does not require companies to disclose their financial arrangements with the relevant factories and the amount they spend to

[43] Accord on Fire and Building Safety in Bangladesh (Bangladesh Accords) (adopted 13 May 2013) Articles 12 and 21.
[44] ibid. Article 22.

assist the remediation process, it is not possible to obtain an overview of these features under the Accord. The Clean Clothes Campaign estimates that, while a significant number of factories have been financially assisted, a significant number of factories equally have not requested such assistance for fear of upsetting buyers, namely the brands and retailers, potentially leading to the termination of the relationship between the factory and its buyers.[45]

To increase compliance by local factories, the Accord requires that the signatory brands and retailers stop sourcing from factories which do not fulfil their duty to make mandated safety improvements. This feature of the Accord is different from previous auditing systems in that it does not leave the discretion to either stop or continue buying from a supplier solely to the brands and retailers. Under the Accord, if remediations are not effectively completed in one of the factories of a factory owner, brands and retailers are required to cease their business with all of the factories of that same owner. In such a case, the factory owner is 'terminated' and becomes ineligible to supply to the signatory brands and retailers of the Accord. As of 1 January 2018, 96 factories have been terminated for failing to comply with the remediation process.[46]

Under the Accord, in order to provide an easily accessible way for workers and trade unions to express their safety and health-related complaints and concerns, a complaint mechanism has been established through which anonymous complaints can be submitted. This process can even lead to the termination of the factory from the Accord. As of 1 January 2018,[47] a total of 497 complaints have been filed under the Accord out of which, among others, 183 were resolved, 96 are under investigation, 56 could not be resolved and 20 were withdrawn or resolved outside of the Accord mechanism.

Although the Accord's five-year term expires in May 2018, the signatories stated that the Accord will continue its work beyond its original deadline. On 29 June 2017, the Accord was renewed and on 19 October 2017, the Bangladeshi Ministers of Commerce and Labour, signatory brands and trade unions agreed that the Accord would remain operational until local administrative bodies met certain standards. Thus, the new Accord is intended to transfer its responsibilities to local authorities after the end of the Accord. As of 11 April 2018, the 2018 Transition Accord, which will replace the first Accord, was signed by 140 brands. Currently, it is planned to extend for three years, until the end of the May 2021. However, if a joint monitoring committee, consisting of the Government of Bangladesh, the ILO, the Bangladesh Garment Manufacturers and Exporters Association, Accord brands and trade union signatories is unanimously convinced that a local regulatory body compliant with a set of standards has been established, they can then decide to terminate the agreement before its deadline.

[45] Clean Clothes Campaign, International Labor Rights Forum, Maquila Solidarity Network, and Worker Rights Consortium, *Bangladesh Accord: Brief Progress Report and Proposals for Enhancement* (2017), 4.
[46] Bangladesh Accord Secretariat, *Quarterly Aggregate Report-on remediation progress at RGM factories covered by the Accord* (24 January 2018), 4.
[47] ibid. 18.

Under the Accord, two arbitration cases lodged against companies have been settled so far. On 16 October 2017, the Permanent Court of Arbitration in The Hague unanimously held that claims of IndustriALL and UNI Global, two global labour unions, against two global brands met the pre-conditions to arbitration under Article 5 of the Accord and found them admissible. The Court also decided that the names of the brands would remain confidential. The claims included the failure of the brands in requiring their suppliers to complete their remediations and in agreeing on commercial terms that are financially feasible for their suppliers to cover the remediation costs. In December 2017, the global unions and one of the companies reached a settlement agreement, according to which brands will ensure that its suppliers' factories will be remediated as well as provide the funding needed for the remediations in accordance with the Accord. Lastly, in January 2018, unions reached a USD 2.3 million settlement with another multinational company. According to this settlement, the company agreed to pay USD 2 million for the remediations in more than 150 garment factories in Bangladesh and contribute USD 300,000 into a joint fund established by the unions to improve working conditions in global supply chains.

b) The Alliance for Bangladesh Worker Safety

Although there are some US brands and retailers which signed the Accord, many of them have refused due to liability concerns[48] since the Accord is a legally binding agreement and foresees an arbitration procedure in case of disputes. Instead, some North American brands (currently 29), led by Gap and Wal-Mart, have come together and formed the Alliance for Bangladesh Worker Safety in July 2013 to be active for a period of five years. The aim was to enhance working conditions and safety in RMG factories in Bangladesh through: the imposition of standards upon suppliers; factory inspections; remediation of fire, electrical and structural issues of the factories; ensuring worker participation in driving workplace safety and worker; and management training. The Alliance is different from the Accord with respect to its governance, in that major US brands control the Alliance and trade unions are not represented in the governing board. Nevertheless, in terms of factory inspections and OSH assessments, their criteria do not differ considerably, and they even sometimes share their audit reports if a factory lies under both of their coverage. The members of the Alliance are not under the obligation to fund remediations – it is done voluntarily.

