ORCHESTRATION FROM BELOW? TRADE UNIONS IN THE GLOBAL SOUTH, TRANSNATIONAL BUSINESS AND EFFORTS TO ORCHESTRATE CONTINUOUS IMPROVEMENT IN NON-STATE REGULATORY INITIATIVES

SARAH RENNIE,* TIM CONNOR,** ANNIE DELANEY*** AND SHELLEY MARSHALL****

I INTRODUCTION

This article is centrally concerned with the *mechanisms and processes* through which human rights in transnational business practices can be respected and remedied when breached, with a particular focus on workers' rights in global garment supply chains. The United Nations ('UN') Guiding Principles on Business and Human Rights ('UNGPs')[1] represent a high-level attempt to provide a normative framework for these issues. The UNGPs were adopted by the UN Human Rights Council in 2011, having been drafted by Professor John Ruggie and his team during Ruggie's service as Special Representative of the UN Secretary-General on the issue of business and human rights. Whereas most UN instruments are solely concerned with the responsibilities of nation states, the UNGPs propose that non-state, non-judicial grievance mechanisms and other private regulatory initiatives have an important role to play in augmenting and complementing state-based laws and judicial processes. The adoption of the UNGPs has thus added fuel to ongoing debates concerning the role and effectiveness of private regulatory initiatives and the relationship between such initiatives and states' responsibility to protect human rights. This debate is relatively polarised, with some arguing that private regulatory initiatives are

* Associate, Centre for Indonesian Law and Islamic Studies, Melbourne Law School, University of Melbourne.

** Lecturer, Newcastle Law School, University of Newcastle.

*** Senior Lecturer, RMIT School of Management & Centre for People, Organisation and Work, College of Business, RMIT University.

**** Vice Chancellor's Senior Research Fellow, Graduate School of Business and Law, RMIT University.

The authors wish to thank the three anonymous reviewers for their very constructive comments and the UNSW Law Journal's editing team for their excellent assistance. All translations of Indonesian sources have been made by the authors except where otherwise specified.

1 John Ruggie, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, UN Doc A/HRC/17/31 (21 March 2011) annex ('*Guiding Principles on Business and Human Rights*').

counterproductive and others, including Ruggie himself,[2] arguing that any effective strategy to enhance governance of the human rights obligations of business must necessarily include efforts to improve private regulatory initiatives.

One of the biggest gaps in the debate is the lack of detailed empirical research concerning the ways in which communities and workers, particularly in the Global South, are engaging with private regulatory initiatives as part of their efforts to persuade businesses to respect their rights. This article makes an important contribution by examining a case study of efforts by Indonesian trade unions representing workers producing athletic clothing and footwear (hereafter 'sportswear') to claim the right to freedom of association.[3] Our case study is unusual in that sportswear production in Indonesia has been the target of a long-running global anti-sweatshop campaign. As a result, some of the local trade unions have built cooperative, networked relationships with international civil society organisations, which have assisted them in making claims for workers' rights. This has included persuading several global brand-owning companies (hereafter 'brands') to work with the unions to establish a local multi-stakeholder initiative focused on trade union rights. The case study helps to shed light on some of the key variables that affect the extent to which private non-state regulatory initiatives usefully complement or augment state regulation, including factors such as geographical reach, procedural scaffolding and, importantly, governance and control.

The exposition in this article is undertaken in a number of steps. In Part II we discuss the debate concerning the role and potential of private mechanisms in promoting business and human rights. Ruggie has not argued for the primacy of private mechanisms over state mechanisms, but rather that such mechanisms can play an important role, given better coordination and alignment.[4] Ruggie believes that intergovernmental organisations ('IGOs') and other actors can 'orchestrate' (ie, create and direct synergies between) various governance pressures (including state regulatory processes, civil society campaigns and multi-stakeholder initiatives) in a manner that facilitates continuous improvement in (and greater coherence between) state and private initiatives. Ruggie explicitly aligns his approach with transnational new governance theorists such as Abbott and Snidal, who suggest a variety of means by which states and IGOs could orchestrate this kind of continuous improvement, including by using state procurement policies

2 See, eg, John Gerard Ruggie, *Just Business: Multinational Corporations and Human Rights* (W W Norton, 2013) 77–8.

3 The case study presented in this article is part of a much larger research project considering the effectiveness of non-state non-judicial grievance mechanisms in addressing business-related human rights claims. This project was funded through the Australian Research Council's Linkage Grant Scheme and involved in-kind and financial contributions from several non-profit civil society organisations.

4 See, eg, John Gerard Ruggie, 'Global Governance and "New Governance Theory": Lessons from Business and Human Rights' (2014) 20 *Global Governance* 5.

to reward good practice among private initiatives and by requiring companies to report on their social and environmental impact.[5]

In Part II(B) we discuss literature that is critical of this view. We provide a framework for our analysis of this literature by noting that, at least in the business and human rights space, non-state regulatory mechanisms can be distinguished based on the degree to which control of the development and implementation of the mechanism is dominated by corporations ('corporate-controlled') or shared with civil society organisations with an interest in seeing the relevant rights protected ('joint-controlled'). Further, the extent to which non-state regulatory initiatives are corporate-controlled or joint-controlled can be considered at a variety of scales. These include: the extent to which organisations representing the interests of rights claimants are able to influence the initiative's standards, institutional design and ongoing governance; the extent to which the initiative incorporates accessible and credible grievance mechanisms into its processes for investigating compliance; and the extent to which civil society organisations in the Global South (in addition to those in the Global North) are able to influence the design and implementation of the mechanism. In addition, the extent to which the initiative focuses on 'process rights' – such as trade union rights and the right to free, prior and informed consent – is also important, since these rights have the potential to increase human rights claimants' influence and control over the way business activity is conducted. It is important to note that, at each of these scales, the dominant model for non-state regulation tends toward the corporate-controlled end of the spectrum. This dominant model involves companies determining which standards they will seek to uphold and then arranging for regular corporate-controlled 'social audits' to determine whether those standards are being upheld in particular production locations.

Critics of 'orchestration' proposals argue that this dominance of corporate-controlled mechanisms has meant that the information that informs views about the efficacy of private regulatory mechanisms is usually deeply flawed. There is considerable evidence that social audits generally under-report violations of key human rights and hence create a misleading impression as to the extent to which performance measurement based regulatory processes are improving compliance. This is important because if states, IGOs or other actors (such as civil society movements) are to orchestrate improvements in private initiatives then they need reliable information as to which initiatives are proving effective and which are not. In the absence of credible information, attempts to orchestrate improvements in private regulatory initiatives could easily generate negative outcomes, for example by rewarding companies whose suppliers are becoming increasingly sophisticated in concealing human rights abuses in their factories from social auditors.

These flaws have led some to argue for the benefits of joint-controlled mechanisms, which involve and promote higher degrees of influence and control

5 Ibid 10–11, citing Kenneth W Abbott and Duncan Snidal, 'Strengthening International Regulation through Transnational New Governance: Overcoming the Orchestration Deficit' (2009) 42 *Vanderbilt Journal of Transnational Law* 501.

by affected rights claimants and organisations that represent their interests. For example, in the field of workers' rights, a number of scholars advocate non-state regulatory mechanisms that prioritise trade union rights, such as the rights to freedom of association and collective bargaining, because these rights have a number of compounding benefits. Particularly relevant to the debate regarding orchestration, the free exercise of trade union rights can facilitate procedures by which workers can communicate information about rights abuses in their factories via their representatives, with less fear of reprisal. That is, at least in theory, if attempts to orchestrate continuous improvement in non-state regulatory initiatives focused on promoting initiatives that genuinely enhance the influence of rights claimants and their representatives, then this would help overcome the information deficit that currently poses a significant challenge to effective orchestration.

In Part III we examine a case study of a joint-controlled mechanism that has a strong focus on procedures for local stakeholder participation and influence (joint-control) at each of the scales mentioned above. The Freedom of Association Protocol ('FOA Protocol')[6] was developed as an attempt to enhance respect for freedom of association by workers producing sportswear and athletic footwear in Indonesia for well-known brands, including Nike and Adidas. The case study illustrates how workers and community members who wish to influence the practices of transnational corporations generally face significant practical barriers, ranging from a lack of information and resources to fear of discrimination, harassment, intimidation and even violence. The study demonstrates how, in practice, increasing the control of non-business stakeholders such as workers and community members requires more than just access to a 'seat at the table' in negotiating standards, or the ability to make a complaint and participate in a process to have that complaint considered. Joint control requires businesses to agree to steps to enable meaningful participation by representatives of the workers/community members impacted by their operations. In the context of the FOA Protocol, by drawing on leverage arising from global anti-sweatshop campaigning by allied organisations in the Global North, the unions were able to negotiate a set of standards that directly address some of the local impediments to freedom of association in Indonesia. Although implementation of the Protocol has been imperfect, it has increased the space for democratic trade unions to operate in a considerable number of factories, and this is remarkable in a context in which non-state regulatory initiatives usually struggle to provide evidence that they have enhanced respect for trade union rights.

In Part IV we reflect on the implications of those findings for the contention that global civil society organisations, states and/or IGOs can and should orchestrate continuous improvement in private regulatory initiatives in the business and human rights space. While we remain agnostic as to how seriously and extensively such orchestration will be pursued, our field research suggests

6 'Freedom of Association Protocol' (English Translation, 7 June 2011) <http://www.play-fair.org/media/wp-content/uploads/FOA-Protocol_7-June-2011_English-translation1.pdf>.

that any attempts at orchestration will have more chance of success if they: prioritise procedural rights such as freedom of association; motivate global companies to invest in rewarding suppliers that respect human rights; generate continuous improvement in state regulation as well as private regulation; and provide clear and consistent guidance to transnational corporations regarding their responsibilities to investigate allegations of human rights violations, combined with pressure to conduct those investigations in a credible and rigorous manner. In particular, our field research indicates that, given the opportunity and sufficient sources of leverage, local representatives of workers and affected communities can use their knowledge of the local context and their connection with rights claimants to make key contributions to any orchestration process.

II THE DEBATE AS TO THE ROLE OF PRIVATE MECHANISMS IN GOVERNING THE HUMAN RIGHTS IMPACT OF TRANSNATIONAL BUSINESS

The UNGPs consist of three pillars, which will be familiar to most readers. The first pillar requires that states protect against human rights abuses within their territory and/or jurisdiction by third parties, including by business enterprises. The second pillar states that business enterprises are not only expected to 'avoid infringing on the human rights of others', they should also '[s]eek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts'.[7] The third pillar emphasises the need for greater access to remedy by victims of corporate-related abuse and provides a role for both judicial and non-judicial grievance mechanisms. In so far as the latter is concerned, the UNGPs outline seven principles that should underpin any non-judicial grievance mechanism: legitimacy, accessibility, predictability, equitability, transparency, rights-compatibility and continuous improvement. These principles are expected to apply to non-state non-judicial mechanisms (such as those provided by businesses and multi-stakeholder initiatives) as well as non-judicial mechanisms administered by the state. Those designing and administering these grievance mechanisms are also expected to engage in dialogue with affected groups.[8]

A Ruggie's Rationale for Including Private Mechanisms in the UNGPs: The Concept of Orchestration

Ruggie's decision to include private mechanisms in the UNGPs is controversial. Many human rights organisations and scholars are highly critical of such mechanisms, arguing that they represent an unwelcome diversion from the need to press governments to take responsibility for protecting human rights.

7 *Guiding Principles on Business and Human Rights*, UN Doc A/HRC/17/31, annex Guiding Principles 11, 13.

