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Are Supply Chains Transnational Legal Orders?
What We Can Learn from the Rana Plaza
Factory Building Collapse

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Abstract: *In 2013, over a thousand workers were killed when the Rana Plaza factory building collapsed in Bangladesh, one housing several garment factories producing goods for global consumer markets. The collapse, and its consequences, exposed both the complex interweaving of national law, international standards, and private governance standards that together might be understood as a transnational legal order that has some effects on business behavior. This essay engages in a close examination of the Rana Plaza factory building collapse and its aftermath as the starting point for theorizing systemicity in the emerging interlocking systems of national, private and international governance orders. At one level, the governance architectures around the Rana Plaza building collapse suggests bits and pieces of governance and lawmaking that may point to the development of distinct governance orders that bump into each other serendipitously. Yet it is also possible to theorize systemicity from out of these bits, pieces, and bumps that may suggest the nature and forms that are emerging as a distinct class of transnational legal order. Starting from the governance response to the Rana Plaza building collapse facts, this article examines the way that the collective actions of states, international organizations, enterprises, civil society, and affected groups evidence a robust transnational legal order. That transnational order has a normative structure, operationalizes a legal process, and structures a framework within which international organizations, and state and non-state private actors strive toward building functional coherence within formally polycentric governance orders. Alternatively, Rana Plaza might suggest polycentric governance ordering or the new face of old hierarchical relations between developed and developing states. The essay concludes that the reality of the context in which governance arises may continue to defy a single robust theorization. Theories may be chasing facts, but the complexity of the legal ordering reflected in the arc of*

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the story of the Rana Plaza factory building collapse also suggest that facts may soon turn on and reshape theory.

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I. INTRODUCTION

On April 24, 2015, high level representatives of the governments of the United States and the European Union released a statement marking the second anniversary of the “tragic collapse of the Rana Plaza building in Dhaka, Bangladesh, that claimed over 1,100 lives and injured many more . . . mourning those who lost their lives and remain mindful of the difficult struggle for those who survived.”¹ It was one of several statements issued by powerful global actors to mark this event, and the train of consequences that followed.² In stark contrast, the office of the Bangladesh

1. Press Release, Office of the United States Trade Representative, Joint Statement on the Anniversary of Rana Plaza Building Collapse in Bangladesh (Apr. 2015), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2015/april/joint-statement-anniversary-rana>. The Joint Statement was released in the names of U.S. Secretary of State John Kerry; High Representative of the European Union for Foreign Affairs and Security Policy Federica Mogherini; U.S. Secretary of Labor Thomas E. Perez; EU Commissioner for Employment, Social Affairs, Skills and Labour Mobility Marianne Thyssen; U.S. Trade Representative Michael Froman; EU Commissioner for Trade Cecilia Malmström; U.S. Agency for International Development Acting Administrator Alfonso E. Lenhardt; and EU Commissioner in charge of International Cooperation and Development Neven Mimica. *Id.*

2. Among them were those from NGOs, *see, e.g.*, Statement by the Clean Clothes Campaign on the second anniversary of the Rana Plaza disaster (Apr. 24, 2015), <https://www.cleanclothes.org/news/2015/04/24/statement-by-the-clean-clothes-campaign-on-the-second-anniversary-of-the-rana-plaza-disaster>; *see also* European Parliament resolution of 29 Apr. 2015 on the second anniversary of the Rana Plaza building collapse and progress of the Bangladesh Sustainability Compact (2015/2589(RSP)), <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P8-TA-2015-0175&language=EN&ring=P8-RC-2015-0363>.

Prime Minister spent the day responding to criticisms of the way in which her government had allocated and spent funds earmarked for the victims of that factory collapse and their families.³

Yet the U.S.-EU Joint Statement did more than commemorate. Its object was not merely to mourn the loss of life in the daily business of global trade along complex supply and production chains. Rather, the Joint Statement served as a celebration, a commemoration, of the triumph of a new sort of multilateral governance architecture, one in which the state, or at least a small state like Bangladesh,⁴ would now share responsibility for governing its own territories with others.

In the aftermath of the Rana Plaza collapse, the European Union, the United States and the International Labor Organization (ILO) joined with Bangladesh (“The Partners”) to undertake a series of significant commitments to foster respect for fundamental labor rights and ensure worker safety and health in the garment sector. The Partners announced the Sustainability Compact for Bangladesh – a statement of principles and commitments designed to bring about a lasting transformation in the sector.⁵

That sharing, however, did not merely involve the states that represented the largest enterprises which sources garments from much smaller enterprises within Bangladesh. It also involved a host of other actors—enterprises, NGOs, labor organizations, and international public and private actors, in distinct and complex ways.⁶

The collapse, then, exposed not just the structural weakness of the Rana Plaza factory building, but also the structural weaknesses of traditional ways of understanding and invoking regulatory authority. But how? The collapse, and its consequences, then, might be understood as uncovering the complex interweaving of national law, international standards, and private governance standards that together might be understood as a transnational legal order that produces effects on

3. PMO Trashes TIB Report on Rana Plaza Assistance, THE NEWS TODAY, Apr. 24, 2015, http://www.newstoday.com.bd/index.php?option=details&news_id=2409293&date=2015-04-24 (“Dismissing Transparency International Bangladesh’s (TIB’s) report that claimed Tk 108 crore mobilised in the prime minister’s aid fund to distribute among Rana plaza victims remains unused, the Prime Minister’s Office (PMO) on Thursday said there is no fund in the name of Rana Plaza, reports UNB. “I would like to clearly say there is/was no fund in the name of Rana Plaza in the Prime Minister’s Office. There are two funds of the honorable Prime Minister—one is Relief and Welfare Fund and another is Discretionary Fund,” said PMO Director General-4 Kabir Bin Anwar. He said this while addressing a press conference to clarify TIB’s version on the fund of Rana Plaza victims held at the PMO.”).

4. The policy and structural issues for law and state systems are considered further in Larry Catá Backer, *Economic Globalization Ascendant: Four Perspectives on the Emerging Ideology of the State in the New Global Order*, 17(1) BERKELEY LA RAZA L.J. 141-68 (2006).

5. Press Release, Office of the United States Trade Representative, *supra* note 1.

6. The European Parliament Joint Motion provided a clear window on the web of regulatory sources and constraints within which Bangladesh now finds itself as actor and object. See European Parliament resolution of 29 Apr. 2015, *supra* note 2.

business behavior, and on the regulatory activity of states both within and beyond its borders.⁷ Or it might be understood as a reflection of patterns of rough consensus around the logic of the societal systems in which even states now operate.⁸ Or it might be understood to serve as a disciplinary and socialization technique, a means of managing and gap filling among communities of states.⁹

This essay uses the circumstances of the Rana Plaza factory building collapse and its aftermath as the starting point for an examination of possibilities of *generalizing theory from circumstances*. The connection between theory and fact tends to be dynamic at best, and substantially disconnected at worst. It can be distorted as much at the micro level from an obsessive examination through the generalized implications of data—a cancerous self-referencing empiricism that *reduces theory to algorithm*—as it can be the victim of an inverted cause and effect at the macro level, in which theory is used instrumentally to make facts, that is when *theory becomes politics*. Yet in our culture, one marked by elite-driven mass mobilization societies, theory can serve both qualitative and quantitative driven instrumentalism by offering a coherent structure within which the reality around us can be ordered, either around a central concept or insight, or around nothing at all.

Indeed, the narrative of the Rana Plaza factory building collapse *does* offer a framework for connecting realities on the ground to the construction of theory that is around it. Such a theory would have to be dynamic, in the sense that it must recognize in the rather complex realities that is the Rana Plaza factory building collapse, a temporal sequence of governance arrangements. Alternatively, efforts at theorizing the regulatory constructions built on the foundation of the Rana Plaza Building collapse might suggest a caution in that theory building and a reminder that the relationship between facts and theory might neither be invariably vertically arranged or, thus arranged, invariably placing theory above facts on the ground.

If theorization is possible, might a better theorization of Rana Plaza lie with Transnational Legal Order (TLO) theory? It is possible that one might view Rana Plaza as evidence of the crystallization of the emergence of a transnational legal order governing business behavior. That transnational order has a normative structure, operationalizes a legal process, and structures a framework within which international organizations, and state and non-state private actors strive toward building functional coherence within formally polycentric governance orders. It assesses the operation of a normative order that can be viewed in terms of norms that affect the understanding of actors of their legal obligations by considering how different norm systems—state law, international standards, and private governance

7. See TRANSNATIONAL LEGAL ORDERS (Terence C. Halliday & Gregory Shaffer eds., TRANSNATIONAL LEGAL ORDERS (Cambridge Univ. Press, 2015).

8. See GRAF-PETER CALLIENS AND PEER ZUMBANSEN, ROUGH CONSENSUS AND RUNNING CODE: A THEORY OF TRANSNATIONAL PRIVATE LAW 134-52 (Oxford, 2010).

9. See, e.g., Robert Wai, *Transnational Public Law and Private Ordering in a Contested Global Society*, 46 HARV. INT'L L.J. 471 (2005).

standards—intermesh¹⁰ in shaping the expectations of businesses and their counsel of their legal obligations. And in intermeshing, constitute yet another and potentially distinct legal or governance order or orders. That might be done by grounding analysis in not only a series of contingent circumstances (transnational business activity, activist responses, or different forms of norm building) but also from out of precipitating events (such as catastrophes). It is that combination that leads to the interaction of these various standards to shape transnational legal norms that can be viewed as a form of legal order in a world otherwise lacking centralized legal law-making and law-applying institutions as conventionally conceived at the national level. Two alternative possibilities are considered as well. First, it may be possible to see in Rana Plaza confirmation of the emergence of transnational disorder or un-ordering. Alternatively, still, one can see in Rana Plaza a confirmation of the workings of the traditional and conventional state-law system and its ability to embrace changing circumstances without losing its internal coherence.

After this introduction, Part II focuses on the events leading up through and then past the collapse of the Rana Plaza factory building on April 24, 2013. The catastrophe is used, in a sense, as a lure to attract the conventional and emerging governance actors and then to consider how they behave (in the production of governance objects) with the lure and each other. Part III then seeks to extract a theory out of the context of the story of the Rana Plaza factory building collapse. Does Rana Plaza fit comfortably or uncomfortably into the narrative of TLO, and its implications for TLO theory? Does Rana Plaza instead suggest the possibility of disordered order, which is of order without a center as an alternative perspective? And lastly, does Rana Plaza still fit comfortably into traditional narratives of state-law system, or point to something considerably more radical?

II. TRANSNATIONAL OR POLYCENTRIC LEGAL ORDERING IN CONTEXT: THE RANA PLAZA FACTORY BUILDING COLLAPSE

While law and governance systems struggle to define themselves, and the extent of their authority to order the complexities of the social order, new systems of governance emerge in response to events—crystalizing moments—that catalyze institutional and mass movements with regulatory or governance effects. One such event centered on the operation of a multi-factory building in the suburbs of the Bangladeshi capital that collapsed in 2013, killing over a thousand workers. The Rana Plaza factory building collapse may nicely illustrate the complex and perhaps disordered nature of law and governance making within and beyond any single class of individual or institutional actor to manage or order. And, perhaps ironically, it may also suggest the ways in which order is arising out of disorder, but an order that follows its own logic rather than the authoritative ideologies of state or private or popular power arranged neatly within clusters of governance asserting

10. See Gunther Teubner, *Self Constitutionalizing TNCs?: On the Linkage of "Private" and "Public" Corporate Codes of Conduct*, 18 IND. J. GLOBAL LEGAL STUD. 617 (2011).

communities. An examination of the Rana Plaza factory building collapse from the perspective of its consequences to the established order of law and governance within which the building and its factories were operated, might provide a way of teasing out some of the characteristics of norm making. The Rana Plaza factory building collapse, then, will serve as bait that attracts those norm making and enforcing creatures that may be drawn to its scent. Having observed them and their characteristics in this section, the possibilities of generalizing observed behaviors into theory (which one?) is considered next.

By the 21st century, garment production, directly and indirectly sourced, became a significant element of Bangladesh's industrial production.¹¹ Much economic activity in Bangladesh revolves around maintaining Bangladesh's competitive advantages for sourcing garments within global production chains. By April 2013, the town of Savar, in Bangladesh, became an important center for garment factory operation.¹² Savar had seen a substantial growth in the construction of these multi-story and multi-factory buildings since the 1990s.¹³ "Savar land values soared as new factories hurriedly opened to meet the new Western demand."¹⁴ These buildings were partitioned and rented out among a number of businesses that operated factories within these factory buildings.¹⁵ Most of these factories produced clothing, an industry that accounted for much of Bangladesh's recent growth and much of its employment.¹⁶ The garments were produced either directly for global retailers or were sometimes subcontracted from local manufacturers subcontracting work, with or without authorization.¹⁷

11. See Sarah Labowitz and Dorothée Baumann-Pauly, BUSINESS AS USUAL IS NOT AND OPTION: SUPPLY CHAINS AND SOURCING AFTER RANA PLAZA 12-16 (NYU Stern Center for Business and Human Rights) (Apr. 2014), http://www.stern.nyu.edu/sites/default/files/assets/documents/con_047408.pdf; cf. 2014), http://www.stern.nyu.edu/sites/default/files/assets/documents/con_047408.pdf; Cf. Sarah Labowitz and Dorothée Baumann-Pauly, BEYOND THE TIP OF THE ICEBERG: BANGLADESH'S FORGOTTEN APPAREL WORKERS (NYU Stern Center for Business and Human Rights), (Dec. 2015), http://people.stern.nyu.edu/twadhwa/bangladesh/downloads/beyond_the_tip_of_the_iceberg_report.pdf.

12. Sabir Mustafa & Shyadul Islam, *Profile: Rana Plaza owner Mohammad Sobel Rana*, BBC NEWS ONLINE, May 3, 2013, <http://www.bbc.com/news/world-asia-22366454>. ("During the 1990s Savar became a sought-after place to locate factories and acquire land for homes, because of its proximity to Dhaka. In the rush, illegal land-grabbing became rife.")

13. *Id.* ("During the 1990s Savar became a sought-after place to locate factories and acquire land for homes, because of its proximity to Dhaka.")

14. Jim Yardley, *The Most Hated Man in Bangladesh: Toppled from a Shady Empire*, N.Y. TIMES, Apr. 30, 2013, <http://www.nytimes.com/2013/05/01/world/asia/bangladesh-garment-industry-reliant-on-flimsy-oversight.html?pagewanted=all>.

15. CBS/Justine Redman, *Inside a Bangladesh Garment Factory*, CBS News, <http://www.cbsnews.com/pictures/inside-a-bangladesh-garment-factory/10/>.

16. Amy Yee, *Two years after Bangladesh factory collapse, a struggle to set things right*, WASH. POST, Apr. 23, 2015, http://www.washingtonpost.com/world/asia_pacific/bangladesh-garment-industry-pushes-to-meet-deadlines-on-safety-standards/2015/04/22/b72ca9f0-e87b-11e4-8581-633c536add4b_story.html. ("It accounts for 80 percent of Bangladesh's exports and has propelled annual economic growth of 6 percent in recent years.")

17. Jason Motlagh, *A Year After Rana Plaza: What Hasn't Changed Since The Bangladesh Factory Collapse*, WASH. POST, Apr. 18, 2014, <http://www.washingtonpost.com/opinions/a-year-after-rana->

Among the factory building complexes in Savar was an eight-floor garment factory building known as the Rana Plaza.¹⁸ It had been built during the previous decade and housed a number of independent factories under a variety of arrangements. The building was said to have been built on swampy ground.¹⁹ Government regulation of buildings, structural inspections, and monitoring before 2013 had been a complicated business with a substantial gap between formal regulation and administrative practice and enforcement.²⁰ It was not uncommon for building plans filed with the government not to match the building actually built, and buildings erected before 2000 might not have architectural drawings at all.²¹ There were allegations of substantial irregularities in the construction and approval of the Rana Plaza factory building itself.²²

The owner of the building was Mohammed Sohel Rana, by 2013 in his mid-30s.²³ Mr. Rana had a colorful history, as a student activist, and then an associate of powerful politicians and political parties.²⁴ As a consequence, there were rumors that suggested that Mr. Rana's acquisition of the Rana Plaza property might have been tinged with illegality²⁵ and that Mr. Rana also participated in some illegal

plaza-what-hasnt-changed-since-the-bangladesh-factory-collapse/2014/04/18/9a06f266-c1c3-11e3-b195-dd0c1174052c_story.html. ("A top garment producer admitted to me that unauthorized subcontracting remains standard practice across the industry. With so many variables threatening to disrupt production — political violence, strikes, electrical breakdowns — he still farms out some work to meet deadlines.").

18. Factory Collapse in Bangladesh, Institute for Global Labour and Human Rights, Rana Plaza: A Look Back and Forward, (Apr. 24, 2014), <http://www.globallabourrights.org/alerts/rana-plaza-bangladesh-anniversary-a-look-back-and-forward>.

19. See Alex Magdaleno, Bangladesh Charges 18 People in Connection With Deadly Factory Collapse, MASHABLE, July 16, 2014, <http://mashable.com/2014/07/16/rana-plaza-charges-bangladesh/>.

20. See, e.g., Jim Yardley, *After Disaster, Bangladesh Lags in Policing Its Maze of Factories*, N.Y. TIMES, July 2, 2013, <http://www.nytimes.com/2013/07/03/world/asia/bangladeshi-inspectors-struggle-to-avert-a-new-factory-disaster.html>. ("Critics often blame this lack of regulation on Dhaka's development authority, known as Rajuk. Last week, the authority's director told members of Bangladesh's Parliament that roughly 8,000 buildings in Dhaka, the national capital, lacked required approvals or violated construction codes. In a later interview, the authority's chief engineer blamed part of the problem on manpower: Rajuk has only 40 inspectors to oversee a million structures in Dhaka.")

21. *Id.*

22. Syed Zain Al-Mahmood and Luke Harding, *Bangladeshi garment factory death toll rises as owner arrested on border*, THE GUARDIAN, Apr. 28, 2013, <http://www.theguardian.com/world/2013/apr/28/bangladesh-garment-factory-collapse-owner-held>. ("Rana's influential political contacts allowed him to circumvent the rules and to get rich. He reportedly bought several government-owned properties at a discount and in 2010 constructed Rana Plaza on the site of a pond. The building was supposed to be five stories high; Rana added an extra three. Two local engineers and the mayor — a political ally — signed off on the project.").

23. Mustafa & Islam, *supra* note 12.

24. *Id.*

25. *Id.* ("Rabindranath Sarkar, owner of a building adjacent to Rana Plaza, told the BBC that the land had originally been acquired jointly in his name and that of Sohel Rana's father, Abdul Khaiek. 'But Sohel Rana and his family grabbed the land forcibly and built the building even though it was bought in my name,' Mr. Sarkar claimed.").

activities.²⁶ “And perhaps no one wielded power more brazenly than Sohel Rana. He traveled by motorcycle, as untouchable as a mafia don, trailed by his own biker gang.”²⁷ Mr. Rana’s alleged conduct and practices may not have been aberrational.²⁸

Mr. Rana, however, did not own the businesses operating within the Rana Plaza building. By April 2013, some 3,639 workers toiled in five factories housed in the Rana Plaza building.²⁹ Most of the workers were women working a standard shift of between 13 to 14 ½ hours starting usually about 8:00 a.m.³⁰ Many of these workers labored on some of the floors of the building that had been added after initial construction, which had been added with permission of local officials.³¹ Officials later suggested that these approvals might have been unauthorized.³² That would not have been unusual: it had been reported in the Western press that “[b]uilding codes are often unenforced, regulatory oversight is flimsy and the men wielding power often travel with armed guards.”³³ Others reported

Rana Plaza had numerous illegal floors built on a hopelessly weak structure. Its construction materials were of extremely poor quality, and giant vibrating generators had been placed on several floors to keep the power on and the sewing machines running during the city’s regular power cuts.³⁴

The factories in the Rana Plaza building did not operate for their own account—that is they did not manufacture garments for the retail markets. Most produced a variety of garments for about forty global retailers. The apparel

26. *Id.* (“The 35-year-old Mr. Rana has been described in the local media as the archetypal Bangladeshi musclem, known locally as a ‘masthan,’ or neighbourhood heavy. His power, influence and money came from providing muscle to local politicians. ‘He is known as a thug, a gangster in the area,’ Firoz Kabir, chairman of the Savar sub-district council, told the BBC. He declined to give details. The allegations against Mr. Rana have not been verified by the BBC, and he cannot be reached in custody for comment.”).

27. Jim Yardley, *The Most Hated Man in Bangladesh: Toppled from a Shady Empire*, N.Y. TIMES, Apr. 30, 2013, <http://www.nytimes.com/2013/05/01/world/asia/bangladesh-garment-industry-reliant-on-flimsy-oversight.html?pagewanted=all>.

28. See Ruma Paul, *Bangladesh garment factories intimidate workers over unions — group*, REUTERS, Feb. 6, 2014, <http://www.reuters.com/article/2014/02/06/bangladesh-labour-rights-idUSL3N0LB1PU20140206>. (“Some union organizers said they were beaten up, and others said they had lost their jobs or had been forced to resign. Factory owners sometimes used local gangsters to threaten or attack workers outside the workplace, including at their homes, they said,” quoting a 2014 Human Rights Watch Report based on interviews of 47 workers in 21 factories).

29. Factory Collapse in Bangladesh, Institute for Global Labour and Human Rights, Rana Plaza: A Look Back and Forward (Apr. 24, 2014), <http://www.globallabourrights.org/alerts/rana-plaza-bangladesh-anniversary-a-look-back-and-forward>.

