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NOTE

WORKER DRIVEN SOCIAL RESPONSIBILITY AGREEMENTS: A NEW FUTURE IN LABOR RIGHTS PROTECTIONS

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ABSTRACT

The emergence of complex, global supply chains has imperiled the rights of workers across the globe. Attempts to protect workers' rights through traditional forms of private regulation, namely Corporate Social Responsibility codes ("CSRs") and Multi-Stakeholder Initiatives ("MSIs"), have failed due to a lack of enforceability and a lack of worker involvement. However, a new model of private regulation, Worker Driven Social Responsibility ("WSR") Agreements has succeeded where CSRs and MSIs have failed. WSR Agreements have emerged as a form of enforceable private regulation, created with worker involvement, which have concretely protected the rights of workers.

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* J.D. Candidate, 2021, Fordham University School of Law; B.A., 2018, University of Maryland; Online Content Editor, *Fordham International Law Journal*, Volume XLIV. I would like to extend my deepest gratitude to Professor James Brudney for introducing me to the FFP and to the Accord and for guiding me throughout my law school career. My thanks to the entire editorial staff of Volume XLIV for greatly improving this Note. I would also like to thank my parents, my sister, and all my friends and family for their continued support. Lastly, this Note would not have been possible without the bravery of the workers of Florida and Bangladesh. Together we will achieve dignity for all workers!

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I. INTRODUCTION

In the 1990s, local activists informed United States Department of Justice officials that tomato growers in the town of Immokalee, Florida held their employees in labor camps against their will and used corporal punishment, such as beatings, shootings, and pistol-whippings, to ensure that these workers

harvested tomatoes.¹ One Justice Department official, in reference to Immokalee, called Florida “ground zero for modern slavery.”² About fifteen years later, on April 24, 2013, in Dhaka, Bangladesh, Rana Plaza, a building that housed five garment factories, collapsed.³ Despite widespread concerns that the building was unsafe, economic necessity forced at least 3,122 garment employees into dangerous working conditions on the day it collapsed.⁴ Over 1,100 workers died.⁵

Though separated by time and space, the situations of the Immokalee farmworkers and the Rana Plaza garment workers are not so different: both groups of workers worked in corporate supply chains⁶ and both groups of workers were unable to avail themselves of local labor laws.⁷ In response to these realities, both groups engaged in labor organizing that went beyond the traditional union model and reshaped the notion of corporate social responsibility.⁸ In doing so, they, along with other

1. See Greg Asbed & Steve Hitov, *Preventing Forced Labor in Corporate Supply Chains: The Fair Food Program and Worker-Driven Social Responsibility*, 52 WAKE FOREST L. REV. 497, 502-03 (2017).

2. *Id.* (quoting John Bowe, *Nobodies: Does Slavery Exist in America?*, NEW YORKER (Apr. 21, 2003), <http://www.newyorker.com/magazine/2003/04/21/nobodies> [<https://perma.cc/73MJ-RXMX>]).

3. See Mark Anner, Jennifer Bair & 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, 1 (2013); Serajul Quadir & Ruma Paul, *Rescuers comb Bangladesh rubble for second night, 260 dead*, REUTERS (Apr. 24, 2013, 9:52 PM), <https://www.reuters.com/article/bangladesh-building/rescuers-comb-bangladesh-rubble-for-second-night-260-dead-idINDEE93N05620130425> [<https://perma.cc/33B8-CJK4>].

4. It was reported that there were at least 3,122 people inside Rana Plaza when it collapsed. See Quadir & Paul, *supra* note 3; *Bangladesh factory collapse death toll tops 800*, GUARDIAN (May 8, 2013, 2:00 PM), <https://www.theguardian.com/world/2013/may/08/bangladesh-factory-collapse-death-toll> [<https://perma.cc/VSD6-H4CS>].

5. See Jimmy Donaghey & Juliane Reinecke, *When Industrial Democracy Meets Corporate Social Responsibility — A Comparison of the Bangladesh Accord and Alliance as Responses to the Rana Plaza Disaster*, 56 BRIT. J. INDUS. REL. 14, 14 (2018).

6. See Asbed & Hitov, *supra* note 1, at 506; Anner et al., *supra* note 3, at 2.

7. See Asbed & Hitov, *supra* note 1, at n.30 (noting that agricultural workers are exempt from the US labor law); Donaghey & Reinecke, *supra* note 5, at 21-22 (noting pre-Rana Plaza, Bangladesh suffered “an immature system of industrial relations and political corruption point to the limitations of traditional labour governance in the sector”).

8. See generally ACCORD ON FIRE AND BUILDING SAFETY IN BANGLADESH (May 13, 2013), <https://admin.bangladeshaccord.org/wp-content/uploads/2018/08/2013-Accord.pdf> [<https://perma.cc/4WZG-UWRT>]; *Fair Food Code of Conduct*, FAIR FOOD

initiatives, have given all workers a new tool to force the beneficiaries of corporate supply chains to uphold labor rights from a living wage to workplace safety protections. The Coalition of Immokalee Workers (“CIW”)—an organized group of farmers from Florida—created the Fair Food Program (“FFP”).⁹ Bangladeshi garment workers, along with various local and international workers organizations and over 220 Bangladeshi companies, signed the 2013 Accord on Fire and Building Safety in Bangladesh (“Accord”).¹⁰ The type of agreement that resulted from these workers’ efforts were Worker Driven Social Responsibility (“WSR”) Agreements. Unlike other forms of private regulation,¹¹ WSR Agreements center the needs of the workers they protect, are enforceable against the brands on top of complex global supply chains,¹² and have achieved concrete successes.¹³

This Note argues that WSR Agreements are the best form of private regulation for protecting workers’ rights in a corporate supply chain because they have protected these rights where other forms of private regulation—as well as local labor laws—have failed. To do so, this Note will outline both theoretical and practical aspects of WSR Agreements and evaluate these Agreements’ successes and failures. Part II explores both the theoretical and generalizable aspects of WSR Agreements and demonstrates their advantages over traditional forms of private regulation. Part III analyzes the successes achieved by two specific WSR Agreements: the FFP and the Bangladesh Accord. Part IV explores areas where these two WSR Agreements did not achieve their goals, and highlights outstanding questions facing future WSR Agreements. Lastly, Part V concludes by synthesizing the theoretical and practical aspects of WSR Agreements, demonstrating that their strengths far outweigh those of other

STANDARDS COUNCIL, <http://www.fairfoodstandards.org/resources/fair-food-code-of-conduct/> [https://perma.cc/5PKJ-5N5L] (last visited Oct. 10, 2020).

9. See *Fair Food Code of Conduct*, *supra* note 8.

10. See ACCORD ON FIRE AND BUILDING SAFETY IN BANGLADESH, *supra* note 8; see also *About, ACCORD ON FIRE & BUILDING SAFETY IN BANGL.*, https://bangladeshaccord.org/about_ [https://perma.cc/R998-SUB9] (last visited Oct. 10, 2020).

11. See *infra* Part II.C.

12. See *infra* Part II.D.

13. See *infra* Part III.

forms of private regulation, and advocating for their use moving forward.

II. WHAT IS A WORKER DRIVEN SOCIAL RESPONSIBILITY AGREEMENT?

A. *The Problem: Large Corporations with Complex Supply Chains Regularly Exploit Their Workforce*

“In the early 1970s, the sky fell in,” is how one scholar described the collapse of the post-World War II economic order and the rise of new globalized neoliberal order.¹⁴ While the concept of globalization has long concerned workers’ advocates,¹⁵ the explosion of industry in non-Western economies changed the gravitational center of the world economy.¹⁶ Businesses changed models: small local companies were replaced by giant brands that sit on top of complex, global, contracted supply chains.¹⁷ Unfortunately, this model can severely impede a national labor movement because the brands at the top could shift their production from one subcontracted employer to another, even across national borders, in a “race to the bottom” of worker power.¹⁸

Despite the hostile terrain, the labor movement did not surrender to the supply chain model of business organization. Since the 1990s, the United Nations (“UN”), the International Labor Organization (“ILO”), and labor activists have fought to institute a variety of private regulations to impose baseline standards on these long, international supply chains.¹⁹ Other forms of private regulation, such as Corporate Social Responsibility codes (“CSR”) and Multi-Stakeholder Initiatives

14. PETER DICKEN, *GLOBAL SHIFT: MAPPING THE CHANGING CONTOURS OF THE WORLD ECONOMY* 16 (7th ed. 2015).

15. *See id.* at 4; *see also* KARL MARX & FRIEDERICH ENGELS, *THE COMMUNIST MANIFESTO* 16 (Samuel Moore trans., Rand Sch. of Soc. Sci. 1919) (1848) (“The need of a constantly expanding market for its products chases the bourgeoisie over the whole surface of the globe.”).

16. *See* DICKEN, *supra* note 14, at 36.

17. *See* Brecher, Costello & Smith, *International Labor Solidarity: The New Frontier*, 15 *NEW LAB. F.* 8, 9 (2006).

18. *See id.* at 10.

19. *See* RUTH PEARSON ET AL., *CORPORATE RESPONSIBILITY AND LABOUR RIGHTS: CODES OF CONDUCT IN THE GLOBAL ECONOMY* (2002).

(“MSI”) have failed to protect workers’ rights,²⁰ while others, namely WSR Agreements, have enjoyed success in ameliorating the working conditions of previously unprotected workers in corporate supply chains.²¹ Part II.B will describe the theoretical aspects of WSR Agreements by explaining the shortcomings of other forms of private regulation and by providing the ways that WSR Agreements are a practical method of protecting workers’ rights in a supply chain.

B. Worker Driven Social Responsibility Agreements Represent an Enforceable Form of Private Regulation

Both the Fair Food Program and the Accord on Fire and Building Safety in Bangladesh are examples of WSR Agreements.²² WSR Agreements regulate employment relationships through legally binding private contracts between workers (or worker organizations) and corporate brands.²³ These agreements hold the corporate brands legally responsible for meeting minimum labor standards as defined in these agreements.²⁴ Furthermore, these brands face legal and economic consequences for failing to meet these standards or for working with firms in the supply chain that fail to meet these standards.²⁵ Importantly, the workers themselves, rather than corporations or third parties, design, monitor, and enforce these agreements.²⁶

20. *See infra* Part II.C.

21. *See infra* Part III.

22. *See Success Stories*, WORKER-DRIVEN SOC. RESP. NETWORK, <https://wsr-network.org/success-stories/> [<https://perma.cc/C89Z-RYH5>] (last visited Oct. 10, 2020); *see also* Greg Asbed, *Worker-Driven Social Responsibility (WSR): A New Idea for a New Century*, HUFFINGTON POST (June 17, 2014, 3:25 PM), https://www.huffpost.com/entry/workerdriven-social-respo_b_5500104 [<https://perma.cc/4SP5-PXR2>] (noting that the FFP and the Bangladesh Accord are WSR Agreements).

23. *See What is WSR*, WORKER-DRIVEN SOC. RESP. NETWORK, <https://wsr-network.org/what-is-wsr/> [<https://perma.cc/WD2Y-YJ9K>] (last visited Oct. 10, 2020); *see also* Asbed, *supra* note 22 (noting WSR Agreements bind corporate supply chains).

24. *See What is WSR*, *supra* note 23.

25. *See id.*

26. *See id.*; *see generally Comparison of Critical Elements of WSR vs. CSR and MSIs*, WORKER-DRIVEN SOC. RESP. NETWORK, <https://wsr-network.org/type/tools-for-practitioners/> [<https://perma.cc/52NR-7XGL>] (last visited Oct. 10, 2020) (noting that multi-stakeholder initiatives share many commonalities with corporate social responsibility programs).

The Worker-Driven Social Responsibility Network (“the Network”), a leading and authoritative online community of academics and advocates of WSR Agreements, has published six guiding principles that WSR Agreements should follow.²⁷ These principles are: (1) labor rights initiatives must be worker-driven; (2) obligations for global corporations must be binding and enforceable; (3) buyers must afford suppliers the financial incentive and capacity to comply; (4) consequences for non-compliant suppliers must be mandatory; (5) gains for workers must be measurable and timely; and (6) verification of workplace compliance must be rigorous and independent.²⁸ These principles differentiate WSR Agreements from traditional forms of private regulation, such as CSRs and MSIs.²⁹

These principles outline an agreement that is stronger and, in practice, more effective than CSRs and MSIs. The first principle—labor rights initiatives must be worker-driven—states that for an agreement to meet the standards articulated by the Network, workers must be present at every stage of its development, from proposal to enforcement.³⁰ The Network suggests that any WSR Agreement, at the minimum, should comply with the Universal Declaration of Human Rights (“UDHR”) and the Conventions of the ILO.³¹ Importantly, this principle explicitly incorporates the core ILO conventions, which theoretically already impose a duty on most nations to enforce some worker protections.³² The second principle—obligations for global corporations must be binding and enforceable—forecloses the possibility that, once signed, corporate compliance with the

27. See *Statement of Principles for Worker-driven Social Responsibility (WSR)*, WORKER-DRIVEN SOC. RESP. NETWORK, <https://wsr-network.org/about-us/endorsers/> [<https://perma.cc/JND9-XY8U>] (last visited Oct. 10, 2020).

28. *Id.*

29. See generally *Comparison of Critical Elements of WSR vs. CSR and MSIs*, *supra* note 26 (noting that multi-stakeholder initiatives share many commonalities with corporate social responsibility programs).

30. See *Statement of Principles for Worker-driven Social Responsibility (WSR)*, *supra* note 27.

31. See *id.* (saying that a WSR Agreement “must be based on universal labor and human rights principles, which are embodied in the Universal Declaration of Human Rights and defined by the Conventions of the ILO”).

32. See *id.*; see also *Fair Food Code of Conduct*, *supra* note 8 (incorporating several of the ILO core conventions in practice); *ACCORD ON FIRE AND BUILDING SAFETY IN BANGLADESH*, *supra* note 8, at 1 (explicitly incorporating the ILO Conventions on Freedom of Association).

WSR Agreement is optional or voluntary.³³ The third principle—buyers must afford suppliers the financial incentive and capacity to comply—reflects one of the important innovations of WSR Agreements,³⁴ that organized groups of workers and advocates need to place pressure at the top of the supply chain to counter the market forces that often incentivize worker abuse.³⁵ The fourth principle—consequences for non-compliant suppliers must be mandatory—coupled with the second, helps rectify a large weakness of CSRs and MSIs, namely a lack of enforcement, by ensuring that violators cannot escape negative consequences through enforceable contractual terms that impose liability on any violations.³⁶ The fifth principle—gains for workers must be measurable and timely—ensures the effectiveness of the WSR Agreement by mandating that the positive outcomes of the agreement be measurable and timely.³⁷ Lastly, the sixth principle—verification of workplace compliance must be rigorous and independent—is also a marked departure from CSR programs as it divorces oversight of the program from the parties that are bound by it. Thus, the brands at the top of the supply chain cannot manipulate the oversight process.³⁸ Further, this principle calls for a financially independent oversight process that includes expert inspectors, worker interviews free from intimidation, an independent complaint mechanism, and extensive worker education programs that inform workers of their rights under the WSR Agreement.³⁹

C. Other Forms of Private Regulation Lack the Strength of WSR Agreements

These principles help differentiate WSR Agreements from traditional forms of private regulation, namely CSRs and MSIs. To illustrate this difference, it is important to briefly describe CSRs

33. See *Statement of Principles for Worker-driven Social Responsibility (WSR)*, *supra* note 27.

34. Asbed & Hitov, *supra* note 1, at 506 (noting that the CIW “realized” that the corporate suites of major food retailers were responsible for the abuse and poverty).