8 Ibid 22–7.

According to this perspective, private regulatory initiatives conceal and legitimise exploitative and anti-social practices and assist corporations to undermine campaigns for legally binding state-sanctioned regulation.[9] Although Ruggie is aware of these perspectives, he does not share them. Ruggie acknowledges that many private regulatory initiatives in the business and human rights field have significant shortcomings in relation to their design or structural features and notes that the empirical literature as to the effectiveness of private business and human rights mechanisms is 'spotty'.[10] Despite acknowledging these limitations of private voluntary initiatives, Ruggie is sufficiently enthused by their rapidly expanding scope and reach to argue they must 'provide an essential building block in any overall strategy' for improving governance of the relationship between business and human rights.[11]

In a 2014 article, Ruggie notes that his views on the potential of private initiatives are in line with those of 'transnational new governance' theorists who argue that both individual states and IGOs have proved themselves unable to unilaterally impose solutions on many complex international problems.[12] These theorists argue that the best way to address this governance deficit is to increase the coherence between state regulatory strategies and various other governing influences. Hence, through his work on the UNGPs, Ruggie aimed to improve coherence in the goals and operations of three 'governance systems': pressure from civil society employing mechanisms such as advocacy campaigns; private systems of corporate governance; and laws and other regulatory processes implemented by states and IGOs. In his own words, Ruggie sought to contribute to

> a new regulatory dynamic under which these governance systems become better aligned in relation to business and human rights; add distinct value; compensate for one another's weaknesses; and play mutually reinforcing roles – out of which cumulative change can evolve.[13]

In the same article, Ruggie specifically aligns his work on the UNGPs with Abbott and Snidal's advocacy of regulatory orchestration.[14] In a 2009 article, Abbott and Snidal contend that IGOs and states can play a role in orchestrating improvements in (and convergence among) global private regulatory initiatives. Abbott and Snidal suggest several means by which this could be achieved. For example, they suggest that states could mandate operational and monitoring procedures for any private initiatives based within their jurisdiction and could require national firms to report on the conditions under which their products are

9 See Ronnie D Lipschutz, 'Sweating It Out: NGO Campaigns and Trade Union Empowerment' (2004) 14 *Development in Practice* 197; Ronnie D Lipschutz and James K Rowe, *Globalization, Governmentality, and Global Politics: Regulation for the Rest of Us?* (Routledge, 2005); David L Owen et al, 'The New Social Audits: Accountability, Managerial Capture or the Agenda of Social Champions?' (2000) 9 *European Accounting Review* 81; Robert B Reich, *Supercapitalism: The Transformation of Business, Democracy, and Everyday Life* (Alfred A Knopf, 2007).

10 Ruggie, *Just Business*, above n 2, 71.

11 Ibid 77–8.

12 Ruggie, 'Global Governance', above n 4, 5.

13 Ibid 9.

14 Ibid 10–11, citing Abbott and Snidal, above n 5.

made so that ethically-minded consumers and investors can reward progressive companies.[15] In later articles, Abbott, Snidal and their co-authors further develop their theory of orchestration to give other actors a role as 'orchestrators', in addition to states and IGOs. For example, in a 2014 article Abbott and Hale describe the emergence of 'global solution networks' that enable 'companies, cities, civil society groups, individuals, and other actors to join traditional organisations in addressing global problems'.[16]

In so far as labour rights in global supply chains are concerned, Abbott and Snidal's orchestration proposal is not new. As they readily acknowledge,[17] in this context much of what they are proposing is very similar to Sabel, O'Rourke and Fung's earlier 'ratcheting labour standards' ('RLS') proposal.[18] In this article we will refer to any proposals (or enacted schemes) involving a variety of actors working together in a concerted and systematic way to continuously improve the effectiveness of private regulatory initiatives in the business and human rights space as examples of attempts to effect regulatory orchestration.[19]

B Criticism of Orchestration: Effective Orchestration Requires Credible Information

While a number of scholars have questioned the viability of orchestration proposals, in this article we are primarily concerned with one of those criticisms.[20] Locke, Amengual and Mangla point out that if states, IGOs and other actors are to effectively orchestrate improvements in private initiatives, then they need reliable information as to which initiatives are proving effective.[21] They also argue that, at least insofar as private labour rights initiatives in global supply chains are concerned, the available information is not reliable.[22] In the following sections we examine this argument in detail. Before doing so we provide a framework for our analysis of the argument by discussing an important variable

15 Abbott and Snidal, above n 5, 566–7.

16 Kenneth W Abbott and Thomas Hale, 'Orchestrating Global Solutions Networks: A Guide for Organizational Entrepreneurs' (2014) 9(1/2) *Innovations: Technology, Governance, Globalization* 195, 195.

17 Abbott and Snidal, above n 5, 577.

18 Charles Sabel, Dara O'Rourke and Archon Fung, 'Ratcheting Labor Standards: Regulation for Continuous Improvement in the Global Workplace' (Discussion Paper No 0011, Social Protection Unit, Human Development Network, The World Bank, May 2000).

19 Not all case studies in the orchestration literature involve attempts to effect continuous improvement in existing schemes; some focus on the process by which the establishment of a new regulatory initiative has been 'orchestrated'. Although this article discusses the process by which the FOA Protocol was established and how it has evolved, the main focus of the article is on orchestration that aims to achieve continuous improvement, since it is this kind of orchestration that corresponds with Ruggie's aspirations for the UNGPs.

20 For additional examples of some of the arguments made by scholars who question the viability of orchestration approaches in global supply chains see, eg, Richard Locke, Matthew Amengual and Akshay Mangla, 'Virtue out of Necessity? Compliance, Commitment, and the Improvement of Labor Conditions in Global Supply Chains' (2009) 37 *Politics & Society* 319. See also the responses of various scholars to the 'ratcheting labour standards' proposal: Joshua Cohen and Joel Rogers (eds), *Can We Put an End to Sweatshops? A New Democracy Forum on Raising Global Labor Standards* (Beacon Press, 2001).

21 Locke, Amengual and Mangla, above n 20, 324.

22 Ibid 327–34.

by which non-state regulatory mechanisms in this domain can be distinguished: the extent to which they are dominated by corporate interests or are jointly controlled by (and focus on processes that give more power to) affected stakeholders and their representatives.

1 Distinguishing Corporate-Controlled and Joint-Controlled Mechanisms

To the extent that global companies claim to be exercising due diligence in relation to the human rights practices of their suppliers, the great majority of them primarily do so by implementing a corporate-controlled, performance standards approach. By this we mean processes whereby a company or group of companies create a code of conduct, and commit to monitoring and improving compliance with the standards set out in that code, in their own operations and, in some cases, in the operations of their suppliers. Generally the content of these codes of conduct is determined by the companies themselves and can be viewed as an example of managerial prerogative. The business may consult stakeholders in the formation of its code, but worker or civil society stakeholders – particularly those in the Global South – rarely have the opportunity to shape, monitor or enforce the codes. These mechanisms do not increase the accountability of the company to stakeholders in an active sense, although the outcome of the implementation of such codes by companies may further the interests of stakeholders.

Such mechanisms can be contrasted with joint-controlled non-state mechanisms. Here participating corporations do not unilaterally control the mechanism, but rather share control with civil society organisations representing the interests of stakeholders whose rights are impacted by the companies' business practices. Rather than constituting discrete categories, the extent to which initiatives are company-controlled or joint-controlled is more usefully thought of as a continuum, or perhaps a group of interrelated continua, since the extent of stakeholder influence over non-state regulatory initiatives can be considered at a number of different scales.

At the scale of the mechanism as a whole, there is the question of the extent of stakeholder participation and influence over the initiative's institutional design and ongoing development, including the initial design of the initiative's standards, structures and processes, and its ongoing governance. At one extreme of this continuum, there are mechanisms whose design and ongoing governance is controlled by participating corporations. At the other extreme lies a private regulatory initiative such as the Worker Rights Consortium ('WRC'), for which corporations have no control over either the standards to be complied with or the processes of investigation.[23] In between these two ends of the continuum sit a range of multi-stakeholder mechanisms that are (to a greater or lesser extent) joint-controlled, in the sense that corporations and civil society representatives have varying degrees of control over decisions regarding the mechanisms' institutional design and ongoing governance.

23 The WRC is considered in more detail in Parts II(B)(3) and III(D)(2) of this article.

A second scale at which the extent of stakeholders' participation and influence can be assessed is in terms of the processes by which compliance with a private regulatory initiative's standards are investigated and shortcomings are addressed. Whereas corporate-controlled social audits represent the primary means of monitoring compliance with corporate codes of conduct, some non-state regulatory initiatives either supplement or replace social audits with grievance mechanisms. Such mechanisms usually set out a grievance resolution process (which may include investigation, mediation or adjudication) that, in theory at least, gives affected stakeholders and their representatives and/or allies an opportunity to influence whether particular rights violations are investigated and how they are resolved. However, as discussed later in this article, the extent to which aggrieved communities or individuals are able to meaningfully participate in a grievance process depends on the institutional scaffolding of individual mechanisms and tends to be highly variable.

A third scale at which this issue of stakeholder participation and influence can be considered has to do with the geography of civil society participation in non-state mechanisms. To the extent that civil society organisations are involved in the design and ongoing implementation of non-state human rights initiatives, these organisations tend to be based in countries in the Global North, more proximate to the corporate headquarters and consumer markets – typically in the US or Europe – and remote from those locations in the Global South in which much of the production and operations take place. This scale is particularly relevant to the case study in this article, which describes and analyses an unusual initiative in which workers' organisations in Indonesia have had a significant influence over the design and ongoing governance of a particular non-state initiative regulating trade union rights in Indonesian factories in global supply chains.

Finally, closely related to the question of whether the mechanism itself is joint-controlled is the question of the extent to which the mechanism focuses on 'process rights', by which we mean rights that are designed to give human rights claimants and their representatives more influence over how the relevant business activity is conducted. For example, trade union rights, such as the rights to freedom of association and collective bargaining, are not only human rights in themselves but also constitute a means by which workers' other rights and interests can be pursued. Similarly, the right to free, prior, informed consent (to provide a non-labour example) can be understood as a process that generally facilitates a degree of negotiation and joint-control between corporate project proponents and local community stakeholders (often in the Global South), as illustrated by the growing body of locally negotiated community development agreements in the global resource sector. Like freedom of association, the realisation of free, prior, informed consent is dependent on the fulfilment of other process rights, such as the right to access clear and accurate information about the proposed development; though, compared with the labour context, there is

less jurisprudence in relation to process rights in indigenous human rights law.[24] The extent to which non-state mechanisms focus their efforts on upholding process rights (rather than measuring corporate performance in relation to a set of fixed standards) is thus an important aspect of the extent to which the mechanism gives more control or influence to human rights claimants and their representatives.

Of course, at each of these different scales, for stakeholders to have genuine influence and shared control requires more than just a 'seat at the table' at which non-state regulatory initiatives are designed and governed, or particular grievances are resolved. If the participating organisations representing affected stakeholders lack sufficient leverage in relation to the participating companies, the stakeholders may be forced to either accept standards and institutional arrangements that they regard as sub-optimal, or else withdraw from the initiative.

2 Evidence as to the (Un)reliability of Information Generated by Corporate-Controlled, Performance Measurement-Based Mechanisms

It is perhaps because civil society organisations generally have very limited leverage in relation to global corporations that, at each of these scales, the dominant model for non-state regulation in the business and human rights space tends toward the corporate-controlled end of the spectrum. In global apparel supply chains, the primary method through which monitoring is implemented is through social audits of suppliers by commercial social auditors, although some global companies (including Nike and Adidas) have their own in-house compliance teams. Some global companies have also joined with civil society organisations to form non-state multi-stakeholder initiatives ('MSIs'), such as the Fair Labor Association ('FLA') in the US or the Ethical Trading Initiative ('ETI') in the UK. Such initiatives have their own codes of conduct, to which all member companies must commit.[25] These MSIs provide advice to member companies as to how to improve their rights compliance efforts. Some also evaluate member companies' performance and (although it rarely occurs in practice) companies can be expelled from some MSIs for failing to make adequate progress.[26] In 2005 it was estimated that between 20 000 and 30 000

24 However, there is an increasing body of guidance from the civil society sector, and in some limited legal contexts. For example, in the context of native title holder procedural rights under the *Native Title Act 1993* (Cth), the Federal Court of Australia and National Native Title Tribunal have detailed a number of specific procedural requirements that arise from the requirement to negotiate in good faith and must be respected by a grantee or government party when dealing with native title holders. See, eg, *Collins v Nguddaboolgan Native Title Aboriginal Corporation RNTBC* [2015] NNTTA 13; *Rusa Resources (Australia) Pty Ltd v IS (deceased)* [2015] NNTTA 15.