30. *Id.* (“Eighty percent of the workers were young women, 18, 19, 20 years of age. Their standard shift was 13 to 14 ½ hours, from 8:00 a.m. to 9:00 or 10:30 p.m., toiling 90 to 100 hours a week with just two days off a month.”).

31. Magdaleno, *supra* note 19.

32. *Id.* (“Of those breached codes, Bhattachajee noted that municipal officials gave permission to add extra floors in the Rana Plaza factory without the authority to do so,” quoting Pranab Kumar Bhattachajee, a spokesman for the Anti-Corruption Commission).

33. Yardley, *supra* note 27.

34. Tansy Hiskins, *Reliving the Rana Plaza factory collapse: a history of cities in 50 buildings*, day 22, THE GUARDIAN, Apr. 23, 2015, <http://www.theguardian.com/cities/2015/apr/23/rana-plaza-factory-collapse-history-cities-50-buildings>.

companies included some of the largest and most well-known brands in North America and Europe.³⁵ The factory owners thus stood somewhere in the middle of global supply chains for those products (above the farmers and the manufacturers of cloth) but either at the same level or below distributors, transport companies and warehouses, all of which occupied spaces on the supply chain below that of the retailers on whose behalf these efforts were ultimately undertaken.³⁶ The owner of the Rana Plaza building occupied a position not directly within the supply chain but at a level that might be viewed as equivalent to that of the factory owners in his building.

Many of the apparel retailers operated through sometimes complex systems of oversight of operations down their supply chains.³⁷ These generally took one of two main forms. The first projects behavior and conduct standards onto factory operators that have been developed or form part of the terms of the relationship between downstream manufacturers, like the factories operating in the Rana Plaza building, and the global apparel enterprises who hire them. These terms and conditions are usually written into supplier codes of conduct or similar instruments that form part of the arrangements between manufacturer and apparel retailers.³⁸ The substantive elements of supplier codes of conduct generally treat issues of legal compliance, and beyond that of ethical conduct, labor standards and practices, environmental practices, human rights, and community relations.³⁹ Indeed, to some

35. *Id.* These included United Colors of Benetton (Italy), Cato Fashions (U.S.), Ascena Retail Group (U.S.); Auchan (France); Matalan (UK); Adler Modemärkte (Germany); Grabalok /Store Twenty One (UK); Güldenpfennig (Germany); Kids for Fashion (Germany); Manifattura Corona (Italy); NKD Deutschland GmbH (Germany); PWT (Texman) (Denmark); Yes Zee Essenza (Italy); JCPenney (U.S.); Carrefour (France); - Asda (UK); Bonmarché (UK); C&A (Dutch/German); El Corte Ingles (Spain); Inditex (Spain); LPP S.A. (Poland); Kik (German); Mango (Spain); Mascot (Denmark); VF Corporation (U.S.); Camaïeu (France); N Brown Group (UK); Premier Clothing (UK); Primark (UK); Walmart (U.S.); Loblaw (Canada); and The Children's Place (U.S.).

36. "The businesses that, directly or indirectly, provide the goods or services used by a company form its supply chain." Fédération des Experts Comptables Européens (FEE), Position Paper, "Assurance for a Sustainable Supply Chain" (June 2005), pp. 4 (¶1.1), http://www.fee.be/images/publications/sustainability/FEE_DP_Assurance_for_a_Sustainable_Supply_Chain_050630620051934.pdf.

37. Discussed in Larry Catá Backer, *Economic Globalization and the Rise of Efficient Systems of Global Private Law Making: Wal-Mart as Global Legislator*, 39 CONN. L. REV. 1739-84 (2007).

38. The Fédération des Experts Comptables Européens defines a supplier code of conduct as "a statement by a company of the principles underlying the conduct of its business. Ordinarily, it will be designed to ensure compliance with relevant laws and regulations but may be more stringent than those in some jurisdictions. A code may be intended for use only within a company or for application by its suppliers as well, with or without modification. In some instances, a supplier code of conduct may exist without there being a direct counterpart within the company." Fédération des Experts Comptables Européens (FEE), Position Paper, "Assurance for a Sustainable Supply Chain" (June, 2005), *supra* note 36 at pp. 9, ¶ 30.

39. Thus, for example, Wal-Mart's Standards for Suppliers Manuel provides: "[T]hese Standards for Suppliers are Walmart's minimum expectations of Suppliers and their Factories for the ethical treatment of workers, workplace safety, environmental responsibility, and appropriate business practices. Suppliers meet these standards by upholding human rights and creating an ethical and sustainable supply chain." Wal-Mart Stores, Inc., Responsible Sourcing, Standards for Suppliers Manuel

extent, supplier codes harmonize practices across jurisdictions and may impose standards in addition to those required by local law.⁴⁰ Most supplier codes also include provisions related to worker health and safety. Wal-Mart's supplier code⁴¹ provides in part that "[s]uppliers must obtain valid construction approvals as required by applicable law. If the local law does not provide for such approvals, a certification by a Wal-Mart-approved third-party civil or structural engineer that the facility is structurally sound must be obtained."⁴²

Supplier codes can affect companies with no direct relation to the multinational enterprise. Wal-Mart, for example, defines suppliers to include "all manufacturing, subcontracting, packaging, packing materials facilities, and fresh product facilities."⁴³ Subcontractors of suppliers, however, may sometimes be difficult to police, even when supplier codes formally reach down to control the relationships between suppliers and their subcontractors down the supply chain.⁴⁴ Multinational corporations continue to adjust their supplier codes to develop stronger monitoring and sanctions mechanisms to protect against subcontracting.⁴⁵ That problem is sometimes resolved by monitoring supplier efforts at subcontractor enforcement. Alternatively, and especially where suppliers are themselves large multinational enterprises, it is sometimes the case that companies at the middle level of supply chains may also produce their own supply chains effective against the

(Apr. 2014), pp. 2, <http://cdn.corporate.walmart.com/d1/7e/ee6f5c8942f69ad4183bc0683771/standards-for-suppliers-manual.pdf>.

40. Wal-Mart, for example, forbids overtime in excess of generally applicable law even when such may be approved by local governments. Likewise, suppliers may not initiate work from home programs without the prior approval of Wal-Mart. See Wal-Mart Stores, Inc., Responsible Sourcing, Standards for Suppliers Manual, *supra* note 39 at § 3.A.4 & 5 (Labor hours), pp. 6-7.

41. For a discussion of Wal-Mart's supplier code, see Haley Revak, Note: *Corporate Codes of Conduct: Binding Contract or Ideal Publicity?*, 63 HASTINGS L.J. 1645, 1648-52 (2012). <http://www.hastingslawjournal.org/wp-content/uploads/2014/03/Revak-63.6.pdf>.

42. Wal-Mart Stores, Inc., Responsible Sourcing, Standards for Suppliers Manual, *supra* note 39 § 7.B.2 (Health & Safety; Permits and Designs), pp. 13. Special rules were provided for fire safety training for suppliers in Pakistan and Bangladesh. *Id.* at § 7.H.1.a, pp. 17.

43. *Id.* at 37 (definition of Supplier).

44. See MARY JANE BOLLE, CONG. RESEARCH SERV., 7-5700 R43085, BANGLADESH APPAREL FACTORY COLLAPSE: BACKGROUND IN BRIEF 5-6, (Jan. 10, 2014), <http://fas.org/sgp/crs/row/R43085.pdf>. As Labowitz and Baumann-Pauly note:

Workers in this part of the sector are especially vulnerable because they are invisible to regulators and their employers operate on such slim margins that they cannot invest in even basic safety equipment or procedures. Small, under-resourced factories must rely on labor-intensive production methods rather than making capital investments in machines and processes that improve efficiency. They also undercut larger, more compliant factories on price. Informal factories do not pay taxes, submit to regulation, or bear the costs of labor rights compliance.

See SARAH LABOWITZ & AND DOROTHÉE BAUMANN-PAULY, BEYOND THE TIP OF THE ICEBERG: BANGLADESH'S FORGOTTEN APPAREL WORKERS, *supra* note 11 at 23.

45. Wal-Mart noted on its website that "[u]nauthorized subcontracting continues to be an issue across the global supply chain. Because of this, we implemented policies in 2013 to address unauthorized subcontracting by Walmart suppliers. This includes any undisclosed subcontracting, with or without the supplier's knowledge." Wal-Mart's Standards for Suppliers (May 8, 2015), <http://corporate.walmart.com/global-responsibility/ethical-sourcing/standards-for-suppliers>.

entities from which they contract.⁴⁶ That may be necessary because corporate supplier codes might sometimes effectively reach only to the direct relationship between company and supplier. Though issues of coordination are possible, most supplier codes tend generally to permit harmonization.

Beyond normative standards, company supplier codes of conduct also provide mechanisms for monitoring, technical assistance, investigation and sanctions. At their most efficient, they function effectively as the law of the supply chain promulgated through the ultimate purchasing entity and enforced by them. Compliance is usually understood as a training and auditing function and is written into the terms of the arrangement between the multinational corporation and its suppliers.⁴⁷ Compliance auditing is sometimes subcontracted to third parties enterprises specializing in supplier code auditing.⁴⁸ Suppliers who fail to conform to the supplier conduct codes may be disciplined, up to and including loss of the supplier relationship.⁴⁹ These are matters handled internally for the most part. While it is possible that such supplier codes might be enforced in courts among the parties to them, U.S. courts have so far refused to extend their protections to third parties, especially workers.⁵⁰

The second also projects conduct standards onto factory operators. But in this case the standards are developed or certified by third party entities. The Ethical Training Initiative offers a base code of conduct for suppliers.⁵¹ The Fair Labor Association offers a code targeting workplace conduct.⁵² These organizations both develop and monitor (and certify) compliance with their standards of conduct. In that way they provide an arm's length assurance of compliance.⁵³ International standards might be used as a substitute for supplier codes or as a supplement. By 2013, there were a substantial number of important public codes as well. These

46. Foxconn is a good example. On the one hand, it is obligated under the Apple Inc. supplier code of conduct for all of its operations linked to the manufacture of Apple Inc. products in its plants. Simultaneously, Foxconn has its own supplier code of conduct which it enforces against its own suppliers down its supply chain.

47. Revak, *supra* note 41 at 1652-54.

48. Wal-Mart, Responsible Sourcing Audit Process, <http://corporate.walmart.com/global-responsibility/ethical-sourcing/standards-for-suppliers>.

49. Wal-Mart provides, for example, that its "[s]tandards parallel the audit standards Walmart uses to measure how well Suppliers are meeting requirements. If a Supplier's factory fails to meet the Standards, it must take corrective action to improve its performance or the factory will not be permitted to supply merchandise to Walmart." Wal-Mart Stores, Inc., Responsible Sourcing, Standards for Suppliers Manual, *supra* note 39 at 2.

50. See *Doe v. Wal-Mart Stores, Inc.*, 572 F.3d 677 (9th Cir. 2009).

51. Ethical Trading Initiative Base Code, Ethical Trading Initiative Respect for workers worldwide, <http://www.ethicaltrade.org/eti-base-code>.

52. Fair Labor Association Workplace Code of Conduct, Fair Labor Association, http://www.fairlabor.org/our-work/about_us_code-of-conduct_e1.htm.

53. Discussed in Larry Catá Backer, *Transnational Corporations' Outward Expression of Inward Self-Constitution: The Enforcement of Human Rights by Apple, Inc.*, 20 IND. J. GLOBAL LEGAL STUD. 805-879 (2013).

included notably the ten principles of the U.N. Global Compact,⁵⁴ and the United Nations Guiding Principles for Business and Human Rights.⁵⁵ The latter developed an architecture of human rights due diligence⁵⁶ for companies to implement in monitoring their behavior and those of their downstream supply chain partners based on the so-called International Bill of Human Rights.⁵⁷

Though the factories operating in the Rana Plaza building were local enterprises, and in the first instance subject to the laws of Bangladesh, and in addition, to their contractual and societal obligations under arrangements with their customers (principally multinational enterprises in the garment sector), their operation might also be tinged with legal and policy obligations under public international governance regimes. Bangladesh has been a member of the International Labor Organization (ILO) since 1972 and ratified seven of the eight ILO conventions.⁵⁸ Bangladesh was party to thirty bilateral investment treaties,⁵⁹ all but six of which were in force.⁶⁰ Many contain "most favored nation" provisions,⁶¹ and some include provisions that effectively could internationalize Bangladeshi national law to the extent it might come within coverage of the BIT.⁶²

On Tuesday, April 23, 2013, it was reported that a number of cracks had appeared in the Rana Plaza building.⁶³ "The building had been evacuated . . . but the workers had then been ordered back to work."⁶⁴ It is not clear what was done about those reports, but it was clear that on the morning of Wednesday, April 24, 2013, many of the factory workers were aware of the cracks. They gathered outside the Rana Plaza building before the 8.00 A.M. starting time for work and refused to

54. U.N. Global Compact, The Ten Principles, <https://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html>.

55. U.N. Office of the High Commissioner for Human Rights, Guiding Principles on Business and Human Rights (Geneva and New York, 2011), http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

56. *Id.* at ¶¶ 17-21.

57. *Id.* at ¶ 12 ("[U]nderstood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work.").

58. BOLLE, *supra* note 44 at 3.

59. See U.N., UNCTAD Investment Policy Hub, Bangladesh, <http://investmentpolicyhub.unctad.org/IIA/CountryBits/16>. (including most major European countries, China, the United States and Canada).

60. Among the BITs signed but not enforced were those with Denmark, North Korea, Pakistan, Turkey, United Arab Emirates and Vietnam. See *id.*

61. See, e.g., U.K. Bangladesh BIT, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/277>.

62. Thus, for example, the U.S. Bangladesh BIT provides that the "treatment, protection and security of investment shall be in accordance with applicable. National laws, and shall in no case be less than that required by international law." Treaty Between The United States Of America And The People's Republic Of Bangladesh Concerning The Reciprocal Encouragement And Protection Of Investment, U.S.-Bangl., Signed Mar. 12, 1986; Entered into Force July 25, 1989, Art. II, ¶ 3, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/278>.

63. *Id.*

64. Human Rights Watch, World Report 2014: Bangladesh (Labor Rights and Conditions of Workers), <http://www.hrw.org/world-report/2014/country-chapters/bangladesh?page=2>.

enter.⁶⁵ It was reported that “3,639 workers refused to enter the eight-story Rana Plaza factory building because there were large and dangerous cracks in the factory walls. The owner . . . brought paid gang members to beat the women and men workers, hitting them with sticks to force them to go into the factory.”⁶⁶ Others reported that “Rana confidently insisted the building was safe, despite the discovery of ominous cracks. He told 3,200 workers employed by five garment companies that they had nothing to worry about and should return to their jobs. ‘The building has minor damage. There is nothing serious,’ he insisted. ‘It will stand for a hundred years.’”⁶⁷ Still others reported that they were told that if they did not enter the building they would receive no wages for the month.⁶⁸ In any event, by around 8:00 A.M., most workers had entered the building and begun their shift. At 8.45 A.M., it was reported that power went out in the building and a number of internal generators kicked in, adding substantially to the vibration of machinery in the building. “Almost immediately the workers felt the eight-story building begin to move, and heard a loud explosion as the building collapsed, pancaking downward, killing 1,137 workers.”⁶⁹

A number of events followed the collapse of the Rana Plaza factory building. Bangladesh moved almost immediately to personalize the collapse within the persons of the owner of the building and the factory owners. Mohammed Sohel Rana fled but was caught attempting to cross into India.⁷⁰ He was arrested and abandoned by the political and economic elites within which they operated.⁷¹ In addition, the owner and the managing director of one of the largest factories within the Rana Plaza building were also arrested, along with two engineers tied to the design of the building,⁷² Rana’s wife and cousin were arrested as well.⁷³ Rana was

65. Hiskins, *supra* note 34.

66. Factory Collapse in Bangladesh, Institute for Global Labour and Human Rights, Rana Plaza: A Look Back and Forward, *supra* note 18.

67. Syed Zain Al-Mahmood and Luke Harding, *Bangladeshi garment factory death toll rises as owner arrested on border*, THE GUARDIAN, Apr. 28, 2013 <http://www.theguardian.com/world/2013/apr/28/bangladesh-garment-factory-collapse-owner-held>.

68. *Id.* “Another devastated mother, Argina, says her 18-year-old daughter, Rubina, was told if she didn’t show up for work that day then she would not be paid for the month. She had only been working there for four months before she died.” Hiskins, *supra* note 34.

69. INSTITUTE FOR GLOBAL LABOR AND HUMAN RIGHTS, *supra* note 18 at 6.

70. Syed Zain Al-Mahmood and Luke Harding, *Bangladeshi garment factory death toll rises as owner arrested on border*, THE GUARDIAN, Apr. 28, 2013, <http://www.theguardian.com/world/2013/apr/28/bangladesh-garment-factory-collapse-owner-held>.

71. Mustafa & Islam, *supra* note 12. (“Mohammad Sohel Rana, the owner of the building, is desperately trying to prove he was not to blame for the disaster on 24 April, which cost more than 500 lives. But given his background - and the alleged history of Rana Plaza itself - he has found little sympathy among local Bangladeshis or the media. Even the governing Awami League (AL), with which he has been closely linked, has distanced itself from him.”).

72. *Bangladesh factory owners and building engineers arrested*, THE GUARDIAN, Apr. 27, 2013, <http://www.theguardian.com/world/2013/apr/27/bangladesh-factory-owners-engineers-arrested>.

73. Syed Zane Al-Mahmood and Shelly Banjo, *Engineers Detained in Bangladesh Disaster*, THE WALL STREET JOURNAL, Apr. 28, 2013, <http://www.wsj.com/articles/SB10001424127887324474004578445991168551584>. Others reported the arrest of Mr. Rana’s father.

eventually charged in two proceedings, one for violation of building codes in constructing Rana Plaza,⁷⁴ and the other for loss of life.⁷⁵ Additional factory owners were soon arrested as well, and the Bangladesh Prime Minister ordered the arrests of all of the five factory owners in addition to Mr. Rana.⁷⁶ Efforts were made to confiscate Mr. Rana's property along with that of the factory owners.⁷⁷ Eventually forty-one people were charged with murder, including Mr. Rana, his parents, the factory owners, a number of officials.⁷⁸ But the wheels of justice grind slowly and by May 2016, local courts were still attempting to set a hearing date.⁷⁹

Developed states also reacted. The U.S. initially sought to manage the event by encouraging private enterprises to take the lead.⁸⁰ In subsequent hearings shortly thereafter before Congress, State Department officials contextualized the Rana Plaza collapse, along with the then recent Tazreen factory fire,⁸¹ as examples of the challenges that remain for the steady improvement of conditions in Bangladesh.⁸² But the U.S. soon took more public actions, suspending its generalized system of preferences (GSP) with Bangladesh, which were in any case soon to expire,⁸³ and with respect to which "[g]arment products were not included under the GSP

74. Tyler McCall, *Building Owner to be Charged in Rana Plaza Collapse*, FASHIONISTA, July 15, 2014, <http://fashionista.com/2014/07/rana-plaza-owner-charged>. Eventually an additional seventeen people were charged as well. *Id.*

75. *Bail for Rana Plaza Owner*, THE DAILY STAR, Mar. 24, 2014, <http://www.thedailystar.net/bail-for-rana-plaza-owner-16994>.

76. Al-Mahmood & Banjo, *supra* note 73.

77. *Bangladesh Court Orders Confiscation of Building Owner's Assets*, BLOOMBERG BUSINESS, <http://www.bloomberg.com/news/articles/2013-04-28/bangladesh-arrests-rana-plaza-owner-as-fire-breaks-out-in-rubble>.

78. Juyfikar Ali Manik and Nida Najar, *Bangladesh Police Charge 41 With Murder Over Rana Plaza Collapse*, N.Y. TIMES, June 1, 2015, http://www.nytimes.com/2015/06/02/world/asia/bangladesh-rana-plaza-murder-charges.html?_r=0.

79. See Sanaul Islam Tipu, *Charge Framing in Rana Plaza Collapse Case on June 13*, DHAKA TRIBUNE, May 15, 2016, <http://www.dhakatribune.com/bangladesh/2016/may/15/charge-framing-rana-plaza-collapse-case-june-13>.

80. John R. Crook, *U.S. Government Responds To Poor Working Conditions In Bangladesh's Garment Industry*, 107 AM. J. INT'L L. 936, 937 (2013) ("The State Department strongly urged U.S. buyers to coordinate efforts with each other and with the Government of Bangladesh and the Bangladesh Garment Manufacturers & Exporters Association (BGMEA), as well as civil society and labor groups, on factory safety and fire initiatives, including helping pay for independent safety and fire inspectors.").

81. Anis Ahmed & Rumana Paul, *More than 100 die in garment factory fire, the deadliest in Bangladesh's history*, THE CHRISTIAN SCIENCE MONITOR (Nov. 25, 2012), <http://www.csmonitor.com/World/Latest-News-Wires/2012/1125/More-than-100-die-in-garment-factory-fire-the-deadliest-in-Bangladesh-s-history>.

82. *Labor Issues in Bangladesh*, Hearing Before the S. Comm. on Foreign Relations, 113th Cong. 1 (2013) (statement of Robert O. Blake, Assistant Secretary, Bureau of South and Central Asian Affairs, U.S. State Department), <http://www.state.gov/p/sca/rls/rmks/2013/210347.htm>.