35. See *Statement of Principles for Worker-driven Social Responsibility (WSR)*, *supra* note 27.

36. See *id.*

37. See *id.*

38. See *id.*

39. See *id.*

and MSIs. CSRs are codes of conduct generally adopted by large, transnational corporations to show that they intend to protect “decent” labor standards.⁴⁰ The strongest proponents of CSRs point to a variety of advantages. CSRs regulate international markets that may be beyond traditional legal jurisdictions.⁴¹ They can adapt quickly to changing economic, technological, or scientific standards.⁴² They also represent a corporation’s public commitment to certain standards, which can attract customers who are concerned about corporate ethics.⁴³ In conjunction with specific CSRs, corporate behavior may be influenced by the UN’s Guiding Principles on Business and Human Rights (“Guiding Principles”), which, while not directly binding on any corporation or non-state entity, compel states to protect against human rights abuses by private entities within their jurisdiction and set guidelines on how these entities should respect human rights.⁴⁴ Under these Guiding Principles, corporations have the responsibility “to respect human rights and [provide] access to an effective remedy” to any violations.⁴⁵ The duty to respect human rights is often articulated as a duty to conduct due diligence in avoiding human rights abuses.⁴⁶ Under this articulation, a corporation that fails to conduct due diligence—such as by failing to develop good faith compliance programs or to implement internal systems to avoid violations—may suffer civil or criminal sanctions, but only under the color of its domestic jurisdiction.⁴⁷

40. JAMES J. BRUDNEY, *Decent Labour Standards in Corporate Supply Chains: The Immokalee Workers Model*, in *TEMPORARY LABOUR MIGRATION IN THE GLOBAL ERA: THE REGULATORY CHALLENGES* 351, 356 (Joanna Howe & Rosemary Owens eds., 2016).

41. See Martijn Scheltema, *An Assessment of the Effectiveness of International Private Regulation in the Corporate Social Responsibility Arena: A Legal Perspective*, 21 *MAASTRICHT J. EUR. & COMP. L.* 383, 385 (2014).

42. See *id.*

43. See BRUDNEY, *supra* note 40, at 356-57.

44. See Peter Muchlinski, *Implementing the New UN Corporate Human Rights Framework: Implications for Corporate Law, Governance, and Regulation*, 22 *BUS. ETHICS Q.* 145, 147 (2012); see generally John Ruggie (Special Representative of the Secretary General), *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, U.N. Doc. A/HRC/17/31 (Mar. 21, 2011) (setting out the new guidelines on human rights and businesses with weak language). The Guiding Principles were endorsed by the Human Rights Council and purport to guide all states and business organizations. See *id.* at 6.

45. Muchlinski, *supra* note 44, at 145.

46. See *id.* at 157.

47. See *id.* at 157-58.

Like CSRs, MSIs operate through codes of conduct. Unlike the CSRs, however, these codes of conduct are developed with some third-party, usually an NGO or activist group.⁴⁸ MSIs evolved in the vacuum created by the doctrine of deregulation that permeated the global economy beginning in the 1980s.⁴⁹ Early in that decade, some proponents of the CSR model recognized that any private regulation needed to include more actors than merely the corporation and state actors to achieve some form of acceptance among workers.⁵⁰ This expansion prompted proponents of private regulation to include NGOs, citizen movements and other non-state, non-corporate actors in these corporate policies.⁵¹ Thus, MSIs could move beyond the “ad hoc and piecemeal” nature of traditional CSR programs, which rely on no outside insight or input, and create cohesive programs that, at least on paper, create regulatory regimes that promoted social goods, retained credibility, and remained voluntary.⁵²

However, critics of CSRs and MSIs charge that these efforts are ineffectual at best and mere window dressings at worst.⁵³ Critically, the fundamental difference between WSR Agreements and other forms of private regulation is the actor who is ultimately responsible for guarding against and sanctioning labor rights violations. Under the traditional CSR formulation (i.e. a code of conduct adopted by a specific brand, company, or supply chain), the corporation’s central duty is its fiduciary duties to its shareholders, and thus the protection of human rights is at most a secondary objective.⁵⁴

The classic example of a largely unsuccessful CSR program is Nike’s Code of Conduct.⁵⁵ In 1992, a series of investigative reports from journalists and activists thrust Nike’s below-

48. See Donaghey & Reinecke, *supra* note 5, at 19.

49. See Peter Utting, *Regulating Business via Multistakeholder Initiatives: A Preliminary Assessment*, in VOLUNTARY APPROACHES TO CORPORATE RESPONSIBILITY: READINGS AND A RESOURCE GUIDE 1, 5 (2002).

50. See *id.* at 6.

51. See *id.*

52. See *id.* at 6-8.

53. See *Comparison of Critical Elements of WSR vs. CSR and MSIs*, *supra* note 26, at 3; see generally Ruggie, *supra* note 44 (setting out the new guidelines on human rights and businesses with weak language); BRUDNEY, *supra* note 40.

54. Muchlinski, *supra* note 44, at 159.

55. For a full accounting of Nike as a case study, see DEBORA SPAR & JENNIFER BURNS, *HITTING THE WALL: NIKE AND INTERNATIONAL LABOR PRACTICES* (2002).

subsistence wages—and other appalling labor practices—into the spotlight.⁵⁶ To remedy the issue, Nike adopted a “Code of Conduct and Memorandum of Understanding” that purported to force Nike’s contracted suppliers to adhere to baseline working conditions.⁵⁷ However, even after years of aggressive public relations campaigns and the apparent implementation of the Code of Conduct, Nike did not raise the below-subsistence wages that were the source of the original controversy.⁵⁸ In 2019, a report authored by the Clean Clothes Campaign, an global alliance of garment worker advocates, concluded that there was no evidence that Nike was paying its workers a living wage, despite the promises of its Code of Conduct.⁵⁹

MSIs appear to be more efficacious because of participating NGOs that are advocating for workers’ rights, but by excluding the workers the MSI purports to protect, critics say they are “trying to have their cake and eat it too.”⁶⁰ Recent critiques of MSIs demonstrate their weakness. One is the gap between paper and practice.⁶¹ Often, workers cannot understand the language in which the codes of conduct governing MSI agreements are written.⁶² Consequently, workers often are unaware of how to assert the protections offered by the MSI.⁶³ Even if a worker knew the details of their governing MSI it is unlikely to be of much help. A recent study analyzing whether MSIs have delivered on their promises found that MSIs “are not effective tools for holding corporations accountable for abuses, protecting rights holders against human rights violations, or providing survivors and victims with access to remedy.”⁶⁴ A survey of the top “standard

56. *See id.* at 4; *see also* Jeffrey Ballinger, *The New Free-Trade Heel*, HARPER’S MAG., Aug. 1992, at 4647 (noting that Nike’s Indonesian workers made just under fourteen cents an hour).

57. SPAR & BURNS, *supra* note 55 at 5.

58. *See id.* at 13 (“But on wages, they’re still lying through their teeth.”).

59. *See* CLEAN CLOTHES CAMPAIGN, TAILORED WAGES 52 (2019).

60. Donaghey & Reinecke, *supra* note 5, at 19 (quoting Luc Franssen, *Multi-stakeholder governance and voluntary programme interactions: legitimation politics in the institutional design of corporate social responsibility*, 10 SOCIO-ECON. REV. 163 (2012)).

61. *See* Utting, *supra* note 49, at 7.

62. *See id.*

63. *See id.*

64. *See* MSINTEGRITY, NOT FIT-FOR-PURPOSE: THE GRAND EXPERIMENT OF MULTI-STAKEHOLDER INITIATIVES IN CORPORATE ACCOUNTABILITY, HUMAN RIGHTS AND GLOBAL GOVERNANCE 4 (2020) (a 200+ page reporting detailing multiple failures of MSIs).

setting” MSIs revealed that they generally “do not have a grievance mechanism, nor do they require that their individual members provide an effective grievance mechanism.”⁶⁵ For the few that do have such grievance mechanisms, they “fail to meet the minimum internationally recognized criteria for access to effective remedy.”⁶⁶ These faults exist because the non-traditional actors incorporated into the MSIs tend to be those that do not have agendas that pose a real threat to corporate status quo.⁶⁷ NGOs or other groups—notably trade unions—that could design a MSI that would alter the corporate driven “production and consumption patterns,” which drive poor labor conditions, are generally not included in the design process.⁶⁸ As a result, the MSIs that are implemented tend to “fail to respect the centrality of rights holders” that they purport to protect.⁶⁹

Unfortunately, MSIs largely have failed to deliver the results they promised. The summary report⁷⁰ “Not Fit-for-Purpose the Grand Experiment of Multi-Stakeholder Initiatives in Corporate Accountability, Human Rights and Global Governance,”⁷¹ details six insights into MSIs that suggest they do not actually protect workers. The Summary Report finds that MSIs have waning influence and entrench corporate power.⁷² Further, they tend to adopt “weak or narrow standards” that are then inadequately monitored, creating a “misperception that abuses are being effectively addressed” or ignoring the root causes of the abuse.⁷³ Lastly, the report concludes that the structure of MSIs do not provide the people it purports to protect access to a remedy when

65. *See id.* at 161.

66. *See id.* at 166.

67. *See* Utting, *supra* note 49, at 8.

68. *See id.*

69. *See* MSINTEGRITY, *supra* note 64, at 179. For an in-depth, personal account of an MSI evaluated by MSIIntegrity, see Maria Hengeveld, *The Factory Oversight Industry Protects Profits, Not People*, NATION, (Apr. 23, 2020), <https://www.thenation.com/article/world/factory-audit-investigation/> [<https://perma.cc/6YTK-8EJ6>] (detailing how Social Accountability International, an MSI, cheats on its own reports).

70. MSINTEGRITY, SUMMARY REPORT: NOT FIT-FOR-PURPOSE: THE GRAND EXPERIMENT OF MULTI-STAKEHOLDER INITIATIVES IN CORPORATE ACCOUNTABILITY, HUMAN RIGHTS AND GLOBAL GOVERNANCE 4 (2020) [hereinafter MSINTEGRITY SUMMARY REPORT].

71. *See* MSINTEGRITY, *supra* note 64.

72. *See* MSINTEGRITY SUMMARY REPORT, *supra* note 70, at 9.

73. *See id.*

abuse is found and thus says “[t]here is little evidence that MSIs are meaningfully protecting rights holders or closing governance gaps.”⁷⁴ It is important to highlight that the author of this report is the Institute for Multi-Stakeholder Initiative Integrity, an organization (previously) dedicated to promoting MSIs.⁷⁵

The Guiding Principles are vulnerable to similar criticisms. Unlike WSR Agreements, or even MSIs, the Guiding Principles make state actors solely responsible for the protection of human rights.⁷⁶ While this may not seem like a fatal defect, critics charge that not only are workers not a party to the Guiding Principles, the language is very weak (e.g. it “encourage[s]” protection of human rights “where appropriate”).⁷⁷ Thus, critics charge that the due diligence standard articulated by the Guiding Principles will be voluntary at best because the limited liability protections enjoyed by multinational corporations will insulate them from the legal consequences of noncompliance.⁷⁸ Supporters argue that the Guiding Principles have created a marketplace of compliance.⁷⁹ Unfortunately, the individual “actors” in this new marketplace are CSR or MSI programs.⁸⁰ However, this “marketplace” is susceptible to key market failures. Because the market actors—under this conception—would be CSRs and MSIs, the market could never provide solutions to problems that these types of programs typically cannot solve, such as labor issues. In response, some commenters propose additional state or international action in the form of the Human Rights Reporting and Assurance Frameworks Initiative (“RAFI”). The RAFI is a program that essentially tries to standardize these forms of private regulation by offering accepted frameworks for reporting and oversight that could be used across various CSRS and MSIs.⁸¹ Unfortunately, the RAFI is susceptible to similar critiques as the

74. *See id.*

75. *See id.* In light of these findings, it appears that MSIIntegrity no longer champions the MSI model.

76. *See Ruggie, supra* note 44, at 4, 6.

77. *Id.*

78. *See Nicola Jagers, Column: UN Guiding Principles: Making Headway Toward Real Corporate Accountability?*, 29 NETH. Q. HUM. RTS. 159, 162 (2011).

79. *See Larry Cata Backer, Moving Forward the UN Guiding Principles for Business and Human Rights: Between Enterprise Social Norm, State Domestic Legal Orders, and the Treaty Law that Might Bind Them All*, 38 FORDHAM INT’L L.J. 457, 495 (2015).

80. *See id.* at 496.

81. For an extended discussion of the RAFI, *see id.* at 497-512.

MSIs.⁸² It relies on a top-down institution that sets rules and standards without worker input. Thus, even with the RAFI, the Guiding Principles do not follow the Network’s Six Principles of WSR.

D. WSR Agreements Offer an Adaptable Model to Worker Organizers

To demonstrate that WSR Agreements are possible, effective, and different than other forms of private regulation, the WSR Network published several concept briefs that help ground the six guiding principles discussed above into concrete agreements.⁸³ While the Network strongly advocates for WSR Agreements, it recognizes that WSR Agreements are not widely used.⁸⁴ The Network highlights eight “feasibility assessment” areas that workers should evaluate when determining if implementing a WSR Agreement is feasible.⁸⁵

The first “feasibility assessment” area is the scope of the labor violations. WSR Agreements are, at their core, contractual agreements to address labor violations.⁸⁶ Workers have a stronger position at the bargaining table when there is independent or third-party documentation of abuses because this legitimizes their grievances.⁸⁷ Furthermore, WSR Agreements should be as broad as possible,⁸⁸ addressing labor abuses at the sectoral, regional or supply-chain level, rather than focusing on one factory or subcontractor.⁸⁹ This is because a WSR Agreement necessarily increases the cost of production.⁹⁰ Therefore, a WSR Agreement that does not bind enough suppliers and buyers can result in capital flight.⁹¹ Labor rights cannot be protected if workplaces are

82. See *supra* notes 40-43 and accompanying text.

83. See *Search Results concept briefs*, WORKER-DRIVEN SOC. RESP. NETWORK, <https://wsr-network.org/?s=concept+brief> [<https://perma.cc/WK7E-76JL>] (last visited Oct. 21, 2020) (listing all available concept briefs).

84. See WSR NETWORK, *WSR Concept Brief: Feasibility Assessment*, WORKER-DRIVEN SOC. RESP. NETWORK 1 (May 15, 2018), <https://wsr-network.org/resource/feasibility-assessment/> [<https://perma.cc/X7NM-BYB4>].