25 See, eg, Ethical Trading Initiative, 'The ETI Base Code' (1 April 2014); Fair Labor Association, 'FLA Workplace Code of Conduct and Compliance Benchmarks' (5 October 2011); Fair Wear Foundation, 'FWF Code of Labour Practices' (2011).

26 For example, the ETI rules state that where a member does not meet its membership obligations, disciplinary action may be evoked and failure to improve its performance could lead ultimately to expulsion: Ethical Trading Initiative, 'Procedures for Enforcing Membership Obligations: Corporate Members' (Disciplinary Procedure, September 2009) 7 [30]–[33].

garment factories were being investigated by private social auditors each year,[27] and in 2012 Anner indicated that garment and electronic factories around the globe were often more likely to be inspected by commercial social auditors than by government labour inspectors.[28] This highlights the key role that private performance measurement-based mechanisms have come to play in the regulation of labour rights in global supply chains.

Despite Ruggie's comment regarding the 'spotty' nature of the empirical research,[29] at least in so far as private labour rights auditing is concerned, there have been enough significantly scaled studies to justify reasonably confident generalisations. In 2009, for instance, Locke, Amengual and Mangla reported on extensive field research into the labour rights auditing program of a company they described as ABC, a global apparel company and FLA member. Their field research included almost 300 interviews and involved tracking ABC auditors as they conducted factory inspections in five different countries. They noted that ABC was regarded by industry and multi-stakeholder initiatives as a leader in labour rights compliance programs.[30] Nonetheless, they reported that in ABC supplier factories in Asia, Latin America, Europe, and the Middle East there were widespread and ongoing violations of the FLA code provisions in relation to health and safety, overtime and work hours, and freedom of association provisions.[31] Based on this research and on their review of the existing literature Locke, Amengual and Mangla concluded that any labour rights improvements resulting from audit-based programs tend to be limited in scope and not always sustained.[32]

Locke, Amengual and Mangla's findings match those of other similarly scaled studies. In 2007 Barrientos and Smith reported on a major research project into the effectiveness of the labour rights programs of ETI member companies, involving interviews with 411 workers in South Africa, India, Costa Rica and Vietnam, as well as interviews with 80 other key informants.[33] They reported that ETI member companies' labour compliance programs had resulted in no significant improvement in compliance with ETI code provisions regarding harsh treatment, regular employment, discrimination, freedom of association or living wages.[34] Workers in some countries did report improvements in health and safety conditions, greater compliance with ETI limits on excessive work hours and improved compliance with local minimum wage laws (but not the ETI code's

27 Duncan Pruett et al, 'Looking for a Quick Fix: How Weak Social Auditing Is Keeping Workers in Sweatshops' (Report, Clean Clothes Campaign, 2005) 58–9.

28 Mark Anner, 'Corporate Social Responsibility and Freedom of Association Rights: The Precarious Quest for Legitimacy and Control in Global Supply Chains' (2012) 40 *Politics & Society* 609, 610.

29 Ruggie, *Just Business*, above n 2, 71.

30 Locke, Amengual and Mangla, above n 20, 329.

31 Ibid 331.

32 Ibid 319, 329–36.

33 Stephanie Barrientos and Sally Smith, 'Do Workers Benefit from Ethical Trade? Assessing Codes of Labour Practice in Global Production Systems' (2007) 28 *Third World Quarterly* 713, 718.

34 Ibid 721. Note that in relation to some of these standards workers reported 'minor' improvements, that is, improvements that 'were reported at only a few sites or had minimal impacts on workers'.

'living wage' requirement).[35] Barrientos and Smith concluded that '[s]ocial auditing is able to identify visible aspects of codes, such as health and safety provisions and wages, but is less able to identify less visible or more deeply embedded aspects relating to workers' rights and discrimination'.[36] They noted that their findings supported 'the rising tide of criticism of social auditing for its failure to ensure sustained improvements in working conditions'.[37] Esbenshade's review of more than 60 reports, articles and commentaries on the monitoring of labour codes was also very critical of private social auditing,[38] and similar findings have been documented in a suite of civil society reports.[39]

These various studies all came to very similar conclusions as to why private social auditing has resulted in relatively limited improvements; why those improvements that have occurred have sometimes been temporary; and why the improvements that have occurred relate to some rights and not others. One problem is that social auditors generally operate under significant resource constraints: they rarely visit each workplace more than once per year and audits of each workplace generally take from half a day to one day.[40] This leads to a bias toward easier to identify 'visible' issues: locked fire exits, inadequate ventilation, a lack of safety equipment. Other important human rights considerations, such as whether workers are free to organise or whether they are frequently subjected to discrimination, harassment or abuse, are given far less attention.[41]

A second problem is that suppliers commonly engage in social audit fraud: keeping double sets of books, only providing workers with safety gear on audit days, training workers to lie, and threatening workers that they will lose their jobs if they tell the truth.[42] In so far as 'visible' issues are concerned auditors can overcome this fraud by conducting surprise audits and some global companies have made such visits a characteristic of their audit programs. Persuading

35 Ibid.

36 Ibid 725.

37 Ibid.

38 Jill Esbenshade, 'Codes of Conduct: Challenges and Opportunities for Workers' Rights' (2004) 31(3) *Social Justice* 40, 49. See also Jill Esbenshade, *Monitoring Sweatshops: Workers, Consumers and the Global Apparel Industry* (Temple University Press, 2004).

39 Kate Raworth, 'Trading Away Our Rights: Women Working in Global Supply Chains' (Report, Oxfam International, 2004); Pruett et al, above n 27; Corinne Adam, François Beaujolin and Martine Combermale, 'Codes of Conduct Implementation and Monitoring in the Garment Industry Supply Chain: Summary Evaluation of the Field at the 10-year Mark' (Fondation des droits de l'Homme au travail, 2005), cited by Pruett et al, above n 27, 27, 46, 62. See also Ethical Trading Initiative, 'Getting Smarter at Auditing: Tackling the Growing Crisis in Ethical Trade Auditing' (Report from ETI members' meeting, ETI Forum, 16 November 2006).

40 Locke, Amengual and Mangla, above n 20, 332; Raworth, above n 39; Pruett et al, above n 27.

41 Barrientos and Smith, above n 33. This is particularly so when auditors commonly have little, if any, training or expertise in relation to the latter rights: Locke, Amengual and Mangla, above n 20, 333–4. See also Joshua Samuel Brown, 'Confessions of a Sweatshop Inspector', *Albion Monitor* (online), 1 September 2001 <http://www.albionmonitor.com/0108a/sweatshopinspect.html>.

42 Barrientos and Smith, above n 33, 725; Locke, Amengual and Mangla, above n 20, 327–8, 332; Raworth, above n 39; Pruett et al, above n 27. See also Adam, Beaujolin and Combermale, above n 39; Dexter Roberts and Pete Engardio, 'Secrets, Lies, and Sweatshops', *Bloomberg Businessweek* (online), 27 November 2006 <https://www.bloomberg.com/news/articles/2006-11-26/secrets-lies-and-sweatshops>; Ethical Trading Initiative, 'Getting Smarter at Auditing', above n 39, 8; Ethical Trading Initiative, 'ETI Perspective 2020: A Five Year Strategy' (Organisational Strategy, 7 December 2015) 9.

workers to report violations of less visible issues is much more difficult. The research indicates that even when social auditors make an effort to interview workers confidentially (and this is not the norm) workers in labour-intensive industries are commonly fearful of reporting violations.[43]

A third problem is that even where auditors do identify labour rights violations, those violations are not necessarily corrected or else are corrected in a temporary rather than a sustained manner. Numerous studies have identified that a key reason for this is the conflicting messages that buying companies send their suppliers: when a brand's compliance department asks a supplier to make potentially expensive or time consuming changes to its production processes in order to comply with a labour rights code, the same brand's buying department is commonly asking the same supplier to reduce its prices, or increase the speed, flexibility and/or quality of production. Suppliers have usually learned from experience that brands' buying departments have more power than their compliance departments, and so if a compliance demand would potentially increase costs or reduce speed of delivery then suppliers generally prioritise meeting the buying departments' demands.[44] Where a producer sells to multiple buyers, this further reduces their incentive to comply with the labour rights demands of individual buyers, since it is often more cost-effective to forego a particular buyer's orders than to implement expensive labour rights reforms that could increase the suppliers' overall cost base and hence imperil orders from the suppliers' other buyers.[45] Buyers are also more strongly motivated to persuade their suppliers to end those labour rights violations that have the potential to generate considerable media interest (such as child labour or severe industrial accidents) than labour rights breaches that are less likely to end up on the front pages of newspapers, such as denial of freedom of association.[46]

---

43 This is usually either because they do not trust that they auditor will preserve their confidentiality (and hence that honestly reporting violations will invite retribution from their employer) or because they have been warned by factory managers that a negative audit report could result in lost orders, factory closure and lost jobs: Pruett et al, above n 27.

44 Barrientos and Smith, above n 33, 725–6; Locke, Amengual and Mangla, above n 20, 327–8, 335; Raworth, above n 39; Pruett et al, above n 27. See also Roberts and Engardio, above n 42.

45 Barrientos and Smith, above n 33, 720; Locke, Amengual and Mangla, above n 20, 326. Although it is less common, at the opposite end of the spectrum there are also very large suppliers in some industries such as the Taiwanese Pou Chen Group, which supplies Nike and Adidas with more than a quarter of their athletic footwear. It is also difficult for buying companies to dictate to these very large suppliers how they should conduct their businesses since, for example, Nike or Adidas would find it difficult to replace Pou Chen as a supplier if Pou Chen threatened to bring the business relationship to an end: see at 325–6.

46 Anner, above n 28. Note that in recent years there have nonetheless been some very serious and high profile industrial accidents in garment factories, including the 2012 Tazreen factory fire in Bangladesh and the 2013 Rana Plaza tragedy in the same country. These accidents resulted from lax safety practices that had continued despite those factories having been previously subjected to numerous social audits: see Ethical Trading Initiative, 'ETI Perspective 2020', above n 42, 9; Garrett Brown, 'Hansae Vietnam: Case Study of Hazardous Working Conditions and the Failure of Corporate Social Responsibility Audits to Fix the Hazards' on *Science Blogs: The Pump Handle* (13 December 2016) <http://scienceblogs.com/thepumphandle/2016/12/13/hansae-vietnam-case-study-of-hazardous-working-conditions-and-the-failure-of-corporate-social-responsibility-audits-to-fix-the-hazards/>.

Given this analysis, it would be problematic if civil society organisations, states and/or IGOs used social audit results as the core data guiding any scheme designed to orchestrate improvements in private labour rights initiatives. Any such scheme would have significant potential to be counterproductive, since, rather than rewarding good practice, it could, for example, reward companies whose suppliers are becoming more sophisticated at deceiving social auditors.

3 Joint-Controlled Mechanisms as a Better Way Forward?

Because of the problems with corporate-controlled mechanisms discussed in the previous section, a number of scholars have advocated increased civil society participation and control of non-state regulatory initiatives, and a heightened focus on 'process' rights that enable workers and community members to report and lodge complaints, monitor business conduct, and collectively advocate and organise on their own behalf. For example, in the area of work and employment rights, these scholars argue that that if non-state regulatory initiatives can help create more space for workers to organise trade unions (at either a community or workplace level) then workers can collectively advocate on their own behalf, with less fear that individual workers will be intimidated or dismissed.[47] This could also help overcome the lack of reliable information guiding efforts by civil society organisations and states to orchestrate improvements in private initiatives, since workers' elected representatives could more freely report on progress or lack thereof in improving rights compliance without placing their members' jobs at risk.

