Beyond the audit: the regulatory legitimacy of multi-stakeholder initiatives in the apparel sector

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Beyond the audit: the regulatory legitimacy of multi-stakeholder initiatives in the apparel sector

Nana Frishling

A thesis in fulfilment of the requirements for the degree of Doctor of Philosophy

Faculty of Law and Justice

School of Global and Public Law

December 2021
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To my two shining stars born into this thesis, and the third one coming, I dedicate this to you.
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<td>Action Collaboration Transformation</td>
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<td>AFL-CIO</td>
<td>American Federation of Labor-Congress of Industrial Organizations</td>
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<td>Apparel MSIs</td>
<td>MSIs that aim to address the adverse human rights impacts of global supply chains in the apparel sector</td>
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<tr>
<td>Bangladesh Accord</td>
<td>Bangladesh Accord on Fire and Building Safety in Bangladesh</td>
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<tr>
<td>Buyer</td>
<td>The lead brand or retailer at the apex of a supply chain</td>
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<td>Certification Apparel MSI</td>
<td>An Apparel MSI that adopts the Certification MSI model</td>
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<td>Certification MSI</td>
<td>An MSI whose oversight activities focus on suppliers</td>
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<td>CSR</td>
<td>Corporate social responsibility</td>
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<td>Dutch Agreement</td>
<td>Dutch Agreement on Sustainable Garments and Textile</td>
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<td>ETI</td>
<td>Ethical Trading Initiative</td>
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<td>Fair Wear</td>
<td>Fair Wear Foundation</td>
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<td>FFSC</td>
<td>Fair Food Standards Council</td>
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<td>FLA</td>
<td>Fair Labor Association</td>
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<tr>
<td>GBVH</td>
<td>Gender-based violence and harassment</td>
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<td>German Partnership</td>
<td>German Partnership for Sustainable Textiles</td>
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<td>GFA</td>
<td>Global Framework Agreement</td>
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<td>Governance Apparel MSI</td>
<td>An Apparel MSI that adopts the Governance MSI model</td>
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<tr>
<td>Governance MSI</td>
<td>An MSI whose oversight activities focus on buyers</td>
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<td>GSP</td>
<td>Generalised System of Preferences</td>
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<td>GVC</td>
<td>Global value chain</td>
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<tr>
<td>Home state</td>
<td>The state in which buyers are domiciled</td>
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<tr>
<td>Host state</td>
<td>The state in which production is based</td>
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<tr>
<td>ILO</td>
<td>International Labor Organization</td>
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<td>ILO Tripartite Declaration</td>
<td>ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy</td>
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<td>Immokalee Coalition</td>
<td>Coalition of Immokalee Workers</td>
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<tr>
<td>Indonesia Protocol</td>
<td>Indonesia Freedom of Association Protocol</td>
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<tr>
<td>International Accord</td>
<td>International Accord for Health and Safety in the Garment and Textile Industry</td>
</tr>
<tr>
<td>KPI</td>
<td>Key Performance Indicator</td>
</tr>
<tr>
<td>Learning MSI</td>
<td>An MSI which focuses on learning and networking activities, and which does not provide for a substantial form of oversight</td>
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<tr>
<td>Lesotho Agreements</td>
<td>Lesotho agreements to prevent gender-based violence and harassment</td>
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<tr>
<td>Acronym</td>
<td>Full Form</td>
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<tr>
<td>MSI</td>
<td>Multi-stakeholder initiative</td>
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<td>NCP</td>
<td>National Contact Point</td>
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<td>NGO</td>
<td>Non-governmental organisation</td>
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<tr>
<td>OECD</td>
<td>Organisation for Economic Co-operation and Development</td>
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<td>OECD Guidelines</td>
<td>OECD Guidelines for Multinational Enterprises</td>
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<td>SAAS</td>
<td>Social Accountability Accreditation Services</td>
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<td>SAC</td>
<td>Sustainable Apparel Coalition</td>
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<td>SAI</td>
<td>Social Accountability International</td>
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<tr>
<td>SLCP</td>
<td>Social &amp; Labor Convergence Program</td>
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<tr>
<td>UDHR</td>
<td>Universal Declaration of Human Rights</td>
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<td>UN</td>
<td>United Nations</td>
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<td>UNGPs</td>
<td>United Nations Guiding Principles on Business and Human Rights</td>
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<td>Worker-driven model</td>
<td>Worker-driven social responsibility model</td>
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<td>WRAP</td>
<td>Worldwide Responsible Accredited Production</td>
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<tr>
<td>WRC</td>
<td>Worker Rights Consortium</td>
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<td>WSRN</td>
<td>Worker-driven Social Responsibility Network</td>
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Chapter 1  
Introduction

1.1 The thesis
This thesis examines multi-stakeholder initiatives (MSIs) that aim to address the adverse human rights impacts of global supply chains in the apparel sector (Apparel MSIs). The argument of this thesis is that Apparel MSIs must adopt new regulatory approaches, including moving beyond social audit, expanding stakeholder participation and better measuring and communicating impact. They must transform in order to preserve their legitimacy, and to realise their ultimate aim of improving human rights outcomes for apparel sector workers. In the words of an independent expert and former MSI employee:

Either we radically change the way that the MSI works or we are just continuing to do business and not be effective at all. (Independent Expert 29 Interview).

The background to the thesis is that despite being in operation for more than two decades, Apparel MSIs have not demonstrated substantial or consistent human rights advances for global apparel supply chain workers. At the same time, they are now subject to increasingly strident criticism from civil society. These critics argue that MSIs are an ineffective, unreformable form of private regulation that is not fit-for-purpose and lacks legitimacy. Accordingly, this thesis is significant, becomes it comes at a critical juncture. Faced with their own limited progress and the emergence of alternative models of private regulation, it is now incumbent upon Apparel MSIs to innovate and reform. If they do not, their legitimacy will continue to decline and they will be rendered obsolete. In a world where gaps in public regulation show no signs of abating, the broader regulatory system still requires private regulation. Thus, resolving the question of Apparel MSI legitimacy is critical to improving the overall effectiveness of the regulatory system as a whole. Most importantly, it is critical to safeguarding the human rights and dignity of millions of apparel supply chain workers worldwide.

1.2 Background
Apparel MSIs emerged in the mid-1990s in response to the human rights challenges posed by complex global supply chains.

Global supply chains are, today, widely recognised in many sectors - including apparel - as the driving force of globalised production (ILO 2016a; Mayer et al. 2017). Accounting for an estimated 80% of global trade flows (UNCTAD 2013, 135) and linked to one in five jobs worldwide (ILO 2015, 132), supply chains are an all-pervasive feature of the contemporary economy. Their wide-ranging impacts – including economic, social and environmental – are felt in virtually every corner of the globe.
Supply chains are inextricably intertwined with the rise of global outsourcing in the 1970s (Sarfaty 2015). Global brands and retailers, motivated by the search for cheap labour began to rely on global production networks and contractual relationships rather than direct ownership to produce their goods (Gereffi 2006). Over time, the process of production became more functionally and geographically fragmented (Mayer et al. 2017). Functionally, the production of a final good is now typically broken up into several subcontracted segments, or tiers. Geographically, brands and retailers have ‘outsourced and off-shored stages of the production process, shaping new global and regional patterns of specialisation’ (Mayer et al. 2017, 129).

The global apparel sector, with estimated values ranging from US$1.5 trillion (Shahbandeh 2021) to US$2.4 trillion (Business of Fashion & McKinsey 2017, 6) and employing more than 60 million workers worldwide (Better Work 2019), is often cited as an exemplar of this fragmented system of production (Rossi et al. 2014). The 1974 Multi-Fibre Arrangement rapidly accelerated the sector’s fragmentation. Under the Arrangement, quotas were assigned to developing countries that limited the quantity of clothing and textile each country could export to the United States (US) and European Union (EU) (WTO n.d.). As the appetite for global outsourcing grew, and manufacturing countries reached their quota limits, production was forced across an ever-wider range of countries in the developing world, including in Asia, Latin America, the Caribbean and Africa. In 2005, the quota system was replaced with the World Trade Organization’s Agreement on Textiles and Clothing. This resulted in a pivot to Asia, and in particular China, for production, with many other developing countries losing their apparel manufacturing industries as a direct result (Staritz 2011, 8-10; Business of Fashion & McKinsey 2019, 35).

The phase out of quotas, combined with the global financial crisis in 2008 led to the rationalisation and consolidation of supply chains, with major brands seeking to reduce their supplier numbers. The 2008 crisis also led to increased consolidation among lead firms at the apex of global supply chains (Staritz 2011, 39-40; Business of Fashion & McKinsey 2020, 30). Experts expect supply chain consolidation to accelerate even further in the wake of the social and economic upheaval wrought by the global COVID-19 pandemic (the pandemic) (Business of Fashion & McKinsey 2020, 30).

Overall, despite recent shocks and some movement towards consolidation, global apparel supply chains remain functionally and geographically dispersed. Thus, today, the typical brand or retailer in the apparel sector no longer manufactures the goods that it sells. Instead, it outsources production to fragmented, multi-tiered networks of contractors, typically located in developing economies where production costs (in particular labour costs) are low, and regulations weak (Fernandez-Stark et al. 2011; Mayer & Gereffi 2010). According to global value chain (GVC) literature, this makes the apparel supply chain a typical example of a ‘buyer-driven’ chain (Fernandez-Stark et al. 2011; Mayer & Gereffi 2010). The term ‘buyer’ refers to those lead firms - typically brands and retailers - sitting at the apex of apparel supply chains.
This thesis adopts this term. Chapter 2 will demonstrate that characterising the apparel supply chain as ‘buyer-driven’ has significant implications for power relations between buyers and suppliers.

This outsourced business model has created significant opportunities for employment and aided the development of emerging economies. It has also given rise to profound human rights challenges, with systemic human rights breaches a daily reality for tens of millions of apparel supply chain workers across the globe (Human Rights Watch 2015a; Human Rights Watch 2015b; Clean Clothes Campaign 2021). Consistent with the language of the United Nations Guiding Principles on Business and Human Rights (UNGPs), this thesis refers to these breaches as the ‘human rights impacts’ of global apparel supply chains.

These human rights impacts have persistedlargely unchecked for decades, primarily due to a permissive global regulatory environment (Gereffi & Mayer 2006; Ruggie 2008a; Kolben 2011; Baumann-Pauly et al. 2017). In particular, labour regulation in states where production is located is weak, extraterritorial regulation in states where buyers are headquartered is limited, and corporations are not subject to binding obligations under international law. All this has meant that buyers and suppliers are not adequately held to account, while workers are left without remedy. These failures, commonly referred to as ‘global governance gaps’ present a major obstacle to the effective regulation of global apparel supply chains and pose a significant human rights challenge for business.

In response, major apparel buyers - who began facing growing public scrutiny and pressure from the early 1990s - initially turned to self-regulation in the form of supplier codes of conduct (Vogel 2005; Bartley 2007; Utting 2014). Growing dissatisfaction with these unilateral and non-binding codes in turn gave rise to a new experiment in private transnational regulation: the MSI (Utting 2002; O’Rourke 2006).

Defined at a high level, an MSI is a voluntary initiative involving a group of networked stakeholders working together to address the social and environmental impacts of transnational business (Utting 2005a; O’Rourke 2006; Bartley 2007; Baumann-Pauly et al. 2017). Participating stakeholders are typically business, trade unions and non-governmental organisations (NGOs). They may also include others such as universities, government, intergovernmental organisations, industry associations and independent experts. Often seen as an ‘evolution’ of corporate social responsibility (CSR), MSIs seek to respond to global governance gaps and the limits of self-regulation (Utting 2005a). They do so through a combination of varying tools and mechanisms, including more standardised codes, strengthened and more independent systems of monitoring and verification, greater levels of disclosure, broader participation by civil society and opportunities for learning and information sharing (Utting 2005a; O’Rourke 2006; Baumann-Pauly et al. 2017). Since they first emerged in
the 1990s, there are now nine MSIs that seek to address the human rights impacts of global apparel supply chains. It is these Apparel MSIs that are investigated and evaluated in this thesis.

Despite much initial promise, two decades on, evidence suggests that Apparel MSIs have had only a limited impact on human rights protection (Barrientos & Smith 2007; Anner 2012; Sethi & Rovenpor 2016). This seeming lack of progress has been attributed to a range of factors. These include, a failure to meaningfully incorporate workers and local stakeholders, a lack of participation by sufficiently diverse stakeholders and the disproportionate influence of corporate members. In addition to these concerns, this thesis will contend that a particularly pressing issue facing Apparel MSIs is the manner in which they seek to control their targets of regulation and ensure regulatory compliance.

Most Apparel MSIs have, to date, relied predominantly on social audit to monitor and ensure compliance with human rights standards. Yet there is now a strong body of evidence showing that social audit is an inherently flawed tool that is not sufficiently powerful to implement meaningful and consistent change (O’Rourke 2003; Clean Clothes Campaign 2005a; Locke et al. 2009; LeBaron et al. 2017; Islam et al. 2018; Clean Clothes Campaign 2019). In particular, social audit is incapable of addressing complex systemic rights such as freedom of association. Likewise, it fails to challenge broader systemic issues such as power relations, market pressures and purchasing practices. It is also incapable of changing the broader social and political context. All of these factors have a significant impact on the human rights of apparel supply chain workers.

The seeming lack of progress has caused disillusionment among a growing cohort of civil society advocates who argue that all MSIs (including Apparel MSIs) are an entirely ineffective model of private regulation, that they are not fit-for-purpose, and are entirely unreformable (AFL-CIO 2013; MSI Integrity 2020). Instead they point to a recent innovation, known as the worker-driven social responsibility model (the worker-driven model) as a more promising and effective private regulatory alternative.

These challenges and the growing chorus of vocal critics give rise to the critical question of the legitimacy of MSIs. According to political science scholars of private transnational governance, in order for regulation beyond the state to be justified, the assumption of regulatory functions by private actors must be democratically legitimate. That is, there must be a “socially shared belief that the regulator has the capacity and the authority to impose rules on a community of citizens’ (Mena & Palazzo 2012, 528; Scharpf 2009). Regulation by the state is considered legitimate because it is underpinned by a system of representative democracy. Unlike states, MSIs are not embedded within established democratic mechanisms, nor do they have access to traditional mechanisms of state power to ensure compliance (Fuchs et al. 2009; Bernstein & Cashore
Thus to the extent that they regulate - MSIs must establish legitimacy in order to justify, and recruit stakeholders to, their regulatory scheme (Bernstein 2004).

1.3 The inquiry and the argument of this thesis

Against this backdrop, the overarching question that this thesis seeks to address is:

What limits the regulatory legitimacy of Apparel MSIs, and how can these limitations be addressed?

This inquiry will be answered by considering the following series of questions:

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<td>What are the key tools, techniques and strategies used by Apparel MSIs to ensure compliance with human rights standards in global apparel supply chains?</td>
<td>Chapters 5 &amp; 6</td>
</tr>
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<td>6.</td>
<td>What are the limitations of social audit?</td>
<td>Chapter 5</td>
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<td>7.</td>
<td>What are the most significant legitimacy challenges facing Apparel MSIs today?</td>
<td>Chapter 6</td>
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<tr>
<td>8.</td>
<td>What, if any, unique value do Apparel MSIs bring as private regulators?</td>
<td>Chapter 7</td>
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<tr>
<td>9.</td>
<td>Is the new worker-driven model an adequate replacement for MSIs as a form of private regulation?</td>
<td>Chapter 7</td>
</tr>
<tr>
<td>10.</td>
<td>To the extent that Apparel MSIs are still legitimate, how can they reform in order to increase and maintain their legitimacy, and become more effective regulators?</td>
<td>Chapter 8</td>
</tr>
</tbody>
</table>

As stated at the outset, the argument of this thesis is that the limits of Apparel MSI influence are now eroding their regulatory legitimacy. The answers to the above questions will reveal that Apparel MSIs must urgently innovate and reform in order to rebuild their legitimacy and realise their potential as effective private regulators.
1.4 Innovation and significance

The study of MSIs is an inherently multi-disciplinary endeavour, spanning disciplines such as political science, business, economics, geography and law (De Bakker et al. 2019). This thesis analyses MSIs at the intersection of two disciplines: political science, and law and regulation. Both place primacy on the role of MSIs as regulators, each bringing a different focus.

To the extent that they perform a regulatory function, MSIs reflect the rise of decentralised, transnational private power (Cerny 2009). As noted in section 1.2, the political science literature on transnational non-state governance argues that the exercise of private regulatory power must be legitimate to be justified. Legitimacy becomes 'the glue that links authority and power'; it justifies authority, empowers regulators, and increases the likelihood of compliance (Bernstein 2011, 20). Further, MSIs are subject to multiple legitimacy claims from both internal and external stakeholders (Black 2008). From a political science perspective, maintaining legitimacy across a spectrum of stakeholders is key to ensuring that the regulatory power of MSIs is accepted, and critical to securing their survival as regulators (Black 2008; Quack 2010). Legitimacy is comprised of both a normative and sociological dimension, which to date, have mostly been addressed separately by scholars (Bernstein 2011; Schleifer 2018). As outlined further below, the thesis seeks to bridge this divide.

Regulatory theorists are also concerned with the power of regulatory actors. Like political science scholars of transnational governance, they recognise that non-state actors now wield significant regulatory power in a range of contexts (Drahos 2017). The main focus of their inquiry is on how to explain, control and influence the power of regulatory actors in order to better achieve regulatory ends (Drahos 2017). Although regulatory theorists are concerned with other matters as well, they nonetheless emphasise the need for regulation to be legitimate, including through democratic accountability (Ayres & Braithwaite 1992, 54-100; Kingsford Smith 2011).

This thesis draws primarily upon the theory of responsive regulation, which explicitly contemplates the emergence of private institutional regulators such as MSIs (Braithwaite 2008, 94-97). Responsive regulation acknowledges that different regulatees (and even the individual regulatee) may have multiple motivations for compliance; and that regulatory strategies should be devised accordingly (Parker 2021). Responsive regulation argues that to be more effective, regulators must constantly respond to the behaviours and context of regulatees (Braithwaite 2011). It also recognises the importance of incorporating multiple stakeholders, and in particular civil society, into the regulatory project (Ayres & Braithwaite 1992, 54-100). Influenced by the principle of participative and deliberative democracy, it argues that such participation ensures regulators are democratically accountable and legitimate (Ayres & Braithwaite 1992, 54-100; Kingsford-Smith 2011). In this sense, responsive regulation converges with the political science

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1 As will be discussed in Chapters 2 and 5, not all MSIs perform a regulatory function.
theory of democratic legitimacy. At its core, responsive regulation aims to foster effective, non-coercive and respectful regulation (Braithwaite 2011).

Responsive regulation, influenced by the regulatory theory of nodal governance, also posits that the power of multiple stakeholders can be leveraged to empower weak regulators and weak actors within regulatory systems (Braithwaite 2008, 94-97). This is a significant theme emerging from this thesis, which highlights the imbalances of power among multiple MSI stakeholders (Chapter 2, Chapter 6). Responsive regulation’s focus on alternate regulatory actors highlights the importance of understanding the broader centred regulatory system in which MSIs sit. Accordingly, this author relies on responsive regulation for two reasons. First, because it has the potential to bolster the regulatory power and effectiveness of Apparel MSIs in a manner that is democratically accountable. Second, because it presents a strategy for redressing power imbalances and building power among weaker actors within the broader regulatory system.

This thesis also presents a legal perspective on the regulatory power of MSIs, in line with legal traditions of legal pluralism and viewing the law in context (discussed further below). The legal analysis facilitates a broader understanding of the legal and political context and associated structures and institutions within which MSIs are embedded (Morgan & Yeung 2006, 1-15). It supports the responsive regulation analysis, by identifying those actors and forms of regulatory power (both legal and non-legal) which MSIs might seek to leverage.

Together, the theories of legitimacy and responsive regulation, combined with the legal analysis aid a deeper analysis of how Apparel MSIs operate, provide an understanding of the broader legal and regulatory environment in which they are situated, and facilitate unique insights into how they might be reformed. This is further supported by original empirical research undertaken for the purpose of this thesis, which provides a sociological perspective to the analysis, and also drives the final recommendations for reform. The original contribution brought by each of these approaches is outlined below.

1.4.1 Theoretical innovation

The normative concept of legitimacy is constituted by both input and output legitimacy (Risse 2006; Kalfagianni & Pattberg 2013). Input, or governance legitimacy, is concerned with the extent to which MSIs are perceived as justified or credible, in light of their procedures and governance structures (Mena and Palazzo 2012). The literature on input legitimacy emphasises, among other things, the importance of inclusive and fair participation (Gilbert & Rasche 2007; Beisheim and Dingwerth 2008; Boström and Hallström 2013), the quality of deliberation (Bernstein & Cashore 2007; Dingwerth) and transparency and accountability (Bernstein 2011; Bäckstrand 2006). Output legitimacy is concerned with the effectiveness of an MSI, namely, the extent to which an MSI is effectively regulating and achieving its aims (Bäckstrand 2006; Mena & Palazzo 2012). There is a dearth of detailed empirical study of the impact of Apparel MSIs (although see Barrientos & Smith 2007; and Egels-Zandén & Lindholm
Despite, or perhaps because of this lack of clear data, some scholars and civil advocates argue that Apparel MSIs have had little to no success in achieving sustained human rights advances for workers in apparel supply chains (Sethi & Rovenpor 2016; MSI Integrity 2020). Increasingly, scholars and advocates are linking the ineffectiveness of MSIs to their reliance on social audit (AFL-CIO 2015; LeBaron & Lister 2015; Sethi & Rovenpor 2016; MSI Integrity 2020).

This thesis contributes to this literature in a number of ways. First, although it is recognised that input and output legitimacy are interconnected (Beisheim & Dingwerth 2008; Kalfagianni & Pattberg 2013), there are few academic studies that simultaneously assess both the input and output legitimacy of MSIs (examples of those that do, include Mena & Palazzo 2012; Baumann-Pauly et al. 2017). Further, while much has been written on specific Apparel MSIs (Barrientos & Smith 2007; Anner 2012; AFL-CIO 2015; Egels-Zandén & Lindholm 2015; Sethi & Rovenpor 2016), as far as can be discovered, there has been no comprehensive analysis of the legitimacy of all MSIs focusing on the apparel sector. Accordingly, the legitimacy analysis undertaken by this thesis is innovative because it presents a detailed assessment of the input and output legitimacy of all Apparel MSIs, which specifically highlights the interrelationship between normative legitimacy criteria.

The legitimacy analysis is also innovative because of the emphasis that it places on the function performed by an MSI. Some scholars do delineate MSIs on this basis (Gilbert et al. 2011; Mena & Palazzo 2012; Baumann-Pauly et al. 2016; De Bakker et al. 2019). However the author has not uncovered scholarship that specifically considers how the primary function adopted by an MSI affects its legitimacy. This is particularly relevant given that social audit – a practice subject to heavy critique – is the primary function performed by many MSIs (Fransen & Kolk 2007). This thesis argues that it is also important to acknowledge that MSIs perform other significant functions, a matter not comprehensively addressed by the literature on MSIs and social audit. This thesis is innovative in that it assesses the extent to which each Apparel MSI relies on social audit as its primary form of oversight and analyses the consequent implications for their legitimacy.

As already stated, responsive regulation contemplates the rise of MSIs and presents strategies for improving their regulatory efficacy. To date, the literature has not presented a detailed analysis of the extent to which MSIs are applying the principles of responsive regulation in practice. This thesis addresses this specific question in respect of Apparel MSIs. In doing so, the thesis also considers whether Apparel MSIs might better harness the principles of responsive regulation to address the challenges they presently face as private transnational regulators. Framing the challenge of legitimacy through the lens of responsive regulation reflects a further original contribution to MSI scholarship.
1.4.2 Innovation in legal synthesis and analysis

It is broadly accepted, across multiple disciplines, that the major underlying cause of human rights breaches within the apparel global supply chain is the lack of effective regulation governing transnational business (Gereffi & Mayer 2006; Ruggie 2008a; Kolben 2011; Baumann-Pauly et al. 2017). However, as noted by De Bakker et al. (2019), MSI scholarship tends to ignore the broader regulatory context within which MSIs sit. Further, as far as can be discovered, there has been no attempt to systematically map the key forms of regulation (both public and private) specifically governing the human rights impacts of global apparel supply chains. This thesis makes an original contribution by performing a baseline analysis of this broader regulatory context. This facilitates the application of the theory of responsive regulation by indicating which other regulatory actors might be leveraged by Apparel MSIs to increase their legitimacy.

1.4.3 Empirical Innovation

This thesis relies on two forms of empirical data. First, it analyses key relevant documents made publicly available by each Apparel MSI. Second, the author has undertaken qualitative interviews with a spectrum of relevant stakeholders. Further detail on methodology is set out in section 1.5.

As highlighted at the outset of this section, legitimacy is comprised of both a normative and sociological dimension. Normative legitimacy focuses on whether MSIs meet specific criteria, some of which have been flagged in section 1.4.1, and which are further detailed in Chapter 6. Sociological legitimacy focuses on the extent to which relevant stakeholders deem the MSI to be acceptable and credible in practice (Buchanan & Keohane 2006; Black 2008, 144). Despite the tendency in the scholarship to address these questions separately, some argue that they are interconnected and should therefore be considered together (Quack 2010; Schleifer 2018). This thesis adopts, and contributes to, this combined approach by importing an empirical dimension into the present legitimacy analysis.

First, this thesis finds that most of the key themes and issues raised by stakeholders mirror the normative criteria for legitimacy. This contributes to the literature by providing further support for the proposition that normative and sociological criteria are interconnected, at least in respect of Apparel MSIs.

Second, the empirical research leads the author to propose an additional normative criterion: the source of funding for MSIs. Although the issue of funding, and its attendant risk of corporate capture has been raised by civil society advocates (MSI Integrity 2020), it has not been directly incorporated into normative legitimacy analysis. The empirical research conducted here demonstrates that this is a concern across a spectrum of stakeholders, not just civil society.
Accordingly, this thesis innovatively proposes that source of funding be incorporated into the existing criteria for normative legitimacy.

Third, this thesis provides an empirical perspective to the literature on social audit. As Chapters 5 and 6 argue, understanding the role and limitations of social audit is critical to assessing the normative legitimacy of MSIs. The interviews empirically confirm the limitations and critiques set out in the literature. They also build upon the literature by adding a more nuanced account of the perspective of corporate actors. Some scholarship has characterised social audit as a fig-leaf for companies, used to protect brand reputation rather than advance workers’ rights (LeBaron et al. 2017; Islam et al. 2018). The responses of MSI member companies suggest that the reality is more complex. All companies interviewed understood the limitations of social audit, and viewed it simply as one tool among many in addressing human rights concerns. They also emphasised how embedded social audit has become in daily corporate decision-making, highlighting that it serves necessary internal corporate functions. This leads the thesis to distinguish between the use of social audit by companies, and its use by Apparel MSIs, something which the literature has not clearly done to date.

Fourth, the empirical research provides an overarching assessment of the sociological legitimacy of Apparel MSIs. This supports the assessment of their normative legitimacy.

Finally, the empirical research also informs the recommendations for reform in this thesis. It emphasises an emerging view that the worker-driven model should replace MSIs. Although this proposition has been raised by civil society (MSI Integrity 2020; WSRN 2019), it has not been considered in any detail by MSI scholarship. This is most likely because, as already pointed out, the MSI literature does not tend to look to the broader regulatory context in which MSIs sit. This thesis innovates by critically engaging with this question, with the empirical research facilitating a comparison between MSIs and the worker-driven model. This analysis, combined with the insights of MSI stakeholders in respect of other key issues, influence the recommendations for reform in Chapter 8. As far as this author is aware, no study has made detailed recommendations for the reform of Apparel MSIs in the manner set out in this thesis.

1.4.4 Significance

Apparel MSIs have the ultimate aim of improving human rights for millions of apparel workers worldwide, but after two decades they have shown limited evidence of such improvement. As a result, they now face increasingly strident criticism from civil society (described above), and tempered enthusiasm from the United Nations (UN) (UN 2018b). They also face competition from emerging alternate forms of private regulation. As long as global governance gaps persist, some form of private regulation will be necessary to fill those gaps. If Apparel MSIs are no longer legitimate, they should be abandoned as a regulatory project and replaced with alternatives. If they remain legitimate, they must nonetheless evolve to address present critiques and challenges.
Against this backdrop, it is now incumbent upon Apparel MSIs to demonstrate their legitimacy. Resolving the question of Apparel MSI legitimacy is critical to improving the overall effectiveness of the regulatory system as a whole, and ultimately, to safeguarding the human rights and dignity of millions of apparel supply chain workers. This thesis is significant because it addresses this critical question. It does so by assessing the present legitimacy of Apparel MSIs, and making specific recommendations for their reform. If Apparel MSIs undergo the transformation proposed in this thesis, they have an opportunity to maintain their legitimacy. If they do not innovate, they may soon be rendered obsolete. Given the opportunity to build a more just world coming out of the pandemic, these recommendations could not come at a more critical juncture.

1.5 Methodology

The overarching inquiry of this thesis and its component questions are answered through a combination of research methods. First, the analysis relies on a review of the underlying literature in respect of MSIs, social audit, and the new worker-driven model. As already noted, this literature spans a spectrum of disciplines. In addition, NGOs and trade unions have also undertaken analysis and written reports in respect of MSIs and the worker-driven model. This chapter has already introduced some of the key issues and questions raised by the literature. The remainder of this thesis interweaves the results of the literature review throughout the entire analysis, with different arms of scholarship informing the discrete questions outlined above. This is overlaid with original legal, theoretical and empirical analysis.

Theoretical Analysis

The political science theory of democratic legitimacy is introduced in Chapter 3, and applied directly to Apparel MSIs in Chapter 6. That chapter sets out the key criteria of normative legitimacy and assesses the extent to which Apparel MSIs presently satisfy these criteria. This analysis, combined with the empirical assessment of legitimacy answers the central inquiry of this thesis: what limits the regulatory legitimacy of Apparel MSIs, and how can these limitations be addressed? The deficiencies in legitimacy identified by this analysis inform the recommendations for reform in Chapter 8.

The regulatory theory of responsive regulation, introduced in Chapter 3, does not directly inform the legitimacy analysis. Rather, it provides a broader theoretical framing to the inquiry, and is interwoven throughout the entire thesis. In Chapter 4, the regulatory theory of nodal governance - which has informed the evolution of responsive regulation – supports the legal analysis of how the human rights impacts of global apparel supply chains are presently regulated (discussed below). Nodal governance argues that the state is no longer a focal point of regulation, but simply one actor or ‘node’ among many in a broader network or system of regulation (Johnston 2006; Burris et al. 2008). According to scholars of nodal governance, understanding nodes is critical to understanding how power is structured and created within a system, and how new
centres of power may emerge (Drahos 2004; Wood & Shearing 2007, 27). The legal analysis constitutes a mapping of the relevant ‘regulatory system’. The application of a nodal governance lens brings into sharper focus the degree of current (and underutilised) power residing among key players, or ‘nodes’, within the system. Chapters 5 and 6 of this thesis consider the extent to which Apparel MSIs – which in theory reflect a form of responsive regulation – are applying the principles of responsive regulation in practice. The gaps identified contribute to the recommendations for reform in Chapter 8.

**Legal analysis**

The legal analysis in Chapter 4 outlines and analyses the existing forms of, and gaps in, apparel supply chain regulation. This analysis, by focusing on regulation in a broad sense, adopts a legal pluralist, and ‘law in context’ perspective. Both approaches look beyond a strict doctrinal view and offer a more decentred vision of the law. Law in context scholars recognise that the law can encompass ‘institutions, processes, structures, practices, personnel and craft traditions’ (Twining 2019, 173). They also emphasise the importance of understanding ‘how ‘law’ forms part of a larger phenomenological picture and how it interacts with ‘extra-legal’ phenomena’ (Cane 2020, 460). Similarly, legal pluralists emphasise the importance of state and non-state, and legal and non-legal systems of ordering (Twining 2010). This is particularly relevant when considering a problem of transnational dimensions (Twining 2009, 362-375; Darian-Smith, 2013).

Accordingly, the legal analysis considers domestic and international law, including hard and soft law, as well as non-legal forms of regulation. The analysis of domestic and international law is predominantly doctrinal, as in essence, it seeks to ‘establish the nature and parameters of the law’ (Hutchinson & Duncan 2012, 113). The analysis also extends beyond a strict doctrinal approach, as Chapter 4 considers a range of international soft law\(^2\) instruments. Chapter 4 also reflects a legal pluralist approach, in that it analyses the spectrum of non-legal forms of regulation - including MSIs\(^3\) - operating in the apparel sector.

Consistent with a law in context approach, the thesis also considers the broader context in which the problem of regulating supply chains has arisen. Chapter 2 emphasises key stakeholders and associated power dynamics within global apparel supply chains. It also highlights how the dominant business model adopted by buyers at the apex of supply chains has contributed to human rights breaches. Understanding this broader context is critical to understanding the obstacles to effective regulation, and to proposing solutions.

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\(^2\) The definition of soft law is itself amorphous and subject to debate. This thesis adopts the international law usage of the term as applying to non-binding norms and instruments which may nonetheless have the effect of law (Cerone 2016; Twining 2009, 117).

\(^3\) Scholars of law and regulation have characterised MSIs as non-legal systems of regulation. For example, Black (2008) argues that although transnational private regulation such as MSIs may be legitimate, it is not on a legal basis. This thesis adopts this approach.
Empirical analysis

As flagged in section 1.4.3, this thesis relies on two forms of empirical data. First, it analyses key relevant documents made publicly available by each Apparel MSI. The author reviewed: (1) constituting/founding documents; (2) annual reports; (3) strategy papers; (4) a sample of audit reports and headquarter level company reviews (to the extent that Apparel MSIs have made these publicly available); (5) select research papers published by Apparel MSIs on discrete issues; (6) and other information available on the websites of Apparel MSIs. This document-based analysis informs the legitimacy analysis.

Second, the author undertook qualitative interviews with relevant stakeholders. The author had initially intended to undertake a case study of one or two Apparel MSIs. Based on the results of the literature review and document-based analysis, the author formed the view that of the nine existing Apparel MSIs, three would be the most promising subjects of a case study: the Fair Labor Association, Fair Wear Foundation and Ethical Trading Initiative. Each of these three Apparel MSIs were contacted with a formal request for participation in the study, however they either did not respond, or indicated that they were not willing to participate (representatives of one of these Apparel MSIs did however subsequently consent to be interviewed). As a result, the author chose instead to interview a broad spectrum of relevant stakeholders within the MSI ecosystem. This included organisations that were members of the three Apparel MSIs above, as well as external stakeholders whose work or experience directly relates to Apparel MSIs.

The purpose of these interviews was threefold. First, it was to gain practical insights, greater depth and new perspectives to the issues raised in the literature. Second, to add a sociological dimension to the normative question of legitimacy. Third, the interviews were intended to explore ideas as to how Apparel MSIs might innovate, evolve and reform. The purpose of these interviews was not to test or establish a hypothesis. Accordingly, their primary purpose can be characterised as exploratory.

The author undertook a total of 36 interviews from April 2018 to December 2019. Interviewees were selected through a combination of purposive and snowball sampling. Purposive sampling is an appropriate technique in exploratory research as it allows the research to identify ‘a sample that appears most likely to provide the in-depth information relevant to the study research question, addressing key characteristics of a phenomena which the researcher wishes to better understand’ (Parker & Northcott 2016, 1117). The author complemented this approach with snowball sampling, which allows the researcher to take ‘advantage of the social networks of identified respondents, which can be used to provide a researcher with an escalating set of potential contacts’ (Atkinson & Flint 2004, 1044). This is particularly relevant in the case of contacts that are difficult to access, such as senior NGO leaders and senior corporate executives (Atkinson & Flint 2004).
The author initially identified three broad stakeholder groups which it considered could provide the deepest and most relevant insights into Apparel MSIs: (1) NGOs and trade unions (including those who are, and are not, MSI members); (2) companies that are members of Apparel MSIs; and (3) independent experts who have knowledge of Apparel MSIs. These three distinct groups granted different perspectives on the same issues, thus allowing this thesis to build a comprehensive picture of the spectrum of stakeholder views. It is important to acknowledge that an even more comprehensive picture would have also included the direct views of workers, suppliers and potentially even consumers and investors. This however was not feasible due to the overlapping limitations of access, adequate resources and time.4

In relation to corporate members, the author focused on senior CSR and social compliance executives. Companies do not typically make public the contact details of individual executives. Accordingly, the author relied on a combination of LinkedIn and internet searches to contact individuals. The author made the conscious decision not to interview companies who are presently not members of MSIs. This was principally because the central inquiry of this thesis requires interviewees to have some knowledge or experience of MSIs, which non-member companies do not. In relation to civil society organisations that are MSI members, the author contacted those that have direct expertise in relation to business and human rights issues and/or the rights of workers in the apparel sector. In relation to civil society organisations that are not MSI members, the author focused on those organisations that have conducted work in relation to, advocated for, or critiqued Apparel MSIs. In relation to independent experts, the author initially interviewed existing contacts, and then interviewed additional independent experts that were recommended through snowball sampling.

Given that the three Apparel MSIs had initially declined to participate in the study, the author did not attempt to contact the staff of these or other MSIs. However, during the process of snowball sampling, the author gained access to three individuals who worked for MSIs, and were willing to speak on the record. Thus a fourth, smaller stakeholder category of MSI stakeholders emerged. The combination of purposive and snowball sampling culminated in a total of 36 stakeholders being interviewed. Three of these interviews were conducted off-the-record. Because these three interviewees did not consent to their interview being reproduced, they have not been included in the total sample. Rather, these interviews provided general background to the author. Accordingly, the total sample for the purpose of analysis in this thesis was 33, broken down as follows: civil society (including MSI members and non-member NGOs (N=12); MSI member companies (N=11); independent experts (N=7); and MSIs representatives (N=3). Further detail in respect of all 33 interviewees is set out in the table at Annex A. Some interviews were undertaken on the condition of anonymity (noted in Annex A) and to the extent that these have been quoted, they are referred to in a general manner.

4 For example, worker interviews would have required fieldwork, which was beyond the scope of this thesis. The author attempted to secure the participation of large suppliers, however was unable to do so.
The author acknowledges that there is little clarity on what constitutes an appropriate sample size in qualitative research. Suggestions for appropriate sample size have ranged from 5 to 25 (Beitin 2012; Brinkmann 2013, 57-59). Because of this uncertainty, the concept of saturation has become the most common guide in determining sample size (Beitin 2012). Saturation refers to the point at which ‘no new information, codes or themes are yielded from data’ (Braun & Clarke 2021, 202). Some authors critique the over reliance on saturation, and point out that sample size will in reality also be influenced by additional factors, including ‘a mix of interpretative, situated and pragmatic judgement’ (Braun & Clarke 2021, 211; Beitin 2012). The author was guided by the concept of saturation, but also by the practical constraints of time, resources and access to interviewees. During the process of coding and theme development (discussed further below), the author observed that after approximately 25 interviews had been analysed, no new codes were emerging. This observation applied within the first three categories of stakeholders and across all categories combined. Accordingly, the author did not consider it necessary to seek any further interviews beyond the 36 initially undertaken.

Interviewees were interviewed in their capacity as representatives of a particular organisation, or in their individual capacity as experts with significant knowledge (gained from either research or practice) in respect of MSIs. As pointed out by qualitative research theorists, the position of the subject is not straightforward. An interviewee may speak from one of ‘multiple bases for authenticity’: as the representative of an organisation; an experienced professional; a parent; a member of a community group (Gubrium & Holstein 2012, 37). Even if an interview begins with the assumption that a person is being interviewed in a particular capacity, there is no guarantee that these subject positions will remain constant throughout.

Further, the author is cognisant of the two major approaches to the analytical status of interviews: interview data as resource, and interview data as a topic (Rapley 2004, 16-17; Gubrium & Holstein 2012; Brinkmann 2013, 36-40). The concept of interview data as a resource - associated with a positivist viewpoint - views data as reflecting the interviewees’ reality outside the interview. Meaning is located in the interview, to be extracted by the interviewer. Interview data as topic – associated with discursive and constructionist approaches - views interview data as reflecting a reality jointly constructed by the interviewee and interviewer. The interview can be characterised as a joint production of accounts or versions of knowledge or opinion (Rapley 2004, 16). This thesis adopts a combined approach, as advocated for by Brinkmann (2013, 36-40). Because it is more focused on capturing the ‘what’ of the interview, rather than analysing the ‘how’ of the interview (Brinkmann 2013, 36-40), it predominantly characterises the interview as a resource. At the same time, the author acknowledges that what is said within the interview cannot completely represent objective facts. Thus, the thesis characterises the interviews as

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5 This did not apply to the fourth category of stakeholder, MSIs. However, as already noted, the author was constrained in her ability to access interviewees from MSIs.
accounts of the observations and opinions of interviewees. Further, given that a majority of those interviewed had either an existing or former connection with MSIs, there is a risk of subjective bias within the results. Chapter 6 acknowledges that this limits the conclusions that can be drawn from the data.

The interviews themselves followed a semi-structured format. The term semi-structured describes an interview process which combines ‘a certain degree of standardization of interview questions, and a certain degree of openness of response by the interviewer’ (Wengraf 2001, 83). In semi-structured interviews, the researcher is guided by a series of questions or topics, but the process itself is flexible. For example, the interviewer decides how and when questions are posed, the interviewee may respond as they wish and the interviewer is open to pursue new lines of inquiry or themes raised by the interviewee (Edwards & Holland 2013, 29).

The author identified semi-structured interviewing as the most appropriate technique for two reasons. First, semi-structured interviewing tends to be characterised as a form of ‘in-depth’ interviewing, in contrast to surveys, informal interviewing or focus groups. In-depth interviewing is a particularly suitable approach when the researcher seeks to understand a topic in greater depth and where different groups of people have differing, complicated perspectives on the same subject-matter; it is also best suited to research questions of the descriptive or exploratory type (Johnson & Rowlands 2012). This accords with the primary purpose of these interviews, which was to gain the in-depth insights of multiple stakeholders. Second, semi-structured interviews allow the author to probe the same issues and themes so as to allow comparison while at the same time providing flexibility to reflect the individual knowledge, circumstances and views of each interviewee (Edwards & Holland 2013, 29-42; Lodge 2013). Given the diversity of stakeholders interviewed, this is a particularly valuable feature.

Interviews lasted between half an hour to one hour. All but two of the 33 interviews were fully recorded and transcribed; detailed notes of the remaining two interviews were taken during the course of those interviews. The interview questions were derived from the literature and document review, and while slightly adapted for each of the four groups, broadly covered the following themes: perceived strengths and weaknesses of MSIs; why interviewees had (or had not) joined MSIs (where relevant); perspectives on the role of social audit and potential alternatives to social audit; the role of purchasing practices; whether the worker-driven model was a viable alternative to MSIs; key challenges faced by MSIs; and whether, and if so, how MSIs might be strengthened and improved.

Given that the purpose of this analysis was explanatory and exploratory, and not intended to support a specific hypothesis or to build theory, the author determined that thematic analysis was the most appropriate analytical approach to the data emerging from the interviews.
As noted by its proponents, thematic analysis has the potential to ‘provide a rich and detailed, yet complex, account of data’ (Braun & Clarke 2006, 78) and is particularly useful for ‘examining the perspectives of different research participants, highlighting similarities and differences, and generating unanticipated insights’ (Nowell et al. 2017, 2). This is precisely the manner in which this thesis seeks to use this data. The analysis followed the steps outlined by Braun and Clarke in their seminal paper on thematic analysis (Braun & Clarke 2006). First, the author familiarised herself with the data by transcribing, reading and re-reading it. Second, the author began to generate initial codes. The author initially identified 30 codes. Third, these codes were then developed into themes (noting that Braun and Clarke describe this as a three stage process of looking for, revising, and finally defining and naming themes) (Braun & Clarke 2006).

Coding and the construction of themes can be approached inductively or deductively (Braun et al. 2018). In the inductive (or ‘bottom-up’) approach, the generation of codes is data-driven, as the researcher seek to identify meaning directly from the data, without pre-existing ideas. In the deductive (or theoretical) approach, the researcher approaches the data (or may already have codes in mind) based on the author’s pre-existing knowledge, research or use of theoretical frameworks. In practice, these two approaches are not exclusive, as a researcher will always be informed to some extent by their existing knowledge, worldview and theoretical approach (Braun et al. 2018). This author followed the inductive approach in the initial stages of coding. As the codes were developed into themes, the author was increasingly influenced by the theories on which it relies in this thesis, namely democratic legitimacy and responsive regulation. In determining themes, the author was guided by the overarching question of whether the theme captures something important in relation to the overall research question (Braun & Clarke 2006, 82). This thematic analysis was ‘reflexive’ in that the author sought to develop themes ‘at the intersection of the researcher’s theoretical assumptions, their analytic resources and skill, and the data themselves’ (Braun & Clarke 2019, 594).

Based on this process, the author developed twelve themes from the data: (1) Social audit is a flawed compliance tool; (2) Companies must address their purchasing practices; (3) MSIs fail to meaningfully include diverse stakeholders; (4) MSIs are not sufficiently transparent; (5) MSIs fail to demonstrate impact; (6) MSIs fail to address complex rights; (7) MSIs fail to move beyond the first tier of suppliers; (8) MSIs are subject to corporate capture; (9) MSIs are unreformable and not fit for purpose; (10) MSIs are good convenors; (11) MSIs provide good oversight of corporate processes; and (12) MSIs should act as political advocates. Unsurprisingly, many of these themes accord with the criteria for political legitimacy, however many additional themes also emerged. The table in Annex B demonstrates how the initial 30 codes informed the development of these twelve themes. These themes are analysed in Chapters 5-8 of this thesis.

1.6 Chapter outline

This thesis is structured as follows.
Chapter 2 introduces the reader to MSIs, global apparel supply chains and their human rights impacts. It sets out a definition of MSIs and proposes an MSI typology to guide the analysis in subsequent chapters. It describes how apparel supply chains are structured, outlines key stakeholders and explains the underlying power dynamics that drive the distribution of value and profit. It argues that human rights breaches within global apparel supply chains cannot be attributed solely to ‘non-compliant’ suppliers. Rather, they must be understood as a consequence of the inherent structure and dynamics of apparel supply chains. This includes the prevalence of subcontracting, and the role of poor purchasing practices, which place significant commercial pressures on suppliers. Later chapters argue that Apparel MSIs must directly address these dynamics – and in particular the purchasing practices of buyers – in order to become more effective regulators.

Chapter 3 lays down the two major theories that frame this thesis. It introduces the concept of democratic legitimacy, which underlies the right of MSIs, as private transnational regulators to perform regulatory functions. Comprised of both input and output legitimacy, it drives the analysis of Apparel MSIs undertaken by this thesis. This chapter also introduces the theory of responsive regulation, which specifically contemplates the rise of private forms of regulation such as MSIs. Responsive regulation situates MSIs within their broader, decentred regulatory context. Informed by the theory of nodal governance, it argues that Apparel MSIs can bolster their regulatory capacity and effectiveness by better enrolling a range of actors. The related theory of transnational new governance argues that in order for responsive regulation to function at the transnational level, states and intergovernmental bodies must also play an orchestrating role. Responsive regulation, informed by nodal governance and supplemented by transnational new governance, provides a theoretical underpinning for many of the recommendations put forward in Chapter 8.

Chapter 4 situates MSIs within their broader regulatory context. It outlines the rise of MSIs, and the deficiencies in public regulation that led to their emergence. This ‘mapping’ of key regulatory actors and mechanisms lays a critical foundation for the remainder of this thesis. For it is only by situating Apparel MSIs within their broader regulatory context can their work to date, and their future potential, be properly assessed.

Chapter 5 introduces the reader to the Apparel MSIs and, based on their primary function, classifies them according to the MSI typology set out in Chapter 2. This classification reveals that a majority of Apparel MSIs rely on social audit to perform their regulatory compliance function. The chapter argues that social audit however, is not an appropriate regulatory technique, as it is not capable of delivering meaningful human rights improvements in global apparel supply chains. First, there are a number of inherent problems in the manner in which social audit is conducted. Second, social audit is not capable of addressing the broader context
in which global apparel supply chains sit. This includes the supply chain power dynamics outlined in Chapter 2, as well as the broader social and political context in which production occurs. This chapter lays the foundation for Chapter 6, which demonstrates that ongoing reliance on social audit as a regularly technique has significant implications for the legitimacy of Apparel MSIs.

Chapter 6 assesses the democratic legitimacy of Apparel MSIs. Expanding upon the theory of democratic legitimacy first introduced in Chapter 3, this chapter sets out the key normative legitimacy criteria for MSIs. It then analyses the extent to which Apparel MSIs are presently meeting these criteria. It also undertakes a sociological analysis of the legitimacy of Apparel MSIs, informed by the original empirical research undertaken by the author. This chapter reveals the significance of the typology set out in Chapter 2, and the analysis of social audit in Chapter 5. It concludes that those MSIs which adopt a functional model that relies excessively on social audit can no longer be deemed legitimate regulators. It argues that the remaining Apparel MSIs, while still legitimate, must urgently reform. In order to remain legitimate, these MSIs must address the major critiques leveled against them, and consider the role of emerging alternate models of private regulation.

Chapter 7 analyses the recent worker-driven model, which is promoted by MSI critics as the only viable form of private regulation. It considers the relative strengths and weaknesses of the worker-driven and MSI approach, and whether the worker-driven model is capable of replacing MSIs.

Chapter 8 presents a future path for reform for Apparel MSIs, in light of the analysis and conclusions reached in Chapters 5, 6 and 7. In response to this analysis, and drawing upon the results of interviews, and theoretical insights from responsive regulation, it sets out nine interconnected recommendations.

Chapter 9 concludes.

1.7 The global pandemic

This thesis was in the final stages of writing and editing when the world was hit by the pandemic. The pandemic did not directly affect or change this research or its conclusion. It did however exacerbate and bring into sharper focus existing issues and dynamics within the global apparel supply chain. It also led to an even greater human rights burden on workers across the developing world. The pandemic also brings an opportunity to reimagine and reconfigure how business operates, and its purpose in doing so. The recommendations put forward by this thesis are made in this spirit of business building back better, fairer and more sustainably.
Chapter 2  
Multi-stakeholder initiatives and global apparel supply chains

Introduction

Apparel MSIs - the subject of this thesis - operate within a broader landscape of more than 40 active MSIs. These MSIs focus on different sectors and issues, are constituted by their own unique stakeholder and governance structures, and are functionally distinct. For the purpose of this thesis, the function that an MSI performs is its most critical distinguishing feature. Focusing on function facilitates an analysis of whether an MSI is in fact regulating, and the extent to which it is effectively doing so. Accordingly, this Chapter introduces a typology based on function, which will facilitate the analysis in Chapters 5 and 6.

As stated in Chapter 1, MSIs were conceived of in response to the social and environmental challenges posed by business. Described as a form of ‘embedded liberalism’ at the global level, MSIs attempt to ameliorate the excesses of globalisation by ‘[e]mbedding the global market within shared social values and institutional practices’ (Ruggie 2008b, 232). That is, MSIs do not seek to upend or challenge the process of globalisation or the system of capitalism underpinning it. Rather, they reflect an institutionalised attempt to lessen its negative impacts.