83. See, e.g., *US leaves out Bangladesh from GSP*, THE DAILY STAR, Aug. 11, 2015, <http://www.thedailystar.net/country/bangladesh-left-out-gsp-125146> ("Obama suspended Bangladesh from GSP in June 2013 based on Bangladesh's failure to meet statutory eligibility requirements related to worker rights. After two industrial disasters – Tazreen Fashions fire and Rana Plaza building collapse, the US suspended GSP for Bangladesh in June 2013, citing serious shortcomings in labour rights and workplace safety.").

scheme to the U.S. market when it used to enjoy the GSP.”⁸⁴ The U.S. then immediately began to renegotiate their terms.⁸⁵ The object was to use the GSP as leverage to induce legal reform in Bangladesh,⁸⁶ an action that had been initiated even before the Rana Plaza factory collapse.⁸⁷ And indeed, prior to the building collapse the Bangladeshi government had argued that it had been making changes to its domestic legal order to satisfy the demand that it reflect international standards.⁸⁸ That leverage was used continuously through 2015 to induce Bangladesh to effectuate a number of substantial changes to its domestic legal order and to the administration of laws within the national territory.⁸⁹

That leverage also was presented to the Bangladesh government in the form of an “action plan.”⁹⁰ The European Union intervened more directly. It “launched a joint initiative for improving conditions for workers in Bangladeshi garment

84. *DBL Group to set up \$100m garment factory in Ethiopia*, THE DAILY STAR, May 27, 2016, <http://www.thedailystar.net/business/dbl-group-set-100m-garment-factory-ethiopia-1229974>. See also Embassy of Bangladesh in the United States, U.S. – Bangladesh Trade Facts, <http://www.bdembassyusa.org/uploads/US%20-%20BD%20trade.pdf>. But note that the nature of globalization appears to permit Bangladeshi workers to be moved to factories built in other developing states that may enjoy enhanced trade preferences from the U.S. See *DBL Group to set up \$100m garment factory in Ethiopia*. *Id.*

85. Mike Godfrey, *US Withdraws GSP Benefits from Bangladesh*, Tax-News.com (July 3, 2013), http://www.tax-news.com/news/US-Withdraws_GSP_Benefits_From_Bangladesh_61276.html.

86. Rezaul Karim, *US wants to know measures taken on GSP action plan*, THE FINANCIAL EXPRESS (Oct. 21, 2013), <http://print.thefinancialexpress-bd.com/old/index.php?ref=MjBfMTBfMTBfMTNfMTV8yXzE4NzQwNA> (“The United States is very interested in working with the government of Bangladesh to restore GSP benefits at the earliest appropriate time based on progress made to address the items in the action plan as this plan communicates actions the USG encourages the government of Bangladesh to take in order to form a basis for reinstating benefits,” the letter also said.”).

87. See *US Suspends Bangladesh from Trade Preference Scheme*, 17(24) Bridges (4 July 2013) (International Centre for Trade and Sustainable Development), <http://www.ictsd.org/bridges-news/bridges/news/us-suspends-bangladesh-from-trade-preference-scheme>. “The Office of the U.S. Trade Representative launched a review of Bangladesh’s GSP eligibility following a 2007 petition by the AFL-CIO labor union, which charged that the status of labor rights in Bangladesh warranted limitation, suspension or removal.” See also *USTR To Suspend Trade Preferences For Bangladesh Over Worker Rights*, INSIDE U.S. TRADE’S WORLD TRADE ONLINE (June 27, 2013), <http://insidetradetrade.com/inside-us-trade/ustr-suspend-trade-preferences-bangladesh-over-worker-rights>.

88. *US Suspends Bangladesh from Trade Preference Scheme*, *supra* note 87. (“The developing country has already enacted some measures to respond to international pressures for industry reform, such as raising the minimum wage for garment workers and allowing trade unions to be formed without the prior consent of factory owners, and is currently considering additional modifications to its labour laws.”).

89. *US leaves out Bangladesh from GSP*, THE DAILY STAR, Aug. 11, 2015, <http://www.thedailystar.net/country/bangladesh-left-out-gsp-125146> (“An interagency review led by the United States Trade Representative (USTR) had earlier concluded that while Bangladesh made progress over the last year to address fire and building safety issues in the garment sector, further progress is needed. But, further progress is needed to get back the generalised system of preferences, the USTR said.”).

90. Crook, *supra* note 80 at 939. (“The Bangladesh Action Plan 2013 cited in the July 2013 U.S. joint statement includes detailed proposals for reforms in government inspections for labor, fire and building standards; the ready-made garments (RMG)/knitwear sector; export processing zones; and the shrimp processing sector”).

factories. . . . The Sustainability Compact seeks to improve labour, health and safety conditions for workers, as well as to encourage responsible behaviour by businesses in the ready-made garment industry in the South Asian country.”⁹¹ This Sustainability Compact,⁹² represented a means through which the European Union, the International Labour Organization, multinational enterprises and civil society would, together with the government on Bangladesh, negotiate changes to the Bangladesh domestic legal order and its administration, to remedy the problems contributing to the factory collapse to the satisfaction of all of these parties.⁹³ The United States associated itself with this effort.⁹⁴

A year after the collapse, and in the wake of these well publicized activities, whatever the extent of their success, the Bangladeshi garment sector continued to thrive.⁹⁵ Initially, however, there was much finger pointing. “Spanish department store El Corte Ingles SA confirmed its clothes were being produced at one of the factories in the building and said it had relied on a safety audit that had cleared the factory. It blamed the collapse on the failure of local authorities to monitor building safety.”⁹⁶ The finger pointing was made more complicated because the audits were conducted by a third party monitoring NGOs set up for this purpose.⁹⁷ There appears little evidence that any of the brands used the human rights due diligence framework of the U.N. Guiding Principles for Business and Human Rights, though

91. Press Release: EU Trade Commissioner De Gucht launches Global Sustainability Compact in response to Bangladesh tragedy, Brussels, 8 July 2013, http://europa.eu/rapid/press-release_IP-13-667_en.htm.

92. Discussed below at text and notes, *see infra* p. 27 and note 194. The official title of this effort was the “Compact for Continuous Improvements in Labour Rights and Factory Safety in the Ready-Made Garment and Knitwear Industry in Bangladesh.”

93. *Id.*

94. Crook, *supra* note 80, at 938.

95. Editorial Board, *One Year After Rana Plaza*, N.Y. TIMES, Apr. 27, 2014, http://www.nytimes.com/2014/04/28/opinion/one-year-after-rana-plaza.html?_r=0. (“After Rana Plaza, Bangladeshi workers and officials feared that Western retailers would stop doing business in the country because of outrage from consumers. That would have put millions of people out of work. It didn’t happen. Bangladesh’s clothing exports jumped 16 percent, to \$23.9 billion, in the 12 months that ended in March from the period a year earlier.” *Id.* citing to Suman Saha, Garment Exports Show Resilience, THE DAILY STAR, Apr. 23, 2014, <http://www.thedailystar.net/garment-exports-show-resilience-21162>). See also Ibrahim Hossain Ovi, *Apparel export to US sees 4.30% rise*, DHAKA TRIBUNE (May 10, 2016), <http://www.dhakatribune.com/business/2016/may/10/apparel-export-us-sees-430-rise> (“In every meeting, the buyers are talking over the compliance issues, which already have seen a remarkable progress, but they did not increase the prices of products, said Nasir. The positive things are that the buyers’ confidence has been restored, he added. After the suspension of GSP or Generalized System of Preferences, it was feared that export to the US market, the single largest export destination of Bangladeshi products, especially apparel items, will see a sharp decline.”). SHIFT has used the database to consult with companies whose disclosure appears in the database for conformity to the UNGP.

96. AL-MAHMOOD & BANJO, *supra* note 73.

97. *Id.* (“The factory had passed an audit by the Business Social Compliance Initiative, a monitoring group set up by the Brussels-based Foreign Trade Association, which is supposed to ‘monitor and improve the social and labor conditions of the supplier companies,’ a spokeswoman said. Local authorities are responsible for the safety of the infrastructure of industrial buildings, she said.”).

many did engage in some forms of managing the conduct of their suppliers.⁹⁸ In any case, these enterprises might have been right to be cautious. On April 23, 2015, a lawsuit was filed in the federal district court for the District of Columbia against Bangladesh, JC Penny Corporation, The Children's Place and Wal-Mart Stores, Inc., seeking damages for wrongful death and negligence.⁹⁹ Other suits have been filed in other states as well.¹⁰⁰

But in the face of well publicized protests in developed states and the appearance of interest by developed states to become involved in the matter, most of the stakeholders whose governance structures might have been implicated in the collapse began working together in a variety of combinations. "In the tumultuous months following the collapse at Rana Plaza, the brands that had been manufacturing there were under tremendous public pressure to take action."¹⁰¹ The companies and allied stakeholders representing the bulk of those affected divided into two camps, mostly along regional lines, the Alliance for Bangladesh Worker Safety¹⁰² and the Accord on Fire and Building Safety in Bangladesh.¹⁰³ In addition, some sourcing companies have sought to intervene directly through their own

98. There are a number of emerging procedure frameworks that seek to implement the human rights due diligence responsibilities in the U.N. Guiding Principles. Among the more well known of these is the Human Rights Reporting and Assurance Frameworks Initiative (RAFI). See SHIFT Human Rights Reporting and Assurance Frameworks Initiative (RAFI), <http://www.shiftproject.org/project/human-rights-reporting-and-assurance-frameworks-initiative-rafi>. In March 2016 RAFI launched a UNGP Reporting database to provide a database of corporate reporting under the UN Guiding Principles. See SHIFT, UNGP Reporting Database, <http://www.ungpreporting.org/reportingdatabase/>.

99. *Abdur Rahaman v. JC Penny Corp., Inc., et al.*, No. 15- 619 (D.D.C. filed Apr. 23, 2015), <http://pdfserver.amlaw.com/nlj/Rahaman%20Rana%20Plaza%20complaint.pdf>.

100. In the U.S., see, e.g., *Abdur Rahaman v. JC Penny Corp., Inc., et al.*, CA No. N15C-07-174 (Super. Ct. Del.) (dismissing the case for failure to meet the Bangladeshi statute of limitations May 2016). See generally, Maria Halkias, *Wal-Mart, J.C. Penney and Children's Place sued by victims of 2013 Bangladesh factory collapse*, THE DALLAS MORNING NEWS, Apr. 27, 2015, <http://bizbeatblog.dallasnews.com/2015/04/wal-mart-j-c-penney-and-childrens-place-sued-by-victims-of-2013-bangladesh-factory-collapse.html/>; Nick Rummell, *Retailers Sued over 2013 Building Collapse*, COURTHOUSE NEWS SERVICE (July 24, 2015, 8:43 AM PST), <http://www.courthousenews.com/2015/07/24/retailers-sued-over-2013-building-collapse.htm>. In Canada, see, e.g., *Arati Rana Das et al. v. George Weston Ltd. Et al* Court File CV-15-52662800CP Fresh as Amended Statement of Claim (Ontario Superior Court of Justice, filed April 22, 2015), <http://www.rochongenova.com/Fresh-as-Amended-Statement-of-Claim-filed-November-5-2015.pdf>. See Hollie Shaw, *Class action suit seeks \$2 billion from Loblaws, Joe Fresh over 2013 Bangladesh garment factory collapse*, FINANCIAL POST, Apr. 30, 2015, <http://business.financialpost.com/news/retail-marketing/class-action-suit-seeks-2-billion-from-loblaw-joe-fresh-over-2013-bangladesh-garment-factory-collapse>.

101. Lydia DePillis, *Two Years Ago, 1,129 People Died in a Bangladesh Factory Collapse. The Problems Still Haven't Been Fixed*, WASH. POST, Apr. 23, 2015, <http://www.washingtonpost.com/blogs/wonkblog/wp/2015/04/23/two-years-ago-1129-people-died-in-a-bangladesh-factory-collapse-the-problems-still-havent-been-fixed/>.

102. About the Alliance for Bangladesh Worker Safety, Alliance for Bangladesh Worker Safety, <http://www.bangladeshworkersafety.org/who-we-are/about-the-alliance>.

103. Accord on Fire and Building Safety in Bangladesh, <http://bangladeshaccord.org/>.

programs with suppliers.¹⁰⁴ While these programs are aimed at suppliers with a direct connection to multinational enterprise members, they appear as yet to do little to reach the more opaque system of subcontracting factories established around Bangladesh.¹⁰⁵

The Alliance for Bangladesh Worker Safety (the "Alliance") is the project of North American multinational enterprises, the establishment of which was announced on July 10, 2013.¹⁰⁶ The Alliance was formed by a group of North American apparel companies and retailers,¹⁰⁷ numbering twenty-eight in July 2015.¹⁰⁸ The Alliance operates through a Member Agreement,¹⁰⁹ and associated

104. Syed Zain Al-Mahmood, *Alliance Sets Plan to Finance Bangladesh Factory Upgrades*, WALL ST. J., Dec. 5, 2014, <http://www.wsj.com/articles/alliance-sets-plan-to-finance-bangladesh-factory-upgrades-1417791607>.

105. DePillis, *supra* note 101. ("Even if they do fix the factories where they have contracts, however, they may not reach the whole industry. Although the government has registered only about 3,400 factories, Sarah Labowitz, director of the Center for Business and Human Rights at New York University, has estimated that there are closer to 6,000—many of them smaller buildings that subcontract with the larger companies when big orders come in.").

106. The Alliance for Bangladesh Worker Safety: Statement of Purpose by Leaders of the Alliance for Bangladesh Worker Safety, July 10, 2013, <http://www.bangladeshworkersafety.org/files/CEO-Letter-7.9-CR-11pm.pdf> (includes list of original members).

107. "The Alliance was organized through the Bipartisan Policy Center (BPC) with discussions convened and chaired by former U.S. Senate Majority Leader George Mitchell (D-ME) and former U.S. Senator Olympia Snowe (R-ME), . . . [involving] apparel industry companies and stakeholders including: the U.S. and Bangladeshi governments; policymakers; NGOs; members of civil society; and organized labor. " About Alliance for Bangladesh Worker Safety, <http://www.bangladeshworkersafety.org/who-we-are/about-the-alliance>.

108. About Alliance for Bangladesh Worker Safety, <http://www.bangladeshworkersafety.org/who-we-are/membership?lang=en>. These included: Ariela and Associates International LLC; Bon Worth; Canadian Tire Corporation, Limited; Carter's Inc.; The Children's Place Retail Stores Inc.; Costco Wholesale Corporation; Fruit of the Loom, Inc.; Gap Inc.; Giant Tiger; Hudson's Bay Company; IFG Corp.; Intradeco Apparel; J.C. Penney Company Inc.; Jordache Enterprises, Inc.; The Just Group; Kate Spade & Company; Kohl's Department Stores; L. L. Bean Inc.; M. Hidary & Company Inc.; Macy's; Nine West Holdings, Inc.; Nordstrom Inc.; Public Clothing Company; Sears Holdings Corporation; Target Corporation; VF Corporation; and Wal-Mart Stores, Inc.; YM Inc. In addition, the Alliance includes a number of supporting associations: American Apparel & Footwear Association, BRAC, Canadian Apparel Federation, National Retail Federation, Retail Council of Canada, Retail Industry Leaders Association, and United States Association of Importers of Textiles & Apparel. "Li & Fung, a major Hong Kong-based sourcing company which does business with many members of the Alliance, will serve in an advisory capacity." *Id.* The original membership in 2013 was seventeen. See Press Release, Alliance of Leading Retailers in North America Join Forces in Comprehensive, Five-Year Commitment to Improve Factory Safety Conditions for Workers in Bangladesh. (July 10, 2013), <http://www.prnewswire.com/news-releases/alliance-of-leading-retailers-in-north-america-joins-forces-in-comprehensive-five-year-commitment-to-improve-factory-safety-conditions-for-workers-in-bangladesh-214897421.html>. ("including list of founding companies.").

109. Alliance Membership Agreement, <http://www.bangladeshworkersafety.org/files/Alliance-Member-Agreement-FINAL.pdf>.

bylaws.¹¹⁰ Membership in the Alliance is binding, as between the Members and the organization over the course of a member's five year commitment.¹¹¹

The Membership Agreement committed member companies to a set of specific goals. First, each was to contribute to a Worker Safety Fund (WSF) to underwrite factor based fire and building safety initiatives applicable to factories from which member company sources products.¹¹² The WSF provides support for mandatory fire and building safety training, assessments of fire and building safety inspections and audits, coordination of readiness efforts among members, and the maintenance of personal worker safety and empowerment hotlines.¹¹³ Members might also contribute to an Affordable Capital for Building Safety (ACBS) fund.¹¹⁴ Factory owners within their respective supply chains would be able to seek loans from funds donated of their donating Member.

Second, Alliance members would work to create Worker Participation Committees in all Alliance member factories to encourage worker reporting of fire and safety violations.¹¹⁵ WPC would be audited to ensure their independence and the democratic election of its members.¹¹⁶ Members would develop systems for ensuring anonymous reporting.¹¹⁷ Third, members will ensure that workers and managers in factories manufacturing for Alliance Members undergo training for fire

110. Bylaws of The Alliance for Bangladesh Worker Safety, Inc., <http://www.bangladeshworkersafety.org/files/Alliance-Bylaws-FINAL.pdf>. The Member Agreement was amended twice. See Member Agreement Amendment I (Apr. 14, 2014) <http://www.bangladeshworkersafety.org/files/Alliance-Member-Agreement-Amendment-1.pdf>. ("Members shall require that the Factories they work with respect the right of a worker to refuse work if he/she has a reasonable justification to believe that a safety situation presents an imminent and serious danger to his/her life, and that such worker shall be protected from undue consequences, in accordance with the relevant ILO Conventions and Bangladeshi Law"); See Member Agreement Amendment 2 (Oct. 1, 2014), <http://www.bangladeshworkersafety.org/files/Alliance-Member-Agreement-Amendment-2.pdf> (identification of factories approved for production, Corrective Action Plan for factories failing inspection; follow up inspections).

111. Alliance FAQ, <http://www.bangladeshworkersafety.org/en/who-we-are/faq> ("Membership to the Alliance is a five-year commitment – and the agreement and its terms that are legally binding on all of its Members. The Alliance Board of Directors – chaired by an Independent Director – has the authority to seek binding arbitration against any Member who does not satisfy its obligations under the agreement, and to publicly expel them for failure to abide by other commitments set forth in the Members Agreement.").

112. Alliance Membership Agreement, *supra* note 109, at §2.2. Contributions were based on a tiered fee structure tied to Member sourcing activity in Bangladesh. The goal was to eventually raise about \$50 million from members. Members might also make in kind contributions within their own supply chains, *id.* at §2.3.

113. *Id.* at § 2.2(b). A 10% reserve fund was to be established to support temporarily displaced workers due to Factory remediation efforts under the programs.

114. *Id.* at §2.3.1.

115. *Id.* at §3.2.

116. *Id.* at §4.2.b.iv.

117. *Id.* at §3.1.

and building safety.¹¹⁸ The Alliance would also develop a uniform fire and safety training curriculum¹¹⁹ to review and approve qualified trainers.¹²⁰

Fourth, the Alliance agreed to establish a common standard for assessing fire and building safety, "based on existing protocols and initiatives, and that meets or exceeds local legal requirements."¹²¹ This Alliance Fire and Building Safety Standards would be made public and applied to all buildings in which Members' products are sourced.¹²² But some NGOS have criticized the looser resulting standards, especially as compared to those from other groups of multinationals¹²³

Fifth, the Alliance Fire and Building Safety would be applied by independent Qualified Inspectors,¹²⁴ in accordance with a process developed by the Alliance.¹²⁵ The immediate objective was to ensure that all factories in Bangladesh that source for Members would be inspected by July 10, 2014.¹²⁶ So called at-risk factories would be given an opportunity to remediate, or in the worst cases, reported to the government for shut down.¹²⁷ Lastly, the Alliance Members would be committed to a program of transparency,¹²⁸ and to prohibit unauthorized subcontracting.¹²⁹ By the time of its first annual report, the Alliance was able to list progress on most objectives.¹³⁰ But NGOs monitoring NGOs continue to criticize members of the Alliance for their failure to effectively police subcontracting policies and rules.¹³¹

118. *Id.* at §4.1.

119. *Id.* at §4.2.

120. *Id.*

121. *Id.* at § 5.1.

122. *Id.* at § 5.2.

123. See Clean Clothes Campaign, *Comparison: The Accord on Fire and Building Safety in Bangladesh and the Gap/Walmart scheme* (Oct. 7, 2013), <https://www.cleanclothes.org/resources/background/comparison-safety-accord-and-the-gap-walmart-scheme>.

124. Alliance Membership Agreement, *supra* note 109, at § 6.1.

125. *Id.* at § 6.2.

126. *Id.* at § 6.2(c).

127. *Id.* at § 6.2.

128. *Id.* at § 7.

129. *Id.* at § 8.

130. Alliance for Bangladesh Worker Safety, *Protecting the Lives and Livelihoods of Bangladesh's Garment Workers: First Annual Report of the Alliance for Bangladesh Worker Safety* (July 2014), <http://www.bangladeshworkersafety.org/files/2014-annual-report/Alliance%20Annual%20Report,%202014.pdf>. The Report noted that all 587 Alliance member factories had been inspected under the new standards, and 10 factories fully or partially closed, with an additional 50% of inspected factories in remediation. It also noted that over 1 million workers had been trained in basic fire safety. The Alliance Report explained that \$100 million had been committed to affordable capital loans programs, and \$5 million raised to support displaced workers, for which 1,000 workers had been compensated. *Id.* at § 7.