While this is a theoretical possibility, there is scant evidence in the literature of private regulatory initiatives contributing to sustained and significantly scaled improvements in respect for trade union rights. Admittedly, the challenges are considerable. The global garment and footwear industry (which is the particular focus of this article) has very small rates of union density, and much garment and footwear production takes place in countries where freedom of association is not legally protected (eg, China and Vietnam). In other key garment production

47 See, eg, Anner, above n 28; Barrientos and Smith, above n 33; Jane L Collins, *Threads: Gender, Labour and Power in the Global Apparel Industry* (University of Chicago Press, 2003); Jane Collins, 'Redefining the Boundaries of Work: Apparel Workers and Community Unionism in the Global Economy' (2006) 13 *Identities: Global Studies in Culture and Power* 9; Jean Jenkins, 'Organizing "Spaces of Hope": Union Formation by Indian Garment Workers' (2013) 51 *British Journal of Industrial Relations* 623; Karin Astrid Siegmann, Jeroen Merk and Peter Knorringa, 'Civic Innovation in Value Chains: Towards Workers as Agents in Non-governmental Labour Regulation' in Kees Biekart, Wendy Harcourt and Peter Knorringa (eds), *Exploring Civic Innovation for Social and Economic Transformation* (Routledge, 2016) 109. Anner argues that grievance processes are a much more effective means of addressing freedom of association violations than social audits. He compares grievances lodged through the FLA's third party complaint process with 850 audits conducted by the FLA between 2002 and 2010 and demonstrates that third party complaints lodged with the FLA were far more likely to focus on freedom of association violations than the FLA's verification audits, with available evidence suggesting that the FLA audits significantly under-report breaches of freedom of association: Anner, above n 28. See also Niklas Egels-Zandén and Jeroen Merk, 'Private Regulation and Trade Union Rights: Why Codes of Conduct Have Limited Impact on Trade Union Rights' (2014) 123 *Journal of Business Ethics* 461.

countries, union organisers are routinely intimidated and discriminated against by employers and sometimes by the state.[48]

Many private regulatory initiatives do not even include trade union rights among the standards they seek to uphold. While multi-stakeholder initiatives with significant civil society representation such as the FLA and the ETI do include trade union rights in their codes and programs, they struggle to provide evidence of significantly scaled improvements in respect for these rights as a result of their operations.[49] The US-based WRC is often held up as a positive example of a process-based private mechanism that focuses on trade union rights. However, the breadth of the WRC's jurisdiction is limited, as it only covers a small proportion of global apparel factories (those that produce college-branded apparel for those universities in the US that have signed up to the WRC).[50]

In the literature there are case studies of individual garment factories in various countries in Asia and Latin America where a combination of international campaign pressure and engagement with non-judicial grievance processes have resulted in dismissed trade union leaders being reinstated.[51] But the literature suggests that such occurrences are rare and that even in these relatively few factories where improved respect for trade union rights has been

48 See, eg, Michael Safi, 'Bangladesh Garment Factories Sack Hundreds after Pay Protests', *The Guardian* (online), 27 December 2016 <https://www.theguardian.com/world/2016/dec/27/bangladesh-garment-factories-sack-hundreds-after-pay-protests>; Sen David, 'Trio Jailed for Leading Kampot Strike Action', *The Phnom Penh Post* (online), 7 July 2016 <http://www.phnompenhpost.com/national/trio-jailed-leading-kampot-strike-action>.

49 For example, in 2013 ETI produced a 'practical guide' on freedom of association in company supply chains. While this document contains much useful information and advice, it contains only two examples of initiatives that are seeking to promote this right and neither of these were ETI initiatives: Ethical Trading Initiative, 'Freedom of Association in Company Supply Chains: A Practical Guide' (Guidance Document, 10 June 2013). A recent review of how the FLA handled a number of trade union rights cases led to a relative positive assessment of the effectiveness of the FLA's grievance process: Karin Lukas et al, *Corporate Accountability: The Role and Impact of Non-judicial Grievance Mechanisms* (Edward Elgar, 2016) 186–9. However, the conclusions of Lukas et al were primarily based on their review of the FLA's own documentation rather than interviews with worker representatives and civil society organisations involved in the cases: at 14–17. More detailed investigations of the FLA's handling of trade union rights complaints tend to be significantly more critical. See, eg, Anner's analysis of how the FLA handled a complaint regarding rights violations in a Russell Athletic factory in Honduras: Anner, above n 28, 624–6. In any case the FLA receives and accepts relatively few complaints for review through its complaint procedure.

50 Anner, above n 28.

51 Ibid; Ralph Armbruster-Sandoval, *Globalization and Cross-Border Labor Solidarity in the Americas* (Routledge, 2005); Collins, *Threads*, above n 47; Esbenshade, *Monitoring Sweatshops*, above n 38; Henry Frundt, 'Cross-Border Organizing in the Apparel Industry: Lessons from Central America and the Caribbean' (1999) 24(1) *Labor Studies Journal* 89; Rebecca A Johns, 'Bridging the Gap between Class and Space: US Worker Solidarity with Guatemala' (1998) 74 *Economic Geography* 252; Steven C McKay, 'The Squeaky Wheel's Dilemma: New Forms of Labor Organizing in the Philippines' (2006) 30(4) *Labor Studies Journal* 41; Bob Jeffcott et al, 'Brand Campaigns and Worker Organizing' (Report, Maquila Solidarity Network, 2005); Tim Connor and Kelly Dent, 'Offside! Labour Rights and Sportswear Production in Asia' (Report, Oxfam International, 2006); Robert J S Ross, *Slaves to Fashion: Poverty and Abuse in the New Sweatshops* (University of Michigan Press, 2004); Graham Knight and Don Wells, 'Bringing the Local Back in: Trajectory of Contention and the Union Struggle at Kukdong/Mexmode' (2007) 6 *Social Movement Studies* 83.

achieved through such processes, those improvements are not always sustained.[52] Again, the failure of brand-owning companies to provide their suppliers with sufficient incentives to continue to comply is frequently cited as a major part of the problem.

III CASE STUDY: IMPROVING RESPECT FOR FREEDOM OF ASSOCIATION IN THE INDONESIAN SPORTSWEAR INDUSTRY

In this Part we present a case study of attempts to enhance respect for freedom of association by workers producing sportswear in Indonesia for well-known brands, including Nike, Adidas and New Balance. The case study is unusual because labour rights in this industry sector in this country have been one of the foci of a sustained 20-year global 'anti-sweatshop' campaign by a transnational network of civil society actors.[53] One of the outcomes of that campaign has been the establishment of a local multi-stakeholder initiative – the FOA Protocol, described further below. This case study sheds light on what can potentially be achieved in countries where there is some political space for workers to organise and when local multi-stakeholder initiatives emerge in response to targeted and sustained governance pressure on global corporations to respect trade union rights.

A Research Methods

Our findings are based on extensive primary and secondary source research gathered through in-country research in Indonesia, as well as ongoing engagement with human rights advocates and others knowledgeable about labour rights issues in this industry. In particular, we conducted extensive semi-structured interviews and focus group discussions with more than 60 workers and factory-level worker representatives, 22 national-level union representatives and NGO representatives, 15 business representatives and one national labour ministry representative during two field trips to Indonesia conducted in June and September 2013. We also held additional meetings with key informants during field trips to Indonesia in June and September 2014 and March 2016 to update our research. In addition, information in this article is drawn from relevant research, online media articles, and civil society organisation and company websites. Our analysis also draws on extensive previous research interviews with trade union organisers and business representatives in the sportswear sector in Indonesia, which were conducted by one of the authors during a number of field trips conducted between 1998 and 2007 for a PhD project, and by two of the

52 Anner, above n 28; Armbruster-Sandoval, above n 51, 29–134; Esbenshade, *Monitoring Sweatshops*, above n 38, 156–8; Johns, above n 51; Ross, above n 51, 274–82; Jeffcott et al, above n 51, 23–35. See also Ethel C Brooks, *Unraveling the Garment Industry: Transnational Organising and Women's Work* (University of Minnesota Press, 2007).

53 See, eg, Connor and Dent, above n 51.

authors in previous roles as labour rights advocates for Oxfam Australia. We also shared some of our draft conclusions with key research participants (both business and civil society representatives) and their comments were considered as we finalised our analysis.

B Legal and Political Context of the Case Study

The global campaign and the setting up of the FOA Protocol occurred in the context of the post-Suharto period in which new industrial relations laws were being legislated and independent unions were re-forming. Prior to the downfall of authoritarian Suharto regime in 1998, workers could only join the official state-backed union, Serikat Pekerja Seluruh Indonesia ('SPSI'). Indonesia's left-leaning trade unions had, in any case, been decimated in the extensive anti-communist massacres associated with Suharto's rise to power in the mid-1960s, which involved the systematic murder of hundreds of thousands of people.[54] During the three decades of Suharto's rule, most factory-level SPSI 'union' branches operated in a largely undemocratic manner, with SPSI officials more closely aligned to management than the interests of their members. In many factories, workers became members of SPSI automatically rather than by choice and frequently played no role in electing SPSI representatives. During this period it was not uncommon for SPSI factory-level leaders to call in the military to suppress worker unrest.[55]

Following the fall of Suharto, legislation was introduced as part of a broad democratic law reform process that recognised freedom of association and the right to form a union.[56] Yet while Indonesia's labour laws are now recognised as relatively progressive, the monitoring and enforcement of those laws remains weak.[57] Further, while workers have the legal right to strike, the procedural framework for conducting a legal strike is quite complex and the timeframe is narrow. Courts have taken a generally strict approach to upholding procedures necessary to conduct a legal strike, but have differed in their interpretations of 'failed negotiations', meaning that workers who are threatened with dismissal for participating in strikes have narrow and uncertain grounds for disputing that dismissal.[58]

Local labour departments play a pivotal role in regulating compliance with labour laws and mediating labour disputes, yet are poorly resourced and often lack staff with industrial relations expertise. The number of labour inspectors in Indonesia remains inadequate, while Indonesia's industrial relations courts have

54 Vedi R Hadiz, *Workers and the State in New Order Indonesia* (Routledge, 1997) 59.

55 Ibid 104–10.

56 See, eg, Udang-Udang Nomor 21 Tahun 2000 Tentang Serikat Pekerja/Serikat Buruh [Law No 21 of 2000 Concerning Trade Unions/Labour Unions] (Indonesia).

57 Teri L Caraway, 'Labor Rights in East Asia: Progress or Regress?' (2009) 9 *Journal of East Asian Studies* 153.

58 Ibid; Teri L Caraway, 'Labor Courts in Indonesia' (Final Report, American Center for International Labor Solidarity, 2011) 13–16.

been criticised as slow, unprofessional and expensive.[59] There are indications that both local labour departments and the industrial relations courts also suffer from the endemic levels of corruption found elsewhere in the Indonesian court system and public sector.[60] Although union busting constitutes a criminal offence under Indonesian law, there have been very few prosecutions and police rarely investigate, let alone prosecute, allegations of anti-union violence.[61]

Although numerous independent trade unions have formed since 1998, weak state enforcement of labour laws, combined with continued repression of trade union rights by employers has made it very difficult for such unions to grow and most remain very small. Approximately 20 per cent of Indonesians employed in manufacturing are union members,[62] with Suharto-era 'legacy unions' representing the lion's share in terms of membership and number of workplaces organised.[63] Some legacy unions have become more democratic in response to the challenge from independent unions, but many continue to operate much as they did during the pre-democratic era. Legacy unions also commonly seek to obstruct any attempts by independent unions to organise in workplaces where a legacy union is already in place.[64]

C The FOA Protocol: A Locally Designed Multi-stakeholder Initiative

In this section, we provide a description of the Freedom of Association Protocol ('FOA Protocol').[65] The FOA Protocol is a rare example of a private

59 Surya Tjandra, 'Industrial Relations Court in Indonesia, Quo Vadis? Some Preliminary Notes from the Court Room' (Paper presented at the Current Issues on Indonesian Laws Conference, School of Law, University of Washington, 27–28 February 2007); Surya Tjandra, 'Labour and Union Strategies to Gain Justice in Pasuruan, East Java' (Working Paper, Atma Jaya Catholic University, 2009).