85. See *id.*

86. See generally *What is WSR*, *supra* note 23 (detailing the basic principles of WSR agreements).

87. See *WSR Concept Brief: Feasibility Assessment*, *supra* note 84, at 1-2.

88. See *id.* at 2.

89. See *id.*

90. See *id.*

91. See *id.*

closed the moment workers make any gains.⁹² Still, a sufficiently wide-reaching WSR Agreement can prevent capital flight because there will be nowhere for capital to flee.⁹³

Secondly, workers must understand the political systems and economic markets in which the brands at the top of the supply chain exist.⁹⁴ The WSR Agreement must be tailored to ensure that sanctions imposed on violators can be enforced effectively and cause concrete economic consequences to the brands.⁹⁵ The next three “feasibility assessment” areas remind workers that it is necessary to make sure that a WSR Agreement fits in with any existing labor organization or previous organizing strategy.⁹⁶ To that end, organizers should define the scope of the membership proposed organization and develop a “strategic plan” to capitalize on any previous organizing campaign.⁹⁷ While logistically important, these considerations are not unique to WSR Agreements, all campaigns must account for these factors.

The final three “feasibility assessment” areas highlight important background necessities over implementing and maintaining a WSR Agreement.⁹⁸ One area concerns the funding of the regime created by the WSR Agreement, which warrants its own discussion, and the other two remind advocates to consider the prevailing laws governing freedom of association and access to legal support.⁹⁹ Simply put, the laws governing freedom of association are generally weak in areas where a WSR Agreement is needed¹⁰⁰ and the legal support needed to enforce them can require a consistent source of funding. Advocates for a WSR Agreement must keep these factors in mind.

WSR Agreements have high start-up costs and continuous implementation and monitoring costs.¹⁰¹ The Network highlights several potential funding sources including independent grants,

92. *See id.*

93. *See id.*

94. *See id.* at 3.

95. *See id.*

96. *See id.* at 3-5.

97. *See id.* Generally, a wider WSR Agreement is preferable. *See id.* at 2 and accompanying text.

98. *See WSR Concept Brief: Feasibility Assessment*, *supra* note 84, at 5-6.

99. *See id.*

100. *See Donaghey & Reinecke*, *supra* note 5 and accompanying text.

101. *See id.* at 5.

governmental support, mass membership dues and, most commonly, a self-financing mechanism.¹⁰² Both the Fair Food Program and the Bangladesh Accord rely on some form of self-financing.¹⁰³ Under the Bangladesh Accord, manufacturers pay a scaling fee that covers enforcement costs.¹⁰⁴ Similarly, buyers bound by the Fair Food Program pay a premium (called the “penny per pound” premium) on goods produced by covered employees.¹⁰⁵ This premium is directly transferred to the paychecks of covered workers.¹⁰⁶ In both instances, the money collected furthers a key goal of each WSR Agreement: either workplace safety or wage increases.¹⁰⁷ However, the Network warns that completely relying on money derived from buyers is risky.¹⁰⁸ Such reliance can lead to undue bias or hesitation when determining violations, as the stream of funds could be threatened.¹⁰⁹

Clearly, grant money¹¹⁰ or large-scale donations cannot be the only, or even the main, source of funds because neither are guaranteed on a yearly basis. Worker membership dues can work in situations where the WSR Agreement functions like a collective bargaining agent. In theory, an agreement could expand a “penny per pound” type program so that workers then transfer

102. *See id.*

103. *See Annual Fees for June 2019 - 2020, ACCORD ON FIRE & BUILDING SAFETY BANGL.* 1 (2019), <https://bangladesh.wpengine.com/wp-content/uploads/2019/10/Annual-fees-table-October-2019.pdf> [<https://perma.cc/KA3Z-5K2T>]; *Fair Food Program: Frequently Asked Questions*, COALITION OF IMMOKALEE WORKERS, http://ciw-online.org/ffp_faq/ [<https://perma.cc/2DWG-DASV>] (last visited Oct. 21, 2020).

104. *See Annual Fees for June 2019 - 2020, supra* note 103, at 1.

105. *See Fair Food Program: Frequently Asked Questions, supra* note 103.

106. *See id.*

107. *See ACCORD ON FIRE AND BUILDING SAFETY IN BANGLADESH, supra* note 8; *Fair Food Program: Frequently Asked Questions, supra* note 103.

108. *See WSR Concept Brief: Feasibility Assessment, supra* note 84, at 5.

109. *See id.* at 5.

110. For example, one of the co-founders of the CIW, Greg Asbed, received a John D. and Catherine T. MacArthur Foundation Fellowship in 2017 and donated the entire \$625,000 grant to the CIW. *See* Noam Scheiber, *A MacArthur ‘Genius’ on Overcoming Modern Farm Slavery*, N.Y. TIMES (Oct. 18, 2017), <https://www.nytimes.com/2017/10/18/business/economy/macarthur-genius-greg-asbed-ciw.html> [<https://perma.cc/6WB9-AMGM>]; *see also From Immokalee Organizer to MacArthur Fellow: Meet Greg Asbed*, CORNELL UNIV. PRESS, <https://www.cornellpress.cornell.edu/from-immokalee-paralegal-to-macarthur-fellow-meet-greg-asbed/> [<https://perma.cc/SB7N-D3BY>] (last visited Oct. 22, 2020).

some of the wage increase into the management of the WSR Agreement. However, this may not be feasible in situations where the WSR Agreement is attempting to root out actual or practical slave labor because there may not be enough money going to the worker to cover the cost of the WSR Agreements.

The WSR Network merely mentions mass membership dues—an idea that can and should be expanded.¹¹¹ While there are many organizations that have relied on membership dues and small-dollar donations, one analogous organization is the American Black Panther Party (“Panthers”), active during the 1960s and 1970s.¹¹² Like workers implementing a WSR Agreement, the Panthers were cut off from normal avenues of capital and, instead, relied on private, individualized donations.¹¹³ To raise money, the Panthers sold an official newspaper and merchandise, went on paid speaking tours, and collected private donations from individuals.¹¹⁴ While some individuals donated a small amount,¹¹⁵ other wealthier supporters could secretly give much more than the average supporter.¹¹⁶ A workers group operating under a WSR Agreement could use similar means to capitalize on both local and global support. While not a lucrative source of fundraising¹¹⁷ these sources can provide stable and independent funding that can supplement a self-financing provision. Thus, while funding presents an obstacle to WSR Agreement feasibility, a combination of traditional and innovative funding sources can help overcome this concern.

Two of the briefs promulgated by the WSR Network concern intertwined issues: WSR Agreement’s code of conduct,¹¹⁸ and

111. See *WSR Concept Brief: Feasibility Assessment*, *supra* note 84, at 5.

112. See Ryan J. Kirkby, “*The Revolution Will Not Be Televised*”: *Community Activism and the Black Panther Party, 1966-1971*, 41 *CANADIAN REV. AM. STUD.* 25, 26 (2011).

113. See *id.* at 41 (“Not surprisingly, because of the Black Panther Party’s revolutionary program, most chapters were unable to rely on donations from mainstream humanitarian groups to support their social activities.”).

114. See *id.*

115. See *id.*

116. See *id.* at n.16.

117. See *id.* at 41 (“the life of most Panthers was marked by neither opulence nor excess”).

118. See WSR NETWORK, *WSR Concept Brief: Worker-Defined Codes and Standards*, WORKER-DRIVEN SOC. RESP. NETWORK, 1 (2018), <https://wsr-network.org/resource/codes-and-standards/> [<https://perma.cc/94NQ-RJ3G>].

compliance monitoring.¹¹⁹ The Network states that any given WSR Agreement has three stages of life: definition, implementation, and iteration.¹²⁰ As a result, the monitoring process changes as the WSR Agreement is implemented. The Network divides the monitoring process into different categories: the development of a monitoring organization, the creation of a reporting process, and an analysis of actions taken to ensure compliance.¹²¹ These categories connect to one another. As drafters define the WSR Agreement, they should also develop a compliance organization; for the WSR Agreement to be implemented, there necessarily must be a reporting mechanism. And finally, as the WSR Agreement matures into a stable status quo, workers need to be able to evaluate its effectiveness. Because WSR Agreements are generally implemented in places where local law or practice does not sufficiently protect labor rights,¹²² incorporating binding language into WSR Agreements can be a challenge. Therefore, the Network urges drafters of WSR Agreements to ground their principles in the UDHR and the Core Conventions of the ILO.¹²³

This grounding has important implications. First, it grounds the WSR Agreement within a body of legal decisions, scholarship, and advocacy. Second, it can help reduce the logistical and financial burden of creating an independent monitoring organization, which the Network argues is a “tremendous asset” that has “extensive expertise” beyond that of an existing organization that “generally lack[s] meaningful experience detecting and documenting violations” of a WSR Agreement.¹²⁴ These new, independent, monitoring organizations will have extensive expertise on the issues within the WSR Agreement it was created to monitor, but may lack the institutional knowledge of previously existing organizations. Thus, by incorporating the UDHR and the Core Conventions of the ILO, these new

119. See WSR NETWORK, *WSR Concept Brief: Monitoring*, WORKER-DRIVEN SOC. RESP. NETWORK, 1 (2018), <https://wsr-network.org/resource/monitoring/> [<https://perma.cc/H2LV-2YC2>].

120. See *WSR Concept Brief: Worker-Defined Codes and Standards*, *supra* note 118.

121. *WSR Concept Brief: Monitoring*, *supra* note 119, at 2.

122. See Anner et al., *supra* note 3, at 2; Asbed & Hitov, *supra* note 1, at 510; Donaghey & Reinecke, *supra* note 5, at 14.

123. See *WSR Concept Brief: Worker-Defined Codes and Standards*, *supra* note 118, at 2.

124. *WSR Concept Brief: Monitoring*, *supra* note 119, at 2.

organizations can look to other initiatives and programs that adhere to these well-established methods for guidance and strategies. They can then combine these methods with their inherent expertise on key issues.

An implemented WSR Agreement must contain market or financial penalties,¹²⁵ because it needs to ensure that the brands at the top of the supply chain suffer consequences for noncompliance.¹²⁶ Accordingly, the WSR Agreement must enable workers to quickly and effectively report any violations of the Code of Conduct to the monitoring organization.¹²⁷ These complaint procedures should resemble whistleblower procedures, but be independent of the brands.¹²⁸ Traditional whistleblower channels are often outsourced to other companies, but this outsourcing is less than ideal because it adds another layer of bureaucracy to the process, which can delay both reporting and the remedy.¹²⁹ Instead, workers should see the fruits of their complaints, such as public responses from management or non-retaliatory meetings that work at achieving a quick and painless resolution of the underlying complaint.¹³⁰

Furthermore, enforcement cannot only come from complaints. Ideally, a WSR Agreement will have independent inspecting provisions consistent with ILO Convention 81.¹³¹ By having proactive enforcement, suppliers and brands will face affirmative pressure to comply with the agreement. This helps lower the pressure on workers who may feel reluctant to report violations by their supervisor or other authority figure. Strong language, an effective reporting system, and an independent inspectorate help in two ways. First, these structures help ensure workers—especially those not involved in its creation—feel that the WSR Agreement has power.¹³² Second, a strong formal structure that is used and powerful will eventually force suppliers

125. See *WSR Concept Brief: Worker-Defined Codes and Standards*, *supra* note 118, at 2.

126. See *Statement of Principles for Worker-driven Social Responsibility (WSR)*, *supra* note 27.

127. See *WSR Concept Brief: Monitoring*, *supra* note 119, at 3.

128. See *id.*

129. See *id.*

130. See *id.* at 3-4.

131. See *id.* at 4. For the convention, see ILO Convention (No. 81) Concerning Labour Inspection in Industry and Commerce, July 11, 1946, 54 U.N.T.S. 3.

132. See *WSR Concept Brief: Monitoring*, *supra* note 119, at 3.

and brands to accept its existence to maintain sales.¹³³ Thus, a strong, independent, transparent, and effective complaint system is necessary to the success of implementing and enforcing a Code of Conduct that ameliorates labor conditions.

Lastly, drafters of WSR Agreements need to include provisions that let those governed by the WSR Agreement evaluate the program. As the WSR Agreement is enforced, new and unforeseen issues will likely arise.¹³⁴ Ideally, the relationship between employer and worker will become less fractious, to the point where modifications to the Code that reflect changes in the industry can positively impact both parties.¹³⁵ Thus, the structure described above should be publicly available to allow for NGOs, governments, and other worker initiatives to assess the successes and failures of any particular WSR Agreement. Outside assessment has numerous benefits. It proves to the workers that the WSR Agreement is effectively protecting their rights.¹³⁶ It creates a database of violations, resolutions, and restitutions, which is valuable to both investigators and employers.¹³⁷ Lastly, an open system can demonstrate to other employers that WSR Agreements are not business-ending ventures, but rather effective ways to preserve a safe and decent workplace,¹³⁸ which could entice other employers to join. Employers proactively joining existing agreements or creating new WSR Agreements is better for all involved parties than waiting until a Rana Plaza-type disaster strikes.

The concept briefs discussed above lay out the generic fundamental structures of a WSR Agreement. They sketch out a binding contractual agreement between workers and employers that can protect labor rights across an entire sector or supply chain. Through independent structures, WSR agreements can provide oversight untainted by the company they purport to bind. Through a combination of traditional and innovative mechanisms, they can maintain their independence. Further, they provide a stable legal model that can protect a group of

133. See *WSR Concept Brief: Worker-Defined Codes and Standards*, *supra* note 118, at 2.

134. See *id.*

135. See *id.*

136. See *WSR Concept Brief: Monitoring*, *supra* note 119, at 5.

137. See *id.*

138. See *WSR Concept Brief: Worker-Defined Codes and Standards*, *supra* note 118, at 2.

workers for extended periods of time. This contrasts them with traditional CSR and MSI models of private regulation, which often lack robust complaint processes, effective penalties, or independent monitoring systems.

Regarding the protection of labor rights, WSR Agreements address criticisms levied against other forms of private regulation. The contractual nature of the WSR Agreement ensures that workers and the public writ large know which companies, brands, suppliers, and workers are bound by the WSR Agreement.¹³⁹ It is simply too hard to keep a contract that is supported by potentially thousands of workers secret. Furthermore, a provision within the WSR Agreement will generally mandate a level of publicity.¹⁴⁰

This publicity stands in contrast with CSRs and MSIs, where the transparency of the policy is beyond the power of the workers.¹⁴¹ The obscured nature of other forms of private regulations can enable bad-faith employers to shift standards and modify what constitutes “compliant” behavior. Furthermore, because WSR Agreements are developed by the workers, the conditions they impose on employers reflect the needs of the workers.¹⁴² In contrast, other forms of private regulation, even MSIs developed with outside groups, may impose a generic or irrelevant standard on employers and fail to address the needs of the workers.¹⁴³ In addition, the independent nature of WSR Agreement oversight ensures that the complaint process remains free from employer bias.¹⁴⁴ This contrasts with other forms of private regulation which can easily enable employers to retaliate against complainants.¹⁴⁵ Even if an employer adopted a form of private regulation that was transparent, spoke to relevant issues, and had an independent complaint procedure, a WSR Agreement would still be stronger.