Apparel MSIs were established in order to address the adverse human rights impacts of global apparel supply chains. Global supply chains have arguably contributed to improved development outcomes. Attributed to them, has been the growth of emerging economies, reduced poverty rates, industrial upgrading, and the creation of millions of jobs in the developing world (ILO 2016a, 1-2; Labowitz & Baumann-Pauly 2014, 16). Women in particular have gained access to new employment opportunities, accounting for an estimated 80% of production workers in the apparel sector (Better Work n.d.). This positive narrative is however increasingly challenged by NGOs, academics, and even intergovernmental organisations. They argue that the dominance of global supply chains – inherently linked to the broader process of globalisation – has resulted in mixed development outcomes, rising inequality and the ‘adverse incorporation’ of workers into the global economy, who remain stuck in self-perpetuating cycles of poverty (OECD 2013, 22; Phillips 2013; LeBaron et al. 2018, 20-23; UNCTAD 2020, 122-123). This chapter details many of these adverse impacts, and explains how they are connected to the apparel supply chain’s inherent structure and economic power dynamics. The power dynamics established in this chapter are critical both to the analysis of MSI legitimacy (Chapter 6), and for charting a course for new regulatory approaches (Chapter 8).

2.1 MSIs: A definition and typology

An MSI is a voluntary initiative involving multiple networked stakeholders working together to address the social (encompassing human and labour rights) and/or environmental impacts of
transnational business (Utting 2005a; Baumann-Pauly et al. 2017; O'Rourke 2006; Bartley 2007). Two aspects of this definition require further elucidation.

First, an MSI must include multiple stakeholders. Underpinning this requirement is the argument that the complex challenges posed by transnational business activities and global governance gaps will be best solved by a diverse group of stakeholders with varying interests, rather than individual actors (Van Tulder 2012). It has been suggested that at a minimum, an MSI requires the involvement of business and civil society (Brown 2007; Van Huijstee 2012), and may also include other stakeholders such as governments, universities or investors (Baumann-Pauly et al. 2017). This thesis considers that it is critical to include both the target of regulation (business), as well as the major voice of opposition to its conduct (civil society). Without sufficient coverage of the sector, MSIs will not be in a position to influence corporate conduct. Without the participation of civil society, the quality of deliberation will remain low. Both are critical elements of legitimacy (Chapter 3, section 3.1; Chapter 6). Thus this thesis adopts this minimum requirement. Therefore, for the purpose of this thesis, single-stakeholder transnational private governance initiatives, or those that do not include business or civil society do not constitute MSIs. The level of participation is also relevant. At a minimum, stakeholders must be included in decision-making processes (Brown 2007; Van Huijstee 2012). Anything less does not constitute meaningful participation. As will be shown in Chapter 5, many initiatives that are often described as MSIs, upon closer inspection, reveal a lack of meaningful multi-stakeholder participation. Such initiatives are better characterised as systems of private transnational regulation rather than MSIs.

Second, not all MSIs necessarily perform a regulatory function in the course of addressing the social or environmental impacts of business. Thus, in the same manner that not all systems of private transnational regulation constitute MSIs, conversely not all MSIs constitute systems of private transnational regulation. An MSI typology proposed by a group of business and human rights experts clarifies this distinction. The typology distinguishes between three distinct operational models: learning (Learning MSIs); certification (Certification MSIs); and governance (Governance MSIs) (Baumann-Pauly et al. 2016). This typology distinguishes MSIs on the basis of function. Alternatively, a typology could be based on MSI form or scope. At present, there are at least 40 MSIs in operation (MSI Integrity 2020). These MSIs differ significantly in membership and governance structures. Each MSI incorporates varying combinations of stakeholders - including corporations, industry associations, NGOs, trade unions, academia, intergovernmental organisations and government - and provides for differing forms of participation. They also differ substantially in scope, addressing a range of issues across multiple sectors. The degree of variation in scope and form

6 Other scholars have adopted slightly broader typologies. For example, Mena & Palazzo (2012) distinguish between learning platforms and rule-setting initiatives and De Bakker et al. (2019) distinguish between Certification MSIs and Principle-based MSIs.
would create a very large number of categories, which would not assist the present (or arguably any) analysis. Further, given that this thesis focuses on the use of social audit as a monitoring and compliance tool, the most critical distinction here is the type of function that MSIs perform.

Learning MSIs (also sometimes referred to as ‘best-practice sharing’ MSIs) typically undertake or promote activities such as awareness raising, dialogue, best practice sharing, data sharing, training, networking, collaboration and discrete projects. They may also engage in some form of standard setting. They do not however perform any oversight function, or impose consequences for non-performance (Bernstein & Cashore 2007, 350; Baumann-Pauly et al. 2016, 108-116). Accordingly, as explained further in Chapter 3, section 3.2, Learning MSIs cannot be characterised as transnational systems of private regulation.

Certification MSIs impose concrete obligations, usually set out in a code of conduct. In contrast to Learning MSIs, Certification MSIs verify compliance with these obligations, usually through a combination of reviews, social audit and other forms of monitoring. Enforcement occurs through the certification process itself, as those deemed non-compliant are not granted certification. Certification MSIs certify sites of production and (sometimes) associated chains of custody: for example, farms, fisheries, commodity producers or specific facilities. Thus, while buyers might be members of or otherwise participate in Certification MSIs, suppliers are the principal rule targets. Some Certification MSIs are membership based, and others operate under a multi-stakeholders governance structure without members.

Governance MSIs are based on a membership structure (as opposed to many Certification MSIs). Typically, members are buyers at the apex of supply chains. Alternatively, they may be companies that provide services such as security or information and communications technology. Members are required to comply with concrete obligations, usually set out in a code of conduct, and face the prospect of suspension or termination in cases of non-compliance. Each Governance MSI verifies member compliance through its own unique combination of reviews, social audit, reporting and other monitoring requirements.

On one view, Certification and Governance MSIs are not dissimilar in that both compare a company’s performance against code requirements, often using similar tools such as reviews and, critically for the purpose of this thesis, social audit. The key distinguishing feature between Certification and Governance MSIs is the supply chain actor on which they are focused. Certification MSIs focus primarily on upstream suppliers, whereas Governance MSIs focus primarily on downstream buyers at the apex of supply chains. The table below summarises the key characteristics of each model.
<table>
<thead>
<tr>
<th></th>
<th>Learning MSI</th>
<th>Certification MSI</th>
<th>Governance MSI</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Membership Structure</strong></td>
<td>Membership based</td>
<td>May be membership based</td>
<td>Membership based</td>
</tr>
<tr>
<td><strong>Standard setting function</strong></td>
<td>May promote guidelines, standards or rules</td>
<td>Promulgates concrete rules, usually through a code of conduct</td>
<td>Promulgates concrete rules, usually through a code of conduct</td>
</tr>
<tr>
<td><strong>Oversight Mechanisms</strong></td>
<td>None</td>
<td>A combination of social audit, reviews, monitoring, reporting, and/or other assessments</td>
<td>A combination of social audit, reviews, monitoring, reporting, and/or other assessments</td>
</tr>
<tr>
<td><strong>Enforcement Mechanisms</strong></td>
<td>None</td>
<td>Successfully completing the certification process</td>
<td>Review and termination procedures for non-compliant members</td>
</tr>
<tr>
<td><strong>Rule Target/Regulatee</strong></td>
<td>None</td>
<td>Suppliers: sites of production are subject to certification. For example farms, commodity producers, factories.</td>
<td>Buyers</td>
</tr>
<tr>
<td><strong>Other activities</strong></td>
<td>Training, dialogue &amp; best practice sharing, data sharing, networking &amp; collaboration, pilot projects <em>(Learning MSI Functions)</em></td>
<td>May also undertake Learning MSI Functions</td>
<td>May also undertake Learning MSI Functions</td>
</tr>
</tbody>
</table>

The above typology provides an important framework for the analysis undertaken by this thesis. First, it delineates on the basis of whether an MSI actually performs a regulatory function (Learning MSIs versus Certification and Governance MSIs). Second, it focuses attention on the specific actor in the supply chain the MSI seeks to regulate (Certification versus Governance MSIs). As the analysis in Chapters 5 and 6 reveal, both these distinctions carry significant implications for the effectiveness and legitimacy of Apparel MSIs.
As noted above, there are at least 40 MSIs in operation at present. These MSIs differ in membership and governance structures as well as scope, addressing a range of issues across multiple sectors. Apparel MSIs— the subject of this thesis— were established to address the specific problem of the human rights impacts of global apparel supply chains. The remainder of this chapter explains how and why supply chains have adversely affected the rights of workers.

2.2 Key stakeholders in the apparel supply chain

The global apparel supply chain is constituted by both vertical and horizontal stakeholders. The diagram below depicts the most significant stakeholders, as well as the most significant connections among them.

At the apex of the supply chain sit buyers (brands and retailers), who contract out manufacturing to a complex network of suppliers. According to global value chain (GVC) theory, and as explained in section 2.3, buyers are the most powerful vertical actors along the supply chain. Suppliers are segmented into a number of subcontracted tiers. Suppliers along each tier perform different functions (described in more detail in section 2.5.). A buyer will typically enter into contractual relations with first tier suppliers only. Some buyers operate through intermediaries, and thus do not enter into direct relationships with suppliers at all. Section 2.4 further outlines this process of subcontracting, and its attendant human rights implications. It is
suppliers and buyers that have the most direct human rights impact on workers in the global apparel supply chain (section 2.6).

Supply chains also sit in a much broader social, political and institutional context (Barrientos et al. 2011). While GVC literature tends to focus on inter-firm dynamics among vertical stakeholders, a distinct but related literature on global production networks also recognises external stakeholders. In addition to buyers and suppliers, there are multiple horizontal stakeholders seeking to exert power and influence over supply chain actors and the terms of production (Coe et al. 2008). That is, supply chains are socially and institutionally embedded (Barrientos et al. 2011, 321). As will be demonstrated throughout this thesis, the horizontal stakeholders with the greatest capacity to influence the human rights impacts of global apparel supply chains are national governments and intergovernmental organisations, MSIs and other private regulatory initiatives, civil society (encompassing both trade unions and NGOs), auditors, consumers and investors. The arrows in the above chart indicate the most significant cross-directional flows of influence (in respect of human rights) among horizontal and vertical stakeholders. The arrows reflect potential (rather than actual) flows of influence. As demonstrated throughout this thesis, most stakeholders have failed to effectively regulate or fully realise their capacity to influence other stakeholders.

Chapter 4 shows that while national governments and intergovernmental organisations are primarily responsible for regulating the human rights impacts of global supply chains, they have comprehensively failed to provide an adequate framework for protection. It is largely due to these deficient actors, and consequent global governance gaps that Apparel MSIs emerged. Chapters 5 and 6 assess the regulatory power of Apparel MSIs, and their impact on human rights to date. They show that these MSIs have not fulfilled their regulatory potential. One significant reason is the over reliance on social audit (undertaken by auditors). Civil society has, through advocacy and campaigns, placed significant pressure on buyers to address the human rights impacts of their supply chains. Some have also become co-regulators, through their active involvement in MSIs and other private regulatory initiatives. Yet, as also demonstrated in Chapters 5 and 6, their ability to influence MSIs has been constrained by the inherent imbalance of power as compared to buyer members. Chapter 8 identifies consumers and investors as other important, albeit underutilised stakeholders, with the ability to significantly influence the human rights performance of buyers. Finally, the most vital stakeholders in an analysis of the human rights impacts of global supply chains are rights-holders themselves, that is, workers (MSI Integrity 2020). Yet to date, their voice and ability to influence their own working conditions has been severely limited, including within most private regulatory systems (Chapters 6-8).

From a regulatory theory perspective, each of these vertical and horizontal stakeholders can be viewed as ‘nodes’ within the broader system of global apparel supply chain regulation (Chapter
3). Chapter 8 of this thesis argues that in order to strengthen their regulatory power, Apparel MSIs must forge greater connections with, and among, these multiple stakeholders, or ‘nodes’. For now, the remainder of this chapter focuses on the three ‘vertical’ actors within supply chains: buyers, suppliers and workers.

2.3 Power dynamics in the apparel supply chain

A key focus of GVC theory is the relationship between firms operating within a supply chain - that is, buyers and suppliers - and how this affects the distribution of power, value and profits along the chain (Bair 2005; Mayer & Phillips 2017). The characterisation of the apparel supply chain as ‘buyer-driven’ in Chapter 1 is significant for the purpose of this thesis for two reasons. First, it provides crucial insights into the power effects between buyers, and their geographically and functionally fragmented suppliers. Generally, GVC literature focuses on how power dynamics influence the distribution of economic value. It is less concerned with supply chain working conditions. However, as this chapter demonstrates, these power dynamics carry significant human rights implications. In particular, the relative power of buyers allows them to impose unfair purchasing practices on suppliers, which have flow on effects for the rights of workers (section 2.4). Second, the buyer-driven characterisation is significant because the practice of subcontracting – the very essence of how the buyer-driven chain operates – is itself a driver of human rights breaches (section 2.5).

In a typical buyer-driven chain, buyers perform the most valuable activities, such as product development, design, innovation, branding, marketing and logistics, and outsource lower value production activities to global networks of suppliers in the developing world (Gereffi et al. 2005; Gereffi & Frederick 2010, 11-12). Sitting at the apex of the supply chain, buyers dictate the terms of sourcing and production, ‘determin[ing] what is to be produced, where, by whom, and at what price’ (Fernandez-Stark et al. 2011, 79). This delineation of functions gives rise to significant power asymmetries between buyers and suppliers, with buyers capturing and retaining a majority of the profits (Gereffi & Frederick 2010, 11-12; Fernandez-Stark et al. 2011, 79).

Buyers are brands and retailers concentrated primarily in the developed world, with the US, EU and Japan respectively accounting for 33.6%, 17.8% and 5.5% of global imports in 2019, together making up 56.9% of the US$536 billion worth of total global apparel imports (WTO Data, n.d.). The top 20 most profitable apparel buyers of 2018 - Nike, Inditex, LVMH, TJX Companies, Kering, Hermes, Fast Retailing, Adidas, Ross, VF Corporation, Pandora, Richemont, Anta Sports, Next, L Brands, HLA Corporation, H&M, Lululemon, Hanes Brands and Burberry (Business of Fashion & McKinsey 2020, 94) - are all headquartered in one of these top three regions.

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7 The EU figure includes intra and extra EU trade. This is the most up to date data provided by the World Trade Organization.
Conversely, supplier firms in the global apparel supply chain comply with the buyer’s product specifications and standards. They perform the labour-intensive, low-value functions within the chain (Fernandez-Stark et al. 2011, 11-16). Today, with the exception of the EU, suppliers remain concentrated in the developing world. In 2019, in a global apparel export market valued at US$493.4 billion, the top six exporters were China, the EU, Bangladesh, Vietnam, India and Turkey. China, the market leader, holds an estimated 30.7% of the global export market, closely followed by the EU at 27.7% (WTO Data, n.d.). Combined, the top five developing country exporters (China, Bangladesh, Vietnam, India and Turkey) constitute 50.5% of total global exports.

Intermediaries are also significant vertical players. They effectively offer a one-stop shop for buyers, performing a wide range of functions including identifying suppliers, sourcing materials, coordinating logistics, quality control, inspection, shipping and delivery (Staritz 2011, 28-29). Perhaps the most well known example is Li & Fung, which sources from a network of 10,000 factories in over 50 production countries (Li & Fung, n.d.1). Generally, smaller buyers or larger buyers that need small quantities of specific items rely on these intermediaries, who have the advantage of scale, buying power, flexibility, and ability to spread risk among suppliers. Some larger buyers also rely on intermediaries for their entire product lines (Gereffi & Frederick 2010, 17).

Increasingly, some first tier suppliers are also performing intermediary functions (Gereffi & Frederick 2010, 12-13). This trend has been most evident in the rise of a handful of giant transnational manufacturers, based predominantly in Hong Kong-China, Taiwan and South Korea (Appelbaum 2008). Examples of major players include the world’s largest jeans maker, Taiwanese multinational Nien Hsing corporation, with factories in Mexico, Vietnam, Taiwan and Lesotho (Nien Hsing, n.d.1.) and TAL Apparel Ltd, a Hong Kong-based shirt maker which produces one out of six of every dress shirts sold in the US (Scott 2018). These East Asian giants operate massive factories. They have also taken on co-ordinating functions, acting as intermediaries who manage global production networks on behalf of buyers.

Both intermediaries, and giant tier one manufacturers, are also increasingly assuming functions traditionally performed by buyers including design, product development, market research and social compliance (Appelbaum 2008; Staritz 2011, 28; Li & Fung, n.d.2; Nien Hsing, n.d.2.). The emergence of these major players reflects a broader trend of supplier consolidation (Gereffi & Frederick 2010; Staritz 2011, 26-38). GVC theory suggests that as suppliers consolidate and upgrade their functions, they will also be able to capture a greater share of value and profits (Bernhardt 2014). While this may be true for the handful of large intermediaries and East Asia manufacturers, there has not been a sufficiently critical mass of consolidation and functional upgrading among first tier suppliers to shift the overall power dynamics (Staritz 2011, 41-45).
Thus buyers continue to dominate (Gereffi & Frederick 2010; Business of Fashion & McKinsey 2021, 72-74).

This dominance is further reinforced by a more than decade long process of consolidation on the buyer side. This has been driven by the phase out of Multi-Fibre Arrangement quotas (discussed in Chapter 1), the 2008 global financial crisis, and the rise of mega brands and retailers (Gereffi & Frederick 2010, 21-25). Profits have become increasingly concentrated among a select handful of buyers, with the top 20 buyers (listed above) accounting for 200% of the combined economic profits of 326 major brands and retailers in 2018 (Business of Fashion & McKinsey 2020). The consolidation trend is forecast to accelerate further in the wake of the pandemic (Business of Fashion & McKinsey 2021, 70).

In parallel, the 2008 global financial crisis led (some) buyers to rationalise and consolidate their supply chains. This process has gained momentum and more buyers are now attempting to reduce the number of suppliers they work with, focusing more on strategic, long-term relationships with their most capable suppliers (Gereffi & Frederick 2010, 19; Business of Fashion & McKinsey 2021, 74-75). The process of supplier consolidation has the potential to be beneficial for both buyers and suppliers. GVC scholars argue that with consolidation, buyers are able to assert even greater influence over commercial terms while suppliers gain more security through guaranteed orders (Gereffi & Frederick 2010, 21). In addition, it is also posited that the more long-term the relationship between a buyer and its suppliers and the greater proportion of a supplier’s volume a buyer takes, the more co-operative and trusting the relationships is likely to be. This in turn may lead to better human rights outcomes (Barrientos & Smith 2007; Staritz 2011, 42). This possibility is explored further in Chapters 5, 6 and 7. Although the development of closer relationships is an emerging trend, at present, relations between buyers and suppliers remain typically characterised by contractual transactions. Contracts are short-term and seasonal, with buyers switching between producers based on price, quality and speed, rather than social compliance (Raworth 2004, 37-38; Locke et al. 2009; BHRRC 2019), and buyers continue to maintain the upper hand (Business of Fashion & McKinsey 2021, 74-75).

2.4 Purchasing practices

As described above, according to GVC theory, the dynamics of the buyer-driven chain allow buyers to dictate the terms of the commercial relationship with suppliers. The consolidation of buyers over the past decade has only exacerbated this power imbalance (Gereffi & Frederick 2010, 22). Further, many of the major buyers driving consolidation have been at the forefront of two significant developments in the apparel supply chain: ‘lean retailing’ and ‘fast fashion’ (Taplin 2014).
Lean retailing involves buyers tracking consumer activities and preferences and then transmitting this information to its global network of suppliers. Rather than storing large inventories, buyers expect suppliers to deliver stock frequently and in smaller batches, based on the up-to-date data transmitted by the retailer. This model requires a high level of integration between the retailer and its suppliers as well as speed, predictability and accuracy to ensure that goods are delivered ‘just-in-time’ (Appelbaum & Lichtenstein 2006; Taplin 2014). Relatedly, the rise of fast fashion has also fundamentally altered expectations of speed and flexibility. Fast fashion is marked by shorter production cycles and lead times (the time between when an order is placed and when the goods are ready for delivery), and shorter and more frequent seasons. For example, Zara (owned by Inditex), one of the leaders in fast fashion, takes two to five weeks to design, manufacture and distribute garments and manufactures about 11,000 distinct items a year (Taplin 2014). Once upon a time, two to four fashion seasons per year was considered the industry standard. Fast fashion has now pushed the norm from six to ten (Raworth 2004, 51; Asia Floor Wage Alliance et al. 2018a, 32-33). Although fast fashion traditionally served the lower-cost segment of the market, these trends are increasingly extending beyond the lower-cost fast fashion players and setting the pace for the entire industry (Staritz 2011, 33-34; Business of Fashion & McKinsey 2019, 37).

These trends have arisen within the broader context of a highly competitive environment, with short-term profit expectations of shareholders combined with consumer pressure in relation to price, variety and speed propelling the ongoing search for cheaper and faster production (Raworth 2004, 32-38; Gereffi & Frederick 2010, 21-22). Combined, these commercial and competitive pressures result in the imposition of unfair purchasing practices, which place unrealistic pressures on suppliers (Vaughan-Whitehead & Caro 2017; BHRRC 2019). These practices in turn have a significant flow on effect on the human rights of workers (section 2.6).

Suppliers are expected to comply with a range of production pressures, including fluctuating and volatile order demands, smaller and more frequent shipments, unrealistic production deadlines and lead times and greater product variety. Suppliers that do not meet these conditions face financial penalties, order cancellations, and the loss of future orders (Clean Clothes Campaign 2009; Vaughan-Whitehead & Caro 2017; BHRRC 2019; Human Rights Watch 2019).

For example, a recent cross-sectoral global survey on purchasing practices undertaken jointly by the International Labour Organization (ILO) and the Ethical Trading Initiative found that only 17% of suppliers considered their orders had enough lead time, and half reported insufficient lead times for 30 to 50% of their orders (Vaughan-Whitehead & Caro 2017, 6; see also Better Buying 2018, 26). Even where initial lead times are adequate, other purchasing practices - including poor planning and forecasting, inaccurate technical specifications and last minute technical changes and late placement or approval of orders - eat into agreed upon lead times.
In addition, buyers often fail to meet their own pre-production deadlines (for example, approving materials, approving samples, undertaking quality testing) which are critical in allowing suppliers to meet already set lead times (Better Buying 2018, 26). Nonetheless, buyers continue to place multiple rush orders to replenish stock and demand that orders are completed on time (Raworth 2004, 51; Clean Clothes Campaign 2009; ETI 2016a, 15; Better Buying 2018, 21-22).

These practices combined lead to the imposition of volatile and unreasonable production targets and deadlines on suppliers. The brunt of this is felt by workers who are subjected to variable working hours, excessive and forced (and at times unpaid) overtime, limitations on leave and breaks and unsafe working conditions, in an attempt to meet the commercial expectations of buyers (Jørgensen et al. 2003, 28-30; Raworth 2004; Perry et al. 2014, 740; Better Work 2016, 35-37; Human Rights Watch 2019; 31-40).

Arguably the most significant purchasing practice is the price that buyers are willing to pay. The consolidation of buyers, combined with the phase out of country quotas under the Multi-Fibre Arrangement and shifting consumer expectations has placed significant pressure on suppliers to cut costs (Raworth 2004, 54; Clean Clothes Campaign 2009; Anner et al. 2013). The relative power of buyers allows them to conduct aggressive price negotiations, leading to outcomes that do not reflect the true cost of production. Labour costs are not itemised and buyers often refuse to take into account rises in minimum wages or overtime and social benefits, let alone the costs of health and safety improvements and training. Rather, suppliers are expected to absorb the costs of social compliance through improved productivity; yet productivity gains on their own are rarely sufficient (Human Rights Watch 2015a 38-39; Vogel 2008, 274; BHRRC 2019, 7-9). Again, it is workers who suffer, as aggressive pricing practises are passed on in the form of below living wages, unpaid overtime and benefits and unsafe working conditions (BHRRC 2019, 7-9; HRW 2019, 31-39).

A study by Anner, Bair and Blasi highlights this trend, finding that the real price paid by US importers to the top 20 apparel exporting countries declined by 48% from 1989-2010 (Anner et al. 2013). More recently, the ILO global survey (mentioned above) found that on average, only 25% of buyers were willing to adjust their prices to incorporate statutory increases in the minimum wage (Vaughan-Whitehead & Caro 2017, 8-9; see also BHRRC 2019, 8-9). A further 52% of suppliers in the apparel sector reported having accepted orders at a price that did not cover their production costs, with 46% of these suppliers responding to pressure from buyers (Vaughan-Whitehead & Caro 2017, 8; see also Better Buying 2018, 24-25). Pham Tu Lan of the Institute of Workers and Trade Unions (Vietnam) highlighted these cost pressures:

... according to our survey we see that the purchasing price is lower for 5 years or 10 years recently. That means they pushed down the price and here the minimum wage increase and the
union tried to push it up. So in the middle, the factory here, how can they survive? (Lan Interview).

The global pandemic has only exacerbated these dynamics. An October 2020 survey of 75 apparel suppliers from across the globe found that on average, 65% of suppliers had received demands for price cuts from buyers. This resulted in 56% of suppliers forced to accept orders below cost (Anner 2020).

Inadequate prices clearly impact the ability of a supplier to pay its employees a living wage (Vaughan-Whitehead & Caro 2017, 14). Combined with the other purchasing practices outlined above, these practices pose significant obstacles in affording human rights protection to workers (Human Rights Watch 2019). That is, buyers, in a position of relative power, are contributing to a business model that leads to a non-compliant supply chain. Suppliers, in a position of relative weakness, simply risk losing work if they refuse these production and pricing demands (Clean Clothes Campaign 2009, 45-52; Vaughan-Whitehead & Caro 2017, 8).

2.5 Subcontracting in the apparel supply chain

As flagged in the preceding sections, subcontracting lies at the core of how the buyer-driven chain operates. A typical apparel supply chain is divided into the following stages: 9

1) production of raw materials and fibres;
2) manufacture of materials (textiles) from yarn;
3) manufacture of embellishments such as buttons, zips and garment trimmings; 10
4) manufacture (assembly) of garments through production networks;
5) export channels established by trade intermediaries;
6) product design and development; and
7) marketing networks at the retail level.

Buyers typically undertake stages six and seven and outsource production to first-tier suppliers or intermediaries who undertake stages four and five. Tier one suppliers in turn rely on their own cascading network of suppliers to complete stages one to three. Thus, while tier one suppliers compete for business from buyers, other subcontractors in turn compete for the business of tier one suppliers. Buyers typically have very poor visibility of their own supply chains beyond the first tier, particularly when dealing with intermediaries, rather than manufacturers direct (Labowitz & Baumann-Pauly 2014). Thus, while buyers are aware that their first tier suppliers (or intermediaries) are subcontracting out work to their own networks, their knowledge of suppliers further down the chain is limited.

9 These stages are a combination of stages listed by global value chain theorists (Fernandez-Stark et al. 2011, 11-13) and the Dutch Agreement on Sustainable Garments and Textile (Chapter 4).
10 Some definitions include this as a component in stage 4, however it is separated here given that it is usually different suppliers that undertake these functions.
This authorised form of subcontracting reflects the basic structure of the global apparel supply chain. Increasingly, value chain theorists, political theory scholars and international institutions posit that it is this very structure that also drives systemic breaches of workers’ human rights.

Earlier GVC literature did not directly address the question of working conditions in global supply chains. It was principally concerned with how firms along the supply chain can upgrade their capacity and capture a greater share of value and profits, and the associated implications for economic development (Gereffi et al. 2005). The underlying implication being that upgrading by suppliers will also lead to better working conditions or ‘social upgrading’ (Bair 2009). More recently, this assumption is being challenged (Bair 2009; Barrientos et al. 2011; Rossi et al. 2014). First, it is becoming evident that the ‘fragmentation and globalisation of each segment has prevented backward and forward linkages emerging in many low income countries’ (Rossi et al. 2014, 3). That is, the practice of subcontracting within the apparel supply chain has allowed for very limited economic upgrading, with developing countries confined to narrow segments of less productive and less-skilled or knowledge intensive work (UNCTAD 2020, 122-123). Second, even if economic upgrading were possible, evidence suggests that it may not automatically lead to social upgrading (Barrientos et al. 2011).

As a result, many academics argue that value capture by buyers is in fact predicated upon locking in low wages, poverty, inequality and other human rights breaches along the supply chain (Mayer & Phillips 2017, 146-148; LeBaron et al. 2018, 45-49; Selwyn 2019). The practice of subcontracting simply pushes these issues further upstream, as first tier suppliers attempt to pass on the commercial pressures imposed by buyers in order to themselves remain competitive and capture some value (LeBaron 2014). Margins become tighter and oversight – either by government, buyers or private regulatory initiatives – diminishes (Labowitz & Baumann-Pauly 2014).

In addition to this authorised form of subcontracting which reflects the very essence of how value is extracted in the supply chain, suppliers often engage in unauthorised subcontracting to manufacture the orders to which they have committed (Labowitz & Baumann-Pauly 2014; OECD 2018, 129).

Buyers usually expressly prohibit unauthorised subcontracting, perhaps most clearly demonstrated by the asserted surprise of major buyers whose goods were discovered in unauthorised subcontracting facilities after major disasters (LeBaron 2017, 11). Yet the reality is that their own purchasing practices (section 2.4) foster this situation. A report by New York University, which took an in depth look into Bangladesh’s apparel industry determined that ‘the business of garment production in its current form would not be possible without subcontracting’ (Labowitz & Baumann-Pauly 2014, 17. See also LeBaron 2014). It found that all the practices...
described above, namely fluctuating demand, production delays, time, price and volume pressures imposed by buyers, contributed to the widespread use of unauthorised subcontracting (Labowitz & Baumann-Pauly 2014). The ILO also recently acknowledged the influence of buyer conduct, with its global survey finding that prices below production costs were associated with a 16% increase in outsourced production ( Vaughan-Whitehead & Caro 2017, 20; see also Better Buying 2018, 20-21; OECD 2018, 40).

These practices combined make it unprofitable for suppliers to hire a permanent workforce sufficient to meet peak demand (Anner et al. 2013; ILO 2016a, 22-25). Even large first tier suppliers are not able to complete high volume orders within the short lead times demanded by buyers without relying on a network of subcontractors; a dynamic that is exacerbated even further when the buyer is a mega-retailer (Raworth 2004, 60; Appelbaum & Lichtenstein 2006, 120; Labowitz & Baumann-Pauly 2014, 17-20). Further, while subcontracting is often expressly forbidden by buyer firms, research indicates that an element of wilful ignorance is also involved, with buyers often placing orders which they know their direct suppliers will be unable to complete without resorting to unauthorised subcontracting (Labowitz & Baumann-Pauly 2014, 19-20). Subcontracted facilities may be unregistered under local laws, or alternatively subcontractors may themselves subcontract work out further to unregistered factories or home-based workers (Labowitz & Baumann-Pauly 2014; ILO 2016a, 7). There is very limited data on the prevalence of unauthorised subcontracting, yet it is widely accepted as common practice within the apparel sector (Gold et al. 2020; Caro et al. 2021). A recent study analysing the orders of a global supply chain intermediary provides the most concrete data to date. In a sample of over 30,000 orders from 226 factories across Asia, it found unauthorised subcontracting in a staggering 36.4% of orders, while also hypothesising that the actual number was likely to be much larger (Caro et al. 2021; see also Human Rights Watch 2019, 43-46).

The purchasing practices of firms also drive tier one suppliers to rely more heavily on informal or temporary contract workers, who can be hired and fired rapidly in response to fluctuations in production demand and who also constitute a lower labour cost for suppliers (Clean Clothes Campaign 2009; LeBaron 2014; Asia Floor Wage Alliance et al. 2018a). For example, the ILO found that prices below the cost of production led to a 20% increase in the number of temporary workers, as this was seen as a direct way to cut production costs (Vaughan-Whitehead & Caro 2017, 19). The ILO estimates that almost 40% of firms in the apparel sector use some type of temporary labour, with the average proportion of temporary workers per firm at approximately 25% (ILO 2016b, 120).

Reliance on unauthorised subcontractors and a temporary workforce create additional vulnerabilities for workers, placing them at greater risk of human rights breaches. As
unauthorised work is pushed further upstream, profit margins decrease, employment becomes more precarious and working conditions deteriorate, particularly in unregistered facilities (Clean Clothes Campaign 2005a, 25; Human Rights Watch 2015a, 14, 94-95; Asia Floor Wage Alliance et al. 2018a). Workers also earn significantly less, often do not have access to benefits or social security and are more likely to be subject to informal employment practices (Raworth 2006, 60-61; Human Rights Watch 2019, 6, 43-46). In the case of homeworkers, work is typically outsourced on a verbal, non-contractual basis, with workers paid piece-rates, leaving individuals particularly exposed (Phillips 2013). They are also at a greater risk of harassment and abuse and are less likely to seek to enforce their rights or join a union out of fear of termination or non-renewal (Clean Clothes Campaign 2009; Locke et al. 2013, 526; Asia Floor Wage Alliance et al. 2018a; Human Rights Watch 2019, 36-37). Thus unauthorised subcontracted workers and temporary workers are frequently some of the most vulnerable and exploited workers in the supply chain (Clean Clothes Campaign 2009; Phillips 2013; Labowitz & Baumann-Pauly 2014).

The prevalence of subcontracting – both authorised and unauthorised - is significant for two reasons. First, buyers do not directly commit human rights breaches nor are they directly legal responsible (Chapter 4), precisely because of subcontracting. Yet as demonstrated, the purchasing practices of buyers have significant flow on effects for the rights of workers throughout the apparel supply chain. Second, it is widely accepted that human rights conditions deteriorate further upstream in the supply chain, and unauthorised subcontracting and informal or temporary work becomes more prevalent (Phillips 2013; Verité 2017, 649-651). Chapters 5 and 6 show, that at present, a majority of MSIs operating in the apparel sector do not go beyond the first tier, nor do they adequately address the issue of unauthorised subcontracting.

The following section outlines the most common and prevalent human rights breaches within global apparel supply chains. It is these rights that Apparel MSIs are seeking to protect.

2.6 The human rights impacts of apparel supply chains

The human rights impacts of global apparel supply chains first entered the public consciousness in the 1990s, as a spate of high-profile scandals exposed major human rights abuses in the supplier factories of a number of prominent brands including Nike, Reebok, Gap, Disney and Walmart. Allegations ranged from sweatshop conditions (including long hours, forced overtime and unsafe working practices) to child labour (Vogel 2005, 77-82; Bartley 2007; Ansett 2007; Doorey 2011). Despite increased awareness and advocacy and a range of efforts undertaken in response, twenty years on the apparel sector was again making headlines. In 2012, over 18 factory fires in Bangladesh caused injury and death to hundreds of workers, with the Tazreen factory (supplying to brands including Disney, Wal-Mart and Sears and agent Li & Fung) fire alone killing 112 employees (Clean Clothes Campaign n.d.1.). In that same year, an explosion at the Ali Enterprises factory in Pakistan killed over 250 people and injured 55 (Clean Clothes
In April 2013, the world witnessed ‘one of the deadliest factory disasters in modern history’ with the tragic collapse of the eight-story Rana Plaza factory complex (which supplied to a number of well known apparel brands), resulting in more than 1,000 workers dead and more than 2,000 injured (Berliner et al. 2015, 127; see also Clean Clothes Campaign n.d.3.). Beyond these tragic headlines, as methodically documented by NGOs, trade unions, international governmental organisations and academia, human rights abuses remain a daily reality for the 60 million strong global apparel supply chain workforce.

The human rights of workers are rights recognised under international law, primarily in core UN11 and ILO treaties12, as well as the Universal Declaration of Human Rights (UDHR). It is increasingly recognised that labour rights are in fact human rights (UN 2016; IndustriALL 2016). This is reinforced by the fact that each right below is enumerated in both human and labour rights treaties. Accordingly, this thesis refers to these rights collectively as human rights. The table below outlines the most common human rights abuses experienced by workers in global apparel supply chains, as well as their source in international law.

The treaties listed impose obligations on states, not corporations, to protect the human rights of those within their jurisdiction. The legal and practical implications of this are discussed further in Chapter 4.

<table>
<thead>
<tr>
<th>Right</th>
<th>Source</th>
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<tbody>
<tr>
<td>Right to freedom of association, including:</td>
<td>- International Covenant on Civil and Political Rights (ICCPR), Article 22</td>
</tr>
<tr>
<td>- the right to join trade unions</td>
<td>- International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 8(1)</td>
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<tr>
<td>- the right to engage in collective bargaining</td>
<td>- UDHR, Articles 20, 23(4)</td>
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<td>- ILO Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)</td>
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<td>- ILO Right to Organise and Collective Bargaining Convention, 1949 (No. 98)</td>
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<td>- International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (Migrant Workers Convention), Article 26</td>
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<tr>
<td>Right to a living wage</td>
<td>- ICESCR, Article 7(a)</td>
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<td>- UDHR, Article 23(3)</td>
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11 There are nine core human rights treaties. Seven of those are listed in the table below. The two remaining core treaties that are less directly relevant to workers’ rights are: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and International Convention for the Protection of All Persons from Enforced Disappearance.
12 The ILO has identified eight ‘fundamental’ conventions that reflect core labour rights, each of which are listed in the table below, as well as additional ILO treaties.
| Right to reasonable working hours | - ILO Equal Remuneration Convention, 1951 (No. 100)  
- ILO Minimum Wage Fixing Convention, 1970 (No. 131)  
- ILO Constitution (Preamble) |
|----------------------------------|--------------------------------------------------|
| Right to safe and healthy working conditions, including the right to be free from gender based violence and harassment | - ICESCR, Article 7(d)  
- UDHR, Article 24  
- ILO Forty-Hour Week Convention, 1935 (No. 47)  
- ILO Reduction of Hours of Work Recommendation, 1962 (No. 116)  
- ILO Weekly Rest (Industry) Convention, 1921 (No. 14) |
| Prohibition against forced labour and child labour | - ICESCR, Article 7(c)  
- UDHR, Article 23(1)  
- ILO Occupational Safety and Health Convention, 1981 (No. 155)  
- ILO Occupational Health Services Convention, 1985 (No. 161)  
- ILO Violence and Harassment Convention, 2019 (No. 190) |
| Prohibition against discrimination on prohibited grounds including, but not limited to, sex, race and disability | - ICCPR, Article 8  
- CRC, Article 32  
- Migrant Workers Convention, Article 11  
- Abolition of Forced Labour Convention, 1957 (No. 105)  
- ILO Minimum Age Convention (No. 138).  
- ILO Worst Forms of Child Labor Convention (No. 182)  
| - ICESCR, Article 2(2)  
- ICCPR, Article 2(1)  
- Convention on the Elimination of All Forms of Discrimination against Women (in particular, Article 11)  
- Convention on the Elimination of All Forms of Racial Discrimination (in particular Article 5(e))  
- Convention on the Rights of Persons with Disabilities (in particular Article 27) |
As the discussion below highlights, the rights enumerated above are intersecting and interdependent, with the breach of one right often linked to the breach of another.

### 2.6.1 Freedom of Association

The right to freedom of association, encompassing the right to join trade unions and the right to engage in collective bargaining, serves as a foundational right to all others. This right – termed an ‘enabling’ or ‘process’ right by some - is particularly powerful due to its role in enabling the negotiation and achievement of other rights (Barrientos & Smith 2007). It is fundamental not only to improving working conditions, such as hours, wages and health and safety, but more broadly, to worker empowerment and social justice (Barrientos & Smith 2007; AFL-CIO 2013; UN 2016, para. 11; Fair Wear 2020a).

The right to freedom of association, and associated rights, are complex, systemic rights whose achievement is inextricably intertwined with local and global political and social forces, giving rise to particular regulatory challenges for MSIs (Chapters 5 and 6). The reader will recall that national governments are external stakeholders of supply chains. They have the greatest capacity to influence the human rights of apparel workers, including rights of association. Yet states persistently attack these rights. The 2021 International Trade Union Confederation Global Rights Index, which ranked 149 countries, found that 89% of countries had violated the right to strike, 79% had violated the right to collectively bargain and 74% had excluded workers from the right to join a trade union. In 45 countries, workers were exposed to violence and in 68 countries, trade union leaders and other individuals associated with organising were subject to arbitrary arrest and detention. Based on this data, the Index ranked two of the top five apparel exporters – Bangladesh and Turkey – as being among the top 10 world’s worst countries to work in (ITUC 2021). Accordingly, the average rate of unionisation in most garment producing countries is estimated as being only 2-5% (Fair Wear 2017a, 20).

### 2.6.2 Right to a living wage

The suppression of freedom of association clearly impacts the ability of workers to achieve a living wage. This is an issue which, thanks in large part to the sustained advocacy of NGOs (Oxfam n.d.; Asia Floor Wage Alliance n.d.), is now recognised as one of the most critical human rights challenges facing the sector (alongside freedom of association) (Fair Wear, n.d.1; Dutch Agreement on Sustainable Garments and Textile). Most Apparel MSIs, and a growing number of buyers are now considering this issue. However, very little progress has been made and wages remain exploatively low within a system of production that, as argued above, has low labour costs as its foundation.
It is important to distinguish between a living wage, and the legal minimum wage set by the governments of production countries. Somewhat unhelpfully, the concept of a living wage does not have a settled legal, let alone methodological definition (ILO 2014). The Global Living Wage Coalition has consolidated over 60 descriptions of a ‘living wage’ across a range of sources, coming up with the following definition:

Remuneration received for a standard work week by a worker in a particular place sufficient to afford a decent standard of living for the worker and her or his family. Elements of a decent standard of living include food, water, housing, education, health care, transport, clothing, and other essential needs, including provision for unexpected events. (Global Living Wage, n.d.).

Similar definitions have been used by MSIs and NGOs (Fair Wear n.d.2.). While there may be some consensus on the concept of a living wage, there is no established quantitative definition (Asia Floor Wage Alliance et al. 2015, 49). Different organisations have come up with alternative methodologies, leading to substantially different figures. Nonetheless it is clear that globally, the legal minimum wage falls well below a living wage, with most apparel producing countries providing for a legal minimum wage that is somewhere between 20 to 50% of living wage estimates (Fair Wear 2019a, 5).

Many buyers argue that uncertainty around the calculation of a living wage poses an obstacle to corporate uptake (Asia Floor Wage Alliance et al. 2015, 43). Yet in the view of Lavinia Muth of Armed Angels (a Fair Wear member), ‘if a brand wants that a factory pays living wages, they can realise it’ (Muth Interview). As argued in this chapter, one of the biggest obstacles to achieving a living wage (aside from the ongoing suppression of workers’ freedom of association rights) is the very nature of the subcontracted supply chain business model, and the purchasing practices of buyers embedded within that model.

2.6.3 Right to reasonable hours of work

The right to a living wage is also connected to the right to reasonable working hours. Workers on insufficient wages are often compelled to work excessive hours, as standard hours do not come close to providing a wage on which workers and their families can live.

By way of illustration, an investigation by the Clean Clothes Campaign found that workers in factories in Bangladesh, India and Sri Lanka that supplied major retailers such as Walmart and Carrefour were averaging between 60 to 90 hours a week. (Clean Clothes Campaign 2009; see also Asia Floor Wage Alliance et al. 2018a, 32-33). Further, while overtime is at times voluntary (given insufficient base wages) overtime is also often forced upon workers in order to meet production deadlines and unattainable production targets (Clean Clothes Campaign 2009; Human Rights Watch 2015a; Human Rights Watch 2015b). This often stems directly from the poor purchasing practices of buyers. According to the ILO’s global survey, suppliers reported
that inaccurate technical specifications (for 41% of suppliers) and short lead times (for 58% of suppliers) led to additional overtime (Vaughan-Whitehead & Caro 2017, 15).

2.6.4 Right to healthy and safe working conditions, including freedom from gender-based violence and harassment

The right to safe and healthy working conditions came under the spotlight in the wake of the tragedies mentioned at the outset of this section. While building safety should in theory, be within the purview of a government inspectorate, it is reasonable to assume that had workers been unionised, they would have felt more empowered to raise concerns. As will be explored in Chapter 7, the Bangladesh Accord, a worker-driven initiative established in direct response to Rana Plaza, has sought to directly incorporate workers into building inspection processes.

The right to health and safety also encompasses the right to be free from violence and harassment (ILO 2017). In the apparel sector - where an estimated 80% of workers are female (Better Work n.d.1) - violence and harassment is overwhelmingly gender-based (GBVH). That is, it is disproportionately perpetrated against women, and often precisely because they are women (ILO Violence and Harassment Convention, Article 1(1)(b); UN 1992, para.6; UN 2017a).

Research by MSIs, NGOs and trade unions suggests that GBVH is ubiquitous within the apparel supply chain. According to Fair Wear, at least 60% of apparel factory workers in India and Bangladesh reported experiencing GBVH at work (Fair Wear, 2013). Similarly, Human Rights Watch has documented high levels of GBVH in Bangladesh and Cambodia (Human Rights Watch 2015a; 2015b). Reports published in 2018 by a global coalition of trade unions and NGOs detailed widespread gender based violence in the Asian based supply chains of Walmart, Gap, and H&M (Asia Floor Wage Alliance et al. 2018a; 2018b; 2018c).

The prevalence of GBVH is deeply intertwined with socio-economic factors, commercial pressures embedded within the supply chain, as well as violations of other fundamental rights at work. Women workers are often young and from rural or migrant backgrounds. They are situated within a broader societal context of deeply embedded gender inequalities, unequal power relations, and discrimination (ILO 2017, 8). They tend to remain in low-skilled employment, rarely reaching leadership positions in their factories or unions (Asia Floor Wage Alliance et al. 2018a, 34). Buyer purchasing practices, which give rise to unreasonably high production targets, excessive hours of work and lack of a living wage further exacerbate the risks of violence (Asia Floor Wage Alliance et al. 2018a, 71-91).

The prevalence of GBVH is also clearly connected to a lack of trade union representation, with evidence indicating that women who are trade unions members are more aware of their rights and more likely to report and resist (ILO 2017; Asia Floor Wage Alliance et al. 2018a, 53). All
these risk factors are exacerbated the further work is pushed up the supply chain, and the more it moves into the informal economy (section 2.5). Migrant workers and women in situations of forced or child labour (discussed below) are also at much greater risk of GBVH (ILO 2017).

It is important to highlight that GBVH is not only connected to discrimination, but also, in and of itself amounts to discrimination. Thus, GBVH constitutes a violation of both the right to health and safety, as well as the prohibition against discrimination (UN 1992, paras. 6-7).

2.6.5 Forced labour and child labour, and human trafficking and slavery

At the very extreme end of human rights violations within supply chains is the ongoing prevalence of forced and child labour. Forced labour and the worst forms of child labour are both recognised as forms of modern slavery (US Department of State n.d.).

Article 2(1) of the ILO Forced Labour Convention, defines forced labour as ‘all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily’, and covers a wide range of coercive labour practices. The most common manifestation is debt bondage, where personal debt is used to forcibly obtain labour. It is estimated that 51% of forced labour is debt bondage, with the figure rising to 70% in the case of manufacturing workers (ILO et al. 2017). Forced labour is also connected to human trafficking, which involves the recruitment, transport, transfer or harbouring of people by means of threat, force or coercion, for the purpose of exploitation (Palermo Protocol, Article 3). Other practices which suggest that an individual may be in a situation of forced labour or human trafficking include deceptive recruitment, restricted freedom of movement, retention of identity documents by employers and the withholding of wages (Verité 2017, 5).

Today, an estimated 24.9 million people worldwide are trapped in situations of forced labour, 16–18 million of which are exploited in the private economy, generating an estimated US$150 billion in illegal profits per year. More than half of those subject to forced labour in the private economy are women (57.6%), nearly 20% are children and 15% are in the manufacturing sector (ILO et al. 2017). According to the US Department of Labor, each of the top five apparel exporters - China, Bangladesh, Vietnam, Turkey, India – are implicated in forced labour, child labour or both (US Department of Labour 2020).

As with GBVH, the prevalence of forced and child labour is inextricably intertwined with underlying social and economic conditions and other rights violations. Multi-dimensional poverty, violence, a lack of social safety net and restrictions on freedom of association all create pressures that give rise to greater risks of forced and child labour (LeBaron et al. 2018; ILO et al. 2019). Researchers also highlight the intersection with discrimination - including on the basis

13 Modern slavery also encompasses other extreme deprivations of liberty including forced marriage, human trafficking and servitude.
of gender, race and caste – which ‘shapes how people are treated in the labour market, and helps to create and justify the supply of people vulnerable to forced labour in the global economy’ (LeBaron et al 2018, 25).

As with all other rights, the further upstream work is outsourced and the greater the reliance on informal or temporary contract workers, the more vulnerable and less protected workers become, and thus the greater the risk of forced labour, child labour and human trafficking (Phillips 2013; LeBaron 2014, 243; Verité 2017, 127-128; Le Baron et al. 2018; ILO et al. 2019, 29).

2.6.6 Migrant workers
Migrant workers form an integral part of the global apparel workforce. They are also among the most vulnerable and exploited.

The Migrant Workers Convention (Articles 25, 26) provides that migrant workers - regardless of whether they are documented or not - shall enjoy treatment ‘not less favourable’ than that which applies to nationals in respect of pay and working conditions. They also have an explicit right to join trade unions. Yet research shows that migrant workers are often paid less than local workers, experience greater barriers to exercising freedom of association, are at greater risk of discrimination, and are in a weaker legal position, particularly if undocumented (SOMO 2016). They also typically (but not always) carry out temporary or contract work, which further exacerbates their vulnerability to human rights breaches (section 2.5).

Migrant workers are also at a higher risk of modern slavery, with the ILO estimating that one in four victims of forced labour are exploited outside their country of residence (ILO et al. 2017). Common abusive practices by labour recruiters such as charging excessive recruitment fees, deception over working conditions, confiscating identity documents, and threatening violence and deportation are all linked to a heightened risks of debt bondage, forced labour and human trafficking (Verité 2017, 10; ILO et al. 2019, 23-25).

2.6.7 Discrimination
Finally, the discussion above highlights the underlying role of discrimination in relation to all rights violations. Like freedom of association, discrimination – which can occur on a range of prohibited grounds, including gender, race, caste and migrant status – increases vulnerability and impedes the ability of workers to meaningfully assert their rights. In the apparel sector, women, migrant workers, and ‘lower castes’ are at particular risk. Discrimination generates inequality, reinforces poverty, limits opportunities for advancement, and locks workers into low-skilled and often informal work, in turn placing workers at greater risk of all rights breaches (LeBaron et al. 2018, 25-29; ILO et al. 2019, 22-23). Given its symbiotic relationship with broader social forces, discrimination is an underlying and complex right, making it uniquely difficult to address.
Conclusion

The contemporary outsourced system of global apparel production, while generating employment opportunities for millions of (predominantly female) workers, has also generated systemic adverse human rights impacts. This is the problem that Apparel MSIs were established to address.