60 Simon Butt, 'Anti-corruption Reform in Indonesia: An Obituary?' (2011) 47 *Bulletin of Indonesian Economic Studies* 381; Stewart Fenwick, 'Measuring up? Indonesia's Anti-corruption Commission and the New Corruption Agenda' in Tim Lindsey (ed), *Indonesia: Law and Society* (Federation Press, 2nd ed, 2008) 406; Nicholas Newman, 'Indonesia: Telling Lies' (2011) 28(4) *World Policy Journal* 82; Sofie Arjon Schütte, 'Against the Odds: Anti-corruption Reform in Indonesia' (2012) 32 *Public Administration and Development* 38.

61 Surya Tjandra, 'Disputing Labour Dispute Settlement: Indonesian Workers' Access to Justice' (2010) 15 *Law, Social Justice & Global Development Journal* <https://www2.warwick.ac.uk/fac/soc/law/elj/lgd/2010_1/tjandra>.

62 Maarten van Klaveren et al, 'An Overview of Women's Work and Employment in Indonesia' (Decisions for Life MDG3 Project Country Report No 14, Amsterdam Institute for Advanced Labour Studies, University of Amsterdam, February 2010) 32.

63 In this context, the term 'legacy unions' refers both to SPSI and to unions that have formed by breaking away from SPSI.

64 See Teri L Caraway, 'Explaining the Dominance of Legacy Unions in New Democracies: Comparative Insights from Indonesia' (2008) 41 *Comparative Political Studies* 1371; Teri L Caraway, 'Pathways of Dominance and Displacement: The Varying Fates of Legacy Unions in New Democracies' (2012) 64 *World Politics* 278.

65 The observations that follow are based on research interviews and correspondence with representatives of trade unions and companies who participated in the negotiation and implementation of the FOA Protocol. In the period 2009–16 the two authors who previously worked as labour rights advocates for Oxfam Australia also attended several relevant meetings of the trade unions and companies, initially as participants and, more recently, as observers. For more detail concerning design of the FOA Protocol, please see our report that examines more thoroughly the process by which the Protocol was negotiated, the content of its standards and the way it has been implemented: Tim Connor, Annie Delaney and Sarah

mechanism that is dedicated to the aim of supporting workers in the Global South to organise collectively and raise complaints about working conditions, and which was negotiated by worker organisations.

Briefly, the background to this initiative was a long-running global anti-sweatshop campaign targeting the sportswear industry, including campaigning by the 'Play Fair Alliance', whose members include the International Textile, Garment and Leather Workers Federation ('ITGLWF') (a global union now part of IndustriALL), Oxfam, and the Clean Clothes Campaign (a global network of organisations campaigning for labour rights in garment production). In 2008, during a meeting between Play Fair Alliance representatives and major sportswear brands in Hong Kong, Adidas representative Bill Anderson proposed a pilot national-level dialogue in Indonesia on factory labour practices as a way to make some practical advances, and engaged support from other brands, including Nike.

The dialogue process between six brands (Adidas, Asics, New Balance, Nike, Pentland and Puma), their suppliers and the five Indonesian unions (FSPTSK, Garteks, GSBI, KASBI, SPN) associated with the Play Fair Alliance began in Jakarta in November 2009,[66] with Oxfam staff in Indonesia playing a role in facilitating meetings.[67] The Indonesian unions wanted (and still want) the dialogue to focus on three issues: job security, wages and freedom of association.[68] However, the participating brands have so far only been willing to negotiate regarding freedom of association.[69] It took 18 months for the parties to agree on what standards should be included in the FOA Protocol and a further 18 months to finalise the formal monitoring and dispute resolution procedures. The dispute resolution procedures include provision for regular meetings between

---

Rennie, 'The Freedom of Association Protocol: A Localised Non-judicial Grievance Mechanism for Workers' Rights in Global Supply Chains' (Report, Corporate Accountability Research, 2016). See also Tim Connor and Liam Phelan, 'Antenarrative and Transnational Labour Rights Activism: Making Sense of Complexity and Ambiguity in the Interaction between Global Social Movements and Global Corporations' (2015) 12 *Globalizations* 149; Daisy Gardener, 'Workers' Rights and Corporate Accountability – The Move Towards Practical, Worker-Driven Change for Sportswear Workers in Indonesia' (2012) 20(1) *Gender and Development* 49; Karin Astrid Siegmann, Jeroen Merk and Peter Knorringa, 'Positive Class Compromise in Globalized Production? The Freedom of Association Protocol in the Indonesian Sportswear Industry' (2017) forthcoming *International Labour Review* <http://onlinelibrary.wiley.com/doi/10.1111/ilr.12036/epdf>.

66 Garteks is the garment and textile division of Serikat Buruh Sejahtera Indonesia ('SBSI') [Indonesian Prosperous Workers Union]. KASBI stands for Kongres Aliansi Serikat Buruh Indonesia [Indonesian Congress of Allied Unions]. SPN stands for Serikat Pekerja Nasional –[National Workers Union]. GSBI stands for Gabungan Serikat Buruh Indonesia [Indonesian Workers Union Association].

67 Interview with Chris Wangkay, Oxfam Australia (Jakarta, 10 June 2013). Many of the trade union and company representatives we interviewed during field trips in June and September 2013 commented that Wangkay's role as a facilitator had been important in keeping the negotiation process moving forward.

68 One of the authors (Connor) participated in the initial two-day meeting between the unions and brands in Jakarta on 23–24 November 2009, in which the parties agreed to start negotiating the FOA Protocol. Connor also attended (as an observer) a meeting involving the same brands and trade unions on 29–30 March 2016. At both meetings the unions strongly urged the brands to negotiate in relation to wages and job security, in addition to trade union rights.

69 At the meeting on 29–30 March 2016 mentioned in the previous footnote, representatives of the participating brands declined to begin negotiations regarding wages and job security, arguing that further work was still needed to improve implementation of the FOA Protocol.

trade unions and factory managers at the factory level and, if an issue cannot be resolved at that level, scope for an appeal to the National Committee of the Protocol.[70] The National Committee is comprised of representatives of signatory brands, suppliers and unions, and the dispute resolution procedure requires that the Committee reach consensus on how to resolve any dispute.[71]

The Protocol is highly unusual (and perhaps unique) among private labour rights regulatory initiatives in global supply chains because local worker representatives in a country in the Global South were directly involved in negotiating both the standards and the operating procedures. It is also unusual because the labour standards agreed in the Protocol go beyond what is required by international law, to include facilitative requirements such as paid time off for union organisers to undertake union work.[72] The standards also include requirements that might seem unnecessary to an outsider, such as the right to have a union notice-board in a prominent place in the factory and the right to fly a union flag on one of the factory flagpoles.[73] However, these standards are perceived by the unions as an important means of establishing the legitimacy of independent trade unions in a country where the memory of previous anti-communist purges makes many workers afraid to do anything that might result in them being branded as communists.

Our research shows that the FOA Protocol has been reasonably well adopted by the industry. The brands have made serious efforts to persuade their suppliers to comply and to sign the Protocol. By April 2014 the Protocol had been signed by 48 Adidas suppliers, 27 Nike suppliers, nine New Balance suppliers, three ASICS suppliers, two Puma suppliers, and one Pentland supplier. While trade union leaders at both national and factory level provided us with many examples of factories where the Protocol was not being fully implemented, they also acknowledged that its partial implementation had made it significantly easier for them to operate in many factories.[74] In general, the positive examples of implementation related to matters for which non-compliance would be very difficult to conceal or deny (such as union noticeboards and office space in the factory and paid time off for union organisers).[75] Conversely, for those standards for which non-compliance is more difficult to prove (such as whether factory representatives have been involved in violent intimidation of union organisers, or whether union members have been dismissed because of union membership or for other reasons) union leaders reported that implementation of the Protocol tended to be weaker.[76] However even in factories where union organisers and members were experiencing various forms of harassment and discrimination, they reported that being able to insist on the more obvious or 'indisputable'

70 'Standard Operating Procedures for Freedom of Association Protocol Supervision and Dispute Resolution Committee' (English Translation, 25 September 2012) 1–3.
71 Ibid 4.
72 'Freedom of Association Protocol', above n 6, 3.
73 Ibid 4, 6.
74 See, eg, Interview with Emilia Yanti, national-level union official, GSBI (12 June 2013).
75 See, eg, Interview with Parto, national-level union official, KASBI (12 June 2013).
76 See, eg, Interview with two factory-level union officials, SPN (22 June 2013).

standards in the Protocol was making it easier for their unions to survive and to establish and retain legitimacy among potential members in the factories.[77]

D Case Examples of Grievances in Particular Factories

The following sections of this article provide two case examples of efforts by two independent (ie, non-legacy) trade unions to pursue grievances in relation to more 'disputable' aspects of freedom of association in particular factories.[78] As detailed in those sections, although the existence of the Protocol and its implementation procedures were of benefit, these unions found it necessary to engage with multiple grievance processes in their efforts to see these rights respected.

1 Factory A (2012–16)

Our first case describes the efforts of KASBI, the newer, independent union in Factory A, to gain recognition and legitimacy and to be involved in wage bargaining. The factory is owned and managed by a large Asian manufacturer that only produces athletic footwear for Nike. In July 2012 some of the workers at Factory A formed an independent union, in competition with the existing legacy union. The new union formally affiliated with KASBI in March 2013. KASBI had been participating with Nike and other brands in negotiating and implementing the FOA Protocol since late 2009.

Factory A had worked with the existing (legacy) union to obtain a waiver from the government in relation to a recent increase in the regional minimum wage. When granted, such waivers allow employers to delay implementing increases in the legal minimum wage for a negotiated period of time (often for 12 months), so that they are effectively always behind in paying any annual increase in legal minimum wages. However, the new union actively called on the factory to forego the waiver and comply with the new minimum wage.

---

77 See, eg, Interview with factory-level union official, GSBI (16 June 2013). These findings are consistent with a recent but unpublished survey of 80 participants from 24 suppliers covered by the FOA Protocol (both worker and business representatives). The survey indicated significant progress in implementation of those aspects of the Protocol for which compliance or non-compliance is relatively easily determined (70 per cent reported worker representatives had been provided with paid time-off from work for union activities and 84 per cent reported their union had been given an office on the factory grounds). However, worker representatives were less confident that the Protocol's processes would protect them in circumstances where suppliers engaged in anti-union activity for which the suppliers could provide some alternative explanation (eg, only 25 per cent of surveyed worker representatives believed their former positions were guaranteed after the end of their union appointment): Halida Nufaisa and Ulfi Arsa Putri, 'Laporan Baseline Survey Implementasi Protokol Kebebasan Berserikat di Indonesia' [Report on the Baseline Survey of the Implementation of the Freedom of Association Protocol in Indonesia] (Oxfam, July 2015) (unpublished, copy on file with authors); Halida Nufaisa and Nanda Oktaviani, 'Implementasi Protokol Kebebasan Berserikat: Baseline Report Tahap Kedua' [Implementation of the Freedom of Association Protocol: Baseline Report Phase Two] (Oxfam, January 2016) (unpublished, copy on file with authors).

78 In addition to the two cases described below, as part of the field research we conducted in 2013 and 2014 we investigated two other cases in which trade unions pursued grievances in sportswear factories covered by the Protocol (Factories B and D). Although there is not space to describe those cases in detail, they inform our discussion and are in some cases are mentioned in passing in the ensuing analysis.