131. See Michelle Chan, *This is What Goes Into Your Cheap T-Shirt*, THE NATION (June 6, 2016), <http://www.thenation.com/article/this-is-what-goes-into-your-cheap-t-shirt/> ("There are also reported cases of Walmart subcontractors actively flouting pro-worker reforms. Among Bangladeshi Walmart supply-chain workers, despite recently implemented overtime rules, most interviewees 'considered overtime wage rates to be at the discretion of the employer—suggesting widespread irregularity in overtime remuneration paid.'").

The Accord on Fire and Building Safety in Bangladesh (the “Accord”), like the Alliance, was formed to aid in fire and building safety and inspections.¹³² It also was based on a “legally binding agreement between brands and trade unions designed to work towards a safe and healthy Bangladeshi Ready-Made Garment Industry,”¹³³ which was entered into on May 15, 2013.¹³⁴ Like the Alliance, its basic objectives were built around the creation of an independent inspection program, public disclosure, the creation of a fund to help factory remediation efforts, the creation of democratically elected safety and health committees, and worker empowerment through training programs and the institution of complaint mechanisms.¹³⁵ The basic goal of the Accord was to “establish a fire and building safety program in Bangladesh for a period of five years”¹³⁶ The objectives were to be reached through programs of credible inspections,¹³⁷ remediation,¹³⁸ training,¹³⁹ the institution of a complaint process,¹⁴⁰ and programs of training and transparency.¹⁴¹ But unlike the Alliance, the Accord appeared to place more emphasis on providing supplier incentives through contract terms between supplier and global retailer.¹⁴² The Accord is “committed to working with all relevant stakeholders including members of the Alliance, to ensure a safe and sustainable Bangladeshi Ready Made Garment industry.”¹⁴³

The Accord includes a broader membership base than the Alliance, with apex production chain enterprises from Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Hong Kong, Italy Japan, Netherlands, Norway, Poland,

132. For a discussion on the Accord, see Benjamin A. Evans, Note, *Accord on Fire and Building Safety in Bangladesh: An International Response to Bangladesh Labor Conditions*, 40 N.C. J. INT’L L. & COM. REG. 597 (2015).

133. ACCORD ON FIRE AND BUILDING SAFETY IN BANGLADESH, <http://bangladeshaccord.org/> (last visited Mar. 27, 2016). Commentators have noted that part of the reason that several of the largest U.S. retailers refused to sign onto the Accord was because they objected to the binding nature of the agreement, and especially its obligations to make payments to help pay for Factory remediation and other expenses. The Alliance Membership Agreement is equally binding, but the members are bound to a smaller set of terms. See MARY JANE BOLLE, BANGLADESH APPAREL FACTORY COLLAPSE, *supra* note 44, at 10-11.

134. *About the Accord*, ACCORD ON FIRE AND BUILDING SAFETY IN BANGLADESH, <http://bangladeshaccord.org/about/>.

135. BANGLADESH ACCORD SECRETARIAT, INTRODUCTION TO THE ACCORD ON FIRE AND BUILDING SAFETY IN BANGLADESH, ACCORD ON FIRE AND BUILDING SAFETY IN BANGLADESH (2015), <http://bangladeshaccord.org/wp-content/uploads/Brochure-about-the-Accord.pdf>.

136. See Accord on Fire and Building Safety in Bangladesh, May 13, 2013, http://bangladeshaccord.org/wp-content/uploads/2013/10/the_accord.pdf.

137. *Id.* at ¶¶ 8-11.

138. *Id.* at ¶¶ 12-15.

139. *Id.* at ¶¶ 16-17.

140. *Id.* at ¶ 18.

141. *Id.* at ¶¶ 19-20.

142. See, e.g., *id.*, ¶¶ 21-23 (noting at ¶ 22 “[P]articipating brands and retailers will negotiate commercial terms with their suppliers which ensure that it is financially feasible for the factories to maintain safe workplaces and comply with upgrade and remediation requirements instituted by the Safety Inspector.”).

143. See Accord, FAQs, <http://bangladeshaccord.org/about/faqs/>.

Spain, Sweden, Switzerland, Turkey, United Kingdom, and the U.S.¹⁴⁴ Also, unlike the Alliance, the Accord's governance structures parallels the tripartite organization of the ILO (government, labor, and business), with a Steering Committee at its head, comprised of equal representation of signatory companies and trade unions, presided over by a chair provided by the ILO.¹⁴⁵ NGOs also participate, but indirectly.¹⁴⁶ The Accord represents about 190 brands sourcing in over 1600 factories employing more than 2 million workers.¹⁴⁷ "The Accord is governed by a Steering Committee with equal representation of the signatory companies and trade unions with a neutral Chair provided by the International Labour Organisation (ILO)."¹⁴⁸ Its bylaws mirror those of the Alliance.¹⁴⁹ An Advisory Board, consisting of representatives of brands and retailers, suppliers, governments, trade unions, and NGOs was also created.¹⁵⁰ Contributions were assessed on the basis of volume of business in Bangladesh,¹⁵¹ though there appears to be a greater obligation for sourcing companies to fund repairs.¹⁵² Maximum contributions were set at \$500,000 per year.¹⁵³

On the basis of the inspection standards developed and applied by the Accord, it was reported that almost 1500 inspections had been made, with more to follow.¹⁵⁴ Those inspection standards were developed as part of a common approach coordinated with Bangladeshi national authorities.¹⁵⁵ A number of downstream manufacturers in Bangladesh has been terminated and excluded from participation in global garment production chains with Accord members, until it meets the conditions for requalification.¹⁵⁶ At least within that group of downstream

144. See Accord, Signatories, <http://bangladeshaccord.org/signatories/>.

145. See Accord, Governance, <http://bangladeshaccord.org/governance/>.

146. FAQs, ACCORD ON FIRE AND BUILDING SAFETY IN BANGLADESH, <http://bangladeshaccord.org/about/faqs/>.

147. Progress Overview, ACCORD ON FIRE AND BUILDING SAFETY IN BANGLADESH, <http://bangladeshaccord.org/progress/>.

148. Governance, ACCORD ON FIRE AND BUILDING SAFETY IN BANGLADESH, <http://bangladeshaccord.org/governance-policies/>.

149. Accord on Fire and Building Safety in Bangladesh Regulations, adopted 24 Sept. 2013, amended 10 July 2014, <http://bangladeshaccord.org/wp-content/uploads/Governance-Regulations.pdf>.

150. ACCORD ON FIRE AND BUILDING SAFETY IN BANGLADESH, *supra* note 149.

151. FAQs, *supra* note 146.

152. *Id.*

153. ACCORD ON FIRE AND BUILDING SAFETY IN BANGLADESH, *supra* note 149, at ¶ 24.

154. Progress overview, *supra* note 147.

155. BANGLADESH SUSTAINABILITY COMPACT: TECHNICAL STATUS REPORT, EUROPEAN UNION 28 (2015), http://trade.ec.europa.eu/doclib/docs/2015/april/tradoc_153390.pdf.

156. Accord, Terminated Suppliers, <http://bangladeshaccord.org/terminated-suppliers/> ("A terminated factory may requalify for placement of business by an Accord signatory company after a period of no less than 24 months from the date of termination."). See also Accord, Statement on Termination of Accord Companies' Business With Young International (May 26, 2016), <http://bangladeshaccord.org/wp-content/uploads/160524-Termination-of-Business-statement-Young-International.pdf>. ("Accord engineers determined new, immediate, urgent safety concerns which necessitated temporary suspension of production and evacuation of the building. However, the factory refused to evacuate the main building in their compound which was deemed to have significant

manufacturers who participate within Accord member production chains, the Accord itself has become a significant regulator of building safety and the most significant source of governance in that respect.¹⁵⁷ In addition, the Accord shares the Alliance's position on unauthorized subcontracting but appears more willing to accept the reality of the practice, providing that all such subcontracting arrangements will lead to facilities inspection.¹⁵⁸ There is a grudging willingness to work with the Alliance, though it is clear that the two organizations view themselves as distinct and competitive.¹⁵⁹

Beyond the work of the Accord and the Alliance, additional orders were established to govern the issue of compensation—which became known as the “Arrangement.”¹⁶⁰ Like the development of fire and safety standards, the implementation of programs for the compensation of the victims of the Rana Plaza factory building was established through public-private multi-lateral efforts in which the state of Bangladesh played a diminished role. In September 2013, a Rana Plaza Coordination Committee¹⁶¹ was established to administer the “Arrangement.”¹⁶² The Rana Plaza Committee was made up of representatives from the Ministry of Labour of the Government of Bangladesh, local and international garment

structural issues. The factory further refused to cooperate fully and allow access to Accord engineers to verify evacuation of the factory.”). *See also* Accord, Statement on the termination of Accord signatory companies' business relations with M-Yew Fashion Ltd, 52, Shahid Tajuddin Ahmed Sharoni, Mohakhali, Dhaka, Bangladesh, due to the supplier's failure to implement workplace safety measures (May 18, 2016), <http://bangladeshaccord.org/wp-content/uploads/160518-Termination-of-Business-statement-M-Yew-Fashion-Ltd.pdf>; *see also* Accord, Statement on the termination of Accord signatory companies' business relations with Padma Sweaters Ltd, 1/B Darus Salam Road, Section 1, Mirpur, Dhaka, Bangladesh, due to the supplier's failure to implement workplace safety measures (May 18, 2016), <http://bangladeshaccord.org/wp-content/uploads/160518-Termination-of-Business-statement-Padma-Sweaters-Ltd.pdf>.

157. Thus consider the regulatory effect of the reinstatement procedures:

To requalify after such period, the factory is required to demonstrate that all remediation from the Accord initial inspection has been satisfactorily completed and that an acceptable, time bound corrective action plan is in place to correct any new findings identified after the initial inspection. It shall be the Accord Chief Safety Inspector who determines if initial remediation has been satisfactorily completed through an Accord verification inspection. The onus shall be on the terminated factory, after the above-described 24 month period, to inform the Accord CSI that remediation has been completed and to request an Accord verification inspection.

Accord, Terminated Suppliers, <http://bangladeshaccord.org/terminated-suppliers/>.

158. *FAQs*, *supra* note 146. (“Unauthorized sub-contracting is one of the many recognised challenges for the Accord and it is impossible for the Accord alone to end the practice of unauthorised subcontracting. Where factories of unauthorised subcontractors are identified and confirmed as supplying an Accord signatory, they will be subject to the same process of inspection as primary suppliers.”).

159. *Id.* (“We urge all brands to join the Accord as it provides a tripartite, transparent, and robust governance structure and mechanism. However, we are committed to working with all relevant stakeholders including members of the Alliance, to ensure a safe and sustainable Bangladeshi Ready Made Garment industry.”).

160. *Rana Plaza Arrangement*, RANA PLAZA ARRANGEMENT COORDINATION COMMITTEE, <http://www.ranaplaza-arrangement.org/>.

161. *Id.*

162. *Id.*

industry,¹⁶³ local and international trade unions,¹⁶⁴ and local and international non-governmental organisations.¹⁶⁵ The International Labour Organisation “acts as a neutral and independent chair.”¹⁶⁶ The Accord has supported the Arrangement and urged its members to contribute to the Fund established for payouts through it.¹⁶⁷ And civil society has focused pressure on those multinational enterprises that have refused to contribute.¹⁶⁸

The objective of the Rana Plaza Committee was to develop “a comprehensive and independent process that would deliver support to the victims, their families and dependents in a predictable manner.”¹⁶⁹ The process might be grounded in the laws of Bangladesh, but only to the extent those might be “consistent with international labor standards.”¹⁷⁰ This formula appears to import the language and sensibilities of bilateral investment treaties, which have moved toward a regulatory basis grounded in internationalized national law.¹⁷¹ This approach changes the relationship between law and the interested parties. It is to some extent and from the perspective of sourcing companies and their home states, internationalization *serves as a sword*, one meant to smooth over the unique preferences of Bangladeshi law in the service of global consistency. But equally important, perhaps, it also seems to serve Bangladeshi leaders as a shield, protecting them, to a certain extent, from accountability by their electorate.¹⁷²

163. *Governance*, RANA PLAZA ARRANGEMENT COORDINATION COMMITTEE, <http://www.ranaplaza-arrangement.org/mou/governance>. These included Bangladesh Garment Manufacturers' Association (BGMEA), Bangladesh Employers Federation (BEF), El Corte Ingles, Loblaw, and Primark.

164. *Id.* These included IndustriALL Bangladesh Council (IBC), National Coordination Committee for Workers' Education (NCCWE), and IndustriALL Global Union.

165. *Id.* These included Bangladesh Institute of Labour Studies (BILS), and Clean Clothes Campaign (CCC).

166. *Id.*

167. *Statement from the Accord on Fire and Building Safety in Bangladesh (Accord) regarding the Rana Plaza Arrangement*, ACCORD ON FIRE AND BUILDING SAFETY IN BANGLADESH (Mar. 7, 2014), <http://bangladeshaccord.org/2014/03/rana-plaza-arrangement/>. Almost a year after the Rana Plaza factory building collapse the Accord issued a statement that explained: “The Accord believes that the joint approach agreed by the Rana Plaza Coordination Committee, which includes also the Bangladesh Ministry of Labour, the BGMEA and BEF, is a role model for a temporary compensation structure in the absence of a long term solution.”

168. *See, e.g.*, International Labor Rights Forum, Press Release: Pressure increases on Benetton as nearly 1 million activists demand they immediately pay into Rana Plaza victims' compensation fund, (Feb. 11, 2015), <http://laborrights.org/releases/pressure-increases-benetton-nearly-1-million-activists-demand-they-immediately-pay-rana-benetton>.

169. *Governance*, *supra* note 163.

170. *Id.* (“The Arrangement provides a single approach for establishing the amount of financial support and level of medical care to be provided to the victims of the disaster, consistent with international labour standards concerning employment injury benefits (ILO Convention No.121).”).

171. For a discussion, *see, e.g.*, PETER MUCHLINSKI, *MULTINATIONAL ENTERPRISES AND THE LAW* 579-83 (Oxford, 2007).

172. *See Families of 104 Missing Rana Plaza Workers to Get Help*, BDNEWS24.COM (Apr. 24, 2015), <http://bdnews24.com/bangladesh/2015/04/24/families-of-104-missing-rana-plaza-workers-to-get-help>. (“Commerce Secretary Hedayetullah Al Mamoon said there was propaganda in and outside

To aid in the effort, an international Rana Plaza Donors Trust Fund was established.¹⁷³ The Trust Fund is managed by the International Labour Organization.¹⁷⁴ Through April 2015, it has received donations of about \$14 Million, much of which has come from companies sourcing in Bangladesh and involved in the leadership of either the Alliance or the Accord.¹⁷⁵ The amount of these contributions have been criticized by Western NGOs.¹⁷⁶ A little less than \$2.5 million has been made available through the Bangladesh Prime Minister's Relief and Welfare Fund.¹⁷⁷ A little less than \$10 million has been paid out in claims.¹⁷⁸ And record keeping remains a problem.¹⁷⁹ Moreover, it remains to be seen the effect, if any, of the litigation against companies sourcing product in Bangladesh will have on these efforts.¹⁸⁰ In May 2016, the Delaware Superior Court rebuffed efforts to bring

Bangladesh regarding the compensation. "That is still going on. We've given compensation by adhering to the international standards. Our factories are also complying with international norms," he said.").

173. Press Release, Rana Plaza Coordination Committee, The Rana Plaza Coordination Committee Pays Out BDT 76 Crore (USD 9.84 million) to the Injured and the Family Members of Deceased and Missing Workers of Rana Plaza Building Collapse ¶16, (Apr. 20, 2015), http://www.ranaplaza-arrangement.org/news/Press%20Release%2020%20April%202015_Final.pdf; *The Rana Plaza Donors Trust Fund*, RANA PLAZA ARRANGEMENT COORDINATION COMMITTEE, <http://www.ranaplaza-arrangement.org/fund>. It is hoped that the Trust Fund generates about \$30 million to cover expected claims. *RPCC Revises Estimate on Funding Target*, RANA PLAZA ARRANGEMENT COORDINATION COMMITTEE, <http://www.ranaplaza-arrangement.org/news/rpcc-revises-estimate-on-funding-target>.

174. *Id.*

175. See *Donors*, RANA PLAZA ARRANGEMENT COORDINATION COMMITTEE, <http://www.ranaplaza-arrangement.org/fund/donors>.

176. "Activist groups say that donations from brands like the Children's Place and Benetton are inadequate, relative to the business they did in the two factories before the collapse. So on Friday, they're launching protests in dozens of cities across Europe and the United States urging the companies to pay up. 'The apparel brands that were buyers at Rana Plaza were unwilling to adopt a formula requiring themselves to pay in particular amounts, and so it has required public campaigning to urge companies to pay in,' says Liana Foxvog, head of organizing at the International Labor Rights Forum." DePillis, *supra* note 101. NGOs have been more direct: "A number of globally recognised brands, all with links to the Rana Plaza factories have so far refused to provide adequate payments into the Fund. Amongst the worst offenders is Benetton, who is yet to pay a penny into the Fund. Others including Walmart, Mango and The Children's Place are being singled out for making donations that fall far short of expectations. Other companies still to pay the required amount include Lee Cooper, JC Penny, Matalan and Kik." See also Press Release, Clean Clothes Campaign, Rana Plaza: Countdown to Second Anniversary Begins with Compensation Fund Still \$9 Million Short (Mar. 24, 2015), <http://www.cleanclothes.org/news/press-releases/2015/03/24/rana-plaza-countdown-to-second-anniversary-begins-with-compensation-fund-still-9-million-short>.

177. DePillis, *supra* note 101.

178. Press Release, Rana Plaza Coordination Committee, *supra* note 173.

179. Two years after the collapse the identification of victims remains contested and unsure. See Aditya Tejas, *Bangladesh's Rana Plaza Factory Collapse: Two Years On, Victims Remain in the Dark*, INTERNATIONAL BUSINESS TIMES (Apr. 24, 2015, 2:17 AM), <http://www.ibtimes.com/bangladeshs-rana-plaza-factory-collapse-two-years-victims-remain-dark-1895180>. ("There have been conflicting reports about the number of victims the government has failed to identify; the Daily Star reports that the Bangladeshi government lacks information about 85 victims, while the Agence France-Presse (AFP) reports that 135 remain unaccounted for.").

180. See, e.g., Class Action Complaint, *Abdur Rahaman v. JC Penny Corp., Inc., et al.*, No. 15-619 (D.D.C. Apr. 23, 2015), <https://assets.documentcloud.org/documents/2065618/rahaman-rana>

litigation to the home jurisdictions of the brands—rejecting application of U.S. law on choice of law grounds and indicating doubts about the legal basis of the substantive claims.¹⁸¹

NGOs and local individuals continue to complain about a number of aspects of the Arrangement.¹⁸² The compensation framework has been faulted for undervaluing the loss of injured or dead workers.¹⁸³ The Arrangement and related remediation efforts have also been faulted because they provide only compensation for lost income and medical expenses.¹⁸⁴ The process was also faulted for the burden placed in victims' families in the claims process.¹⁸⁵ The Arrangement Claims Form, running about eight pages, suggests both the efforts made to avoid complexity and the burdens that have been placed on those seeking compensation. The instructions run a page.¹⁸⁶ Help in filling out the claims form was offered, but

plaza-complaint.pdf; *Abdur Rahaman v. JC Penny Corp., Inc., et al.*, CA No. N15C-07-174 (Super. Ct. Del.).

181. See *Abdur Rahaman v. JC Penny Corp., Inc., et al.*, CA No. N15C-07-174 (Super. Ct. Del.) Memorandum Opinion on Defendants' Motion to Dismiss at p. 13, <http://courts.delaware.gov/Opinions/Download.aspx?id=240380> (applying Delaware choice of law rules to determine that Bangladesh's statute of limitations barred the suit, and rejecting the notion that defendants owed any duty to plaintiffs under Delaware law, applying *Doe I v. Walmart Stores*, 572 F.3d 677 (9th Cir. 2009)).

182. *Families of 104 Missing Rana Plaza Workers to Get Help*, BDNEWS24.COM, Apr. 24, 2015, <http://bdnews24.com/bangladesh/2015/04/24/families-of-104-missing-rana-plaza-workers-to-get-help>.

183. See, e.g., Michelle Chen, *\$1,000 for a Dead Family Member—Is That Justice for Bangladesh's Garment Workers?*, THE NATION (June 3, 2015), <https://www.thenation.com/article/1000-dead-family-member-justice-bangladeshs-garment-workers/>.

184. See Adria Vasil, *Joe Fresh faces class action over Bangladesh disaster*, NOW TORONTO (May 6, 2015), <https://nowtoronto.com/news/ecoholic/joe-fresh-faces-class-action-over-bangladesh-disaster/>. ("Maquila Solidarity Network's Bob Jeffcott . . . adds, 'the Rana Plaza Donors Trust Fund only provides compensation for lost income and medical expenses and doesn't offer anything for the pain and suffering of seriously injured workers and the families of those killed.'").

185. Ibrahim Hossain Ovi, *No Compensation Given Yet to 13 Missing Rana Plaza Workers*, DHAKA TRIBUNE (Apr. 24, 2015, 12:47 AM) <http://www.dhakatribune.com/business/2015/apr/24/no-compensation-given-yet-13-missing-rana-plaza-workers> ("We've included the missing workers, who were able to present minimum documents to prove them as workers," Ramesh Chandra Roy, secretary general of IndustriAll Bangladesh Council and member of the coordination committee, told the Dhaka Tribune. He also said: "If a genuine missing worker was not included in the list, we will provide them compensation as per the rules if their families could claim with proper documents.")

186. The Claim Form Instructions read in full as follows:

(1) The Rana Plaza Claims Administration is an exclusive scheme set up and authorized by the multi-stakeholder Rana Plaza Coordination Committee. The purpose of the scheme is to provide fair and quick compensation to the victims of Rana Plaza collapse and their families in a transparent manner.