139. See *Comparison of Critical Elements of WSR vs. CSR and MSIs*, *supra* note 26, at 3.

140. See *id.*

141. See *id.*

142. See *id.*

143. See Donaghey & Reinecke, *supra* note 5, at 19; see also Utting, *supra* note 49, at 21 (noting “there is no guarantee that participation in [MSIs] that focus on management systems will significantly improve a firm’s social and environmental performance or impact.”).

144. See *Comparison of Critical Elements of WSR vs. CSR and MSIs*, *supra* note 26, at 2; see also Utting, *supra* note 49, at 29 (noting that complaint-based MSIs tend to be fairly weak).

145. See *Success Stories*, *supra* note 22.

The greatest benefit of a WSR Agreement over other forms of private regulation is its enforceability.¹⁴⁶ Unlike the optional nature of other private regulations,¹⁴⁷ the “defining element” of a WSR Agreement is that it is a legally binding contract that signatories cannot renounce without suffering negative economic consequences.¹⁴⁸ Furthermore, even under stronger CSRs and MSIs, effective consequences are never guaranteed.¹⁴⁹ If a brand engages in self-disciplinary behavior, there is no guarantee it will deter against future violations or be any more harsh than a slap on the wrist.¹⁵⁰ Conversely, not only are the consequences of violating WSR Agreements public, they are designed by the workers so that they carry significant market consequences.¹⁵¹ Thus, in principle, WSR Agreements bind employers to effective and relevant standards, impose sanctions for non-compliance, and deter labor rights violations, unlike other forms of private regulation, which may consist of merely empty promises and do not compromise the corporate status quo.

III. WSR AGREEMENT SUCCESS STORIES: THE FAIR FOOD PROGRAM AND THE ACCORD ON FIRE AND BUILDING SAFETY IN BANGLADESH

The general principles described above derive from and inspire new WSR Agreements. Two of the most important WSR Agreements have already been mentioned.¹⁵² The Fair Food Program and the Accord on Fire and Building Safety in Bangladesh represent two successful, effective WSR Agreements. Fleshing out each of these WSR Agreements demonstrates how the universal principles are adapted across sectors and how drafters necessarily tailored each WSR Agreement to the adverse conditions they wished to ameliorate.

146. *See id.* at 1.

147. *See* BRUDNEY, *supra* note 40 at 356-57; Scheltema, *supra* note 41 at 385.

148. *See Comparison of Critical Elements of WSR vs. CSR and MSIs, supra* note 26, at 1.

149. *See* BRUDNEY, *supra* note 40, at 356-57; Scheltema, *supra* note 41, at 385.

150. *See Comparison of Critical Elements of WSR vs. CSR and MSIs, supra* note 26, at 1.

151. *See id.*

152. *See generally* ACCORD ON FIRE AND BUILDING SAFETY IN BANGLADESH, *supra* note 8; Fair Food Code of Conduct, *supra* note 8.

A. The Fair Food Program

As discussed in Part I, the Fair Food Program is a WSR Agreement developed by the Coalition of Immokalee Workers in response to horrendous working conditions and low to no wages.¹⁵³ Until the establishments of CIW and FFP, agricultural employers brutalized their workers.¹⁵⁴ The history of worker exploitation in the agricultural fields of Florida begins with chattel slavery, dating back to the eve of the Civil War, when up to forty-four percent of people living in Florida were enslaved.¹⁵⁵ Even worse, slavery in Florida was particularly brutal as slaveowners pushed the enslaved workers to produce faster and faster, which often required “new and harsher forms of abuse.”¹⁵⁶ Even after the abolition of slavery, the fields of Florida were rife with abuse.¹⁵⁷ An interlocking system of prison labor, debt peonage, and the targeted lynchings of labor organizers kept wages low and working conditions poor well into the twentieth century.¹⁵⁸

By the 1990s, the degradation occurring in the fields caused farmworkers to begin to band together.¹⁵⁹ Starting in 1993, these workers would gather in local Catholic churches to discuss the abuse and to explore ways to fight back.¹⁶⁰ These informal gatherings would transform into the CIW by the end of the 1990s.¹⁶¹ Between 1993 and 2001, the nascent CIW organized locally and helped the Department of Justice prosecute seven farm labor servitude cases in Florida.¹⁶² However, these efforts did

153. See Asbed & Hitov, *supra* note 1, at 503.

154. See *id.* at 499.

155. See *id.* at 500.

156. See *id.*

157. See *id.*

158. See *id.* at 500-02.

159. See *id.* at 504.

160. See *id.* (noting that they discussed “forced labor to subpoverty wages, widespread sexual harassment, verbal abuse, and violence at the hands of local farm bosses”).

161. See *About*, COAL. IMMOKALEE WORKERS, <https://ciw-online.org/about/> [<https://perma.cc/P7CL-YKVW>] (last visited Nov. 9, 2020); see also *Coalition of Immokalee Workers*, NAT’L FARM WORKER MINISTRY (June 2018), <http://nfwm.org/farm-workers/farmworker-partners/coalition-of-immokalee-workers/#:~:text=History%20of%20CIW,tomato%20industry%20had%20been%20declining> [<https://perma.cc/P7CL-YKVW>].

162. See Asbed & Hitov, *supra* note 1, at 502.

not address the main cause of the abuse: the supply chain of the brands that bought Floridian crops. The different brands on top of supply chains could circumvent these actions by easily switching between different farms;¹⁶³ thus they could frustrate CIW's efforts by not buying from farms where the CIW had a presence. This led the CIW to expand its organizing efforts so it could respond to the supply chain problem.

Unfortunately, the CIW could not turn to traditional sources of organized relief, such as labor unions, because agricultural workers (including the tomato pickers that created the CIW) were generally exempt from protection by relevant American labor law and could not form traditional labor unions.¹⁶⁴ It is important to the development of the FFP that the CIW existed beyond the reach of labor law. Despite lacking legal protection, the CIW initially tried traditional labor strategies to end the abuse.¹⁶⁵ For about a decade before implementing the FFP, the CIW engaged in community strikes and work stoppages, which led to increased wages.¹⁶⁶ However, without institutional legitimacy, direct action quickly led to diminishing returns, and the tomato pickers still lived in dire economic circumstances.¹⁶⁷ It is in this liminal space that the CIW realized that the brands at the top of their supply chains not only incidentally benefited from their suffering, but drove it.¹⁶⁸ It is also in this space that the CIW launched the FFP.

Once the CIW discovered what would become a foundational aspect of WSR Agreements, namely that the same top-down pressure that drove employers to commit abuses, could be utilized to coerce employers into protecting labor rights (a realization that is codified in the third and fourth principles promulgated by the Network¹⁶⁹), it shifted its focus from the

163. See Brecher et al., *supra* note 17 and accompanying text.

164. See BRUDNEY, *supra* note 40, at 364; see also 29 U.S.C. § 152 (The term "employee . . . shall not include any individual employed as an agricultural laborer . . ."); *In Re Cervantes*, 87 NLRB 877, 880 (1949) (noting the NLRA does not consider agricultural workers to be "employees" under the Act).

165. See Greg Asbed & Sean Sellers, *The Fair Food Program: Comprehensive, Verifiable and Sustainable Change for Farmworkers*, 16 U. PA. J. L. & SOC. CHANGE 39, 43 (2013).

166. See *id.*

167. See *id.*

168. See Asbed & Hitov, *supra* note 1, at 505.

169. See *Statement of Principles for Worker-driven Social Responsibility (WSR)*, *supra* note 27.

stagnating, traditional labor strikes and stoppages to an attack on the entire supply chain.¹⁷⁰ In 2001, the CIW transitioned its resistance from local Floridian growers to national brands by boldly declaring “*Taco Bell makes farmworkers poor.*”¹⁷¹ Even bolder than this language was the boycott that accompanied it: the CIW called for a boycott of Taco Bell until the working conditions in Immokalee were ameliorated.¹⁷² By targeting the top of the supply chain, the CIW was quickly able to garner national support—largely from students—greatly expanding its reach beyond Immokalee.¹⁷³ These “Student/Farmworker Alliance” chapters boycotted and drove Taco Bell from college campuses until 2005.¹⁷⁴ That year, Yum Brands, the parent company of Taco Bell, agreed to the demands of the CIW and signed the first Fair Food Agreement (“FFA”).¹⁷⁵ In this FFA, Taco Bell agreed to pay one penny more per pound of tomatoes to increase wages and further agreed to adjust its supply chain to buy from growers that complied with a to-be-developed code of conduct.¹⁷⁶ By 2012, ten more multibillion-dollar food corporations had followed suit and by 2017 a total of fourteen companies have signed an FFA.¹⁷⁷ These companies range from fast food chains (such as McDonald’s) to national supermarkets (Trader Joe’s) to general stores (Walmart).¹⁷⁸ These initial FFAs could constitute a complete WSR Agreement, with the penny per pound program in place, major buyers contractually bound to raise wages, and conditions on the ground improving.¹⁷⁹ But even with these successes, the CIW was not done.

170. *Id.*

171. *Now Is the Time Tour*, COALITION IMMOKALEE WORKERS, <http://www.ciw-online.org/now-is-the-time-schedule-1/> [<https://perma.cc/7XBU-SSHC>] (last visited Nov. 9, 2020); see also Bret McCabe, *Farmworkers to Table*, *JOHNS HOPKINS MAG.* (Fall 2018), <https://hub.jhu.edu/magazine/2018/fall/greg-asbed-coalition-immokalee-workers/#:~:text=%22What%20we%20found%20out%20was,and%20food%2C%22%20Asbed%20says.&text=That%20when%20we%20came%20out,%22> [<https://perma.cc/DB8D-D7JY>] (“That’s when we came out and said, ‘Taco Bell makes farmworkers poor.’”).

172. See Asbed & Hitov, *supra* note 1, at 507.

173. See *id.* 508.

174. See *id.*

175. See BRUDNEY, *supra* note 40, at 362; Asbed & Hitov, *supra* note 1, at 508.

176. See BRUDNEY, *supra* note 40, at 362.

177. See Asbed & Hitov, *supra* note 1, at 508.

178. See BRUDNEY, *supra* note 40, at 362.

179. See Asbed & Hitov, *supra* note 1, at 509.

A major keystone of a WSR Agreement is its code of conduct,¹⁸⁰ which necessarily goes beyond what the CIW achieved in the first FFA. However, it remained unclear if the CIW could develop the referenced code of conduct. In 2011, the CIW pushed for the creation of the Fair Food Standards Council (“FFSC”) an independent, third party entity that oversees the implementation of the FFP.¹⁸¹ The FFP is the successor to the initial FFAs. Whereas the FFAs were individual agreements without a larger plan, the FFP is an “industry-wide social responsibility program” that governed ninety percent of the Florida tomato industry within three years of its inception.¹⁸² It includes the penny per pound premium as well as a code of conduct.¹⁸³ It is “singularly dedicated to enforcement” since it is legally binding, contains an effective and quick complaint process free from retaliation, and empowers the FFSC to conduct independent audits and dole out penalties for non-compliance.¹⁸⁴ Substantively, the FFP’s Code of Conduct requires compliance with all relevant labor laws, carries immediate penalties for violence, slavery, child labor and sexual assault, and also bans labor subcontracting, meaning that all farmworkers are full employees of the growers.¹⁸⁵ The ban on sub-contracting farmworkers helps the FFSC oversee compliance as all workers covered by the FFP are known and easily informed of their rights under the Code.¹⁸⁶ The FFP’s influence on the concept briefs published by the Network is clear as workers drove the drafting of the initial agreement¹⁸⁷ and are involved in a continuous dialogue that reshapes the agreement.¹⁸⁸

While the Guidance Manual detailing the implementation of the FFP is only available to participants, the principal outlines of

180. See generally *WSR Concept Brief: Worker-Defined Codes and Standards*, *supra* note 118.

181. See *Frequently Asked Questions*, FAIR FOOD STANDARDS COUNCIL, <http://www.fairfoodstandards.org/resources/frequently-asked-questions/> [<https://perma.cc/KS5Y-989D>] (last visited Nov. 9, 2020); see also Asbed & Hitov, *supra* note 1 (describing the FFSC’s relationship to the FFP).

182. See Asbed & Sellers, *supra* note 165, at 45.

183. See *id.*

184. See Asbed & Hitov, *supra* note 1, at 510.

185. See BRUDNEY, *supra* note 40, at 364.

186. See *id.*

187. See Asbed & Hitov, *supra* note 1, at 514.

188. See BRUDNEY, *supra* note 40, at 364.

the Code are public.¹⁸⁹ It contains four parts: labor standards, violations, penalties for non-compliance, and guidelines for joining the Program.¹⁹⁰ The first part codifies the gains discussed in the previous paragraphs, including the pay raise, the ban on subcontracting, and workplace safety.¹⁹¹ Evidence of worker input is clear as there are specified procedures to ensure safety, ample protections from retaliation, and regulations regarding company housing¹⁹²—each responding to the substandard conditions that existed before the WSR Agreement.

The second part outlines three tiers of violations (Article I through Article III).¹⁹³ Article I violations include use of slave or child labor and carry an immediate suspension of the grower from the FFP.¹⁹⁴ Article II violations include using or threatening violence, sexual harassment without correction from the grower, retaliation, wage theft, discriminatory practices, negligent endangerment and employment of non-certified workers.¹⁹⁵ Violations of this Article can result in suspensions if the grower does not take specific remedial actions.¹⁹⁶ These violations are reported and adjudicated through the complaint system. The FFSC staffs a 24/7 complaint line.¹⁹⁷ The staff of the line is the same staff who audits, such that the independent inspectors are the same people hearing directly from the workers.¹⁹⁸ The audits are substantial, as FFSC audits over half of the workforce at all seniority levels to generate a yearly report that details compliance, violations, and recommendations.¹⁹⁹ Article III is a catch-all for violations and merely requires growers to develop a corrective plan of action with the FFSC, with no threat of suspension.²⁰⁰ Regardless of the type of remedial or corrective action, FSSC

189. *See Fair Food Code of Conduct, supra* note 8.

190. *See id.*

191. *See id.*

192. *See id.*

193. *See id.*

194. *See id.*

195. *See id.*

196. *See id.*

197. *See Asbed & Hitov, supra* note 1, at 522-23.

198. *See id.* at 523.

199. *See id.* at 524-25.