Between April and May 2013 members of the newly formed KASBI union at the factory were subjected to various forms of intimidation designed to persuade them to close down the new union. A document prepared by the head of the KASBI factory-level union in early May 2013 described nine separate examples of intimidation.[79] In one incident a union organiser was grabbed by the throat just before he entered the factory and forced to remove his union t-shirt, leaving him only in a singlet; the same organiser had earlier received a threat that his house would be burned down and was subsequently forced to take the union's flag down from the factory flagpole; another organiser received a death threat; another was punched in the jaw, which became badly swollen; another had an electric shock applied to his knee; and another was surrounded by ten men who threatened his safety if he did not sign a letter resigning from the union. In this document the head of the KASBI factory-level union alleged that most of these acts were perpetrated by the head of the local sub-district and his associates, who were financially linked to the factory via businesses that provided services to the factory.[80] He also alleged that at least one factory official was complicit in the violence because that factory official allowed the perpetrators to enter the factory and observed the violence without trying to stop it, instead continuing to 'sit back and smoke cigarettes'.[81] The factory-level KASBI union organisers confirmed these various allegations when we interviewed them in June 2013.[82]

Union representatives reported this violence to the police. However, the union struggled to get the police to follow up on the complaints and had to employ multiple advocacy techniques. According to national KASBI representative, Parto,

> In most cases the reports made to the police are neglected when there is no pressure from other agencies. We need to address the issue of getting these organisations to perform.[83]

To increase pressure on police to actively investigate the case, KASBI's national office contacted the Witness and Victim Protection Agency ('LPSK'), an Indonesian government agency. Though small and under-resourced, the LPSK made regular contact with local police to request updates on their investigations, providing increased accountability. The KASBI union organisers at Factory A also reported frequent contact with LPSK staff, who would contact victims on a regular basis to check on their safety as well as physical and psychological wellbeing. The union organisers expressed the view that LPSK's contribution was beneficial in several ways, including providing complainants with support, a sense of security and enough confidence to press charges and seek redress.[84] If an official agency had not been regularly checking on their welfare during this

79 'Kronologis Perkara Menghalang-Halangi Kebebasan Berserikat dan Berorganisasi di [Factory A]' [Chronology of Barriers to Freedom of Association and Organization at [Factory A]] (3 May 2013) (copy on file with authors).

80 Ibid 1–2.

81 Ibid 3. The original phrase in Indonesian was 'hanya merokok bareng dan duduk santai di tempat merokok'.

82 Interview with three leaders of the KASBI branch union in Factory A (Jakarta, 13 June 2013).

83 Interview with Parto, national-level union official, KASBI (Jakarta, 18 September 2013).

84 Interview with four leaders of the KASBI branch union in Factory A (Jakarta, 20 September 2013).

period it is quite possible the workers may have given up on their efforts to establish the union – when we interviewed them in June 2013 they were clearly very afraid that the intimidation they had recently experienced might be repeated.[85]

The KASBI union organisers also believe that reporting to the LPSK expedited the police investigation into the assaults. In May 2013 they also filed a report with the Indonesian Human Rights Commission (Komnas HAM), again with the aim of putting pressure on the police to investigate. As of September 2013, workers had not received a formal reply from Komnas HAM, but despite the lack of formal response workers believed that there was value in being able to inform the police as well as factory management and Nike that the Komnas HAM report had been filed because it created a sense that their actions (or inaction, as the case might be) were being monitored. Despite the fact that the police investigations never amounted to prosecution, the KASBI union representatives still believed that police involvement had value. After taking the serious step of filing an official report and engaging the services of LPSK, the stakes surrounding the case increased and violence and overt intimidation against the KASBI union officials ceased.

In late April 2013 KASBI had also raised the anti-union intimidation with Nike's two Indonesian representatives responsible for labour rights compliance. According to Parto local Nike representatives were not initially responsive and did not take the complaint seriously to begin with,[86] although Nike denies that this was the case and maintains that internal inquiries were underway.[87] The union again raised the issue at a meeting of the national committee of the FOA Protocol on 13 May 2013 and sent its documentation of the incidents to the Oxfam representatives in attendance. Oxfam immediately contacted compliance staff personnel at Nike's international headquarters, urging immediate redress. At this point Nike personnel responded quickly by initiating an extensive investigation and corrective action process, which aimed to provide a safe work environment and personal security and to improve the factory's approach to employee management. The process resulted in staffing changes within the factory and ongoing formal recognition of the KASBI union. The factory also agreed to forego the waiver and pay the full legal minimum wage.

In a follow-up research meeting in July 2014 the KASBI union leaders at the factory reported they no longer felt under any immediate physical or psychological threat. In accordance with the FOA Protocol they were able to come to work in their union uniforms; the union's flag was being flown at the factory; and they had been given office space within the factory and paid time off from work to undertake union activities. Their union had been invited to participate in collective bargaining negotiations with management and they had met with the factory's Korean owners. The union reported that it was still encountering some lower-level discrimination, including difficulty in having new

85 Interview with three leaders of the KASBI branch union in Factory A (Jakarta, 13 June 2013).
86 Interview with Parto, national-level union official, KASBI (Jakarta, 12 June 2013).
87 Interview with Amy Curry-Staschke and John Richards, Nike Inc (Jakarta, 13 June 2013).

members recognised and in communicating with members within the factory.[88] However, representatives of KASBI expressed the belief that only certain individuals in the HR department were responsible for that discrimination and that it was not reflective of the factory's policies as a whole.[89] The union's main concern at that time was that it was difficult to raise these problems with senior management due to language barriers since not all managers speak Indonesian. Overall the union leaders believed that Nike's response to the complaint has significantly improved their members' welfare. Subsequent contact with the national KASBI union representative in 2016 confirmed that the union has been able to continue functioning effectively in the factory without fear of violence or intimidation.[90]

This positive example of remediation was not achieved by filing a complaint with a single grievance mechanism. Instead the result was considerably assisted by KASBI's strategic engagement with multiple processes. The complaints to two state non-judicial mechanisms (Komnas HAM and LPSK) put increased pressure on the police to seriously investigate the allegations of violence. Even though the police investigation did not result in formal charges it helped dissuade the perpetrators from engaging in further intimidation. LPSK's support also helped give the KASBI union organisers confidence to continue to pursue the case, despite their fear of further intimidation. Given that Oxfam had a history of campaigning on sweatshop issues in Nike's supply chain, reporting the incident to Oxfam also no doubt increased pressure on Nike to take the issue seriously.

With regard to the FOA Protocol, although KASBI did not engage the Protocol's formal grievance procedure, KASBI's national union representative believed that raising the issue informally in front of other brands at a National Committee meeting of the Protocol had put pressure on Nike to demonstrate to other brands that it was taking the Protocol seriously. During the period in which they were experiencing intimidation, the fact that Nike had signed the Protocol with KASBI and other unions also increased the resolve of the factory-level union organisers. In a June 2013 interview the leader of the KASBI factory-level union told us that Nike representatives had come to the factory to investigate 'because of the FOA Protocol' and that Factory A would have to sign and comply with the FOA Protocol for fear of losing Nike's orders.[91] In the same interview he also said that if Factory A complied with the Protocol it would have a 'big impact' on their capacity to establish their new union,[92] and in later interviews he confirmed that this had proved to be the case.[93] Interestingly, during the period of intense intimidation of the KASBI union leaders (April – May 2013), the perpetrators targeted some of the more symbolic standards in the Protocol, for example by forcing one of the KASBI organisers to lower the union

88 Interview with three leaders of the KASBI branch union in Factory A (Jakarta, 2 July 2014).
89 Ibid.
90 Meeting with Parto, national-level union official, KASBI (Jakarta, 28 March 2016).
91 Interview with three leaders of the KASBI branch union in Factory A (Jakarta, 13 June 2013).
92 Ibid.
93 Interview with four leaders of the KASBI branch union in Factory A (Jakarta, 20 September 2013); interview with three leaders of the KASBI branch union in Factory A (Jakarta, 2 July 2014).

flag on the factory flag pole and, on another occasion, to remove his union t-shirt before entering the factory.[94] This suggests that the perpetrators were aware that these symbolic standards were playing an important role in assisting the new union to establish legitimacy with workers at the factory.

2 Factory C (1998–2016)

Our second case concerns efforts by the GSBI union to claim trade union rights in Factory C, which exclusively produces athletic footwear for Adidas.[95] Like the KASBI union in Factory A, the GSBI union in Factory C has responded to the challenges of weak law enforcement and marginalisation by adopting combinations of different strategies.

In 2001 the Secretary General of the factory-level GSBI union branch at Factory C, Ngadinah Binti Abu Mawardi (Ngadinah), was charged with 'offensive behaviour' and incitement over her role in a strike and was imprisoned for 29 days pending trial.[96] Given the chronic corruption in the Indonesian court system, GSBI was very concerned that Ngadinah would not receive a fair trial. The union responded by arranging for international activist allies to attend the trial and indicated their intention to submit the case to the ILO Conference in Geneva, in both cases with the goal of making the judges aware that the case could attract international attention. GSBI also organised public demonstrations, attracting media coverage by both Indonesian and English language news

94 It is not uncommon for factories in Indonesia to have one day per week in which workers are not required to wear the company uniform. Although the FOA Protocol does not directly entitle trade union members to wear union uniforms at work on those days, in a number of factories (including Factory A) this privilege had already been accorded to the legacy union. Hence the introduction of the FOA Protocol meant that the non-legacy union at Factory A was also able to claim this privilege, based on the principle of non-discrimination between unions: 'Freedom of Association Protocol', above n 6, 3; Interview with three leaders of the KASBI branch union in Factory A (Jakarta, 13 June 2013); Email from Mimmy Kowel, Coordinator of the Clean Clothes Campaign South East Asian Coalition to Tim Connor, 11 August 2017.

95 We have recently produced a detailed narrative account of trade union rights grievances in the factory between 1998 and 2016, which is available online: Tim Connor, Annie Delaney and Sarah Rennie, 'Online Supplement to Non-judicial Mechanisms in Global Footwear and Apparel Supply Chains: Lessons from Workers in Indonesia' (Corporate Accountability Research, 2016) <http://corporate accountabilityresearch.net/njm-report-xiv-indo-footwear>. Rather than repeating or summarising that narrative, in this Part we will instead make some general observations and provide examples from particular disputes. Trade union rights issues at this factory have been the focus of previous research and advocacy conducted by some of the authors of this article and the research interviews and research meetings we conducted in 2013, 2014 and 2016 for our current research project updated that earlier research.

96 The charges related to art 160 (inciting others to break the law) and art 335 (offensive behaviour toward someone to force them to do or not do something) of the Indonesian Criminal Code. Art 335 is a poorly defined offence that has often been used to target activists. See, eg, Human Rights Watch, 'Turning Critics into Criminals: The Human Rights Consequences of Criminal Defamation Law in Indonesia' (Report, May 2010) 16–17, 25, 28–9. On 16 January 2014 the Indonesian Constitutional Court determined that the phrase 'offensive act' in art 335 is unconstitutional, on the grounds that the phrase is too uncertain and hence has caused injustice: Mahkamah Konstitusi Republik Indonesia [Constitutional Court of the Repblic of Indonesia], Putusan Nomor 1/PUU-XI/2013 [Verdict No 1/PUU-XI/2013], 16 January 2014 <http://www.bphn.go.id/data/documents/1.1._perkara_nomor_1_puu_2013__16_jan_2014_kuhap_(dikabulkan.pdf>.

agencies. GSBI and international organisations also lobbied Adidas, who agreed to write to the Indonesian Minister for Justice requesting Ngadinah's release. While there is no way of knowing whether Ngadinah's acquittal on all charges would have occurred in any case, in a research interview Ngadinah strongly expressed the view that international scrutiny of the case was the main reason she was not found guilty.[97]

In relation to other grievances, an ongoing challenge for GSBI is that Adidas has frequently refused to investigate alleged violations of the freedom of association provisions in Adidas' code. Adidas has instead argued that since these rights are embodied in Indonesian laws the Indonesian courts are the appropriate bodies to interpret and apply those laws. However, GSBI has frequently refused to pursue cases through the court system for fear that factory management would buy the result they want from corrupt judges. In 2004 this impasse was temporarily broken when Adidas and GSBI and Oxfam (who had been campaigning to persuade Adidas to address trade union rights issues in the factory) agreed to invite the WRC to investigate labour issues at the factory. The WRC conducted a comprehensive investigation and made detailed findings and recommendations. These were accepted by Adidas, who persuaded Factory C to comply with many of the recommendations, including the recommendation that several previously dismissed union members be reinstated.