(2) This form is therefore applicable only to those who suffered personal injury (i.e., any injury not fully recovered at the time of submitting the claim), or whose spouse, child, parents or other close relative died or disappeared, as a result of Rana Plaza collapse on 24th April 2013 in Savar-Bangladesh.

(3) You will receive assistance to submit your claim on this form. Your claim will be reviewed in order to determine the amounts to be allocated to your claim. Compensation will only be awarded if your claim is approved by the Commissioners. A local bank will be in charge of distributing payments to claimants and/or investing funds for the benefit and on behalf of claimants in accordance with the Coordination Committee approval and instructions based on post-award assessment needs of the victims.

documentation requirements were not insignificant, especially as they might require very poor people employed substantially all day long to navigate Bangladeshi bureaucracies in order to obtain required documents. Nothing is said about the additional impediments that fees for such documents might pose for the claimants. Yet, some authenticated verification is necessary for claims. And the state still sits at the center of the nexus of data that give people an acknowledgement of their formal existence, the nature of their relation to the state and to each other. But the state itself can pose the greatest obstacle to reliance on its systems of authentication and documentation. Even more difficult might be the obligation to provide evidence of employment relationship with the factory owners. Work contracts, salary slips or worker IDs might be hard to obtain; and, in the event of loss, harder to obtain duplicates from factory owners jailed on account of the collapse. These difficulties were ameliorated, in part, by efforts of the sourcing companies themselves.¹⁸⁷

The Arrangement is not the only effort to provide a framework for compensation created outside the legal apparatus of the state. Other production chain apex corporations, whose branded garments were manufactured or assembled in Rana Plaza also provided ad hoc arrangements for compensation.¹⁸⁸ Primark, a European retailer provides a good example of these efforts. Primark describes these efforts on its web site: “Immediately after the disaster Primark worked with local partners in Bangladesh to give financial support and food aid to the victims and their families. At the time, we also committed to providing long-term

(4) Attach documentation confirming your identity, such as a photocopy of your national identity card, birth certificate or certificate from UP Chairman. If this is a family claim, attach same documentation confirming the identity of all family members.

(5) Attach documentation, such as photocopy of a work contract, salary slip, or worker ID to show the employment relationship and the last salary of the injured deceased, or missing person.

(6) Attach documentation, such as photocopy of a marriage document, birth certificate, heir certificate or dependent certificate issued by UP Chairman, to show family relationship of claimant(s) to the deceased or missing person.

(7) Attach documentation that you may have concerning the nature and seriousness of your personal injury. You will undergo a medical assessment to establish the degree of disability and cases requiring urgent medical treatment.

(8) Attach documentation, such as photocopy of a death or burial certificate, or certificate issued by UP Chairman, to show the place and date of death; and the national identity card of the deceased or other documents to show her date of birth.

(9) Attach the national identity card of the missing relative or other documents to show her date of birth, any documentation that you may have on the circumstances of the disappearance, and a witness testimony signed under oath by minimum 4 persons who knew and worked with the missing person.

CLAIM FORM FOR PERSONAL INJURY, DEATH, OR DISAPPEARANCE AS A RESULT OF RANA PLAZA 24 APRIL 2013 COLLAPSE, RANA PLAZA CLAIMS ADMINISTRATION, <http://www.ranaplaza-arrangement.org/mou/claims/claims-form-english>.

187. *Id.*

188. *See, e.g.,* Adria Vasil, *Joe Fresh faces class action over Bangladesh disaster*, NOW TORONTO (May 6, 2015), <https://nowtoronto.com/news/ecoholic/joe-fresh-faces-class-action-over-bangladesh-disaster/> (Canadian MNE Loblaw Companies Ltd “said that it’s contributed “more than its share,” noting that it has spent \$5 million on relief and compensation commitments and is the only Canadian clothing company to have signed the Accord for Fire and Building Safety in Bangladesh.”).

compensation.”¹⁸⁹ By March 31, 2015, Primark announced that it had remediated damage to its downstream laborers, at least to its satisfaction.¹⁹⁰ A total of roughly \$14 million in payments were made. Primark stated that payments were made on a basis of a process founded on medical and vulnerability assessments with substantial liaison with the ILO.¹⁹¹ Primark contributed more modest funds to the Arrangement (about \$1 million) and an additional \$3 million in other aid to workers.¹⁹² It appears that the object of this direct remediation approach was to focus funding within the apex corporation’s own supply chain and to avoid or minimize compensation “for distribution to workers in its competitors’ supply chain.”¹⁹³

One other public multi-lateral effort is worth mentioning. In July 2013, the European Union and Bangladesh announced agreement on a “sustainability compact.”¹⁹⁴ This compact focused on the reform of labor laws and effective enforcement of labor rights in Bangladesh and includes the active participation of representatives of the ILO.¹⁹⁵ In particular, Bangladesh committed to a substantial reform of its labor laws, agreed that such reform be in compliance with ILO rules, procedures and practices, agreed further to ILO consultation before legislative changes, enhancing compliance inspections to ensure ILO standards for freedom of association and collective bargaining, committing to education and training programs, achieving eligibility for the Better Work Programme between the ILO and the International Finance Corporation of the World Bank, increasing the number of labor inspectors, developing a public database for reporting labor, fire, and building safety inspections.¹⁹⁶ Bangladesh also committed to assess the structural integrity of all export oriented garment factories by June 2014 and develop

189. Primark, Rana Plaza, <http://www.primark.com/en/our-ethics/news/rana-plaza>. Primark worked through local NGOs and its Bangladeshi supplier, New Wave Bottoms. Aid included limited short term material support as well. “We gave emergency food parcels to over 1265 households for five weeks in partnership with a local NGO. Each package contained enough dry food for a family of four for one week, and included rice, dal, potatoes, biscuits, tea, oil, sugar, and salt.”

190. See Primark, Primark long-term compensation payments draw to a close (Mar. 31, 2015), <http://www.primark.com/en/our-ethics/news/press-releases/primark-long-term-compensation-payments-draw-to-a-close>.

191. *Id.*

192. *Id.*

193. *Id.*

194. *Joint Statement: Staying Engaged: A Sustainability Compact for Continuous Improvements in Labour Rights and Factory Safety in the Ready-Made Garment and Knitwear Industry in Bangladesh*, Geneva, Switzerland (July 8, 2013), http://trade.ec.europa.eu/doclib/docs/2013/july/tradoc_151601.pdf.

195. EU, Bangladesh Agree on “Sustainability Compact” in Wake of Factory Collapse, *Bridges* (July 11, 2013), <http://www.ictsd.org/bridges-news/bridges/news/eu-bangladesh-agree-on-sustainability-compact-in-wake-of-factory-collapse>. In particular, the Compact focused on respect for labor rights, structural integrity of factory buildings and responsible business conduct by all stakeholders. *Joint Statement: Staying Engaged: A Sustainability Compact for Continuous Improvements in Labour Rights and Factory Safety in the Ready-Made Garment and Knitwear Industry in Bangladesh*, *supra* note 194, at 2-3.

196. *Joint Statement: Staying Engaged: A Sustainability Compact for Continuous Improvements in Labour Rights and Factory Safety in the Ready-Made Garment and Knitwear Industry in Bangladesh*, *id.* at 3-5.

a public database to disclose the results of inspection.¹⁹⁷ The European Union, for its part, committed to technical assistance and to the extension of the EU's BEST program with Bangladesh.¹⁹⁸ The three also acknowledged the utility of the Accord (but not the Alliance) and the need to foster regimes of responsible business conduct by global enterprises.¹⁹⁹ The Technical Status Report on the Sustainability Compact noted substantial progress by Bangladesh,²⁰⁰ but also warned of difficulties in implementation and the inability of Bangladesh to extend legal protection to workers within Export Processing Zones.²⁰¹ On the second anniversary of the Rana Plaza building collapse, Bangladesh was applauded for making extensive progress in many of these areas,²⁰² but "significant work remains to be done under the Sustainability Compact to realize its goals."²⁰³ Much of that remaining work was detailed in a report issued in April 2015 by Human Rights Watch.²⁰⁴

Multinational enterprises sourcing product in Bangladesh also moved to modify their supplier codes of conduct. Some developed very specific governance regimes applicable to products sourced in Bangladesh. Wal-Mart, for example, developed a specialized framework for responsible sourcing in Bangladesh.²⁰⁵ The changes paralleled and incorporated the approach adopted by the Alliance, of which Wal-Mart was a founding member.²⁰⁶ And it pointed to greater engagement with local stakeholders through the Women in Factories Training Program,²⁰⁷ donations

197. *Id.* at 5-7

198. *Id.* at 7.

199. *Id.* at 7-8.

200. BANGLADESH SUSTAINABILITY COMPACT: TECHNICAL STATUS REPORT, *supra* note 155, at 2.

201. *Id.* at 3.

202. Office of the United States Trade Representative, Press Release: Joint Statement on the Anniversary of Rana Plaza Building Collapse in Bangladesh (Apr. 2015), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2015/april/joint-statement-anniversary-rana>.

203. *Id.* ("In particular, we encourage and support the Government of Bangladesh's efforts to continue reforming its labor laws, in close consultations with the ILO, complete the safety inspections of all RMG factories and continue to register unions in a timely and transparent way. We urge the government to issue –without further delays– the implementing rules for Bangladesh Labor Act, consistent with international labor standards. Similarly, we call upon the Government of Bangladesh to enact legislation on economic processing zones that ensures workers inside the zones enjoy rights commensurate with those outside the zones.").

204. Human Rights Watch, *Whoever Raises Their Head, Suffers the Most: Workers' Rights in Bangladesh's Garment Factories* (Apr. 2015), http://features.hrw.org/features/HRW_2015_reports/Bangladesh_Garment_Factories/assets/pdf/bangladesh0415_web.pdf (documenting continuing violations of garment workers' rights in Bangladesh, details recent allegations of illegal anti-union tactics by managers, including assaults on union organizers, and shows the inadequacy of efforts to date to compensate victims of the Rana Plaza collapse and Tazreen Fashions fire).

205. WAL-MART, RESPONSIBLE SOURCING IN BANGLADESH, <http://corporate.walmart.com/global-responsibility/ethical-sourcing/promoting-responsible-sourcing-in-bangladesh> (last visited Jan. 16, 2016).

206. *Id.*

207. *Id.* ("The Women in Factories Training Program is a five-year initiative by Walmart and the Walmart Foundation to work with NGOs in India, Bangladesh, China and Central America to provide critical life and work skills training to at least 60,000 women in the supply chain. The curriculum,

to the Institute for Sustainable Communities,²⁰⁸ and through the LEAN Manufacturing program.²⁰⁹ There is little mention made of any renewed or enhanced application of the human rights due diligence monitoring and remediation framework of the U.N. Guiding Principles on Business and Human Rights.²¹⁰ The Women in Factories Training Program focuses on cultural and societal change through education, targeting changes in customs as a potential trigger to changes in law. "The program, which is being implemented in collaboration with local NGOs, will teach critical life skills related to communication, hygiene, reproductive health, occupational health and safety, identifying personal strengths and gender sensitivity."²¹¹ The Institute for Sustainable Communities is also an intervention in the management of societal behavior norms and customs which was established as part of U.S. private efforts to help transitioning Eastern European states transition out of Soviet style systems and now works generally on transformative projects in places at a number of locations, including Bangladesh.²¹² Its Bangladesh operations,

developed in partnership with CARE, provides women and men with the fundamental life and work skills necessary to be successful in the workplace, at home and in their communities.").

208. *Id.* ("Walmart made a donation to the Institute of Sustainable Communities (ISC) to support the newly created Environmental, Health and Safety (EHS) Academy in Bangladesh. Through the EHS Academy, more apparel manufacturers in Bangladesh will have access to high-quality, affordable and comprehensive training on fire safety and environment, health and workplace safety.").

209. *Id.* ("Our team at George, Asda's and Walmart's private-label clothing line, has worked with 17,000 workers in 34 factories in Bangladesh to implement the LEAN Manufacturing program. The LEAN program is designed to streamline production processes and invest in worker skills training.").

210. Indeed, in 2013, Walmart sought to exclude a shareholder proposal from its proxy materials that asked the Walmart Board of Directors to report to shareholders on Walmart's human rights risk assessment within its supply chains. The SEC agreed on the basis of its assessment that prior similar proposals had received very little support among shareholders. *See* SEC Div. Corp. Fin. To Erron W. Smith Mar. 27, 2013, <http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2013/marypattiffetal032713-14a8.pdf>. However, Walmart has adopted a risk based approach to managing its supply chains. *See* Walmart, Managing Risk in Our Supply Chains, <http://corporate.walmart.com/sourcing/managingrisk>. Walmart has joined programs that are closely aligned to the U.N. Guiding Principles, for example the Fair Foods Program. *See, e.g.*, Wal-Mart Joins McDonalds, Burger King, Subway, Chipotle, Whole Foods Market, & Trader Joe's in Fair Food Program, <http://www.andnowuknow.com/buyside-news/wal-mart-joins-mcdonalds-burger-king-subway-chipotle-whole-foods-market-trader-joes-fai#.V1YHIo4wyi0>. Walmart has been included in SHIFT's UNGP Reporting Database. *See* <http://www.ungpreporting.org/reportingdatabase/companies-page/>. And it has cooperated though the methodologies of SHIFT's RAfi reporting under the UNGP and Walmart's governance methodologies appear to differ. *See* <http://www.shiftproject.org/project/human-rights-reporting-and-assurance-frameworks-initiative-rafi>.

211. WAL-MART, NEWS AND VIEWS, WALMART LAUNCHES GROUNDBREAKING INITIATIVE TO EMPOWER WOMEN WORKING IN FACTORIES IN INDIA, BANGLADESH, CHINA AND CENTRAL AMERICA (Apr. 5, 2012), <http://news.walmart.com/news-archive/2012/04/05/walmart-launches-groundbreaking-initiative-to-empower-women-working-in-factories-in-india-bangladesh-china-central-america>.

212. THE INSTITUTE FOR SUSTAINABLE COMMUNITIES, History, <http://www.iscvt.org/impact/history> (last visited Jan. 16, 2016).

funded by USAID, the Swedish government, and Wal-Mart²¹³ “supports the health and safety of women in factories. Trainings build the leadership and management skills needed to improve health and operational safety in the workplace.”²¹⁴ It seeks to train factory managers on issues of gender disparities and essential health, environmental and safety methods.²¹⁵ The LEAN program is part of a comprehensive technical assistance and process technology transfer program at Wal-Mart,²¹⁶ in this case focused on its George brand.²¹⁷

And indeed, by the second anniversary of the collapse of the Rana Plaza factory building, a number of the most active regulatory and governance stakeholders could look back on the collapse and its aftermath and reflect on the importance of their interventions. The government of Bangladesh spent substantial sums on the rescue and clean-up, though it is not clear how much of the funds expended were donated.²¹⁸ Most recommitted themselves to a basic and noble objective—to ensure garment workers in Bangladesh a safe working environment. What that means for each turns on their role in apparel supply chains and the character of their institution and the methods through which they assert governance authority. For the Arrangement, the second anniversary meant coming closer to paying all claims.²¹⁹ The Alliance noted its commitment to factory building inspection, remediation and its financing and safety training for workers.²²⁰ It also noted its willingness to “collaborate with all Stakeholders who are similarly committed to a safe and prosperous RMG sector.”²²¹ They emphasized their role in working with the Bangladeshi state organs to “implement critical worker safety

213. THE INSTITUTE FOR SUSTAINABLE COMMUNITIES, EHS+ CENTER-BANGLADESH, <http://www.iscvt.org/program/ehs-center-bangladesh/> (last visited Jan. 16, 2016).

214. *Id.*

215. BANGLADESH EHS+ CENTER, FACT SHEET, <http://www.iscvt.org/wp-content/uploads/2014/06/EHS+-Network-Bangladesh-v2-8-14.pdf> (last visited Jan. 16, 2016).

216. *See* WAL-MART, EDUCATION AND TRAINING IN OUR SUPPLY CHAIN, http://your.asda.com/system/dragonfly/production/2013/03/08/10_24_03_786_George_DTRT_Report_2012_2013_SPREAD_.pdf (last visited Jan. 16, 2016).

217. WAL-MART, GEORGE, DOING THE RIGHT THING UPDATE 2012-2013, pp. 6-11, http://your.asda.com/system/dragonfly/production/2013/03/08/10_24_03_786_George_DTRT_Report_2012_2013_SPREAD_.pdf (last visited Jan. 16, 2016).

218. A report noted:

A rough estimate of the cost of the rescue operation was presented at a PMO press conference, indicating over Tk 46.66 million was spent. Of the amount, Dhaka district administration spent over Tk 25.38 million, army over Tk 12.13 million, other district administrations over Tk 3.51 million, Fire Service Tk 2.5 million and Dhaka police superintendent spent over Tk 2.7 million. Authorities spent Tk 395,000 to fence the site with tin. The injured were given 206 sarees, 111 three-piece and 158 lungis. The prime minister gave Tk 1.2 million to the rescuers as allowance and to buy tools for the rescue.

Families of 104 Missing Rana Plaza Workers to Get Help, bdnews24.com, (Apr. 24, 2015), <http://bdnews24.com/bangladesh/2015/04/24/families-of-104-missing-rana-plaza-workers-to-get-help..>

219. *Id.* (“A total of 2,871 victims applied for the help and 2,839 got aid after scrutiny,” he said, quoting Bangladesh Labour Secretary Mikail Shipar.”).

220. *Alliance for Bangladesh Worker Safety, Press Release: Statement on the Second Anniversary of the Rana Plaza Disaster* (Apr. 2015), <http://www.bangladeshworkersafety.org/files/press-releases/RANA%20ANNIVERSARY%20STATEMENT%202015.pdf>.

221. *Id.*

reforms and put systems in place that will be necessary to sustain those reforms.”²²² The state party members of the Bangladesh Sustainability Compact noted the progress that had been made in legislative changes within Bangladesh and the problems that remained for implementation.²²³ They noted particularly:

the essential contributions of the ILO and development partners, including the Netherlands, the United Kingdom, Canada, Japan, Germany, Sweden, Norway and many others, as well as the European Commission and the US Government, who have through assistance programmes made a major contribution to creating awareness, developing strategies and action plans, training and capacity building with not only the competent authorities, but also workers and factory management.²²⁴

By April 2015, they reported the recognition of more than 300 garment industry trade unions, 2,500 safety inspections and the training of more than 250 safety inspectors.²²⁵

But some of the language of the key European actors suggested a new twist on notions of sovereignty and the expression of democratic will. Federica Mogherini, High Representative of the Union for Foreign Affairs and Security Policy and Vice-President of the Commission, spoke about the need for European and international intervention in states that confront “severe political and social challenges, the Sustainability Compact has the potential for setting an example on how to address the basic needs and legitimate expectations of the people of Bangladesh. It is essential that this potential is brought to fruition.”²²⁶ Cecilia Malmström, European Commissioner for Trade implied the connection between Bangladesh’s commitment toward reform of its labor laws and its continued access to the EU’s trade preferences under its “Everything-But-Arms initiative.”²²⁷ Marianne Thyssen, Commissioner for Employment, Social Affairs, Skills and Labour Mobility was perhaps more blunt in describing the power relationships “all along our supply chains.”²²⁸ Those relationships, though cast in the language of partnership, also suggested its hierarchical ordering.²²⁹ Lastly, Neven Mimica, Commissioner in charge of International Cooperation and Development spoke to the internationalization of the frameworks within which Bangladesh might express

222. *Id.*

223. BANGLADESH SUSTAINABILITY COMPACT: TECHNICAL STATUS REPORT, *supra* note 155, at 2.

224. *Id.*

225. *European Commission, Two years after Rana Plaza-progress report on Bangladesh Sustainability Compact* (Apr. 24, 2015), http://ec.europa.eu/ireland/press_office/news_of_the_day/rana-plaza-progress-report_en.htm (since removed, original on file with author). It was not clear however, which safety standards were being referenced and whether the numbers included the efforts of the Alliance as well as of the Accord.

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*, (“In a globalised world, united efforts are needed and we will continue to promote better labour conditions in cooperation with our partners and in global fora such as the G7 and the G20.”).

its national preferences in law. It suggested as well the role of powerful developed states in the context of managing less powerful state behaviors, of a kind with their obligations to manage non-state actors.²³⁰

The European Parliament hosted an exhibition and conference for the purpose, in part, of emphasizing the need for “the fashion industry to take more responsibility for the safety and working conditions of those that supply them.”²³¹ The European Parliament also put forward a resolution that appeared to assume as beyond dispute, the embedding of Bangladesh, its economic sectors, public and private global actors, and itself, within a network of regulatory structures whose application was necessary and perhaps mandatory.²³²

In the wake of the Rana Plaza collapse, the Organization for Economic Cooperation and Development (OECD) also intervened. The OECD’s focus was on the development of due diligence guidelines for responsible supply chain in the garment and footwear sector,²³³ which it began to develop in December 2014.²³⁴ It is meant to serve as an influential source of soft law for garment production supply chains developed by the OECD states and their multistakeholder advisory groups. Thereafter national groups began to develop similar soft law approaches to sustainability in the garment and textile sector—to be formulated in the home states of apex supply chain corporations and imposed down the supply chain—in this case into Bangladesh.²³⁵ The World Economic Forum’s Global Agenda Council on

230. *Id.* She noted: “Through our development support, the European Union fosters inclusive and sustainable growth that gives people access to jobs that fully respect existing international labour standards, ensure adequate working conditions and environmental protection. The Commission is also reflecting how we can create incentives for partner countries as well as the private sector for a responsible management of the supply chain in which all actors abide by those standards and principles.” Also posted at Neven Mimica, “A Day to Remember,” Blogpost 24 Apr. 2014, https://ec.europa.eu/commission/2014-2019/mimica/blog/day-remember_en.