The Alliance's 2017 Annual Report indicates that there are currently 658 active factories under the umbrella of the Alliance in Bangladesh, accounting for 1.4 million workers in total, while 162 factories have been suspended from the list of approved factories because they did not achieve adequate progress in terms of remediations.[49] 234 factories have successfully completed all remediations spotted in the inspections and, in total, 85% of all fire, structural

[48] "U.S. Retailers Offer Plan for Safety at Factories" *The New York Times* (New York, 10 July 2013) <https://www.nytimes.com/2013/07/11/business/global/us-retailers-offer-safety-plan-for-bangladeshi-factories.html> accessed 11 April 2018.

[49] Alliance for Bangladesh Worker Safety, *Annual Report* (November 2017), 3.

and electrical issues have been remediated so far. A helpline was set up for workers to safely and anonymously report safety issues in their factories. It does not seem that the Alliance will be extended after 2018, but there are discussions on the creation of a local organization that could build on the legacy of the Alliance and would be tasked with monitoring new and existing factories according to the standards of the Alliance concerning fire, electrical and building safety.

The Alliance, built upon a fairly traditional CSR-based approach and collective industry-wide self-regulation,[50] has been criticized by NGOs including the Clean Clothes Campaign on different grounds.[51] The operation of the Committee of Experts, the body that conducts inspections under the Alliance, is overseen by the Board of Directors and Executive Director, which are not independent from the brands; it thus embodies a fox-guarding-henhouse-like situation which threatens the legitimacy of the inspection process. Moreover, workers do not have the right to refuse dangerous work under the Alliance. With respect to the enforcement of the Alliance standards, workers can merely file a complaint to the company, in contrast to the recognition of worker organizations' capacity to enforce the standards in the Accord. Furthermore, in a separate study, NGOs complained about the lack of transparency of the Alliance and dissemination of inaccurate information about the progress of remediation under the Alliance.[52] The NGOs asserted that, although the Alliance claims that most of the remediation progress has been concluded, the situation on the ground is different. The NGOs alleged that the Alliance misclassified many factories as 'on track' even though they did not show any sign of achieving progress, resulting in an overstatement of the achievements of the Alliance.

c) ILO

A high-level ILO mission was sent to Bangladesh shortly after the collapse to engage with stakeholders including the Bangladeshi government, employers, workers and development partners to identify what actions should be performed to prevent future tragedies. From 1-4 May 2013, the ILO delegation entered into dialogue with the stakeholders and they developed a Joint Statement on Building and Fire Safety on 4 May 2013. Parties agreed that all Ready-Made Garment (RMG) factories needed to be inspected for structural, electrical and fire safety issues. Moreover, it was emphasized that longer-term measures needed to be adopted to increase the capacity and accountability of the administrative bodies which have the responsibility of monitoring and inspecting the factories.

[50] Jimmy Donaghey and Juliane Reinecke, "When Industrial Democracy Meets Corporate Social Responsibility — A Comparison of the Bangladesh Accord and Alliance as Responses to the Rana Plaza Disaster" (2018) 56(1) British Journal of Industrial Relations 14, 15.

[51] Clean Clothes Campaign, *Comparison: The Accord on Fire and Building Safety in Bangladesh and the Gap/Walmart scheme* (2013).

[52] International Labor Rights Forum, Worker Rights Consortium Clean Clothes Campaign, and Maquila Solidarity Network, *Dangerous Delays on Worker Safety* (2016), 1.

To respond to the disaster and support the National Tripartite Plan of Action, the ILO initiated the 'Improving Working Conditions in the RMG Sector' Programme on 22 October 2013, funded by the governments of the Netherlands, Canada and the UK**.** This programme has operated with the Bangladeshi Government, employers and workers organisations to ensure safety at work through actions in five priority areas: enhancing building and fire safety, strengthening the labour inspection system, building a culture of safety and health in the workplace, rehabilitating injured RMG workers, improved working conditions and competitiveness through Better Work Bangladesh.