For a time, respect for freedom of association and labour rights improved considerably in the factory. However, in October 2005 Factory C dismissed 33 workers, including the entire leadership team of the GSBI union in the factory, for their actions during a strike. The WRC investigated this dismissal in November 2005 and found the dismissals to be unlawful. However, this time Adidas declined to regard the WRC's determination as authoritative. In addition to seeking assistance from international allies, who campaigned to persuade Adidas to intervene, GSBI lodged a complaint with Komnas HAM. After Komnas HAM determined that the workers' dismissal was illegal, Adidas agreed to accept that its code had been breached. As with the WRC's first investigation, in this case the findings of one non-judicial mechanism (Komnas HAM), increased pressure on another (Adidas' implementation of its code of conduct) to uphold human rights.

Adidas' subsequent failure to persuade Factory C to reinstate the dismissed GSBI leaders provides further evidence that the conflicting messages brands send their suppliers can undermine efforts to persuade suppliers to comply with labour codes. After Komnas HAM's finding, Adidas' labour compliance team made considerable efforts to persuade Factory C to reinstate the GSBI union leaders. But these efforts were arguably undermined by the overall economic relationship between Adidas and Factory C. In mid-2006 Adidas announced that because of concerns about the factory's product quality and speed of delivery it would cut a significant percentage of orders to Factory C, resulting in 2000 job losses. Further, in July 2006 the WRC reported that it had received 'credible information

97 Interview with Ngadinah Binti Abu Mawardi (Jakarta, 18 January 2002).

that Adidas has asked [Factory C] to take a three per cent price cut next year, and likely another price cut the following year'.[98]

In a 2013 interview FX Supiarso (the primary investigator for the WRC's Factory C investigations) commented that:

> In our informal meetings with management [in the period 2005–06] they complained to me: 'If I invest my money to protect the workers, Adidas does not do the same thing with us, they do not give the premium price for the shoes'. So I think that is the reason they just stopped working with WRC and following up the complaints from workers.

That is, according to Supiarso, the factory managers' motivation was economic. Once it became clear to them that Adidas was not willing to cover any increased costs (or accommodate any slowing of delivery times) resulting from the advocacy work of assertive trade union leaders in the factory, Factory C's managers concluded that it was not in their interest to have those leaders in their factory. Adidas strenuously denies this claim, reporting that it does not reflect the company's meetings with Factory C management at the time. According to Adidas, Factory C management were convinced their dismissal of the union leaders was appropriate because the workers had acted illegally and hence '[t]here was no 'incentive' that would have moved the factory to secure a better outcome'.[99] While it is difficult to know definitively what motivated factory management, in all the circumstances the economic analysis suggested by Supiarso is arguably more persuasive than Adidas' explanation that management's refusal to reinstate the workers was a matter of principle.

More recently, Factory C managers have taken advantage of disunity within GSBI to prevent properly elected GSBI leaders from enjoying the benefits of the standards in the FOA Protocol. The background is that the main leader of the GSBI union at Factory C who was elected in 2007, Mr Ifar Sidik,[100] sought to delay facing re-election and in 2014 the national GSBI union intervened and required that he step down and be replaced by interim leaders who would manage an election process. Sidik then hurriedly arranged an Extraordinary General Assembly at Factory C, which took place on 12–13 March 2014 and was attended by only 37 of the GSBI union's 2866 members in the factory. On the basis of this Assembly, Factory C managers have continued to treat Sidik as the legitimate leader of the factory-level GSBI union and have continued to divert GSBI members' union dues to the union bank account controlled by his team and

98 Worker Rights Consortium, 'Update on Code of Conduct Violations at [Factory C] (Indonesia)' (3 July 2006) 6 <http://www.workersrights.org/Freports/PanarubMemo-7-3-06.pdf>. This is consistent with press reports published the following year indicating that Adidas had substantially increased its profit margins by demanding price cuts from its suppliers: 'Adidas Profit Rises 27% as Purchasing Expenses Fall (Update6)', *Bloomberg News Service* (online), 8 August 2007 and 'Adidas Profit Gains on Cost Savings after Reebok Buy (Update7)', *Bloomberg News Service* (online), 8 November 2007, cited by Tim Connor, *Rewriting The Rules: The Anti-sweatshop Movement; Nike, Reebok and Adidas' Participation in Voluntary Labour Regulation; and Workers' Rights to Form Trade Unions and Bargain Collectively* (PhD Thesis, University of Newcastle, 2007) 241, 271–2.

99 Adidas' feedback regarding a draft report: Attachment to Email from Adelina Simanjuntak to Sarah Rennie, 1 December 2014, 12.

100 This is a pseudonym.

accord them the rights and entitlements required under the FOA Protocol.[101] This is despite the fact that in April 2014 a meeting attended by more than 1500 GSBI members elected a different leadership team, who are being denied all of those rights and entitlements. Although the election process conducted in March 2014 clearly does not comply with the union's constitution,[102] the local labour department has endorsed Sidik's re-election and Adidas has refused to intervene, on the grounds that it is not the appropriate body to interpret a union's constitution. The case has been referred to the National Committee of the FOA Protocol, a committee on which GSBI and Adidas are both represented. The committee's decisions are made by consensus and at this stage the National Committee is also treating the issue as an internal dispute within GSBI and has encouraged national GSBI representatives to resolve it.

IV FINDINGS AND IMPLICATIONS

In this Part we discuss the implications of this field research for debates as to the potential role of private regulatory initiatives in improving the human rights practices of business. Our findings mainly concern the role that local civil society organisations in the Global South can play in wider efforts to orchestrate continuous improvement and convergence in the operation of private initiatives. Our first set of observations and recommendations in this Part concern the creation and impact of the process-based mechanism studied – the FOA Protocol, a non-state regulatory mechanism that tends strongly toward the joint-controlled rather than corporate-controlled end of the continuum in relation to each of the scales discussed in Part II(B)(1) above. Our second set of observations and recommendations concern the interaction of mechanisms and their coordination and orchestration.

Our primary finding is that the case study shows workers and their representatives engaging in what could be termed 'regulatory orchestration from below'. Although the regulatory orchestration literature is open to the possibility of a range of different kinds of stakeholders participating in orchestration initiatives, case-studies in this literature have tended to focus on the role of players who are removed from the production process – states, IGOs, consumers, investors, international NGOs – which might be termed 'regulatory orchestration from above'. For the FOA Protocol, local trade unions in Indonesia drew on leverage created by a global anti-sweatshop campaign by international civil society allies, and they used that leverage to persuade sports brands and their suppliers to commit to human rights standards that were more sensitive to local

101 In an email in response to research questions, a manager of Factory C argued that the meeting on 12–13 March 2014 gave the leader who had first been elected in 2007 'the strong foundation as the legitimate leadership of the period 2014–17 in accordance with the evidence conveyed to the management': Email from a manager of Factory C to Tim Connor, 29 November 2014.

102 Sidik provided a copy of the union's constitution as at March 2014: Attachment to Email from Ifar Sidik to Sarah Rennie in January 2015. It is very clear from the text of the constitution that an electoral process involving just 37 out of 2866 members cannot legitimately elect the union's leadership team.

needs and which went beyond the internationally accepted human rights norms to which brands had previously committed. Some of these standards, such as the right to wear union uniforms at work and the right to fly a union flag at their workplace, are particularly attuned to local challenges facing union organisers seeking to establish legitimacy in the Indonesian context. It is unlikely those standards would have been prioritised if the relevant negotiations had taken place among global actors who were remote from the sites of production and did not understand the local context.[103]

These standards have then been adopted in brands' private labour rights compliance programs, demonstrating the important influence that process-based mechanisms of this type can have on brands' policies and codes of practice. After the inclusion of locally negotiated standards, the brands' programs contributed more effectively to respect for freedom of association in their suppliers' factories. Although implementation of the standards in the Protocol has been imperfect, in so far as the elements of the Protocol that are difficult to dispute are concerned (existence of union noticeboards, office space, paid time off, etc) there has been extensive (if not uniform) compliance among first tier suppliers of signatory brands. All of the union organisers we interviewed saw this as a positive development and, in most factories where there were significant ongoing disputes regarding freedom of association, the implementation of these indisputable aspects of the Protocol were assisting the unions to continue to function in the factories in the face of significant challenges.[104] It is remarkable that the Protocol has resulted in even partial improvements in respect for freedom of association across numerous factories in light of broad findings in the literature (discussed in the first Parts of this article) indicating that it is rare for private regulatory initiatives to contribute in to progress in relation to enjoyment of this right on a significant scale.

In concert with international allies, then, the Indonesian unions not only orchestrated the establishment of a new non-state regulatory initiative but also orchestrated improvements in the companies' existing codes of conduct and monitoring procedures, increasing their focus on process-based rights. These achievements relied heavily on the flow of reliable information. The trade union representatives were able to communicate to their international allies in the Play Fair Alliance regarding the progress of the negotiation and implementation of the FOA Protocol, and the international organisations involved in that alliance relied on this information to push the companies toward agreeing to (and implementing) more effective standards.[105]

---

103 At the beginning of the process of negotiating the FOA Protocol, the ITGLWF sent proposed model language to all parties but the Indonesian unions wanted the Protocol to reflect local circumstances and hence did not advocate for the ITGLWF's proposed text.

104 The particular circumstances in Factory C mean that it is currently an exception.

105 In the period from 2009 to 2013 international labour rights campaigners played an important role in influencing the brands to stay involved in first the negotiation and then the implementation of the Protocol, for example by publishing a chart of 'how the brands are performing' in relation to the Protocol on the international 'Play Fair' campaign website: see Play Fair Alliance, *How the Brands Are Performing* (2017) <http://www.play-fair.org/media/index.php/workers-rights/brand-performance/>. This chart helps demonstrate the potential of process-based approaches as a means of obtaining more reliable

Nonetheless, our study of human rights grievances in two factories demonstrated two problems with the process-based mechanism studied, suggesting limits to genuine joint-control and gaps in procedures. First, there was a lack of an agreed and mutually respected fact-finding and adjudication process among all parties for determining whether or not particular rights or standards had been violated.[106] Our field research indicated that, on occasion, participating brands refuse to instruct their social compliance teams to investigate alleged FOA violations, arguing that this is instead the role of the state. This is an important gap, since the brands were not willing to put pressure on their suppliers to change their practices until they had been persuaded that one of the standards in their codes or in the FOA Protocol had been breached. The trade unions have used the FOA Protocol's National Committee meetings as an informal and in some cases quite effective, means of putting pressure on brands to investigate grievances. However, the FOA Protocol's formal grievance procedure is of limited benefit in resolving contested cases, since the formal process requires consensus between the companies and unions represented on the National Committee.

A second problem that the mechanism did not overcome was the tension between commercial pressures on the one hand and respecting and remedying rights breaches on the other. In many of the factory grievances we studied, the brands involved were unwilling to provide their suppliers with sufficient incentives to address those violations that the global brands did accept had occurred.[107] Here, our research reinforces the observation frequently made in the literature that in the context of highly competitive labour-intensive global industries, threats to reduce orders or sever business relationships may be insufficient, and that more positive incentives (longer term orders, higher prices, preferred supplier status) are needed. The Factory C case provides evidence of this, but it was also an issue in other cases we investigated.[108]

---

information, since the international organisations were able to check with their contacts in the Indonesian unions that the brands were reporting accurately.

106 In the Factory A case this was not an issue, since Nike was willing to investigate the grievance and Nike's investigation confirmed the trade union's concerns. However, if the union had disputed Nike's findings then it is unclear whether an appeal to the FOA Protocol National Committee would have resulted in a clear determination, as the Protocol's grievance resolution process requires consensus among the brands, suppliers and unions represented.