200. *See Fair Food Code of Conduct, supra* note 8.

retains oversight throughout the process; nothing is left solely to the growers.²⁰¹

The third part divides penalties into two categories: grower penalties and supervisor penalties.²⁰² Growers are subject to a sliding scale of suspensions, which go beyond a slap on the wrist.²⁰³ The brands at the top of these supply chains are contractually forbidden from buying from suspended growers, so market consequences are immediate.²⁰⁴ These consequences result from the market power the brands wield over the growers.²⁰⁵ The brands purchase tomatoes at such high volumes that growers essentially must cater to the conditions of sale imposed by the brands.²⁰⁶ Before the FFP, the brands used this market power to depress wages and worsen working conditions.²⁰⁷ As the CIW changed the demands of the brands through organizing and boycotts, growers necessarily had to adapt their business practices to ensure they would not lose such high-volume customers.²⁰⁸ Therefore, growers in supply chains governed by the FFP have strong economic incentives to satisfy the demands of the workers. Thus, the FFP is an archetypal WSR Agreement as it utilizes the market power of the brands at the top of the supply chains to pressure growers to protect labor rights.²⁰⁹ The penalties for overseers are similar; the FFSC maintains a list of supervisors and can suspend them for various lengths of time.²¹⁰ Again, these penalties are mandatory and not left to the discretion of either the brands or the growers.²¹¹

Brand entry to the FFP is a rigorous process. Potential entrants must be ready to comply fully the day they officially join, with implementation of relevant processes beginning prior to entry.²¹² In this sense, the FFP has achieved the goal of a WSR

201. See Asbed & Hitov, *supra* note 1, at 522-23.

202. See *Fair Food Code of Conduct*, *supra* note 8.

203. See *id.*

204. See BRUDNEY, *supra* note 40, at 369.

205. See Asbed & Hitov, *supra* note 1, at 506.

206. See *id.*

207. See *id.*

208. See *id.*

209. See *Statement of Principles for Worker-driven Social Responsibility (WSR)*, *supra* note 27.

210. See *Fair Food Code of Conduct*, *supra* note 8.

211. See *id.*

212. See *id.*

Agreement;²¹³ it has become an established and respected part of the rules governing the supply chain.²¹⁴ The growth of the FFP demonstrates this. It is a testament to the CIW's organizing ability and the enforceability of the FFP that within four years of the first FFP and a decade within the first FFA, it covered tens of thousands of workers across industries and states.²¹⁵

The FFP embodies the six principles of WSR Agreements as defined by the Network. Tomato pickers are at the heart of the regulatory process.²¹⁶ The brands cannot avoid oversight; their records are checked monthly to ensure they do not buy from suspended growers.²¹⁷ The penny per pound initiative somewhat alleviates the traditional downward market pressure that crushes workers.²¹⁸ Growers cannot opt out of being suspended because they are unable to sell their non-compliant tomatoes to the brands at the top of the supply chain.²¹⁹ The complaint system maintained by the FFSC quickly responds to complaints and is empowered to issue measured sanctions.²²⁰ While growers may be included in the creation of policies to ensure they are feasible and effective,²²¹ the FFSC maintains total independence from both the growers and the brands in monitoring complaints to ensure that workers are free from retaliation.²²² This structure ensures that the FFSC will never create rules that will cause capital failure, and also insulates workers from reprisal. Though the universe of workers covered is relatively small—only about 35,000 workers in

213. See *WSR Concept Brief: Worker-Defined Codes and Standards*, *supra* note 118, at 2 (noting that institutional acceptance is paramount to success).

214. See Asbed & Hitov, *supra* note 1, at 525-26.

215. See BRUDNEY, *supra* note 40, at 370, 372.

216. See *Statement of Principles for Worker-driven Social Responsibility (WSR)*, *supra* note 27.

217. See *id.*; BRUDNEY, *supra* note 40, at 372.

218. See *Statement of Principles for Worker-driven Social Responsibility (WSR)*, *supra* note 27.

219. See *id.*

220. See *id.*

221. See FAIR FOOD STANDARDS COUNCIL, *Fair Food 2017 Annual Report*, 14 (2017), <http://fairfoodstandards.org/2017-annual-report.pdf> [<https://perma.cc/5RSJ-3RF2>] (noting that growers are consulted in a “working group” that assists in the creation and evaluation of policies).

222. See *id.*

2015—²²³ the FFP demonstrates the feasibility of a WSR Agreement in principle.

B. The Accord on Fire and Building Safety in Bangladesh

Unlike the FFP, which formed after a long groundswell of local activism, the Accord on Fire and Building Safety in Bangladesh emerged in response to a series of mass-casualty building collapses and fires culminating in the Rana Plaza disaster.²²⁴ Even before the Rana Plaza collapse, workers faced multiple hazards in the Bangladeshi garment industry, as the country had suffered sixteen mass casualty events involving factory workers.²²⁵ Five months before the Rana Plaza collapse, a fire at the nine-story Tazreen Fashions factory killed 112 people and injured over 200 more.²²⁶ Worse still, these discrete incidents occurred within the context of industrial exploitation.²²⁷

Beginning in the 1970s, low labor costs, government deregulation, and privatization attracted ready-made garment factories to Bangladesh.²²⁸ Despite these factories employing millions of people and being a key part of Bangladesh's export boom, its workers have long worked for low wages, without strong legal protections, and with minimum job security.²²⁹ Furthermore, the working conditions themselves are abysmal: workers work over fourteen-hour days, seven days a week, face rampant sexual harassment and discrimination, and work in

223. The total number of farmworkers covered by the FFP varies, but the FFP reported about 35,000 members in 2017. See Deepa Fernandes, *Lessons for Hollywood's women from tomato pickers in Florida*, PRI (Nov. 30, 2017, 1:00 PM), <https://www.pri.org/stories/2017-11-17/lessons-hollywoods-women-tomato-pickers-florida> [<https://perma.cc/8A9T-6KDX>]; see also Asbed & Hitov, *supra* note 1, at 519 (noting in 2017 that the FFP covers "roughly 35,000 workers").

224. See Anner et al., *supra* note 3, at 27.

225. See PAUL M. BARRETT, DOROTHÉE BAUMANN-PAULY & APRIL GU, *Five Years After Rana Plaza: The Way Forward*, 15 (2018), <https://static1.squarespace.com/static/547df270e4b0ba184dfc490e/t/5ac9514eaa4a998f3f30ae13/1523143088805/NYU+Bangladesh+Rana+Plaza+Report.pdf> [<https://perma.cc/A287-55KM>].

226. See *id.* at 9.

227. See generally Laia Blanch & Amin Haque Amirul, *Report: Bangladesh's Garment Industry and Worker's Rights*, 20 INT'L UNION RTS. 12 (2013) (detailing the labor history of the Bangladeshi garment industry).

228. See *id.* at 12.

229. See *id.*

“unsafe, cramped and hazardous conditions.”²³⁰ Between 1990 and 2012, over 1,000 people were killed and 3,000 injured in over 275 “unsafe factory incidents.”²³¹

These disasters were dwarfed by the carnage of the Rana Plaza collapse.²³² It was abundantly clear that the Rana Plaza building was faulty.²³³ The building was over-encumbered, stood on a landfill, and was built with shoddy materials.²³⁴ Local workers speculated that the owner’s political connections and personal corruption persuaded the local government from closing the building.²³⁵ Within three weeks of the disaster, the brands at the top of the affected supply chains announced the Accord,²³⁶ without requiring a years-long effort of worker campaigns analogous to the CIW’s campaign against Taco Bell. When it was signed on May 13, 2013, it bound two international union groups (IndustriALL Global Union and UNI Global Union), eight IndustriALL affiliates and about forty-three clothing companies.²³⁷ The 2013 Accord was a five-year contract; by its expiration in May 2018, over 220 companies had signed on and it covered millions of Bangladeshi garment workers.²³⁸ It also went beyond Rana Plaza and Dhaka, as it covered 1,600 factories across Bangladesh.²³⁹ Thus, the Accord started with at least nominal support from brands, unlike the FFP, which had to fight for its first signatory.

The preamble to the 2013 agreement details the goals and ambition of the Accord. It is fundamentally a building safety

230. *See id.*

231. *See id.*

232. *See* Benjamin A. Evans, *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, 601 (2015).

233. *See id.*

234. *See id.* at 603.

235. *See id.*; Jim Yardley, *The Most Hated Bangladeshi, Toppled From a Shady Empire*, N.Y. TIMES (Apr. 30, 2013), <https://www.nytimes.com/2013/05/01/world/asia/bangladesh-garment-industry-reliant-on-flimsy-oversight.html> [<https://perma.cc/X9PK-MR2Y>].

236. *See id.* at 606.

237. *See Achievements 2013 Accord*, ACCORD ON FIRE AND BUILDING SAFETY IN BANGL. (July 20, 2018).

238. *See id.* However, the parties negotiated an extension in 2018, and it will be analyzed separately. *See infra* notes 279-81 and accompanying text.

239. *See* Evans, *supra* note 232, at 607.

agreement.²⁴⁰ It builds upon the National Action Plan on Fire Safety (“NAP”), an agreement between local manufacturers and the Bangladeshi government, which tried to fight unsafe conditions, but failed to garner support from brands at the top of the supply chains.²⁴¹ Furthermore, it “welcome[s] a strong role” for the ILO to guarantee that the signatories adhere to the Agreement.²⁴² That the ILO plays a central role in oversight and administration of the Accord is one of the many ways the Accord commits to enforceability; at its heart there is third party oversight such that the brands themselves were not supervising the terms of the Accord.

Under the Accord, local suppliers fall into one of three tiers.²⁴³ Tier 1 factories are those that produce at least thirty percent of a signatory’s Bangladeshi output.²⁴⁴ These factories must submit to safety inspections, remediation, and fire safety trainings.²⁴⁵ Tier 2 factories are long-term or major suppliers for a signatory that do not qualify as Tier 1 because they fail to meet the production quota.²⁴⁶ Tier 2 factories must submit to inspections and remediation, but not safety training.²⁴⁷ Sixty-five percent of goods bought from Bangladesh by signatories of the Accord must be produced by Tier 1 or Tier 2 suppliers.²⁴⁸ This ensures that the Accord is effective. Tier 3 factories are factories that represent ten percent of a company’s order (including occasional or one-shot orders) and must submit to limited initial inspections.²⁴⁹ Brands may not purchase more than thirty-five percent of their Bangladeshi goods from Tier 3 factories.²⁵⁰ If a Tier 3 factory fails its initial inspection, it is treated as a Tier 2

240. See ACCORD ON FIRE AND BUILDING SAFETY IN BANGLADESH, *supra* note 8, at 1.

241. See *id.*; Evans, *supra* note 232, at 602. The NAP tried to achieve worker safety through public regulation. However, neither the brands nor the workers played a role in the creation or governance of the agreement. It was also smaller in scope than the Accord. See generally Evans, *supra* note 232, at 612-15.

242. ACCORD ON FIRE AND BUILDING SAFETY IN BANGLADESH, *supra* note 8, at 1.

243. See *id.* 1-2.

244. See *id.* 1.

245. See *id.*

246. See Evans, *supra* note 232, at 608.

247. See ACCORD ON FIRE AND BUILDING SAFETY IN BANGLADESH, *supra* note 8, at 1.

248. See *id.*

249. See *id.* at 2.

250. See *id.*

factory.²⁵¹ Furthermore, the Accord covers all suppliers in the chain, even if the brand does not know the supplier is being used, ensuring that the brand cannot escape liability by claiming ignorance of the supplier.²⁵² The Accord provides that a single aggregated, regularly updated list of all suppliers used by covered brands must be provided to the Accord's steering committee or otherwise these brands would be in breach.²⁵³ Thus, there is direct market pressure on brands to ensure that the entirety of their supply chain comports with the agreement, as negligent or passive behavior can result in penalties.

A steering committee governs the Accord. An ILO representative acts as a "neutral chair" of the steering committee.²⁵⁴ The rest of the steering committee consists of up to three union signatories and up to three company signatories, for a total of seven members.²⁵⁵ The steering committee is responsible for the management of the bureaucracy of the inspectorate but also chooses the Chief Safety Inspector and the Training Coordinator.²⁵⁶ By mid-2017, the Accord had a staff of almost 250 people in Bangladesh and could conduct 500 follow-up inspections per month to ensure continued compliance.²⁵⁷ Thus, the workers have direct input into the oversight of the Accord, akin to the FFP, even if they are not solely in control of its implementation. The Chief Safety Inspector oversees the inspection of factories in accordance with individualized Plans of Action.²⁵⁸ Similarly, the Training Coordinator oversees the Health and Safety Committees at all factories.²⁵⁹ While the steering committee "strives to reach decision[s] by consensus," it can act by majority vote.²⁶⁰ Furthermore, the steering committee

251. *See id.*

252. *See Evans, supra* note 232, at 609.

253. *See* ACCORD ON FIRE AND BUILDING SAFETY IN BANGLADESH, *supra* note 8, at 5.

254. *See Evans, supra* note 232, at 607.

255. *See* ACCORD ON FIRE AND BUILDING SAFETY IN BANGLADESH, *supra* note 8, at 2.

256. *See id.*

257. *See* JEREMY BLASI & JENNIFER BAIR, AN ANALYSIS OF MULTIPARTY BARGAINING MODELS FOR GLOBAL SUPPLY CHAINS 17 (2019).

258. *See Evans, supra* note 232, at 609.

259. *See id.* at 610.

260. ACCORD ON FIRE AND BUILDING SAFETY IN BANGLADESH, *supra* note 8, at 2. Furthermore, the minutes of the steering committee do not readily reveal the voting record of the committee. *See generally Steering Committee Meeting Minutes, ACCORD ON FIRE & BUILDING SAFETY IN BANGL.*, <https://bangladeshaccord.org/resources/steering->

has original jurisdiction over any disputes between signatories arising under the agreement.²⁶¹ Importantly, parties may appeal decisions of the steering committee to binding arbitration, and parties agree to enforce any arbitration award, as governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.²⁶² These awards can force a breaching company to directly pay for the changes needed to bring a supplier into compliance.²⁶³ This is a level of enforcement that is generally not found in traditional CSR or MSI agreements.²⁶⁴

Like the FFP, a strict, structured, independent inspection system governs compliance. Inspections can either be done internally or through a steering committee-approved inspector.²⁶⁵ However, internal inspections must be made available to the Inspector and are held to the same standard as those done under color of the agreement.²⁶⁶ These internal inspections do not replace the reporting system, so the Accord merely advises suppliers to inspect complaints pursuant to the Accord and previously approved internal mechanisms.²⁶⁷ Furthermore, the Inspector will hold companies with compliant internal inspections to those standards in the future.²⁶⁸ All inspection reports produced by the Safety Inspector (including the reports of compliant internal inspections) are made public within six weeks of the inspection, while all signing parties are immediately informed of “severe and imminent danger[s].”²⁶⁹ If a Safety Inspector finds noncompliance, the Accord empowers them to issue corrective orders mandating actions the supplier needs to take, corresponding to the violating supplier’s tier ranking. A public, mandatory, and time-bound schedule governs the

committee-minutes [<https://perma.cc/HW6A-WSUK>] (last visited Nov. 9, 2020) (preserving .pdfs of steering committee minutes).