In the aftermath of the collapse, together with Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) and ActionAid, under the ILO RMG programme, an assessment was conducted to determine the needs of Rana Plaza victims and to identify those most in need of support. Consequently, the ILO provided 300 injured workers with counselling and livelihood training as a short-term support. As of April 2017, 238 out of these 300 workers were contacted and all of them were either self-employed or in paid employment.[53]

In collaboration with the International Finance Corporation, a member of the World Bank Group, the ILO initiated the Better Work Bangladesh programme (BWB), launched in 2013 but fully operational only in late 2014, to work together with workers, employers and government in order to enhance competitiveness and working conditions in the garment sector in Bangladesh. At the beginning of the programme, BWB assisted the Bangladeshi government to incorporate some international labour standards to the labour code of Bangladesh and to build capacity of the RMG factories to improve working conditions. To this end, BWB cooperates with the government, workers and unions, factories and manufacturers and industry leader brands and retailers. Under the BWB, advisory visits are conducted to factories and trainings for management and staff are given.

Since the completion of the inspections of RMG factories and the identification of safety issues in December 2015, the focus has been on the development of Corrective Action Plans (CAPs). The ILO programmes with the help of other initiatives, such as the Accord and Alliance, have led to a significant improvement in the capacity of the Bangladesh Department of Inspections for Factories and Establishments (DIFE) to effectively monitor the remediation process in the inspected factories. To coordinate this process, together with the government and other stakeholders, ILO set up a Remediation Coordination Cell on 14 May 2017. The purpose was to manage the remediation process, which is planned to be completed by the end of 2018, in RMG factories under the National Initiative of the Bangladeshi Government – that is, 1,293 non-Accord and non-Alliance factories.

[53] ILO, *Towards safer working conditions in the Bangladesh ready-made garment sector* (2017), 31.

The ILO's RMG programme has greatly contributed to the rebuilding of the operational and management systems of DIFE since 2013.[54] As a result, the management processes within DIFE were reformed and a number of specialized operational units were established under the aegis of the DIFE to oversee some areas such as occupational safety and health (OSH) and communications. Furthermore, on 1 January 2017, DIFE adopted an inspection checklist to be used by inspectors to gather information on factory safety more systematically and comprehensively. This checklist also covers issues such as violence against women in the workplace and gender-based discrimination.[55]

Under the ILO RMG programme, from late 2015 until early 2017, trainings in a number of areas, ranging from basic training for new inspectors to more sophisticated areas such as fire assessment follow up, were provided to DIFE staff to enable them to apply International Labour Standards and Bangladesh Labour Laws thoroughly.[56]

The ILO RMG programme supported the institutionalization of OSH in Bangladesh as well. Within the Labour Inspectorate, a specialized OSH unit has been established to offer trainings on OSH and to provide advice to factories with respect to standards and best practices concerning OSH. Employer's organizations also benefited from the institutionalization of OSH, by strengthening their OSH capacity and establishing internal support mechanisms for their members in OSH-related issues.[57]

Satisfied with the achievements of the ILO RMG programme and of the idea that the reform process in the Bangladesh garment sector must continue, the state partners (Canada, the Netherlands and the UK) pledged support to long-term sustainable actions in the RMG sector. Consequently, the second phase of the programme has been developed which is planned to run until June 2023. The focus in the second phase is on four strategic areas:

- ensuring factory safety through remediation;
- governance building and supporting the government to effectively regulate industrial safety and continuing to back labour inspection reform;
- improving OSH in both policy and practice; and
- improving working conditions and productivity through BWB.

To crack down on safety issues in the RMG sector, ILO launched other initiatives with various partners. One of these was the Improving Fire and General Building Safety in Bangladesh Project, funded by the US Department of Labour. It ran between January 2014 and December 2016 and contributed to improving building and fire safety in Bangladesh by supporting the

[54] ibid. 13-23.
[55] İbid. 14.
[56] ibid. 15.
[57] ibid. 13-15.

enforcement of laws and regulations concerning fire and building safety. The project worked closely with the Accord and Alliance, but also with the ILO RMG programme to maximise the concerted efforts of different stakeholders and increase the efficiency of plans and projects. Harmonized criteria for fire and structural safety assessment conducted by the three initiatives were agreed upon in late 2014, leading to the development of a common protocol for fire, electrical and building safety remediation and monitoring of the RMG factories.

Building on the lessons of the Rana Plaza Arrangement, pointing out the *ad hoc* nature of the Arrangement and recognizing the difficulty of making such an *ad hoc* arrangement whenever a similar disaster occurs, the ILO, together with the Italian and German governments, initiated a five-year project, Employment Injury Insurance Scheme for Bangladesh (EII) in October 2015. As one of the various projects that ILO carried out with different partners in Bangladesh, EII was launched to set up a permanent national employment insurance injury scheme, at first for the RMG sector, and to establish a new public institution aimed at implementing the scheme and progressively extend the coverage of the scheme to every sector in Bangladesh.