This chapter first provided a definition of MSIs and proposed an MSI typology. The typology distinguishes between three MSIs models: Learning, Certification and Governance MSIs. Learning MSIs do not utilise oversight mechanisms or provide for any meaningful form of accountability, and therefore do not amount to systems of private transnational regulation. In contrast, both Certification and Governance MSIs perform an oversight function and are appropriately characterised as private transnational regulators. The critical distinguishing feature between the latter two models is that Certification MSIs focus their oversight activities in respect of upstream suppliers, while Governance MSIs focus on downstream buyers at the top of global supply chains.

This chapter went on to demonstrate that the problem that Apparel MSIs were established to address is in large part driven by the inherent structure and power dynamics of the ‘buyer-driven’ apparel supply chain. Buyers at the apex of global supply chains have grown reliant on complex, multi-tiered supply chains to manufacture their goods. These buyers, located predominantly in the developed world, dictate the commercial terms of production and capture a majority of profits. Suppliers, predominantly in developing countries are in turn expected to comply with the increasingly onerous terms set by buyers. Relations between buyers and suppliers remain predominantly transactional, with long-term partnerships the exception rather than the norm. Buyers impose unfair purchasing practices on suppliers, driven by ever-greater demands for low-cost, speed and flexibility. These purchasing practices generate an environment antithetical to decent working conditions and human rights standards. Suppliers - the majority of which are trapped in the low-skilled, low value-added portion of the supply chain - respond to these pressures by exploiting their own workforce. They also squeeze suppliers further upstream, entering into unauthorised subcontracting arrangements and engaging informal and precarious labour. Recent trends such as the rise of the giant intermediaries and East Asian first tier suppliers and attempts by some buyers to consolidate their supply chains have not occurred on a sufficiently large scale to overcome these supply chain dynamics. Ultimately, it is workers who bear the brunt through systemic human rights breaches.

This chapter also emphasised that supply chains are embedded in a broader social and political context, where a range of external stakeholders have the potential to regulate and influence human rights outcomes. Thus while supply chains might drive (and potentially even be predicated upon) human rights breaches, these breaches are able to proliferate unchecked due to the failure of both public and private regimes to regulate the conduct of buyers and suppliers.
These failures, commonly referred to as ‘global governance gaps’, are described in Chapter 4. Prior to considering these, this thesis first introduces two key theories: the political science theory of democratic legitimacy, and the regulatory theory of responsive regulation. Both frame and inform the analysis of Apparel MSIs. In addition, responsive regulation provides a theoretical perspective on the decentred manner in which global apparel supply chains are today regulated. Chapter 3 now turns to these theories.
Chapter 3 Multi-stakeholder initiatives as regulators and their regulatory legitimacy

Introduction

The argument of this thesis is that unless Apparel MSIs adopt new regulatory approaches - including moving beyond social audit, expanding stakeholder participation and better measuring and communicating impact - their legitimacy as regulators will erode. This may be to such a degree that the adhesion of members and allegiance of wider stakeholders will disappear and their efforts will have no regulatory value. This chapter introduces two frameworks that provide the theoretical foundation for this argument: the political science theory of democratic legitimacy and the regulatory theory of responsive regulation.

MSIs form part of the broader global trend of transnational private regulation (Bernstein & Cashore 2007; Beisheim & Dingwerth; Bernstein 2011). According to the political science theory of democratic legitimacy, such private systems must establish legitimacy. Comprised of both a normative and sociological dimension, the theory explains why an MSI must establish legitimacy, when it must do so, how legitimacy is constituted and how it might be improved. This thesis applies this framework to answer the central question: what limits the regulatory legitimacy of Apparel MSIs and how can these limitations be addressed?

As highlighted in Chapter 1, the regulatory theory of responsive regulation also emphasises the need for regulation to be legitimate. Unlike the political science theory of democratic legitimacy, it does not focus on specific legitimacy criteria. Instead, responsive regulation focuses on how to bolster the regulatory capacity and effectiveness of Apparel MSIs as institutional regulators (Braithwaite 2006). With effectiveness constituting a significant component of democratic legitimacy (section, 3.1), responsive regulation therefore brings a broader, institutional lens to bear onto the question of legitimacy. It does so in two significant ways. First, responsive regulation explains the broader context in which Apparel MSIs operate. It highlights that they are but one regulatory actor in a complex, decentred system in which a multitude of actors – both state and non-state - perform regulatory functions (Black 2008; Burris et al. 2008). Responsive regulation posits that it is vital for MSIs to understand and respond to this broader context, in particular insofar as it impacts the behaviour of regulatees. Second, responsive regulation identifies power imbalances among regulatory actors as a significant institutional challenge, and presents a theory of how to empower weaker actors within regulatory systems to achieve better regulatory outcomes (Braithwaite 2008, 94-97). Thus, responsive regulation builds upon the theory of democratic legitimacy by presenting the broader institutional legitimacy challenges faces by Apparel MSIs, and proposing solutions to how they might be addressed. Chapters 6, 7 and 8 argue that addressing these institutional challenges is a matter of vital importance for improving the effectiveness, and therefore maintaining the legitimacy of, Apparel MSIs.
3.1 MSI legitimacy

Legitimacy underlies the authority of MSIs to perform regulatory functions. As argued by scholars of non-state transnational governance, in order for regulation beyond the state to be justified, the assumption of regulatory functions by private actors must be legitimate (Bernstein 2004; Fuchs et al. 2009). While the concept of legitimacy originates from academic assessments of MSIs, it also forms the basis of the most significant critiques levelled at MSIs by advocates and civil society.\(^\text{14}\)

When discussing legitimacy, scholars are typically referring to democratic legitimacy, which has been described as the “socially shared belief that the regulator has the capacity and the authority to impose rules on a community of citizens” (Mena & Palazzo 2012, 528; Scharpf 2009). Or put another way, it is ‘the acceptance of a governance relationship, where commands ought to be obeyed’ (Bernstein & Cashore 2007, 351). Other commentators refer to the notion of ‘authority’ or ‘legitimate power,’ which is said to exist ‘when an individual or organisation has decision-making power over a particular issue and is regarded as exercising that power legitimately’ (Boström & Hallström 2013, 99-100).

Legitimacy has both a normative (that is, moral or obligatory) and a sociological dimension. From a normative perspective, the relevant question is when should an institution be regarded as legitimate? When an institution complies with certain normative criteria (which vary among scholars), it is asserted that the institution has the right to rule or regulate. The sociological approach, drawing upon Weberian social science, focuses on the empirical question of whether it is widely believed that an institution has the right to rule. That is, the question becomes whether an organisation is deemed acceptable and credible by those it seeks to govern (Buchanan & Keohane 2006, 405; Black 2008, 144-146).

In democratic political theory, it is well-established that regulation by the state is legitimate because it is underpinned by a system of representative democracy. People indicate their consent to regulation by electing political representatives (Fuchs et al. 2009; Bernstein 2011, 2-3). This is the traditional, minimum requirement of legitimacy in the democratic state context. At the international level, public global governance organisations (for example intergovernmental organisations such as the UN and the ILO) are said to derive their legitimacy from the consent of sovereign states, evidenced in part by their entry into treaties (Bernstein & Cashore 2007, 351).

Unlike states, MSIs ‘are not embedded in … a context of well-established democratic mechanisms’ that are typically associated with participation and accountability (Mena & Palazzo 2012, 528). Nor are they based on state consent like public institutions of global governance.

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\(^\text{14}\) Although civil society critics do not necessarily invoke the term, they have directed most of their criticism towards the specific components that make up MSI legitimacy, as set out in Chapter 6.
Further, they face the challenge of ‘geographically dispersed’ publics that ‘do not form one institutionalised political container’ and do not have the backing of state power to motivate compliance (Mena & Palazzo 2012, 528-529). Thus, MSIs must establish legitimacy in order to justify their claim to regulate (Bernstein 2004).

When considering legitimacy, the starting point for many scholars is Fritz Scharpf’s distinction between ‘input’ and ‘output’ legitimacy. Input legitimacy considers to what extent regulations are perceived as justified or credible, in light of their procedures and governance structures. Output legitimacy is outcome focused, and is concerned with the extent to which regulation effectively regulates the issue being targeted (Risse 2006; Mena & Palazzo 2012, 528-529; Boström & Hallström 2013; Baumann-Pauly et al. 2017, 4-5). It is argued that ‘[i]n democratic systems, both sources together ensure the legitimacy of the political order’ (Risse 2006, 185; see also Kalfagianni & Pattberg 2013, 236-237). Chapter 6 outlines the specific elements of input and output legitimacy, and demonstrates the extent to which they are interconnected.

Prior to assessing legitimacy, it is necessary to first determine whether an MSI is in fact performing a regulatory function. As flagged in the typology set out in Chapter 2 (section 2.1), not all MSIs regulate. To the extent that they do not, they do not constitute transnational system of private regulation and are therefore not required to establish legitimacy.

3.2 Regulation: a definition

At its broadest, regulation has been described simply as ‘influencing the flow of events’ (Parker & Braithwaite 2003, 119), incorporating both intentional and unintentional acts. Some argue that a broad definition is necessary in order to account for the effect of broader forces and structures, for example market forces, political structures and social influences (Parker et al. 2004). Others, such as Black argue that regulation should be concerned solely with intentional acts, precisely so that it can be distinguished from these structures, and the forms of social control that they entail (Black 2002). Some regulatory scholars have drawn on the views of Black, describing regulation as the ‘intentional activity of attempting to control, order or influence the behaviour of others’ (Crawford 2006, 453-454). In addition it is often stated that a regulator must incorporate three essential elements: standard-setting; a process for monitoring compliance with such standards; and a means for enforcing compliance (Parker et al. 2004, 1; Crawford 2006, 453-454; Burris et al. 2008, 35). This thesis adopts the intentional approach, combined with the three underlying elements. As succinctly summarised by Black (2008, 139) this leads to a definition of regulation as:

... sustained and focused attempts to change the behavior of others in order to address a collective problem or attain an identified end or ends, usually through a combination of rules or norms and some means for their implementation and enforcement, which can be legal or non-legal.
This definition is consistent with the views of scholars of transnational governance that a system constitutes private transnational regulation only if it creates binding and enforceable rules. This means it must possess ‘mechanisms to verify compliance and to create consequences for non-compliance’ (Bernstein & Cashore 2007, 348-350).

Applying the MSI typology (Chapter 2, section 2.1), Learning MSIs do not possess any oversight mechanisms to implement or enforce rules. Therefore, they do not regulate and cannot be characterised as systems of transnational private regulation. Accordingly, they are not required to satisfy the demands of democratic legitimacy (Mena & Palazzo 2012, 536; Bernstein 2011, 37). Certification and Governance MSIs on the other hand, utilise various oversight mechanisms to enforce their rules. Therefore, they perform a regulatory function, and must establish legitimacy. Chapter 5 applies the MSI typology to Apparel MSIs, in order to delineate between Learning, Certification and Governance MSIs. Only Certification and Governance MSIs – those performing a regulatory function - are subject to the legitimacy analysis in Chapter 6.

Finally, two caveats must be applied. First, the three underlying elements of regulation - standard-setting, compliance and enforcement – need not necessarily be effective for a phenomena to be considered regulation (Black 2002). Further, a decentred vision of regulation envisages that these three elements need not necessarily emanate from a single regulator. Rather, they may be undertaken by different actors within a regulatory regime (Burris et al. 2008).

3.3 Responsive regulation

The theory of responsive regulation, first comprehensively articulated in 1992 in Ian Ayres and John Braithwaite’s seminal book is the foundational theory of regulatory theory (Ayres & Braithwaite 1992; Parker 2013). Despite being subject to criticism and debate, more than two decades on, it remains an influential and enduring theory of regulation, acting as a springboard for ongoing developments in regulatory theory (Ayres 2013; Baldwin & Black 2008, 62).

3.3.1 The essence of responsive regulation

Borne out of a desire to transcend the ‘intellectual stalemate’ between arguments in favour of strong regulation (and consequent punishment) of business on the one hand and deregulation on the other, responsive regulation argues for a mix of private and public regulation as a ‘third alternative’ (Ayres & Braithwaite, 4). At least initially, responsive regulation drew heavily upon the concept of the ‘new regulatory state’, whereby the state rules at a distance through the devolution of functions, particularly those connected to its role as provider. Private entities increasingly take on ‘rowing’ functions, principally through the privatisation of functions and services once the domain of government. The state increasingly ‘steers’ through public norms and objects, new regulatory institutions and forms of oversight - in particular co-regulation and enforced self-regulation - to constitute this hybridisation (Braithwaite 2000; Levi-Faur 2013). The
emergence of MSIs is a prime example of the devolution of regulatory functions to the private sphere.

Responsive regulation argues that regulators should be responsive both to the motivations of regulatees, as well as their wider sectoral context. In particular, the behaviour of an industry or firms, and the extent to which they are effective self-regulators will determine the extent to which a regulator will intervene (Braithwaite 2008, 88). Underpinned by the republican value of freedom as non-domination, responsive regulation seeks to promote ‘less costly, less coercive, more respectful options’ as the primary tools of regulation (Braithwaite 2011, 486).

This philosophy is reflected in the ‘enforcement pyramid’ or ‘pyramid of sanctions’, which sets out a hierarchy of sanctions and interventions. The bottom of the pyramid represents softer approaches to regulation such as persuasion and education, with measures becoming more intrusive and coercive further up the pyramid (Ayres & Braithwaite 1992, 35-36; Braithwaite 2008, 89). The pyramid represents a ‘tit-for-tat’ approach, meaning that a regulator should begin at the base of the pyramid, and only escalate when less intrusive approaches fail. Further, once compliance has been achieved, the regulator moves back down the pyramid, for ‘[r]eform must be rewarded just as recalcitrant refusal to reform is ultimately punished’ (Braithwaite 2008, 90). The theory is that most regulation should occur at the bottom of the pyramid, with more stringent regulation reserved for more severe cases, for example where the regulatee is incompetent or a ‘calculating recidivist’ (Ayres & Braithwaite 1992, 19-53; Braithwaite 2011, 483-484).

In a subsequent development, responsive regulation also incorporated a ‘pyramid of supports’ or ‘strength-building pyramid', which proposes a hierarchy of incentives and encouragement that will improve the capacity of regulatees to comply (Braithwaite et al. 2007, 305-333). Rather than escalating sanctions, the pyramid envisages escalating incentives, for example, capacity-building, informal and formal praise, rankings and prizes. It is only when the strength-based pyramid is exhausted and compliance has still not been achieved that the regulator should move to the enforcement pyramid (Braithwaite 2008, 96; Braithwaite 2011, 480-481).

Significantly, these pyramid strategies rely on a ‘benign big gun’ looming in the background. This requires the regulator to have strong enforcement powers, to signal but not directly threaten the use of these powers, and to resort to their use only sparingly (Ayres & Braithwaite 1992, 19-53). That is, in order to work, responsive regulation requires regulatees to believe that the regulator will escalate its strategies if compliance is not achieved at the lower levels of the pyramid (Braithwaite 2011, 488). As noted by Ayres and Braithwaite, ‘[r]egulatory agencies will be able to speak more softly when they are perceived as carrying big sticks’ (Ayres & Braithwaite 1992, 6).
At heart, responsive regulation seeks to promote greater regulatory compliance and enforcement, or the ‘effectiveness ideal’ (Ayres & Braithwaite 1992, 57; Braithwaite 2006; Baldwin & Black 2008; Kingsford Smith 2011). This ideal is advanced through the pyramid strategies outlined above. It is argued that ‘by only resorting to more dominating, less respectful forms of social control when more dialogic forms have been tried first, coercive control comes to be seen as more legitimate,’ and thus compliance more likely (Braithwaite 2011, 486).

Importantly, responsive regulation also aims to reflect a ‘democratic ideal’ by incorporating notions of deliberative democracy and restorative justice (Braithwaite 2006, 884-885; Kingsford Smith 2011). As explored below, this aspect of responsive regulation has become more pronounced over time as the theory has evolved to more directly and emphatically acknowledge the participation of a wide range of actors in the regulatory process. Through the operation of the two ideals of effectiveness and democracy, responsive regulation seeks to provide a normative analytical framework that promotes more effective regulation (Wright & Head 2009, 197). These two ideals mirror the concepts of input and output legitimacy, insofar as input legitimacy is concerned with fair and credible procedures and output legitimacy with effectiveness.

3.3.2 Strengths, weaknesses and enhancements

Since its inception much has been written about the strengths and weaknesses of responsive regulation. It is beyond the scope of this thesis to consider the wealth of surrounding literature in depth. Rather, this section will consider how scholarly debate regarding the key strengths and weaknesses most relevant to the regulatory challenge posed by this thesis have led to refinements and further developments of the theory.

Flexibility and communication are arguably the two most significant (and interconnected) characteristics of responsive regulation. They are also two key strengths. Regulation is no longer ‘about specifying punishment in advance’ (Braithwaite 2017, 121), but rather is seen as a product of ongoing and complex interaction and dialogue (Heimer 2011, 663). Braithwaite envisages a collaborative process, where the regulator acts as a highly effective communicator who listens to the concerns of the regulatee, encourages the regulatee’s motivation and commitment to change, and elicits a plan of action from the regulatee itself (Braithwaite 2011, 493-500). Such an approach draws upon the knowledge of the regulatee, which is likely lead to more informed and realistic regulatory solutions (Ford 2013). There is also a greater chance of success where the commitment of the regulatee has been secured. However this type of relationship cannot be assumed. As highlighted by Kingsford Smith (2011), responsive regulation emerged from extensive empirical research in industries where physical inspections were a major component of enforcement. She argues that responsive regulation requires a relationship of understanding and trust, which can only come from years of ongoing interaction. That is, in order for the power of effective communication to be realised, an ongoing relationship must be actively cultivated. This is particularly apposite to the present context. As discussed in Chapter 5, Apparel MSIs currently perform inspections through social audit. However, the
manner in which this is undertaken does not adequately facilitate the requisite relationship of understanding and trust. As Chapter 8 recommends, improving levels of trust and commitment between buyers, suppliers and workers is critical if MSIs are to act as responsive regulators.

Turning to flexibility, in later writings, Braithwaite expanded on this concept, suggesting that flexibility should not be conceived of as simply moving along or between pyramids, but rather, is about being responsive to context and the use of entire regulatory strategies (Braithwaite 2011). This development appears to pick up critiques, including by Baldwin, Black and Heimer that responsive regulation should consider not only the compliance efforts of individual firms, but the context in which regulatees operate, and the competing considerations which may impact upon their ability to comply. For example, Heimer (2011, 693) talks about the need for ‘relational regulation’, where the regulator:

… would help regulatees solve other problems so that they can also meet regulatory objectives. It takes seriously what regulatees say about how regulations fit with, and perhaps interfere with, other valuable activities, particularly when regulatees can offer good evidence that what they propose is a different but not diluted regulatory solutions. Responsiveness is not just in sanctions but in regulatory solutions.

Baldwin and Black also develop this argument through their concept of ‘really responsive regulation’, where in addition to individual firm compliance, a regulator should respond to the following additional factors: (1) the cultures and understandings that operate within regulated organisations (‘attitudinal settings’); (2) the broader institutional environment of the regulatory regime; (3) the different logics of regulatory tools and strategies; (4) the regime’s own performance; and (5) changes in each of these elements (Baldwin & Black 2008).

As will be demonstrated in this thesis, these are all apposite considerations in the present context. Specifically, Chapters 5 and 6 argue that improving human rights outcomes in supply chains requires buyers and MSIs to be more responsive to the existing attitudinal settings, structures, power dynamics and pressures faced by both suppliers and buyers. Apparel MSIs must also assess the underlying ‘logic’ of social audit, and be more responsive to the broader regulatory environment in which they operate.

The need to be responsive to regime performance (element 4 above) is also significant. This type of responsiveness requires regulators to assess the extent to which a regulatory regime is achieving its objectives, and adjust its tools and strategies accordingly. Baldwin and Black acknowledge the difficulty of this task, noting that this ‘might involve radical shifts of strategy such as an emphasis on the re-incentivising or reorganising of an industry rather than a continued stress on enforcing the current regime of rules’ (Baldwin & Black 2008, 72). Braithwaite also picks up this point in later writings, invoking Parker’s ‘triple loop’ concept, where improvements are monitored, publicised, and lessons about how to revise regulatory
goals and strategies disseminated. Like Baldwin and Black, Braithwaite acknowledges the difficulty of the task, and also raises concerns about the scientific rigour of the evaluation process (Braithwaite 2011, 512-518).

As the discussion above highlights, in order for two of the key strengths of responsive regulation – communication and flexibility – to be more fully realised, regulators must strive to become ‘really responsive regulators’. This means that they must pay more attention to the nature of the relationship between regulator and regulatee, the broader regulatory context in which that relationship sits, as well as the performance of the regulatory regime. Chapters 6 argues that in order to bolster legitimacy, Apparel MSIs must become really responsive regulators. Chapter 8 presents recommendations in this regard.

Turning to weaknesses, perhaps the most common criticism of responsive regulation has been that it is a statist theory, which focuses excessively on the regulatory role of states (Scott 2004; Grabosky 2013). Braithwaite has refuted this critique arguing that responsive regulation acknowledges the potential for non-state actors to participate in the regulatory process (Braithwaite 2008, 87). From the outset, responsive regulation promoted regulatory ‘tripartism’ whereby civil society was to be involved in enforcement at a range of stages within the pyramid. Civil society could for example be granted access to information available to a state regulator, be included in negotiations with regulatees and given standing to prosecute as a regulator. Tripartism was put forward as a potential solution to the risk of regulatory capture, while also reflecting the principle of participatory democracy (Ayres & Braithwaite 1992, 54-100). More generally responsive regulation also argued for the delegation of regulatory tasks to firms, thus empowering private actors to promote compliance with regulatory standards (Ayres & Braithwaite 1992, 101-162).

Critics such as Grabosky argue that the third-party participation envisaged by responsive regulation nonetheless relies too heavily on the imprimatur of the state. The theory fails to explore the rise of complex and decentred forms of regulation ‘where a variety of private actors are in a position to play very significant regulatory roles, beyond state auspices’ and thus remains overly state-centric (Grabosky 2013, 114).

This thesis contends that responsive regulation has, over time, evolved to reflect a more decentred account, and thus the state-centric charge is not apt. In later empirical work, Braithwaite and Drahos highlighted the range of actors who had influenced global systems of business regulation. While positing that states were still the key actors, they nonetheless highlighted the potential for civil society actors to promote their own goals by tapping into global regulatory ‘webs of influence’ (Braithwaite & Drahos 2000). A more significant evolution came

15 This has been acknowledged by some critics, causing them to revise their earlier criticisms (Scott 2017).
with Braithwaite’s conceptual shift from the new regulatory state (which underpinned the original theory) to regulatory capitalism, and a direct embrace of nodal governance.

3.4 The evolution of responsive regulation: regulatory capitalism, nodal governance and the networked pyramid of escalation

Developed principally by Levi-Faur, regulatory capitalism argues that states, markets and society are inherently interconnected and interdependent. Markets require strong and effective regulation in order to function effectively and thus capitalism is both constituted and moderated by regulation (Levi-Faur 2005). Similarly to the regulatory state, regulatory capitalism recognises the growing delineation of functions between the state and private actors. The state steers and provides less, while business rows through the provision of services and technological innovation. However regulatory capitalism moves beyond the regulatory state in that it explicitly recognises the rapid growth of new decentred forms of regulation, including regulation by non-state actors such as MSIs (Braithwaite 2008, 28-29).

At the same time that Levi-Faur was developing the theory of regulatory capitalism, another decentred account of regulation – the theory of nodal governance – was emerging. Drawing upon network theory (Castells 2000), nodal governance scholars argue that regulation occurs by way of non-hierarchical, fluid and multi-layered relationships and alliances (Johnston & Shearing 2003, 160; Wood & Shearing 2007, 13). The state is no longer the focal point from which regulation emanates, and governance becomes ‘the property of networks rather than any centre of action’ (Wood & Shearing 2007, 147). In contrast to responsive regulation (and regulatory capitalism) nodal governance does not envisage a central regulatory role for the state at all. Rather, the state is viewed as an important, albeit no longer central actor, whose regulatory power must be understood as operating alongside a constellation of other private actors with the ability to regulate (Johnston 2006, 34; Burris et al. 2008, 4).

Informed by the conceptual shift from the regulatory state to regulatory capitalism, as well as the emergence of nodal governance, the theory of responsive regulation evolved to encompass a new ‘pyramid of networked escalation’. Rather than escalating vertically along an enforcement pyramid, in the networked pyramid, decentred actors attempt to enrol a range of network partners or ‘nodes’ as a means of increasing regulatory pressure (Braithwaite 2008, 95-97).

The concept of enrolling nodes is drawn directly from nodal governance. According to nodal governance scholars, nodes are significant sites where knowledge, capacity and resources are mobilised for transmission (Burris 2004; Wood & Shearing 2007, 27; Holley & Shearing 2017, 165). Scholars of nodal governance argue that it is nodes that drive governance within networks and therefore social systems as a whole (Drahos 2004, 404-405; Burris et al 2005, 33). It is ‘nodes rather than networks … that make governance “buzz”’ (Shearing & Johnston 2010, 500). Proponents argue that this focus on nodes leads to a greater understanding of how power is
created and exercised within a social system, as well as how new structures of governance and centres of power might be generated (Drahos 2004; Wood & Shearing 2007, 27). Thus, a nodal governance perspective has the potential to re-imagine the traditional power relations outlined in Chapter 2.

Nodal governance scholars define nodes as institutional sites where actors cluster together to mobilise mentalities, technologies and resources with a view to shaping events (Burris et al 2005, 37; Wood & Shearing 2007, 149). Mentalities are defined as the ‘culture of the node, its way [of] thinking about itself and the world around it’ (Burris 2004, 342), as well as a way of thinking about the matter sought to be governed; technologies are the methods used to influence events; and resources are the financial, social, cultural, economic (or other) capital that support the operation of the node and its exercise of influence (Burris et al. 2005, 37-38; Shearing & Johnston 2010, 503).

A node may be a single organisation or a cluster of actors. For example, it may be a company, industry association, an NGO, trade union, government agency, legislature, court, international government organisation (Burris et al. 2005, 37), or an MSI. Accordingly, each stakeholder outlined in Chapter 2 can be characterised as a node. A node can be a member of another node and thus many of these stakeholders can be further broken down into clusters of subsidiary nodes (Drahos 2004). For example, the MSI is a node, which is in turn, made up of other separate nodes including companies, NGOs and trade unions. In addition, many large institutions such as states and companies may ‘be understood as networks themselves, comprised of many subsidiary nodes, rather than as monolithic entities’ (Burris 2004, 341). Thus, what at first sight may appear to be a unified node, may on closer inspection in fact be a cluster of nodes pursuing competing objectives. As Chapters 5 and 6 demonstrate, buyers and MSIs, upon first inspection appear to be unified nodes. However, too often, they are subject to internal discord, which in turn affects their regulatory effectiveness. Chapter 8 makes recommendations as to how to overcome these challenges.

Nodes can be both objects and subjects of regulation (Shearing 2006, 32). They will ‘relate to one another and attempt to mobilise and resist one another, in a variety of ways so as to shape matters in ways that promote their objectives and concerns’ (Wood & Shearing 2007,149). This process of mobilisation to achieve outcomes is referred to as enrolment, and is the essence of nodal governance. Enrolment recognises that different actors will have varying capacities to regulate. When actors combine their regulatory capacity, they can increase their own regulatory capacity, as well as the regulatory capacity of the entire system (Burris et al. 2005; Wood & Shearing 2007). It is this process that is central to Braithwaite’s updated networked pyramid.

The ability of a node to enrol is determined in large part by the resources it possesses (Wood & Shearing 2007, 97-98). Resources should be understood as a broad concept that includes
capital of all forms. Scholars identify six forms of capital as particularly relevant to the performance of regulatory functions: information, expertise, financial and economic resources, authority and legitimacy, strategic position, and organisational capacity (Black 2003). In the context of this analysis, the relevant question is what types of resources do the relevant stakeholders (nodes) possess that can influence human rights outcomes in global apparel supply chains? (Wood 2006; Shearing & Johnston 2010).

Nodal governance scholars propose a mapping exercise, in order to determine which nodes might be enrolled in the governance of a system. Relevant nodes in a social system are identified by asking which actors shape or participate in that system (Shearing & Johnston 2010). Nodal governance has been applied principally to the field of security provision (Johnston & Shearing 2003; Wood & Dupont 2006; Wood & Shearing 2007). It has also been applied in the context of global health, and global pharmaceutical markets (Burris 2004; Drahos 2004). For the purpose of the present analysis, the social system in question is the regulation of the human rights impacts of global apparel supply chains. The actors that shape, and have the potential to govern this system - the nodes - are those stakeholders identified in Chapter 2 (section 2.2). Once relevant nodes have been identified, their four essential elements – mentalities, technologies, resources and institutions – are investigated through empirical inquiry (Burris et al. 2005; Shearing & Johnston 2010).

A regulator seeking to invoke the networked pyramid of escalation must undertake a similar inquiry. That is, the regulator must assess the elements of key relevant nodes in order to determine which nodes it should enrol in order to increase its regulatory effectiveness. To this end, Chapter 4, which assesses the current regulatory landscape, illuminates the extent to which the mentalities, technologies, resources and institutions of key nodes in the global apparel supply chains determine their present regulatory power. Chapter 6 then explores which nodes MSIs (as nodes themselves) have sought to enrol, and to what extent this has been successful. Chapter 8 makes recommendations as to how enrolment could be strengthened.

3.5 Empowering the weak and the role of orchestration: is the networked pyramid sufficient?

The networked pyramid was developed in direct response to a major critique of responsive regulation: that it did not, in its original form, sufficiently account for weaker actors. For example, at an early stage, Haines (1997) had queried the capacity of smaller firms, particularly suppliers (regulatees) to comply with regulation. Conversely state (and non-state) regulators could also be weak for a range of reasons including lack of political will, lack of resources and imbalances of power between industry and regulators (Braithwaite 2006; Braithwaite 2011). Such concerns raise significant challenges given that the entire theory of responsive regulation relies on regulatees having the capacity to comply on the one hand, and on regulators holding a ‘benign big gun’ in reserve on the other (Ayres & Braithwaite 1992, 19-53).
These concerns are only exacerbated at the transnational level. For responsive regulation, originally conceived in the domestic context, is enabled by a society with a strong state, strong markets, and strong civil society, where the strength of each institution enables the governance and compliance capabilities of other institutions (Braithwaite 2006; 2013). Most importantly, the state must have strong regulatory capacities, including the ability to escalate to coercive enforcement strategies. Yet in the case of transnational problems, states are often incapable of, or unwilling, to play such a role, and thus the problem of weaker actors is exacerbated. In addition to strength, responsive regulation assumes a high level of co-ordination among regulatory actors. As argued by Heimer (2011), regulators should be able to call upon others in the regulatory network to support their regulatory decision, to persuade the regulatee to comply and fill loopholes that might otherwise permit the regulatee to avoid the costs of non-compliance. Yet in practice, domestic systems of regulation can operate in a highly disarticulated manner. The problem of disarticulation becomes even starker at the transnational level.

Braithwaite argues that the updated networked pyramid can replace the role of state power and co-ordination at the transnational level. The ‘benign big gun’ is replaced with the power of networked actors. He specifically contemplates the emergence of transnational systems of regulation (including MSIs) as an example of networked responsive regulation (Braithwaite 2008, 94-97). Braithwaite argues that such systems should require large companies to regulate smaller ones, creating ‘[a]n upstream–downstream community of shared fate constituted by making major … companies responsible for the way their products are used by those they trade with upstream and downstream’ (Braithwaite 2008, 95). He specifically highlights the role that MSIs can play in enrolling the threat of reputational risks and the power of consumers and retailers to compel stronger companies to regulate weaker ones. He also argues that such systems can address the weakness of regulatees (such as suppliers in developing countries) by compelling stronger companies to engage in capacity-building, thus invoking the pyramid of supports.

Braithwaite acknowledges in passing the range of critiques relating to the effectiveness of private transnational regulation, and suggests that regulatory failure is ultimately due to two major factors: poor design of the initiative itself, and the relative weakness of such initiatives as compared to the ‘much better resourced and more politically powerful’ industries they seek to regulate (Braithwaite 2008, 96). He argues that this power imbalance can be overcome precisely by invoking the networked pyramid and enrolling the power of multiple nodes. Potential partners may be equally weak actors, ‘whose combined power tied in a node governs the situation with greater power than the sum of its parts’ or stronger parties with greater (or different) resources and regulatory capacity (Braithwaite 2008, 99).
The argument of this thesis is that Apparel MSIs have not lived up to their regulatory potential. One significant reason for this is that they have not managed to overcome the challenge of regulating a strong and well-resourced industry in a systematic and co-ordinated manner. Chapter 6 demonstrates that corporate capture remains a significant problem for Apparel MSIs, which in turn has direct implications for their legitimacy. Viewed through the prism of the networked pyramid, Chapter 6 argues that this can be attributed in part to a failure by Apparel MSIs to fully realise the power of enrolment.

An alternative explanation - put forward by scholars of new governance - is that the updated networked theory of responsive regulation is not sufficient to overcome the sector's power dynamics. Scholars argue that systems of private transnational regulation ‘are not deeply enmeshed in a regulatory network, let alone orchestrated by the State’ (Abbott & Snidal 2009, 541). They are also fragmented, and relatively small, in terms of resources and participation, compared to the scope of the problems they address (as outlined in Chapter 6, the latter point is a key component of input legitimacy). As a result, new governance scholars posit that networking and enrolment – key elements of networked responsive regulation - are not sufficient to make up for the lack of centralised power at the transnational level. Instead, they suggest that complex decentred systems must also be ‘orchestrated’ by the state and/or intergovernmental organisations. Orchestration is defined to include ‘a wide range of directive and facilitative measures designed to convene, empower, support, and steer public and private actors engaged in regulatory activities’ (Abbott & Snidal 2009, 511).

Direct orchestration by states could entail relaxing legal and administrative requirements for firms that adhere to approved MSIs, requiring firms to join an MSI, imposing social reporting or due diligence obligations on home-based parent companies, ensuring socially responsible public procurement and harnessing international trade agreements. As Chapter 4 demonstrates, the current regulatory landscape already reflects many such forms of state orchestration, including though the rise of legislated reporting obligations and the inclusion of labour rights clauses in trade agreements.

Direct orchestration by intergovernmental organisations could include conditioning membership or other benefits on participation in an MSI, pressing states to orchestrate, imposing reputational sanctions and enlisting civil society to enhance monitoring and enforcement (Abbott & Snidal 2013; Vogel 2010). To date, the main form of orchestration undertaken by intergovernmental organisations has been norm creation, through the promulgation of treaties and soft-law frameworks. As outlined in Chapter 4, they have been far less effective in facilitating enforcement.

New governance scholars concede that states and intergovernmental organisations are most likely to undertake softer ‘facilitative orchestration’ measures. This would include measures
such as assisting in the establishment of MSIs, providing funding, technical assistance, and publicising information about MSIs (Abbott & Snidal 2009; Abbott & Snidal 2013). Chapter 4 demonstrates that many states have already undertaken indirect orchestration, principally by funding and facilitating the establishment of Apparel MSIs.

The concept of orchestration reflects the view that public and private regulation are interconnected and complementary (Vogel 2010). As argued by Vogel (2010, 69), the success of private transnational regulation in particular, depends on the extent to which its standards and accountability mechanisms ‘are integrated with and reinforced by state-based and enforced regulatory policies at both the national and international levels’. This concept of complementarity is applied in Chapter 8.

As foreshadowed here, Chapter 4 will demonstrate that Apparel MSIs, as private transnational regulators, are already subject to some form of orchestration. It will also show that present levels of orchestration are not sufficient to overcome the limitations of decentralised power at the transnational level. Further, given that MSIs emerged precisely because of the failure of states and intergovernmental organisations to regulate and co-ordinate, there is a real question as to whether it is realistic to expect them to orchestrate any further. This is explicitly acknowledged by new governance scholars, who concede that the political will of states and intergovernmental organisations to become involved in transnational regulation may be lacking (Abbott & Snidal 2009; Abbott & Snidal 2013). Chapter 8 proposes that this obstacle can be overcome if MSIs themselves adopt an orchestrative role, with a view to encouraging greater complementarity with public regulation. It argues that greater levels of orchestration will bolster the ability of Apparel MSIs to act as responsive regulators at the transnational level and assist Apparel MSIs to become more effective, and therefore more legitimate regulators.

**Conclusion**

This chapter introduced the reader to two key theoretical frameworks: democratic legitimacy and responsive regulation.

Democratic legitimacy underlies the right of MSIs, as private transnational regulators to perform regulatory functions. Comprised of both input and output legitimacy it drives the analysis of Apparel MSIs in Chapter 6.

Responsive regulation, originally grounded in the domestic context, promotes a non-coercive form of regulation, where industry is encouraged to self-regulate. Critical to the success of the theory is the regulatory power of the state which acts as a ‘benign big gun’ looming in the background, with the threat of escalation inducing private actors to self-regulate. Capacity-building, effective communication and regulatory flexibility are also critical elements of a successful regulatory strategy. Over time, responsive regulation, informed by the theories of
regulatory capitalism and nodal governance, has expanded to the transnational realm to explicitly contemplate the rise of private transnational regulators. The power of the ‘big-gun’ is replaced with the concept of a networked pyramid, where weak actors enrol others in order to increase their overall regulatory power. The updated networked pyramid highlights that MSIs operate in a much broader system of regulation, alongside multiple ‘nodes’ that also seek to regulate and/or exert power. It posits that by enrolling more nodes, MSIs can empower weaker actors and overcome the challenges of regulating a well-resourced and powerful industry. In contrast, new governance scholarship argues that in order to be effective at the transnational level, responsive regulation must also be supplemented by public orchestration. These intersecting ideas inform the recommendations for reform set out in Chapter 8.

Together, these theories drive and support the overall argument of this thesis: that Apparel MSIs must adopt new regulatory approaches. The application of these theories simultaneously demonstrates the present regulatory weaknesses of Apparel MSIs, and the areas in which they must urgently reform.
Chapter 4 The regulatory landscape

Introduction
This chapter identifies Apparel MSIs as one of many actors, or ‘nodes’ - both state and non-state - in a crowded, complex and decentred regulatory landscape.

Apparel MSIs are but one form of private regulation that seeks to address the human rights impacts of global apparel supply chains. Other significant forms of private regulation include corporate codes of conduct, alternate private transnational systems of regulation, and private agreements.

The proliferation of private regulation over the past two decades is attributed primarily to the failure of public regulation. At the domestic level, states in which production is based (host states) have proven unwilling or unable to effectively regulate the direct human rights impacts of suppliers operating within their jurisdiction. States in which buyers are domiciled (home states) are constrained in their ability to regulate due to the extended, fragmented and transnational nature of supply chains. At the international level, international law (and its associated institutions), as the source of binding international obligations on states, has failed to provide effective mechanisms to ensure states protect those within its jurisdiction. Further, international law does not, at present, impose binding or enforceable obligations on corporations, who are directly responsible for human rights violations in supply chains.

These combined limitations, described as global ‘governance gaps’ or ‘governance deficits’, have created a ‘permissive environment’, where the human rights violations described in Chapter 2 are able to flourish (Gereffi & Mayer 2006; Ruggie 2008a; Kolben 2011; Baumann-Pauly et al. 2017).

By demonstrating the failure, but also the potential, of the most critical regulatory actors within the global apparel supply chain system, this chapter lays a critical foundation for the remainder of this thesis. For it is only by situating Apparel MSIs within their broader regulatory context that their limitations can be addressed, and their potential fully realised.

4.1 The rise of private transnational regulation
Private transnational regulation first emerged in the 1990s, largely in response to ongoing gaps in the global regulation of business conduct. Driven by pressure from the media and civil society to take responsibility for their supply chains, buyers first turned to pure self-regulation in the form of supplier codes of conduct. Growing dissatisfaction with these unilateral and non-binding efforts in turn gave rise to a proliferation of transnational non-state regulatory efforts. These new systems of private transnational regulation, of which MSIs form a part, were initially seen as a way of ensuring independent oversight in respect of the unilateral regulatory efforts of major
corporations (Bartley 2003; Baumann-Pauly et al. 2016). Yet, as demonstrated in Chapters 5 and 6, critics have become equally disillusioned with the ability of such systems to effectively regulate the human rights impacts of global supply chains in the apparel sector.

4.1.1 Corporate codes of conduct

In the early 1990s, the concept of CSR began to gain traction as a mainstream concept in the corporate world (Vogel 2005, 6; Utting 2005b; Utting 2008). During this decade, the specific issue of abuses in modern global supply chains, and in particular in the apparel and footwear industries, came under the spotlight. This was illuminated by a series of high profile scandals and campaigns, particularly in the US, but also in Europe, exposing sweatshop conditions in the supplier factories of major brands (Doorey 2011; Bair & Palpacuer 2012). Ongoing naming and shaming campaigns as well as high profile scandals in other sectors (perhaps most notoriously, Shell’s activities in Niger) all contributed to a growing perception that buyers, as beneficiaries of rapid globalisation and economic liberalisation, could no longer completely disavow responsibility. At the same time, a number of bills were being introduced into US Congress focusing on the use of foreign child labour and sweatshops and the US Department of Labor increased its efforts to enforce domestic labour law in US factories (Bartley 2007).

In a bid to avoid the threat of regulation, and salvage their public image, companies turned to CSR and self-regulation as a means of addressing the growing criticism and attendant calls for action (Vogel 2005, 6-12; Bartley 2007; Nolan 2014; Utting 2014). Corporations began to develop their own codes of conduct to be applied to their suppliers. Levi Strauss & Co was the first company in the apparel industry to introduce a code. Other major brands such as Nike, Reebok, Adidas and Gap soon followed suit. From 1992 to 1996, many companies began to establish codes of conduct on labour and environmental practices, sometimes accompanied by monitoring programs (Bartley 2007). Whereas companies in the US introduced codes in the early 1990s, their use did not become widespread among European companies until the mid to late 1990s (Andersen & Skjoett-Larsen 2009).

These codes were often selective, omitting key rights, and were widely viewed as weak tools for the promotion of workers’ rights (Justice 2002; Zandvliet & Van Der Heijden 2015). Further, monitoring for compliance with codes (to the extent that it occurred) was undertaken either by internal staff or hired external auditing firms. These measures were soon criticised for their lack of independence, transparency and accountability, and ultimately, their ineffectiveness. Critics claimed that this mode of self-regulation was simply a cynical exercise more concerned with protecting brand reputation than the rights of workers (Utting 2002; O’Rourke 2003; Bartley 2007; Locke 2013, 25).
More than 20 years since their adoption – with a large number of buyers in the apparel industry now relying on codes of conduct\textsuperscript{16} - many of these concerns remain. The most significant issue for this thesis is the dominant role that social audit has come to play in monitoring such codes. Major companies rely on auditing – undertaken either internally or by an external auditing company - to investigate the extent to which their suppliers are complying with codes. Auditing has become the bedrock of supply chain due diligence efforts by most major corporations, accounting for up to 80\% of ethical sourcing budgets, and amounting to an estimated US$50 billion industry (LeBaron et al. 2017, 8). As will be contended in Chapter 5, this reliance on social audit is problematic, as a strong body of evidence now demonstrates that social audit is an ineffective tool for achieving consistent human rights improvements.

Both codes of conduct and social audit reflect the decentred regulatory vision of regulatory capitalism (Chapter 3). Both are a classic example of industry self-regulation, Social audit, whether undertaken internally or by external providers can be seen as a component of regulation in its performance of a monitoring (and sometimes enforcement) function. The ongoing reliance on codes and social audit reflects a ‘risk-based’ mentality. This is typical among corporations whose main concern is to maximise corporate benefits while at the same time minimising any factors that may impact negatively on their economic effectiveness (Johnston & Shearing 2003, 75-97). As aptly summarised by one independent expert:

> For the buyers, the audit has a role to play because it’s about measuring risk ... its not about fixing anything. It's about trying to figure out how much risk am I putting myself in by putting my goods, my production in this facility ... It’s not that I care that you have forced labour and you have children. It's that I don't want my reputation and my money to be impacted so I'm moving out. (Independent Expert 29 Interview).

Critically, from a responsive regulation perspective, these self-regulatory activities lack a centralised form of oversight. Corporations are neither required by governments to self-regulate, nor is the veracity or effectiveness of their regulatory efforts assessed. In response to these concerns and renewed pressure from civil society, new systems of private transnational regulation began to emerge in the late 1990s. Home state governments, themselves unwilling to directly regulate played a critical ‘orchestrating’ role in establishing these market-based systems.

\textbf{4.1.2 The emergence of Apparel MSIs and related private regulatory initiatives}

By the mid-1990s, critics and activists were becoming increasingly disillusioned with self-regulatory measures. At the same time, a spate of new sweatshop scandals in the mid-1990s

\textsuperscript{16} Statistics are difficult to obtain. The World Bank estimated that by 2003, there were an estimated 1,000 corporate codes of conduct (across sectors): Jørgensen et al 2003, 17. This figure would no doubt have multiplied in the last two decades.
(particularly in the US) forcefully brought the issue to the attention of the more mainstream public, and the US Administration (Vogel Book 2005, 77-80; Bair & Palpacuer 2012).

During this period, NGOs initially pushed for stronger regulation. For example, groups such as the International Labor Rights Fund and the Lawyers Committee for Human Rights in the US focused their advocacy on intergovernmental approaches rather than private voluntary initiatives. They campaigned for the inclusion of labour rights clauses in international trade agreements such as the General Agreement on Tariffs and Trade, the North American Free Trade Agreement and the Generalised System of Preferences (GSP) (Bartley 2007). While an increasing number of trade agreements now have such clauses, and the EU and US appear more willing to remove preferences under the GSP (section 4.3.4), this was not the case at the time. It was only when the trade approach failed that NGOs turned their attention to strengthening existing CSR tools. As noted by Bartley (2007, 333), ‘the perceived closure of political opportunities for intergovernmental solutions led several major NGOs to shift some of their resources and energy to the market, where they became major players in the construction of labour standards certification’ (see also O’Rourke 2003; Vogel 2005, 9; Seidman 2007). As argued by Utting (2005b, 376), this shift in focus was also reinforced by the general pressure on NGOs to move beyond confrontation and criticism, and to ‘engage constructively’ with mainstream decision-making processes.

It was at this juncture that the US Government - worried about the impact of the growing scandals on its push for free trade - entered as a key orchestrator of an alternative market-based approach: private, voluntary labour standards (Jenkins 2002; Bartley 2007). In 1996, in response to a new wave of particularly explosive human rights scandals, President Clinton and Secretary of Labor Robert Reich convened the Apparel Industry Partnership. This was comprised of a range of stakeholders including corporations, unions and NGOs, with the purpose of negotiating an industry wide code of conduct which would be independently monitored (Van Heerden 2016).

Divisions soon arose over issues such as the incorporation of a living wage, maximum working hours, levels of transparency and monitoring, and whether to critically engage with governments that failed to respect core labour rights such as freedom of association. This ultimately led to unions and a number of NGOs exiting the discussions (Jenkins 2002). In 1998 an informal group of nine of the remaining parties agreed on the code, and subsequently formed the Fair Labor Association (FLA) as the vehicle to monitor and implement it (Van Heerden 2016; Baumann-Pauly et al. 2017). Shortly after, the student organisation United Students Against Sweatshops, which viewed the FLA as captured by corporate interests and not sufficiently accountable or transparent, established the Worker Rights Consortium (WRC), which targeted universities rather than brands (Jenkins 2002; Doorey 2011; Bair & Palpacuer 2012). At the same time that the Clinton Administration was experimenting with new initiatives, the Council on
Economic Priorities, a non-profit group focused on identifying socially conscious corporations established Social Accountability International (SAI). In 1997, it published its code of conduct, SA8000, which sought to activate international human rights standards and link verification and compliance (Sethi & Rovenpor 2016).

It is important to note that aside from its political imprimatur, the Clinton Administration also provided significant financial support to both the FLA and the SAI in their early years, accounting for nearly half of their funding in 2000 and 2001 (Bartley 2007). Thus while activism was no doubt a major impetus, the US Government also played a significant role in orchestrating the formation of MSIs in the US.

Across the Atlantic, similar pressures led to the formation of two major European Apparel MSIs. In the United Kingdom (UK), NGOs and trade unions had initiated discussions with companies in 1997 about how to make corporate codes more effective. They approached the British Government’s Department for International Development with a proposal to form a tripartite alliance. In contrast to the US experience, the proposal was initiated by stakeholders. Like the US, the UK Government played an orchestrating role, providing both political and financial backing, which led to the creation of the Ethical Trading Initiative (ETI) in 1998 (Hughes et al. 2007). Subsequently, the pre-eminent anti-sweatshop NGO in Europe, the Clean Clothes Campaign, developed its own code of conduct and eventually took a leading role in creating the Dutch MSI, the Fair Wear Foundation (Fair Wear) in 1999 (Bair & Palpacuer 2012).

Soon after, a series of more industry focused initiatives emerged. In the US, the American Apparel Manufacturers Association incorporated Worldwide Responsible Accredited Production (WRAP) in 2000 (WRAP, n.d.1). In Europe, the early 2000s saw the creation of the Business Social Compliance Initiative (now amfori BSCI), an initiative of the Foreign Trade Association (re-named amfori in 2017).

Most of these initiatives have, at some point, been described as an MSI. These initiatives are comprised of a range of stakeholders including buyers, universities, suppliers, NGOs, trade unions, academics and independent experts. However, a closer look at each of their membership base and governing structures reveals that not all of these can be described as truly multi-stakeholder (Chapter 5). Rather, together these initiatives can be described as systems of transnational private regulation, as specifically contemplated by the updated networked version of responsive regulation.

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17 Subsequently, two other ETIs were established in Norway and Denmark. This thesis focuses on the ETI (UK).
18 While the BSCI is not exclusively focused on the apparel sector, its members include apparel companies.
Each of these initiatives – the FLA, SAI, WRAP, ETI, Fair Wear, WRC and amfori BSCI – aim to overcome the perceived limits of corporate self-regulation through independent oversight mechanisms. As Chapter 6 demonstrates, civil society stakeholders have cast doubt upon both the independence and effectiveness of such mechanisms. Each initiative promotes a code of conduct, and seeks to either verify or certify the practices of buyers or participating suppliers. Despite different working models (discussed further in Chapter 5) until recently, a unifying feature of most of these initiatives (save the WRC and ETI) has been their reliance on social audit as a compliance tool. While these initiatives were established in order to provide third party oversight over corporate self-regulation, they have done so predominantly with the assistance of the same tool that corporations have themselves relied on and been criticised for. As Chapter 6 shows, some have begun to move away from social audit as their primary compliance tool. Chapter 8 argues that such a shift is essential if MSIs are to remain legitimate. In addition, it is important to highlight the role of states in establishing many of these initiatives. This reflects the importance of state orchestration at the transnational level, as advocated for by scholars of transnational new governance (Chapter 3). Chapter 8 argues that renewed orchestration efforts are another avenue for strengthening the legitimacy of MSIs.