261. See ACCORD ON FIRE AND BUILDING SAFETY IN BANGLADESH, *supra* note 8, at 2.

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

263. See *id.* at 3.

264. See *id.* at 2-3.

265. See ACCORD ON FIRE AND BUILDING SAFETY IN BANGLADESH, *supra* note 8, at 3.

266. See *id.*

267. See *id.*

268. See *id.*

269. *Id.* at 3-4.

completion corrective actions.²⁷⁰ Importantly, should a factory require closing to complete renovations, the supplier may not fire any workers and must keep them on payroll so long as the closing is less than six months.²⁷¹ Furthermore, suppliers must work together to give workers terminated incidental to the Accord preferential treatment at other covered suppliers.²⁷² These provisions of the Accord provide incredible employment protections unseen in traditional forms of private regulation. Furthermore, it is improper retaliation to take adverse employment actions against a worker who, in good faith, refuses to complete unsafe work.²⁷³

However, the Accord does not only impose obligations on suppliers; they also receive benefits. The clearest benefit is that compliant suppliers can sell their goods to the brands at the top of the supply chain.²⁷⁴ Furthermore, the brands agree to work with Tier 1 and Tier 2 factories to ensure that the cost of compliance does not result in economic ruin for suppliers.²⁷⁵ They also agree to maintain pre-Accord order volumes for the first two years of coverage.²⁷⁶ Akin to the penny per pound premium, signatory companies fund the bureaucracy of the Accord.²⁷⁷ Capped at US\$500,000 per year, companies must pay a fee proportional to the volume of garment goods they buy from Bangladeshi suppliers.²⁷⁸

The 2013 Accords expired in 2018. However, the parties negotiated a 2018 Transition Accord, which extends the agreement through May 31, 2021.²⁷⁹ This Transition Accord extends most of the 2013 Accord's provisions, but, reminiscent of the "Iteration" stage of the Network's brief, adopts some

270. *See id.* at 4.

271. *See id.*

272. *See id.*

273. *See id.*

274. *See id.* at 6.

275. *See id.*

276. *See id.*

277. *See id.*

278. *See id.*; The Annual Fees for June 2019-2020 are available at ACCORD ON FIRE AND BUILDING SAFETY IN BANGLADESH, *supra* note 103, at 1.

279. *See* 2018 ACCORD ON FIRE AND BUILDING SAFETY IN BANGLADESH: MAY 2018 (June 21, 2017), <https://admin.bangladeshaccord.org/wp-content/uploads/2018/08/2018-Accord.pdf> [<https://perma.cc/9HGS-DVEX>].

changes.²⁸⁰ Most notably, the Transition Accord formalizes ways brands can end a business relationship with a supplier and exit the Accord altogether.²⁸¹ Brands can leave a supplier if the factory commits a “zero tolerance” violation or if they have not sourced from the factory in the previous eighteen months and they agree to not return for two years.²⁸² Similarly, a brand may exit the Accord three months after giving notice, if they cease all sourcing from Bangladesh and have no other outstanding obligations under the Accord.²⁸³ Interestingly, the Transition Accord includes a choice of law provision which specifies Dutch law.²⁸⁴

The reason that the Transition Accord is a “transition” agreement instead of a permanent one is because it self-terminates. The Accord sought to protect workers unprotected by the contemporary labor law regime.²⁸⁵ The Transition Accord reveals that a secondary goal was to help Bangladesh develop effective labor regulations.²⁸⁶ At the end of the Transition Accord, the steering committee is supposed to hand off its work to an ILO-supported national regulatory body to ensure perpetual protections.²⁸⁷ A year and half before expiration, the steering committee will evaluate the purported regulatory body.²⁸⁸ If competent, the Accord expires, if not, the Accord lasts an additional year.²⁸⁹ Furthermore, the steering committee has the authority to terminate the Accord prematurely if there is an

280. See *WSR Concept Brief: Worker-Defined Codes and Standards*, *supra* note 118, at 2.

281. See 2018 ACCORD ON FIRE AND BUILDING SAFETY IN BANGLADESH: MAY 2018, *supra* note 279, at 7-8.

282. See *id.* at 8.

283. See *id.*

284. See *id.* While this choice of law likely reflects where an associated foundation was incorporated, it also likely reflects a distrust in Bangladesh’s local legal system to implement the Accord. See generally *The Accord on Fire and Building Safety in Bangladesh*, BUS. & HUM. RTS. RESOURCE CTR. (Apr. 23, 2016), <https://www.business-humanrights.org/en/latest-news/the-accord-on-fire-and-building-safety-in-bangladesh/> [<https://perma.cc/RM38-5PVR>].

285. See ACCORD ON FIRE AND BUILDING SAFETY IN BANGLADESH, *supra* note 8, at 1.

286. See 2018 ACCORD ON FIRE AND BUILDING SAFETY IN BANGLADESH: MAY 2018, *supra* note 279, at 1.

287. See *id.*

288. See *id.*

289. See *id.*

adequate regulatory body in place before May 31, 2021.²⁹⁰ Part IV of this Note evaluates the Accord's limited success on this front.²⁹¹

As with the FFP, the Accord meets the six principles of WSR Agreements as defined by the WSR Network. Garment workers are the primary instigators of the regulatory process.²⁹² The brands cannot avoid oversight as the safety inspections are carried out by an independent and public process that responds directly to workers' concerns, ensures compliance, and involves an organization that can issue penalties.²⁹³ The incentives and penalties authorized by the Accord ensure there is adequate market pressure to compel compliance.²⁹⁴ Supplier factories cannot refuse to implement safety measures because, if they refuse, they would be cut out of the supply chains of signatory companies.²⁹⁵ The oversight system governed by the steering council quickly responds to complaints, issues corrective action, and can award enforceable damages.²⁹⁶ Lastly, the steering committee maintains total independence from specific brands as well as the supplier factories.²⁹⁷ Unlike the FFP, the Accord covers a large population of workers. As of October 1, 2019, the Accord covered approximately 1,649 factories and 2,387,355 workers.²⁹⁸ Thus, the Accord serves as proof that the framework pioneered by the CIW can be implemented on a much larger scale.

Furthermore, workers can compare the characteristics of a WSR Agreement in the Bangladesh garment industry with a more traditional CSR.²⁹⁹ The brands that were unwilling to sign onto

290. *See id.*

291. *See infra* Part IV.B.

292. *See Statement of Principles for Worker-driven Social Responsibility (WSR)*, *supra* note 27.

293. *See id.* *See also* Evans, *supra* note 232, at 609-10.

294. *See Statement of Principles for Worker-driven Social Responsibility (WSR)*, *supra* note 27.

295. *See id.*

296. *See id.*

297. *See id.*

298. *See* THE BANGL. ACCORD FOUND., ACCORD PUBLIC DISCLOSURE REPORT 1 (Sept. 1, 2020), <https://bangladesh.wpengine.com/wp-content/uploads/2020/09/Public-Disclosure-Report-1-September-2020.pdf> [<https://perma.cc/7Y8T-HLSV>].

299. *See* Beryl Ter Haar & Maarten Keune, *One Step Forward or More Window-Dressing: A Legal Analysis of Recent CSR Initiatives in the Garment Industry in Bangladesh*, 30 INT'L J. COMP. LAB. L. & INDUS. REL. 5, 24 (2014) (noting that the Alliance "bears a strong resemblance to the early period of unilateral CSR codes").

the Accords formed the Alliance for Bangladesh Worker Safety (“Alliance”) on July 10, 2013, about a month after the ratification of the Accord.³⁰⁰ As with other CSRs, the program was voluntary and workers did not play a central role as the Alliance relegated local unions to an advisory capacity.³⁰¹ Defenders of the Alliance can say much of the Alliance mirrors the Accord and was a stronger form of the traditional CSR model,³⁰² but critics argue that the few differences make the two programs substantively distinct.³⁰³ The Alliance specifically recognized two employers’ organizations: the Bangladesh Garment Manufacturers and Exporters Association (“BGMEA”) and the Bangladesh Knitwear Manufacturers and Exporters Association (“BKMEA”) as key members of the Alliance, but failed to similarly recognize any specific workers’ organizations.³⁰⁴ The Alliance explicitly did not make the brands responsible for improved conditions as it recognized “that responsibility for conditions in Bangladesh ultimately resides with the local factory owners and people and government of Bangladesh.”³⁰⁵ The insistence on the separation of the suppliers and the brands was emphasized in a no-third party beneficiary clause.³⁰⁶ The Alliance’s agreement specifically prohibited non-parties to the Alliance—i.e. workers and suppliers—from seeking to enforce its terms.³⁰⁷ The Alliance contained neither mandatory nor suggested penalties on the brands. It merely stated that the signatories will set penalties for non-compliance for suppliers within their own supply chain.³⁰⁸

300. See Donaghey & Reinecke, *supra* note 5, at 25.

301. See *id.*

302. See Evans, *supra* note 232, at 623 (noting that “although the Alliance is more ambitious and public than previous efforts” it still relies on the strategy of self-policing).

303. Jaakko Salminen, *The Accord on Fire and Building Safety in Bangladesh: A New Paradigm for Limiting Buyers’ Liability in Global Supply Chains?*, 66 AM. J. COMP. L. 411, 418-20 (2018) (saying that workers’ rights activists charge that the Alliance “undercut[s] the Accord by providing a less onerous and less rigorous alternative”).

304. See MEMBERS AGREEMENT OF THE ALLIANCE FOR BANGLADESH WORKER SAFETY, INC. 2 (2013), <https://rdacell.com/Documents/Bangladesh%20US%20Alliance%20Member%20Agreement%20FINAL.pdf> [<https://perma.cc/F7LW-T4VD>]; see also Salminen, *supra* note 303, at 420 (noting that “the Alliance was developed and is governed without worker participation”).

305. MEMBERS AGREEMENT, *supra* note 304, at 4.

306. See Salminen, *supra* note 303, at 420-21.

307. See *id.*

308. See MEMBERS AGREEMENT, *supra* note 304, at 14.

The Alliance did require members to pay administrative fees, but did not mandate any further contributions.³⁰⁹ The rest of the operating budget was supposed to come from a nonobligatory loan program.³¹⁰ The Alliance claimed that its agreement was enforceable because its board of directors could have expelled members who failed to meet their commitments.³¹¹ However, expulsion for failure to comply without any further sanctions was a specious punishment at best because no one would ensure that the offender was actually making factories any safer. Furthermore, the Alliance expired after five years without enacting a replacement.

Thus, the comparison between the Accord and the Alliance demonstrates how WSR Agreement models take a stronger approach to the rights of workers than more traditional CSR models.³¹² In fact, the Alliance meets *none* of the principles promulgated by the Network.³¹³ There are direct asymmetries in key portions of these agreements. The Accord centers itself around the workers; the Alliance focuses on brands. The Accord creates third party rights and obligations; the Alliance does not. The Accord secures adequate funding to help achieve the goals it places on itself; the Alliance does not guarantee adequate funding. The Accord helped propagate a second agreement that responded to the needs of the first and is designed to help develop a Bangladeshi public regulatory regime; the Alliance does not achieve either goal.

IV. WSR AGREEMENTS CAN EFFECTIVELY AMELIORATE SPECIFIC PROBLEMS BUT ARE NOT PANACEAS.

WSR Agreements offer workers a new form of private regulation that, in the abstract, is legally binding and effective. Consequently, workers themselves must determine whether the abstract benefits in these agreements are realized in the workspace. Ultimately, the evidence demonstrates that WSR

309. See *Salminen*, *supra* note 303, at 420-22.

310. See *id.*

311. See *id.* at 419.

312. See Ter Haar & Keune *supra* note 299, at 22 (suggesting that the authority of the Alliance “remains weak”).

313. See generally *Statement of Principles for Worker-driven Social Responsibility (WSR)*, *supra* note 27.

Agreements effectively ameliorate the conditions their creators intended them to address, but cannot serve to end all workplace abuse. Furthermore, as workers gain power in the workplace, their capacity to demand better treatment grows.³¹⁴ Thus, the benefits accrued under a WSR Agreement give workers the space and ability to demand better treatment in other areas of the workplace. For example, after the implementation of the Accord, the Bangladeshi workers began fighting for a higher wage with limited success, which is both an incredibly important goal and beyond the scope of the Accord.³¹⁵

This Part will evaluate the successes of both the FFP and the Accord, highlighting their benefits over other forms of private regulation. Next, it will discuss where the FFP and the Accord did not meet their goals. Further, it will highlight some outstanding questions, offer some preliminary answers, and encourage the creation of more WSR Agreements in the future.

A. The FFP Has Achieved Great Success in Improving the Working Conditions of Farmworkers

Both data and testimony suggest that the FFP is an efficient and effective program that has resulted in real change.³¹⁶ The 2018 Annual Report issued by the FFSC divides the implementation of the FFP into two phases: the first four growing seasons (2011-2015) and the subsequent seasons.³¹⁷ Phase 1 concerns transformation, raising workplace standards, and achieving compliance. Phase 2, consequently, was about solidifying these changes into the status quo and expanding the reach of the program.³¹⁸

314. See generally *Banning Hope: Bangladesh Garment Workers Seeking a Dollar an Hour Face Mass Firings, Violence, and False Arrests*, WORKER RTS. CONSORTIUM (Apr. 2019), <https://www.workersrights.org/wp-content/uploads/2019/04/Crackdown-on-Bangladesh.pdf> [<https://perma.cc/RK32-3ZMV>] (detailing the Bangladeshi workers' next fight for workplace benefits).

315. See *id.* at 5.

316. See *Fair Food: 2018 Update*, FAIR FOOD STANDARDS COUNCIL, <https://www.fairfoodprogram.org/wp-content/uploads/2019/10/Fair-Food-Program-2018-SOTP-Update-Final.pdf> [<https://perma.cc/S9R9-VHJG>] (last visited Oct. 17, 2020).

317. See *id.* at 4.

318. See *id.*

During Phase 1, reported complaints steadily increased.³¹⁹ During the first year of the FFP, the hotline fielded 107 reports of violations.³²⁰ These reported violations peaked in the 2014-15 growing season, with 524 reports to the hotline.³²¹ However, this steady growth of complaints does not reflect a failure of the FFP, rather it is a mark of success.³²² The increase in complaints derives from workers' awareness of the FFP, their confidence in its effectiveness, and its ability to protect them from retaliation.³²³ After the fourth season, complaints dropped by a third and have remained at that level (about 350 complaints per season) for all subsequent years.³²⁴ In recent years, both observers and farmworkers have said that the fields governed by the FFP are among the best working fields in American agriculture, especially compared to non-FFP fields.³²⁵

However, it is not enough to merely give workers the ability to complain about workplace issues, these complaints must be investigated if not remedied. Fortunately for the tomato pickers, the FFP has promulgated effective solutions to these problems. One holistic solution—divorced from any specific complaint—must be highlighted, because it effectively demonstrates the need for workers to drive the terms of Codes of Conduct.³²⁶ Tomato pickers are generally paid by production rather than by the hour.³²⁷ In other words, they are paid by the amount of buckets of tomatoes they fill, not the hours they work.

Pre-FFP, there was significant controversy of what constituted a “bucket of tomatoes.”³²⁸ The growers insisted that the pickers

319. *See id.* at 11.

320. *See id.*

321. *See id.*

322. *See* Manoj Dias-Abey, *Justice on Our Fields: Can “Alt-Labor” Organizations Improve Migrant Farm Workers’ Conditions?*, 53 HARV. C.R.-C.L. L. REV. 167, 203 (2018).

323. *See id.*

324. *See* FAIR FOOD STANDARDS COUNCIL, *supra* note 316, at 11.