d) EU

The EU is a major trading partner for Bangladesh and their economic exchanges are framed by the EU-Bangladesh Cooperation Agreement concluded in 2001. The Agreement covers issues ranging from trade, economic development to human rights and environmental protection. Whereas Bangladesh supplies the EU with most of its textiles, the EU provides Bangladesh with machinery and transport equipment. Due to Bangladesh being a Least Developed Country (LDC), it is eligible for the Everything but Arms (EBA) trade arrangement, which is the most favourable treatment under the EU's Generalized Scheme of Preferences (GSP), and enjoys quota-free zero-rate duties in 7,200 different products and free access to the EU, except for arms and ammunitions. In order to keep their status as eligible for the EBA, beneficiary states must comply with the eight ILO fundamental conventions and avoid violating them in a serious and systematic manner. Where violations are found, this preferential treatment can be ceased following an investigation by the EU.

On 8 July 2013, after the collapse of Rana Plaza, the EU and the Bangladeshi Government agreed on the Bangladesh Sustainability Compact, which is supported by ILO. The partners of the Compact are the ILO, the EU, the Bangladeshi Government, the USA and Canada – both of which are among the largest buyers of Bangladeshi garment. An intergovernmental group of '3+5' which consists of the Commerce, Foreign Affairs and Labour Ministries of Bangladesh and a total of five representatives from the EU, the US, Canada and two rotating EU member states. The main aim of the Compact is to enhance the enjoyment of labour rights and improve the safety of factories in the RMG sector. The commitments in the Compact are separated into three pillars which are the respect for labour rights, structural integrity of buildings and occupational safety and health and responsible business conduct. To be more specific, the Compact is concerned with the implementation, enforcement and reform of labour

law, refusal of garment workers' right to register unions, anti-union discrimination, freedom of association, upgrading labour inspections and fire and building safety.

The Compact is, in a way, an outcome of the EBA and tries to ensure the compliance of the Government of Bangladesh with the ILO standards and, thereby, with the EU's GSP. A direct link between the Compact and the EBA can also be found in the statements of some EU officials at the initial launch of the Compact. Occasionally, some high-level EU officials envisaged reconsidering Bangladesh's eligibility for the EBA in case of an absence of compliance with the Compact.[58] Furthermore, on 29 April 2015, the European Parliament, in its resolution, urged a review to evaluate whether Bangladesh is still eligible for GSP. On 16 March 2017, three European Commission bodies sent a joint letter to the Bangladeshi Ambassador to the EU, saying that the EU wants to see progress regarding the Compact to keep the eligibility of Bangladesh for the EPA. Since then, no further action has been taken by the EU to end Bangladesh's eligibility for the EPA.

In the latest technical assessment report of the Compact published in October 2017, some progress in several areas have been recognized, including steps taken by the government to reform its legislation pertinent to labour rights, the strengthening of DIFE, the formation of the Remediation Coordination Cell or the Tripartite Consultative Council, founded to manage the relationship between the workers and the factory owners. However, the report also pointed out that a lot needs to be done on some issues such as the inadequate protection of workers with union ties from discriminatory practices, unfair labour practices, inspection of RMG factories for labour rights and fire and building safety and further changes in relevant laws.

After the Rana Plaza collapse, the European Commission committed to create a flagship initiative for all member states to advance responsible business conduct in the RMG sector.[59] Yet, after four years, on 27 April 2017, the European Parliament asked the Commission to propose legislation to prevent the involvement of European companies in human rights violations in the RMG sector. This is a different approach from that hitherto taken by the EU insofar as it aims to go beyond previous voluntary initiatives. It invites the Commission to come up with binding legislation imposing due diligence obligations for the global value chains of European companies active in the RMG, in line with the international labour standards and the OECD Guidelines and Guidance for the garment sector. However, the Commission indicated that adopting such legislation is not on top of its short-term agenda. In a similar fashion, the Council does not favour binding obligations upon EU-based companies, and is instead more sympathetic to voluntary initiatives. In this context, the EU as a whole does not intend to take a step forward on the subject, but some steps are being taken by its Member States.

[58] European Parliament, *Second anniversary of the Rana Plaza building collapse and the state of play of the Sustainability Compact* (2015) para. 26.
[59] European Parliament, *EU flagship initiative on the garment sector* (2017).