More recently, two national level initiatives initiated by home states have emerged: the Dutch Agreement on Sustainable Garments and Textile (Dutch Agreement) and the German Partnership for Sustainable Textiles (German Partnership). The German Partnership was initiated in 2014 in response to the tragedies in Bangladesh and Pakistan (German Partnership, n.d.1) and the Dutch Agreement was signed in July 2016 for a five-year term (Dutch Agreement, n.d.1). Both initiatives describe themselves as ‘national MSIs’. However as the analysis in Chapter 5 demonstrates, these two MSIs differ substantially in their operations as compared to the preceding initiatives.

Finally, two other initiatives, instigated at the intergovernmental level, should briefly be mentioned here, the UN Global Compact and Better Work.

At the same time that the private initiatives described above were emerging, the UN Secretary-General Kofi Annan sought to facilitate a similar endeavour under the auspices of the UN. In 2000, the UN Global Compact was launched. Described as the world’s largest MSI, it currently has almost 20,000 participants, including over 14,670 companies across a range of sectors, academia, global and local NGOs and unions, business associations and foundations. The UN Global Compact Board is comprised of four constituency groups, business, civil society, labour and the UN (Global Compact, n.d.1).

The Global Compact describes itself as a ‘call to companies to align strategies and operations with universal principles on human rights, labour, environment and anti-corruption, and take actions that advance societal goals’ (Global Compact, n.d.2). Unlike the preceding initiatives,
the Global Compact does not promote a code of conduct. Instead it sets out ‘Ten Principles’ related to its four priority areas, which are for the most part stated at a high level of generality. For example, Principles 1 and 2 (relating to human rights) provide that ‘[b]usinesses should support and respect the protection of internationally proclaimed human rights’ and ‘make sure that they are not complicit in human rights abuses.’ The Global Compact also promotes best practices, resources, and networking events.

In order to join the UN Global Compact, businesses must voluntarily commit to operate in alignment with the Ten Principles to take action in support of UN goals. They must make a clear statement of this commitment to its stakeholders and the general public. The Compact does not monitor or measure the performance of its participants. The only oversight measure is a requirement to submit an annual ‘Communication on Progress’ describing practical actions taken to implement the Ten Principles, and a measurement of outcomes. Reporting is not standardised and, as acknowledged in a UN review, there is no mechanism for verifying implementation of the principles by participants (Fall & Zahran 2010). The lack of accountability and enforcement mechanisms, combined with the broad nature of its principles has given rise to the criticism that the UN Global Compact is largely ineffective. It has been described by some as yet another corporate public relations exercise that allows business to benefit from the UN seal of approval, without making real changes to the operation of their business (Nolan 2005a; Amerson 2012). Given that the UN Global Compact does not undertake any monitoring and enforcement functions, it does not amount to a system of private transnational regulation. Rather, it is most appropriately characterised as a Learning MSI.

The Better Work initiative was established jointly by the ILO and the International Finance Corporation to address working conditions in the apparel sector. Conceived of in the context of the 1999 US–Cambodia Bilateral Textile and Apparel Trade Agreement, initially Better Work conditioned increased access to the US market on improved working conditions in Cambodia’s apparel sector. When the trade agreement expired in 2004, Better Work shifted its incentive structure. Instead of relying on the promise of market access, it sought to induce supplier compliance through the promise of increased orders from buyers (Bair 2017). Better Work seeks to facilitate this process by auditing factory conditions and providing its audit reports to ‘participating’ and ‘partner’ buyers to aid their purchasing decisions (Better Work, n.d.2). It simultaneously provides practical and financial assistance to factories to improve working conditions. Better Work now operates on this premise in nine countries.19

Better Work partners with a broad range of stakeholders at each level of its operations (Better Work, n.d.3). However the final decision-making body is comprised solely of senior officials from the ILO and the IFC. Despite deep engagement with national and transnational actors, both

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public and private, Better Work is ultimately administered by state-based intergovernmental organisations. This thesis argues that it is this unique ‘hybrid governance’ (Bair 2017) that distinguishes Better Work from other forms of private transnational regulation discussed in this section.

Reviews of Better Work have come to different conclusions on its effectiveness. A recent independent assessment found that it was having a 'significant and positive impact on working conditions': reducing the prevalence of abusive workplace practices, increasing pay and reducing excessive working hours, and creating positive effects outside the factory for workers and their families (Better Work 2016, 51-52). Others have cast doubt on the effectiveness of Better Work’s non-binding programmes once the connection to the US-Cambodia trade agreement was eliminated (Arnold 2013; Bair 2017). From a responsive regulation perspective, this reflects a shift down the enforcement pyramid to softer enforcement measures. Previously, poor working conditions would result in suppliers losing access to the US market. In its new iteration, suppliers lose business only if buyers are willing to use their commercial leverage\(^\text{20}\) to encourage improvements. Yet this incentive structure is undermined by the fact that supplier participation is not mandatory and partner brands are not required to commit to suppliers, or even remain in Better Work countries (Bair 2017). Additionally, other studies have found that Better Work only results in substantial improvements where civil society is already active, and have questioned the sustainability of Better Work (Pike 2020). Given its non-binding nature, Better Work might be better classified as a capacity-building measure. To the extent that it constitutes regulation, it is in a very weak form, without any compliance mechanisms.

4.1.3 The worker-driven social responsibility model

MSIs have been subject to an array of critiques, in particular by civil society stakeholders (Chapters 5 and 6). Some critics argue that MSIs are an inherently flawed regulatory tool that will never deliver meaningful human rights improvements for workers in global apparel (or other) supply chains. In particular, they consider that a lack of participation by workers with sufficient power to force changes, combined with excessive influence of corporate members means that MSIs are incapable of performing a strong accountability function (MSI Integrity 2020). Instead they argue that a recent innovation in private regulation known as the worker-driven social responsibility model (the worker-driven model) is a more promising regulatory alternative. In 2015, seven civil society organisations formed the Worker-driven Social Responsibility Network (WSRN) with a view to promoting this new approach. Chapter 7 considers the worker-driven model in greater depth. It does not analyse the worker-driven model to the same extent that MSIs - the focus of this thesis – are examined in Chapters 5 and 6. Rather, the purpose of Chapter 7 is to compare the worker-driven approach to MSIs.

\(^{20}\) The concept of leverage will be discussed in more detail in section 4.4.2.
For now, it is worth highlighting three key features that distinguish it from the MSI approach. First, the process is worker-driven, in that workers and/or their representatives play a central role in its creation, monitoring and enforcement. Second, buyers must provide adequate market incentives to suppliers to comply with human rights standards. Third, brands are subject to binding and enforceable commitments. In the apparel sector, three recent initiatives - the Accord on Fire and Building Safety in Bangladesh (Bangladesh Accord), Action Collaboration Transformation (ACT) and the Lesotho agreements to prevent gender-based violence and harassment (Lesotho Agreements) – reflect this worker-driven approach. They will be revisited in Chapter 7.

Some commentators have sought to characterise these agreements (in particular the Bangladesh Accord) as MSIs (Kabeer et al. 2020). However advocates of the worker-driven model are very careful to distinguish these, precisely because they embody the features just described. Chapter 7 will consider the impact of these agreements to date, whether they can effectively replace MSIs, and the extent to which MSIs might learn from the worker-driven model. For the purpose of understanding their impact on the overall regulatory landscape, it is important to note here that while this is a potentially promising form of regulation, it is currently at a relatively nascent stage.

4.1.4 Global and sector-based agreements
Agreements between unions and buyers represent another form of private transnational regulation in the apparel sector. Originally concluded between global unions and individual brands, more recently, these types of agreements have evolved to include multiple parties, covering larger portions of the apparel sector at either the global or national level.

Global Framework Agreements (GFAs) are negotiated agreements between global trade unions and individual corporations, which set out standards for workers’ rights that are to be applied throughout the company’s operations. GFAs have been likened to codes of conduct, in that they set out basic minimum standards that a company agrees to adhere to. However, critically, while codes of conduct are unilateral, GFAs are the product of collective bargaining, thus reflecting a process of social dialogue (Schömann et al. 2008). Further, most GFAs (although not all) grant unions some kind of monitoring or implementation role. To date, five apparel sector companies have entered into a GFA, with H&M, Inditex, Esprit, Mizuno, Tchibo and Asos each having signing an agreement with IndustriALL (IndustriALL, n.d.).

As with all regulatory tools canvassed in this chapter, GFAs are not without their critics. Concerns include the extent to which such agreements are truly representative of workers (particularly given that global, rather than local unions are parties). Their minimal coverage (given that only single brands are signatories), lack of clear mechanisms for practical
implementation and inclusion of worker-voice, legal status and power to enforce, and overall effectiveness are also questioned (Niforou 2012; Fichter & McCallum 2015).

Similar agreements have also emerged at the national, sectoral level. In Jordan, two local employers’ associations and a local union signed an agreement in 2015 (and again in 2017) covering all workers and enterprises in the apparel industry (Jordan Agreement). The agreement, which provides for collective bargaining, union access to factories and the establishment of workers’ committees, has been credited with improving working conditions in Jordan’s apparel sector (ILO 2019, 37). In Indonesia, the 2011 Indonesia Freedom of Association Protocol (Indonesia Protocol) was developed, which explicitly seeks to address freedom of association. Signed by six international sportswear brands, 73 supplier factories, six national-level unions and dozens of workplace unions, the Protocol requires signatory suppliers to implement freedom of association and to negotiate collective bargaining agreements in the workplace. The Protocol has been linked to at least some improvements, including more participation by local actors, greater recognition of unions by suppliers and an increased ability (by unions) to influence brands. Research also suggests inconsistent and insufficient implementation, due largely to a lack of concrete obligations and weak enforcement mechanisms. Further, the Protocol is limited to first tier suppliers, and also does not comprehensively cover Indonesia’s apparel industry, as only a handful of brands have signed it to date (Connor et al. 2016a).

The relatively small number of GFAs and national level sector agreements, combined with the limitations noted above mean that for now, these types of agreements do not perform a strong regulatory function in the apparel sector.

4.1.5 The role of information

The theories of responsive regulation (implicitly) and nodal governance (explicitly) recognise the significance of information to a well-functioning regulatory system (Baldwin & Black 2008; Burris et al. 2008). For the responsive regulator, it is critical to understanding the ability and willingness of a regulatee to comply. Yet the fragmented and lengthy nature of supply chains means that more often than not, buyers will not have a comprehensive picture of their entire supply chain. Some may not even be able to readily identify all their first tier suppliers, let alone the conditions faced by workers. This information deficit is exacerbated beyond the first tier of suppliers. A lack of information affects the ability of buyers to regulate, and impedes the ability of other actors, such as trade unions and NGOs to effectively monitor. Conversely, multiple social audits have led to concerns regarding duplication of information and wasted resources. In an attempt to combat these issues, several initiatives have emerged specific to the apparel sector. These initiatives – some of which are multi-stakeholder - do not themselves perform a

21 By October 2015, 90 suppliers had signed the Protocol: Siegmann et al. 2017.
regulatory function, in that they do not set standards that members are expected to comply with. However, they are important to note due to their role in facilitating the acquisition and transfer of information, both by buyers and other relevant regulatory actors.

In recognition of the growing costs and complexity associated with extensive social auditing, member based platforms - such as SEDEX, Fair Factories Clearinghouse and the Responsible Sport Initiative - now facilitate audit-sharing among companies. These are purely private initiatives as their membership base consists solely of companies (WFSGI, n.d.; FFC, n.d.; Sedex, n.d.). Similarly, a recent initiative launched in 2016, the Social & Labor Convergence Program (SLCP), seeks to overcome audit fatigue by providing a single data set on factory conditions which can be shared by companies in the apparel and footwear industry. The SLCP describes itself as multi-stakeholder (SLCP, n.d.1).

In addition, the Sustainable Apparel Coalition provides performance assessment tools to its corporate members. Established in 2010, the SAC promotes its own index, the Higg Index, which is intended to be used as a self-assessment tool by member companies to better understand the social and environmental impacts of their supply chains. With over 200 members including brands and retailers, suppliers and NGOs, the SAC describes itself as multi-stakeholder (SAC, n.d.1).

Most recently, in 2019, Better Buying was established to provide a forum for suppliers of major apparel brands to rate their purchasing practices. It operates as a non-profit and does not provide for multi-stakeholder governance. As outlined in Chapter 2, the purchasing practices of buyers at the top of supply chains have a significant impact on the ability of suppliers to ensure human rights standards, while at the same time meeting commercial terms.

Of the above initiatives, only the SLCP and SAC are potentially multi-stakeholder. These two are considered further in Chapter 5. Chapters 8 contends that some of these initiatives have the potential to play a critical role in aiding the flow of information both to Apparel MSIs, and within the apparel supply chain system more broadly.

4.2 Host states

It is widely accepted that the systems of private transnational regulation described in the preceding section emerged in response to persistent failures of public regulation, also referred to as ‘global governance gaps’ (Gereffi & Mayer 2006; Ruggie 2008a; Kolben 2011; Baumann-Pauly et al. 2017). Many argue that regulatory failures in host states present the most significant ‘governance gap’ (Kolben 2011; UN 2018a). This is because under international law, states have the primary duty to provide human rights protection to those within their jurisdiction. That is, host states carry the primary duty to protect apparel supply chain workers. These obligations stem from international human rights and labour rights treaties, which impose binding
international law obligations on states that have ratified them. These treaties – the most relevant of which have been set out in Chapter 2 - are promulgated and overseen by the UN and ILO. As the discussion below highlights, failures at the host state level are reinforced by failures at the intergovernmental level.

The duty to protect imposes three distinct levels of obligation on states: a positive obligation to refrain from violating human rights; a negative obligation to protect individuals from human rights violations by private actors; and an obligation to fulfil by taking positive action to facilitate the enjoyment of basic human rights (De Schutter 2010, 242-253; UN 2017b, para.10). The second, negative obligation ‘extends to protection against abuses by business entities’ and thus is particularly relevant (Ruggie 2007, para. 10).

The UN Human Rights Committee has emphasised that the negative obligation to protect requires that states ‘exercise due diligence to prevent, punish, investigate or redress’ harm caused by private actors (UN 2004b, para. 8). A state can be said to have undertaken ‘due diligence’ in respect of its negative obligations where it enacts and enforces policies, legislation and regulations, and provides for an effective system of administration and adjudication (De Schutter 2010, 379-429; UN 2017b, para.14; UNGPs, Principle 1). However, these are precisely the factors that are often lacking in host states.

As outlined in Chapter 2, host states tend to be developing (or middle income) countries, with China, Bangladesh, Vietnam and India representing four out of five of the largest apparel producing countries. Each of these countries (save China) is a signatory to six of the seven major international human rights treaties cited in Chapter 2 (China is a signatory to five). They are also each signatories to over half of the ILO fundamental conventions. Yet in practice these (and other) producing countries in the developing world have proven either unable or unwilling to fulfil their treaty obligations. They fail to protect workers against violations committed directly by suppliers in their jurisdiction. This is due either to inadequate laws that do not reflect international obligations, or a lack of effective enforcement (UN 2018a, para. 31). This may be because of a lack of resources or capacity, however the question of political will and economic and political context are also significant (Cooney 2004; Berliner et al. 2015).

A strong system of local labour laws and inspections, as well as conditions for trade unions and civil society to operate are needed for the realisation of the rights of workers in supply chains. Major manufacturing countries continue to exhibit weaknesses in these areas, with labour ministries often under-resourced (ILO 2019, 53) and suppression of trade union activities commonplace (Chapter 2). Strengthening the rule of law and institutions to ensure freedom of

22 Although, as noted in Chapter 2, production does also occur in developed countries, where allegations of human rights breaches also arise (BHRRC 2020).
association in host states, is viewed by many as the most effective and long-term means of improving the human rights of workers (AFL-CIO 2013; UN 2018a, para. 65).

The reality is that at present, most apparel producing host states lack key institutions and nodal resources including financial and economic means, organisational capacity, expertise and political will. They are very far from providing effective domestic systems of labour and human rights protection. They are concerned with attracting capital for development and establishing themselves as production hubs. Arguably, the lack of effective human rights protections reflects a view that such an environment is attractive to buyers (Davies & Vadlamannati 2013); a perception which is fostered by the purchasing practices of buyers. As argued by Pham Tu Lan of the Institute for Workers and Trade Unions (Vietnam), ‘government, they want to keep the minimum wage to be attractive to foreign investors, so it's very difficult to achieve the minimum wage as a living wage’ (Lan Interview). Accordingly, host states open the most significant ‘governance gap’ facing the regulation of global apparel supply chains.

This problem is exacerbated by a lack of accountability at the international level. Both the UN and ILO – which promulgate and oversee obligations binding on states - perform a powerful standard-setting function. As significant nodes, they clearly possess authority, legitimacy and expertise. However neither the UN or the ILO systems provide for coercive enforcement mechanisms.

The UN and ILO have established sophisticated institutional procedures to monitor state progress in meeting treaty obligations.23 They have also each established a range of individual complaints mechanisms, which are empowered to receive complaints alleging specific human and labour rights violations by states.24 These sophisticated and well-established systems of reporting, monitoring and complaint reflect the UN and ILO’s strategic position within the international law system and their organisational capacity. However neither the UN nor ILO have the power to coerce or sanction. The primary function of these mechanisms is to publicise violations, engage in dialogue and where necessary, to shame member states (De Schutter 2010, 791-854, 870-881; Anner & Caraway 2010). Their success is ultimately dependent upon the willingness of states to co-operate.

The contemporary reality is that treaty ratification has not translated into widespread improvements in human or labour rights outcomes in practice (Charlesworth 2017).


24 There are 10 UN human rights treaty bodies (committees): https://www.ohchr.org/en/hrbodies/Pages/HumanRightsBodies.aspx. The ILO may set up an ad hoc tripartite committee to consider complaints (ILO Constitution, Articles 24, 25). Alternatively, violations of freedom of association are considered by a standing tripartite Committee on Freedom of Association (ILO 2019, 110-116).
Enforcement of international obligations relies on the power of naming and shaming and (at times) the promise of capacity-building, yet from a responsive regulation perspective, lacks the threat of a ‘big gun’ looming in the background. Consequently, a failure by host states to fulfil their international treaty obligations leaves workers, for the most part, without remedy at the international level.

Despite current weaknesses, host states clearly carry significant regulatory potential, and are the primary means by which effective human rights protection can be achieved in supply chains. Chapter 8 will consider the extent to which Apparel MSIs may harness and leverage this potential.

4.3 Home states

Buyers at the apex of global apparel supply chains are not directly involved in the violation of workers’ rights. Further, given that buyers are typically headquartered in developed countries, they lie beyond the jurisdictional reach of host states. Rather, it is the home state (the state in which buyers are domiciled), that has primary jurisdiction over their conduct. However, as discussed below, at present, international law does not impose an obligation on home states to regulate the extraterritorial human rights impacts of corporations within their jurisdiction, let alone the impacts of their supply chains. As a result, there are currently no instances of such direct regulation.

Instead, a growing number of home states are imposing social compliance reporting requirements on corporations within their jurisdiction. Most of these laws, while drawing on the UNGPs concept of due diligence (section 4.4.2), do not impose a mandatory due diligence requirement. Mandatory due diligence laws, although gaining momentum, remain at a nascent stage. Another emerging avenue of accountability for extraterritorial human rights violations – litigation in the courts of home states – is unlikely to apply in the case of global supply chains. Trade laws and agreements, while a potentially promising avenue, at present remain underutilised as a tool for protecting human rights. For these reasons, despite their significant regulatory capacity, home states do not currently perform a strong regulatory function in respect of apparel supply chains.

4.3.1 The human rights obligations of home states under international law

As stated in section 4.2, states have a duty to protect the human rights of those within its jurisdiction. Jurisdiction is primarily a territorial concept, with international law clearly recognising extraterritorial jurisdiction only in certain exceptional circumstances (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: Advisory Opinion (2004), paras. 109-112). These are where a state agent exercises authority and control overseas, and where a state exercises effective control over an area and in some cases (albeit more controversially) over persons outside its national territory (Al Skeini v United Kingdom
(2011), paras. 130-140). Clearly, none of these very specific circumstances apply in the context of global supply chains.

United Nations treaty bodies, in particular, the UN Committee of Economic Social and Cultural Rights have argued for a more expansive view of extra-territorial obligations in the context of corporate harm. In its General Comment No. 24, the Committee stated that extraterritorial obligations arise when a state party ‘may influence situations outside its territory … by controlling the activities of corporations domiciled in its territory and/or under its jurisdiction’ (UN 2017b, para. 28) and thus:

The extraterritorial obligation to protect requires States parties to take steps to prevent and redress infringements of Covenant rights that occur outside their territories due to the activities of business entities over which they can exercise control … (UN 2017b, para. 30).

The Committee opined that the state duty to protect included requiring home state corporations to undertake due diligence in respect of its subsidiaries and suppliers, regardless of where they are located (UN 2017b, para. 32-33). In 2019, the Human Rights Committee asserted that states must take appropriate measures to ensure that actions by corporations within their jurisdiction which have ‘a direct and reasonably foreseeable impact on the right to life of individuals outside their territory’, are consistent with the right to life (UN 2019, para. 22).

Scholars have relied on this emerging body of UN commentary to argue that states are under an obligation to protect individuals, located extraterritorially, from the acts of corporations within their jurisdiction (Maastricht Principles 2011; Augenstein & Kinley 2013). While the views of UN Committees are considered authoritative, they are not binding (Oette 2020). Although the position is evolving, as noted in Methven O’Brien’s in depth analysis of this legal question, at present, it cannot be said that international law imposes a clear obligation on states to regulate the extraterritorial human rights impact of companies domiciled within their jurisdiction (Methven O’Brien 2018; see also Ruggie 2007; Bernaz 2013). Nor does international law impose an obligation on states to require corporations to undertake due diligence.

As a result, at present, no home state has imposed direct liability on domiciled corporations either in respect of their direct extraterritorial human rights impacts, or the human rights impacts of their global supply chains. Instead, a growing number of jurisdictions are addressing human rights concerns indirectly, through the imposition of non-financial corporate reporting obligations, and to a lesser extent, mandatory due diligence.

4.3.2 Non-financial corporate reporting obligations and mandatory due diligence

The emergence of non-financial corporate reporting obligations draws upon the concept of human rights due diligence, introduced by the UNGPs (section 4.4). Yet most laws enacted to date do not impose a requirement to actually undertake due diligence. Rather, companies must
simply report on the extent to which they have done so, and clearly indicate if they have not. Thus these home state legislative developments, while perhaps reflecting ‘the beginning of a paradigm shift’ (Amensty & BHRRC 2017, 2) do not currently provide for strong and effective regulation of the human rights impacts of global supply chains.

California, the UK and Australia have now all passed laws requiring large corporations within their respective jurisdictions to make public disclosures in respect of modern slavery risks in their supply chains. In essence, each of these laws require companies to disclose how (or to what extent) they are assessing and responding to modern slavery risks within their supply chains. The Australian law is the most robust of all three. Like California, and in contrast to the UK, it provides for mandatory reporting criteria. In addition, unlike the California and UK laws, it provides for a central registry of companies required to report, and also applies to the Commonwealth Government.

Critically, these laws are weak on three key points. First, they are all limited to modern slavery risks as opposed to broader human rights impacts. Second, they do not impose an obligation to actually undertake due diligence, but rather rely on pressure from relevant stakeholders - including consumers, investors and civil society - to compel companies to do so (New 2015, 700; Explanatory Memorandum, Modern Slavery Bill 2018 (Cth), para.7; Hansard, House of Lords 2014). Third, none of these laws impose any financial penalties for non-compliance with the obligation to report.

The European Union’s recent Directive 2014/95/EU (EU Directive), effective from 2017, provides for similar reporting obligations in respect of large companies, however in respect of the full spectrum of potential human rights impacts. While broader in scope than the California, UK and Australian laws, the EU Directive still does not require companies to undertake due diligence. In April 2021, the European Commission adopted a proposal for the Corporate Sustainability Reporting Directive, which would amend the EU Directive (EU CSRD Proposal). Among other things, the EU CSRD Proposal would apply to a larger cohort of companies and provide for new EU sustainability reporting standards (European Commission 2021).

From a regulatory theory perspective, these types of reporting obligations can be characterised as a form of responsive regulation. Home states are opting for a regulatory strategy at the bottom of the enforcement pyramid by encouraging, but not requiring business to themselves regulate the human rights impacts of their supply chains through due diligence. While most of these laws provide for some kind of enforcement in respect of reporting obligations (such as injunctions), companies cannot be forced to actually undertake due diligence. Rather, the ‘benign big gun’ of enforcement is to be wielded by third parties such as civil society and

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25 California Transparency in Supply Chains Act of 2010; Modern Slavery Act 2015 (UK); Modern Slavery Act 2018 (Cth); Modern Slavery Act 2018 (NSW) (the latter is in force but has not commenced).
investors. For, as noted above, the rationale underlying these types of reporting requirements is that the reputational implications of forced disclosure will compel companies to undertake human rights due diligence. Thus even though home states clearly have the capacity to provide for a stronger system of due diligence regulation, at present they are opting for less coercive regulation that relies on a network of actors for enforcement.

Evidence from the UK challenges the efficacy of such an approach, finding that reporting, let alone due diligence practice, has to date, been of varying quality (UK Joint Committee 2017, 37-39). For example, a 2017 report by Ergon Associates, indicated that only 13% of companies had addressed their risk assessment processes moderately well, 29% did not disclose such information at all and almost a third of companies did not disclose actions taken to address modern slavery risks, while a majority mentioned some steps but only at a general level (Ergon 2017, 6-9; see also Ergon 2018). Similarly, the Business and Human Rights Resource Centre in its 2018 analysis of FTSE 100 companies gave companies an average overall compliance score of 31%, (BHRRC 2018) and alarmingly, found that after 6 years, 40% of companies were not complying with even the most basic reporting requirements (BHRRC & Modern Slavery Registry 2021).

As a result, momentum for mandatory due diligence laws is now building. To date, France has introduced the most comprehensive mandatory human rights due diligence law. The Law on the Corporate Duty of Vigilance (2017) requires large French companies to identify and prevent adverse human rights (and environmental) impacts, including those resulting from their supply chains. Specifically, companies must implement, and report annually on, a ‘vigilance plan’ in line with the UNGPs concept of due diligence. Interested parties may enforce non-compliance with the law through the courts. This law represents the most promising advance to date in mandating human rights due diligence, although its enforceability and impact on practice remains to be seen. While at least five cases have been filed to date, none of these have progressed to substantive hearings or remedy (Brabant & Savourey 2020).

More recently, Norway passed what appears to be a broad mandatory human rights due diligence law in 2021 (ECCJ 2021). The Netherlands and Switzerland have passed more limited mandatory due diligence laws, each focusing on the risks of child labour and, in the case of Switzerland, conflict minerals also (Dutch Child Labour Due Diligence Law; Oser & Marti 2021). None of these laws are presently in operation. A number of other European jurisdictions including Germany, Finland and Denmark – also have potential mandatory due diligence laws in the pipeline. Most significantly, on 23 February 2022, the European Commission adopted a proposal for a Directive on Corporate Sustainability Due Diligence, which mandates human rights (and environmental) due diligence. The proposal is now due to be presented to the European Parliament and the Council for approval (European Commission 2022a; 2022b). These mandatory due diligence developments reflect an ‘escalation’ by home states along the
enforcement pyramid. Chapter 8 will consider the role of MSIs in encouraging more home states to accelerate this process.

4.3.3 Courts

In theory, the courts of home states reflect another source of potential regulation, principally through the adjudication of tort claims. However, in practice, this avenue, already exceedingly difficult in respect of parent companies and the conduct of their foreign subsidiaries, would unlikely apply to claims in respect of the conduct of suppliers.

First, foreign plaintiffs must establish that the home state court is the appropriate forum for their case to be tried. Second, plaintiffs face the hurdle of separate legal personality as between parent companies and their overseas subsidiaries. This means that defendants must either establish that a parent company owes a direct duty of care to those affected by the actions of its subsidiaries, or establish facts sufficient to ‘pierce the corporate veil’. Jurisprudence from the UK and Canada indicates that courts are only willing to do so in very limited, and exceptional circumstances. For example, a direct duty of care may arise where a parent has group policies in place and also publicly holds itself out as exercising a high degree of supervision or control over its subsidiaries (Vedanta v Lungowe (2019); see also Okpabi v Royal Dutch Shell Plc (2021); Four Nigerian farmers and Milieudefensie v. Shell Petroleum NV (2021)). The corporate veil might be pierced where a subsidiary is completely controlled and being used as a shield for improper conduct, where it acts as an authorised agent, or if it is required under law (Choc v. Hudbay Minerals Inc (2013)).

Establishing direct liability or piercing the corporate veil turns on very specific facts. This imposes a heavy burden of proof on plaintiffs, as it often requires access to corporate information which may be difficult and costly to obtain (Amnesty 2017, 157-168; Kaufmann 2016). Further, jurisdictional claims can drag on for years before proceeding to merits. For example, the Vedanta claim was filed in 2015, and issues of jurisdiction resolved only in 2019.

These obstacles are only exacerbated in the context of supply chains. Given the difficulties associated with establishing direct liability for a buyer in respect of the actions of its subsidiary, it is highly unlikely, and perhaps only in very specific circumstances that a buyer could ever be held to owe a duty of care to those impacted by the actions of its suppliers. This argument was made in the case against German retailer KiK, in connection with a major fire in the Ali Enterprises factory in Pakistan which killed over 250 workers. KiK was the factory’s main customer and maintained a close working relationship with the supplier including frequent factory visits. On this basis, a group of survivors filed proceedings in the Regional Court in Dortmund in March 2015, arguing that the harm was due to inadequate safety measures and that KiK, due to its close relationship was jointly responsible under common law principles of tort law. The Court rejected the claim on procedural grounds and thus the substantive claim was
never considered. A subsequent appeal was rejected (ECCHR 2021). Thus there is currently no precedent to suggest how a court might rule on such arguments.

In the US, the Alien Tort Claims Act has effectively been closed off as a potential avenue of corporate liability for human rights violations committed abroad. In Jesner v Arab Bank, PLC (2018), the Supreme Court confirmed that foreign corporations cannot be sued under the Act. Most recently, the Supreme Court considered the explicit case of alleged slavery in the supply chain of Nestle (headquartered in the US). It held that in circumstances where the alleged conduct occurred overseas, and the only domestic conduct pleaded was ‘general corporate activity’, there was an insufficient connection between the cause of action and domestic conduct to give rise to a claim under the Act (Nestle v Doe (2021)).

4.3.4 Trade and trade agreements

Both international and domestic trade measures are a powerful, yet at present underutilised economic resource in the hands of home states.

Increasingly, both bilateral and multilateral free trade agreements are incorporating provisions in respect of labour rights. According to the ILO, as at 2016, 70 trade agreements included such provisions (ILO 2019, 28-29). For example, the United States-Mexico-Canada Agreement, which replaced the 1993 North American Free Trade Agreement in July 2020, devotes an entire chapter to labour considerations. Innovatively, it also expressly requires Mexico to adopt measures to protect the right to collective bargaining. Disputes are to be resolved through state-to-state dispute settlement procedures, with the ability to impose sanctions. In another innovation, it establishes a facility-specific “rapid-response” dispute mechanism for dealing with violations of freedom of association and collective bargaining rights. In May 2021, a coalition of trade unions requested the US Government to initiate proceedings in respect of alleged violations of freedom association at specific car manufacturing facilities in Mexico. In response, the US Government initiated the first ever proceedings under the rapid response mechanism (Picone 2021).

To date, only one other labour rights complaint has been filed under the dispute mechanism of a free trade agreement. In 2010, the US launched a complaint against Guatemala under the Dominican Republic-Central America-United States Free Trade Agreement, in respect of alleged violations of collective bargaining rights, which it claimed put American workers at an unfair competitive disadvantage. The claim was unsuccessful (In the Matter of Guatemala (2017)). Ultimately, widespread enforcement of labour provisions in trade agreements relies on the political will of state parties to bring claims. Some commentators argue that real enforcement of labour rights under free trade agreements will not occur until independent third parties are able to invoke treaty dispute settlement mechanisms (Gött 2018).
Another more utilised trade approach is the GSP. First instituted in 1971 under the auspices of the United Nations Conference on Trade and Development, under the GSP, developed countries offer non-reciprocal preferential trade treatment to certain developing countries.26 Some GSPs – including those of the EU and US - are conditioned upon respecting core UN and ILO treaties. Both have shown some willingness to act in respect of human rights concerns. For example, in August 2020, the EU withdrew Cambodia’s preferential duty and quota-free access to the EU market. This was in respect of apparel (and other) exports, ‘due to serious and systematic concerns related to human rights’, in particular in respect of political rights such as freedom of expression and association (European Commission 2020a). The EU has indicated that it will continue to engage with the Cambodian government and will review its decision once the Cambodian government takes active steps to restore political freedoms. Similarly, the US suspended Bangladesh’s access to its GSP program after the Rana Plaza collapse in 2013, and has not reinstated it since.27 In contrast, the EU entered into the Bangladesh Sustainability Compact under which Bangladesh committed to pursue efforts to improve respect for labour rights, with the EU providing technical assistance (European Commission, n.d.). In the face of limited improvement and ongoing violations, particularly in respect of freedom of association, the EU recently ‘intensified dialogue … to press for concrete actions and sustainable solutions’ (European Commission 2020b). However it has not withdrawn GSP preferences from Bangladesh.

While trade agreements have promise as regulatory approaches, there has been no consistent or widespread pattern of action under these or the GSP system. Ultimately, their enforcement remains a political decision for states.

The US has also shown a willingness to impose domestic trade measures through the Trade Facilitation and Trade Enforcement Act of 2015, which prohibits the importation of goods produced by forced or compulsory labour. Since then, the US Customs and Border Protection has issued 67 ‘Withhold Release Orders’ in respect of goods associated with a high risk of forced labour. Orders tend to be in respect of a specific good associated with a specific overseas manufacturer, facility or company. It has also issued orders covering whole sectors, including a prohibition on all cotton from Turkmenistan, as well as all cotton and tomato products produced in China’s Xinjiang Uyghur Autonomous Region (US CBP n.d.). At present only the US has imposed this type of import ban.

4.3.5 Other

Finally, another home state regulatory development comes from Canada, where in 2018, the government established an independent Canadian Ombudsperson for Responsible Enterprise. The Ombudsperson focuses on companies in the apparel, mining and oil and gas sectors. Its

26 For a full list of countries that offer GSPs see: http://ptadb.wto.org/ptalist.aspx.
27 Although this had limited impact, as Bangladesh’s garment exports had not previously benefitted under the GSP scheme (Vogt 2017).
mandate includes promoting the UNGPs and OECD Guidelines for Multinational Enterprises (OECD Guidelines), providing a dispute resolution mechanism for complaints and reviews in respect of human rights abuses (which the Ombudsperson has the power to initiate), making recommendations in respect of such complaints and reviews, and advising the Minister of International Trade. Yet, as pointed out by Canadian civil society, the Ombudsperson does not have the power to compel companies to participate in reviews or to comply with recommendations (CNCA 2021). While an interesting innovation, given that the Ombudsperson does not have binding powers, the extent of its impact is questionable.

4.4 The role of international law in regulating business conduct

The third major governance gap is the lack of binding obligations on corporations under international law. Yet it is corporations, not states that are usually directly responsible for human rights violations in global apparel supply chains. The question of international legal obligations for corporations remains contested, and at present, international law only promulgates soft-law frameworks in respect of corporations. These frameworks, despite carrying significant normative force, are not binding at the international level.

4.4.1 Corporations and international human rights law

The question of whether direct international law obligations should be imposed on corporations remains a controversial one. Traditionally, only states were deemed to be ‘subjects’ of international law capable of possessing ‘international legal personality.’ This characterisation was based on the premise that only states were the bearers of international rights and duties, which could be maintained by bringing international claims. International law has since progressed and now recognises that certain non-state actors – including intergovernmental organisations, individuals, insurgents and armed groups - may also be subjects of international law (Clapham 2006, 59-83; McCorquodale 2009). This recognition has not to date extended to corporate actors.

Some scholars argue that the notion of ‘subjects’ of international law should be abandoned, as it is circular, artificial and unhelpful. For example, Clapham argues that the focus of the inquiry should simply be whether an entity has the capacity to bear international rights and obligations. He argues that corporations, in particularly powerful multinationals clearly do (Clapham 2006, 60-80; see also Ruggie 2007).

Further, many eminent international law scholars have argued that corporations are in fact subject to international law obligations (Deva 2003; Kinley & Tadaki 2004; Alston 2005; Bilchitz 2013). For example, Bilchitz argues that the obligations of non-state actors are derived from state obligations in international human rights treaties. The state’s duty to protect individuals from harm by third parties ‘necessarily entails the notion that non-state actors, including corporations, in fact have binding legal obligations with respect to the human rights contained in these treaties’ (Bilchitz 2013, 112; see also Clapham 2006, 111). More generally, he argues that
non-state obligations flow from the universal nature of human rights and the inherent right to dignity of the individual. Viewed from this perspective, whether it is a state or other actor that violates these inalienable rights is irrelevant.

However these evolving views fall short of a widely accepted recognition of such obligations. In fact, an attempt by the U.N. Sub-Commission on the Promotion and Protection of Human Rights to assert the existence of such binding obligations - through the development of the UN Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights - was met with significant hostility and criticism, and rejected by the Commission on Human Rights (UN 2004a; see also Nolan 2005b; Amerson 2012). The assertion was also explicitly rejected by Special Representative Ruggie (Ruggie 2006, 60-65). Despite academic criticism of this position (Bilchitz 2013), at best, the notion that corporations are subject to binding human rights obligations is gaining legal coherence. It is not, at present, clearly established. Further, even if such an obligation were widely accepted, the question of enforcement would remain. In circumstances where the international system is unable to enforce human rights obligations against states, it is unclear how it would enforce international law obligations against corporations.

The current proposal for a new international human rights treaty to regulate the activities of transnational corporations and other business enterprises also falls short of imposing direct binding obligations on corporations. Instead, the current draft focuses on the obligation of states to protect against human rights abuses stemming from ‘business activities’. It proposes imposing obligations on states to, among other things: enact mandatory due diligence laws; ensure that both individuals and corporations will be held liable for human rights violations undertaken in the context of business activities; and provide for access to justice and remedies (UN 2021). That is, it focuses on the less controversial imposition of obligations at the domestic level, where enforcement is also ostensibly more likely. Against the backdrop of these ongoing legal debates, the intergovernmental system has instead sought to set global standards for corporate conduct through soft-law frameworks.

4.4.2 Soft-law instruments

The three key frameworks at the international level are the UNGPs, the OECD Guidelines and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (ILO Tripartite Declaration). The UNGPs, the most significant and influential of these, have not only influenced subsequent iterations of the ILO and OECD frameworks, but have also created the impetus for the non-financial disclosure and mandatory due diligence laws discussed in section 4.3.2.

The UNGPs ‘operationalised’ the seminal ‘Protect, Respect and Remedy’ Framework (Framework), which was released by the Special Representative on business and human rights, Professor John Ruggie (Ruggie 2008). The Framework set out three separate, but inter-
connected principles. First, the Framework reaffirmed the international law principle that states have a duty to protect against human rights abuses by third parties, including business. Second, it stated that business had a 'baseline responsibility' to respect human rights, independent of the state’s duty to protect human rights. Third, the Framework emphasised the need for both states and business to facilitate or provide (as appropriate) victims with more effective access to remedy. The Human Rights Council unanimously 'welcomed' the Framework and extended the mandate of the Special Representative in order to further elaborate and 'operationalise' it (UN HRC 2008).

In 2011, the Special Representative released the UNGPs, which - unanimously endorsed by the UN Human Rights Council – set out concrete and practical recommendations for the implementation of the Framework (Ruggie 2011). Guiding Principle 13, which provides further guidance on the scope of the responsibility to respect, states that businesses should:

(a) avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;
(b) seek 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. (Emphasis added).

Business relationships ‘include relationships with business partners, entities in its value chain, and any other non-state or state entity directly linked to its business operations, products or services’ (emphasis added) (UNGPs, Principle 13). Thus, the UNGPs clearly impose responsibility on corporations in respect of the human rights impacts of their supply chains. Recent additional UN guidance clarifies that this duty extends beyond the first tier of suppliers (UN 2018a).

The UNGPs introduce the concept of human rights due diligence as a key mechanism through which the corporate responsibility to respect is to be fulfilled. As opposed to corporate due diligence which tends to focus on the risks to a company, human rights due diligence focuses on the human rights risks that a company may pose to others (UN 2018a, para.15). Due diligence is presented as an ongoing and iterative process by which businesses: (1) identify and assess their actual and potential adverse human rights impacts; (2) integrate these findings internally and take appropriate preventative and mitigating action; (3) track the effectiveness of their response; and (4) publicly communicate how they are addressing their human rights impacts (UNGPs, Principles 15(b), 17-21).

In accordance with Principle 13, business is expected to undertake due diligence both in respect of those human rights impacts which it may itself cause or contribute to and those impacts ‘which may be directly linked to its operations, products or services by its business
relationships’ (UNGP, Principle 17). That is, business is expected to undertake due diligence in respect of its supply chains. However, the UNGPs also acknowledge the difficulties associated with complex supply chains, and thus the ‘appropriate action’ a business is expected to take in response to its risk assessment will depend on how directly connected the human rights impact is to its conduct.

The UNGPs distinguish between three situations: where a business causes a negative impact; contributes to a negative impact; and where it does not contribute, but the impact is nonetheless directly linked to its operations, products or services by its business relationship with another entity (UNGP, Principle 19). In the case of global supply chains, it is the third scenario that is most likely to apply (although as argued in Chapter 2, a buyer at the top of a supply chain may also contribute to human rights impacts through its own practices). In such cases, the UNGPs invoke the concept of leverage, understood as the ability to change the behaviour of another entity that is causing harm, or risk of harm. Companies are expected to exercise, and where possible, increase leverage over their suppliers to prevent or mitigate human rights impacts (UNGP, Principle 19). Where a business lacks leverage and cannot increase it, the UNGPs suggest considering ending the relationship. The application of leverage in the MSI context is discussed further in Chapters 5 and 8.

The OECD Guidelines are recommendations from OECD governments to multinational corporations, which set out non-binding standards for responsible business conduct. Covering a range of matters including the environment, bribery and taxation, in 2011, they were updated to include human rights, bringing them into alignment with the UNGPs. The OECD Guidelines now provide that companies should respect human rights, prevent or mitigate adverse human rights impacts through due diligence, and exercise leverage. They apply to the human rights impact of supply chains, including suppliers beyond the first tier (OECD Guidelines, Chapter IV).

The OECD Guidelines also provide for a grievance mechanism in the form of National Contact Points (NCPs), which must be established by all adhering governments. Since 2000, NCPs have held a mandate to provide mediation and conciliation to assist in the resolution of specific instances of alleged non-observance of the Guidelines by companies. The OECD describes the NCP as the ‘only governmental, non-judicial grievance mechanism, providing access to remedy to stakeholders wishing to raise issues related to operations of companies operating in or from adhering countries’ (OECD 2016, 11). While the NCP is a unique mechanism representing the opportunity for dialogue and engagement, it is not binding. NCPs cannot compel parties to participate in a conciliation or mediation process, or to reach an agreement or issue binding decisions. Further, its impact is reasonably limited. Over 15 years it has handled only 360 specific instances, with 24% of these relating to human rights (OECD 2016, 12). This is in part because a high proportion of cases are rejected outright; in 2019, over 36% of cases never made it to negotiation (OECD Watch 2020). In addition, accepted cases are rarely successful; in
2018 and 2019 combined, under 20% of cases resulted in remedy (OECD Watch 2019; OECD Watch 2020).

Like the OECD Guidelines, the ILO Tripartite Declaration was amended in 2017 to reflect the UNGPs. The Declaration now confirms the responsibility of corporations to respect human rights, to conduct human rights risk assessments and carry out human rights due diligence. It is the less influential and utilised framework of the three.

These soft-law developments perform a significant standard-setting function, and have no doubt contributed to a normative shift in the expectations placed on (and increasingly accepted by) the business community (Vogel 2008; Nolan 2014). Yet these three frameworks are not binding, nor do they establish any systematic monitoring or implementation mechanisms. Rather, the task of monitoring and implementation is implicitly left to third parties, with a failure to comply said to give rise to judgment in the ‘courts of public opinion’ (Ruggie 2008, para. 54). This is consistent with the definition of regulation set out in the previous chapter, which noted that different actors may perform each of the three components of the regulatory function: standard-setting, compliance, and enforcement.

As pointed out by Braithwaite and Drahos in their study of global business regulation, it is in fact rare that rule enforcement (to the extent that it occurs) is undertaken by an intergovernmental organisation. Instead, states, corporations or industry associations are enrolled to enforce rules, in the face of pressure from among others, civil society, media, and the fallout from major scandals and disasters. Further, rules do not need to be enforceable to rapidly globalise. The process of ‘modelling’ can still lead to widespread application. For example, where a treaty fails, frameworks or guidelines may nonetheless be incorporated by states through domestic laws, or by private actors through applied industry practice. This process of modelling is a potentially powerful tool for weaker actors, who can seek to exert influence by promoting their preferred models (Braithwaite & Drahos 2000, 539-43; 548-549, 578-601).

This is precisely what has occurred with the UNGPs, which in addition to influencing the ILO and OECD frameworks, have influenced domestic law developments (section 4.3) and also been taken up by a range of actors, including standard-setting bodies, reporting frameworks, civil society and some MSIs. They have even fed back into current international treaty negotiations, with the latest business and human rights treaty draft obligating states to mandate due diligence (section 4.4.1). Chapter 8 recommends that Apparel MSIs are perfectly positioned to extend this modelling process.
Conclusion

This chapter has outlined the key mechanism and processes that regulate the human rights impacts of global apparel supply chains. It has outlined the major non-state forms of regulation, and the ‘governance gaps’ which caused them to emerge.

The main actors or ‘nodes’ performing a regulatory function within the global apparel supply chains system are: intergovernmental organisations (namely, the UN, ILO and OECD), host states, home states, buyers, auditors, civil society (including NGOs and global and local trade unions) and transnational systems of regulation (including MSIs). Organisations that collect and share data or promote reporting frameworks do not perform a regulatory function in and of themselves. However they do play an important role in facilitating the flow of information, and thus should also be acknowledged as relevant actors within the apparel supply chain system.

The UN, the ILO and the OECD regulate principally by promulgating binding human and labour rights treaty obligations for states, and non-binding human rights and labour rights standards for corporations. Relying on their strong claim to moral authority and legitimacy, as well as expertise on human rights, labour rights and international law, these intergovernmental organisations play a critical standard-setting role. Yet their lack of enforcement power renders them a relatively weak regulatory node in the apparel supply chain system.

Host states carry primary responsibility for protecting the human rights of those within their jurisdiction. In practice they have proven unwilling or unable to provide and administer the laws, policies and institutions necessary to ensure an adequate system of human rights protection. Despite current weaknesses, host states clearly have significant regulatory potential, given their authority and strategic position in respect of suppliers. According to many, host states are the primary means by which effective and sustained human rights protection can be achieved in supply chains.

Home states rely principally on non-financial reporting obligations to regulate global supply chains. Mandatory due diligence laws are only just beginning to gain traction. Trade tools such as trade agreements and preferences and import bans have so far been applied in a limited and inconsistent manner. Domestic courts remain a weak and insufficiently victim-centred form of regulation. In addition, home states have played an indirect meta-role in regulation by orchestrating the establishment of key MSIs in the apparel sector. This relatively limited involvement in the regulation of global supply chains does not reflect the resources available to home states, which include among other things, financial means, economic power, authority and legitimacy, and a strategic position as regulators of buyers at the top of supply chains. This limited involvement can in part be attributed to limitations surrounding extraterritorial legislation and adjudication. Although arguably, the greater obstacle is the lack of political will of home states to interfere with the economic activities of their buyers.
Buyers at the top of global supply chains have increasingly taken on a self-regulatory role, relying heavily on codes of conduct and social audit to regulate the human rights impacts of their own supply chains. The reliance on audit also means that auditors, whilst not themselves regulators, have become significant actors in the supply chain system, principally through the performance of a monitoring function. As argued in Chapter 5, social audit is becoming an increasingly discredited tool. Buyers have also been pushed to participate in alternate regulatory mechanisms such as private transnational systems of regulation (including MSIs), worker-driven initiatives and agreements with unions. Some, although not all, of these mechanisms also continue to rely on social audit. Given their significant financial and economic resources and strategic position with global supply chains, buyers clearly possess enormous potential to more effectively regulate the human rights impacts of the supply chains that they rely upon.

NGOs and trade unions perform a regulatory function through participation in private transnational systems of regulation, worker-driven initiatives as well as global frameworks, collective and sector agreements. They also perform a monitoring function through their work in documenting and publicising human rights violations. Their ability to enforce compliance with human rights violations is limited, due to a lack of resources and coercive power. The key resource possessed by unions and NGOs is legitimacy, as they are seen as legitimate actors in the struggle for workers’ rights, with the power to influence public opinion, including of consumers, and potentially of governments. They also possess human rights expertise and may possess greater information about the working conditions faced by workers. These are the resources that they bring to the table when participating in the various private regulatory mechanisms described in this chapter. Yet as will be explored in Chapter 6 and 7, many are becoming increasingly frustrated with many of these mechanisms, including in particular MSIs. They consider that a worker-driven model is a more promising means of ensuring human rights protection in global supply chains. Trade unions and NGOs consider that the most appropriate and powerful way to counteract human rights violations in supply chains is the enforcement of laws which allow, support and protect workers’ rights. In particular they emphasise the importance of the right to freedom of association. Thus the initiatives they are most likely to support are those that align most closely with this vision of human and labour rights protection.

Currently, suppliers do not perform a regulatory function. Within transnational systems, they have principally taken on the role of ‘regulatee’. Yet suppliers possess important regulatory resources including information (regarding the conditions faced by their workers) and a strategic position in the supply chain due to their role in controlling production and working conditions and outsourcing decisions.
It is also important to note that three significant actors are currently missing from the regulatory landscape: workers, consumers and investors.

Workers, as individuals are central as rights-holders and the intended beneficiaries of regulation. Although represented institutionally through trade unions, the reality is that production often occurs where trade union activity is either illegal or significantly curtailed. A relevant question is whether there are other ways in which worker voice can be enrolled in pursuit of worker empowerment.

Consumers clearly have an important role to play in determining regulatory outcomes, for ultimately it is their preferences and demands that drive the entire system of production. Further, the range of campaigns orchestrated by NGOs are often aimed at raising consumer awareness and changing behaviour. To date, consumers have not been mobilised in an organised, institutional manner in respect of human rights issues.

Investors clearly play an important role in influencing the decisions of arguably the most significant regulatory actors within this landscape, buyers. As argued in Chapter 8, human rights considerations are increasingly being taken into account, and acted on by investors.