231. Iwona Karbowska, *European Parliament hosts an exhibition to mark the 2nd anniversary of the Rana Plaza factory collapse in Dhaka*, THE INDEPENDENT, Apr. 24, 2015, <http://www.independent.co.uk/news/pictures/european-parliament-hosts-an-exhibition-to-mark-the-2nd-anniversary-of-the-rana-plaza-factory-collapse-in-dhaka-10201558.html>.

232. European Parliament resolution of 29 Apr. 2015 on the second anniversary of the Rana Plaza building collapse and progress of the Bangladesh Sustainability Compact (2015/2589(RSP)), *supra* note 2.

233. *See, e.g.*, OECD-ILO Roundtable on responsible supply chains in the textile and garment sector, (2014), Paris, <http://www.oecd.org/daf/inv/mnc/2014-ilo-oecd-roundtable-textile-supply-chains.htm>; OECD Roundtable on Due Diligence in the Garment and Footwear Supply Chain, (2015), Paris, <https://mneguidelines.oecd.org/garment-footwear-supply-chain-due-diligence-roundtable-2015.htm>.

234. *See* OECD, Responsible Supply Chains in the Garment and Footwear Sector, <https://mneguidelines.oecd.org/responsible-supply-chains-textile-garment-sector.htm>.

235. *See, e.g.*, Social and Economic Council of the Netherlands (SER), Agreement on Sustainable Garment and Textile (presented Mar. 9, 2016) executed July 2016, <http://www.oecdguidelines.nl/binaries/oecd-guidelines/documents/publication/2016/3/09/agreement-on-sustainable-garment-and-textile/160309-agreement-sustainable-garment-textile.pdf>. Discussed in Press Release: Agreement on Sustainable Garment and Textile (Mar. 10, 2016), <http://www.euandgvc.nl/news/news/2016/03/10/agreement-on-sustainable-garment-and-textile>. (“The next steps in this process will be to secure funding of the agreement and have it signed – in June

Human Rights also circulated a white paper framework for managing supply chains.²³⁶

Yet the focus on the garment sector also produced some controversy. In 2015, an influential business and human rights NGO lamented that laser focus on Bangladesh's garment sector while "less attention has been paid to other industries such as leather, construction and cement: which do not have prominent links through to international supply chains."²³⁷ They also noted that even with all the attention to the garment sector, local conditions below the bright gloss of governance and regulation reform remained difficult.²³⁸ The anniversary was marked by worker protests in Bangladesh,²³⁹ in part to put pressure on some companies sourcing garments in Bangladesh to make greater contributions to the Arrangement.²⁴⁰ The United States and the European Union issued a Joint Statement. It noted the successes and work ahead for reform of the regulatory space within with garment production occurs in Bangladesh.²⁴¹ It also, perhaps more tellingly, declared their continued commitment to legislative reform in Bangladesh. This commitment was underlined by a European Parliament Resolution that sought to ensure that the European Union project its power to ensure substantial legislative reform in Bangladesh, the institutionalization of corporate responsibility down supply chains, and the reform of cultures of corruption.²⁴² The criminal cases

— by at least 35 companies in the sector, who together represent at least 30 percent of sales in the Netherlands.”)

236. WORLD ECONOMIC FORUM, GLOBAL AGENDA COUNCIL, SHARED RESPONSIBILITY: A NEW PARADIGM FOR SUPPLY CHAINS (2015), http://www3.weforum.org/docs/WEF_GAC_Supply_Chains_%20A_New_Paradigm_2015.pdf.

237. Harpreet Kaur, *No way to mark the 2nd anniversary of the Rana Plaza building collapse in Bangladesh*, Business and Human Rights Resource Centre, Apr. 22, 2015, <http://business-humanrights.org/en/no-way-to-mark-the-2nd-anniversary-of-the-rana-plaza-building-collapse-in-bangladesh>.

238. *Id.*, citing the report of another NGO, *The Lost Thread – Violations and abuse of power in the garment industry in Bangladesh*.

239. See, e.g., *Bangladesh: Rana Plaza Victims' Orphans Stage Sit-In On 2nd Anniversary of Collapse*, International Union League for Brand Responsibility, Apr. 24, 2015, http://www.union-league.org/rana_plaza_orphans_bangladesh.

240. *Id.* This echoed similar calls from other NGOs. See *Global Unions Say to Benetton 'Pagare' Pay Up!*, INDUSTRIALL, Feb. 19, 2015, <http://www.industriall-union.org/global-unions-say-to-benetton-pagare-pay-up>. The European Parliament also joined in this effort. See European Parliament resolution on the second anniversary of the Rana Plaza building collapse and progress of the Bangladesh Sustainability Compact (Apr. 29, 2015) (2015/2589(RSP)) at ¶2, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+MOTION+P8-RC-2015-0363+0+DOC+XML+V0//EN>.

241. Office of the United States Trade Representative, Press Release, Joint Statement on the Second Anniversary of the Rana Plaza Disaster in Bangladesh, *supra* note 1. (“Our commitment to Bangladesh is strong and enduring. The European Union and the United States, in close cooperation with the ILO, will remain closely engaged with the Government of Bangladesh in the spirit of partnership to continue our work together to ensure that economic growth and sustainable development go hand-in-hand with workers’ safety and rights.”).

242. See European Parliament resolution on the second anniversary of the Rana Plaza building collapse and progress of the Bangladesh Sustainability Compact (Apr. 29, 2015) (2015/2589(RSP)) at ¶1-27, <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+MOTION+P8-RC-2015-0363+0+DOC+XML+V0//EN>.

against Mr. Rana and others drags on.²⁴³ It was only in 2015 that forty-one people, including Mr. Rana, his parents, the factory owners, more than a dozen government officials, and others, were charged with murder in the deaths that resulted from the building collapse.²⁴⁴ The civil actions alleging violation of safety rules are also pending.²⁴⁵ All the pieces of this regulatory puzzle appear both in place and in play.

Yet, even by the second anniversary of the collapse of the Rana Plaza factory building, another image appeared much more clearly. With a closer look, one might discern the outlines of the construction of another Rana Plaza factory building, not a physical manifestation producing garments, but a factory building designed to create a space for the production of regulation/governance by a variety of producers to satisfy the domestic and global needs of markets in regulation/governance. This new regulatory factory in many ways resembled the Rana Plaza factory building itself. The building has developed in part through coordinated planning and in part organically, adding structured and unstructured layers of work spaces for governance producers to operate. Its regulatory factory space was constructed in several layers, only some of which might be understood as registered with legitimating authorities. Indeed, it is not clear that, except perhaps at a very great level of generality there is a single point source of authentication, and in any case it is relatively hard to find some agent for enough authentication to get by. It was subdivided into a number of operational “factories” operated locally but driven by absent and very powerful institutional actors. They competed with each other both for adherents (workers) and for clients, sourcing regulatory commodities for both domestic and global consumption. And they produce a variety of products, each factory within the regulatory factory building manufactures products for a number of brands. From a distance the factory appears tidy and coordinated—all of these regulatory endeavors are housed within a building complex that is singular and appears unified. The regulatory factory building looks solid enough, but inside complexity and conflict are as common as harmonization and coordination among the occupants of the factory building. And each of the factory owners continues to make changes that may affect the structure of the building in which all are housed. Is the Rana Plaza regulatory/governance factory also structurally compromised and ready to collapse? Is there a factory building? It is to the elaboration of a theory of regulatory action from the story of the collapse of the Rana Plaza factory building that the next section turns.

243. *Bangladesh mourns anniversary of garment factory disaster*, DAILY HERALD (AP), Apr. 24, 2015, <http://www.dailyherald.com/article/20150424/business/304249940>.

244. *Rana Plaza collapse: dozens charged with murder*, THE GUARDIAN, June 1, 2015, <http://www.theguardian.com/world/2015/jun/01/rana-plaza-collapse-dozens-charged-with-murder-bangladesh>. (“Investigators said the shift from the culpable homicide charges came after the investigation found that Rana, his staff and the management of the five factories had forced the workers to enter the building despite their unwillingness to work on the day of the accident after the building developed major cracks a day earlier.”). See *supra* notes 78-79.

245. *Id.*

III. DRAWING THEORY FROM CONTEXT: TRANSNATIONAL, POLYCENTRIC OR OTHER LEGAL ORDER?

The Rana Plaza building collapse provides both a germinal illustration and a structure for approaching the issue of theorizing the complex interactions of governance institutions. The building collapse and its aftermath are neither random nor disconnected. They suggest the outlines of an emerging ordering of governance that is situated within, between and beyond states, but that is felt like law but may not be tied to the domestic orders of states. Indeed, the Rana Plaza building collapse appears to call out for a theory to craft a normative theory within which the "story" of Rana Plaza can be understood, framed and contained within a rational structure of law, politics and economics. In the face of the tragedy that is the Rana Plaza building collapse, and perhaps the greater tragedy of the actions that followed in the political, economic and societal spheres, such theorizing is necessary to rationally order the past and manage the future.

Theory provides an instrument to manage policy discourse and the development and application of the techniques of governance that may be deployed in the service of the premises at the core of the policies structured within theoretical constructs. In the case of Rana Plaza, commentators derived a number of theories and approaches that appeared to conform their own views of the nature of governance and the operation of the emerging economic global order. One perspective embedded Rana Plaza within the larger project of folding transnational economic activity, and the enterprises through which these activities are undertaken, within systems of international legalities.²⁴⁶ Another perspective seen in Rana Plaza and its aftermath the emerging hierarchy of the management of developing (host) states by developed states and their multinational enterprises.²⁴⁷ Still another seen in Rana Plaza, are the possibilities for reforms of Bangladesh labor or other laws to approach or conform to international standards,²⁴⁸ or those of other states.²⁴⁹ This perspective is sometimes contextualized within private governance and focused on the structures for managing downstream suppliers,²⁵⁰ or the effectiveness of

246. See Erika R. George, *Incorporating Rights: Empire, Global Enterprise, And Global Justice*, 10 U. ST. THOMAS L.J. 917, 953-54 (2013).

247. See Peter C. Hansen, *Avoiding Harmful Overreach When Promoting Human Rights In African Investments*, 35 U. PA. J. INT'L L. 1113 (2014).

248. See Tamanna Rubya, Note: *The Ready-Made Garment Industry: An Analysis Of Bangladesh's Labor Law Provisions After The Savar Tragedy*, 40 BROOK. J. INT'L L. 685 (2015).

249. S.M. Solaiman, *Unprecedented Factory Fire Of Tazreen Fashions In Bangladesh: Revisiting Bangladeshi Labor Laws In Light Of Their Equivalents In Australia*, 31 HOFSTRA LAB. & EMP. L.J. 125 (2013); Alyssa B. Coffey, Note: *Beyond Pre-Reconstruction Slavery: America's Modern Day Trade Practices And Confronting Forced Labor*, 6 GEO. MASON J. INT'L COM. L. 201, 208-09 (2015).

250. See, e.g., Kishanthi Parella, *Outsourcing Corporate Accountability*, 89 Wash. L. Rev. 747 (2014) (approach grounded in reflexive law principles). This perspective is quite useful for its insights on the fragmentation and diffusion of intersect and incentive within a multilayered public and private governance order that easily evades traditional legal structures of command. It seeks to devise techniques that match the behavior structures of critical actors within the context of the problem to be corrected.

corporate codes of conduct in global management of behavior in economic relationships across a supply or production chain²⁵¹ (and their legalization),²⁵² or ethical sourcing.²⁵³ A related perspective contextualizes Rana Plaza within the larger issue of supply chain behaviors, emerging business expectations and the distribution of societal, economic and legal risk for damages.²⁵⁴ These can focus on the importance of one or another of the actions taken in the wake of the Rana Plaza building collapse—the Accord, for example, as a new type of governance contract that ought to function more like law than a private arrangement among the parties thereto.²⁵⁵ Conversely, still another perspective of Rana Plaza sees in supply chains a means of closing a governance gap that limits the ability of states to manage their own internal orders and that requires a sharing of governance responsibilities across a group of stakeholders.²⁵⁶ Rana Plaza is sometimes embedded in other global movements—gender based empowerment,²⁵⁷ human rights to health,²⁵⁸ embedding rights to development within legal regimes,²⁵⁹ or greater public and private monitoring and accountability structuring.²⁶⁰

251. See Barbara J. Fick, *Corporate Social Responsibility For Enforcement Of Labor Rights: Are There More Effective Alternatives?*, 4 GLOBAL BUS. L. REV. 31 (2014); Greg M Zipes, *Ties That Bind: Codes Of Conduct That Require Automatic Reductions To The Pay Of Directors, Officers, And Their Advisors For Failures Of Corporate Governance*, 15 J. Bus. & Sec. L. 105, 122-23 (2014); Sarah Labowitz & Dorothee Baumann-Pauly, NYU Stern Sch. of Bus., *Business As Usual Is Not an Option: Supply Chains and Sourcing after Rana Plaza* (2014), https://www.stern.nyu.edu/sites/default/files/assets/documents/con_047408.pdf; Donald C. Dowling Jr., *Global Codes of Conduct*, 24 No. 3 Int'l HR J. ART 1 (2015).

252. See, e.g., Madeleine Conway, *A New Duty of Care? Tort Liability from Voluntary Human Rights Due Diligence in Global Supply Chains*, 40 QUEEN'S L.J. 741, 753 (2015) (Canada).

253. See Olivera Medenica, *The Importance Of Counsel In The Context Of The Fashion Industry's Emerging Issues*, Aspatore (Sept. 1, 2014) 2014 WL 5473989 at 6.

254. E. Christopher Johnson Jr., *Business Lawyers Are In A Unique Position To Help Their Clients Identify Supply-Chain Risks Involving Labor Trafficking And Child Labor*, 70 Bus. Law. 1083, 1101-02 (2015). See also Elizabeth Tuttle, Note: *Made In Violation: Non-Legal Solutions To Labor Abuses Perpetrated By American Multinational Corporations In Foreign Sweatshops*, 17 Duq. Bus. L.J. 101 (2015) (arguing for the use of non-legal solutions, focused on corporate codes of conduct and consumer involvement, to meet this global issue).

255. See, e.g., Mark Anner, Jennifer Baird, and Jeremy Blasi, *Toward Joint Liability In Global Supply Chains: Addressing The Root Causes Of Labor Violations In International Subcontracting Networks*, 35 COMP. LAB. L. & POL'Y J 1 (2013).

256. See WORLD ECONOMIC FORUM, GLOBAL AGENDA COUNCIL, SHARED RESPONSIBILITY: A NEW PARADIGM FOR SUPPLY CHAINS (2015), http://www3.weforum.org/docs/WEF_GAC_Supply_Chains_%20A_New_Paradigm_2015.pdf.

257. See, e.g., Lamia Karim, *Analyzing Women's Empowerment: Microfinance And Garment Labor In Bangladesh*, 38-SUM Fletcher F. World Aff. 153 (2014).

258. See Carol Castleberry, *A Human Right To Health: Is There One And, If So, What Does It Mean?*, 10 INTERCULTURAL HUM. RTS. L. REV. 189, 220-221 (2015).

259. See Upendra Acharya, *The Future Of Human Development: The Right To Survive As A Fundamental Element Of The Right To Development* 42 DENV. J. INT'L L. & POL'Y 345, 364 (2014) ("Corporate activity in underdeveloped areas of the world additionally lead to continued underdevelopment. Perhaps one of the most current examples is that of the garment belt in Bangladesh, where disregard for the basic safety of factory workers has cost thousands of lives in factory fires and collapses.").

260. See Natasha Schwarzbach and Ben Richardson, *A Bitter Harvest: Child Labour In Sugarcane Agriculture And The Role Of Certification Systems*, 21 U.C. DAVIS J. INT'L L. & POL'Y 99, 126-27 (2014).

However, few consider the possibility of systemicity in the complex of relationships that constitute the Rana Plaza episode in spatial and temporal context.²⁶¹ Indeed, there is much to learn from the bits and pieces that make up what is organized here as the construct of the governance regimes of Rana Plaza from before, through, and after the collapse of the factory building and among public and private actors within and beyond Bangladesh. But it is also possible that from these bits and pieces, might emerge the outlines of a system, of something new, that is coherent and self-referencing. It is possible to posit order within the multiple actors, jurisdictions and intermeshing governance orders that constitute that regulatory stew that is Rana Plaza. Yet if Rana Plaza illustrates the operation of such a system, then what kind of system is it? Three possibilities are considered.

A. A Transnational Legal Order?

Transnational Legal Orders (TLOs) are constellations of legal norms, organizations, and actors that seek to order behavior in a highly globalized world in ways that transcend nation-states.²⁶² The concept was developed with contributions from a variety of scholars representing multiple disciplines, including: international lawyers, political scientists, sociologists, anthropologists, and law and language experts.²⁶³ TLOs contain three elements: order, legal, and transnational—that is they must exhibit the characteristics of a governance order that is at once both legal in character and transnational in scope.²⁶⁴ First, a TLO must solve or order some problem recognized by actors. That is, a TLO seeks to theorize the basic issue of what is ordered and the behaviors entailed in the notion of order.²⁶⁵ Second, TLOs are legalized and legitimized because they employ legal norms.²⁶⁶ That is, TLO theory seeks to understand the distinctiveness of a legal order.²⁶⁷ Finally, TLOs are

261. On the importance of both temporal and spatial dimensions in complex multi-planed governance, see, e.g., Larry Catá Backer, *Governance Polycentrism Or Regulated Self-Regulation—Rule Systems for Human Rights Impacts of Economic Activity Where National, Private and International Regimes Collide*, CONTESTED COLLISIONS: INTERDISCIPLINARY INQUIRIES INTO NORM FRAGMENTATION IN WORLD SOCIETY 198 (eds., Kerstin Blome, Hannah Franzki, Andreas Fischer-Lescano, Nora Markard and Stefan Oeter, Cambridge Univ. Press, 2016).

262. Terence Halliday and Gregory Shaffer, *Transnational Legal Orders*, in TRANSNATIONAL LEGAL ORDERS, 3, 5-6 (eds., Terence Halliday and Gregory Shaffer, New York: Cambridge Univ. Press, 2015).

263. Terence Halliday and Gregory Shaffer, acknowledgements in TRANSNATIONAL LEGAL ORDERS, xi, xi-xii (eds., Terence Halliday and Gregory Shaffer, New York: Cambridge Univ. Press, 2015).

264. Terence Halliday and Gregory Shaffer, *Researching Transnational Legal Orders*, in TRANSNATIONAL LEGAL ORDERS, 475, 475-76 (eds., Terence Halliday and Gregory Shaffer, New York: Cambridge Univ. Press, 2015).

265. Halliday and Shaffer, *Transnational Legal Orders*, *supra* note 263, at 5-9 (“An ‘order,’ in other words, connotes some regularity of behavioral orientation, communication and action, but it remains open to incremental change and considerable variation.” *Id.* at 9.).

266. Halliday and Shaffer, *Researching Transnational Legal Orders*, *supra* note 265, at 475-76.

267. Halliday and Shaffer, *Transnational Legal Orders*, *supra* note 263, at 9-18 (stipulating three distinct attributes: norms produced by or in conjunction with a legal organization or network (*ibid.*, 11);

transnational as they exist in a globalized society, and are not attached or bound to one nation-state.²⁶⁸ That is, TLO theory seeks to contextualize legal ordering within the transnational sphere.

TLOs have certain characteristics that are certainly not uniform among the many TLOs that exist today. For example, TLOs come in different sizes and apply to different legal areas.²⁶⁹ They do not exist for an indefinite amount of time, they may rise and fall quickly or exist for a long period of time.²⁷⁰ TLOs apply to different areas and are not bound to any one state, they are implemented differently across nations.²⁷¹ Finally, TLOs are not bound to a uniform standard and they may exist in different sizes and structures.²⁷² The task of the TLO project is to “produce a theoretically infused and empirically based approach to mapping and explaining the formation, institutionalization and impact of TLOs.”²⁷³

The concept of the TLO, as applied by scholars from across many different disciplines, builds from Terrence Halliday and Gregory Shaffer’s influential work on TLOs.²⁷⁴ In their book, Halliday and Shaffer seek to build theories and empirical understanding of TLOs for the purposes described above.²⁷⁵ Scholars have applied their concept of TLOs to empirically study different regulatory areas that help flesh out both the concept of the TLO and its position with global ordering.

For example, Susan Block-Lieb and Terrence Halliday examined TLOs in bankruptcy and maritime law.²⁷⁶ The focus is on the development of a “conceptual basis for establishing when the legal norms promulgated by a TLO have settled.”²⁷⁷ Roderick Macdonald traces the emergence of TLOs that govern secured transaction law.²⁷⁸ He finds that there is not a proposal for a comprehensive and global uniform

the norms engage legal institutions within multiple nation-states (*ibid.*, 13); and the norms are produced in recognizable legal forms (*ibid.*, 15)).

268. *Id.*, at 18-20 (“TLOs span legal orders that vary in their geographic scope, from bilateral to plurilateral agreements, to private transnational codes to regional governance bodies to global regulatory ordering.”); *see also* Halliday and Shaffer, *Researching Transnational Legal Orders*, *supra* note 265, at 476.

269. Halliday and Shaffer, *Researching Transnational Legal Orders*, *supra* note 265, at 516-17.

270. *Id.*, at 517.