3) National responses

The Bangladeshi Government, supported by international partners and international organisations, engaged in an effort to improve safety, working conditions, and labour rights in garment factories. At the same time certain national governments in the EU have either pressed for legislation addressing due diligence in value chains or brokered multi-stakeholder governance arrangements aiming at increasing transparency and due diligence in the garment sector. Both strategies directly implement the United Nations Guiding Principles on Business and Human Rights and the OECD Guidelines.

a) Bangladeshi legislative responses

After the Tazreen Fashions fire, the Bangladeshi Government, in collaboration with employers and workers organisations and with the technical support of the ILO, started to develop an action plan aimed at preventing fire safety at garment factories. Although the plan was formally adopted on 24 March 2013, it was reassessed after the collapse of Rana Plaza which took place one month later and issues concerning structural integrity were included in the plan. After the revision, on 25 July 2013, the National Tripartite Plan of Action on Fire Safety and Structural Integrity for the RMG Sector in Bangladesh was adopted.[60] To ensure the implementation of the Plan of Action, a High-Level Tripartite Committee was established and undertook the duties of monitoring the progress in implementation of the Plan, reviewing and updating the Plan if necessary and developing ways to facilitate other stakeholders' support towards implementation. This government initiative, supported and coordinated by ILO, inspected approximately 1,500 factories not covered by the Accord or the Alliance.

In July 2013, the Bangladeshi Government amended its 2006 Labour Act with the aim to align Bangladeshi labour law provisions to core international labour standards.[61] Some important provisions concerning workplace safety, forming trade unions and resolution of labour disputes were included in the Act. The provisions relating to workplace safety include: gangways and stairs installed with CCTV and left unlocked during business hours; distribution of personal safety equipment to workers and offering training on how to use them; periodical mandatory fire drills; establishment of a health centre in the factories with 5,000 or more employees; creation of safety committees in factories with fifty or more employees; and financing the costs of an employee's medical expenses by the employer if he/she develops an occupational sickness or injury. As regards the changes to trade union formation rules, approval of the factory owner to form a union is no longer necessary (the owner had the power of veto beforehand); after the changes maximum of five unions can be formed within the same factory

[60] Ministry of Labour and Employment of Bangladesh, *National Tripartite Plan of Action on Fire Safety and Structural Integrity for the RMG Sector in Bangladesh* (2013).
[61] Act No. 30 of 2013 (BD).

(up from two beforehand); and the Director of Labour is no longer obliged to pass the names of union officers to employers whenever a new trade union is established. Furthermore, there were some improvements to the 2006 Labour Act with respect to collective bargaining and the right to strike and the coverage of the Act was extended to some new categories of workers by the amendment. While recognising some of the improvements in the 2006 Labour Act, the ILO noted that further steps about several issues concerning freedom of association, collective bargaining, workplace safety and the fundamental rights of employees needed to be taken to ensure the compliance of the Act with international labour standards.

Since the collapse, the number of trade unions in the RMG sector has increased. Since 2013, 524 new trade unions were formed and as of September 2017, this number has increased to 644.[62] However, some commitments of the Government of Bangladesh concerning the unionization of workers and freedom of association are still expected to be fulfilled.[63] It is necessary that the importance of trade unions is understood by all parties, including the Government and domestic manufacturers, instead of denying the union registration applications and anti-union treatments.[64] To enhance transparency and consistency in the trade union registration procedure, standard operating procedures for the registration of trade unions have been introduced by the Ministry of Labour and Employment. Furthermore, for the sake of capacity-building, the personnel, resources and mandate of DIFE have been upgraded remarkably. More than 250 new labour inspectors have been recruited, the budget was quintupled and the institutional abilities of DIFE have been improved. The necessity of further steps concerning capacity-building in Bangladesh and legislative changes to the 2006 Labour Act has also been reiterated by the EU in one of its reports.[65]

b) French Law on Duty of Vigilance

On 27 March 2017, the French law, also known as 'the French Duty of Vigilance Law', introducing due diligence obligations on some certain French transnational companies entered into force after a long legislative process.[66] Although the very first footsteps of the law were heard in the presidential campaign in 2012, French MPs did not bring the legislative proposal to the table for a while. However, the Rana Plaza disaster has changed the tides and sped up the procedure (and is also the reason why the law is unofficially labelled the 'Rana Plaza Law'). In November 2013 the initial bill was put forward, yet the bill would not come before the

[62] European Commission, *Implementation of the Bangladesh Compact Technical Status Report* (2017) 7.
[63] Clean Clothes Campaign, "The European Union and the Bangladesh garment industry: the failure of the Sustainability Compact" (October 2017) <https://cleanclothes.org/resources/publications/the-european-union-and-the-bangladesh-garment-industry-the-failure-of-the-sustainability-compact> accessed 11 April 2018.
[64] Jeffrey S. Vogt, "The Bangladesh Sustainability Compact *Technical Status Report*: An Effective Tool for Promoting Workers' Rights?" (2017) 75(4) Politics and Governance 80, 82-84.
[65] ibid. 8.
[66] Friends of the Earth France and ActionAid France, *End of the Road for Transnational Corporations? Human rights and environment: from a groundbreaking French law to a UN treaty* (October 2017), 4-5.