Finally, this conclusion turns to transnational systems of regulation, and in particular Apparel MSIs, the subject of this thesis. According to the theory of responsive regulation, MSIs have the potential to be powerful regulatory actors within the apparel supply chain system as they enrol a range of significant stakeholders in pursuit of a common aim: to improve human rights outcomes (Chapter 3). Yet as Chapters 5 and 6 reveal, Apparel MSIs have not to date lived up to this potential. This thesis argues that one significant reason is that Apparel MSIs have not sufficiently harnessed or ‘enrolled’ the resources of the key regulatory actors discussed in this chapter. Chapter 8 will recommend how MSIs might further enrol these important actors to become stronger and more legitimate regulators.
Chapter 5  Multi-stakeholder initiatives and the limits of social audit

Introduction

The preceding chapter outlined the key forms of transnational private regulation in the apparel sector. It also analysed the primary reason for their emergence, namely the failure of traditional, state-based regulation. This chapter now turns to consider a specific subset of these transnational private regulators: MSIs.

As outlined in Chapter 4, corporations in the apparel sector initially sought to address the limitations of traditional regulation through CSR programs and, in particular, corporate codes of conduct. Growing criticism and dissatisfaction with these unilateral measures, combined with the political foreclosure of other regulatory options (specifically, intergovernmental collaboration and trade policy) led corporations and advocates towards a new experiment in private governance, the MSI. Described as an evolution or a ratcheting-up of the voluntary CSR approach, MSIs sought to respond to global governance gaps and the limits of corporate self-regulation through a combination of varying tools and mechanisms (Jørgensen et al. 2003; Utting 2005a; 2005b; Waddock 2008). These included more standardised codes, strengthened and more independent systems of monitoring and verification, greater levels of disclosure, broader participation by civil society and opportunities for learning and information sharing (Utting 2005a; O’Rourke 2006; Baumann-Pauly et al. 2017).

Significantly, most Apparel MSIs (those that seek to address human rights violations within global apparel supply chains) rely heavily on social audit as a key, if not primary, monitoring and compliance tool. As this chapter reveals, the existing literature on social audit demonstrates that it is an ineffective means of identifying and remedying human rights violations in global supply chains. Original empirical research undertaken for the purpose of this thesis reinforces this literature. It also builds upon it, by highlighting that despite its flaws, social audit does serve an important corporate function. It also demonstrates that buyers view social audit in a more nuanced manner than the literature suggests. Accordingly, this chapter contends that a distinction should be drawn between the reliance on social audit by companies, and MSIs.

This chapter argues that attempts by Apparel MSIs to ameliorate the failings of social audit have not been sufficient to overcome its limitations. This conclusion has significant implications for the central question addressed by this thesis: what limits the regulatory legitimacy of Apparel MSIs, and how can these limitations be addressed? Chapter 6 - explores the need for MSIs, as private regulators, to maintain legitimacy - It argues that a continued reliance on social audit as a regulatory tool poses a critical challenge to the legitimacy of Apparel MSIs. Chapter 8 proposes recommendations as to how this constraint on legitimacy might be addressed.
5.1 Apparel MSIs

This section delineates the transnational private initiatives outlined in Chapter 4, section 4.1 on two grounds. First, it determines which of these initiatives are truly multi-stakeholder, and therefore constitutes an MSI. Second, it classifies these MSIs according to the typology introduced in Chapter 2, section 2.1. These distinctions provide an important foundation for the legitimacy analysis in Chapter 6.

5.1.1 Membership and governance: is it an MSI?

As outlined in Chapter 4, since the late 1990s, the following transnational private regulatory initiatives focusing on apparel supply chains (albeit not necessarily exclusively) have emerged: the FLA, SAI, WRAP, ETI, Fair Wear, WRC, amfori BSCI, the Dutch Agreement and the German Partnership.

There is a threshold question as to whether all these initiatives are MSIs. As defined in Chapter 2, section 2.1, an MSI must include at a minimum both business and civil society (NGOs or trade unions) at the decision-making level. These stakeholders must have the power to shape the direction and course of the MSI. Answering this threshold question is important as a matter of definition: this thesis is about MSIs, not private regulation more broadly. It is also significant because MSIs (which perform a regulatory function) must establish legitimacy. The argument of this thesis is that Apparel MSIs must adopt new regulatory approaches – including expanding stakeholder participation - to preserve their legitimacy. Private initiatives lacking any participatory governance structures are unable to fulfil this essential legitimacy criteria at even the most basic level.

The FLA, ETI and Fair Wear, each of which are membership based organisations, all clearly meet the threshold participation requirement. Their membership base includes business and civil society and each of their governing boards are based on a tripartite structure. The ETI Board currently allocates three seats each to unions and NGOs and four seats to corporate members (ETI, n.d.1). The Fair Wear Board allocates three seats for employers’ organisations and two seats each for trade unions and NGOs (Fair Wear, n.d.3). The FLA Board grants seats to companies (including buyers and suppliers), universities and NGOs in equal proportions (FLA n.d.1). Thus, at least on their face, these MSIs have enrolled a range of stakeholders, each with different resources, with a view to increasing the MSIs overall regulatory power (Chapter 3). Chapter 6 further investigates the extent to which this enrolment has, in practice, been successful.
The SAI, which does not operate on a membership basis, does not allocate board seats to specific groups of stakeholders. Rather, the board is comprised of individuals from a range of backgrounds including finance, corporate social responsibility, public administration, research institutes and politics. The SAI Board is advised by an advisory board, which is divided into two groups: those affiliated with business, and those affiliated with NGOs, trade unions, socially responsible investing and government. The SAI’s governing documents are not publicly available, and thus the precise powers of the advisory board are unknowable. As a general rule, the role of advisory boards is to provide non-binding strategic advice to shareholders and the board of directors. They are not authorised to make binding decisions on behalf of the organisation, nor are they accountable under corporations laws in the same manner that directors of boards are (Advisory Board Centre, n.d.). On this basis, it is difficult to assert that different groups of stakeholders – either business or civil society - are meaningfully included in SAI’s decision-making processes. Nonetheless, the SAI indicates that it was established as a multi-stakeholder initiative that continues to run under the governance of a multi-stakeholder board (SAI, n.d.1).

WRAP, like SAI also does not operate on a membership basis. It presents this as a considered choice designed to avoid undue influence from any stakeholder group (WRAP, n.d.2). As noted in Chapter 4, WRAP was formed at the initiative of an industry group, the American Apparel Manufacturers Association, who convened a taskforce with brands, suppliers, NGOs, academia, and government officials. This taskforce in turn recommended creating ‘an independent third-party organisation free of government or corporate influence’ (WRAP, n.d.1). Today WRAP describes itself as an ‘independent, objective, non-profit team of global social compliance experts’ (WRAP, n.d.3). Similar to SAI, the WRAP board does not allocate formal representation to stakeholder interests. Rather, it is comprised of individuals from a range of backgrounds including academia, the NGO sector, corporate social responsibility, public administration and the apparel industry.

Despite similar governing structures, SAI and WRAP tend to be characterised differently in the literature. SAI has been consistently characterised as an MSI by academics and advocacy groups (Baumann-Pauly et al. 2017; AFL-CIO 2013; MSI Integrity 2020). Whereas WRAP has been characterised both as an MSI and as an industry-based initiative. For example, civil society classifies it as an MSI (AFL-CIO 2013; MSI Integrity 2020). In contrast, independent expert Dorotheé Baumann-Pauly expressed the view that ‘WRAP … is an industry-driven initiative. I would even question that it’s truly multi-stakeholder’. This thesis considers that in circumstances where different stakeholder groups are not clearly represented in either their membership or governance structures, arguably neither SAI or WRAP are true MSIs. Rather, they might more appropriately be characterised as systems of private transnational regulation. From a responsive regulation perspective they have not enrolled a sufficiently broad network of relevant stakeholders within their regulatory pyramid. However, given the ambiguity of their
status and the continued reference to these initiatives as MSIs, in particular by civil society, this thesis considers it necessary to analyse the operations of SAI and WRAP. For this reason, they will be included in the definition of Apparel MSIs.

Unlike SAI and WRAP, amfori BSCI is clearly an industry-based initiative. It is established under the auspices of amfori (formerly the Foreign Trade Association), which describes itself as a global business association. Its membership base is comprised solely of businesses and industry associations from a range of sectors (including the apparel sector). Its key governing bodies are comprised of members only. Amfori receives some input from external stakeholders through its Stakeholder Council, which includes representatives from intergovernmental organisations, unions, NGOs, independent foundations and MSIs. However the Stakeholder Council acts in a purely advisory capacity and has no decision-making power (amfori n.d.). For this reason, NGOs and commentators have concluded, and this thesis agrees, that while amfori BSCI ‘may have a multi-stakeholder dimension …[it is] not characterised by multi-stakeholder governance’ (Van Hujistee 2012; see also Clean Clothes Campaign 2009; Brown 2007). On this basis, amfori BSCI is not an MSI.

The WRC purposely does not include corporate members. Chapter 4 showed that the WRC emerged in response to the perceived failings of the FLA. Amongst many criticisms, it was argued that monitoring would not provide the information needed to permit consumers to punish or reward brands. In the alternative, the WRC addresses abuses in factories based on complaints received. The WRC focuses specifically on factories that make apparel for universities and colleges. Universities can become affiliates by adopting a code of conduct. The WRC conducts factory assessments in direct response to complaints by workers (or occasionally on its own initiative) and issues detailed public reports in response.

While the WRC works with corporations in response to complaints, it does not include them in its governance structure. Rather, its 18-member board is equally represented by university affiliates, representatives of United Students Against Sweatshops and the WRC Advisory Council (an international body of human rights and labour rights experts) (WRC, n.d.1). On one view, universities could be equated to buyers, as they are outsourcing production. Yet, unlike buyers, universities are not active participants in the apparel supply chain, and do not constitute part of the sector. Further, the WRC characterises itself as an ‘independent labor rights monitoring organisation’ (WRC, n.d.2). Ben Vanpeperstraete of the Clean Clothes Campaign specifically highlighted the WRC’s independence, noting that:

[the] assessment team is not governed by business but the businesses are almost subjected, if they want to have collegiate apparel, to have those sites assessed. (Vanpeperstraete Interview)

The lack of participation by a critical stakeholder group (business) combined with the WRC’s own self-characterisation justifies excluding it from the definition of an MSI. Accordingly, the
work of the WRC will not be considered further in this chapter. It will be revisited in Chapter 8 in the course of discussing alternate approaches.

Finally, the Dutch Agreement and German Partnership both include national businesses, trade unions, NGOs, industry organisations, as well as their respective governments in their governance structures (Dutch Agreement, 2016; German Partnership, n.d.2). On this basis, both can be characterised as MSIs.

As noted in Chapter 4, section 4.1.5, a number of newer private initiatives have emerged - which seek to facilitate information sharing among corporations. Two of these - the SLCP and SAC - are potentially multi-stakeholder. The SAC includes companies, academia, government and NGOs among its membership base. It does not allocate board seats to specific groups of stakeholders. Rather, the board is comprised of individuals, predominantly from corporate backgrounds, and with some NGO and intergovernmental representation (SAC, n.d.2). The SLCP has signatories rather than members. It currently has 252 signatories including buyers, suppliers, audit firms, civil society organisations, MSIs and government (SLCP, n.d.2). The SLCP is governed by a Council, comprised of three suppliers, three brands, three ‘other’ stakeholders, three expert members, two intergovernmental observers and an independent Chair (SLCP, n.d.3). The diversity of membership coupled with inclusive governance structures (more so for the SLCP), reflect a sufficient level of participation to characterise the SAC and SCLP as MSIs.

For the reasons outlined in Chapter 4, other significant initiatives relevant to the apparel sector, while similar, are not strictly MSIs. To briefly re-iterate, Better Work is better characterised as an intergovernmental initiative reflecting a ‘hybrid governance’ approach. The Bangladesh Accord, Lesotho Agreements and ACT are better characterised as examples of the worker-driven model, which is discussed further in Chapter 7. Global Framework Agreements and the Indonesia Protocol and Jordan Agreement are agreements with unions focused on collective bargaining and freedom of association.

Based on the discussion above, this thesis uses the term Apparel MSIs to refer to the FLA, ETI, Fair Wear, SAI, WRAP, SAC, SLCP, the Dutch Agreement and German Partnership.

5.1.2 The scope of Apparel MSIs

It is important to highlight that each of the Apparel MSIs differ in scope. Some address only the first (manufacturing) tier of the apparel supply chain, others attempt to address further tiers (such as spinning mills, textile production and raw materials), and others also address entirely different sectors and industries.

The FLA was initially created to address sweatshop conditions in factories manufacturing apparel (and footwear). It has also recently expanded to agriculture and food. Its corporate
membership base however remains dominated by apparel (and footwear) companies, with 48 out of 51 participating brands and 9 out of 12 participating suppliers coming from the apparel and footwear sector. The FLA has explicitly acknowledged the need ‘to improve conditions for workers in deeper tiers of the supply chain’, and has conducted a handful of discrete projects in this regard, for example in respect of cotton production in Turkey and leather in India (FLA 2015). Despite these extensions, its routine monitoring functions (discussed further below) currently only target the first manufacturing tier of the supply chain (FLA 2021).

The ETI currently has 98 members, 64 of which are from the apparel (and textiles) industry. The remainder are from food, farming, fisheries, other retail and general merchandise. Like the FLA, it focuses mainly on tier one manufacturers, although it has also addressed further tiers of the apparel supply chain through pilot projects (ETI 2015-2016).

The SAI (whose principal activity is certification) has to date certified 12,491 facilities from a range of industries, including among others, electronics, food, automotive, energy and financial services. Apparel (and textiles and footwear) constitutes the largest portion of its activities, accounting for 3,951 certified manufacturing facilities (SAI, n.d.2).

WRAP and Fair Wear’s activities are more concentrated. WRAP’s certification activities focus predominantly on ‘sewn products, apparel, and footwear sectors and related industries’ with a particular focus on manufacturing (WRAP, n.d.2) and Fair Wear focuses exclusively on tier one manufacturers in the apparel sector (Fair Wear, n.d.3).

The Dutch Agreement and German Partnership do not clearly specify their scope, however appear to apply to the entire supply chain.

The SAC and SLCP do not explicitly delineate their scope, and their membership base includes both first tier (including cutting, sewing, assembly and packaging) and second tier (textile) manufacturers.

In summary, Fair Wear focuses solely on first tier manufacturing, the FLA, WRAP and ETI focus predominantly on first tier manufacturing (insofar as their apparel sector activities are concerned), the SAI, SAC and SLCP focus on first and also second tier manufacturing, and the Dutch Agreement and German Partnership apply to the entire supply chain.

Given that all Apparel MSIs focus on at least first tier apparel manufacturing, the analysis in this thesis focuses primarily on this aspect of their efforts. This is not to say that MSIs should only be focusing on the first tier of the supply chain. To the contrary, as noted in Chapter 4, section 4.4.2, the UNGPs and OECD guidelines clearly provide that companies should be conducting human rights due diligence throughout their entire supply chain. MSIs should in turn be
supporting member companies in this endeavour. Chapters 6 and 8 argue that that is something Apparel MSIs will need to better grapple with in the future.

5.1.3 Apparel MSIs: applying the MSI typology

This section now turns to consider the manner in which each of the Apparel MSIs operates, and to classify each MSI according to the typology introduced in Chapter 2 (section 2.1). The typology distinguishes between three types of MSIs: Learning, Certification and Governance MSIs. This distinction is significant for two reasons. First, Learning MSIs do not perform a regulatory function, and therefore are not required to establish legitimacy (Chapter 3, section 3.1). Consequently, those Apparel MSIs that constitute Learning MSIs will not be subject to the legitimacy analysis in Chapter 6. In addition, as demonstrated below and in Chapter 6, Certification MSIs rely on social audit to a much greater degree than Governance MSIs. Chapter 6 argues that this distinction translates into differing conclusions on legitimacy.

5.1.3.1 Learning MSIs

The first major distinction among the Apparel MSIs is between those that regulate (Certification and Governance MSIs), and those that do not (Learning MSIs). This thesis characterises the SAC, SLCP, Dutch Agreement and German Partnership as Learning MSIs. Unlike the other Apparel MSIs, none of these MSIs promulgate a code of conduct. Therefore they do not perform a clear rule-setting function. Nor do they perform a sufficiently strong accountability or oversight function.

The SAC promotes the Higg Index, which is a suite of tools that enables buyers and suppliers to measure and score their social (and environmental) sustainability performance. The SAC does not oblige its members to use, or report on the Higg Index, or to verify all of its scores. Like the SAC, the SLCP also does not perform an accountability or oversight function. Its overall aim is to reduce audit fatigue (discussed further in section 5.2.2) by creating one verified dataset of factory conditions, which is relied upon by a range of stakeholders for their own respective purposes. To this end it has developed the Converged Assessment Framework, which collects and verifies data on factory conditions on an annual basis. Data is self-reported by suppliers and then verified by a body approved by the SLCP (SLCP, n.d.4). Sharon Hesp of the SLCP specifically highlighted that the Framework is not intended to operate as a standard. It is simply intended to be a common data point, from which users can draw their own conclusions (Hesp Interview).

The functions of the Dutch Agreement and German Partnership are more difficult to clearly classify. Both MSIs are attempting to change the behaviour of their members and are therefore arguably regulating. However the lack of clear rules combined with weak implementation and enforcement mechanisms are not sufficiently strong to constitute regulation. One company representative expressed the view that the German Partnership:
... has no regulatory power at all, nevertheless it brings together 50% of the German textile turnover with regard to the companies that are members (Company 23 Interview).

Neither MSI promulgates a specific code of conduct. Rather, they require companies to undertake due diligence, prepare action plans with targets (based on a company’s particular risks) and report on annual progress. A recent independent review of the Dutch Agreement found that reports lacked sufficient depth and an appropriate level of detail (Clean Clothes Campaign & SOMO, 2020). Similarly, a review of a sample of German Partnership reports undertaken by this author revealed vague targets that do not comprehensively cover the spectrum of human and labour rights. Member companies typically only set out one or two targets in respect of human rights, stated at a high level for generality, for example: ‘strengthen and improve our monitoring system’ (German Partnership 2019a) or ‘all producers and business partners to comply with social Partnership goals’ (German Partnership 2019a).

Neither of these MSIs perform a strong oversight function. The Dutch Agreement reviews the quality of action plans and progress reports, but only randomly verifies the improvements reported (Dutch Agreement 2016, 10-11). The German Partnership verifies the company’s plan and reported progress based on an ‘in-person assessment meeting’. The focus of the verification appears to be on whether the targets and objectives in the plan are appropriate (German Partnership n.d.3.). Further, it is not clear the extent to which external information is taken into account in either process. Otherwise, both initiatives also conduct a range of discrete projects, facilitate co-operation among members and promote collaboration with other initiatives. Both initiatives mention the possibility of expulsion at a high level, but do not appear to provide for any formal mechanisms in this regard.

These two national level initiatives can be likened to the UN Global Compact (Chapter 4, section 4.1.2). They do not impose specific rules, nor do they provide for strong monitoring or enforcement mechanisms. Accordingly, they are more appropriately characterised as Learning MSIs. This is also consistent with how these MSIs present themselves. For example, the German Partnership describes itself as a platform for ‘knowledge exchange, learning and dialogue’ (German Partnership, n.d.4.), which seeks to promote improvements in supply chains ‘through individual responsibility, collective engagement, and mutual support’ (German Partnership, n.d.1).

Accordingly, the SAC, SLCP, Dutch Agreement and German Partnership are not included in the main analysis in Chapters 5 and 6. However, the recommendations in Chapter 8 draw upon some aspects of their operation.
5.1.3.2 Governance and Certification MSIs

Each of the remaining Apparel MSIs - FLA, ETI, Fair Wear, SAI and WRAP - promotes its own code of conduct, which imposes concrete obligations. While the precise details differ, the codes are similar in that they are all based on international human rights norms and the fundamental ILO conventions. Each code covers the key human and labour rights outlined in Chapter 2, section 2.6. The critical question for the purpose of this analysis is the manner in which each MSI seeks to monitor and enforce its code.

The FLA and Fair Wear adopt substantially similar obligations and oversight techniques. Member companies commit to adopting the respective codes of each MSI through the introduction of appropriate monitoring activities and management systems. First, members are required to monitor code compliance among their first tier suppliers. The FLA requires members to monitor suppliers that are producing products that account for more than 30% of the members’ revenue. Fair Wear requires members to conduct social audits in respect of at least 80% of their purchasing volume from suppliers. Each MSI expects its members to implement this level of coverage within three years. Second, FLA and Fair Wear members are required to implement comprehensive management systems at the headquarter level. Such systems include coherent processes for monitoring, compliance and remediation, responsible purchasing practices, effective grievance mechanisms, training and capacity building measures and ongoing evaluation and improvement.

Both the FLA and Fair Wear then verify member compliance with these two sets of obligations through four main oversight mechanisms. First, each MSI conducts factory level social audits of a proportion of each of its members’ suppliers. The FLA conducts audits of a random, risk-weighted sample of 5% of its members’ suppliers, and Fair Wear audits 10% of a members’ supplier base over the course of three years. After these audits, the member company must work with the supplier to develop a remediation plan. The FLA subsequently revisits some of these audited factories to verify that remediation plans have been implemented. Second, both the FLA and Fair Wear undertake annual audits at the company headquarter level to ensure that management systems are being implemented appropriately. Third, both MSIs provide for a third-party complaints mechanism for workers and their representatives. Fourth, non-compliant members are subject to formal review procedures, which can lead to termination of membership for non-compliant members.

The FLA provides an additional layer of accountability through its ‘accreditation process’. At the end of the initial two to three year implementation period, the FLA reviews the company’s internal compliance program as well as the results of its independent monitoring. Based on this,

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it decides on whether to recommend the company to the Board of Directors for accreditation. Companies are then reaccredited on an ad hoc basis. Independent expert Dorotheé Baumann-Pauly described the accreditation process as:

... involv[ing] a rigorous review of their program, their business models, their systems in place at the corporate level to ensure that they can manage the supply chain in a responsible way. (Baumann-Pauly Interview).

Currently, the FLA has accredited 32 companies, out of a total 63 participating companies. Through this process, the FLA implicitly provides for two tiers of membership, with accredited company members performing to a higher standard. Fair Wear only provides for one level of membership, however it does distinguish the performance of members through a rating system (discussed further in Chapter 6, section 6.2.5).

Another difference between the FLA and Fair Wear is the size of its member companies. The FLA counts major brands such as Adidas, Nike, PVH and Hanesbrands among its members, while Fair Wear members tend to be small to medium companies, with a much smaller supplier base.

Both the FLA and Fair Wear place the primary onus on buyers, rather than suppliers, to implement their respective codes of conduct (although in recent years, the FLA has expanded to include supplier members). They both seek to verify that buyers (rather than factories) have effective processes and systems in place. On this basis, both constitute Governance MSIs. The idea behind this model is that by joining an MSI, members are signalling that they have in place (or are working towards putting in place) appropriate systems and procedures for successfully upholding fair labour standards throughout the relevant portion of their supply chains. Membership does not signify that a member and its suppliers are 100% compliant with the MSI code.

Like the FLA and Fair Wear, the ETI requires its members to adopt and implement its ETI Base Code throughout their supply chains. In contrast to the FLA and Fair Wear, the ETI does not monitor its members’ supplier base through social audit. Rather, the ETI focuses on learning and collaboration through pilot projects, working groups and roundtable discussions, shared best practices and training exercises.

The ETI does impose some level of oversight, with consequences for members who do not comply. Member companies are required to report annually on the steps they are taking to improve working conditions in their supply chains, including: how they have integrated ethical trade into their business practices; how they assess working conditions at supplier sites and monitor requested improvements; and what concrete changes to working conditions have occurred as a result. The reporting structure is intended to reflect the human rights due
diligence approach set out in the UNGPs. These annual reports are then reviewed by the ETI Board and feedback is provided by the Secretariat (Buttle Interview). This entire process is currently confidential, as the ETI does not publish company reports or the results of its assessments. If companies are deemed not to have made sufficient progress or honoured their membership obligations, membership may be terminated. To date, one member has been terminated by the ETI (Chapter 6, section 6.2.5.2).

This reporting and review requirement is a stronger form of oversight than the UN Global Compact (which does not assess member reports at all). It is also stronger than the Dutch Agreement and German Partnership, whose reviews appear to focus on the appropriateness of targets. Yet it also does not reach the level of rigour of the other Governance MSIs, the FLA and Fair Wear. Recent research also indicates that there are internal tensions within the ETI as to whether it should focus on learning or oversight activities (Connor et al. 2016b). The ETI’s five strategic priorities or ‘pillars’ further reflect a mixed approach (ETI 2015). One of these pillars, ‘increase accountability’, highlights its existing monitoring and evaluation systems and foreshadows the introduction of new accountability frameworks and reporting procedures. The remaining four pillars are directed towards learning activities such as training, collaboration and discrete projects. This combination of priorities indicates that the ETI does not clearly fit into one of the three functional models. On this basis, this thesis classifies it as a combined Learning and Governance MSI. The comments of the ETI’s Executive Director, Peter McAllister, support this conclusion:

… we have an internal mechanism where we try and hold members to account for change but that's not enough, over the years we have realised that for some of these problems there isn't an easy answer … So that's why we became a learning and doing and sharing organisation … What we're not is a compliance organisation … (McAllister Interview).

In contrast, the SAI and WRAP do not oversee the policies, monitoring activities and management systems of buyers. Rather, their primary function is to oversee a system of certification in respect of individual (supplier) facilities. Similar to the Governance model, certification is not intended to imply that a supplier is 100% compliant with relevant codes, but rather that it has sufficient systems in place. As noted by an independent expert:

The ones who are actually providing certification they're actually saying you know our audit is guaranteeing that there is a system in place that's going to manage this problem in the long-term, even if it's not perfect. So that's the SAI model or the WRAP model … (Independent Expert 30).

SAI andWRAP do not directly certify facilities. Certification (that a facility is compliant with their respective codes) is granted through a social auditing process that is undertaken by accredited external organisations and renewed periodically. WRAP directly accredits monitors. Social Accountability Accreditation Services (SAAS), SAI’s independently managed affiliate, accredits
monitors for SAI. SAI certification lasts for three years and WRAP certification ranges from six months to two years. To date the SAI has certified 3,951 apparel (and textile) factories (SAI, n.d.2) and WRAP has certified 2,451 apparel factories worldwide (WRAP, n.d.4).

WRAP asserts that its primary activity is its factory certification program (although it also provides some training) (WRAP, n.d.2). Thus it is clearly categorised as a Certification MSI. SAI’s activities are somewhat broader. In addition to certification and training, it also conducts a ‘corporate program’ under which it advises companies on how to develop and implement sustainability plans and management systems (SAI, n.d.3). However these activities do not amount to an accountability function, and reflect an advisory service role rather than a form of oversight. For this reason SAI remains a certification system and is also best characterised as a Certification MSI.

In summary, the FLA, Fair Wear and ETI (in part) constitute Governance MSIs. The SAI and WRAP are Certification MSIs. Certification MSIs directly regulate suppliers. Through certification, supplier factories and farms are showing potential customers (buyers) that they are committed to improving working conditions. The pressure for suppliers to comply is predicated on the buyer-supplier relationship. In contrast, Governance MSIs directly regulate buyers, who in turn are expected to regulate their suppliers. Governance MSIs allow buyers signal their social compliance efforts to the public. Thus the motivation to regulate comes from the prospect of improved brand reputation among consumers (O’Rourke 2006). Both the Certification and Governance model reflect Braithwaite’s vision of an ‘upstream-downstream community of shared fate’, where weaker suppliers are regulated by pressure from more powerful reputation-conscious buyers.

Despite reflecting different models, these MSIs share a critical underlying feature: each MSI (save the ETI) relies on social audit as a significant compliance tool. The FLA and Fair Wear require their members to monitor a substantial portion of their supply chains, which is typically undertaken by way of social audit. They then verify member compliance by conducting additional independent social audits of a portion of the member’s supplier base. SAI and WRAP grant certification to facilities on the basis of social audits undertaken by independent accredited auditing organisations. Finally, while the ETI does not itself conduct audits, its members have typically relied on auditing to implement the ETI code throughout their supply chains (ETI 2015).

The following section argues that social audit is a narrow and ineffective mechanism for driving human rights improvements. Consequently, Chapter 6 demonstrates that the ongoing reliance on social audit outlined here, poses a major obstacle to MSI legitimacy. It is in Chapter 6 that the distinction between Certification and Governance MSIs also becomes significant. Although both MSI models rely on social audit, the centrality of social audit to the Certification model
results in even greater legitimacy challenges, and simultaneously limits their potential for reform.

5.2 Apparel MSIs and the limits of social audit

Social audit - recognised as ‘probably the most important organisational challenge for MSIs’ (Mena & Palazzo 2012, 542) - has been subject to extensive scrutiny and criticism by NGOs, trade unions and scholars. Existing research reflects a growing consensus that social audit is a limited regulatory tool, capable of delivering only superficial and short-term outcomes at best, and wholly inadequate for detecting and addressing more serious and systemic human rights violations (O’Rourke 2003; LeBaron et al. 2017; Clean Clothes Campaign 2019).

The International Organization for Standardization defines audit as a ‘systematic, independent documented process for obtaining objective evidence and evaluating it objectively to determine the extent to which the audit criteria are fulfilled’ (ISO 2018, 3.1). In the context of the apparel sector, a social audit is usually undertaken by means of a physical inspection of the facility in question, combined with a review of documents and interviews with staff.

Social audit is not exclusive to Apparel MSIs. Most MSIs in other sectors rely on social audit in some form (MSI Integrity 2020). Further, as noted in Chapter 4, most companies have also come to rely on social audit to investigate their supply chains. Thus, while the critique of social audit in this thesis applies to its use by Apparel MSIs, it also has potential implications for other MSIs, non-MSI initiatives and companies more broadly.

5.2.1 The failure of social audit

The failure of social audit is most tragically exemplified by major disasters such as the Rana Plaza collapse and the Tazreen and Ali Enterprises fires (Chapter 2). At least two of the factories in the Rana Plaza complex had passed social audits by amfori BSCI just months before its collapse (Reinecke & Donaghey 2015a; LeBaron & Lister 2015). The Tazreen factory had been audited multiple times by Wal-Mart (albeit not through an MSI) and while safety issues had been raised, no remedial action was ever taken (LeBaron & Lister 2015; WRC 2012). The Ali Enterprises factory had been SA8000 certified by a SAAS-accredited auditor (recalling that SAAS facilitates auditing services to SAI), and also separately audited by an auditor accredited by both WRAP and the FLA (WRC 2012; Pekdemir et al. 2015).

Beyond these headline tragedies, a significant body of academic research provides empirical basis for the assertion that social audit is routinely failing workers. Large-scale quantitative research undertaken by Professor Locke and his colleagues highlights the limited ability of audit to achieve consistent and sustained results. A study analysing over 800 audits of Nike’s (an FLA member) suppliers in 51 different countries found mixed compliance results (Locke et al. 2007). Some factories were substantially compliant, while others exhibited persistent violations of wages, overtime and health and safety. The authors concluded that despite significant and
consistent efforts on Nike’s part in improving working conditions of its suppliers, monitoring alone was ‘not producing the large and sustained improvements in workplace conditions that many had hoped it would’ (Locke et al. 2007, 21). A separate study of the audit reports of another prominent brand (also a member of the FLA) came to a similar conclusion. The study found consistent violations of the code’s provisions on health and safety, overtime and work hours, and freedom of association. Only 24% of factories were in full compliance and 53% were explicitly ‘not approved’ although still producing for the buyer (Locke et al. 2009).

Similarly, a quantitative study of Fair Wear, which considered the results of multiple audits of 43 factories also reported mixed results. It found a complete failure to identify complex rights such as freedom of association and limited, but not statistically significant improvements across most categories of rights. Further, it found that while social audit was capable of improving specific instances of non-compliance, suppliers moved in and out of compliance. This led to the conclusion that audits were unable to achieve sustained improvements over time (Egels-Zandén & Lindholm 2015). Smaller, qualitative case studies have come to similar conclusions. An independent case study review of the ETI found that social audit had led to some improvements in health and safety and working hours, but had virtually no impact on more complex rights (Barrientos & Smith 2007).

Combined, these studies suggest that at best, social audit has led to patchy and inconsistent improvements in basic working conditions on outcome rights such as health and safety, wages, working hours and leave entitlements (Barrientos & Smith 2007; Locke et al. 2009). In relation to wages, while social audit may have contributed to some limited improvements, such advances have been only towards a minimum, rather than living wage (Barrientos & Smith 2007; ETI 2015). Turning to broader systemic rights such as freedom of association, the right to join trade unions, the right to collective bargaining and non-discrimination, there is widespread consensus among NGOs and researchers that social audit has had barely any impact at all (Clean Clothes Campaign 2005; Barrientos & Smith 2007; Utting 2008; Locke et al 2009; Bartley 2011; AFL-CIO 2015 Human Rights Watch 2015a).

These limited outcomes have been attributed to two separate but interconnected issues: inherent limitations in the manner that social audit is conducted; and broader systemic and structural impediments to changes in conditions for workers.

5.2.2 Inherent limitations

5.2.2.1 Audits are a superficial snapshot in time

The audit format itself is inherently superficial. Audits tend to be based on the ‘financial audit’ model, with inspectors usually focusing more on ticking off checklists than conducting in depth investigations and addressing underlying causes (Clean Clothes Campaign 2005; Locke 2013,
Further, audits are undertaken in a relatively short space of time, generally ranging from one to three days, with one to two year follow-ups (Locke 2013, 36).

Some Apparel MSIs perform better than average on the duration of audits, with both SAI and Fair Wear inspections ranging from 1-14 days, depending on the size of the factory (Fair Wear 2012; SAAS 2019). However, these audits are undertaken on only an intermittent basis. WRAP issues certifications that are valid for six months, one or two years (depending on the grade given to the facility) and SAI certification lasts for three years. The FLA and Fair Wear require companies to undertake annual audits but only verify a small sample of a member’s supplier base.

As a result, audits, including those undertaken by Apparel MSIs, can only provide a snapshot view. They are not able to pick up all violations that may be occurring at a factory at any given time (Locke et al. 2009; LeBaron & Lister 2016). Chris Harrop of Marshalls (an ETI company member) specifically highlighted the limitations of such intermittent checks:

> Auditing is there to make sure the processes are in place. They're not getting data, the auditor is there to check process. The data is there daily. Not waiting once a year (Harrop Interview).

5.2.2.2 Audits do not meaningfully engage with workers and local stakeholders

On the whole, workers are not meaningfully involved in the audit process. To the extent that worker interviews are conducted, they are often perfunctory and subject to influence. Management often pre-select coached workers to be interviewed, while on-site interviews inhibit frank and open responses (O’Rourke 2002; Clean Clothes Campaign 2005; Barrientos & Smith 2007; Locke et al. 2009, LeBaron & Lister 2016; Vanpeperstraete Interview; Parakuni Interview). More generally, there is a real question as to whether workers are likely to disclose sensitive information about rights violations to transient auditors, when they have not established trust, either with the auditor or the overall process (MSI Integrity 2020, 128). As acknowledged by an ETI company member:

> No one's going to say in a worker interview as part of a social audit, you know I'm being bullied by my line manager … or I’m being discriminated against because I'm a woman … that is not the environment that that information is going to come out. (Company 21 Interview).

This limited inclusion affects the accuracy of information collected by auditors, and ultimately serves to disempower workers, the intended beneficiaries of the process (Barrientos & Smith 2007; Utting 2014).

In addition, local NGOs and trade unions are often not consulted; yet these are the groups most likely to shed light on violations. Often, local stakeholders do not wish to participate in audits in circumstances where they are not permitted to see the final report, and some local stakeholders...
do not want to lend legitimacy to a process that they are not meaningfully involved in (Clean Clothes Campaign 2005; Barrientos & Smith 2007).

Apparel MSIs address these issues to varying degrees. Fair Wear engages local auditors, conducts worker interviews on and off-site and also interviews local stakeholders (including trade unions, NGOs, business associations and local authorities) (Fair Wear 2012). Lavinia Muth of Armed Angels (a Fair Wear company member) considered that interviews were a particular strength as ‘approximately 50% of the audit methodology are interviews’ (Muth Interview). The FLA also conducts interviews on and off-site and gathers information from ‘local knowledgeable sources’ (FLA 2021, 95). SAI requires off-site interviews only in ‘high risk’ countries, or where information provided by a worker cannot be corroborated; it also requires auditors to engage with relevant stakeholders, including NGOs and unions (SAAS 2020, sections 11.1.3, 15.8.4). WRAP does not provide public information on these matters. Thus, overall, MSIs include workers and civil society to varying degrees, with Fair Wear the strongest performer. However, as explored further in Chapter 6, section 6.2.2, many critics argue that the level of inclusion remains insufficient.

5.2.2.3 Audit fraud and audit fatigue

The compliance model underpinning social audit tends to create a cynical and antagonistic dynamic between suppliers and buyers. Buyers often find themselves engaged in a ‘cat and mouse game’ with suppliers, with more time spent on evasion and superficial compliance than co-operation and meaningful improvements (Locke et al. 2009; Baumann-Pauly et al. 2017; NGO 12 Interview). Research points to widespread practices of audit fraud, including ‘cleaning up’ factories prior to inspections, setting up showcase factories and falsifying documents relating to wages, hours and leave (Clean Clothes Campaign 2005, 2009; Chan 2009; Labowitz & Baumann-Pauly 2014; Human Rights Watch 2015b). Yet auditors will often simply rely on data provided by management, without cross-checking it against information from workers (O’Rourke 2002).

Even where direct fraud is not present, many suppliers nonetheless take a combative approach. Faced with an ever-increasing audit burden, suppliers hire former auditors as consultants to ‘help them meet and beat a system of multiple audits’ (LeBaron & Lister 2016). Different auditors, while applying similar codes, will follow different criteria and indices. The proliferation of social audit gives rise to multiple implementation requirements that are burdensome on suppliers and buyers alike (Jørgensen et al. 2003; Locke et al. 2013; Kuruvilla et al. 2020). In a consultation conducted by the World Bank, some suppliers reported being audited up to 50 times per year, resulting in differing implementation requirements in respect of management systems and remediation efforts (Jørgensen et al. 2003). Two NGOs and an independent expert specifically raised the issue of audit fatigue (Lan Interview; NGO 12 Interview; Independent Expert 20 Interview). Similarly, Mariusz Stochaj of Continental Clothing (a Fair Wear company
member) noted that ‘some factories that have 20 or 30 customers are in this perpetual state of being audited. One audit team leaves and another steps in the following week’ (Stochaj Interview).

In addition, an individual external audit costs in the range of US$400-$1500 per day (SAI n.d.4). Assuming a three-day audit, this could amount to up to US$4,500 per audit. Multiple audits translate into increased expenses, and as the number of audits grow, there are growing concerns as to their long-term cost sustainability (Jørgensen et al. 2003, 20; Locke et al. 2007).

One NGO representative argued that rather than alleviating this issue, MSIs exacerbate the existing audit burden, by contributing to fragmentation:

> The other area where there's a huge problem is co-ordination among these different MSIs. So you see that in one factory they've got all these certifications hanging … It's been done by WRAP, SAI, … and some of the brands have done it. Which means that though the standards look more or less similar, there is a huge lack of coordination among them, which is resulting in a huge amount of resources being misused … So the audit fatigue is huge. (NGO 12 Interview).

Some MSIs operate shared databases, and initiatives such as Fair Factories Clearinghouse and SEDEX (Chapter 4, section 4.1.5), allow corporate members to share audits. The recently established MSI, SLCP, is attempting to overcome audit fatigue through its common dataset that can be used by brands (section 5.1.3.1). Despite these emerging efforts, as noted by the ETI in a recent strategy paper, ‘suppliers still report a heavy and expensive audit burden’ (ETI 2015, 9).

5.2.2.4 Auditors lack appropriate independence and expertise

Critics also point to concerns about independence and appropriate expertise. The fact that auditors are paid (either by buyers or supplier factories), combined with their often limited experience in human rights and labour issues raises questions about the quality and independence of social audits (O'Rourke 2003; Clean Clothes Campaign 2005; Lock et al. 2009; AFL-CIO 2013). On the whole, Apparel MSIs have not avoided these issues entirely, in spite of their networked structure.

The term ‘independence’ is intended to distinguish third party monitoring from audits that a company may conduct or commission itself, and was considered one of the advantages of MSIs when they first emerged. SAI and WRAP require suppliers to pay auditors directly, thus leading to a relationship of financial control (SAI n.d.4; WRAP n.d.2). In contrast, the FLA and Fair Wear pay auditors from funds contributed by member companies (Fair Wear 2020b; FLA 2021). This funding structure, combined with the fact that it is the FLA and Fair Wear that engage and select auditors (as opposed to SAI and WRAP where buyers themselves select the auditor) arguably goes some way towards ameliorating a direct conflict of interest.
Nonetheless, when the party conducting audits relies on those commissioning its services for its profits, a relationship of dependence arises. Social auditing has become a multi-billion dollar industry, with an estimated annual value of up to $50 billion (LeBaron et al. 2017, 8). Even with indirect funding structures in place (such as at FLA and Fair Wear), there remains a real question as to whether social auditors, who rely on the repeat business of suppliers, buyers and MSIs to remain profitable, are too financially compromised to adopt a rigorous and critical approach (MSI Integrity 2020, 134).

Apparel MSIs have also, on the whole, not sufficiently addressed the issue of appropriate experience. Critics argue that the auditing industry has become a professionalised, commercial endeavour, taken over by social compliance firms with backgrounds in management and business rather than workplace relations, labour and human rights (Anner 2008; LeBaron & Lister 2016). Further, as highlighted by an independent expert, a thorough audit requires a broad range of expertise unlikely to be held by one individual:

So with social auditing it's hard to get, especially with the pricing model, let alone the quality or lack of quality of auditors, to find people who really are able to be expert in all the things and do a credible audit around that. (Independent Expert 30 Interview).

Apparel MSIs do not use large accounting and auditing firms, which had originally emerged as major players in the social audit industry (O'Rourke 2002). However they still predominantly, if not exclusively, accredit only professional social compliance, general auditing or CSR firms, rather than NGOs or labour rights organisations, let alone trade unions.

For example, both WRAP and SAI accredited auditors are predominantly major global social compliance and auditing firms such as SGS, Bureau Veritas, Intertek, BSI, TUV Nord Group and TUV Sud Group (SAI n.d.5; WRAP n.d.5). Chris Harrop of Marshalls (an ETI company member) expressed doubt about the value of these large auditing companies:

... sending SGS or Veritas to do an audit is pointless really. It will be prepared with all the right processes and all the right forms will be in place but we won’t learn anything. (Harrop Interview).

Brian Finnegan of the American Federation of Labor-Congress of Industrial Organizations (AFL-CIO) went even further, arguing that the existence of such firms poses an obstacle to local reform:

... the model of - whether it's UL in the United States or SGS or Intertek or all of those companies - that is not going to produce the answer and they have a disincentive to see the national laws and the enforcement of labour inspectors happen because that's where their 80 billion dollars a year comes from, the failure of those countries to be able to have a functioning labour inspector. (Finnegan Interview).
In contrast, the FLA accredits smaller social compliance firms, mostly locally based, as well as individual freelance auditors and some of its own internal staff (FLA n.d.2). Yet these still tend to be compliance and auditing professionals as opposed to labour rights experts. Fair Wear adopts the most advanced approach. It acknowledges that social audit requires a diversity of skills and expertise. Rather than relying on one auditor, it recruits and trains (predominantly) local audit teams, which between them, must have sufficient expertise to interview management, interview workers, review documents related to the business, and to conduct occupational health and safety inspections (Fair Wear 2012). This diversification goes a step further than other Apparel MSIs in addressing concerns around expertise.

This thesis did not uncover direct evidence as to why most Apparel MSIs do not engage human rights and labour rights experts such as trade unions or NGOs to undertake social auditing. One reason may be that NGOs and trade unions do not necessarily have all the relevant expertise to conduct audits (such as knowledge of accounting and payroll functions, human resources management, engineering and occupational health and safety issues). A more pertinent reason may be that civil society itself is unwilling to participate in a practice that it is highly critical of. As noted by Owen Tudor of the Trades Union Congress (an ETI member), trade unions believe that it is trade unionism and not social audit that is best positioned to uncover violations:

> What we argue with audit companies that trade unionism presents is we're there all day everyday inside the factory. You cannot hide bad behaviour from the workforce itself … (Tudor Interview).

Based on the above, this thesis argues that the monitoring undertaken by most Apparel MSIs is not sufficiently independent of the financial interests of buyers and suppliers. Nor is it conducted by individuals with sufficient labour rights expertise. As argued in Chapters 7 and 8, it is only when workers, local stakeholders and local experts are meaningfully incorporated that monitoring can be said to be independent.

5.2.2.5 Audits are not transparent

Another significant issue relates to the transparency and accountability of audits. Audit disclosure can enhance compliance by allowing external actors (such as unions and NGOs) to perform ‘watchdog’ functions and monitor audit results (Utting 2002; Ruggie 2007). At present, only the FLA publishes its audit reports. A lack of transparency renders stakeholders unable to assess the basis on which certification was granted.

5.2.2.6 Audits do not pick up unauthorised subcontractors

Unauthorised subcontractors and temporary workers are usually not picked up by social audit at all (Barrientos & Smith 2007). As pointed out in Chapter 2, these are some of the most vulnerable workers within the supply chain. Of the Apparel MSIs, only Fair Wear explicitly includes subcontractors within its auditing process (Fair Wear 2012). However because of the
lack of transparency around audits, it is unclear the extent to which unauthorised subcontracted facilities are monitored in practice.

5.2.3 Broader structural limitations

The previous section established that Apparel MSIs have not comprehensively overcome the inherent limitations of social audit. Even if this were the case, and Apparel MSIs managed to undertake social audit in a perfect matter, existing evidence indicates that social audit is simply not a powerful enough tool to protect the human rights of workers (Jørgensen et al. 2003, 30; Locke et al. 2009). In the words of Owen Tudor of the Trades Union Congress:

... it's an external fix that you're trying to lay on a fundamentally broken system and generally speaking it does not work because it doesn't lead to sustainable long-term changes in behaviour or activities or values ... I mean that as I say were auditing done perfectly and brilliantly and well and so on. (Tudor Interview).

As highlighted by researchers and activists, this is largely because factory conditions do not arise in a vacuum, and broader structural conditions must also be addressed (Barrientos & Smith 2007). This thesis identifies two particularly significant structural issues that social audit completely fails to address.

First, buyers and suppliers interact within the confines of a broader business model, marked by incentives, power, and ultimately, the pursuit of profit (Utting 2014). These conditions give rise to poor purchasing practices, which, as demonstrated in Chapter 2, have a significant impact on workers’ rights. Second, supply chains operate within complex domestic contexts. Enabling rights, including the right to freedom of association, depend on local social and political conditions.

The significance of purchasing practices and freedom of association is supported by a majority of interviewees, who identified either one, or both, as critical issues that buyers and MSIs must address. It is also consistent with an independent assessment of the ETI, in which member companies recognised that more meaningful change required addressing both purchasing practices and restrictions on freedom of association (IOD Parc 2015).

5.2.3.1 Purchasing practices

Chapter 2 demonstrated how the poor purchasing practices of buyers – short lead times, poor planning, inaccurate technical specifications, last minute changes, late orders and low prices - have a significant impact on the conditions faced by workers. Chapter 2 argued that these purchasing practices stem principally from competitive market pressures and the power imbalance between buyers and suppliers. Social audit, with its focus on suppliers, is simply not designed to address these dynamics.
Poor purchasing practices undermine a suppliers’ ability to implement appropriate standards and improve working conditions. Chapter 3, section 3.3.2 introduced Baldwin and Black’s concept of ‘really’ responsive regulation, which argues that a responsive regulator should consider not only the compliance efforts of individual firms, but the context in which regulatees operate, and the competing considerations which may impact upon their ability to comply. Viewed from this theoretical perspective, purchasing practices create significant commercial pressures, which in turn reflect a competing priority that impacts the ability of suppliers to comply with human rights requirements. Independent expert Marsha Dickson of Better Buying pointed out this dynamic, arguing:

In some ways it's become a joke because you've got a company pushing on one side with purchasing practices and then they're auditing on the other and those are in conflict. (Dickson Interview).

Consequently, buyers must be compelled to look inwards, and address the human rights impacts of their own conduct and business models. Eighteen out of 33 interviewees (54%) highlighted purchasing practices as a critical issue that buyers must seriously address. For example, Nazma Akter, President of the Sommilito Garments Sramik Federation (a union based in Bangladesh, that is an FLA member) stated:

So I don't know, I don't much believe in [social audit]. Because if the company pays good money, good salary or the brand pays a fair price why you need the audit, you don't need this, because you are not paying, you are not serious about the workers' issues, that is why you are saying we are doing audit, we are doing that. You don't need this, just pay the workers and build their capacity for their rights and responsibilities. (Akter Interview).

Pham Tu Lan of the Institute for Workers and Trade Unions (Vietnam) argued:

We need the pressure from the buyer, we need the buyer to be more responsible to pay more for the labour cost to calculate the price so that it includes the labour cost. You need that, and you need commitment from the buyer ... (Lan Interview, emphasis added).

Pham Tu Lan raises a significant point. In addition to reflecting the commercial terms of engagement between buyers and suppliers (discussed in Chapter 2), purchasing practices also encompass the broader nature of the relationship between a buyer and supplier. This includes the extent to which buyers are willing to establish more long-term, committed relationships with their suppliers (Vaughan-Whitehead & Caro 2017; Better Buying 2018). Levels of buyer commitment are directly connected to their ability to influence supplier conduct, or in UNGP terms, to exercise leverage.

Underpinning the social audit model is the assumption that buyers have sufficient leverage to compel suppliers to comply with codes of conduct and improve working conditions, and further,
that they will exercise this leverage (Locke et al. 2009; Barrientos & Smith 2007). As noted in Chapter 4, section 4.4.2, the UNGPs expect companies to exercise, and where possible, increase leverage over their suppliers to prevent or mitigate human rights impacts.

The theory of power relations in buyer-driven supply chains discussed in Chapter 2 posits that buyers in apparel supply chains have the power to impose commercial terms on suppliers. This power imbalance drives the purchasing practices described in Chapter 2. By extension buyers should also have sufficient leverage to enforce compliance with codes of conduct (Locke et al. 2009; Distelhorst et al. 2015). Yet power relations are far more subtle in practice than theory suggests. Academic research indicates that the broader nature of the relationship between a buyer and supplier is also relevant when it comes to social compliance. In particular, a company is most likely to be able to exercise leverage when it constitutes a large proportion of a factory’s output, places regular orders, and has a long-term relationship with the supplier (Cooney 2005; Locke et al. 2009; Barrientos & Smith 2007; Locke 2013).