271. *Id.*

272. *Id.*, at 518.

273. Halliday and Shaffer, *Transnational Legal Orders*, *supra* note 263, at 21.

274. Nicely collected in the essays published in *TRANSNATIONAL LEGAL ORDERS*, (eds., Terence Halliday and Gregory Shaffer, New York: Cambridge Univ. Press, 2015).

275. *See generally* Halliday and Shaffer, *Transnational Legal Orders*, in *TRANSNATIONAL LEGAL ORDERS*, 5 (eds., Terence Halliday and Gregory Shaffer, New York: Cambridge Univ. Press, 2015), *supra* note 263.

276. Susan Block-Lieb and Terrence Halliday, *Settling and Concordance: Two Cases in Global Commercial Law*, in *TRANSNATIONAL LEGAL ORDERS*, 75-113 (eds., Terence Halliday and Gregory Shaffer, New York: Cambridge Univ. Press, 2015).

277. *Id.* at 109. The timing and location of this settling has powerful effects on textual meaning. *Ibid.* Meaning, itself, then, develops in a transnational and recursive context that is amplified by the multiple sites within which these norms are made and then come to be legalized.

278. Roderick Macdonald, *When Lenders Have Too Much Cash and Borrowers Have Too Little Law: The Emergence of Secured Transactions Transnational Legal Orders*, in *TRANSNATIONAL LEGAL ORDERS*, 114-53 (eds., Terence Halliday and Gregory Shaffer, New York: Cambridge Univ. Press, 2015).

and codified secured transaction TLO.²⁷⁹ Rather, there may be informal and uncoded TLOs.²⁸⁰ These TLOs are emerging due to the spread of *Lex Americana* by the US through three mechanisms: US influence on the work of international lawmaking agencies, influence of international financial agencies, and financing of some graduate programs in law and economics.²⁸¹

Philip Genschel and Thomas Rixen analyze the TLO on double tax relief and analyze its impact on taxpayers.²⁸² They offer four empirical lessons.²⁸³ First, tax TLOs were facilitated by the narrowness of their scope.²⁸⁴ Second, consolidation of Tax TLOs was possible because it was undertaken at a time when its "practical significance and political salience were rather limited."²⁸⁵ Third, the tax TLOs impact tends toward issue expansion, overlap and enmeshment; they may start small but grow.²⁸⁶ According to Genschel and Rixen, TLOs have an innate tendency that leads to "issue expansion, overlap, and enmeshment."²⁸⁷ Fourth, timing and sequence matter in TLO development.²⁸⁸ They conclude that because a TLO initially "deals only with one particular issue or set of issues in isolation, it is likely to create unintended ([sometimes unforeseen]) spillover effects on other issues: By ordering – solving – one particular problem, they reshape the problem context and may thus trigger a further round of legal ordering."²⁸⁹ They further conclude that TLOs "shape social relations and outcomes both by constraining and by enabling behavior."²⁹⁰

In the context of the TLOs for monetary law and trade law, Gregory Shaffer and Michael Waibel address variation in the alignment (and misalignment) between trade and monetary TLOs regarding three particular issues: balance of payments, currency manipulation, and capital controls. They examine how variation in how the rules of these two TLOs align affects outcomes. For example, they argue that these TLOs have become "less aligned over the use of capital controls since the 1990s."²⁹¹ According to Shaffer and Waibel, the alignment on this issue in "legal ordering becomes more difficult, despite the considerable legalization and judicialization of one of the two TLOs—the trade one."²⁹² Eric Helleiner

279. *Id.* at 146.

280. *Id.* ("Such a comprehensive, global, and systematic TLO may be emerging, albeit as an informal, not a codified, legal order." *Id.*)

281. *Id.* at 147-48.

282. Philip Genschel and Thomas Rixen, *Settling and Unsettling the Transnational Legal Order of International Taxation*, in *TRANSNATIONAL LEGAL ORDERS*, 154-83 (eds., Terence Halliday and Gregory Shaffer, New York: Cambridge Univ. Press, 2015).

283. *Id.* at 178-81.

284. *Id.* at 178-79.

285. *Id.*

286. *Id.* at 179

287. *Id.*

288. *Id.* at 179-80.

289. *Id.* at 178.

290. *Id.* at 179.

291. *Id.* at 225.

292. *Id.*

complements this analysis in the context of the ineffectiveness of the transnational financial legal order.²⁹³ He traces the incremental and piecemeal development of this TLO in response to crises in globalizing financial markets, but finds the financial TLO not highly institutionalized.²⁹⁴ As a result, he contends that the “ineffectiveness is more likely to prompt policymakers to increasingly embrace a more decentralized order involving the greater use of host country regulation and even restrictions on cross-border movements of financial capital.”²⁹⁵

In analyzing the TLO for food safety, Tim Büthe considers the Codex Alimentarius and its alignment with the World Trade Organization which has helped to produce TLO institutionalization.²⁹⁶ He maintains that the focus on institutionalization “should therefore lead to an intensification of the conflicts of interest during the rulemaking within the institutionalized TLO.”²⁹⁷ He finds that this TLO “consists not of a static bundle of rules but of a combination of specific current rules and meta-rules and procedures for updating or appending the current rules. These characteristics are found in other areas of global governance as well.”²⁹⁸ TLOs do not so much “solve” governance issues as they reshape the context in which these challenges are approached. Thus, regarding the climate change TLO, Daniel Bodansky notes only limited normative settling.²⁹⁹ He concludes that even if micro-TLOs for climate change in particular sub-issues have emerged, “it may not be sufficient to solve climate change problems.”³⁰⁰

Laurence Helfer “applies the TLO framework to explain the origins of ... controversies and their consequences” in the area of access to medicines.³⁰¹ He provides a “conclusion that future studies of TLOs may wish to explore: that highly contested international rules constrain, rather than expand, the policy space available to governments when those rules are transposed into national and sub

293. Eric Helleiner, *Regulating the Regulators: The Emergence and Limits of the Transnational Financial Legal Order*, in *TRANSNATIONAL LEGAL ORDERS*, 231-57 (eds., Terence Halliday and Gregory Shaffer, New York: Cambridge Univ. Press, 2015).

294. *Id.* at 232 (one that might lead to a legitimacy crisis).

295. *Id.* at 255.

296. Tim Büthe, *Institutionalization and its Consequences: The TLO(s) for Food Safety*, in *TRANSNATIONAL LEGAL ORDERS*, 258-86, (eds., Terence Halliday and Gregory Shaffer, New York: Cambridge Univ. Press, 2015) (“Institutionalization in this sense is important because the analytical usefulness of recognizing TLOs as a distinct phenomenon hinges on them being more than a reflection of the momentary inter- or transnational distribution of powers.” *Id.* at 260).

297. *Id.* at 261.

298. *Id.*

299. Chapter 8: Daniel Bodansky, *Climate Change: Transnational Legal Order or Disorder?*, in *TRANSNATIONAL LEGAL ORDERS*, 287 (eds., Terence Halliday and Gregory Shaffer, New York: Cambridge Univ. Press, 2015).

300. *Id.* at 305. (“To the extent that order has emerged, it has been through a more bottom-up process.” *Id.* at 304).

301. Laurence Helfer, *Pharmaceutical Patents and the Human Right to Health: The Contested Evolution of the Transnational Legal Order on Access to Medicines*, in *TRANSNATIONAL LEGAL ORDERS*, 311-39 (eds., Terence Halliday and Gregory Shaffer, New York: Cambridge Univ. Press, 2015); see also Gregory Shaffer & Susan K. Sell, *Transnational Legal Ordering and Access to Medicines*, in *PATENT LAW IN GLOBAL PERSPECTIVE*, 97, 98 (eds., Ruth L. Okediji & Margo A. Bagley, Oxford Univ. Press, 2014).

national legal systems and can be invoked and enforced by competing groups of domestic actors.”³⁰² This insight reinforces the notion of interplay of politics and institutionalization in TLOs operating at multiple governance levels.³⁰³

Does Rana Plaza fit comfortably within TLO theory? TLO theory offers *two potentially useful approaches* to the analysis of the context that is Rana Plaza—the aggregate of operations that are embedded in a supply chain. The first considers the premise that the supply chain is an object of transnational governance effectuated through networks of transnational legal orders. It is premised on the idea that TLO theory is a useful means of approaching the interactions of these multiple legal ordering initiatives as they affect particular points in the supply chain. The second considers the premise that the supply chain (or a supply chain in a particular area, such as for apparel) itself is an integrated and self-referencing transnational legal order. It is grounded in the notion that the supply chain itself is the framework within which a unified transnational legal order operates. Each is considered in turn.

One can make a strong case that a close reading of the governance structures around the Rana Plaza building collapse suggest the emergence of a well-defined TLO. Reading Rana Plaza within its multiple contexts—within Bangladesh, within global supply chains, and in time—points to an order that is both legal and transnational in the way that the advocates of TLO theory would embrace. If that is indeed the case, the Rana Plaza serves as a powerful additional evidence of the power and value of TLO theory to explain and understand emerging governance frameworks.

1. *Supply Chains as Nexus Points for TLO Systems*

One can see in Rana Plaza the existence and interactions of related TLOs. And, indeed, Rana Plaza might provide a valuable case study not merely for the structuring of TLOs but for a theory of their interactions around particular events that touch on their respective governance zones. Every one of the actors that affected or were affected by these events could be understood as an autonomous TLO, or as constituents of a broader TLO comprising states, multinational enterprises, civil society, and international organizations.

a. States

To a great extent, states appear to embody what TLOs are not—national legal orders embedded in an international order of states. Yet consider the nature of that embedding of states within the emerging international framework of governance. The state players in Rana Plaza provide a good example. Each is to a greater or lesser extent a national legal order, but Bangladesh appears to test the conception of states as distinct legal orders whose borders form a permeable barrier within which legitimate legal ordering, grounded in democratic and representational

302. *Id.* at 335.

303. *Id.* at 376.

principles, can be maintained. Both before and after the factory building collapse. Bangladesh itself appears to be a state only with respect to residual characteristics of statehood: It operates as a state *in form*, but in effect, it appears more as a container for the implementation of the governance orders of other actors than as the controlling organization of its own distinctive legal order.³⁰⁴ TLO theory can help us understand the changing character of developing states emerging within the globalized legal order as internally constituted parts of broader TLOs. Bangladesh appears to be a receptacle within which the functionally differentiated governance orders developed by multinational enterprises and international organizations reside, and in residing contribute to the articulation of a transnational order within the national territory.³⁰⁵ That transformation of the Bangladeshi *national legal order* reflects *transnational legal ordering*.

It follows that Bangladesh can be understood as a site of incomplete governance that requires a network of transnational actors to complete.³⁰⁶ This transformation becomes evident in the context of Bangladesh's positioning in its international relations. Before the building collapse, Bangladesh's domestic legal order could be understood as a particularized expression of a transnational legal order—the aggregation of Bangladesh's obligations under its international treaties, and especially its trade and investment treaties with other states and international organizations. The resulting partial internationalization of Bangladesh law—at least with respect to those internal elements of Bangladesh activities covered by those engagements—might indicate a loss of sovereignty in classical terms. But it may also evidence the embedding of Bangladesh within a legal order that is transnational. That legal order was manifested effectively in the wake of the building collapse. The swift move by the U.S. and the European Union to advance agreements with Bangladesh covering a variety of changes to Bangladesh's domestic legal order through applying international norms suggests the way that states themselves should be understood as participants in TLOs, especially relating to that portion of national regulation that relates to transnational activity.

304. See Ralf Michaels's excellent discussion of states as sites for TLO in *State Law as a Transnational Legal Order*, 1 U.C. IRVINE J. INT'L TRANSNAT'L AND COMP. L. 141-160 (2016).

305. Larry Catá Backer, *Fractured Territories and Abstracted Terrains: Human Rights Governance Regimes Within and Beyond the State*, 23 IND. J. GLOB. L. STUD. (forthcoming 2016) (discussing in the context of the loss of representational legitimacy).

306. As Labowitz and Baumann-Pauly note in their study:

Filling the governance gap will require a network of interconnected actors – national and international companies, governments, civil society, unions, and international organizations – to enhance governance in the garment sector through a mix of public and private mechanisms. This means fostering greater transparency in business relationships, investing in enhanced regulatory oversight, coordinating financing systems for making factories safer, and prioritizing infrastructure development.

SARAH LABOWITZ AND DOROTHÉE BAUMANN-PAULY, BUSINESS AS USUAL IS NOT AN OPTION: SUPPLY CHAINS AND SOURCING AFTER RANA PLAZA 46 (NYU Stern Center for Business and Human Rights, 2014).

b. Multinational organizations

Multinational enterprises are usually viewed as the classical expression of transnational order. In the Rana Plaza events, they clearly evidence their character as transnational and as an ordering system. Multinational enterprises were a crucial player in governance orders within Bangladesh through their supplier codes of conduct and the governance power they asserted down their supply chains. But that governance order was quite narrow—focused on the characteristics and behaviors of downstream supply chain partners, and sometimes in competition with the governance orders of competitor multinational enterprises. Enterprises have been quite aggressive in resisting notions that their obligations under their own normative systems extend beyond their suppliers to so called third party beneficiaries.³⁰⁷ That severely limits the scope and effectiveness of the governance community created, and may make it harder to consider the outcomes to constitute either law or order.

The answer depends, in part, on what one considers to be a *legal* order, as Rana Plaza highlights both the legal and non-legal ordering around which transnational economic actors organize their activities. MNE self-constituting governance orders can be understood both as legal³⁰⁸ and governance³⁰⁹ orders. It depends on the concepts of the observer and the way one characterizes their connection with the domestic legal orders of the states in which they operate. What appears clear from the realities of Bangladesh before the building collapse was that the supply chains were ordered as transnational systems, but their legal character was, at best indirect and consequential. They might have impacted the legal order of Bangladesh, and they might have been protected within the domestic legal orders of home and host states, but they were not directly legal because their existence depended on their autonomy from law.

Yet even in the context of the transnational orders of economic actors, it is possible to see the emergence of a legal order in the aftermath of the building collapse. It is in the collective action of economic enterprises—in the Accord and Alliance—that one sees the emergence of private transnational governance orders that begin to take on a set of *legal* characteristics. The Accord and Alliance represent the self-constitution of private and public governance orders to the ends of developing and implementing legal regimes within a state that incorporates and legalizes international normative rules. It is not just that the Accord and Alliance are legal persons, but that their object is the construction of a legal order that is inherently transnational. The move towards this form of transnationalism—involving states, international organizations, and private actors—points to the rise of a new normal for legal ordering both within and beyond the state. The same, of course, is true of the Arrangement. On the one hand, it can be viewed as a means

307. See, e.g., *Doe I v. Wal-Mart Stores, Inc.*, 572 F. 3d 677 (9th Cir. 2009).

308. GRAF-PETER CALLIESS & PEER ZUMBANSEN, *ROUGH CONSENSUS AND RUNNING CODE: A THEORY OF TRANSNATIONAL PRIVATE LAW* (Oxford 2010).

309. GUNTHER TEUBNER, *CONSTITUTIONAL FRAGMENTS: SOCIETAL CONSTITUTIONALISM AND GLOBALIZATION* (Gareth Norbury Trans., 2012).

for avoiding domestic litigation. Yet the Arrangement itself is grounded in legalities that are internationalized and embedded within legal systems itself. Both in its administration and in its normative structure it evidences a distinctive and autonomous order that is functionally differentiated in a narrow way but, within the scope of its function, legal and transnational.

c. Civil society and international organizations

Civil society played a crucial but derivative role both before and after the building collapse. To a large extent Rana Plaza suggests the necessary role of civil society in the development of TLOs that may be centered in the state, in multinational enterprises, or in multilateral orders. Civil society serves as a driver of accountability both as a supplement and a substitute for the monitoring and accountability functions of the state, the multinational enterprise and multilateral (international) orders. But civil society may not drive TLOs. And it is not clear from Rana Plaza, either before or in the aftermath of the building collapse, that civil society itself, and for itself, constitutes a free-standing TLO. On the other hand, one might see in civil society the necessary elements of functionally differentiated self-constituted orders that are transnational. But might they be legal orders? It is true enough that these orders may lead toward legalization, broadly understood. But it is less clear that their ordering is itself, while transnational, either legal or ordered.³¹⁰

International organizations are deeply embedded in state-based and enterprise TLOs. Rana Plaza clearly shows that the international or transnational portion of a TLO is grounded on the core work of international organizations as norm producers and as the focus of the structures within which internationalization occurs.³¹¹ Indeed, Rana Plaza suggests that international organizations are a crucial element in the establishment and structuring of TLOs. They provide normative values, the principles that might find expression through law (and governance), and also serve as the “order” through which transnational legalization may be implemented. But those normative values are sometimes understood as aspirational, or the sources from which specific regulatory governance (public and private) may be based. Thus, for example, the U.N. Guiding Principles are invoked as a baseline standard, but often for judging the effectiveness of private ordering.³¹² The

310. Consider in this respect the recent trends toward the control of foreign NGOs by many states. These might evidence either the legalization or the absence of transnational NGOs. See, e.g., Larry Catá Backer, *Managing Civil Society—Next Generation NGO Laws and Resistance to the Internationalization of Civil Society and its Normative Elements*, LAW AT THE END OF THE DAY (Oct. 10, 2015), <http://lcbackerblog.blogspot.com/2015/10/managing-civil-society-next-generation.html>; Office of the High Commissioner of Human Rights, *Civil Society Space And The United Nations Human Rights System* (Oct. 2014), http://www.ohchr.org/Documents/AboutUs/CivilSociety/CS_space_UNHRSysSystem_Guide.pdf.

311. Catá Backer, *supra* note 310.

312. “The United Nations Guiding Principles on Business & Human Rights appear to have been ignored in Bangladesh.” Business and Human Rights Resource Center, The Rana Plaza building collapse in Bangladesh - one year on (Apr. 2014), <http://business-humanrights.org/en/the-rana-plaza>.

embedding of international normative standards is sometimes undertaken through civil society capacity building, which includes strong elements of transnational socialization through legal norms.³¹³ In the European Union context, they may also serve as an aspirational governance template within European legal orders.³¹⁴

It is curious to note the way that ILO principles found expression in the terms of legalization and in the structure of the orders. The Accord, the Arrangement, and the multi-state compacts seem to center the ILO within their governance frameworks. The ILO appears to serve both as a means of seeking legitimacy for the normative foundations of private multinational enterprise self-ordering, and it also served as the source of those very normative framework for the transnational legal ordering of those enterprises. That is, its institutional participation was as necessary as the application of its normative framework. Both together appeared to provide the imprimatur necessary to legitimate the public character of the actions of these private actors. The harder question centers on the extent to which international organizations themselves are integral to the creation of TLOs. On the one hand, it is easy to dismiss international organizations as appendages but never as the central catalyst of a TLO. And there is much evidence in Rana Plaza to suggest that this is the primary role of international organizations. Yet, on the other hand, such a view ignores the very real autonomy of international organizations as legal orders in their own right that themselves are enmeshed in ordering relationships among networks of actors.³¹⁵ Within the context of Rana Plaza, it may be possible to characterize the ILO as a core agent within the broader TLO, or within an array of competing TLOs, for the governance of apparel supply chains.

building-collapse-in-bangladesh-one-year-on. Both enterprises and states were criticized for the failure to embed the duties and responsibilities of the UN Guiding Principles in their response to the Rana Plaza Building collapse. See Office of the High Commissioner for Human Rights, Press Release: "The lessons of Rana Plaza have still not been learned" – UN expert group on business and human rights (May 15, 2015), <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15965&LangID=E#sthash.dRwT5V5G.dpuf>.

313. Thus for example, consider the Pillars in Practice Program, undertaken by the NGO Social Accountability International, in partnership with the Danish Institute for Human Rights, the object of which is to advance the UN Guiding Principles in Bangladesh, Nicaragua and Zimbabwe. See Social Accountability International, Pillars in Practice Program, <http://www.sa-intl.org/index.cfm?fuseaction=Page.ViewPage&pageId=1344>. SIA has noted that "Bangladesh is a key focus country in our Pillars in Practice Program (PIP), in partnership with the Danish Institute for Human Rights (DiHR) and the CSR Centre Bangladesh. PIP builds the capacity of local civil society organizations to engage with and train on the UN Guiding Principles for Business and Human Rights." Social Accountability International, Bangladesh - 1 Year after Rana Plaza Collapse (Apr. 2014), <http://sa-intl.org/index.cfm?fuseaction=Page.ViewPage&PageID=1585>.

314. See Jerome Chaplier and Paige Morrow, *Three Years After Rana Plaza: Progress on Corporate Responsibility Remains Modest*, EURACTIV.COM, Apr. 28, 2016, <http://www.euractiv.com/section/social-responsibility/opinion/three-years-after-rana-plaza-progress-on-corporate-responsibility-remains-modest/> (Companies "need to see the EU engage constructively in the implementation of its international commitments, particularly the UN Guiding Principles on Business and Human Rights. Rules to set up level playing field for human rights due diligence by companies in the European market would be an essential first step towards making responsible business conduct the norm and not the exception.").

315. Shaffer et al., *supra* note 7.

d. Supply Chains as TLOs

There is much to be said for the argument that Rana Plaza provides a contextually and temporally based illustration of a number of TLOs whose impact on the events—both those leading to the collapse, and in response to that collapse—was decisive, as I will consider the possibility of disordered order, that is of order without a center as an alternative perspective. If TLO theory is useful for understanding the segmented TLO systems at play during the arc of the events around the Rana Plaza building collapse, do the interactions of these segmented TLOs imply systemicity within the arc? That is, assuming the transnational and legal elements of the governance actions around the Rana Plaza factory collapse, does Rana Plaza also suggest that, in the aggregate, it evidences a singular order organized around a supply chain?