French Parliament before January 2015. However, the French National Assembly sent the text back to a committee of the Assembly for further discussion and modification. In February 2015, after the work of the committee was complete, the second version of the bill was brought to the National Assembly. This time, although the National Assembly adopted the bill, the Senate rejected all articles in the bill and sent it back to the National Assembly. Throughout the entire legislative procedure, some parts of the first version have been trimmed and after the definitive adoption of the law by the National Assembly, some MPs appealed to the Constitutional Council, contesting every paragraph of the law. Finally, four days after the Council validated the law with quite minor changes on 23 March 2017, the law came into effect.

Since its first tabling, the bill was faced with opposition, particularly from some lobby groups and company and employer associations and some MPs, which resulted in substantive changes. The first version of the bill contained some unprecedented provisions in its context. To name some, the obligation of companies to prevent environmental damages and damages caused by human rights violations was recognized, the burden of proof that the damage occurred despite the company's efforts to prevent it was on the companies, the presumption of responsibility for a company was introduced in case of business-related human rights abuses and every company with subsidiaries abroad, regardless its size, was the subject of the law.

In the second version of the law, there was no general obligation for companies to prevent damages and instead, a duty to prepare and publish vigilance plans, which provide an account of the measures that the company has implemented to identify and prevent human rights and environmental harms stemmed from the operations of the company, was recognized. Any concerned party can ask a company to adopt and implement the plan. A threshold size for companies to be subjected to the law was introduced and this covered approximately 120 French companies. Another major difference is that the presumption of responsibility of companies disappeared in this version of the bill, the burden of proof was replaced and put on the claimants who need to prove a causal link between the company's fault and the harm inflicted on them.

The final version of the bill, which affects 150-200 companies, does not just cover companies in the garment sector in one state or in the world and is not limited in scope to labour rights violations; every business sector and all serious human rights violations are within the scope of the law. As regards the companies affected by the law, either companies which employ at least five thousand employees domestically in France or at least ten thousand employees worldwide need to prepare effective vigilance plans concerning their environmental and human rights impacts. The activities of a parent company, its direct or indirect subsidiaries, subcontractors and suppliers with an established business relationship fall within the scope of the law. Although the burden of proof is still on the claimant, NGOs working on human rights and environmental protection, trade unions and victims can bring a case to the French courts. The vigilance plan should include measures aimed at risk identification and prevention of serious human rights violations resulting from the company's operations, measures to monitor

and assess the impacts of the actions implemented and procedures to regularly assess the operations of its subsidiaries, subcontractors or suppliers. Thus, the expected vigilance plan is not an exercise in *ex post* reporting, but is rather an *ex ante* prevention plan. This is also in line with human rights due diligence standards provided for in the UN Guiding Principles, which states that a company should initiate its due diligence as early as possible in the development of a business relationship and identify and assess actual or potential adverse human rights impacts of their operations and business ties.[67] However, the obligation for companies is not to prevent human rights violations but is instead to prepare and publish the report. If a company fails to do so, even after a formal notice by a concerned party, a judge may force the company to adopt a complete vigilance plan and decide on the payment of a civil fine of at most ten million euros to be paid to the French state, depending on the seriousness of the negligence. If operations of a company which fails to comply with its vigilance plan or without a complete plan result in damages, victims of the company can seek damages of up to thirty million euros for negligence. Consequently, when the substance of the law was contested before the French Constitutional Council, the Council validated the main elements of the bill but censored the payment of a civil fine, which is a criminal sanction in France, because some of the terms of the law such as "reasonable vigilance measures" and "adapted risk mitigation actions" were not specific enough to meet the principle of criminal legality and legality of offences.[68]

c) Dutch Agreement on Sustainable Garment and Textile

The Dutch Agreement on Sustainable Garment and Textile[69] (Agreement) was negotiated and agreed under the auspices of the Social and Economic Research Council of the Netherlands (SER) and is one of the first examples of an initiative undertaken at the national level to promote international responsible business conduct in the garment and textile sector following the collapse. It is one of several sectoral multi-stakeholder Agreements on International Responsible Business Conduct (IRBC Agreements) and, as such, provides for a framework by which companies work with government and other stakeholders to tackle specific problems and achieve improvements on substantial risks within a specified time frame, as well as elaborate shared solutions to problems.[70] The Agreement was signed in July 2016 by a coalition

[67] UN Human Rights Council, *Protect, respect and remedy: a framework for business and human rights: report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises* (7 April 2008), 17-20.