In the apparel sector, suppliers typically manufacture for a multitude of buyers, with even large brands sometimes only constituting a small proportion of a supplier’s total production (Barrientos & Smith 2007; Esbenshade 2012; Company 21 Interview). This, combined with short-term contracts and a lack of commitment by buyers gives buyers less leverage than theory would suggest in influencing a supplier’s code compliance (Locke et al. 2009; Locke 2013). As noted by Locke, Amengual and Mangla, these dynamics ‘challeng[e] the received wisdom that global brands, if only willing, are able to “force” their suppliers to comply with their codes of conduct’ (Locke et al 2009, 326). Other academics dispute this characterisation of power relations. For example, Anner, Bair and Blasi argue that the ability of buyers to dictate commercial terms remains the true indicator of power, and thus the onus is on buyers to take greater responsibility for social compliance (Anner et al. 2013).

This thesis agrees that power relations are not as clear-cut as the theory of buyer-driven supply chains suggests. It also argues that the dilution of buyer power is in large part caused by a factor that is within the control of the buyer itself: namely, its level of commitment to a supplier.

As noted in Chapter 2, supply chains in the apparel industry are still typically characterised by short-term, seasonal contracts, with buyers switching between producers based on price, quality and speed, rather than social compliance. Buyers also often send mixed messages to suppliers, as internal buying and social compliance teams are not co-ordinated and tend to impose differing requirements; although it is usually the buying team that makes the final decision. This dynamic can result in buyers pulling out of factories at small price margins, despite producers having made serious efforts to comply with codes of conduct (Raworth 2004, 37; Locke et al. 2009; ETI 2017; Starmanns 2017). This is a direct example of the internal division that can occur within a ‘node’ that on its face, appears unified (Chapter 3, section 3.4).
Conversely, buyers rarely switch suppliers on the basis of non-compliance with codes of conduct (ETI 2017a) and sourcing decisions remain predominantly motivated by commercial terms (Raworth 2004, 37; Locke et al. 2009; ETI 2016a). There is research indicating that some brands do reward suppliers for improvements in compliance through more orders or long-term relationships (Oka 2012; Distelhorst & Locke 2018). Yet for a majority of buyers, social compliance remains an afterthought, something that is considered subsequent to entering into a contract with a supplier, rather than a critical component of whether to do so in the first place, or whether to maintain a commercial relationship (Vaughan-Whitehead & Caro 2017, 10).

From a regulatory theory perspective, the threat of termination for poor compliance is a ‘benign big gun’ held by buyers applying the pyramid of sanctions, and the promise of more orders is a potential incentive along the ‘pyramid of supports’. However buyers must be willing to ‘escalate’ along these pyramids. A buyer is more likely to have greater leverage in respect of human rights standards if it remains committed to a supplier. In circumstances where suppliers are generally not rewarded for improved compliance, it is difficult to see how buyers can expect to exercise power or leverage in this regard.

The importance of commitment was highlighted by a number of interviewees. As noted above, it was raised by Pham Tu Lan of the Institute for Workers and Trade Unions (Vietnam). Similarly, an NGO representative noted:

… as an owner I’m willing to bring changes if I know that if I’m transparent and I bring those changes that this buyer will remain with me and this volume of business will remain with me for at least two to three years. So that level of commitment is very important to bring changes. So the first thing is there has to be a clear commitment from the buyer to remain in a country or in a factory or in a supply chain for a certain period of time. (NGO 12 Interview).

Locke and his colleagues suggest that the power of buyers to compel social compliance can be addressed by what they term ‘the commitment model’. This is in effect a form of capacity building, whereby buyers assist suppliers to improve social compliance through ‘joint problem solving, information sharing, and the diffusion of best practices’ (Locke et al. 2009, 321). A study of Nike’s efforts to train its suppliers in ‘lean manufacturing’ methods, which resulted in a 15% reduction in serious labour violations over three years, provides empirical support for this approach (Distelhorst et al. 2017). The authors argued that a ‘commitment’ or ‘capacity-building’ model, while not directly guaranteeing future orders, sends an implicit signal to the supplier that the buyer is taking a longer-term view of their business relationship. This is also consistent with two elements of responsive regulation: first, the pyramid of supports, which proposes that regulators should build the capacity of regulatees to comply; and second, the recognition that successful responsive regulation requires an ongoing relationship of understanding and trust (Chapter 3, section 3.2.2).
Evidence shows that this kind of commitment model is not widespread. According to the ILO, while more than 90% of suppliers (across sectors) were expected to follow a code of conduct, 49% of those did not receive any assistance with compliance (Vaughan-Whitehead & Caro 2017, 10). Better Buying has reported that more than 60% of apparel suppliers did not receive incentives (Better Buying 2019, 7). According to the ILO, of those suppliers (in the apparel sector) receiving assistance, a majority (58%) came in the form of training. Only 26% of suppliers reported buyers sharing audit costs and 12% received financial assistance (Vaughan-Whitehead & Caro 2017, 10).

Some major brands are beginning to directly address the issue of commitment. For example, Nike indicates that it works with ‘long-term, strategic suppliers’ (Nike 2019, 33). William Anderson of Adidas highlighted Adidas' consolidated supply chain and partnership approach to suppliers. He noted that this was generally more prevalent in the sporting goods sector, although increasingly fast fashion businesses were also adopting these models (Anderson Interview). H&M, one of the largest fast fashion players, reflects this strategic shift, as it now refers to building long-term partnerships with suppliers (H&M 2020, 9).

Independent expert Dorotheé Baumann-Pauly also noted the rise of the commitment, or partnership model:

There are sourcing models that are more compatible with human rights outcomes … So it’s a partnership approach where they commit from the beginning to work with a certain amount of suppliers for a longer period of time and they make up for that commitment where they maybe sometimes have to accept slightly higher prices by helping those suppliers to improve productivity and training them on human rights … and by sticking around longer the chances for establishing, that working conditions are much better. (Baumann-Pauly Interview).

Eight out of the eleven brands interviewed explicitly indicated that they had adopted more long-term relationships with their suppliers. These brands, as members of MSIs who were also willing to participate in interviews for the purpose of this research, are arguably a self-selecting group who represent some of the most advanced social practices in the industry. Overall, these kinds of developments still remain the exception rather than standard industry practice.

It should be acknowledged that greater commitment is only likely to act as a counterweight in the case of large buyers. Smaller buyers will most likely always struggle to maintain leverage over factories in which their orders constitute only a very small part. Research suggests that in this scenario, buyers are likely to have power over a supplier only where a critical mass combines forces and demands that their supplier complies with a code (Barrientos & Smith 2007; ETI 2015). One NGO representative and three small to medium sized brands explicitly noted the problem of leverage. One ETI company member commented:
... our volumes and our supply chains in terms of area that we cover and the number of suppliers is relatively small so when we encounter issues in the supply chain it's very difficult for us to actually have that leverage or be able to have enough information or intelligence or resources to tackle certain issues with regard to labour conditions and human rights. (Company 20 Interview).

In theory, MSIs have the ability to increase the leverage of its members, precisely because they represent a network of buyers. That is, ‘the more buying firms of a supplier participate in an MSI, the more this supplier will be asked to engage and comply with the same standards’ (Mena & Palazzo 2012, 541). This view was reflected in the experience of five interviewed company MSI members who reported positive outcomes from collaborating on activities such as audits, training, response to complaints, and follow-up on remediation. Kathmandu representative Gary Shaw cited an experience where brands across two MSIs had come together to total 95% of a supplier’s output, ‘and now suddenly we’re able to bring about a major shift in their mindset and have complete engagement and large investment in CSR and in their journey’ (Shaw Interview).

The extent to which MSIs directly facilitate collaboration and leverage among their membership base is unclear. Some companies indicated that their MSI did not explicitly do so, and that any collaboration was a result of the general networking opportunities presented by MSI membership. Further, the ability of MSIs to successfully utilise this dynamic depends on their level of coverage (Utting 2002; Mena & Palazzo 2012). Chapter 6 demonstrates that coverage remains a challenge for MSIs. In addition, as alluded to in section 5.2.2.3, the range and diversity of Apparel MSIs creates a fragmented system. This further limits the ability of buyers to co-ordinate their leveraging power (Clean Clothes Campaign 2009). As noted by an NGO representative:

... enough leverage is not there and because certain brands are members of MSIs, certain brands and trade unions are members of other MSIs, again there's a coordination issue. So for a factory they may be working for ten different brands, they're a member of five different MSIs, as a result they've got five different things hanging on their wall. Five different MSIs and brands are having five different programs in their factory ... (NGO 12 Interview).

A number of international frameworks now recognise that companies have a responsibility to assess the impact of, and take appropriate action in respect of, purchasing practices. The latest guidance to the UNGPs specifically states that ‘each business enterprise should ensure that its own practices, for example … irresponsible purchasing practices, or low-cost, fast-delivery business models, do not contribute to adverse human rights impacts caused by entities in the value chain’ (UN 2018a, para. 48). The OECD Apparel Guidelines provide that companies should assess whether their purchasing practices contribute to harm, and implement control measures and policies accordingly (OECD 2018, 45-46, 69-70).
Social audit, with its supplier focus, is clearly not capable of addressing these issues, nor was it ever designed to do so (Esbenshade 2012; ETI n.d.2). Ultimately, buyers must also come to the table, and be willing to factor in compliance into their own practices and business models. This includes assessing the impact of the commercial terms they offer to suppliers, adopting more committed partnerships with suppliers, and co-ordinating more with other buyers in order to improve their leverage. MSIs, as Baldwin and Black’s ‘really’ responsive regulators, must consider new strategies to foster such changes and adequately ‘respond to’ this critical industry context. Chapter 6, section 6.2 considers the extent to which MSIs have already begun to take steps in this direction. Chapter 8 recommends further action that Apparel MSIs should take.

5.2.3.2 Social audit is incapable of addressing broader systemic rights

As flagged in section 5.2.1 there is widespread consensus that social audit has had no impact on broader systemic rights such as freedom of association and non-discrimination. Chapter 2 argues that such rights (also termed ‘enabling’ or ‘process rights’) enable the negotiation and achievement of outcome rights, and are critical to improving working conditions and advancing worker empowerment and social justice. Yet these are complex, ‘less visible [and] more deeply embedded’ rights, which are not readily identified, let alone remediated by an overly technical checklist audit approach (Barrientos & Smith 2007, 725; see also Clean Clothes Campaign 2005; Locke et al 2009). As noted by an ETI company member:

I believe in the countries that we source from … there are systemic issues there, like gender discrimination and like lack of voice which will never ever be picked up in a social audit and I almost think we could get rid of social auditing and it wouldn't really change anything, we wouldn't be worse off, in fact we would be better off. We would have more time and more cash. (Company 21 Interview).

Of these complex rights, the right to freedom of association (and associated rights, including the right to join trade unions and the right to collective bargaining) is arguably the most critical, due to its role in enabling the negotiation and achievement of other rights. Six interviewees explicitly highlighted freedom of association as a critical issue that buyers needed to seriously address. In an independent assessment of the ETI, over 70% of member companies surveyed agreed that promoting freedom of association was the most sustainable means of promoting better working conditions in supply chains (IOD Parc 2015). Fair Wear and the ETI have also highlighted freedom of association as a critical challenge facing the apparel sector (ETI 2015; Fair Wear 2017a).

Social auditors are not adequately trained to identify complex rights such as freedom of association (Amengual 2010; Anner 2012). Even in cases where social audit does identify violations, remediation tends to be in the form of improved management policies and training programs. Such responses might be adequate for outcome rights. However, they are a wholly inadequate response to violations of enabling rights, which are inextricably intertwined with
underlying social and political conditions (Anner 2012; 2017). For example, in Bangladesh and India, violations are linked to systematic and deliberate attempts by political and financial elites to block union activity by employers (Berliner et al. 2015; ITUC 2019; 2021). In China and Vietnam, violations arise in the broader context of restrictive state laws (Appelbaum 2008; Anner 2017). Social audit fails to provide for adequate remediation of violations of rights that are rooted in such complex social and political conditions. As Gopinath Parakuni, the General Secretary of CiviDep India (an FLA NGO member) argued:

Social audits might be effective in dealing with non-compliance to physically verifiable aspects of production such as fire safety. However, when it comes to industrial relations and the various vulnerabilities of workers, audits have failed. (Parakuni Interview).

A majority of interviewees acknowledged that MSIs should not be expected to solve these complex, country specific, political problems on their own, and that the primary responsibility lay with host states. For example, independent expert Bennett Freeman argued:

There are limits by definition as to how much [private initiatives] can close those gaps and ultimately if you can’t do governance without government and you need a stronger government role, regulatory enforcement prosecution where necessary, other forms of remedy when necessary and that for this whole approach to work overall there needs to be a better balance between private and public action. (Freeman Interview).

Syed Sultan Uddin Ahmmed of the Bangladesh Institute of Labour Studies highlighted the need to invest in an industrial relations system, to stop police intervention and to review existing labour laws, noting that the international community could play a role in supporting such endeavours (Ahmmed Interview). This position is supported by the views of scholars and commentators (Vogel 2010; Locke 2013; McQuade 2020).

The international human rights system, governments, intergovernmental organisations, development agencies, trade unions and citizens all have a role to play in addressing these challenges. Apparel MSIs, as only one regulator among many (Chapter 4), cannot bear sole responsibility for these problems. Yet it is also somewhat disingenuous of Apparel MSIs to claim to promote freedom of association in their codes of conduct, and continue to rely on such an obviously inadequate tool as social audit. Apparel MSIs must develop new strategies to address these complex rights. As Chapter 6, section 6.2, demonstrates, some Apparel MSIs have begun taking steps in this direction. Chapters 7 and 8 consider whether these developments are sufficient, particularly in light of emerging private regulatory alternatives.

5.3 Should MSIs continue to rely on social audit?

Original research conducted for the purpose of this thesis confirms unanimous acknowledgment of the limitations of social audit among a range of MSI stakeholders. As the preceding section indicates, both the inherent, and broader, structural limitations of social audit raised in the
literature, were also explicitly canvassed by interviewees. Overall, all 33 interviewees agreed
that social audit was an imperfect and, at times, problematic tool. One quarter of interviewees
expressed the view that companies should cease social audit altogether. The remaining
interviewees considered that while social audit has its limitations, it nonetheless remains a
relevant tool in the overall social compliance toolbox. Interviewees in both camps highlighted
the role of social audit as a risk management tool. Those categorically against social audit
viewed it as a cynical exercise. Other interviewees argued that social audit’s risk assessment
function formed a necessary basis for corporate decision-making.

Only one company (an ETI member) argued that ‘we should stop auditing and really invest in
tackling root causes’ (Company 21 Interview). The other interviewees against social audit - one
independent expert, two NGOs and all unions - argued that companies embraced audit
precisely in order to avoid tackling complex issues on a deeper level. As stated by Aidan
McQuade of Anti-Slavery International (an ETI NGO member), ‘it’s about establishing plausible
deniability for business … Auditing is a way of showing they are doing something but without
changing any system’ (McQuade Interview). Similarly, Theresa Haas of the Worker-driven
Social Responsibility Network (WSRN) argued:

> … brands can claim in the face of information about abuses in their supply chain, they can claim
> that they have these social auditing programs in place. And that the abuse that has come to light
> was an aberration. You know they’ve been able to use these social auditing programs as an
> excuse to, to really deflect pressure away and protect their reputations. (Haas Interview).

These views reflect an overarching critique found in much of the literature, that social audit is
utilised to protect brand reputation, rather than advance workers’ rights (LeBaron et al. 2017;
Islam et al. 2018).

The remaining interviewees, including almost all 11 companies (save the ETI member noted
above) explicitly argued that companies still needed social audit. They accepted that an audit
was only a snapshot in time, that the process could be subject to fraud and depended on the
skill of the particular auditor, and that it would not uncover all problems in a factory. As noted by
one ETI company member:

> … social audit is only a drop in the ocean because we are well aware that a social audit is only a
> snapshot of a moment in time and the auditor might be looking at doing a tick box exercise and
> there are certain issues that the audit in-and-of-itself is not able to cover and also the audit is just
> as good as the auditor is. But there are other underlying issues that the audit doesn’t capture and
> … we’ll take the audit as one element of the puzzle. (Company 20 Interview).

However companies also emphasised that social audit performed the essential function of
providing a baseline understanding of the conditions in a factory, including ‘general company
data’ (Muth Interview) and ‘whether the suppliers … are adhering to legal strictures in their country’ (Company 22 Interview). Sandya Lang of Nudie Jeans indicated that they had considered doing away with audit, however ultimately could not, due to the need to be appraised of constantly changing circumstances (Lang Interview). All brands acknowledged that social audit was not capable of actually solving problems and improving factory conditions. Rather it was viewed as ‘a tool that's linked to management systems and guidance programs and to training’ (Anderson Interview), ‘the baseline from which a development and correction action program for the supplier needs to start’ (Company 23 Interview).

Many of these interviewees also pointed out that companies rely heavily on social audit as a risk assessment tool, and, without a viable alternative, are unlikely to stop the audit cycle any time soon. For example, the same ETI company member who considered that social audits should be stopped noted that:

... businesses are addicted to auditing because it gives a really simple overview of risk. So you can RAG [Red Amber Green] rate an audit ... and in a business that's a really valuable and easily understandable metric of risk. (Company 21 Interview).

Similarly, an independent expert (with experience working for both MSIs and brands), while accepting the cynical role of audit, argued that brands would continue to rely on it:

... the buyers continue to understand now that we need to audit these factories and so we're trapped ... So the auditing still remains a very important and even so more now, a tool for the brand and will continue to go on. Because that's how we measure risk and that's how we decide. (Independent Expert 29 Interview).

Another independent expert also highlighted that in addition to risk assessment, social audit was a necessary corporate tool for justifying business decisions, both internally and externally:

... [companies] need a mechanism, a tool in their relationship, in their contractual relationship with a supplier let alone if they're cascading it down through different tiers. They have to have a thing, they have to have an activity to start off with, because they need a paper trail, and they need a process to start the negotiation ... if you didn't have that, the company, the buyer has trouble having the first conversation with the supplier factory ... and you need that paper trail if you're going to use those contractual stipulations against the supplier, if you are going to actually cut off the relationship... (Independent Expert 30 Interview).

These comments raise an important point, namely, while social audit is no doubt seriously flawed, it also serves a necessary corporate function. It allows companies to form a baseline assessment of supplier conditions, and is the tool by which companies assess risk and justify corporate decision-making. Accordingly, it may be unrealistic to expect companies to altogether
stop social audit soon. The question here is whether, given all the problems discussed in this chapter, it is appropriate for MSIs to continue to rely on social audit as a compliance tool.

Apparel MSIs are not subject to the same corporate pressures as buyers. They are not required to justify commercial decisions based on risk, nor do they need a tool to mediate relations with suppliers. Rather, the role of Apparel MSIs is to improve human rights outcomes for workers by regulating the conduct of its corporate members. This chapter has established that social audit is an entirely inadequate form of regulation. Representatives of the ETI and the Clean Clothes Campaign argued that companies needed to embrace a holistic due diligence process, guided by the UNGPs. The Executive Director of the ETI, Peter McAllister in advocating for such an approach, argued that it was not just social audit, but the entire premise of compliance underpinning it that was problematic:

… compliance is a flawed paradigm. Yet it's a multi-hundred million dollar industry, in which people are still trying to sharpen the tools with the hope that if we just sharpen the tools better they would work. Well we think that audit in and of itself is not a bad thing, if it's done skilfully and appropriately. It's the compliance approach which is in fact the flaw in the system … the attitude towards suppliers. If you speak to suppliers they'll say I've had 40 audits this year and each will come up with different corrective actions … We've created this dynamic as somebody described the other day, a supplier said we've created this monster together. I think it's a common weakness that for many years we thought that a compliance approach was the right paradigm. Recognising the flaws in this approach is why we at ETI moved to the UN Guiding Principles as a framework, trying to shift the paradigm much more to due diligence and engagement and action built on a partnership throughout the supply chain. (McAllister Interview).

This thesis agrees with, and adopts, these views. The purpose of MSIs is to hold corporations to account in their efforts to improve conditions for workers in their supply chains, and to also be best practice leaders in the field. Further, unlike corporations, MSIs are subject to legitimacy claims. Chapter 6 argues that continued reliance on a largely discredited tool severely limits the ability of MSIs to claim such legitimacy. Chapters 7 and 8 consider new strategies and approaches to move beyond audit and bolster MSI legitimacy.

Conclusion

This chapter classified the Apparel MSIs according to the typology set out in Chapter 2. The SLCP, SAC, Dutch Agreement and German Partnership are Learning MSIs; SAI and WRAP are Certification MSIs; and the FLA, Fair Wear and ETI29 are Governance MSIs.

This chapter then considered how the Governance and Certification MSIs function, revealing that social audit is central to how each of these MSIs (save the ETI) perform their regulatory compliance function.

29 Noting that the ETI is a mix of both the Learning and Governance model.
It is now widely accepted by a range of stakeholders that social audit, is, in and of itself, not capable of delivering widespread and sustained human rights improvements in global apparel supply chains. First, there are a number of inherent problems in the manner in which social audit is conducted. These include superficial inspections, a failure to meaningfully include workers and civil society, fraud and audit fatigue. A lack of independence and appropriate auditor expertise, insufficient transparency and non-recognition of unauthorised subcontractors and temporary workers furthers the critique.

Second, social audit is not capable of addressing the broader context of the structural and power relations within which global apparel supply chains sit. Audit does not address the underlying business model and purchasing practices of buyers, which limit the ability of suppliers to provide an adequate environment for workers. Audit is also incapable of addressing complex systemic rights, which are connected to the broader social and political context in which production occurs. Finally, social audit reflects an outdated ‘compliance mentality’ imposed by buyers on suppliers.

Original research undertaken for the purpose of this thesis reinforces these critiques. All 33 interviewees agreed that social audit was an imperfect and problematic tool. All raised both the inherent, and broader, structural limitations of social audit canvassed in the literature. The interviewees also added nuance to this literature. First, they provided an alternative narrative to the view that companies undertake social audit purely as a cynical, reputation saving exercise. Instead, company interviewees were aware that social audit must be complemented by a range of other tools and approaches. Second, they highlighted the importance of social audit to the fulfilment of basic corporate functions.

Accordingly, the argument in this chapter acknowledges that it may not be realistic for companies to cease social audit at present. However, MSIs perform a substantially different function to companies. Their purpose is to regulate the human rights impacts of their member companies. Where social audit has proved itself wholly inadequate, this chapter has argued that MSIs should cease conducting social audit. This is reinforced by Chapter 6, which demonstrates that reliance on social audit has significant implications for the legitimacy of Apparel MSIs.
Chapter 6  The legitimacy of apparel multi-stakeholder initiatives

Introduction

This chapter analyses the legitimacy of those Apparel MSIs that perform a regulatory function. It demonstrates that Apparel MSIs face a number of critical legitimacy challenges, including their ongoing reliance on social audit as a primary regulatory technique. This legitimacy analysis directly supports the overarching argument of this thesis, which is that Apparel MSIs must adopt new regulatory approaches in order to preserve their legitimacy. It also provides the foundation for the recommendations for reform set out in Chapter 8.

As set out in Chapter 3, section 3.1, from a political theory perspective, MSIs must establish legitimacy in order to justify their assumption of regulatory functions beyond the state. The concept of legitimacy encompasses both a normative and sociological dimension. This chapter further expands on Chapter 3 by setting out, and applying, the key normative legitimacy criteria to those Apparel MSIs that perform a regulatory function (Chapter 5, section 5.1.3). The analysis of the extent to which Apparel MSIs meet these normative criteria draws on key critiques from literature and civil society, as well as the empirical investigations undertaken for this thesis. The analysis considers the full range of legitimacy concerns, but with a particular emphasis on the legitimacy implications of the continued reliance by MSIs on social audit. This chapter also assesses the overall sociological legitimacy of MSIs, based on the author’s original empirical research and key civil society critiques.

Based on the normative and sociological assessment combined, this chapter argues that those Apparel MSIs adopting the Certification MSI model (Certification Apparel MSIs) are not a legitimate form of regulation, whereas those Apparel MSIs adopting the Governance MSI model (Governance Apparel MSIs) are. Nonetheless, Governance Apparel MSIs must urgently address the major legitimacy critiques levelled against them. Central to these critiques is the allegation that MSIs are more of a public relations exercise than a tool for corporate accountability. Designed to fill the gap left by more traditional forms of oversight such as state regulation and union activities, the most vocal critics of MSIs argue that they take up valuable political space and resources which could otherwise be devoted to more radical and effective solutions (Justice 2002; Seidman 2007; Anner 2012; AFL-CIO 2013; MSI Integrity 2020). Governance Apparel MSIs must also contend with emerging models of private regulation, which critics point to as a more promising and legitimate form of private regulation.

6.1 Normative criteria for MSI legitimacy

As outlined in Chapter 3, according to democratic political theory, MSIs that perform a regulatory function must establish legitimacy in order to justify their claim to regulate. Chapter 5 determined that of the nine Apparel MSIs identified by this thesis, only five can be said to be
truly performing a regulatory function. These five MSIs - FLA, ETI, Fair Wear, SAI and WRAP – will be subject to a detailed legitimacy analysis in this Chapter. This section outlines the most salient normative legitimacy criteria for the purpose of this analysis.

6.1.1 Input (or governance) legitimacy

Input legitimacy is concerned with the extent to which an MSI is perceived as justified and credible, in light of its procedures and governance structures. The focus of input legitimacy is on procedure rather than outcome. Input legitimacy is inherently linked to the concept of accountability (Dingwerth 2007; Hachez & Wouters 2011). The critical questions that then follow are: accountable to whom - that is, who is the relevant public? Accountable how - what does it actually mean to be accountable?

In considering the question of the relevant public, some distinguish between internal and external accountability (Risse 2006; Beisheim & Dingwerth 2008). Internal accountability has been defined as the ‘authorization and support by principals to agents within an institution’ (Beisheim & Dingwerth 2008, 15). In the context of MSIs, this entails participating companies and civil society accepting the authority of the MSI (Mena & Palazzo 2012). External accountability refers to accountability to people or groups outside the acting entity who are nevertheless affected by it, for example workers, suppliers (to the extent that they are not MSI members), NGOs, trade unions and consumers (Risse 2006; Beisheim & Dingwerth 2008; Mena & Palazzo 2012). Together, both the internal and external audience comprise the relevant ‘community’ or ‘stakeholders’ of the MSI. An alternative approach, is to simply consider the circle of persons that are affected – directly and indirectly - by the particular issue and its regulation (Risse 2006; Fuchs et al. 2009; Hachez & Wouters 2011; Kalfagianni & Pattberg 2013). Both internal and external stakeholders were interviewed for the purpose of this thesis.

As to the actual substance of accountability and governance legitimacy, while there are variations and nuances, the three most critical normative criteria emerging from the literature are: (1) inclusion and participation; (2) transparency; and (3) the extent of control exerted by relevant stakeholders (Beisheim & Dingwerth 2008; Fuchs et al. 2009; Mena & Palazzo 2012; Boström & Hallström 2013).

This thesis defines inclusion and participation to include both the range of stakeholders that participate in MSIs, as well as the quality of their participation.30 As stated above, relevant stakeholders are generally acknowledged as being those that are ‘affected’ by the MSI, either directly or indirectly. It is argued that when stakeholders participate in the process of MSI rule-making, the sense of ‘ownership’ generated means that they are more likely to accept policies and outcomes that they do not necessarily agree with. The broader the range of stakeholders that are included, the greater legitimacy is likely to be (Beisheim & Dingwerth 2008). However,

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30 Some scholars identify matters such as procedural fairness, and consensual and deliberative processes (which go to the quality of participation) as separate criteria (Mena & Palazzo 2012).
the question of who constitutes a relevant stakeholder, and who is ultimately included is often a highly contentious issue (Risse 2006; Bernstein 2011). This thesis contends that in the MSI context, corporations (including buyers and suppliers within the targeted industry or sector), workers, NGOs, trade unions, governments, local communities, consumers and investors are all potentially relevant stakeholders.

Transparency refers to the extent to which an MSI provides timely and relevant information on its governance and activities (Fuchs et al. 2009; Hachez & Wouters 2011; Mena & Palazzo 2012). This can include providing reasons for, or at least, explaining its decisions (Hachez & Wouters 2011). Transparency is a crucial element of input legitimacy, as it enhances public scrutiny and visibility and thus enables accountability (Beisheim & Dingwerth 2008; Fuchs et al. 2009). Transparency also allows stakeholders to engage with, assess and respond to the results of MSI activities (Utting 2012; Fuchs et al. 2009). For example, increased transparency allows stakeholders to evaluate and compare the performance of different brands (or factories) and different monitoring methods (O’Rourke 2003). Transparency also enables external actors to take on a watchdog function, or to ‘name and shame’ those not complying with MSI standards (Beisheim & Dingwerth 2008). Transparency should also allow the stakeholders to assess the performance of the MSI itself, which is a component of control.

Control refers to the extent to which relevant stakeholders - those affected by the MSI - are able to exert control over its performance, and where needed, impose sanctions (Dingwerth 2007, 29-30; Hachez & Wouters 2011). The quality of participation and transparency, which are significant elements of accountability, are rendered meaningless if there is no means of imposing consequences for poor performance (Curtin & Senden 2011; Van Heerden 2016). It has been suggested by some that control should be ‘democratic’, meaning that individuals or groups that may legitimately hold decision-makers accountable have equal access to the mechanisms of control (Dingwerth 2007, 29-30). Yet the degree of control exercised by internal stakeholders (members) will almost always be greater than that exercised by external stakeholders (relevant affected parties who do not form part of the membership base). In addition to control in respect of members (or target regulatees), there is a second type of control to consider: the extent of control over the performance of the MSI itself. This secondary form of control requires an MSI to provide aggregate information and undertake or commission impact assessments to appraise the extent to which the MSI is achieving its own aims (Van Hujistee 2012).

Scholars argue that these three factors allow MSIs to both sufficiently take into account and also render account to the relevant identified public. There is also a fourth factor, which although not often referred to in the literature, is critical to both the actual and perceived input legitimacy of MSIs: source of funding. Funding is clearly relevant to the question of MSI independence, for an MSI heavily funded by corporate interests is at greater risk of corporate
capture. Even if corporate funding does not in fact impact the activities and outcomes of an MSI, it will, at a minimum affect the extent to which it is perceived by stakeholders (particularly external) as justified and credible (Backstrand 2006; Mena & Palazzo 2012). On this basis, and in light of original empirical research undertaken by the author (discussed below), this thesis posits that funding should be included as a fourth essential element of input legitimacy.

### 6.1.2 Output (or effectiveness) legitimacy

Output legitimacy raises the question of whether an MSI is actually achieving its aim; that is, is it improving the human rights situation it was designed to address? (Bäckstrand 2006; Mena & Palazzo 2012; Kalfagianni & Pattberg 2013).

MSIs, while making broad claims about improving human rights outcomes for workers rarely quantify or publish their actual impact. That is, they do not have rigorous secondary control mechanisms. As demonstrated in section 6.2, this places a significant limit on the ability of an MSI to establish legitimacy. Given the lack of data, and the uncertainties associated with attributing improvements to the specific efforts of one institution, to date, scholars have instead focused their attention on the extent to which MSIs guide or improve the conduct of rule addressees (Beisheim & Dingwerth 2008). This question is answered by looking at the following three major criteria: (1) the level of coverage of the MSI; (2) the efficacy of its rules; and (3) the extent to which such rules are monitored and enforced (Mena & Palazzo 2012; Kalfagianni & Pattberg 2013).

Coverage reflects the extent to which the standards developed by an organisation are adopted by the intended target group. In the case of Governance Apparel MSIs, the target group is predominantly buyers. In the case of Certification Apparel MSIs, suppliers are the target. In circumstances where MSI rules only apply to the companies that wish to join them, a high level of coverage becomes a significant component of effectiveness (Kalfagianni & Pattberg 2014). As MSIs achieve greater levels of coverage, the more they will attract other companies, as non-participation may increasingly be seen as a competitive disadvantage. In this regard, the participation of well-known brands is significant, as ‘such peer pressure and leadership may then be effective in shaping broader corporate approaches to human rights’ (Baumann-Pauly et al. 2017, 785).

Rule efficacy has been defined as ‘the extent to which the rules fit the problem at hand, and are relevant for solving it effectively’ (Mena & Palazzo 2012, 541). Rules may not be effective for a range of reasons, including that they are not adequately designed, that they create negative externalities, or they do not impose sufficiently rigorous standards. Standards have been described as being rigorous when they include both performance and management indicators, and the targets are detailed and can be considered ambitious (Mena & Palazzo 2012; Kalfagianni & Pattberg 2013).
The critical output or performance legitimacy issue facing Apparel MSIs is not whether the standards are appropriate, but rather their ability to ensure that the rules they establish are followed and applied in practice (Mena & Palazzo 2012; Baumann-Pauly et al 2017). This is the third component of output legitimacy and is recognised as ‘probably the most important organizational challenge for MSIs’ (Mena & Palazzo 2012, 542). This thesis refers to this concept as ‘rule implementation’. As argued in section 6.2.2, an MSI’s ability to ensure rule implementation is directly linked to the rigour of its control mechanisms.

6.2 The normative legitimacy of Apparel MSIs

The preceding section outlined seven critical elements of legitimacy (constituted by both input and output legitimacy): inclusion and participation; transparency; the extent of control exerted by relevant stakeholders; funding; coverage; efficacy of rules; and the extent to which such rules are implemented. This section assesses the legitimacy of Apparel MSIs in light of these criteria. The analysis brings into particular focus the legitimacy implications of a continued over-reliance on social audit. It also highlights the very different legitimacy outcomes for Certification and Governance Apparel MSIs. The order in which the criteria are considered reflects their interconnected nature.

6.2.1 Rule efficacy

As noted in section 6.1.2, rule efficacy is concerned with the extent to which the rules promulgated by the MSI are appropriate and relevant to solving the problem in question. Both Certification and Governance Apparel MSIs perform reasonably well on rule efficacy. As stated in Chapter 5, section 5.1.3.2, Apparel MSIs codes converge on international human rights norms and the fundamental ILO Conventions. Each of these MSIs have also developed their own comprehensive performance and management indicators. Given these two factors - the reliance on international law combined with detailed guidance on performance – it can be said that Apparel MSIs satisfy rule efficacy. Notably, none of the interviewees raised the content of rules as an issue or challenge for MSIs, and a number of interviewees acknowledged the important role that MSIs had played, both in creating uniformity of rules, and in continuously updating them to ensure their ongoing relevance (Cahn Interview; Anderson Interview).

6.2.2 Inclusion and participation

Participation is determined by considering the extent to which stakeholders that are both directly and indirectly affected by the MSI are represented within the governance structure (Fuchs et al. 2009; Mena & Palazzo 2012; Kalfagianni & Pattberg 2013). It is also important to ask how relevant are the stakeholders that have been included, and ‘how convincing is the actual choice in light of [possible] alternatives?’ (Dingwerth 2007, 28). In addition, the quality of participation must also be considered. Here, the question is how those who are included in the decision-making process actually participate and are able to influence the process (Mena & Palazzo 2012; Kalfagianni & Pattberg 2013). In particular, stakeholders should be fairly and equally represented and ideally, have the opportunity to engage in deliberative processes and influence
the decisions being made (Beisheim & Dingwerth 2008; Hachez & Wouters 2011; Kalfagianni & Pattberg 2013; Boström & Hallström 2013). Drawing on the Habermasian framework of discourse ethics, Gilbert and Rasche argue that stakeholder engagement and dialogue must be fair and inclusive such that all relevant stakeholders have the opportunity to participate (Gilbert & Rasche 2007). The extent to which an MSI promotes deliberation and a ‘consensual orientation’ also reflects the quality of participation (Dingwerth 2007; Mena & Palazzo 2012).

As already shown in Chapter 5, section 5.1.1, the Certification Apparel MSIs do not formally incorporate diverse stakeholder interests into their governance structure. Accordingly, they do not meet even the most basic criteria of participation. From a responsive regulation perspective, they have failed to enrol a sufficiently broad spectrum of relevant stakeholders.

In contrast, the three Governance Apparel MSIs each formally allocate board positions to different stakeholders. Nonetheless critics argue that the breadth of stakeholders is not sufficiently representative, that unions and NGOs do not hold a sufficient balance of power, and that these MSIs are not representative of or accountable to workers (Anner 2012; AFL-CIO 2013; Sethi & Rovenpor 2016).

The most inclusive models are those of the ETI and Fair Wear, whose governing boards are based on a tripartite structure, allocating seats to unions, NGOs and corporate members. Further, the NGO and union board members are directly relevant to the regulation of global supply chains. NGO members include Oxfam and Anti-Slavery International at ETI and the Clean Clothes Campaign at Fair Wear, all highly respected NGOs that work on business and human rights and supply chain issues. Trade union members include global trade unions such as the International Trade Union Confederation and Trades Union Congress at ETI and major Dutch unions at Fair Wear.

The FLA also utilises a tripartite board structure, with corporate members, universities and NGOs represented in equal proportions. However, it has historically been criticised for insufficient representation, due to the lack of union involvement, and an NGO base lacking expertise directly relevant to supply chain and labour rights issues (AFL-CIO 2013; Sethi & Rovenpor 2016). FLA members took differing views on the implications of an insufficiently diverse membership base. Gopinath Parakuni of CiviDep India argued that the absence of major trade unions on the board was a ‘major flaw in the stakeholder structure of FLA’ (Parakuni Interview). In contrast Adidas representative William Anderson considered that on a practical level, the lack of union representation made little difference, as the FLA always sought to partner with unions in the development of individual program and projects on the ground (Anderson Interview).
The FLA is cognisant of the issue of participation, and one of its current strategic goals is to ‘create more opportunities for civil society organizations – both affiliated and nonaffiliated – to contribute meaningfully to the FLA’s work’ (FLA 2018a, 3). In recent years, it has made some advances by expanding its civil society base to include two host state trade unions: Sommilito Garments Sramik Federation, one of the largest unions in the Bangladesh ready-made sector (representing over 100,000 workers) and Teksif union which represents close to 50,000 textile and garment workers in Turkey. The FLA now also includes among its membership base, NGOs with direct expertise in business and human rights issues such as CiviDep India and the International Corporate Accountability Roundtable.

It is beyond the scope of this thesis to consider the precise nature of deliberation and decision-making. Some argue that the very fact of a diverse board provides some indication of the scope and quality of participation. The equal allocation of seats between key stakeholders may ‘neutralise’ power relations, reflecting some degree of procedural fairness (Mena & Palazzo 2012, 539). Even where there is equal representation on a superficial level, the reality of resource asymmetries between corporate and civil society participants poses a significant challenge to the influence of civil society. Most NGOs and trade unions – which cover a number of different issues and organisations - do not have sufficient resources to deeply engage with MSIs (Fuchs et al. 2009; Take 2012; Baumann-Pauly et al. 2017). Involvement at governance level is process-heavy, and even attending and preparing for regular meetings can be a significant drain on resources. This can detract from the ability of civil society to actually perform a substantive watchdog function. Further, while civil society may internally advocate for changes, the governance and funding structures of MSIs (discussed below) tend to mean that corporate members must also agree to them (MSI Integrity 2020, 74-79). As argued by MSI Integrity these ‘resourcing and capacity constraints severely undermine [civil society’s] ability to engage as equal partners and effect change’ (MSI Integrity 2020, 74).

These concerns are exacerbated when considering the ability of local civil society to participate, which is another critical component of inclusion and participation (Utting 2002; Fransen & Kolk 2007). To date, the Governance Apparel MSIs remain dominated by northern NGOs. Only the FLA has incorporated local civil society within its governance structures or membership base, with the recent inclusion of CiviDep India, Sommilito Garments Sramik Federation and Teksif. Lack of resources and expertise and local pressures (including from government and/or business) may explain the limited level of local participation (Van Huijstee 2012; MSI Integrity 2020, 74-75). One NGO representative noted:

… at a global level yes if you look at the structure they're generally very impressive but when it comes down to the country level and at the sector level that is where the problem starts because

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31 Given that this information is not publicly available, it would require detailed empirical inquiry on this specific topic.
that is where there is a lack of representation a lack of access or a lack of empowerment of the different stakeholders … (NGO 12 Interview).

Brian Finnegan of the AFL-CIO highlighted how the MSI structure itself inhibits effective participation by local stakeholders:

… of course it doesn't work for them, they don't have the capacity, they don't have the money, they don't have the language, they can't travel to New York or wherever the place is. It's just not really fit for them to participate, that is for the actual workers and communities. It's a cultural gap in addition to everything else … (Finnegan Interview).

The lack of local civil society representation is particularly problematic given that workers themselves are almost completely excluded from Governance Apparel MSIs, and northern NGOs and trade unions do not have the mandate to represent the views and interests of workers in the global south (MSI Integrity 2020, 71). They are not part of governance structures at all, and are only perfunctorily included in oversight processes. At best, they are interviewed as part of the social audit and/or have access to a complaints mechanism. They do not have the power to, among other things, comment on inspection reports, engage in structured dialogue with buyers and suppliers, or provide input into appropriate remedies.

The failure to include workers is a major limitation of MSIs. This concern was directly raised by a number of interviewees. For example, independent expert Dough Cahn, an independent CSR consultant and co-founder of Better Buying who previously served as an FLA board member, argued that the inclusion of worker voice was one of two ‘fundamentally underserved areas of activity’ among MSIs (Cahn Interview). Another independent expert referred to the need to ‘get more and better data from workers themselves’ (Independent Expert 30 Interview).

Worker voice and representation lies at the very heart of the worker-driven social responsibility model introduced in Chapter 4, section 4.1.3. Civil society advocates argue that for private regulation to be legitimate and effective, workers and/or their representatives must, at a minimum, be included in governance structures and inspection processes. Chapter 7 will explore the role of workers in these initiatives. Chapter 8 will consider the extent to which MSIs might learn from this approach.

At a broader level, it is argued that actors from developing countries must be included in order to accurately reflect structural and developmental concerns, such as who should bear the cost of improving labour conditions, and the impact of purchasing practices (Utting 2002; Bernstein 2011). Some Apparel MSIs have made at least some improvements in this regard. The FLA currently includes nine supplier members from the apparel sector, one of which sits on the FLA Board as a corporate member. The FLA does not allocate separate seats for suppliers as a stakeholder group. Similar to its corporate buyer members, the FLA conducts social audits of
supplier member factories and also accredits their social compliance programs at headquarter level. The ETI in its recent strategy paper also indicated that membership would be diversified to represent suppliers, manufacturers and producers (ETI 2015), however the ETI does not appear to have welcomed any supplier members as of yet. Fair Wear is piloting a factory membership with a small number of factories who already supply Fair Wear member brands (Fair Wear n.d.1.). Fair Wear’s Board also currently includes a representative of a European based trade association for manufacturers and suppliers MODINT. This is commendable, however representation must expand to supplier associations in host states.

From a responsive regulation perspective, Governance Apparel MSIs have enrolled relevant stakeholders or nodes, to some degree. Nonetheless civil society, and in particular local civil society, is not sufficiently resourced to effectively participate. Further, suppliers have not been granted a sufficiently strong voice, and workers are not included at all. Chapter 8 recommends how Apparel MSIs might better enrol the power of these stakeholders.

6.2.3 Funding

Weak inclusion of civil society and workers is exacerbated by the source of MSI funding. Clearly, the more reliant on corporate membership fees an MSI is, the greater the risk of corporate capture. Sethi & Rovenpor (2016, 16) argue that MSIs reliant on corporate funding ‘cannot afford to be overly rigorous in their monitoring and auditing activities out of fear of alienating the very executives who help pay for their services.’ Corporate funding may not automatically give rise to actual bias of this kind, yet it may lead to more subtle effects. Anner (2012) argues that it may influence strategic priorities and promote solutions that focus more on management control rather than worker empowerment, which is seen as being inconsistent with corporate interests. Similarly, it could also limit the willingness of MSIs to move beyond social audit and challenge the existing business models of their membership base.

Certification Apparel MSIs obtain their revenue almost exclusively from fees paid by corporations for the provision of services. In 2019, WRAP derived 99% of its income from audit and certification activities (WRAP 2019). In the same year, SAI derived 79% of income from ‘training, standards and impacts and capacity building’ (the remainder coming from royalties and grants) (SAI 2019).

Governance Apparel MSIs also rely on corporate funding. Although it was initiated with the assistance of public funding, the FLA now relies predominantly on corporate revenues. In 2019, the FLA derived 82% of its revenue from membership fees, monitoring fees and special projects (the remainder came from grants and miscellaneous items) (FLA 2019a). Fair Wear and the ETI rely less on corporate donations, as they receive significant government funding. In 2019, Fair Wear derived only 22% of revenue from corporate member contributions and fees for audits, with 78% of revenue coming from government subsidies (Fair Wear 2020c). At ETI, in 2019, approximately 40% of revenue was derived from membership fees and 46% came from
government funding. The remainder came from discrete projects (a majority paid for by corporate members), minimal contributions by NGOs and some miscellaneous items (ETI 2020).

Comparing the FLA and Fair Wear, it could be reasoned that these differences in funding explain the different extent to which an MSI is willing to tackle broader structural issues in a systemic manner. As will be argued in section 6.2.5, Fair Wear (which relies less on corporate funding than the FLA), reflects a somewhat more rigorous approach to assessing the purchasing practices of its members as compared to the FLA. Yet, a similar correlation between funding and stringency does not necessarily follow when comparing the FLA and ETI. For while the ETI relies less on corporate funding, its control mechanisms are significantly weaker than the FLA’s.

Interviewees from both the FLA and ETI - which reflect significantly different levels of corporate funding - expressed the view that control by corporate members was an obstacle to the MSI undertaking more radical change. One union and one corporate member from the ETI as well as one NGO member of the FLA explicitly raised this issue. Gopi Nath Parakuni of CiviDep India (an FLA member) expressed the view that:

> Excessive dependence on membership contributions from brands is the most critical weakness. This constrains the capacity to take independent positions … One challenge is that the NGOs restrain themselves from criticizing member brands openly in the public. They seem to be cautious how far they could push the companies as in case the demands are 'excessive' from their perspective they could walk away and the organisation would collapse … the dependency on brand membership donations … permeates everything doesn't it. … So if a couple of big brands leave then there is no logic for the organisation so that always will be an underlying pressure. (Parakuni Interview).

Similarly, Owen Tudor of the Trades Union Congress stated:

> … one of the weaknesses of ETI is that it does not challenge sufficiently the corporates who belong to it. Now, generally speaking the secretariat is slightly worried that if it challenged them more that they’d be more likely to leave. I actually think it's the other way around. I think that’s one of the benefits. (Tudor Interview).

Owen Tudor further argued that while it was also the role of member trade unions and NGOs to push the corporate member base, ‘the point of having a structure like ETI is that you actually have an institutional body that will do that … the purpose of having an institution that does this is that it goes beyond what the individual actors, the unions and the NGOs are able to do on their own.’ He considered that it was the role of the secretariat (backed by civil society members) to push corporate members. Yet the secretariat remains constrained by the dynamics of corporate funding.
In addition, four external stakeholders (including individuals formerly associated with the FLA) explicitly raised the issue of corporate capture. Two others considered that the balance of participation more broadly was an issue for MSIs. Marsha Dickson of Better Buying (and former FLA board member) noted:

... the companies are powerful and they push, they push back. You know, they want to go at the pace that they feel like they can go at, which is slower than a lot of times one feels like ... they pay into the membership and so you can't really push them that hard you know because you always have that in the back of your minds, we have to keep our members … (Dickson Interview).

Expressing a similar sentiment, another independent expert (also formerly associated with the FLA) stated:

...So it’s about this is our membership and we have to respond to our membership and so a lot of things that you wanted to experiment that's a little bit radical, it's always I can't get the membership upset and as long as you're tied to that then you know it's not going to work your way. (Independent Expert 29).

One corporate FLA member, Adidas, took a different view, arguing that the FLA reflected an independent model of accountability:

... although we are a member organisation, we fund and pay fees and things but they've always had quite an independent voice and a critical examination of practices and programs and they've looked to develop, be at the forefront of development of different initiatives in different areas … (Anderson Interview).

Overall, both the literature and the results of interviews show that the balance of power between different members and the attendant risk (and reality) of corporate capture remains a live issue for MSIs. Even where an MSI relies relatively less on corporate funding (as is the case with Fair Wear and the ETI), the perception remains that the MSI is only able to push its corporate members so far. This has led many to argue that corporations dominate MSIs, meaning that they ’determine which issues are on the agenda, whose interests are considered more legitimate and how they are dealt with’ (Brown 2007. See also Van Huijstee 2012; Baumann-Pauly et al. 2017). Or, as stated by MSI Integrity, they ’serve to entrench corporate power, rather than upend it’ (MSI Integrity 2020, 81).

This power dynamic may inhibit more binding and systematic change. For the issue of purchasing practices, as well as increased unionisation goes to the very heart of the business models of corporate members. Corporations, on their own, are unlikely to propose new strategies that are perceived to be against their interests, particularly in circumstances where they are not yet accepted as industry wide practice. Civil society, to the extent that they are
included in governance structures are not sufficiently resourced to counteract such corporate power (section 6.2.2). Thus, according to the most vocal critics of MSIs, MSIs will forever remain stuck in compliance-based modes of regulation, and will never adequately represent the interests of workers or create sustainable systemic change. Consequently, as explored in section 6.3, some civil society representatives argue that MSIs are an inappropriate regulatory vehicle for holding companies to account for their human rights impacts. In their view, an entirely different model of private regulation is required to overcome the limitations of corporate influence.

In contrast, responsive regulation argues that the weakness of MSIs in the face of powerful, well-resourced buyers can be overcome by enrolling an ever-greater number of horizontal actors or ‘nodes’ into a ‘pyramid of networked escalation’, who together, will increase regulatory pressure (Chapter 3, section 3.4). This section and section 6.2.2 established that the stakeholders presently enrolled – namely civil society – do not exert sufficient regulatory pressure. From a ‘networked’ responsive regulation perspective, it may be that MSIs simply have not yet enrolled a sufficient number of nodes. The potential of additional nodes is considered further in Chapter 8.

6.2.4 Transparency

For the reasons stated in section 6.1.1, transparency is a crucial component of input (governance) legitimacy. Aside from serving an important accountability function, it also facilitates the assessment of other elements of legitimacy, in particular the effectiveness of control mechanisms and rule implementation (section 6.2.5).

There is a distinction between governance related transparency, which entails access to information on decision-making structures and processes, and performance related transparency, which means access to information on the associated (public) benefits gained by the implementation of the standard (Fuchs et al. 2009). Although performance related transparency is more directly relevant to rule implementation, governance related transparency is also important, as it highlights how, and by whom, decisions in relation to performance are made.