One way to approach the answer is in the affirmative. After all, the end product of the factory building collapse was the movement of a number of TLOs in union or cooperation to elaborate a new legal structure for the management of factory production within global supply chains. Better said, perhaps, the Rana Plaza building collapse itself merely served as one of those rare moments when the coherent governance substructures that define the supply chain as an autonomous legal order were exposed, if only briefly. But that moment of exposure produced a substantial amount of effort at shifting the focus of regulation from the actors in supply chains to the supply chain itself as the site that itself sustains its own transnational legal order. Shifting the focus of regulation to the supply chain has been the object of the production of both soft law,³¹⁶ and private law among critical apex actors in supply chains themselves along with their home states.³¹⁷ It fits in nicely with the fundamental insight of TLO theory—merely shifting focus from regulatory objects to regulatory systems as the better means of avoiding the difficulty of regulating actors across borders. But that inverts the traditional structure of law—one regulatory apparatus regulating multiple actors—to one in which multiple actors regulate one system.³¹⁸

The notion of the supply chain itself as a governance order could be understood as a basis for recent efforts to conceptualize a model of global supply

316. See OECD, Responsible Supply Chains in the Garment and Footwear Sector, <https://mneguidelines.oecd.org/responsible-supply-chains-textile-garment-sector.htm>.

317. See, e.g., Social and Economic Council of the Netherlands (SER), Agreement on Sustainable Garment and Textile, *supra* note 235.

318. The World Economic Forum White Paper provides a variant of this approach: It requires the collective action, influence and resources of all major stakeholders in global supply chains, including global companies, national-level suppliers, developed and developing governments, international financial and labour organizations, workers and trade unions, civil society, private philanthropy, and development agencies that are often central to public-private partnerships. WORLD ECONOMIC FORUM, GLOBAL AGENDA COUNCIL, SHARED RESPONSIBILITY: A NEW PARADIGM FOR SUPPLY CHAINS 4 (2015), http://www3.weforum.org/docs/WEF_GAC_Supply_Chains_%20A_New_Paradigm_2015.pdf.

chain risk management.³¹⁹ This literature suggests that the supply chain can be considered an order that is transnational.³²⁰ Hence, a useful definition that itself suggests coherence and systemic autonomy within the context of risk management: "The objective of supply chains are profit maximization. . . . Finding the balance between productivity (efficiency) and profitability (effectiveness) . . . to move goods and materials between nations in a timely and seamless manner . . . so as to enhance the profitability if the supply chain as a whole is the guiding mantra."³²¹ Enterprise risk management is itself sometimes a name used to describe the ordering characteristics of risk management based governance approaches within supply chains.³²²

B. Polycentric Ordered Anarchy or the Classical State System Rebooted?

It is possible to conceptualize the supply chain, then, as either a transnational legal order, or as a nexus point of TLOs whose interaction touch on the way their respective legal orders interact with the supply chain itself. At the end of the day, the *order* that emerges in either version is one that *legalizes*, under dynamic *transnational* standards, systems of factory inspection and labor relations baselines within global supply chains. Beyond that narrow transnational ordering—disorder, governance rather than legality, and national supra-nationalism.³²³

But it is also possible to look across an autonomous supply chain, the arc of the history that marks the Rana Plaza building collapse and the scope of orders that saw in that arc a necessity for extending or applying their legal orders, and see . . . nothing. That is, it is possible to see no system in supply chains, no autonomy, and most importantly no legal ordering. Anne-Marie Slaughter has spoken to the possibility of an anarchic character, of the "need for global rules without centralized power" in transnational space.³²⁴ Building on that insight, Marc Amstutz notes that world law "constructs itself by means of a dynamic interlinkage with the laws of nation states."³²⁵ Law, then, is not an ordering principle—and one ultimately tied to

319. See, e.g., Ila Manuj & John T. Mentzer, *Global Supply Chain Risk Management*, 29 J. BUS. LOGISTICS 133-54 (2008).

320. *Id.* at 134.

321. *Id.* (citing among others, Richard T. Hise, *The Implications of Time Based Competition on International Logistics Strategies*, 38 BUS. HORIZONS 39-45 (1995); Paul T. Nelson & Gadi Toledano, *Challenges for International Logistics Management*, 1 J. BUS. LOGISTICS 1-21 (1979); John T. Mentzer & John Firman, *Logistics Control Systems in the 21st Century*, 15 J. BUS. LOGISTICS 215-27 (1994); Donald J. Bowersox & Roger J. Calatone, *Global Logistics*, 6 J. INT'L MARKETING 83-93 (1998)).

322. See, e.g., Vicky Arnold, Tanya S. Benford, Clark Hampton, and Steven G. Sutton, *Enterprise Risk Management as a Strategic Governance Mechanism in B2B-Enabled Transnational Supply Chains*, 26 J. INFO. SYSTEMS 51-76 (2012).

323. See, e.g., Neil Walker, *Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders*, 6 INT'L J. CONST. L. 373-96 (2008) (discussing the emerging disorder of orders in an increasingly normative polycentric universe of orders).

324. ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 10 (Princeton, 2004).

325. Marc Amstutz, *The Evolution of Corporate Social Responsibility: Reflections on the Constitution of a Global Law For Multinational Enterprises*, 3 SCHWEIZERISCHE ZEITSCHRIFT FÜR WIRTSCHAFTS- UND FINANZMARKTRECHT (SZW/RSDA) 189-98, 195 (2015).

a static conception of states. Rather law, and especially the law of transnational orders—serves not as an end point but as a means of linkage within dynamic systems—and the *functions* of law become detached from its *form*.³²⁶ Like the UN Guiding Principles themselves, a TLO becomes the means for integrating transnational activity into the environments in which they are active with reference to a common set of organizing and normative principles, locally applied. And thus a distinctive approach to anarchy in the transnational sphere: “An absence of statutory norms need not be synonymous with lawlessness.”³²⁷

As an exemplar, then, Rana Plaza itself may be mis-centered as the site for a system centered on a singular regulatory architecture; Rana Plaza attracts systemic action but itself cannot be understood as the framework for order—whether or not legal or transnational. As such, TLO theory is useful for its insight that *effects* or *sites* of transnational governance are incapable of serving as the framework for order. The best TLO theory can offer us, then, is a conceptual framework for understanding the way that actors can respond to stimuli (supply chains, catastrophes, etc.), since these stimuli themselves cannot serve as foundations for TLOs.

1. Polycentric governance orders

The absence of a system grounded within a centering framework does not suggest a lack of order. It only suggests the lack of a singular order. There is a consequence for TLO theory: the possibility that it does not describe a cluster of legal orders that are centered, but rather that Rana Plaza evidences the fractured though ordered ecologies of different TLOs. The Rana Plaza arc, the supply chain it exemplifies, is characterized by dynamic segmented TLOs, to be sure. But it is also marked by *transnational governance orders* and by national orders, each of which revolves around their respective jurisdictional borders and operating within the logic of their institutional strictures. Together, these actors bumped up against each other precisely because the building collapse collapsed the space separating these institutionalized orders. Fabrizio Caffaggi has spoken to the rise of transnational private regulatory regimes created by a host of public and private actors that lack the forms and character of law, but that may have the effect of law.³²⁸ Thus, where TLO theory may see a legal ordering, transnational private regulation theory may see *governance*. One focuses on the formal structures of behavior control within a community, the other on the effect of behavior control mechanics whatever their form. Both, of course, assume, to some extent, the viable autonomy of those institutional actors that produce either the legal forms or the effective tactics of regulation.

326. *Id.* at 191.

327. *Id.* at 198.

328. See Fabrizio Caffaggi, *New Foundations of Transnational Private Regulation*, 38 J. L. SOC'Y 20-49 (2011).

One can see in the supply chain regulatory structures, especially like that illustrated through the Rana Plaza supply chain, an integrated and complementary convergence point where distinct regulatory orders—legal and governance—might meet at the point of intersection of their respective jurisdictions, whether territorially or functionally differentiated. This complementarity tends to obscure the distinct orders which contribute to what in the aggregate looks like a single approach but which in reality is no more than the layering of complementary systems. This is particularly revealed in more well-defined supply chains, for example agricultural and food production.³²⁹ But its structures are becoming clearer in consumer goods industries.³³⁰

The system constitutes itself as an organism with governance structures. These governance structures are devolved and fractured to reflect the functionally differentiated components of the supply chain itself—along territorial, functional and production oriented lines. Stakeholders tend to focus on these segments rather than on the supply chain itself as an autonomous governance order.³³¹ It is not surprising, then, that the unity of the supply chain, as a singular space for governance, is itself a composite of multiple sub-governance zones. But this composite might be better understood as the amalgamation of governance orders around a system, one without a centering apparatus. In this sense, the supply chain is self-constituting, and transnational, but it is not a legal order. It is a governance pass through—a sorting but not organizing structure. The supply chain is instead a hybrid legal-governance order of devolved power organized through public and private systems only partially mediated through law, and thus only partially mediated through those public bodies through which law may only be expressed.

But that mingling did not necessarily imply an order to that co-mingling, to that intermeshing within the context of necessary reactions to the building collapse. It is possible to see in supply chains, like Rana Plaza, the space within which it is (finally) possible to understand that while segmented governance or legal orders may be centered within their respective logics (their ideologies that give shape to their frameworks and solidify their borders), those orders may not be ordered by a singular logic. That is, Rana Plaza should point to an ordering framework within which a TLO can be discerned. And yet rather than illuminating the structures of a TLO around a subject of order—Rana Plaza—it instead shows supply chain

329. See, e.g., Linda Fulponi, *Final Report on Private Standards and the Shaping of the Agro-Food System*, AGR/CAAPM (2006)9/FINAL (2006), <http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=AGR/CA/APM%282006%299/FINAL&docLanguage=En>; Spencer Henson & John Humphry, *Understanding the Complexities of Private Standards in Global Agri-Food Chains as they Impact Developing Countries*, 46 J. DEV. STUD. 1628-46 (2010).

330. See, e.g., Richard Applebaum, *Giant Transnational Contractors in East Asia: Emergent Trends in Global Supply Chains*, 12 COMPETITION & CHANGE 69-87 (2008).

331. A good example touches on the role that civil society organizations see for themselves in the context of supply chains—not the ordering of the supply chain itself, but the engagement with the activities of various components of that system. See, e.g., David J. Doorey, *The Transparent Supply Chain: from Resistance to Implementation at Nike and Levi-Strauss*, 103 J. BUS. ETHICS 587-603 (2011).

systems like Rana Plaza as themselves objects of more functionally differentiated and partial TLOs, each operating within and for the maximization of their own logic and ideology and none contributing to an order that is centered on Rana Plaza itself.³³²

Yet Rana Plaza, as representative of the autonomous supply chain in time, is itself a subject of ordering. Rana Plaza, the supply chain system, then, might be better understood as a framing element—like the state in globalization—within which governance converges within the logic of the centering system itself. But the supply chain itself does not provide an internally coherent and centering element, just a structure within which governance systems converge to the extent of their conjoining with that system—and only to that extent. But it is a subject of ordering without a center, without a leader. It remains little more than an amalgamation of the consequences of the determinations of ordering systems. Thus, what Rana Plaza suggests is not the power of TLOs so much as the power of fracture as the governing insight for understanding the locus of power, and thus the scope and character of law and governance, within the transnational sphere in those areas that count—where events occur that trigger the full range of regulatory responses available to governance orders.³³³

Rana Plaza, then, might be clearly illustrative of the polycentricity,³³⁴ the absence of a single ordering principle, in the structure of governance respecting any governance territory—whether based on territory, function, operation, or relations. Rana Plaza may also suggest the need for TLO theorizing that develops the issue of anarchy in governance ordering, that is of polycentricity within and among governance ordering.³³⁵ There was no centering in Rana Plaza or in any of its sub-systemic ordering systems that suggests order that is not specifically self-referencing within their own governance orbits. And yet the supply chain itself might be that centering—that singularity, within which coherent governance occurs. In this respect, both polycentric and TLO theory would posit the existence of an order from out of the supply chain. And Rana Plaza appears to give that insight some substance. But this is a governance order of a kind quite distinct from what has come before. It is no longer grounded in the tangible—territory, capitals, people—it is intangible, systemic and functionally differentiated, layered upon, within, and through other others.

332. Consider this in light of recent scholarship on the governance ordering of CSR within supply chains. See, e.g., Li-Wen Lin, *Legal Transplants Through Private Contracting: Codes of Vendor Conduct in Global Supply Chains as an Example*, 57 AM. J. COMP. L. 711-44 (2009).

333. And even those responses might themselves be subject to fracture within the logic of globalization. See, e.g., Milton C. Regan, Jr. & Palmer T. Heenan, *Supply Chains and Porous Boundaries: The Disaggregation of Legal Services*, 78 FORDHAM L. REV. 2137-91 (2010) (discussing the disaggregation of legal services within what might be understood as a legal services supply chain TLO or private governance system).

334. See, e.g., Paul D. Aligica & Vlad Tarko, *Polycentricity: From Polanyi to Ostrom, and Beyond*, 25 GOVERNANCE 237-62 (2012).

335. Discussed in Larry Catá Backer, *The Structural Characteristics of Global Law for the 21st Century: Fracture, Fluidity, Permeability, and Polycentricity*, 17 TILBURG L. REV. 177-99 (2012).

The differences between a polycentric and a TLO view of the supply chain system as structure may center on two distinct points. The first touches on the character of governance. A polycentric theory recognizes ordering that is regulatory though not legal, that can exist independent of the structures and legitimating devices of the state. TLO theory tends, still, to incorporate, and be anchored in, the structures, mechanics, and techniques of the state. TLO theory might well be understood as a method of tying transnational legal orders back into the state system. Private governance might be understood as positing an extra-legal universe in which *legality* rather than law is the touchstone.³³⁶ Polycentric governance might embrace the broadest view, focusing on the effects of techniques rather than either their origins or forms.

The second touches on the supply chain itself. Here a large variation is possible under either perspective. Two are most prominent. The first posits supply chain system autonomy. To understand Rana Plaza, then, is to understand the supply chain system that both produced its governance framework and to examine the techniques used to manage and order it in the face of stress (the building collapse). Supply chain systems may be thus understood as the "territory" of a governance order. As such, they might serve, like states, as sites for and about regulation.³³⁷ The second posits supply chains as nexus or convergence points for governance, in which jurisdiction is itself functionally differentiated. Supply chain systems, then, may be understood as a space where either governance is centered even if the governance systems are themselves autonomous, or where governance is centered on the supply chain itself though power is devolved among its stakeholder constituents. The supply chain system that is Rana Plaza may be harmonized with each of these frames of analysis.

C. The return of a hierarchically ordered state system.

Are there alternatives to either approach? Consider here both the way in which Rana Plaza fits comfortably into traditional narratives of a state-law system, and the possibility of neo-feudal ordering grounded on the centrality of production, political, societal and other functionally differentiated chains, not chaos exactly, but more like governance in Angevin France.

Indeed, Ralf Michaels³³⁸ insights about the role of TLO theory within states might add something valuable to the TLO discourse. Rana Plaza suggests that there is something to the notion that states might be understood as TLOs, especially within the emerging global legal orders in which state fracture opens their territory to governance through multiple legal order. But that raises two questions, each of

336. Cf. Errol Meidinger, *Beyond Westphalia: Competitive Legalization in Emerging Transnational Regulatory Systems*, in *LAW AND LEGALIZATION IN TRANSNATIONAL RELATIONS* (eds., Christian Brütisch, Dirk Lehmkuhl, 2007).

337. See, e.g., Phil James, Richard Johnstone, Michael Quinlan, & Dave Walters, *Regulating Supply Chains to Improve Health and Safety*, 36 *INDUS. L.J.* 163-87 (2007).

338. Michaels, *supra* note 304.

which will be briefly considered. First, if states can contain TLOs, then might one postulate that all national orders are or ought to be (if appropriately developed) transnational in character given the logic of globalization (for example). Second, if that is not the case, and indeed, that some states retain legal integrity while other fracture within global polycentric orders that can be projected within their territories, then might TLO theory be deployed to create a new justification for the sort of sovereign hierarchy that characterized international law before the 1930s; that is, only a small group of “advanced” states can be understood as exhibiting the characteristics of national-national orders, and all others may be national but in relation to the transnational, they may be inferior.

If the first insight is correct, then, to some extent, TLO theory suggests a necessary reconsideration of notions of sovereignty, and of the legitimate foundations of the state. That, for example, might explain the logic of securities internationalization through the Financial Stability Board in which the sensibilities of the U.S. and EU are meant to be crammed down other states.³³⁹ It certainly explains the relationships between Bangladesh and the U.S. and EU. And it provides a basis for situating the ILO within the power dynamics of a U.S.-EU drive to manage the internal domestic legal order of Bangladesh to their satisfaction by using the veil of internationalization (and the mechanics of ILO principles) to leverage their authority in Bangladesh and in the process to substitute this TLO for the traditional relationship between citizens and their government at the heart of legitimate state power within the ideology of legitimate constitutional states. Conventional international relations theory might see in that relationship both the neo-colonialism inherent in unequal relationships between advanced and “developing” states, but also the power dynamics of tutelage and the effective inability of less-developed states to resist the hijacking of their domestic legal orders to serve the interests of developed states, now incorporated within internationalized norms that effectively shift the locus of political authority from the Bangladeshi demos to that of the international TLO communities affected by the factory building collapse. Peter Hansen provides a quite blunt description of this TLO dynamic.³⁴⁰ Thus, if this perspective has value, it suggests the need to theorize the

339. Discussed in Larry Catá Backer, *Private Actors and Public Governance Beyond the State: The Multinational Corporation, the Financial Stability Board, and the Global Governance Order*, 18 IND. J. GLOBAL LEGAL STUD. 751-802 (2011).

340. Contrasting the reaction of TLO to crisis in Bangladesh and Africa he noted: Had Rana Plaza been located in a suburb outside Accra rather than outside Dhaka, the response would have been quite different. Rather than see it as an isolated and all-too-typical industrial accident in the developing world, the U.S. media would have assailed U.S. complicity in the horrors of an industrializing Africa that had been pristine and innocent. Advocates of the Global South would have produced articles and conferences bemoaning the ceaseless exploitation of African workers. Congressional hearings would have heard testimony not about safeguarding Africa’s “brand,” but rather about how harshly U.S. officials had chided their African counterparts. (The fact that even troubled Nigeria has a better “brand” than Bangladesh on important metrics would be blithely ignored.) There would have been calls to impose stringent labor conditions in investment treaty negotiations with African countries, despite the fact that the United States does not impose such conditions on existing partners like Bangladesh. Meanwhile, the “development aid” industry

transformation of internationalism within the context of globalization. This is not the state system rendered under the ideology of states after 1945. Rana Plaza suggests the re-invigoration of the conception of the state system, hierarchically arranged, as it was conceived before 1939.³⁴¹

But the more conventional reading of Rana Plaza suggests not merely the possibilities of a reversion of hierarchies of state power, and with it the fracture of the sovereign power of lower tiered states, but also of the polycentricity inherent in the emerging global legal order. That polycentricity produces a governance terrain in which political power is itself shared among public and private actors. These actors occupy the same territories but with quite distinct authority, simultaneously asserting governance power in an internally coherent and externally networked way. It suggests a new and multilateral re-institution of the feudal structures of neo-feudal ordering grounded on the centrality of production, political, societal and other functionally differentiated chains, not chaos exactly, but more like governance in Angevin France. Not, of course, in terms of the personal relationships at the heart of feudalism, but rather in the intermeshed institutional relationships in which a pyramid of power could claim some authority within a single territorial unit. Within this approach, Rana Plaza provides a nexus point for the simultaneous activation of governance power by actors who are free to act autonomously, but whose efforts might be coordinated in the course of intergovernmental efforts at coordination, or not. The dynamics of the cooperative-competitive relationship between Accord and Alliance suggest the nature of these relationships. And within this operation, Bangladesh, of course, plays a somewhat passive and minor role. And for those who still hold to that vision inaugurated by the defeat of the Axis in 1945, the reality of Rana Plaza might be depressing indeed.

IV. CONCLUSION.

The life story of the Rana Plaza factory building, from its development on the cusp of Bangladesh's enthusiastic entry into streams of global commerce and investment, through its collapse and its aftermath, then, might serve as a marker of the shape and character of emerging normative orders derived from, perhaps sourced in, traditional notions of law and authority, but now morphed into something quite distinct. But it is a distinctiveness also grounded on the patterns and forms, quite comforting to large institutional actors, that are traditional and look back on a system that has become in some places almost unrecognizable. Law, the state, enterprises, governance, obligation and the like, terms well understood in the late 20th century, appear to have acquired new meanings, even as the forms they

would discuss with its enablers in the federal bureaucracy and congressional committees how "aid" studies and capacity-building programs could promote the adoption and enforcement of better African labor and building codes.

Peter C. Hansen, *Avoiding Harmful Overreach When Promoting Human Rights In African Investments*, 35 U. PA. J. INT'L L. 1113, 1115-17 (2014) (citations omitted).

341. See, e.g., WESTEL W. WILLOUGHBY, *THE FUNDAMENTAL CONCEPTS OF PUBLIC LAW* 307-13 (1924).

represent are wielded by a new cast of actors. If this world has order, it may well be theorized as transnational legal orders. Yet it may also reflect order within multiple hierarchies, or something else. Many theories are chasing facts at the moment. But it may be too early to tell whether the hunt will be successful, or whether facts may soon turn on and further reshape theory.