[68] Sandra Cossart, Jerome Chaplier and Tiphaine Beau de Lomenie, "The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All" (2017) 2(2) Business and Human Rights Journal 317, 321.

[69] Social and Economic Council of the Netherlands, Agreement on Sustainable Garment and Textile (2016) <https://www.ser.nl/~/media/files/internet/talen/engels/2016/agreement-sustainable-garment-textile.ashx> accessed 10 April 2018.

[70] Social and Economic Council of the Netherlands, Agreements on International Responsible Business Conduct, Advisory Report 14/04 (2014) <http://www.ser.nl/~/media/files/internet/talen/engels/2014/international-responsible-business-conduct.ashx> accessed 10 April 2018.

comprising the Dutch government, 55 business and their representative organisations (then constituting about 30% of the garment sector in the Netherlands), various non-governmental organisations (NGOs) and two Dutch trade unions.[71] As of October 2017, 67 companies had signed the agreement;[72] the Agreement aims to reach 50% of market share by 2018 and 80% by 2020.[73]

The Agreement aims expressly to build upon and give effect to the United Nations Guiding Principles on Business and Human Rights (UNGPs),[74] the OECD Guidelines for Multinational Enterprises,[75] as well as implement the sector-specific OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector (OECD Guidance).[76] Various commitments are included in the Agreement with respect to the enterprises' due diligence obligations, and Duval and Partiti note their broad range (going beyond the scope of the UNGPs with respect to value chain risks) and ostensible alignment with the OECD Guidance in certain respects, while extending beyond it in others, particularly with respect to the form of the "action plans" envisaged under the architecture of the Agreement.[77] The institutional features and mechanisms for review of companies' action plans provide procedures for monitoring, evaluating and settling disputes in connection therewith and are noted to be among the "most interesting elements of the Agreement".[78] The experimentalist governance mechanism by which companies may reflect on and take action to scale up efforts with respect to due diligence practices (under mechanisms of peer pressure and review), and note the critical function of the Steering Committee and Secretariat in overseeing companies' compliance with commitments under their respective action plans under the Agreement's architecture.[79] Yet, given the lack of appetite in the Dutch context for the introduction of sanction- and liability-based mandatory due diligence requirements to implement the UNGPs, it has been noted that compromises have been made limiting the extent of the review of due diligence practices and the insight other parties will be able to gain into the supply chains of companies active in the Dutch market.[80]

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[71] Social and Economic Council of the Netherlands, "75 Signatures Endorse Sustainable Garment and Textile Sector agreement" (4 July 2016) <https://www.ser.nl/en/publications/news/20160704-sustainable-garment-textile-sector.aspx> accessed 10 April 2018.

[72] See "About this Agreement" <https://www.internationalrbc.org/garments-textile/signatories?sc_lang=en> accessed 10 April 2018.

[73] Agreement on Sustainable Garment and Textile (n 57), 6.

[74] UN Human Rights Council, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework (21 March 2011) UN Doc A/HRC/17/31.

[75] OECD, *OECD Guidelines for Multinational Enterprises* (OECD Publishing 2011) <http://www.oecd.org/daf/inv/mne/48004323.pdf> accessed 10 April 2018.

[76] OECD Guidance (n 42).

[77] Antoine Duval and Enrico Partiti, "The UN Guiding Principles on Business and Human Rights in (National) Action: The Dutch Agreement on Sustainable Garment and Textile" (forthcoming in *Netherlands Yearbook of International Law* 2018), T.M.C. Asser Institute for International & European Law, Asser Research Paper Series 2018-02 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3120541> accessed 10 April 2018, 13-16.

[78] ibid. 16.

[79] ibid. 16.

[80] ibid. 24.

For example, the Agreement takes an "opaque" approach to information-sharing and action plans are not made public in a disaggregated form.[81] It also remains unclear to what extent operationalised due diligence processes will actually be the subject of review, and scope for transparency in the review process is limited; the Agreement thus "risks falling short of the UNGPs' strive for the transparency and public disclosure of the due diligence commitments of companies, as enshrined in Principle 21".[82] The Agreement introduces a dispute resolution system, including a dispute procedure, which solves disputes between a company and the Secretariat over the assessment of an action plan and, as such, is limited to the review of actions plans rather than operationalised due diligence processes (with an independent Complaints and Disputes Committee adjudicating whether, in view of its action plan, a company is acting in accordance with the Agreement).[83] The system also includes a complaint procedure, which contemplates the submission of grievances by any stakeholder, whether a party to the Agreement or not, suffering injury, loss or damage by any company party to the Agreement.[84] Duval and Partiti, appraising the dispute resolution system contemplated by the Agreement in light of the standards elaborated the UNGPs (in relation to access to remedy), note that it may risk falling short of the expectations set by Principle 31 of the UNGPs, particularly in respect of accessibility, the equitable nature of the complaint system, transparency, and engagement and dialogue.[85]