The Certification Apparel MSIs perform poorly on transparency. SAI and WRAP publicly list their board membership. However they do not publish annual reports, nor do they make any reference to their foundational documents. Thus, governance related transparency is very low for these MSIs and does not assist the assessment of performance in respect of rule implementation. SAI and WRAP also perform poorly on performance related transparency. Both publish lists of certified facilities, however do not disclose any details in relation to the underlying audits. This renders stakeholders unable to assess the basis on which certification was granted.
The Governance Apparel MSIs are more advanced in both their governance and performance transparency efforts. Each MSI publicly lists its board membership, and also publishes regular annual reports, which provide high-level information about developments in governance. The FLA and Fair Wear publish their foundational charter document, while the ETI makes its Memorandum and Articles of Association available to members. This is a significant improvement on governance related transparency as compared to Certification Apparel MSIs. Nonetheless, these documents do not provide information regarding the internal decision-making processes of Governance Apparel MSIs. One explanation for this is the perceived trade-off between transparency and dialogue; it is argued that transparency can inhibit open and honest exchange and negotiation between participating stakeholders (Risse 2006; Beisheim & Dingwerth 2008; Boström & Hallström 2013). Thus, available information in relation to governance does not significantly contribute to public understanding of performance.

In relation to performance related transparency, the FLA is the highest performer, followed by Fair Wear and then the ETI. The FLA publishes audit reports. These reports contain a significant level of detail in relation to factory conditions, although they do not list the precise name or location of the factory, only the country and brand for whom the factory produces. The FLA justifies this approach on the basis that it encourages at least some level of transparency, without potentially detrimental consequences for the factory (FLA n.d.3). Critics argue that this impedes the ability of third-parties to verify audit results (Sethi & Rovenpor 2016). The former President of the FLA has also argued that the status of remediation is often unclear because timeframes for submitting reports are not kept (Van Heerden 2016). Nonetheless, at present, the FLA is the only Apparel MSI that publishes audit reports at all. Ben Vanpeperstraete of the Clean Clothes Campaign acknowledged that this practice was ‘to the credit of the FLA’, and was a potential source of empowerment for workers (provided that the audit process itself engaged with workers) (Vanpeperstraete Interview). The FLA also publishes accreditation reports, which assess whether members are sufficiently compliant with the ten FLA Principles of Fair Labor and Responsible Sourcing to warrant accreditation.

Fair Wear does not publish audit reports. It does publish company Social Reports in which companies self-report on their progress (noting that the FLA does not publish this type of information). It also publishes its Brand Performance Checks in which it assesses the headquarter level systems, processes and policies of member companies.

The ETI lags behind, as it does not publish any meaningful information in relation to its self-assessment and reporting process, other than some limited aggregate statistics on member progress in implementing the ETI Base Code (discussed further in section 6.2.5.2). The ETI is cognisant of the need to strengthen control and transparency, having identified ‘increased accountability’ as one of five strategic pillars in its 2015-20 strategy (ETI 2015), and published a transparency roadmap in 2017 (ETI 2017b). In respect of its members, the ETI aims to
encourage members to disclose, among other things, their supply chains (including factory sites), information on purchasing practices, due diligence, remediation and evidence of the impact on workers’ rights. While not specifically committing to publishing member company’s self-assessment reports, the ETI indicates that it intends to at least draw from them to provide ‘a reliable source of public, credible, balanced and authoritative statements on member company progress’ which will enable ‘public recognition of progress made, whilst reinforcing trust in member companies’ (ETI 2015, 4; see also ETI 2017b). Section 6.2.5.2 demonstrates that the ETI has not yet published sufficiently detailed information to meet this goal.

In summary, the transparency of Certification Apparel MSIs is virtually non-existent and does not contribute to their legitimacy in any way. The Governance Apparel MSIs perform better in this regard. The ETI provides some governance information and high-level aggregate statistics on member progress. The transparency of the FLA and Fair Wear is the highest and contributes the most to their input legitimacy. The information provided allows external stakeholders to assess (at least to some degree) the extent to which member companies are changing their internal policies, systems and practices. Further, in the case of the FLA, external stakeholders are able to assess the nature of human rights violations uncovered by social audit, and to a certain extent, the manner in which remediation has been undertaken.

What is missing is the critical next step: assessing how social audits, and the headquarter level changes implemented by member companies are actually translating into tangible, systematic and aggregate improvements in working conditions on the ground. As discussed in the following section, this is critical to assessing the effectiveness of an MSI’s control mechanisms, and consequently the effectiveness of the MSI.

6.2.5 Control and rule implementation

As outlined in section 6.1, control is an element of input legitimacy and rule implementation is a component of output legitimacy. Control refers to the extent to which relevant stakeholders are able to exert control over an MSI’s performance. It is comprised of two forms of control: (1) the extent to which the MSI controls its members (or other regulatees); and (2) the extent to which there is control over the performance of the MSI itself.

Rule implementation is concerned with the ability of an MSI to ensure that its rules are followed and applied in practice. This in turn is dependent on the control mechanisms an MSI has in place. For rule implementation is in large part determined by the extent to which relevant stakeholders are able to exert control over the performance of MSI members (and/or the MSIs’ target) and the MSI itself (Dingwerth 2007, 29-30; Hachez & Wouters 2011). Accordingly, this section considers these two elements of legitimacy together. It assesses the effectiveness of both primary and secondary control mechanisms to determine the performance of Apparel MSIs on rule implementation.
As flagged in section 6.2.4, assessing an MSI’s control mechanisms and rule implementation requires transparency on the part of the MSI. This section extends section 6.2.4 by demonstrating how limitations in MSI transparency inhibit this vital appraisal.

6.2.5.1 Certification Apparel MSIs
As outlined in Chapter 5, the two Certification Apparel MSIs - SAI and WRAP - seek to regulate the conduct of suppliers rather than buyers. Their primary form of control is certification, which takes place by way of social audit. Certification MSIs are not able to employ the threat of termination as they are not membership-based organisations. Control comes in the form of non-certification or withdrawal of certification.

Complaints mechanisms reflect another potential (albeit limited) form of control. WRAP does not provide for any mechanism at all, although requires facilities that it certifies to have one (WRAP 2021, 62). SAI is indirectly subject to complaints through SAAS, SAI’s independently managed affiliate that accredits auditors. Complaints may be made by any stakeholder, both in relation to the decision to accredit social auditors, as well as in relation to the actual certification of facilities (SAI n.d.6). Some complaints have led to the withdrawal of certification, reflecting at least some form of control (Homeworkers Worldwide et al. 2018). However, NGOs have raised significant concerns with the SAAS complaints procedure, including that complaints in relation to complex systemic rights are not adequately addressed, and the process is not sufficiently transparent (Homeworkers Worldwide et al. 2018). In relation to the latter, details of audits, re-audits in response to the complaint and corrective action plans are not provided to complainants. More generally, the complaints procedure is not made public. Further, for the reasons discussed in section 6.2.5.2, while a complaints mechanism is an important safeguard, it does not reflect a particularly strong form of control.

Thus, the primary control mechanism utilised by Certification Apparel MSIs is social audit. This characterisation is further supported by some interviewees. For example Ben Vanpeperstraete of the Clean Clothes Campaign expressed the view that ‘WRAP and SAI … are much closer to being just an auditing regime rather than an MSI’ (Vanpeperstraete Interview). Independent expert Dorotheé Baumann-Pauly noted that some MSIs ‘have chosen to focus almost exclusively on auditing based on a checkbox exercise and they certify…’ (Baumann-Pauly Interview).

From a regulatory theory perspective, exclusive reliance on social audit means that there is no possibility of escalating along the ‘pyramid of sanctions’ or holding a ‘big gun’ in reserve. Social audit is the only regulatory technique available, meaning that Certification Apparel MSIs regulate through audit. This leaves Certification Apparel MSIs with no alternative response when social audit fails, except withdrawal of certification.
As stated in section 6.2.4, Certification Apparel MSIs do not publish audit reports. They also do not publish any information in relation to secondary controls. That is, they have not made any attempts to publish aggregate statistics, nor have they published any evaluation reports. The only aggregate evidence of rule compliance proffered by SAI and WRAP is the number of factories certified. Without transparency and in circumstances where the only form of control exerted by SAI and WRAP is social audit, the effectiveness of social audit becomes a proxy for assessing the rule compliance performance of these MSIs. For the reasons outlined in Chapter 5, there is now widespread consensus that social audit, and the compliance model underpinning it, is not achieving its intended results. That is, it is not leading to sustainable improvements in working conditions (compliance with rules).

As highlighted by Brian Finnegan of the AFL-CIO, this mode of control is further constrained due to the manner in which Certification Apparel MSIs distance themselves from the actual act of auditing:

Their main response to the tragedies in Ali Fire in Pakistan and other similar ones has been that what SAI per se produces is a standard SA 8000 … but there is no accountability even on the part of SAI. Their response, the bottom line was to protect themselves and say we just wrote the standard we have no responsibility for that place that got certified three weeks before the fire, not our business, not our job we don’t do that. (Finnegan Interview).

Ongoing reliance on this increasingly discredited tool as the only form of control (which the MSI is then not willing to take complete responsibility for) leads to the conclusion that Certification Apparel MSIs are not performing satisfactorily in relation to control or rule implementation.

In theory, Certification Apparel MSIs could respond to these legitimacy concerns by addressing the limits of the social audit model, and considering new strategies to implement the standards they promote. The SAI has made at least some movements in this direction. For example, it now promotes what it terms ‘a new collaborative approach - one that incorporates the buyer’s purchasing practices and other responsibilities into a statement of shared responsibility’ (SAI n.d.7). To this end, it promotes a Buyer-Supplier Mutual Code of Conduct which addresses the key purchasing practices discussed in Chapter 2. However at present, this is used merely as a guide, without any associated oversight or enforcement mechanisms.

Ultimately, the very functional model adopted by Certification Apparel MSIs poses an obstacle to a meaningful evolution beyond audit. Their focus on individual facilities means that they are inherently supplier focused and too narrow in scope to address broader systemic issues such as purchasing practices and social and political context. From the perspective of ‘really’ responsive regulation, this reflects a failure to respond to the broader power dynamics of the apparel supply chain. It also reflects a failure to assess whether the compliance mentality underpinning social audit is an appropriate ‘logic’ for achieving the regulatory aim of improving
human rights outcomes (Chapter 3, section 3.3.2).

6.2.5.2 Governance Apparel MSIs

In contrast to the Certification Apparel MSIs, the three Governance Apparel MSIs – FLA, Fair Wear and ETI - have attempted to ameliorate the limitations of social audit by employing control mechanisms beyond audit. Nonetheless, legitimacy challenges persist.

The control (or oversight) mechanisms utilised by Governance Apparel MSIs have already been set out in Chapter 5, section 5.1.3. To re-iterate, the FLA and Fair Wear rely on substantially similar forms of control: 1) monitoring (via social audit) of a sample of member’s supplier facilities; 2) assessment at the company headquarter level to ensure that members have appropriate policies and management systems in place; 3) complaints mechanisms; and 4) termination procedures. The FLA also provides for an additional layer of control through its accreditation process. In contrast, the ETI does not undertake social audit, however does provide for the remaining forms of controls (items 2 - 4 listed above).

In contrast to the Certification Apparel MSIs, all three Governance Apparel MSIs have recognised, and sought to act upon, both the inherent and broader structural limitations of the traditional social audit model. This is reflected in adjustments to control mechanisms (discussed here), as well as attempts at broader political engagement (section 6.2.5.3).

Control mechanism 1: Social audit

The FLA and Fair Wear have attempted to ameliorate at least some of social audit’s inherent limitations. In 2012, the FLA introduced its ‘Sustainable Compliance Methodology’ (SCI), precisely because it came to the conclusion that auditing was not preventing recurring violations or contributing to sustainable improvements. According to the FLA, the SCI is designed to ‘move the field of social compliance beyond cat-and-mouse games and band-aid fixes’ (FLA n.d.4). Rather than focusing solely on specific, visible violations, it seeks to uncover the broad employment practices and policies underlying these violations. Further, it promotes a collaborative approach between buyers and suppliers who together, develop long-term strategies, which are subject to ongoing assessment and progress tracking over time. The initial assessment process includes consultation with local civil society, as well as on and off-site interviews with workers, although it is not clear that these stakeholders are included in the actual development of remedial strategies. The FLA has been using the SCI since 2012 for its external audits, and is also encouraging FLA members to use the methodology in their own internal auditing.

The FLA has not to date undertaken any kind of evaluation of the effectiveness of its SCI approach. As already noted, the FLA publishes detailed results of audits. It also used to provide
summary statistics of audits undertaken in a given year in its annual reports. This information however does not allow external stakeholders to draw any conclusions on the effectiveness of the new methodology. First, audits are undertaken in respect of different facilities each year, and thus it is not possible to ascertain the impact of SCI on one factory over time. For while the published audit reports include the factory’s remediation status in respect of identified violations, there is no mechanism to verify whether that same factory maintained its improvements in subsequent years.

Even if one were to take an aggregate view of audits over time, the results are mixed. Focusing on two relatively easily detectable rights, in 2010 (pre-SCI), out of 149 FLA audits, 95% of factories reported health and safety violations and 74% reported violations in relation to hours of work (FLA 2010). Post-SCI, in 2014, health and safety violations decreased to 70.5% of factories, rose to 100% in 2015, and fell to 87% in 2016. Excessive hours of work post-SCI went down to 51.2% in 2014, rose to 87% in 2015 and down to 65% in 2016 (FLA 2014; 2015; 2017). These figures suggest that even an augmented auditing program, whilst an improvement, still does not go far enough to address the limits of social audit.

Further, the FLA only appears to apply a truly in-depth approach to a limited number of audits. The FLA divides assessments into two types, ‘baseline’ and ‘foundational’. Baseline are the more in-depth of the two, and include root-cause analysis for every finding, along with recommendations for sustainable improvement. Foundational assessments only include recommendations for violations requiring immediate action (FLA 2015). The FLA appears to conduct baseline assessments only for the limited number of facilities that are owned by FLA members, with the majority of assessments (in relation to contracted facilities) being foundational (FLA 2017). Thus the root-cause analysis only applies to a limited number of audits.

This author’s review of a sample of SCI audit reports reveals a reasonably superficial approach. For example, a recent report for a member’s factory in China found that 80% of workers had exceeded the 36-hour monthly legal limit on overtime (FLA 2019b). It did not assess the potential root causes of overtime, including for example unrealistic production targets caused by pressure from buyers. Its recommendation was simply that the factory ‘[e]nsure[s] overtime hours do not exceed 36 in a month’. A slightly more sophisticated analysis in a separate report found that the root cause of a factory failing to remediate excessive overtime was due to delays in the approval process by buyers and unrealistic production targets to increase profits. That report recommended, among other things, that the relevant FLA member implement the FLA Principles of Responsible Sourcing (FLA 2018c). Although this reflects some acknowledgment of the responsibility of buyers, it is not clear the extent to which implementation of this recommendation was subsequently monitored. Thus, while the SCI claims to promote a

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32 This practice appears to have stopped as at its latest Annual Report (FLA 2019a).
collaborative approach between buyers and suppliers, the extent to which the responsibilities of buyers are implemented is uncertain.

Similar to the FLA, Fair Wear also promotes a co-operative approach between buyer and supplier as part of its audit process, requiring brands and factory management to work together to create action plans (Fair Wear n.d.2.). As noted in Chapter 5, section 5.2.2, it places a heavy emphasis on worker interviews, as well as local experts. It also conducts audits over a relatively long period of time, ranging from 6-13 days (Fair Wear 2012). It is not possible for external stakeholders to directly assess Fair Wear’s social audit program, as it does not publish the results of its verification audits. Although as noted in Chapter 5, section 5.2.1, empirical evidence suggests that Fair Wear audits have resulted in only minor, non-statistically significant improvements, which are not consistent or sustainable over time (Egels-Zandén & Lindholm 2015).

In contrast to Fair Wear and the FLA, the ETI does not utilise social audits as a form of control at all, having taken the public position that social audit is seriously flawed and emphasising that it is ‘not an auditing organisation’ (ETI n.d.2). In its recent five-year strategy paper, the ETI explicitly acknowledged that the social audit approach ‘has not delivered the expected credible assurance of standards that they and their customers seek’ (ETI 2015, 9). Instead, the ETI promotes a UNGPs human rights due diligence approach, which companies may then supplement with high quality audits. However, as will be explored below, the ETI does not, at this stage, have in place sufficiently strong control mechanisms to ensure that its members are implementing effective human rights due diligence programs.

Control mechanism 2: Headquarter level assessments
Perhaps the most significant, systematic, way in which Governance Apparel MSIs have moved beyond the audit is through the use of headquarter level assessments as a control mechanism. Significantly for the present analysis, these assessments focus on buyer conduct, including purchasing practices and levels of commitment to suppliers. This is consistent with broader public acknowledgment by each Governance Apparel MSI of the need for buyers to address purchasing practices (ETI 2017a; FLA 2018a; Fair Wear n.d.3.).

FLA member companies commit to, among other things, the ten FLA Principles of Fair Labor and Responsible Sourcing (FLA Principles). The FLA Principles set out a range of indicia including that companies must provide for training (both to employees and suppliers), grievance mechanisms, monitoring programs, remediation, verification, and consultation with civil society. In 2015, the FLA Principles were amended to introduce what is now Principle 2 (initially Principle 8) – Responsible Purchasing Practices. It requires members to ‘align planning and purchasing practices with commitment to workplace standards’ (FLA n.d.5.).
The Principle requires that members implement planning and purchasing policies and procedures that address appropriate financial terms, adequate lead times and planning processes. Relevant staff are expected to be trained in relation to these policies, be held accountable for their implementation and engage in dialogue with internal social compliance teams and suppliers. Further, member companies are also expected to provide suppliers with incentives to comply with FLA standards. The Principle also sets out some high level Key Performance Indicators (KPI). For example, the requirement that FLA members have formal policies and procedures for purchasing practices is underpinned by KPIs requiring that five overarching themes are addressed and that impacts are reviewed. Beyond this, there is no specific detail on what systems or practices might be needed. In another example, the requirement that FLA members provide incentives to suppliers is supported by KPIs such as whether incentives are communicated to suppliers and the percentage of suppliers receiving incentives. The FLA does not suggest what kind of incentives could or should be used or any requirements to measure the actual usefulness of such incentives to suppliers.

All member companies are required to self-report annually on their compliance with the Principles. The FLA also assesses compliance with the Principles for those members seeking accreditation. It does so through a range of data points including staff interviews and document and database reviews, through the FLA's own social audits, members' annual self-reports to the FLA, complaints and participation in FLA's strategic projects, observation and general routine interactions (FLA 2019c). William Anderson of Adidas, an FLA member, highlighted the rigour of the accreditation process:

... I mean they go on the ground, they meet with the teams, they evaluate, they shadow audit. They effectively are seeking to accredit and say yes this is a substantial and robust program that upholds the charter obligations and then report out on it. So that to us is a value because there are actually very few organisations out there that I can think of that actually can look at a compliance program that companies are running and evaluate it with the knowledge that they have. I don't think others can do that so easily. (Anderson Interview).

While the overall accreditation process appears to be reasonably rigorous, this author's review of accreditation reports reveals a relatively high-level assessment of member's purchasing practices, arguably reflecting the high-level nature of the Principle itself. As per Principle 2, the accreditation reports focus on company policies, as well as training provided to staff and internal accountability mechanisms (see for example FLA 2019c; 2019d). These are of course significant and critical steps for a company to take. However the accreditation process does not delve further to consider how these policies and processes translate into actual changes in purchasing practices. Further, it does not consider the broader question of the nature of the relationship between buyer and supplier, such as the level of commitment and partnership.

The FLA does attempt to assess the impact of purchasing practices on suppliers, based on the
results of its SCI audit assessments. However different accreditation reports look at different indicators, with some focusing on issues such as excessive overtime and rest days (FLA 2019d), and others focusing on the payment of wages and benefits (FLA 2019c). The result is an inconsistent approach, which is based on a relatively small sample of audits. In order to more comprehensively assess member progress on purchasing practices, the FLA should provide more specific indicators and also attempt to assess the actual impact of purchasing practices in a more comprehensive and systematic manner. The manner in which this might be done is explored in Chapter 8.

Fair Wear explicitly acknowledges the limitations of ‘[t]raditional approaches to improving working conditions [which] tend to focus mainly on factories’ and highlights that ‘the management systems of clothing brands have a significant influence on factory conditions, even if they do not directly employ factory workers’ (Fair Wear 2017b, 10). Similar to the FLA Principles, Fair Wear assesses the policies and systems of member companies through its ‘Brand Performance Check’.

Like the FLA, Fair Wear has incorporated purchasing practices into its Brand Performance Check. Fair Wear adopts a more rigorous approach in assessing member performance in this area. First, the FLA only assesses those member companies seeking accreditation against its principles (only half of FLA members are currently accredited). Second, as argued above, the FLA Principles are framed at a high level, and consequently, so is the assessment process. In contrast, the Fair Wear Brand Performance Check sets out clear and specific indicators for each issue. For example, buyer commitment to suppliers is assessed by indicators such as what proportion of a members’ production volume comes from locations where the member company buys at least 10% of production capacity, and the percentage of production volume from business relationships that have existed for at least five years. Impact on worker overtime is assessed by indicators such as the extent to which a company’s planning systems support reasonable working hours and are integrated across relevant business functions and the degree to which a member company mitigates root causes of excessive overtime. Adequate pricing practices are determined by indicators such as the extent to which pricing policies allow for payment of a minimum wage, whether members actively respond if production locations fail to pay legal minimum wages, whether members assess and respond to the root causes of wages below a living wage, and the percentage of production volume where the member company pays its share of the target wage (Fair Wear 2020d).

All member companies are scored against these benchmarks (as well as the other benchmarks contained in the Brand Performance Check), and then given an overall ranking of ‘leader’, ‘good’, ‘needs improvement’. As highlighted in section 6.2.4, Fair Wear publishes the full results of its Brand Performance Checks, as well as its members’ ‘Social Reports’, in which members
self-report on their attempts to comply with Fair Wear’s Code. This level of transparency allows external stakeholders to assess the progress made by member brands.

The ETI also undertakes a headquarter level assessment of member companies through its annual reporting procedure. Member companies are expected to self-assess and report against an ETI Reporting Framework, the details of which are not public (ETI n.d.3). Martin Buttle of the ETI (Category Lead, Clothing and Textiles) provided some insight into the process. He stated that the reporting framework was ‘structured along the lines of business and human rights due diligence’ and required companies to identify, among other things, their relevant policies and governance processes, monitoring systems, salient human rights risks, responses to those risks, progress over time and future objectives (Buttle Interview).

What is not clear is the extent to which the ETI requires companies to take action and report on their purchasing practices. This is despite the fact that the ETI is actively pushing the issue among its membership base. It recently published a detailed guide on the subject (ETI 2017a), partnered with the ILO on the global survey referred to in Chapter 2 (Vaughan-Whitehead & Caro 2017) and has provided training to buyers. Given that the ETI does not publish its Reporting Framework or the assessments themselves, it is not clear whether the purchasing practices of ETI members are systematically assessed. Although interviewees did not specifically shed light on this question, Peter McAllister, Executive Director of ETI indicated that the ETI had recently begun to focus on the broader question of business models:

So real impact is not a CSR thing and it’s not even just the purchasing practices. If your business model depends on an unequal power relationship and an unfair share of value, you’re going to see the sorts of outcomes for workers that we see, and sticking to the past approach of audit and compliance is not going to fix it. So we are trying to open up the debate more around business practices, not compliance, which is too often an add on. Real change will not be made by CSR, but it goes to the core of how you make business decisions in your supply chain. (McAllister Interview).

It is not clear whether this change in focus has translated into reporting requirements. More generally, the ETI’s reporting process has been subject to critique. The assessment process typically involves a review by the ETI Secretariat as well as an NGO, and sometimes a trade union member (Buttle Interview). A 2015 independent assessment (commissioned by the ETI) determined that while the reporting format itself was sound, the ETI did not sufficiently assess the veracity of information disclosed by companies. It viewed the reporting process as ‘not really amount[ing] to more than self-assessment’, resulting in varying levels of quality among reports, which in turn did not ‘provide a particularly sound basis for interpreting performance across members’. It also found that the ETI struggled to meaningfully ‘sanction’ poor performance by individual company members and ultimately found that the reporting system ‘supports but
doesn’t ensure the credibility of ETI’s brand (in terms of assurance that members are upholding their obligations)’ (IOD Parc 2015, 20-22).

Peter McAllister, Executive Director of ETI, acknowledged that the reporting process was ‘not perfect’ and that ‘across the membership base we cannot assess every data point and every factory so it is a slice through.’ However, he argued that:

... year-on-year ETI reporting builds a picture of which companies are progressing and putting in place the proven systems and approaches that we know work versus those who are not or are static or sometimes drop back because you’ve had a change in business practice or a change in leadership and we see changes which in our opinion are retrograde. (McAllister Interview).

ETI members interviewed for the purpose of this thesis expressed different opinions on the reporting process. One (smaller) ETI company member found the ETI reporting process to be a helpful framework for preparing their own strategic plans and measuring progress (Company 20 Interview). Another, larger company member stated that ‘the time it takes versus the benefit which is nil, it's not worth it’. Interestingly, the same member appeared to implicitly express the view the ETI should not be utilising control mechanisms:

But also it's an unusual relationship because we're paying to be a member and we are demonstrating that we are committed, we've got an external sustainability plan, we join in on the programs, we're really committed to those and make progress, we've got demonstrable results and then we almost have to hand our homework in. (Company 21 Interview).

Conversely, another company member argued that the ETI was ‘not a controlling organisation at all’, and considered the reporting process to be ‘mainly to inform debate with the unions and NGOs.’ He concluded that the ETI ‘isn’t holding me to account. It’s not an accountability organisation, it’s a helping and engaging organisation’ (Harrop Interview). Aidan McQuade of Anti-Slavery International (a former board member) considered that the issue was not a lack of controls, but the willingness of the board to implement sanctions, stating:

Maybe as a board we’re too reasonable with corporate members … In the effort to be fair we were tending to be excessively fair … There was a desire to be reasonable and firm and sometimes it was companies which were not being reasonable. Eventually some of those businesses were kicked out of the ETI. Usually the argument was not whether they should stay or not but over timing when they should leave. So I think there is validity to the criticism [in respect of controls] but I’m not sure it is wholly accurate. There are systems in the ETI. The failings are more due to the Board trying to be fair. (McQuade Interview).

The results of the independent review, combined with the divergent views of members indicate that while the ETI does attempt to impose some level of control over its members through the reporting process, it does not currently compare in rigour or stringency to the headquarter level
assessments undertaken by the FLA and Fair Wear. Further, as flagged in section 6.2.4, it also lags significantly on transparency, making it difficult for external stakeholders to assess the reporting process itself, as well as the relative progress of members.

**Control mechanisms 3 and 4: complaints and termination mechanisms**

The third and fourth forms of control - complaints and termination mechanisms, while important (UNGP, Principle 30), act as safeguards, and ultimately apply only to a handful of cases. The FLA and Fair Wear complaints procedures are open to all external stakeholders, and ETI complaints may only be made by members. Fair Wear and FLA complaints are subject to a relatively high degree of transparency, with both publishing detailed reports of all complaints. The ETI claims to publish summary information once complaints have been resolved, however it only appears to sporadically do so (ETI n.d.4).

Public reporting reveals relatively low numbers of complaints across Governance Apparel MSIs. For example the FLA has accepted 68 complaints from 2013 to the present (FLA n.d.6), and Fair Wear has reported 486 complaints to date. The ETI does not publish the total number of complaints received.

Academic commentators and stakeholders query the efficacy of such mechanisms (Anner 2012). MSI Integrity argues that MSI grievance mechanisms are generally problematic because, among other things, they are voluntary (as company members can always withdraw), they do not necessarily draw broader lessons from the complaints, the extent to which remedy is provided is not clear and the process is not rights-holder centric (MSI Integrity 2020, 158-191). Even if a complaints mechanism functions well, as highlighted by Gopinath Parakuni of CiviDep India (an FLA member), its impact will always be limited due to the relatively small number of cases resolved:

... it's one worker against the whole factory and all these complaints mechanisms it's a maze. You know everybody in FLA has a complaints mechanism so how many complaints do you get and how many complaints do you have the capacity to investigate so those are all very fragile. I mean they are bound to fail. I mean I know the local Trade Union in Bangalore has used the FLA complaints mechanism. There has been some resolution yes but that's not the model that will work, workers are the best auditors of their working conditions and unless workers are involved and workers collectives are involved and workers leadership is promoted. (Parakuni Interview).

The point here is not to critique the Governance Apparel MSI complaints mechanisms per se. For on the whole, investigations appear to be conducted in a comprehensive manner, and outcomes publicly reported. MSI Integrity singled out Fair Wear as an example of a particularly strong complaints mechanism, while the FLA also fulfilled many of the criteria set out in its report (MSI Integrity 2020, 172-173). Rather, it is to highlight that while complaints mechanisms are important, and necessary, they do not (and were never intended) to act as a systematic,
comprehensive form of control.

The final oversight mechanism is the threat of termination, utilised by the FLA, Fair Wear and ETI. The FLA publishes full details of its termination-related procedure, known as ‘Special Review’, whereby non-performing companies are placed on a 90-day review period, during which time they must remedy the issue in question, or face the prospect of termination. To date, the FLA has placed three companies on Special Review, two of which undertook remediation activities and were re-instated, and one of which was ultimately terminated (FLA 2006; 2008; 2013). The ETI has terminated the membership of one member (ETI 2019a). Fair Wear does not provide clear information in this regard. Unlike the FLA, the ETI and Fair Wear do not post details of termination procedures on their websites.

Similar to the complaints mechanism, the threat of termination is reserved for extreme situations. Independent expert Amol Mehra (former Executive Director of the International Corporate Accountability Roundtable, an FLA member) considered that MSIs were ‘way too afraid to slap the wrists of companies that are their members’ (Mehra Interview). Thus termination, like complaints mechanisms, acts as a safeguard rather than a primary form of control.

*Rule implementation: the effectiveness of control mechanisms and measuring impact*

As flagged at the outset of this section, the effectiveness of rule implementation is dependent on the effectiveness of an MSI’s primary and secondary control mechanisms.

Governance Apparel MSIs seek to control their members though four primary control mechanisms: (1) social audit; (2) headquarter level assessments; (3) complaints mechanisms; (4) termination procedures. For the reasons outlined above, (3) complaints mechanisms and (4) termination procedures primarily perform a safeguard function. Accordingly, the primary forms of control utilised by the Fair Wear and FLA are (1) social audit and (2) headquarter level assessments. The ETI’s primary form of control is its self-reporting mechanism, which is akin to the headquarter level assessment.

The critical question is, how effective are these control mechanisms? That is, do these mechanisms result in MSI rules being followed in practice, and therefore, an improvement in human rights outcomes?

In order to adequately assess the effectiveness of these primary controls, an MSI must provide information that allows external stakeholders to assess member performance. It must also provide information in relation to secondary controls, to allow stakeholders to assess the MSI’s overall impact. To date, no Governance Apparel MSI satisfactorily provides this type of data.
As flagged in section 6.2.4, the FLA publishes individual audit reports. However it does not provide any summary of the level of compliance across a members’ supplier facilities, or progress in its factory base over time. Similarly, the headquarter level accreditation assessments provide some insight into a company’s progress on policies and systems. However such improvements are not linked to impact on the ground. As noted by Marsha Dickson of Better Buying (who formerly sat on the FLA Board):

… we had our first company, their program came up for accreditation. You know, it came to us and it was like … ‘oh, we’re grading on effort not outcome’. Here are all the things that this company has put in place and it’s all really good and important stuff but it was ultimately saying hey, you’ve put all these great things into place and we don't have a clue whether it's actually working or not. (Dickson Interview).

The FLA has not published any reports on its own impact. The closest it has come is publishing global statistics in its annual reports indicating how many audits it undertook, and how many violations were found (examples of these kinds of aggregate statistics were set out in the discussion on FLA’s SCI methodology above). Given that the audit sample is different every year, this kind of information does not provide a clear picture of improvements in a specific facility over time, or overall improvements among a members’ supplier base over time. The FLA also has not undertaken any kind of long-range comparison of violations uncovered over time. The upshot is that external stakeholders do not have a clear sense of the overall progress member companies, or the FLA itself, are making in improving human rights outcomes. Thus they are unable to gauge the extent to which an MSI’s primary and secondary control mechanisms are effective. This point was explicitly raised by independent expert Dorotheé Baumann-Pauly:

So it has a lot of experience and a lot of data from their systematic inspection process. But that data unfortunately, while it's publicly available it's hardly readable which is a problem. So in terms of communicating successes of course it's fully transparent but the type of information that the FLA provides to the public is not really helping the public to hold corporations to account … the format is very difficult to read and the FLA doesn't do a good job of aggregating the data for example over time … (Baumann-Pauly Interview).

Fair Wear does not publish audit reports at all. Its Brand Performance Check is a very helpful tool for understanding the progress of member brands in implementing policies and systems. It provides the clearest and most detailed indicators, which are assessed and published annually. Thus it performs the strongest on transparency in respect of member progress at the headquarter level. However, like the FLA, this progress is not linked to actual impact on the ground in member brands’ supplier factories.

Fair Wear has not made any attempt to publish aggregate impact statistics, nor has it published any self-evaluation reports. Its annual reports contain very high-level information such as the
number of audits conducted and complaints received per country. The annual reports also highlight Fair Wear country projects and interventions, and provide high-level descriptions of the key human rights issues uncovered, without accompanying statistics. Thus as with the FLA, external stakeholders are left with little to no understanding as to how Fair Wear’s control mechanisms are actually resulting in improvements on the ground across the supplier factories of its membership base, either individually or on an aggregate level.

As already outlined, the ETI does not publish any information on the progress of member companies. It has however made some attempt to quantify aggregate outcomes. In 2006, it commissioned an independent impact assessment based on three country studies (across three different sectors, including apparel), and two specific company studies (Barrientos & Smith 2006). The country study assessment, which considered impact in respect of nine separate categories of rights overwhelmingly found either zero or minor impact by the ETI. The only major impact on workers was in respect of health and safety (in two countries) and hours of work (in one country).

In 2016, the ETI claimed that in the last five years, its projects had led to 2.5 million workers experiencing improvements in one or more ETI code rights and 30,000 workers in ‘prioritised’ supply chains reporting positive change in their working conditions (ETI 2016b). This is very high-level data, the basis of which is not made clear, and does not reach the level of rigour of the 2006 impact study, the likes of which does not appear to have been undertaken again.

In 2015, the ETI also undertook an independent external evaluation of its performance, which did not measure impact, but rather focused on ETI systems and strategy (IOD Parc 2015). Relevantly, that evaluation specifically raised the issue of impact, noting that while measurement was challenging, ‘the basis for gauging ETIs impact as a membership organisation is constrained by the lack of a coherent, overarching and rounded ‘results framework’ reflecting the totality of what ETI does’ (IOD Parc 2015, 19). It highlighted that the ability of ETI’s reporting process to drive change was ‘largely dependent on the ETI Secretariat's capacity to draw lessons from the aggregated reports, share those lessons among members and the broader public, and take a lead role in encouraging action based upon those lessons’ (IOD Parc 2015, 20-22).

The ETI has already made some attempt to do so through the publication of select, aggregate statistics in relation to the self-assessment process. For example, in its 2016-17 annual report, it reported that 19% of companies had made changes to encourage stable business relationships with suppliers, 21% had improved the way they supported suppliers to meet the provisions of the ETI Base Code and 19% had made progress in remediating identified issues (ETI 2016-17). In 2019, the ETI published an impact report, which reported high-level statistics such as: ETI’s corporate membership reached over 15 million workers (across sectors); 89% of members
improved their ethical trade performance score; 18% of members improved their score on worker representation; and ETI has impacted the lives of workers in 124 countries (ETI 2019b).

This kind of information, while better than nothing at all still does not allow external stakeholders to assess either the rigour of the reporting process, or the progress of individual members. The ETI’s work on transparency is ongoing, with a tripartite group currently considering what further information will be provided publicly (ETI 2017b). At the time of writing, it remains to be seen how the ETI intends to further implement its accountability goals.

A number of interviewees highlighted impact as one of the most significant challenges facing MSIs. As noted by independent expert Doug Cahn (who formerly sat on the FLA Board):

> They will have to increasingly demonstrate that they're having a positive impact on the intended audience … so that ETI and FWF and FLA and the others can stand up and say you know it's not that we had this many trainings, but as a result of this many trainings we were able to determine an increase in the level of X by Y%. That kind of detail. That's where the vulnerability is and that's where the focus should be. (Cahn Interview).

Similarly, Owen Tudor of the Trades Union Congress (an ETI member) saw impact as a major challenge:

> The first task that most MSIs have got to address, and ETI is no different, is the ability to demonstrate impact. They've got to get better at demonstrating the things that they do actually make peoples lives better and they're not good enough at the moment at doing that. (Tudor Interview).

When questioned about impact, Peter McAllister, Executive Director of the ETI admitted that it was measuring it ‘not in a very satisfactory way’, although noting that ‘[i]n that sense I don't think we're very different to other MSIs.’ He indicated that the ETI gauged impact through less formalised indicators such as year-on-year progress of companies in the ETI’s annual reporting process, take up of their advocacy, and direct input from their members about the usefulness of their work. He concluded ‘those would be three areas, but it's not, you know it doesn't end up in a 7.9 or an 8.3, it's a slightly imprecise measurement unfortunately’ (McAllister Interview).

The lack of detailed self-assessment and transparency in relation to MSI performance makes it difficult to assess the extent to which Governance Apparel MSI are actually achieving their aims of improving working conditions in the supply chains of their member companies. It also poses a serious obstacle to both input legitimacy (reflecting a lack of transparency) and output legitimacy (through an inability to show the extent to which MSIs are actually achieving rule implementation and, consequently, human rights improvements). From a responsive regulation perspective, the failure to assess the performance of the regulatory regime and revise
regulatory goals and strategies accordingly, translates into a failure to operate as a ‘really’ responsive regulator (Chapter 3, section 3.2.2).

As noted in Chapter 4, the UNGPs provide that companies should track the effectiveness of their responses to human rights impacts (UNGPs, Principle 20). While the UNGPs were not originally directed towards MSIs, it is arguable that they should also apply to MSIs, particularly in circumstances where MSIs are encouraging their own corporate members to uphold the Principles. Measuring the impact of MSIs was also raised as a critical challenge at the 2017 UN Forum on Business and Human Rights (UN 2018b).

The Governance Apparel MSIs have all publicly acknowledged the need to measure impact. The FLA in its current strategic plan sets out three key goals, one of which is to ‘demonstrate the impact of the FLA’s model on workers' lives’. In this regard, it aims to become more public, and ‘consumer’ facing, to better communicate its work, including specifically to ‘[e]valuate and strengthen the relationship between the accreditation process and companies’ ability to successfully demonstrate an impact on workers' lives’ (FLA 2018a). In 2016, Fair Wear announced the establishment of a monitoring, evaluation and learning taskforce to map, measure, demonstrate and advance the impact of Fair Wear (Fair Wear 2016). The ETI has also indicated that it will seek to publish ‘more information about its progress against its strategy, programme impact data and advocacy priorities’ (ETI 2017b). At the time of writing, it remains to be seen how the Governance Apparel MSIs will implement these commitments to greater transparency on impact.

This thesis, like the regulatory theorists set out in Chapter 3, acknowledges that measuring impact is a complex task, most likely requiring intensive quantitative and qualitative work. It is not suggested that MSIs necessarily measure their impact on an annual basis. However, it is reasonable to expect that they either undertake, or commission, impact assessments on a cyclical basis, for example every three to five years. The question of how to actually measure impact could be a thesis in and of itself. Although this question cannot be answered here in any comprehensive way, Chapter 8 suggests some indicators that could potentially feed into an overall impact assessment.

In the absence of overall impact assessments, the question of how effective Governance Apparel MSIs are at enforcing their own rules can only be answered by reference to existing information in relation to the two primary control mechanisms utilised by Governance MSIs.

In relation to the first control mechanism, social audit, both the FLA and Fair Wear have acknowledged the inherent limitations of social audit, and sought to modify their audit programs accordingly (recalling that ETI does not rely on audit at all). Nonetheless social audit remains a significant form of control for both MSIs, and an essential requirement for membership, recalling
that both the FLA and Fair Wear expect members to audit almost their entire first tier supply chain. As a result, despite some methodological improvements, ultimately these MSIs continue to promote a compliance-based approach, whose limitations were already outlined in Chapter 5.

The second control mechanism, headquarter level assessments, reflect a shift beyond audit. Relevantly, these assessments attempt to address the broader structural issue of purchasing practices. Fair Wear’s headquarter level assessment is the most rigorous as it applies to all members, includes very specific indicia, and rates all members annually, giving external stakeholders some insight into how members are tracking. The FLA accreditation process is also rigorous, however it does not apply to all members, provides relatively high-level indicators and is not undertaken on an annual basis. Further without a rating system, external stakeholders are not able to compare the relative performance of members. Finally, the ETI’s reporting process is the weakest of the three as it is relies predominantly on self-reporting, with minimal assessment and validation by the ETI, and no opportunity for public scrutiny.

This thesis posits that these headquarter level assessments can be a powerful regulatory tool, if utilised to their full extent. In addition to regulating buyer behaviour, these assessments also require buyers to regulate their own suppliers. The increased focus on purchasing practices reflects a significant shift beyond audit. It also reflects the principles of relational and really responsive regulation, whereby both MSIs and buyers take into account the broader institutional context and power dynamics of global apparel supply chains. Further, when buyers reform their purchasing practices, they invoke both the pyramid of sanctions and supports, by providing incentives for compliance (through for example more orders and greater levels of commitment), as well as an escalation in sanctions for poor human rights performance (through for example, reductions in orders).

However, the research referred to in Chapter 2 suggests that these types of assessments are not yet having a sufficient impact. In addition, a 2017 ILO research paper noted that despite MSI membership, a majority of brands and retailers interviewed had not systematically integrated higher wages into their purchasing practices (Starmanns 2017). Recent research conducted by Fair Wear in Bangladesh during the pandemic indicated ‘ongoing issues with orders and prices that point to a need for greater brand accountability and improved purchasing practices’ (Fair Wear 2020c, 15).

Accordingly, this thesis concludes that while Governance Apparel MSIs have made significant attempts to move beyond the ‘compliance model’ through its headquarter level assessments (which specifically address purchasing practices), this reflects only the first step. As recommended in Chapter 8, in order to be more effective, these types of assessments will need to be undertaken with greater rigour and associated with stronger accountability mechanisms.
6.2.5.3 The lack of adequate control mechanism for complex rights

None of the four control mechanisms outlined in this section are appropriate for addressing complex systemic rights such as freedom of association. As highlighted in Chapter 5, section 5.2.3.2, social audit - the first control mechanism - has completely failed to address such rights and their broader social and political context. The second control mechanism, headquarter level assessments, focuses on the policies and management systems of buyers, rather than the social and political context of production. The third and fourth control mechanisms, complaints and termination procedures act as safeguards rather than overarching systems of control.

To date, Apparel MSIs (and primarily Governance Apparel MSIs) have sought to address complex rights through discrete training and projects. These kinds of activities can be classified as 'learning activities', which fit into the typical Learning MSI model. It is beyond the scope of this thesis to assess these projects in any detail. The critical point is that such discrete activities will only ever make small inroads, as they are non-binding, and incapable of overcoming powerful political forces. As noted by Syed Sultan Uddin Ahmmed of the Bangladesh Institute of Labour Studies:

We have a lot of capacity building program, training and everything. But I think that is not enough … most importantly, these union initiatives need protection … our government cannot give them the protection. And the opposite, they will support owners to terminate them, to victimize them, dismiss them, to sue them. Then whatever support you are giving will not work actually … Like there are a lot of programs … But what are they telling when [workers are] dismissed? You gain some people, you ask them that you should organise a trade union, this is their rights and the moment they start organising they are dismissed and then their photograph is circulated in the area so they are not getting any job from other factories. So what is the meaning of this training? This is the formula we are now using … (Ahmmed Interview).

Similarly, Gopinath Parakuni of CiviDep India (an FLA member) argued that various projects did not send a sufficiently strong and consistent message to suppliers:

… there has to be some pressure on suppliers to respect collectiveness and the collectivity of workers … so a very strong message has to go to suppliers that sorry this is an important part of our code and that is not forthcoming from either brands or MSIs. (Parakuni Interview).

The other tool increasingly utilised by Apparel MSIs to address complex rights is political engagement. Both Fair Wear and ETI have highlighted the need to pursue greater advocacy with governments to promote freedom of association (ETI 2015; Fair Wear 2017b). The FLA, while not directly referring to freedom of association in strategy documents, has nonetheless highlighted the importance of engaging governments to address ‘systemic’ challenges (FLA 2018a). Against this strategic backdrop, Apparel MSIs have shown greater willingness to engage, both individual and jointly, at the political level.
For example, in 2017, Fair Wear, ETI, FLA, SAI and WRAP and the Sustainable Apparel Coalition formed an 'MSI emergency response group', in order to coordinate responses to urgent labour rights violations in garment producing countries (Fair Wear 2017b). In 2017, 2018 and 2019, MSIs and buyers wrote jointly to the Cambodian and Myanmar governments, expressing concern about violations of freedom of association and other labour rights and proposing specific legal reforms (FLA et al. 2017; FLA & American Apparel & Footwear Association 2018; FLA et al. 2019a; 2019b). In 2018, Fair Wear and the FLA wrote to the Bangladesh Government raising concerns about repression of union activities (FLA & Fair Wear 2017).

Of all Apparel MSIs, only one has made attempts to address freedom of association among its membership base in a more systematic manner. In November 2020, Fair Wear released a Freedom of Association and Collective Bargaining Policy and accompanying guide. It provides that a buyer member is only in full compliance with the standard in Fair Wear’s Code of Labour Practice when freedom of association can be exercised in all facilities in a brand’s supply chain. The policy outlines six steps for buyers to take: (1) prioritise sourcing from countries that respect freedom of association; (2) participate in direct agreements with trade unions that ensure worker participation; (3) lobby governments; (4) include protections for freedom of association in supplier contracts; (5) urgently address violations of freedom of association; and (6) support and finance workplace training (Fair Wear 2020e). This policy will be reflected in Fair Wear’s headquarter level assessment, the Brand Performance Check as of 2022, with specific indicators currently under development.

The project and advocacy work described above represents an attempt to address broader, structural issues through techniques beyond audit. There is a real question as to whether project, learning based, non-binding approaches to these issues are sufficient. Advocacy, while promising, must be consistent, and connected to tangible consequences. Without more, these remain piecemeal and discrete efforts, rather than comprehensive regulatory strategies. In order to maintain legitimacy, MSIs must seek to tackle these issues in a more systematic, consistent, binding and measurable way. Fair Wear’s recent development reflects a promising advance in this regard, whose impact remains to be seen. Chapter 8 recommends further strategies for addressing complex rights in a systematic manner.

6.2.6 Coverage

The effectiveness of an MSI also depends on its level of coverage. Even if an MSI utilises effective control mechanisms, its overall impact will be limited if it does not cover a sufficient portion of the industry. The need for MSIs to expand their membership base was directly emphasised by Owen Tudor of the Trades Union Congress (an ETI member):

… they’ve got to widen their scope. It is all very well working with a small group of relatively liberal promoters of good performance, difficult thought it is day to day. But if you’re only scratching the
surface of the corporate world of supply chains then you are not going to be making the difference that you need to make … (Tudor Interview).

The Certification Apparel MSIs, SAI and WRAP, have certified 3,951 and 2,451 apparel manufacturing facilities respectively, amounting to 6,402 facilities combined. This reflects a tiny proportion of the estimated 400,728 businesses involved in global apparel manufacturing (IBISWorld 2021). The Governance Apparel MSIs, the FLA, ETI and Fair Wear have 48,33 64 and 147 apparel sector buyer members respectively, amounting to 259 buyers combined. The author was unable to ascertain how many apparel brands are in operation globally, however it is likely to be in the hundreds of thousands, given that an estimated 96,000 apparel companies operate in the US alone (Dun & Bradstreet n.d.). Thus, on its face, the membership base of Governance Apparel MSIs represents a fraction of the total number of global apparel companies.

This thesis posits that more significant than the proportion of companies covered however, is the proportion of industry revenue constituted by MSI membership. The author was unable to ascertain this information in respect of Certification Apparel MSIs. In respect of Governance Apparel MSIs, the members of the FLA, ETI and Fair Wear reflect approximate revenues of $137 billion, $114 billion, and $1.6 billion respectively, amounting to $252.6 billion combined.35 As stated in Chapter 1, the global apparel industry’s value (which reflects revenues) ranges from $1.5 to $2.4 trillion. Taking the midpoint of $1.95 trillion, the membership base of the three Governance Apparel MSIs combined amounts to approximately 13% of the apparel sector’s value. This is a small, but also not insignificant proportion.

Thus, while it cannot be said that MSI membership has become a new norm in the apparel industry, the level of coverage by revenue, at least for Governance Apparel MSIs, is arguably sufficient to catalyse a change in ‘the rules of the game’ (Waddock 2008). In order to fully realise the full potential of their coverage, Apparel MSIs must not only expand their membership base, but also address the issue of fragmentation (raised in Chapter 5). Chapter 8 makes recommendations in this regard.

6.2.7 The overall normative legitimacy of Apparel MSIs

This chapter has argued that the extent to which Apparel MSIs rely on social audit as a compliance tool has a significant impact on both input legitimacy (social audit is a weak control mechanism), output legitimacy (social audit is unable to ensure effective compliance), and therefore, their overall legitimacy. These legitimacy concerns are compounded by weaknesses

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33 The FLA also count thousands of licensees, who supply to universities as members (exact numbers are not publicly available). However these licensees are very small, with annual revenues ranging from $25,000 to $5 million.
34 Noting that the ETI figure is made up of some textile companies.
35 The author estimated these figures based on publicly available information.
in other key legitimacy areas including transparency, measuring impact and levels of participation and funding.

The extent to which Apparel MSIs rely on social audit is inherently connected to their functional model. The Certification Apparel MSIs – WRAP and SAI - rely almost exclusively on social audit to control the human rights compliance of individual facilities. This narrow focus on the conduct of suppliers prevents Certification Apparel MSIs from addressing relevant structural concerns such as the conduct of buyers, and the broader social and political context. Ongoing reliance on a single, limited tool to address the complex issue of human rights violations in supply chains leads to the conclusion that the primary control mechanism utilised by Certification Apparel MSIs is an inadequate tool to ensure rule implementation. Combined with an almost complete lack of transparency, non-representative levels of participation and limited coverage of production facilities, this means that the only element of legitimacy clearly satisfied by Certification Apparel MSIs is rule efficacy. In these circumstances, this thesis posits that from a normative perspective, the Certification Apparel MSIs are not a legitimate form of transnational private regulation.

In contrast, Governance Apparel MSIs reflect a much higher level of normative legitimacy. Unlike Certification Apparel MSIs, the FLA and Fair Wear have attempted to move beyond audit through the use of additional control mechanisms, while the ETI does not rely on social audit at all. Most significantly, each of the FLA, Fair Wear and ETI undertake some assessment of the policies and management systems of buyers. The FLA accreditation process and Fair Wear Brand Performance Check, both of which explicitly include the critical issue of purchasing practices, reflect the most rigorous and transparent approach. The ETI’s self-reporting and assessment process on the other hand is not public, and reflects a weaker form of member accountability. The other two mechanisms (utilised by all three MSIs) – complaints and termination procedures – while important, perform a safeguard function rather than acting as primary forms of control. In addition, each of the Governance Apparel MSIs have sought to move beyond audit through discrete projects and advocacy related to broader structural issues, although these have not translated into systematic control requirements.