325. *See* Scheiber, *supra* note 110 (quoting a longtime observer of agricultural work who said that, under the FFP, Immokalee has “gone from being the worst to the best”); *see also* FAIR FOOD STANDARDS COUNCIL, *supra* note 316, at 1 (quoting a farmworker that says that under the FFP “[t]he fields have changed” and that now workers “better wages and better treatment for everyone”).

326. *See generally* *Statement of Principles for Worker-driven Social Responsibility (WSR)*, *supra* note 27.

327. *See* Asbed & Hitov, *supra* note 1, at 515.

328. *See* Dias-Abey, *supra* note 322, at 200-01.

“cup” their buckets, such that a “full” bucket would have tomatoes beyond the brim so that the filled bucket resembled an ice cream cone.³²⁹ Workers, unsurprisingly, wanted a full bucket to be a bucket filled to the brim or at least to be compensated for the excess tomatoes.³³⁰ A cupped bucket contains about ten percent more tomatoes than a non-cupped bucket, so growers essentially failed to pay workers for up to ten percent of the labor the workers completed.³³¹ The FFP prohibits growers from requiring workers to cup their buckets.³³² While growers initially significantly resisted this change, by the third season, ninety percent of growers complied with the standard, and in the sixth, the practice was nearly eliminated.³³³ Presently, cupping is an infrequent request because the growers know that merely giving the instruction will incur disciplinary action.³³⁴ Importantly, before the FFP, the cupping controversy was not known to many of the NGOs or other third-party groups outside the industry.³³⁵ Thus, it is unlikely that an MSI or a traditional CSR program would have ameliorated this issue because they often lack the worker input that would highlight an issue like cupping as key.³³⁶ Fortunately, the FFP included the workers in designing the Code of Conduct, and thus it could rely on the specialized knowledge of the workers to implement a ban on cupping.³³⁷

More generally, the FFP has a fairly high dispute settlement rate.³³⁸ The hotline does not screen incoming phone calls for valid complaints under the FFP, so necessarily some claims will not be germane under the terms of the FFP.³³⁹ However, growers have been increasingly willing to resolve these non-germane

329. See Asbed & Hitov, *supra* note 1, at 515.

330. See *id.* at 515-16.

331. See *id.* at 516.

332. See FAIR FOOD STANDARDS COUNCIL, *supra* note 316, at 22.

333. See *id.*

334. See *id.*

335. See Asbed & Hitov, *supra* note 1, at 515.

336. See *Comparison of Critical Elements of WSR vs. CSR and MSIs*, *supra* note 26, at 3.

337. See BRUDNEY, *supra* note 40, at 364-65.

338. See FAIR FOOD STANDARDS COUNCIL, *supra* note 316, at 10-11.

339. See *id.*

issues³⁴⁰ anyway.³⁴¹ In the first season, only fourteen percent of these types of complaints resulted in a resolution, however, that number has jumped to nearly forty percent by the end of the latest growing season.³⁴² Similarly, each year a third to a half of all germane complaints are resolved.³⁴³

Also, importantly, the resolution process is quick and gaining speed. In the first years, resolution times were evenly distributed; a third took under two weeks, a (smaller) third took between two-three weeks, and a third took over three weeks to resolve.³⁴⁴ However, by the latest season, nearly half of all complaints were resolved within two weeks.³⁴⁵ This significant increase gives workers confidence that the FFP actually hears their complaints.³⁴⁶ The independent auditing process contains similar trends. The first few years saw both probations and suspensions from the FFP.³⁴⁷ Both measures carry market consequences because the tomato market is fairly inelastic due to the perishability of tomatoes.³⁴⁸ Thus, even though the FFP only covers twenty percent of the market, it is hard for suspended growers to find alternative buyers.³⁴⁹ Under the watchful eyes of the FFSC, violence, forced labor, and sexual harassment have plummeted.³⁵⁰ The first six seasons saw at least one (and up to seven) reports of violence or threats of violence, however, in the latest season, there were zero reported incidents.³⁵¹ Immokalee went from the “ground zero for modern slavery”³⁵² in the late 1990s to a place where not a single instance of physical sexual harassment was reported in the growing season of 2015-16.³⁵³

340. A non-germane issue is merely a complaint made by a farmworker regarding something that is not explicitly covered by the FFP, so it necessarily includes a wide variety of issues. The FFP does not report what the specifically reported issues were. *See id.*

341. *See id.*

342. *See id.*

343. *See id.*

344. *See id.*

345. *See id.*

346. *See id.*

347. *See id.* at 13.

348. *See Dias-Abey, supra* note 322, at 203.

349. *See id.*

350. *See FAIR FOOD STANDARDS COUNCIL, supra* note 316, at 14.

351. *See id.*

352. Asbed & Hitov, *supra* note 1, at 502-03.

353. *See FAIR FOOD STANDARDS COUNCIL, supra* note 316, at 14.

Wages have also skyrocketed over the life of the FFP. Before the FFP, growers engaged in routine wage theft, even beyond the cupping previously discussed.³⁵⁴ However, the Code of Conduct and the penny per pound premium have led to wage increases of 20-35%.³⁵⁵ With the penny per pound premium, the FFP has recovered over US\$270,000 in stolen wages and has ensured that 100% of all participating growers comply with effective and accurate timekeeping systems.³⁵⁶ In gross, the penny per pound has passed along nearly US\$30 million in wage bonuses to workers over the course of the program.³⁵⁷ The program generally distributes US\$3.5 million a year; even in 2017-18 when Hurricane Irma greatly affected tomato harvesting, the program distributed just under US\$3 million.³⁵⁸

Furthermore, the FFP and the CIW have served as direct influences on other WSR Agreements within the United States. In 2017, migrant dairy farm workers in Vermont created the Milk with Dignity Program (“MD”).³⁵⁹ The MD covers 100% of Ben & Jerry’s dairy supply chain, includes a Code of Conduct, and is governed by the Milk with Dignity Standards Council (“MDSC”).³⁶⁰ It came about after Vermont dairy farm workers met with members of the CIW and learned about the FFP.³⁶¹ While it is still too early to evaluate the practical successes and failures of the MD, the Network has labeled its creation an early success story.³⁶²

354. *See id.* at 22.

355. *See* Dias-Abey, *supra* note 322, at 201.

356. *See* FAIR FOOD STANDARDS COUNCIL, *supra* note 316, at 23.

357. *See id.*

358. *See id.*

359. *See About the Milk with Dignity Program*, MIGRANT JUST., <https://migrantjustice.net/about-the-milk-with-dignity-program> [<https://perma.cc/8NRF-2FLB>] (last visited Nov. 10, 2020).

360. *See id.*; Laura Frye-Levine et al., *Milk with Dignity: Worker-centered organizing for social responsibility*, UW-MADISON CTR. FOR INTEGRATED AGRIC. SYS. 1, 5 (2019), <https://www.cias.wisc.edu/wp-content/uploads/2019/07/MWD.pdf> [<https://perma.cc/N9LN-EUAT>].

361. *See* MIGRANT JUST., *supra* note 359.

362. *See, e.g., Milk with Dignity*, WORKER-DRIVEN SOC. RESP. NETWORK, <https://wsr-network.org/success-stories/> [<https://perma.cc/2YV3-P893>] (last visited Nov. 10, 2020).

B. The FFP Has Had Limited Success in Changing the Larger Landscape of Agricultural Work

Nevertheless, the success of the FFP does not mean that the agricultural industry has achieved perfect equity. The FFSC's 2017 Annual Report highlights what still needs to happen, even if these needs are outside the scope of the FFP. Importantly the benefits gained under the FFP have not spread beyond to firms not covered by the FFP.³⁶³ Thus, growers that are not covered by the FFP are free to abuse their workers as the workers have no means of protection.³⁶⁴ Furthermore, the FFP has been unable to reduce the market pressure that causes brands to seek produce from Mexico.³⁶⁵ Watchdog groups dedicated to sustainable agriculture have documented that brands that have not joined the FFP—such as Wendy's—have switched from Floridian growers to Mexican growers.³⁶⁶ Mexican farmworkers are subjected to abuses that are reminiscent of the abuse endured by Floridian growers in the 1990s, with the added pressures of Mexican state violence and organized crime.³⁶⁷ Mexican workers who have worked in both Mexican tomato fields and FFP tomato fields have noted the tangible difference that the presence of the FFP has on the working conditions,³⁶⁸ which demonstrates why market forces drive these brands from Florida to Mexico. The lack of worker protections in fields not covered by the FFP drive the market price of tomatoes down, which in turn increases the

363. See generally FAIR FOOD STANDARDS COUNCIL, *supra* note 221.

364. See *id.* at 24.

365. See *id.* at 22.

366. See Jimmy Sherfey, *Tomato Workers Call for Wendy's Boycott After the Chain Shifts its Sourcing to Mexico*, CIV. EATS (Mar. 17, 2016), <https://civileats.com/2016/03/17/tomato-workers-call-for-wendys-boycott-after-the-chain-shifts-its-sourcing-to-mexico/> [<https://perma.cc/735B-8ENZ>]. For more information about Civil Eats, see *About*, CIV. EATS, <https://civileats.com/about/> [<https://perma.cc/G4KL-4VPG>] (last visited Nov. 10, 2020).

367. See FAIR FOOD STANDARDS COUNCIL, *supra* note 221, at 22 (these similarities include threats of violence, withheld wages, and horrendous conditions). For more information on the labor conditions, see Richard Marosi, *Product of Mexico*, L.A. TIMES (Dec. 7, 2014), <https://graphics.latimes.com/product-of-mexico-camps/> [<https://perma.cc/KC9N-67ZC>] (describing a four part investigative report into Mexican farm conditions detailing slavery, violence, and corporate dominance).

368. See Sherfey, *supra* note 366.

pressure on domestic growers, even those covered by the FFP.³⁶⁹ While the FFP can stave off these pressures in Florida, it is unable—on its own—to change the fundamental market structure so that “it is more profitable to adhere to humane labor standards than to ignore them.”³⁷⁰

C. The Accord on Fire and Building Safety in Bangladesh Has Had Success in Improving Factory Safety

Similarly, the Accord can boast several positive outcomes, however, the factory owners still imperil the lives of Bangladeshi garment workers. Perhaps the Accord’s most important accomplishment is that a mass casualty disaster has not occurred since the implementation of the Accord.³⁷¹ The year of the Rana Plaza collapse, there were seventeen mass casualty events that resulted in at least five deaths and/or ten injured workers. Since the Accord, there has been no mass casualty event and the number of accidents that exceed this death and injury toll has stayed between two and five.³⁷² Fortunately, the number of yearly fatalities has never exceeded thirty. Through April 2018, the Accord inspected over 2,000 factories, with 1,631 of them remaining under supervision.³⁷³ 85% of supervised companies have remediated numerous individual safety concerns, with 42% completing 90% of their remediation action plans.³⁷⁴ However, only 8% of factories have completed all the repairs which their remediation plans require.³⁷⁵ Similarly, the Accord has suspended ninety-six companies from the program, cutting them out of the supply chain.³⁷⁶ Understanding that the Accord started with almost nothing, the sheer number of actions taken demonstrates that a framework is developing under the Accord.³⁷⁷ Furthermore, the Accord has trained 2.2 million workers in

369. See FAIR FOOD STANDARDS COUNCIL, *supra* note 221, at 22 (noting that increased production in Mexico resulting from poor labor conditions causes price pressure in Florida).

370. See *id.* at 24.

371. See BARRETT ET AL., *supra* note 225, at 15.

372. See *id.*

373. See *id.*

374. See *id.*

375. See *id.*

376. See *id.*

377. See BLASI & BAIR, *supra* note 257, at 16-17.

safety, so that the workers are aware of safety hazards and are able to report them.³⁷⁸

On these metrics, the Accord has achieved greater change than the Alliance. The Alliance has reported on the same types of statistics that the Accord has.³⁷⁹ After five and a half years, the Alliance covered just over 700 factories while actively supervising around 650 factories.³⁸⁰ It has trained about 1.5 million workers in workplace safety and about an additional 28,000 security guards in fire safety.³⁸¹ The Alliance self-reports a high remediation rate,³⁸² however, an independent assessment of the Alliance in 2015 revealed that these successes may not be as complete as presented.³⁸³ Furthermore, in some cases, the Alliance relied on reports generated by the Accord.³⁸⁴ They did so when both the Accord and the Alliance governed the same factory but the factory in question primarily sourced Accord members.³⁸⁵ The Accord never reciprocated this arrangement. Thus, this comingling of data makes it difficult to evaluate the Alliance independently of the Accord.

Unfortunately, it is unclear whether suppliers focused on structural issues, such as those that led to the Rana Plaza collapse. Most of the improvements made by the suppliers concerned electrical issues, then fire hazards, with structural improvements

378. *See id.*

379. For the Alliance's report see generally ALL. FOR BANGL. WORKER SAFETY, AN INDUSTRY TRANSFORMED: LEAVING A LEGACY OF SAFETY IN BANGLADESH'S GARMENT SECTOR (2018), <http://www.bangladeshworkersafety.org/files/Alliance%20Fifth%20Annual%20Report%202018.pdf> [<https://perma.cc/7AUT-53L2>]. For an example of the Accord's reports see generally ACCORD ON FIRE AND BUILDING SAFETY IN BANGLADESH, ANNUAL REPORT 2018 (2018), <https://bangladesh.wpengine.com/wp-content/uploads/2020/10/Accord-2018-Annual-Report.pdf> [<https://perma.cc/XK7N-ZEPM>].

380. *See id.* at 9.

381. *See id.*

382. *See* BARRETT ET AL., *supra* note 225, at 15.

383. *See generally* NAT'L FIRE PROT. ASS'N, BANGLADESH READY-MADE GARMENT INDUSTRY HIGH-LEVEL ASSESSMENT REPORT 15 (2016), <https://www.nfpa.org/-/media/Files/News-and-Research/Publications-and-media/NFPA-Journal/2015/November-December-2015/Bangladesh-NFPA-High-Level-Report.ashx?la=en> [<https://perma.cc/WWV9-YL6B>]. For example, as of 2015 the Alliance had yet to develop standardized criteria for "electrical, fire and life safety assessment deficiencies posing an imminent threat" to worker safety. *Id.* at 10.

384. *See id.* at 7.

385. *See id.*

being the least frequent.³⁸⁶ Over eighty percent of factories that had electrical cable and circuit breaker problems have remedied them.³⁸⁷ Ninety-six percent of factories that had locked gates have removed them, improving fire safety, but sixty percent of factories have yet to implement adequate fire detection and alarm systems.³⁸⁸ One third of relevant factories have failed to implement a load management program, thirty-nine percent have failed to update their blueprints with undocumented construction, and forty-four percent have not insured against severe wind damage. While the progress made is commendable, more costly reforms, such as structural safety reforms, are the most likely to be outstanding or behind schedule.³⁸⁹ Supporters of the Accord can accurately claim that they have instituted a formal system for reporting, monitoring and overseeing factory conditions, but they cannot say they have completely achieved what the Accord set out to do.