It is difficult to appraise the Agreement's actual impact at this stage, although Theeuws and Overeem of SOMO are skeptical of the Agreement's ability to benefit garment workers in the supply chain.[86] With reference to the first annual report of the Dutch Agreement in December 2017,[87] the authors note that the majority of participating businesses do not know what the risks are in their supply chains and have no plan of action to address abuses, nor is it clear what concrete solutions brands propose or have used to address any problems. To support their position, Theeuws and Overeem draw on striking facts from the report: over 80 per cent of clothing brands signing the agreement are not aware of whether abuses take place in their supplier factories and have no plans to address these abuses; and, so far, only six abuses from the 2,802 factories falling under the remit of the agreement have been reported to the agreement's secretariat. Moreover, Theeuws and Overeem echo Duval and Partiti's (broader) transparency concerns, observing that there is little information on how the Secretariat has evaluated the risk analyses and action plans, and there is no (possibility for) independent evaluation. Where Duval and Partiti are mindful of the soft voluntary approach of the Agreement, (noting that, while in some respects useful in the Dutch context and in respect of

[81] ibid. 18.
[82] ibid. 24.
[83] See Article 1.3 of the Agreement.
[84] ibid.
[85] Duval and Partiti (n 65), 22-23.
[86] Martje Theeuws and Pauline Overeem, "Dutch Agreement on Sustainable Garments and Textile offers little benefit to garment workers" (5 January 2018) <https://www.somo.nl/dutch-agreement-on-sustainable-garments-and-textile-offers-little-benefit/> accessed 10 April 2018.
[87] See <http://garments-textile-annual-report.internationalrbc.org/nl_NL/4104/78437/cover_nieuw.html> accessed 10 April 2018.

certain enterprises, its upscaling to the international level may risk undercutting mandatory due diligence requirements being put in place), Theeuws and Overeem are forthright in calling for the need to legislate in respect of mandatory due diligence and transparency requirements in order to improve conditions and achieve a level playing field between the Agreement's participants and non-participants alike.

It is instructive to understand why global brands would become party to an Agreement, and what they expect the benefit to be. A survey of the brands and officials involved in the negotiating of the Agreement has been conducted, looking at why firms decided to join the Agreement.[88] The companies sampled appeared to derive their motivation to join the agreement from social norm adherence, market demand and a desire to avoid future costs. Notably, the study highlights that political pressure, including pressure exerted following the Rana Plaza disaster, was not as much of a motivator as the view of CSR as an emerging norm in respect of which they want to be a "frontrunner". In light of increasing demand, companies also viewed the Agreement as a framework for fostering cooperation and learning within the industry. Certain companies also thought that joining such an initiative would better the public perception of their image.

d) German Partnership for Sustainable Textiles

To respond the disasters in Bangladesh and Pakistan, including Rana Plaza, the German Partnership for Sustainable Textiles was established in October 2014 by the German Ministry for Economic Cooperation and Development. The aim of the Partnership is to deal with the social, environmental and economic issues under different working groups in line with some of the international standards such as ILO core labour standards, OECD Guidelines and UN Guiding Principles on Business and Human Rights throughout the RMG supply chains. This multi-stakeholder initiative with approximately 150 members, consisting mostly of companies but also associations, NGOs, unions and advisory members, covers about half of the German textile market; it is aimed that by the end of 2018, three quarters of the sector will fall under the Partnership. Furthermore, the steering committee of the Partnership set binding deadlines for its members to plan and apply some measures to improve the working conditions of employees in their supply chains from 2018 to 2020.

Every member of the Partnership is expected to come up with a roadmap on various subjects concerning the improvement of workers' conditions or reducing impacts throughout the supply chain. Submission of these roadmaps first started in March 2017 and became compulsory for the members starting from 2018. Non-compliance with this obligation may result in sanctions which includes exclusion from the Partnership. However, about 40 companies and associations

[88] MSc thesis Wouter Kuin, "Passion for sustainable fashion" (MSc thesis, Leiden University 2017) <https://www.ow-ourworld.nl/wp0317/wp-content/uploads/2017/09/masterscriptie_Wouter_Kuin_Passion_for_fashion.pdf> accessed 10 April 2018.

did not comply with this obligation and failed to take any steps in terms of the Partnership's goals, leading to the suspension of membership to the Partnership. Moreover, some small and medium-sized enterprises have not joined the Partnership due to possible competitive disadvantages and detailed demands that may come with membership.