107 Again the Factory A case was an exception here, however there were particular circumstances in this case that likely increased Nike's leverage. The owner of Factory A owns a number of factories in other countries, but all of those factories only produce for Nike, thus increasing Nike's leverage. Factory A had also only recently been established in Indonesia and the owner had plans to significantly scale up its operations, so a threat from Nike not to increase orders to the factory until the human rights issue was resolved was more powerful than it might have been in other circumstances. Finally, events at Factory A – particularly the fact that one of the workers had electric shocks applied to his knee – would likely have been of interest to global media outlets, which may have increased Nike's determination to see the issue effectively remediated.

108 In another factory case we studied (Factory B), New Balance reported taking significant steps to persuade factory management to comply with the Protocol and its code of conduct, including reducing orders to the factory by 30 per cent when it failed to meet agreed compliance targets. The union in the factory reported that these efforts did not result in noticeable improvements in compliance. In the Factory D case, Adidas persuaded the supplier to reinstate a fired union organiser, but then the supplier moved the orders from

We propose that the type of regulatory orchestration by states, global civil society movements and IGOs discussed by scholars such as Ruggie and Abbott and Snidal could potentially play a role in addressing these problems. That is, we are not suggesting that orchestration from below can displace the need for orchestration from above, but rather that both are needed. In relation to the first problem (the absence of agreed fact-finding processes), arguably brands who do this are contravening the UNGPs, which state that the responsibility of business enterprises to respect human rights 'exists independently of States' abilities and/or willingness to fulfil their own human rights obligations' and is 'over and above compliance with national laws and regulations protecting human rights'.[109] However a clearly expressed position on this issue from the UN and other relevant IGOs (such as the ILO) would put increased pressure on brands to investigate alleged human rights violations when it is appropriate for them to do so. Further, given that these expectations are now specified in a UN Instrument, there is perhaps potential for an appellate process to a UN body such as the ILO, where a worker or union believes that a brand's investigation (or an investigation by another private initiative) has been inadequate.[110] This would increase pressure on private initiatives to investigate in a credible and defensible manner.

In relation to the second problem, if states, IGOs and civil society movements were able to orchestrate governance pressures that offered significant commercial incentives to brands, then that could potentially motivate the brands to offer more effective incentives to their suppliers to respect trade union rights and other human rights. Incentives that could potentially be attractive to brands include reduced threats to brand reputation; increased market share (through government procurement and purchases by ethically-minded consumers); and easier and cheaper access to capital (through ethical investment or through government investment agencies). As documented in this article, threats to brand reputations have certainly played a significant role in sports brands' human rights performance in the past; the targeting by global anti-sweatshop campaign of labour conditions in sports brands' supply chains in Indonesia was a key factor motivating the brands to engage in the FOA Protocol. However, we note the reduced energy of that campaign in recent years.[111] International civil society organisations face key resource constraints that limit their ability to contribute to

---

Adidas to another part of its corporate group. Adidas determined that this was done for business reasons, but the union believed it had been done to remove the workplace where the union had members from the coverage of the FOA Protocol and Adidas' code.

109 *Guiding Principles on Business and Human Rights*, UN Doc A/HRC/17/31, annex 13; see also John Ruggie, 'Protect, Respect and Remedy: A Framework for Business and Human Rights' (2008) 3(2) *Innovations: Technology, Governance, Globalization* 189, 205.

110 One of the authors has explored this idea elsewhere. For a short exposition see: Shelley Marshall and Scott Colvin, 'Why We Need a New International Labour Law' on *Shelley Marshall* (8 November 2016) <https://shelleymarshall.net/blog/2016/11/8/precarious-work>.

111 Staffing changes in key international labour rights groups and the redirection of much of the energy of the global anti-sweatshop movement toward Bangladesh following the Rana Plaza tragedy has meant that, in recent years, only limited effort has gone in to campaigning to persuade other brands to become involved in the Protocol or to push those brands who have signed to implement it more effectively and negotiate with the unions in relation to other labour standards. Note that this observation is based on the authors' fieldwork with these organisations.

efforts to orchestrate improvements in private initiatives and these resource constraints are a significant hurdle, which may prevent effective orchestration taking place. We note for example that the Indonesian unions and their international allies have not been able to persuade the sports brands to start negotiating regarding wages and job security, even though the unions have made it very clear that this is a high priority. In our assessment the problem here has not been lack of information, but rather lack of leverage: international campaign organisations have not been able to muster sufficient campaign resources to put significant pressure on the brands to tackle additional issues.

We now turn our observations more acutely to the interaction of human rights mechanisms. Our case study describes Indonesian trade unions simultaneously using both private and public human rights mechanisms to pursue rights claims and in order to reinforce claim-making in each forum. This can also be characterised as a form of regulatory orchestration. The unions studied undertook multiple strategies at once, including informal advocacy actions at local and transnational scales, while concurrently engaging with the formal grievance processes of private regulatory initiatives, local and international non-judicial mechanisms and state judicial processes. Indeed, we found that no individual mechanism was entirely effective in resolving the trade union rights grievances. Instead, by simultaneously pursuing a variety of grievance strategies, trade unions in this sector have worked with international allies to mobilise a form of cross-institutional accountability. In doing so they increased the pressure on key decision-makers to take their grievances seriously. For example, in the cases described in this article, the unions relied on mechanisms that have significant legitimacy but limited direct leverage (such as the state non-judicial mechanism, Komnas HAM) to influence private and state mechanisms that have greater leverage (such as brands' compliance programs and the Indonesian police). In relation to some grievances, these multi-pronged grievance strategies have resulted in relatively successful remediation and increased space for workers to exercise their right to organise and to pursue other rights.

The case study demonstrates, then, the different roles that various private and state grievance mechanisms can play in the resolution of particular disputes. This, in turn, has implications for thinking about the design of (what Ruggie terms) non-state non-judicial grievance mechanisms.[112] Rather than expecting each mechanism to be able to resolve individual disputes in a discrete manner, there may well be value in considering how particular initiatives can contribute to more multi-faceted grievance resolution processes.

The case study also confirms the important influence of the local state regulatory context on the effectiveness or otherwise of private regulatory initiatives, which is well reported elsewhere in the literature. The case study described corruption and bias in the judiciary and police, and various attempts by state departments to undermine relationships between Indonesian worker organisations and international labour rights groups. This limited the effectiveness of private regulatory initiatives in a number of ways described

112 *Guiding Principles on Business and Human Rights*, UN Doc A/HRC/17/31, annex 24–5.

earlier in the article. Ideally, then, attempts to orchestrate improvements in private regulatory initiatives must also carefully consider the relationship between non-state and state regulatory initiatives and, where appropriate, seek to also influence states toward enhanced efforts to protect human rights.

V CONCLUSION

According to the global union for garment workers, in the garment industry there was a 73 per cent drop in the workers' rights score of the top 20 apparel exporters to the US between 1989 and 2010.[113] At the same time there was a 42 per cent reduction in the price paid for the clothes they produced. There is an alarming frequency of reports by human rights organisations that worker activists in Bangladesh,[114] Cambodia[115] and China[116] (all key garment producing countries) have been discriminated against and imprisoned for exercising their trade union rights and demanding fair pay. In both China and Vietnam (another key garment producing country) freedom of association is not protected by law and the only union workers are allowed to join is the union affiliated to the government. These facts suggest that existing state and private mechanisms to improve human rights standards in garment supply chains are failing.

This article has examined whether there is any realistic scope for various actors to orchestrate continuous improvement in the operation of private regulatory initiatives in global supply chains, beyond the limited achievements of the better social audit schemes. Was Ruggie being naïve when he concluded that there are significant opportunities for the efforts of IGOs, states and civil society movements to cohere in a manner that improves private regulation, as part of a broader move toward more effective governance in the business and human rights space?[117] While a definitive answer to this question lies beyond the scope of this article, we have made a number of observations that we hope will inform the ongoing debate as to whether (and, if so, how) effective orchestration of continuous improvement in private regulatory initiatives in the business and human rights space might be achieved.

First, and this is the main contribution of this article, our case study demonstrates that there is significant potential for representatives of those whose human rights are impacted by global business – including representatives of workers and community stakeholders in the Global South – to engage in what we have called 'regulatory orchestration from below'. The Indonesian trade unions we studied have strategically generated pressure on private (and public)

113 Jenny Holdcroft and Adam Lee, 'Workers' Rights in Global Supply Chains: Holding Companies Accountable' on *IndustriALL Global Union* (1 June 2016) <http://www.industriall-union.org/workers-rights-in-global-supply-chains-holding-companies-accountable>.

114 Safi, above n 48.

115 David, above n 48.

116 Javier C Hernandez, 'Labor Protests Multiply in China as Economy Slows, Worrying Leaders', *The New York Times* (online), 14 March 2016 <https://www.nytimes.com/2016/03/15/world/asia/china-labor-strike-protest.html?_r=0>.

117 Ruggie, 'Global Governance', above n 4, 9.

regulatory processes to operate more effectively in their local context. Further, because worker representatives understand the particular issues preventing progress in achieving human rights in their local context, their interventions can push private regulatory initiatives to adapt in ways that seek to address those local challenges, in a way that is less likely to occur when regulatory orchestration is solely 'from above'. Hence any attempts to effect regulatory orchestration in global supply chains should ideally treat local worker representatives as potential participants in the process of orchestration, rather than passive recipients of whatever benefits it might bring.

Second, our case study demonstrates some of the specific benefits of joint-controlled mechanisms, which facilitate participation and heightened influence by stakeholders impacted by transnational business in the Global South. The FOA Protocol prioritised freedom of association and gave local stakeholders an active role in negotiating standards and processes. This resulted in the adoption of standards and responsibilities that were adapted to local conditions. While implementation has been imperfect, this approach has been significantly more effective in promoting respect for trade union rights than had previously been the case when auditing of the standards in global codes of conduct was the main human rights due diligence process adopted by participating brands.

This emphasis on local stakeholder participation and control, supported through a focus on process-rights, in turn increased the flow of accurate information about human rights breaches. The case study shows that when workers are organised it is much easier to find out the extent to which private initiatives are actually improving respect for human rights. Good information and transparency is a necessary precursor to effective orchestration, and it is well-documented that performance measurement-based approaches such as social auditing are not providing reliable information. Mechanisms that are not transparent often disguise poor governance practices and a lack of any tangible accountability to worker or community stakeholders. Such mechanisms can, in some circumstances, do more harm than good, as they can be used by companies to shield criticism and to effectively avoid meaningful engagement with stakeholders whose human rights are impacted by their business practices. The relative transparency of joint-controlled mechanisms provides another justification for shifting away from the dominant focus on corporate-controlled mechanisms and towards approaches that empower and prioritise the procedural rights of human rights claimants and their representatives.

This leads to our third observation, that the value of orchestration from below does not negate the need for effective orchestration from above. Access to credible information is only of benefit in an orchestration process if it is received by organisations with the capacity to translate that information into leverage for positive change. The background to our case study was a long-term 'anti-sweatshop' campaign involving close collaboration between local civil society organisations in countries in the Global South, which understood local politics and priorities, and organisations in the Global North, which understood strategies to influence company decision-making by shifting consumer and shareholder perspectives. Without this sustained campaign it is unlikely the FOA Protocol

would have been developed. Whether the Protocol will continue to improve in effectiveness and scope depends significantly on whether international activist organisations can find the resources and capacity (either themselves or in coordination with other actors, such as states or IGOs) to continue to coordinate with the Indonesian unions to pressure other brands to join the initiative, and to push signatory brands to extend its scope and further improve its implementation. The challenges here are significant, since our study indicates there is a need to persuade the brands to invest in providing more incentives to their suppliers to comply with the Protocol. Hence our field research demonstrates that global activist networks can play a key role in pushing private regulatory initiatives to become more effective, and any attempt to orchestrate improved outcomes needs to consider how to enhance the strength and effectiveness of those networks.

Our study also confirms that the effectiveness of private business and human rights initiatives in each country is significantly conditioned by (and to some extent conditional upon) the local state regulatory context. Any attempt to orchestrate improvements in private business and human rights initiatives should not displace efforts to persuade states to enforce human rights. Likewise, any attempts to orchestrate improvements in private regulatory initiatives must also take account of the way state regulatory processes impact on the effectiveness of private initiatives.