However, the Accord does have legal success that sets it apart from traditional CSRs. Under the Accord, an arbitration between two international unions and two undisclosed brands began.³⁹⁰ This represents a level of enforceability and legal repercussions beyond the traditional CSR model.³⁹¹ Pursuant to the terms of the Accord,³⁹² a tribunal was empaneled and made preliminary rulings.³⁹³ Two unions, IndustriALL and Uni Global Union charged two redacted signatories for breach of the Accord.³⁹⁴ Both charges accused the respective signatories of violating Articles 12 and 22 of the Accord such that they failed to require their suppliers to repair facilities within the required deadline

386. See BARRETT ET AL., *supra* note 225, at 15-16.

387. See *id.* at 16.

388. See *id.*

389. See BLASI & BAIR, *supra* note 257, at 17.

390. See Press Release, Permanent Court of Arbitration, Bangladesh Accord Arbitrations 1 (July 17, 2018), <https://pca-cpa.org/wp-content/uploads/sites/6/2018/07/20180717-Press-Release-No.-2-ENG.pdf> [<https://perma.cc/JCA9-ZAQ3>].

391. See *Comparison of Critical Elements of WSR vs. CSR and MSIs*, *supra* note 26, at 2.

392. See HENSLER & BLASI, *supra* note 262, at 2.

393. See Permanent Court of Arbitration, *supra* note 390, at 1-2.

394. See *IndustriALL Global Union v. [Redacted] and Uni Global Union v. [Redacted]*, Case No. 2016-36 and 37, PCA Case Repository, Procedural Order No. 2, at 7-9 (2017), <https://pcacases.com/web/sendAttach/2234> [<https://perma.cc/AS9A-WC4T>].

and failed to ensure that these repairs would be financially feasible for their suppliers.³⁹⁵ The tribunal ruled that the matter was appropriate for *de novo* arbitration after the steering committee tied 3-3 in evaluating the charges on the merits.³⁹⁶ Ultimately, the parties settled for undisclosed terms, but the Tribunal determined that the brands had fulfilled their terms of the settlement.³⁹⁷ It is a significant victory for the feasibility of the WSR Agreement model³⁹⁸ that the parties under the Accord could undergo arbitration and enforce a binding settlement. Under the traditional voluntarist CSR model,³⁹⁹ or even the Alliance, it is unlikely that the unions would have received an enforceable settlement that presumably ameliorated the charged problems.

D. The Accord Has Not Been Able to Ameliorate Other Problems Facing Bangladeshi Workers

Unfortunately, the secondary goal of the 2018 Transitions Accord seems unattainable. Actions of the Bangladeshi officials, including questioning and dismissing the Accord, suggest that the government will not have the capacity or will to take over at the end of the 2018 Accords.⁴⁰⁰ The government insists that it has a role to play in oversight but the Commerce Secretary has stated that the Accord supporters “are finished with their mission and they will go back to their countries.”⁴⁰¹ The leadership of the Accord, unsurprisingly, disagrees and intends to hold the government, brands and suppliers to the terms of the 2018 Accord.⁴⁰² Experts familiar with the outstanding costs surmise that the government would need to invest US\$1.2 billion to fix only current safety concerns, notwithstanding any future needs.⁴⁰³ It is unlikely that the Bangladeshi government is willing to make that financial commitment to protect workers.

395. *See id.*

396. *See id.* at 16-17.

397. *See* Permanent Court of Arbitration, *supra* note 390, at 2.

398. *See WSR Concept Brief: Worker-Defined Codes and Standards, supra* note 118, at 2.

399. *See Comparison of Critical Elements of WSR vs. CSR and MSIs, supra* note 26, at 2.

400. *See* BARRETT ET AL., *supra* note 225, at 17 (Quoting one Accord staff member saying, “A significant amount of work needs to be done . . . I don’t think there is a culture of safety in this country.”).

401. *See id.*

402. *See id.* at 24.

403. *See id.*

One major source of doubt of the Bangladeshi government's commitment to worker protection has been its reactions to assertions of worker power in other areas. In tandem with what some characterize as their determined efforts to "expel the Dhaka office of the Accord" thus "ending the Accord's locally-run inspection program and forcing the Accord to operate remotely," the government has cracked down on other concerted worker activity.⁴⁰⁴ For instance, in December of 2018, workers engaged in largely peaceful wage protests and strikes.⁴⁰⁵ These workers struck in response to a new living wage issued by the government that amounted to less than a quarter of the minimum living wage, as determined by a coalition of garment worker groups.⁴⁰⁶ The response from both factory owners and the government was hostile. Factory owners fired around 11,600 workers, many of whom police arrested for participating in the strikes.⁴⁰⁷ Police responded to wildcat strikes by "using 'water cannons, tear gas, and rubber bullets,' according to witnesses," in violation of Bangladeshi law.⁴⁰⁸ Furthermore, Bangladeshi police perpetrated a wave of indiscriminate violence against the neighborhoods where garment workers tended to live, shooting rubber bullets and gassing residents.⁴⁰⁹ Later, both the government and the factory owners engaged in targeted campaigns against activist workers, illegally firing them and prosecuting them on trumped up charges.⁴¹⁰

404. WORKER RTS. CONSORTIUM, *supra* note 314, at 30.

405. *See id.* at 3.

406. *See id.* at 7.

407. *See* Michelle Chen, *6 Years After the Rana Plaza Collapse, Are Garment Workers Any Safer?*, NATION (July 15, 2019), <https://www.thenation.com/article/rana-plaza-unions-world/> [<https://perma.cc/BP9M-5SRC>]; *see also* *Over 11,600 Bangladesh garment workers lose jobs and face repression*, INDUSTRIALL (Feb. 11, 2019), <http://www.industrialunion.org/over-11600-bangladesh-garment-workers-lose-jobs-and-face-repression> [<https://perma.cc/XCT3-FASS>].

408. *See* Chen, *supra* note 407; Ruma Paul, *Bangladesh garment manufacturers raise workers' pay amid further protests*, REUTERS (Jan. 13, 2019, 5:30 AM) <https://www.reuters.com/article/us-bangladesh-garments-protests/bangladesh-garment-manufacturers-raise-workers-pay-amid-further-protests-idUSKCN1P70BY> [<https://perma.cc/29ZR-8J8S>] (noting witnesses reported that police used violent tactics to suppress the strikes).

409. *See* WORKER RTS. CONSORTIUM, *supra* note 314, at 14.

410. *See generally id.* at 15-26 (detailing case studies of worker arrests, firings, and harassment generally).

Some may argue that an analysis of the Accord's successes and failures does not require a discussion of the recent violence and that including it unfairly tarnishes the record of the Accord. The Accord itself tries to limit its purpose merely to ensuring workers are free from fires, collapses and other accidents.⁴¹¹ However, the 2018 Accord expands the commitment to a "safe and sustainable" industry, "worker protection efforts" and the development of a strong Bangladeshi regulatory body.⁴¹² Thus, there is an implicit recognition that the Accord is a starting framework for workers' rights more generally. Therefore, it is worrying that after five years of the Accord, the government is still so hostile to worker power.⁴¹³ So, while worker power has undoubtedly increased, the government and the bosses subject new worker groups to termination, violence and expulsion from the community.⁴¹⁴ In this environment, it is hard to imagine that the Accord will be able to hand off its responsibilities to the Bangladeshi government in 2021. Like the FFP, the Accord seems to have—at best—limited success in reshaping the status of workers outside of the terms of the agreement. Worse, the self-imposed termination of the Accord jeopardizes the gains made. In contrast, while the Code of Conduct under the FFP is not a static document,⁴¹⁵ the program does not self-terminate. The expiration of 2018 Accord will be critical to developing generalizable WSR Agreement standards.

E. WSR Agreements Can Effectively Protect Workers' Rights, But the Struggle Continues

Even if WSR Agreements are not panaceas, the evidence demonstrates they are effective in protecting the rights of workers in a complex global supply chain.⁴¹⁶ Moreover, these Agreements have achieved successes greater than traditional forms of private regulation.⁴¹⁷ They have proven enforceable, even against giant

411. See ACCORD ON FIRE AND BUILDING SAFETY IN BANGLADESH, *supra* note 8, at 1.

412. ACCORD ON FIRE AND BUILDING SAFETY IN BANGLADESH: MAY 2018, *supra* note 279, at 1.

413. See Chen, *supra* note 407; Paul, *supra* note 408.

414. See BRUDNEY, *supra* note 40, at 364.

415. See *id.*

416. See *supra* Part III.

417. Compare *supra* notes 55-59 and accompanying text with *supra* Part III.

brands like Taco Bell.⁴¹⁸ They have governed huge portions of an industry, such as millions of Bangladeshi garment workers.⁴¹⁹ They have centered workers' demands and allowed for a level of precision unseen in CSRs and MSIs.⁴²⁰

Nevertheless, there are many outstanding issues regarding their creation, form, and implementation. It is unknown if a self-terminating WSR Agreement is destined to weaken over time and lose any gains it may have won. Similarly, the tradeoffs between settling for a self-terminating WSR Agreement and continuing to fight during initial negotiations to extract a permanent agreement remain. Furthermore, it is still undetermined what level of government hostility prevents a WSR Agreement from operating. Resolving these issues may reshape the fundamental principles of WSR Agreements. Currently, the Network's principles are silent on how long a WSR Agreement needs to stay operational, but the Bangladeshi garment industry post-Accord may alter what advocates consider "necessary" in a WSR Agreement.

Though the 2018 Accord is still operating, some of these questions have tentative answers. Presently, it seems that a self-terminating WSR Agreement has several negative implications. First, it signals to hostile governments and employers that they need only to comply with these new regulations for brief periods.⁴²¹ While this may work in instances where building safety is a one-and-done event, it is hard to imagine any company maintaining high levels of internal investment in building safety without the market pressures of WSR Agreements incentivizing them. Second, it is almost impossible to imagine companies maintaining wages or benefits guaranteed by a WSR Agreement after it terminates. One of the FFP's challenges is coping with market pressure coming from farms not covered by the FFP.⁴²² It is highly unlikely that a penny per pound-type program would

418. See *supra* note 175 and accompanying text.

419. See BLASI & BAIR, *supra* note 257, at 16.

420. See *What is WSR*, *supra* note 23 (noting that WSRs are distinct from other forms of corporate social responsibility because workers are the "driving force in the creation, monitoring, and enforcement" of these agreements).

421. See BARRETT ET AL., *supra* note 225, at 17 (quoting an opponent of the Accord saying after it expires its supporters "will go back to their countries").

422. See FAIR FOOD STANDARDS COUNCIL, *supra* note 221, at 20.

survive without a governing body such as the FFSC ensuring that the money is collected and distributed.

Yet, the Milk with Dignity initiative shows the diffuse benefits of a vibrant WSR Agreement. Although the Accord may not have found much success in changing the attitude of the Bangladeshi government, a perpetual Accord could still inspire WSRs for other issues within the garment industry, or even WSR agreements for similar issues in other industries. As of now, workers and worker organizations should be clear-eyed about the substantial costs of a self-terminating WSR Agreement and perhaps should avoid them unless what is truly needed is a short-term commitment from the supply chain. However, if the gains made by the Accord fall by the wayside after it expires—or if it is constantly being extended through a series of subsequent transition accords—it may be advisable for advocates to have a longer upfront struggle and secure a perpetual WSR Agreement.

Regardless of these potential shortcomings and diffuse benefits, it is undeniable that WSR Agreements like the FFP and the Accord have achieved concrete gains for previously unprotected workers. The success of the penny per pound program in the tomato fields and the level of investment into workplace safety in Bangladesh represent real change for workers,⁴²³ in stark contrast to the ephemeral promises of traditional CSRs and MSIs, like the promises on which Nike never delivered.⁴²⁴ Furthermore, the WSR Agreement format ensures that workers themselves are at the heart of the process, which means that they protect the needs and rights of workers in ways that CSRs and MSIs never can.⁴²⁵ Therefore, WSR Agreements should become a global norm when protecting workers' rights in supply chains.

V. CONCLUSION

Worker Driven Social Responsibility Agreements are a new tool in the fight for workers' rights and have proven effective. They recognize the need to hold the tops of the supply chains accountable for abuses made by suppliers lower down the

423. See *supra* Part IV.A; see also *supra* Part IV.C.

424. See *supra* notes 55-59 and accompanying text.

425. See *What is WSR*, *supra* note 23.

chain.⁴²⁶ They improve the voluntary models of private regulation like CSRs and MSIs by imposing enforceable contractual obligations. These contractual obligations revolutionize the notion of private regulation.⁴²⁷ WSR Agreements can expand the universe of protected labor rights, granting protections to workers who remain vulnerable under their respective labor law regime. Whether this vulnerability stems from a gap in the law or the unwillingness of the local government to enforce the law, WSR Agreements provide workers a way to independently hold their employers accountable. The accountability also can reach a level of specificity often not found in national labor laws and never found in CSRs or MSIs.⁴²⁸ Furthermore, successful WSR Agreements build community within the confines of the agreement. As workers see the effects of these agreements in their workplace, they become more confident in their ability to bring complaints.⁴²⁹

The Fair Food Program and the Accord represent impressive models of WSR Agreements. The FFP has transformed the covered tomato fields of Florida from dens of slavery to paragons of safety. Under the Program, wages have soared, and violence and sexual harassment have plummeted. Within a few years of operation, the FFP expanded from Florida to Georgia, South Carolina and Virginia and to other products as well.⁴³⁰ While the FFP may not be able to stop the global shifts in market pressure, it has relieved workers excluded from United States labor law⁴³¹ from horrid conditions, granted them some power in the workplace and most importantly, given over 35,000 farmworkers⁴³² a voice with which they have demanded to be heard. Similarly, across the world, the Accord has helped make thousands of factories safer for millions of workers. Since the Accord started, the number of workplace fatalities in covered Bangladeshi garment factories has plummeted. The Accord has extracted major financial commitments from the brands at the

426. *See id.*

427. *See id.*

428. *See id.*

429. *See* Dias-Abey, *supra* note 322, at 203.

430. *See* BRUDNEY, *supra* note 40, at 370 (noting that the FFP has expanded to bell pepper farms in other states).

431. *See supra* note 164 and accompanying text.

432. *See supra* note 223 and accompanying text.

tops of the supply chains and invested in promoting workplace safety. Furthermore, the Accord has brought worker committees on health and safety—a potential precursor to formally organized labor—to firms which previously had no workplace democracy. While the future of the Accord is in doubt and the larger structural reforms remain delayed, the presence of the Accord has undoubtedly made the workday safer for a countless number of workers. By embracing these principles and following these examples, workers across the world can begin to use the power of the market to hold their employers accountable for workplace abuses, regardless of the existing labor laws.

The struggle for workers' rights is ongoing. The past century has seen dramatic changes in the nature of work. Currently, complex, global supply chains are sources of worker exploitation. The WSR Agreement model offers something to workers in a supply chain that CSRs and MSIs have not: the ability to hold those with power accountable for their abuses and the ability to use their own power as workers to guarantee their rights. There is hope that as more supply chains adopt WSR Agreements, there will be justice in the workplace.