From a responsive regulation perspective, Governance Apparel MSIs have a greater ability to escalate along the pyramid of sanctions as compared to Certification Apparel MSIs. Buyers can be given poor headquarter level performance reviews and are subject to the ‘big gun’ of termination. However, as argued above, headquarter level assessments need to be far more rigorous and transparent in order to attain their full regulatory potential. Termination, because it is rarely invoked is not necessarily a reliable regulatory tool. In order to ‘escalate’ their regulatory power, Governance Apparel MSIs will need to strengthen their control mechanisms.

The Governance Apparel MSIs also meet at least some of the other key legitimacy criteria. Both
the FLA and Fair Wear provide some level of performance related transparency in respect of its members (noting that the FLA performs best in this area due to its publication of audit reports). The ETI lags significantly behind the FLA and Fair Wear as it publishes virtually no information on the performance of its members. All three Governance Apparel MSIs perform poorly on transparency in respect of their own performance and impact. All three reflect at least some level of participatory diversity, with the FLA slightly lagging behind Fair Wear and ETI, principally due to lesser involvement by major US based trade unions. Nonetheless, Governance Apparel MSIs must further expand their networked pyramid by enrolling more stakeholders (sections 6.2.2 and 6.2.3). Governance Apparel MSIs reflect a not insignificant level of coverage (based on revenue). Like Certification Apparel MSIs all the Governance Apparel MSIs perform well on rule efficacy.

Thus, a normative assessment of the legitimacy of the Governance Apparel MSIs shows that the FLA and Fair Wear perform the best (the FLA and Fair Wear both with at least some control mechanisms that go beyond audit, the FLA with slightly higher levels of transparency, and Fair Wear with more diverse levels of participation). The ETI lags behind due to its weaker control mechanisms and poor levels of transparency.

6.3 The sociological legitimacy of Apparel MSIs

Legitimacy has both a normative (that is, moral) and a sociological meaning (Chapter 3, section 3.1). From a normative perspective, the relevant question is when should an institution be regarded as legitimate? For the reasons outlined in section 6.2, this thesis posits that Certification Apparel MSIs should not be considered legitimate, while Governance Apparel MSIs should. In contrast, the sociological concept of legitimacy focuses on the empirical question of whether it is widely believed that an institution has the right to rule. That is, do relevant stakeholders consider that MSIs are an acceptable and credible form of governance? The results of interviews undertaken for the purpose of this thesis guide the answer to this sociological question.

Given the protean nature of the term ‘legitimacy’, the author did not specifically ask interviewees whether they considered MSIs to be legitimate regulators. Rather, the author assessed each interviewee’s view on legitimacy, based on their overall responses to questions, including in particular, the extent to which interviewees indicated that MSIs still had a role to play in addressing human rights concerns in the apparel sector. Overall, 30 out of 33 interviewees (90%) expressed the view that MSIs remained relevant, and would continue to be an important vehicle for improving working conditions in global apparel supply chains.

It is important to acknowledge that a majority of interviewees had either an existing or prior relationship with MSIs; only six (18%) did not. On one view, this sample of interviewees is inherently skewed in favour of MSIs. This limits the ability to present a comprehensive assessment of social legitimacy. Thus perhaps the strongest conclusion that can be drawn from
these figures is that internal stakeholders (that is member brands and member NGOs and trade unions) continue to see MSIs as legitimate, albeit flawed, regulators. On the other hand, half of the six interviewees with no connection to MSIs also viewed them as legitimate (the other half considered that MSIs were not legitimate at all). Thus, in respect of external stakeholders, the strongest conclusion on social legitimacy that can be drawn is that there is some indication that MSIs are not considered wholly illegitimate. This thesis acknowledges that a more definitive response to the question of social legitimacy requires further interview data.

On the whole, interviewees did not distinguish between MSIs. This is likely because interviewees tended to express views on the particular MSIs they had experience or knowledge of. Only two interviewees specifically distinguished between Certification and Governance Apparel MSIs, and like this thesis, expressed the view that Certification Apparel MSIs did not reflect a credible form of regulation (Baumann-Pauly Interview; Vanpeperstraete Interview). In respect of Governance Apparel MSIs, two interviewees suggested that Fair Wear was the most credible followed by the ETI and FLA (Finnegan Interview; Vanpeperstraete Interview), and another considered that the FLA was the most credible (Baumann-Pauly Interview).

The most commonly cited ‘positives’ or ‘successes’ of Apparel MSIs were: their ability to convene a range of stakeholders to act collectively in respect of complex problems; their standard setting role which had resulted in relatively uniform codes of conduct; their role in driving the integrity of company processes and reporting; and their significant contribution to an increased awareness of human rights standards among suppliers globally. Some interviewees also considered that MSIs had contributed to actual improvements in areas such as health and safety and child labour at least for first tier suppliers.

All these interviewees also conceded that Apparel MSIs faced significant credibility issues and consequently needed to evolve in some capacity. Common concerns raised included transparency and accountability, in particular the need to improve public reporting on impact as well as the need to be more agile and responsive.

Another specific concern cited by interviewees was the failure of MSIs to move beyond the first tier of suppliers. Recent OECD Apparel Guidelines specifically provide that “[c]ollaborative initiatives can help to facilitate due diligence on subcontractors’ (OECD 2018 40, 56). That is, the OECD specifically contemplates the role of MSIs in assisting companies to progress their due diligence efforts beyond the first tier. Yet interviewees noted that ‘these multi-stakeholder initiatives … are not at all touching these supply chains’ (NGO 12 Interview) and that ‘as you go into either subcontracted or second and third tier, very quickly we’re seeing all the same issues that we saw 20 years ago ...’ (McAllister Interview).
The most commonly raised concern among interviewees related to impact. As demonstrated in section 6.2.5.2, interviewees considered that MSIs had not to date adequately measured and reported on impact. They also considered that MSIs had not, in practice, achieved sufficient levels of improvement in working conditions, in particular in relation to critical areas such as living wages and freedom of association. One independent expert considered that MSIs needed to undergo ‘radical’ change to address these issues:

Those things we’re not going to fix because we’re looking to brands who are trying to maximize their profit and who can move anywhere at any time and so the MSIs are pretending that if we just changed the model a little from one way to the other that we will clean up the supply chains but they are very limited to what they can achieve I think … either we radically change the way that the MSI works or we are just continuing to do business and not be effective at all … (Independent Expert 29).

Some interviewees also connected the question of impact to coverage. As noted by independent expert Amol Mehra:

I think that there’s a question around perhaps … legitimacy of MSI to be in this at all anymore … the industry has moved so slowly in some ways and harm still exist as such a scale it's sort of like are these just covering little pockets … are they little clubs or are they really solutions for an entire industry and I think that's the credibility challenge they have. (Mehra Interview).

The ETI Executive Director Peter McAllister acknowledged these criticisms, yet also argued that the expectations placed on MSIs were somewhat unrealistic:

I don't think we are at a point where we feel we are comfortable with what we do and we think we've got all the right tools. We recognise that MSIs generally have not been the panacea that they probably were held out to be, but frankly they were probably never going to be the panacea that they were held out to be … (McAllister Interview).

However he agreed that MSIs needed to measure impact, and adjust their strategies accordingly:

… I think it is reasonable to say to the MSIs, including ETI, ok well you’ve been around for 20 years, what are you doing that’s different and how are you testing to see that you’re having more impact than you did before? Because if you’re just doing the same things after 20 years and we all acknowledge that we haven’t seen the breadth and depth of change then surely that's the definition of lunacy. (McAllister Interview).

Despite acknowledged weaknesses, the interviewees that supported MSIs took the view that in circumstances where effective laws and protections for workers in host countries still remained a distant goal, MSIs were the best alternative option, and that without them, present conditions
would arguably be even worse. For example, an independent expert stated that while MSIs were ‘less successful in having the impact that they state they want to have or sometimes … state or imply that they’re having’, one needed to consider ‘would things be even worse if they didn’t exist’, concluding ‘it’s likely that things would be a lot worse if they didn’t …’ (Independent Expert 30 Interview).

This ‘better than nothing’ argument was expressly refuted by three interviewees – representatives of IndustriALL, the AFL-CIO and the WSRN - who considered that MSIs had completely failed, and in their current form, posed an obstacle to meaningful change. For example, Theresa Haas of the WSRN considered that while MSIs may have been successful in setting higher standards, they have ‘generally failed to secure the commitments necessary to implement meaningful and sustainable change.’ She further argued:

MSIs and social auditing programs are worse than nothing because they occupy political space that could be used to achieve effective meaningful programs like WSRN. But because MSIs exist, because so many brands participate in them or have their own social auditing program, when those brands are faced with exposés of violations in their supply chain, they can point to their participation in those programs as evidence that they are doing the right thing. And that deflects pressure that could otherwise be used to prep those brands to join the WSR program and adopt enforceable standards that do not exist within the MSI world … (Haas Interview).

Similarly, Brian Finnegan of the AFL-CIO stated:

… I wouldn’t say they’re standing still or doing nothing but I would say they’re not obviously driven by the concerns of the workers or the communities … and they’re just not questioning the model in the way that we think it has to be questioned, freedom of association which is about workers having rights and a certain level of collective power and also the way that especially garment works as far as the price structures and buying practices so those are the things that they haven’t really been willing to open up and change … the buying brands with power need to be driven to something enforceable so all the MSIs … they have some corporate funding, governance is dominated by them etc and they don’t lead to this enforceability … the MSI model for me is just too tainted by these experiences and this preference for doing less and holding on to power. (Finnegan Interview).

These arguments echo the views of some political science theorists who consider that MSIs hinder real political, structural and institutional change and effective public regulation, and that like corporate social responsibility efforts before them, are simply used as a shield to protect corporate reputations (Fransen & Kolk 2007; Sethi & Rovenpor 2016; Banerjee 2018).

Representatives of the WSRN, the AFL-CIO and also IndustriALL considered that MSIs were completely unreformable. In particular, they emphasised that the MSI structure was inherently incapable of overcoming the issue of corporate capture described in section 6.2.3. According to
IndustriALL representative, Christina Hajagos-Clausen, addressing human rights challenges in the supply chain requires a new industrial relations model:

I don't think MSIs, they don't have the authority to do industrial relations … I mean the root cause is the production right, the way production is organised and as multi-stakeholder initiatives I don't see them having any authority to actually be able to change that … (Hajagos-Clausen Interview).

All three argued that the only viable alternative was the worker-driven model, embodied in agreements such as the Bangladesh Accord, ACT and the Lesotho Agreements.

MSI Integrity came to a similar conclusion in its 2020 report, which considered 40 MSIs across a range of sectors and issues (MSI Integrity 2020). Many of its critiques were similar to those in this chapter. They found that rights holders (defined to include workers and civil society) do not have sufficient power to counteract corporate control, that MSIs have weak monitoring and compliance mechanisms, they are not designed to provide access to effective remedy and have not sufficiently demonstrated impact. As a result, the report argued that while MSIs might be an appropriate vehicle for knowledge exchange, relationship building and corporate engagement, they are not, and never will be effective private regulators that protect human rights and perform an accountability function. Like the three interviewees above, MSI Integrity concluded that MSIs are unreformable and no longer ‘fit for purpose’. They argued that in order to become an effective form of private governance, MSIs must become rights-holder centric and install mechanisms that restrict corporate power. They considered such a transformation to be virtually impossible in light of entrenched corporate interests. Like the WSRN, IndustriALL and the AFL-CIO, MSI Integrity argue that to the extent that private governance is still necessary, the worker-driven model is a more appropriate vehicle for closing governance gaps.

The major input and output legitimacy concerns in respect of MSIs set out in this chapter correspond to the key critiques put forward by the most vocal critics of MSIs. Despite the demonstrated limitations of MSIs, this thesis diverges from the conclusions of those organisations. First, this thesis has argued that it is important to distinguish between Certification and Governance MSIs. MSI Integrity applied a relatively broad-brush analysis to what is a very diverse MSI landscape. It did not seek to distinguish between different sectors, or different MSI models. Thus, while this thesis agrees that Certification Apparel MSIs are not ‘fit for purpose’, the same cannot be said for Governance Apparel MSIs. For the reasons outlined in this chapter, Governance Apparel MSIs still meet the normative legitimacy criteria to a threshold degree.

From a sociological perspective, interviews undertaken for the purpose of this thesis provide some support for the proposition that although concerns exist, MSIs are not yet perceived as illegitimate by a sufficiently broad and diverse group of stakeholders. Specifically, the interviews suggest that a majority of internal stakeholders view MSIs as legitimate, and not all external
stakeholders view MSIs as illegitimate. This thesis acknowledges that a larger sample size is required to further test this preliminary conclusion on social legitimacy.

In addition, while proponents of the worker-driven model suggest that it is the only acceptable form of private regulation, these organisations have not undertaken a detailed analysis of the extent to which the worker-driven model represents a viable, comprehensive alternative to MSIs. Nor do they adequately consider the extent to which these different types of initiatives may, instead of competing with another, in fact reinforce one another, or in regulatory theory terms, enrol one another (Chapter 3).

This chapter has acknowledged the legitimacy challenges facing Apparel MSIs. However it has argued that Governance Apparel MSIs still hold some promise as private regulators. This is because they meet a number of normative legitimacy requirements, reflect some elements of responsive regulation (with the potential to invoke additional features) and because they remain legitimate in the eyes of many stakeholders. Chapter 7 further argues that Governance Apparel MSIs offer two unique regulatory advantages as compared to the emerging worker-driven model. In order to avoid a serious ‘legitimacy crisis’ ahead, these MSIs must address the critiques set out in this chapter and reform accordingly. Chapter 8 argues that Governance Apparel MSIs can do this by honing in on their strengths, drawing upon the worker-driven model and enrolling a greater number of actors within the broader regulatory landscape.

**Conclusion**

This chapter applied the political theory concept of democratic legitimacy, first introduced in Chapter 3, to analyse the overall legitimacy of Apparel MSIs. As private regulators, Apparel MSIs must establish their legitimacy in order to justify their assumption of regulatory functions. Here, the MSI typology (Chapter 2, section 2.1) and its application to Apparel MSIs (Chapter 5, section 5.1.3) became significant. In circumstances where Learning MSIs do not exercise any regulatory power, they need not satisfy these legitimacy demands, whereas Certification and Governance MSIs, as private transnational regulators, do. Accordingly, this chapter analysed the legitimacy - both normative and sociological - of SAI and WRAP as Certification MSIs; and the FLA, Fair Wear and ETI as Governance MSIs.

An assessment of normative legitimacy involves a consideration of: the efficacy of an MSI’s rules; the extent to which the MSI reflects diverse and meaningful participation; the source of funding; levels of transparency; the nature of control exerted in respect of regulatees and the MSI itself; the extent to which compliance is implemented; and the level of coverage. This thesis also proposed funding as an additional criteria, as typically, it is not specifically considered by political theorists.
This chapter argued that Certification Apparel MSIs are not normatively legitimate, whereas Governance Apparel MSIs are. This conclusion is based in large part on the role that social audit plays within each type of MSI. As Chapter 5 established, social audit has become an increasingly discredited means of ensuring compliance with human rights, due both to its inherent limitations, as well as its inability to address broader structural and systemic issues.

The Certification Apparel MSIs – SAI and WRAP – rely almost exclusively on social audit to control target regulatees and ensure rule compliance. Further, the very functional model adopted by Certification Apparel MSIs poses an obstacle to an evolution beyond audit. Their focus on individual facilities means that they remain inherently supplier focused, without any means of holding buyers accountable for broader systemic issues such as purchasing practices and social and political context. The ongoing reliance on an increasingly discredited regulatory tool, combined with poor performance in respect of other key components of legitimacy – including participation, funding, transparency and coverage - leads to the conclusion that the normative legitimacy of Certification Apparel MSIs is very low, if not non-existent.

In contrast, the Governance Apparel MSIs – FLA, Fair Wear and ETI – have each acknowledged the limitations of social audit and sought to move beyond it in at least some capacity. The FLA and Fair Wear have done so through additional control mechanisms that focus on the policies and management systems of buyers, including an explicit focus on purchasing practices. The ETI, which has arguably taken the most strides in acknowledging the limits of social audit (and does not perform social audits at all), on the other hand exhibits weaker accountability due its reliance on a non-transparent self-assessment process as its only control mechanism. Each of the Governance Apparel MSIs have also sought to move beyond audit through a range of discrete projects and advocacy related to broader structural issues, although these have not yet translated into systematic control requirements. These efforts, combined with at least some levels of transparency and participatory diversity render Governance Apparel MSIs a significantly more legitimate form of regulation than Certification Apparel MSIs.

Nonetheless, Governance Apparel MSIs still face a number of legitimacy challenges. First, their attempts to move beyond audit are seen by many stakeholders as an insufficiently radical departure from the manner in which MSIs have operated since their inception. In addition, Governance (and Certification) Apparel MSIs have failed to adequately assess and publicly demonstrate their impact over time. Their relatively limited coverage and failure to move beyond the first tier in a comprehensive manner further compound the question of impact. The issue of corporate capture has arguably prevented more meaningful evolution. To date, diverse participation has not been able to counteract the power of corporate influence. This highlights that existing civil society stakeholders are not sufficiently empowered within the process.
Further, critical stakeholders – including workers and suppliers - are not sufficiently incorporated into MSI structures.

Despite these limitations, the sociological assessment of Apparel MSIs conducted by this thesis reveals that a majority of stakeholders, both internal and external, consider that MSIs remain a legitimate and relevant vehicle for addressing the human rights impacts of global apparel supply chains. Only a small proportion of interviewees disagreed with this conclusion, arguing that all Apparel MSIs have completely failed to provide a sufficient level of corporate accountability and consequent advances in human rights. In their view, the only viable model of private regulation is the worker-driven model.

The majority sociological view, combined with the assessment of normative legitimacy has led this chapter to conclude that Governance Apparel MSIs are still an appropriate and legitimate regulatory vehicle. Certification Apparel MSIs are not. However, if Governance Apparel MSIs do not address the concerns outlined in this chapter, as well as emerging private regulatory alternatives, this perception will only diminish over time. The remainder of this thesis addresses these issues. Chapter 7 compares the worker-driven model to the work of Governance Apparel MSIs. Chapter 8 considers new potential strategies and innovations to address the legitimacy crisis looming ahead.
Chapter 7 Multi-stakeholder initiatives and the worker-driven model

Introduction

As demonstrated in Chapter 6, a number of civil society stakeholders have grown increasingly disillusioned with the MSI model as a form of private regulation. Instead, they argue that the new worker-driven model - reflected in recent apparel sector initiatives (first mentioned in Chapter 4, section 4.1.3), such as the Bangladesh Accord, ACT and the Lesotho Agreements - is a more promising form of private regulation. This chapter investigates these claims by analysing the key features of the worker-driven model. Given that the focus of this thesis is MSIs, and not the worker-driven model, this chapter does not claim to present a comprehensive assessment of the worker-driven model. Rather, the point of the analysis is to facilitate an understanding of the key differences and advantages of the worker-driven model as compared to the MSI approach. The analysis focuses on Governance Apparel MSIs, given Chapter 6’s conclusion that only these MSIs are legitimate.

7.1 The worker-driven model

According to proponents of the worker-driven model, there are a number of critical features distinguishing it from both CSR and MSI approaches. Drawing upon the work of advocates and academia (WSRN n.d.; Outhwaite & Martin-Ortega 2019), this thesis identifies the following five salient features:

Principle 1: Workers and/or their representatives are included in governance structures.
Principle 2: Monitoring is independent and worker-centred.
Principle 3: Buyers commit to providing suppliers with appropriate incentives for compliance (for example higher prices, stronger commitment and financial incentives), and penalties for non-compliance (including termination).
Principle 4: Buyers are subject to binding and enforceable obligations, so that worker organisations can enforce the commitments set out in Principle 3.
Principle 5: The initiative is transparent and assesses its own impact.

The discussion below considers the extent to which the Bangladesh Accord, ACT and the Lesotho Agreement embody these features in practice, and the extent to which this differs from how the three Governance MSIs – the FLA, Fair Wear and ETI – operate. First, it is necessary to briefly introduce each of these initiatives.

The Bangladesh Accord was formed in 2013 in direct response to the Rana Plaza collapse. The Accord is a legally binding agreement between global brands & retailers and global trade unions IndustriALL, Global Union & UNI Global Union and eight of their Bangladeshi affiliated unions. The Accord aims to address building safety in Bangladesh’s ready-made garment sector.
through factory inspection, remediation and training programs. Originally signed by over 220 companies for a five-year term, the Accord was extended for another three years by a Transition Accord, signed by over 190 brands and retailers in 2018. On 1 June 2020, the functions of the Accord were transferred to a new RMG Sustainability Council, set up in the form of a not-for-profit local company comprised of local manufacturers, global brands and global and national trade unions (Bangladesh MoU 2019). The RMG Council’s remit is to continue inspection, monitoring, training and complaints, based on Accord processes. On 1 September 2021, a new International Accord for Health and Safety in the Garment and Textile Industry (International Accord) commenced. The International Accord, signed by 77 brands, is a 26-month legally-binding agreement under which signatories commit to continue the health and safety work already undertaken in Bangladesh through the RMG Council, consistent with the principles and governing structures of the original Bangladesh Accord. The signatories also commit to expanding programs based on the Bangladesh Accord principles to other countries, where feasible (International Accord 2021). A separate initiative, the Alliance for Bangladesh Worker Safety (Bangladesh Alliance) was formed at the same time as the Bangladesh Accord, and ceased operations in December 2018. The Alliance however is not binding and has been likened to a unilateral and voluntary CSR approach (Donaghey & Reinecke 2018).

The Lethoso Agreements were a direct response to an investigation by the WRC, which uncovered extensive gender-based violence and harassment in the Lesotho factories of Nien Hsing Textile Co Ltd (one the East Asian manufacturing giants referred to in Chapter 2). Signed in 2019, the Lesotho Agreements are comprised of separate agreements between local stakeholders (five Lesotho-based trade unions and women’s rights organisations) and Nien Hsing, and between local stakeholders and three major brands, with the WRC, the Solidarity Center, and Workers United signatories to each agreement. These agreements combined require brands to condition their business with Nien Hsing on its compliance with a program to eradicate gender-based violence in its factories. Set to run for two years, the Agreements are funded primarily by the three signatory brands (WRC 2019a).

Established in 2015, ACT aims to achieve living wages in the apparel and textile sectors through the promotion of collective bargaining and freedom of association throughout global supply chains. It establishes a framework for collaboration via a Memorandum of Understanding signed by 21 global brands and retailers in the garment and textile sector and the global union IndustriALL. Signatory brands agree to specific purchasing practices and country commitments, which are contingent on the establishment of national level collective bargaining agreements (ACT n.d.1).

Finally, it is important to mention the genesis of worker-driven model, the Fair Food Program. It emerged from a campaign by a coalition of tomato farmworkers, the Coalition of Immokalee Workers (Immokalee Coalition), to protect the rights of US farmworkers, typically migrant
labourers, who worked for poverty wages and were subject to abusive and dangerous conditions. The Program, founded in 2011, initially applied to tomato farmers in Florida. It now includes tomato growers in other states, as well as other limited produce farmed in Florida. A partnership of farmers, workers, and major retail food companies such as Walmart and McDonald’s, the Program oversees a Code of Conduct and features an innovative ‘Fair Food Premium’, to ensure that workers are paid a sufficient wage. The Program is underpinned by binding agreements between retailers and the Immokalee Coalition (FFP n.d.1).

Principle 1: Workers and/or their representatives are included in governance structures

Worker representatives have played a key role in driving and negotiating each of the above initiatives, and are also signatories to the underlying agreements. The Bangladesh Accord came about due in large part due to significant pressure and negotiation on the part of global trade unions (Reinecke & Donaghey 2015b), with both global and local trade unions becoming signatories. Similarly, the Lesotho Agreement was a direct response to investigation and advocacy by the WRC, and includes local trade unions and civil society as stakeholders (WRC 2019b). The ACT Memorandum of Understanding includes global union IndustriALL as signatory.

Worker representatives, in addition to being initiators and signatories, are also incorporated into the governance structures of these initiatives. For example, the Bangladesh Accord, and latest International Accord is overseen by a Steering Committee which is comprised of (local and global) unions and companies in equal proportion (and an ILO appointee as neutral Chair). The Steering Committee is empowered to appoint a safety inspector that oversees the inspection process, to approve budgeting and financial reporting, perform general management and administrative duties and to hear disputes. Under the Lesotho Agreement, an Oversight Committee, comprised of local organisations and brands in equal proportions oversees the administration of the program (with Nien Hsing Textile and the WRC each granted observer status). Workers do not directly participate in these overarching governance arrangements.

On a superficial level, each of the Governance Apparel MSIs also include trade unions or NGOs within their governance structures. However, the central critique explored in the previous chapter is that these stakeholders do not wield sufficient power to counteract the influence of major buyers. In addition, unlike the worker-driven model, MSIs do not systematically incorporate local civil society into their governance structures. As the discussion under Principles 3 and 4 below show, it is not necessarily the inclusion in governance structures per se that grants local worker representatives power, but rather, the existence of market and legal enforcement mechanisms.
**Principle 2: Monitoring is independent and worker-centred**

Central to each of the worker-driven initiatives is a system of monitoring and/or complaints mechanisms. Under the Bangladesh Accord, each supplier factory is required to establish factory health and safety committees, comprised of workers and managers. Workers must constitute at least 50% of the committee. These committees provide the opportunity for structured worker engagement, as the appointed safety inspector is required to provide its inspection report to these committees, as well as any worker representatives present in the factory. Through these committees, workers can directly comment and provide input into the results of the inspection. The Accord also establishes an independent worker complaints mechanism (under which individual workers or their representatives may make complaints), overseen by the appointed safety inspector. The Accord empowers workers to participate in these mechanisms, through a health and safety training program that is specifically designed to ‘enable workers to voice concerns and actively participate in activities to ensure their own safety’ (Bangladesh Accord 2013, 16).

Like the Accord, the Lesotho Agreements establish an independent oversight body, the office for the prevention of gender-based violence. However, instead of monitoring factories outright, it operates primarily as a complaints mechanism (similar to the WRC model), with the power to receive complaints of gender based violence and harassment from workers, carry out investigations and assessments in response and identify violations and enforce remedies. Complaint intake and counselling is led by local women’s rights organisations, who also (in conjunction with local trade unions) provide training to workers and managers. A trusted, independent complaints-based process is arguably far more appropriate than general monitoring when it comes to the issue of gender based violence and harassment.

The Fair Food Program also sets up an independent monitoring body, the Fair Food Standards Council (FFSC). The FFSC conducts audits of farms, which are comprised of a review of company policies and records, (including payroll and timekeeping systems), field observations, and extensive worker-interviews. Interviews typically cover 50% of a company’s workforce and are conducted in the field and off-site (FFP 2021, 36). All levels of management are also interviewed. The FFSC also operates a complaint line and investigates and resolves complaints, a process which includes workers, supervisors and growers and enforces a ‘zero tolerance’ policy in respect of retaliation against workers. The Immokalee Coalition oversees a ‘worker-to-worker’ education program, whereby farmworkers are empowered to educate their colleagues on their rights. The Program also requires growers to run specialised training on the prevention of sexual harassment and discrimination for workers and supervisors.

ACT does not offer a typical system of inspection-based monitoring. Given the nature of the commitments, monitoring occurs principally through survey-based data collection (discussed
further under principle 3 below). ACT also provides for a confidential complaints mechanism for allegations of non-compliance.

On a superficial level, the above monitoring processes are not dissimilar from the audits undertaken by the FLA and Fair Wear (the two Governance Apparel MSIs that do audit). Like the Bangladesh Accord and Fair Food Program, the FLA and Fair Wear auditors inspect facilities, review records and conduct on–off-site interviews with workers. Further, each of the FLA, Fair Wear and ETI offer complaints mechanisms, which, as discussed in Chapter 5, appear to be of reasonable efficacy.

The critical difference between worker-driven monitoring and MSI social audit is the centrality of workers to the process. This centrality is ensured through three interwoven features, which can be distinguished from MSIs. First, each of the worker-driven initiatives establish a local, centralised body with responsibility for monitoring and receiving complaints (or in the case of the Lesotho Agreements, for receiving complaints only). From the perspective of the worker, a permanent, local body is both more visible and accessible, and may also engender more trust than a constantly changing cast of auditors. The significance of trust and accessibility is borne out by the complaints figures. As noted in section 6.2.5.2, the FLA has accepted 68 complaints from 2013 to the present and Fair Wear has reported 486 complaints to date. In contrast, the Fair Food Program has received 3,110 complaints since 2011 (FFP 2021, 12), and the Bangladesh Accord received 2,073 complaints from 2014 to July 2021 (Bangladesh Accord n.d.1).

Second, worker participation is ensured through the structure of the initiative itself. Both the Bangladesh Accord and Fair Food Program empower workers with the agency and legitimacy to participate in inspections through factory and farm health and safety committees. It is difficult to appraise the quality of such participation without a detailed empirical study. There is some limited evidence (provided by the initiatives themselves), which suggests that these committees are not just superficial measures. In 2018, the Fair Food Program reported that 50% of its growers had established committees in full compliance with the Fair Food Code, and another 45% were working towards full compliance. These committees convene monthly meetings to allow workers to share concerns (FFP 2018, 26). The Bangladesh Accord does not provide overarching statistics in relation to its committees, however the level of training provided (discussed further below) suggests that they have been empowered to participate in inspection processes. In addition, the Fair Food Program ensures ample worker voice by committing to interviewing at least 50% of workers at each audit. The Lesotho Agreement operates on the sole basis of complaints from workers, rendering worker voice critical to its successful functioning. Other than including some workers in the audit process, none of the Governance Apparel MSIs provide any kind of permanent, structured form of worker participation.
Third, as outlined above, each of the worker-driven initiatives engage in extensive and regular worker training, both in respect of worker rights, and the mechanisms of the initiative. In order for workers to meaningfully participate, they must have knowledge of, and trust in the relevant processes. The Bangladesh Accord recorded that from 2013-2018 (the term of the first Accord), 1.4 million individual workers in more than 1,000 factories had been informed about workplace safety and their Accord rights, and 891 Safety Committees (the factory level committees that provide input into inspection reports) underwent safety training to address and monitor factory safety (Bangladesh Accord n.d.2). Fair Food operates a worker-to-worker education program where at least once per harvest cycle all workers crews are visited by the Immokalee Coalition’s education committee which uses ‘popular education methods, including illustrations and real-world scenarios’ to discuss the rights of workers under the Fair Food Program (FFP 2018, 19). Fair Wear, as part of its Brand Performance Check, explicitly requires member buyers to ensure that at least 10% of its suppliers’ production workers receive Fair Wear worker training modules. The FLA and ETI provide for discrete training modules, however do not appear to have a systematic program of worker training in place. Thus, at present, while Governance Apparel MSIs engage in worker training, it is not as targeted, comprehensive and systematic as that offered by the worker-driven model.

Fourth, as explored in principle 3, the worker-centric system of monitoring is backed up by binding commitments. Thus, workers know that not only do they have rights, and mechanisms through which to assert them, but that consequences for suppliers will follow.

**Principle 3: Buyers provide appropriate incentives and penalties**

Each of the worker-driven initiatives require buyers to provide incentives for compliance and/or consequences for non-compliance. Theresa Haas of WSRN, referred to these as *market enforcement* mechanisms (Haas Interview). In practice, these mechanisms require buyers to consider at least some of their purchasing practices, such as the price they pay and the longevity of their commitment to suppliers.

The Bangladesh Accord explicitly requires buyers to ensure the participation of their major suppliers and to provide incentives to ensure that it is financially feasible for suppliers to remediate and maintain safe factories. It envisions that such support may come through negotiated commercial terms, guaranteeing order volumes for longer periods, higher volumes, joint investments, soft loans, accessing donor or government support, business incentives or by paying for renovations directly (Bangladesh Accord 2013, Article 17). The signatory companies also commit to funding the administrative aspects of the Accord. Further, all initial signatory companies committed to continue sourcing from Bangladesh for at least the initial five year term of the agreement, with the Transition Accord of 2018 providing for a further three year commitment.
An NGO representative argued that these commitments were a critical component of the Accord’s success (NGO 12 Interview). Yet some academic commentators have queried how these commitments are enforced in practice (Baumann-Pauly et al. 2015). Preliminary research conducted by Human Rights Watch suggests that signatory brands did not live up to their commitments to provide financial incentives and support for remediation, or to maintain long-term sourcing volumes (Human Rights Watch 2019, 47-50). Conversely, high-level information provided by the Accord appears to suggest that these commitments were fulfilled, at least in part. Each Corrective Action Plan requires signatory brands and their suppliers to confirm that a remediation finance plan has been agreed upon. As at the date of transfer of the Accord to the RMG Council, 1,391 such plans had been confirmed in the Accord factory database, out of a total 1,648 Accord factories. Details of the finance plans are not themselves made public. The Accord also oversees meetings between suppliers and relevant brands in cases where factories request specific financial support to cover remediation costs. As at the date of transfer, 190 such finance requests had been received, of which 50 had been resolved (Bangladesh Accord 2020). On their face, these figures suggest that some brands did enter into some kind of financial arrangements with factories, and to the extent that either they did not, or factories were not able to cover remediation costs, the Accord oversaw a negotiation process.

The Bangladesh Accord also provides that buyers must take decisive action in respect of suppliers that fail to participate in the Accord process, by issuing warning notices and ultimately terminating non-compliant suppliers. This requirement appears to have had some effect with over 152 factories declared as ineligible suppliers due to their failure to co-operate in the implementation of corrective action plans (Bangladesh Accord n.d.4).

Similarly, the Lesotho Agreements require signatory brands to commit to reducing orders in the event that the supplier, Nien Hsing, does not comply with its commitments. There is currently no publicly available information on the extent to which this commitment has been enforced to date.

Like the Accord and Lesotho Agreements, buyers participating in the Fair Food Program must cease business with growers who have failed to comply with the Code of Conduct. The Program credits its willingness to suspend growers as a significant reasons for its success. Between November 2011 and October 2018, growers were suspended from the Program seven times, and were placed or remained on probation 29 times, meaning that growers could not sell to participating buyers during those periods. Thus, ‘the threat of market consequences has remained essential to maintaining high levels of compliance’ (FFP 2018, 13). The Fair Food Program also mandates a Fair Food Premium, which all participating buyers are required to pay in addition to the regular price of produce. The payment of this premium is monitored by the FFSC, with over $29 million paid to workers since 2011.
Finally, there is ACT, which unlike the above initiatives, looks at the entire spectrum of purchasing practices. It envisages that signatory brands will be held accountable for living wages through two key mechanisms: country level commitments, and commitments in respect of purchasing practices.

At the country level, brands agree to specific commitments, if that country has in place a collective agreement at industry level that covers wage growth, freedom of association and monitoring mechanisms. Commitments are specified for each country in consultation with local employers’ representatives and trade unions. For example, in Cambodia, ACT brands have committed themselves to maintain or increase their sourcing from the country until the end of 2022 if a collective agreement is signed (ACT n.d.2; n.d.3).

In respect of purchasing practices, brands are required to commit to five specific actions: including wages as an itemised cost; fair terms of payment; better planning and forecasting; undertaking training in respect of responsible sourcing strategies; and implementing responsible exit strategies (ACT n.d.3).

Brand compliance with the above commitments is to be monitored through a number of mechanisms. In relation to country level commitments, ACT member brands are to provide data on their individual country sourcing volume to a recognised audit firm and ACT in turn provides employers and trade unions annually with the aggregate figure of total ACT member brand purchases in the respective country. To date, no industry level collective bargaining agreements have been signed under ACT auspices. Given that the country-level brand commitments are contingent upon a collective bargaining agreement being in place, none of the ACT requirements have formally commenced.

Member brands have however already adopted purchasing practices commitments, and committed to progressive implementation (ACT n.d.3). These commitments are monitored through self-assessment conducted by brands, an anonymous purchasing practices assessment by suppliers, and an overarching assessment conducted by ACT. So far, 18 (out of 21) ACT brands have undertaken the self-assessment process, the results of which have been published, on an aggregate and anonymous basis (ACT 2019). ACT is now conducting a pilot for suppliers (in Turkey) to assess purchasing practices. However supplier assessment has not yet been rolled out to all ACT countries. It has also adopted the ACT accountability and monitoring framework, which sets out common indicators in order to monitor annual brand progress towards fulfilment of its purchasing practices commitments. ACT has foreshadowed the release its first ACT Accountability and Monitoring Progress Report in 2021 (not released at the time of writing), which will analyse the level of implementation to date (ACT n.d.4). Given the lack of public reporting on progress at the time of writing, it is not possible to assess the extent to which ACT has actually been successful in improving purchasing practices.
In summary, the Bangladesh Accord and Fair Food Program appear to have had at least some practical success in shifting incentive structures. The Lesotho Agreements and ACT are not possible to assess at this stage as they are not fully operational. At least in principle, each of these initiatives reflects a significant step forward in addressing the responsibility of buyers to consider the impact of their own conduct. As argued in Chapter 6, at present, while MSIs ask member buyers to look at their purchasing practices, they do not reflect a sufficiently strong form of accountability.

**Principle 4: Binding Commitments**

Proponents of the worker-driven model argue that binding commitments are critical to ensuring that obligations are actually enforced (WSRN n.d.; Donaghey & Reinecke 2018). Theresa Haas of WSRN referred to these as legal enforcement mechanisms (Haas Interview). In contrast to market enforcement, which as discussed in Principle 3 above, is the means by which buyers enforce standards expected of suppliers, legal enforcement is directed at enforcing the commitments of buyers. Theresa Haas argued that legal enforcement requires the commitment in question to be set out in a legally binding contract, signed by buyers and worker representatives, and be capable of enforcement in the jurisdiction in which the buyer is based.

The Bangladesh Accord very clearly provides for legal enforcement. It sets out an internal dispute resolution process and the option of escalating to binding UNCITRAL arbitration. Any arbitration award resulting from this process is enforceable in the state in which the signatory in question is domiciled. This procedure was invoked twice over the life of the Accord, in respect of two major fashion brands, with arbitration administered by the Permanent Court of Arbitration ultimately resulting in a settlement. Due to the confidentiality often attached to arbitration and in particular arbitration settlements, there is no publicly available information about the claims made in the arbitrations, or even the parties involved (PCA n.d.).

The Fair Food Code of Conduct, as well as the price premium is backed by binding agreements between the Immokalee Coalition and brands, under which brands commit to suspending purchases from growers that violate these conditions. The Lesotho Agreements also elicit a commitment from brands to reduce orders from the supplier Nien Hsing in the event of serious breaches. The reduction of orders is market enforcement in action. Legal enforcement comes from the fact that the commitments are set out in binding agreements. However, given that the full text of Lesotho and Fair Food agreements do not appear to be public, the precise manner in which participating brands’ obligations (to reduce orders in the event of a serious breaches by participating suppliers) are in fact enforceable, is not known.

Finally, ACT does not, at least at this stage, provide for any legal enforcement mechanisms. It has set out a series of country level and purchasing practices commitments, which signatory
brands commit to upon joining, and which are monitored through a number of overlapping mechanisms (Principle 3). At present, it is unclear how these commitments will be enforced in practice. ACT has foreshadowed that it will establish a dispute settlement mechanism between the brands and IndustriALL (ACT n.d.5). It remains to be seen whether this will be effective in enforcing any instances of buyer non-compliance with their country or purchasing practices commitments.

Proponents of the worker-driven model argue that it is the legally binding element that truly distinguishes it from the MSI approach. They argue that the key compliance tools used by MSIs are inherently weak as both suppliers and buyers very rarely face serious consequences for non-compliance. This dynamic is underpinned by an inherent tension between stringency of standards and enforcement on the one hand, and the need for MSIs to retain members on the other. As argued by Theresa Haas of the WSRN, legal enforceability can disrupt this dynamic by acting as a counterweight to ‘the huge imbalance in power that exists between corporations and workers and their organisations … and shift[ing] some of that power from brands to workers within the supply chain’ (Haas Interview).

This thesis has already concluded that Governance Apparel MSIs must strengthen their control mechanisms, and that buyer members exert excessive influence. The solution proposed by the worker-driven model is binding commitments. Yet some academic commentators and interviewees argue that too much has been made of this feature. William Anderson of Adidas (a signatory to the Bangladesh Accord) expressed the view that the significance of the binding commitment was ‘a little over stated’ and that it was the commitment of buyers, rather than binding mechanisms that were critical to the success of the Bangladesh Accord (Anderson Interview). This is supported by a preliminary study which found that the remediation record of the Bangladesh Accord was comparable to its non-binding alternative, the Bangladesh Alliance (Rose 2021).

Others have argued that the efficacy of legal enforcement is limited if those directly responsible for factory conditions – suppliers - are not parties (Baumann-Pauly et al. 2015, 6). More generally, legal proceedings tend to be lengthy and costly, and arbitral awards rely on local court systems for enforcement. As noted above, arbitration was only invoked twice in the context of the Bangladesh Accord and no proceedings have been reported pursuant to the other initiatives (nor have the precise mechanisms of enforcement been made public). It may be however that the indirect threat of legal action is in and of itself sufficient to induce greater levels of compliance. In the parlance of regulatory theory, binding legal obligations act as a signal of power, a ‘benign big gun’ looming in the background (Chapter 3, section 3.3.1).

Another concern is whether buyers will enter into further binding agreements. Theresa Haas of WSRN argued that this should not be an issue, as:
Brands sign contracts all the time, for the orders that they place, for the goods that they sell and so they ought to be willing to make similar commitments when it comes to the labour rights standards that they claim to be following. (Haas Interview).

In contrast a company representative expressed scepticism, querying ‘what is the leverage to do so? What is the thing that companies have in mind which makes them sign the contract? What are they afraid of?’ (Company 23 Interview). He distinguished the Bangladesh Accord as a specific response to a large-scale disaster, with strong reputational implications for major brands, but argued ‘if you take other issues where the case is not so clear, it will be more difficult to really construct those binding agreements’ (Company 23 Interview). The fact that 77 brands subsequently agreed to enter the International Accord in September 2021 provides some counterweight to this claim. Although this could be characterised as an extension of the Bangladesh Accord, which still only focuses on the discrete issue of health and safety. The only other binding agreement in the apparel sector, the Lesotho Agreement, was entered into after significant advocacy by the WRC, and only by three brands. As discussed further in section 7.2, this gives rise to a real question of whether the worker-driven model is replicable on a larger scale.

**Principle 5: Transparency and Impact**

Despite transparency and impact being a cornerstone of the worker-driven model, the initiatives have not performed consistently in this regard.

The Bangladesh Accord and Fair Food Program provide a fairly high degree of transparency. For example, the Accord lists all participating suppliers and makes public the corrective action plan and remediation status for each factory. It also publishes governance documents such as steering committee minutes. The Accord has also effectively communicated its impact by providing regular progress reports, which clearly set out statistics in respect of inspections, remediation, complaints and training. However its levels of transparency decrease when it comes to the commitments of buyers. For example, the Accord does not link buyers to supplier factories nor does it publicly assess the extent to which buyers are living up to their commitments to provide financial incentives for compliance to suppliers. Further, as noted in principle 4, it has not publicised any details in relation to arbitration proceedings.

The Fair Food Program performs well on impact, although less so on overall transparency. Its annual Fair Food updates provide a clear picture of the aggregate impact the Program is having on working conditions on participating farms. However, it does not provide any detailed information in respect of individual farms, or in relation to the commitments of participating buyers. The Lesotho Agreement and ACT currently provide limited information in respect of their work and impact.
The above suggests that some Governance Apparel MSIs do not necessarily fare much worse than the worker-driven model on overall transparency, recalling that the FLA publishes independent factory audit reports including remediation status, and both the FLA and Fair Wear publish the results of its headquarter level assessments. However both the Bangladesh Accord and Fair Food Program provide a much clearer and more sophisticated assessment of their impact, which as already discussed in Chapter 6, is a major weakness of all MSIs.

7.2 MSIs and the worker-driven model: competitors or complements?

Proponents of the worker-driven model argue that the principles discussed in the preceding section have driven successful outcomes (Finnegan Interview; Haas Interview; Hajagos-Clausen Interview).

The Bangladesh Accord, while subject to some criticism (Baumann-Pauly et al. 2015) is on the whole viewed as a successful initiative, and in particular by civil society (Donaghey & Reinecke 2018; WRC n.d.3.; Haas Interview; Hajagos-Clausen Interview; Tudor Interview; Vanpeperstrae Interview; NGO 12 Interview). Since its inception, more than 2,000 factories have been inspected by Accord engineers. As at July 2020, 92% of the safety hazards identified during initial inspections across all Accord factories had been fixed (Bangladesh Accord 2020).

Similarly, the Fair Food Program has received widespread acclaim for its direct impact on working conditions on farms (FFP n.d.2.). From 2011 to 2018, it has seen a steady rise in average code of conduct compliance scores from 10 to 89 (out of 100), and, since its inception, has paid over $36 million to workers in the form of the Fair Food Premium (FFP 2021).

The practical impact of ACT and the Lesotho Agreements, on the other hand, remains to be seen. A number of interviewees, including company and union representatives pointed out that to date, ACT had not achieved any tangible outcomes.

As stated in Chapter 6, three of the 33 interviewees – Christina Hajagos-Clausen of IndustriALL, Brian Finnegan of the AFL-CIO and Theresa Haas of the WSRN – consider that MSIs will never be able to achieve such outcomes and that the worker-driven model is the only viable form of private regulation. The recent report released by MSI Integrity comes to a similar conclusion (MSI Integrity 2020). All remaining interviewees that expressed a view on the worker-driven model, while generally supportive did not view it as a replacement for MSIs. This response was driven principally by a perception that the models each performed different functions, but also by some concerns over the limitations of the worker-driven model.

Both models purport to perform a regulatory function, yet each reflects a different vision of how the private regulation of global apparel supply chains might be ordered. As noted by William Anderson of Adidas, MSIs adopt a global approach by focusing on all relevant human rights, in
respect of all locations in which buyers' suppliers are based, whereas the worker-driven model promotes a decentralised, issues-based approach. He argued that:

> It's really extremely difficult to say this is better than that because they are different things. One is working at a membership level with multi-interfaces across a global picture and the other is an initiative on the ground in a very targeted fashion. (Anderson Interview).

This thesis argues that there are strengths and weaknesses associated with both approaches.

An oft-cited critique of the more targeted worker-driven model is that it lends itself to narrow coverage and the attendant risk of greater regulatory fragmentation. The Bangladesh Accord focuses on fire and building safety in Bangladesh, rather than health and safety in general, let alone broader issues such as wages and working conditions, and the power dynamics between buyers and suppliers (Baumann-Pauly et al at 2015; Scheper 2017). Further, it does not comprehensively address even this narrow issue, for the Accord covers less than one third of the estimated 7,000 production facilities (both direct and indirect and registered and unregistered) currently manufacturing for export in Bangladesh (Labowitz & Baumann-Pauly 2015). In addition, while the Accord appears to contemplate subcontractors (Bangladesh Accord 2013, section 19), the reality is that the Accord did not improve fire and building safety in subcontracted factories (Baumann-Pauly et al. 2015). Thus, while perhaps successful in respect of covered factories, the Accord has not addressed fire and building safety in Bangladesh’s ready-made garment sector at large. Similarly, the Lesotho Agreement addresses the single issue of gender violence in only a handful of Lesotho factories owned by the one signatory supplier, Nien Hsing. The Fair Food Program is broader than both these agreements as it addresses the full gamut of worker rights. However, it is narrow in its coverage in that it focuses principally on Florida tomato farms.

Thus, worker-driven initiatives create a distinct risk of a bifurcated system of protection for workers, distinguishing between those workers in a particular industry that are covered by the initiative and those who are not. A clear by-product of this narrow, issues based approach is the risk of ever-greater fragmentation. In circumstances where buyers are suffering from initiative fatigue and civil society resources are already stretched, it is questionable whether all stakeholders - including buyers, suppliers and civil society - have the resources and capacity to participate in multiple worker-driven initiatives in respect of a range of discrete issues in an array of production countries. Some smaller company representatives specifically highlighted resource constraints. While generally supportive of the worker-driven model, they noted that in contrast with large buyers who had entire social compliance departments at their disposal, small companies, with only one or two people responsible for social compliance, simply did not have the capacity to audit, and engage with MSIs as well as new worker-driven initiatives. Similarly Marsha Dickson of Better Buying stated:
... I've talked to companies about this and they're pretty much, they're looking for every possible way to streamline and harmonise the initiatives that are going on, that are popping up all over the place basically. Because it's fatiguing for them to be asked by a million different groups to be involved in different things ... I know a lot of companies put a lot of resources into various multi-stakeholder types of initiatives and working groups and things like that, but there's kind of a limit to that I think. (Dickson Interview).

Concerns in respect of coverage and fragmentation are not exclusive to the worker-driven model. There will always be workers in factories sitting outside the scope of private regulation, whether it be factories not covered by a worker-driven initiative that is operating in a particular country, or factories whose buyers are not members of MSIs. Further, as pointed out in Chapters 5 and 6, the Apparel MSI landscape is already highly fragmented. That is, coverage and fragmentation are weaknesses of both worker-driven initiatives and MSIs.

Conversely, focusing on discrete issues and locations is arguably one of the underlying reasons for the relative success of the worker-driven approach. Identifying and remedying different rights violations will require different strategies and techniques. Factory inspections are necessary and appropriate for health and safety issues, whereas the sensitive and hidden issue of gender violence and harassment requires safe and trusted complaints mechanisms and interview processes. Further, the underlying reasons for the violation of a particular right may vary from country to country. In order to harness the advantages of a targeted approach, without exacerbating the problem of ever-greater fragmentation, this thesis argues that the worker-driven model and MSIs must begin to actively co-ordinate efforts and resources.

As discussed in principles 3 and 4 (section 7.1), proponents of the worker-driven model argue that another key strength is the use of legal enforcement mechanisms. Yet some company representatives queried the true practical incidence of use, and hence significance of these mechanisms. Others questioned how likely it was that buyers would continue to enter into binding agreements in the future, without very specific pressure and impetus. The willingness of buyers to enter into binding commitments, in circumstances where initiative fatigue is already high and resources stretched, gives rise to a real question as to whether the worker-driven model is replicable on a global scale. This concern was expressed by a number of interviewed company representatives. That is, will there be sufficient impetus and pressure on buyers to enter into multiple binding agreements in multiple locations?

Given the reluctance of buyers to enter into binding commitments, it might not be realistic for MSIs to weave such commitments into the very heart of their governance structures in the same manner as the worker-driven model. As noted by an ETI company representative:

... the role of a multi-stakeholder initiative is not to provide a binding commitment to brands ... it is to provide a safe environment for brands to be able to discuss issues that have commercial
implications and ... reputational implications and these discussions wouldn't otherwise be able to take place because this is the nature of the business. (Company 20 Interview).

MSIs should however make greater efforts to both emulate and ‘enrol’ worker-driven initiatives.

Perhaps the most obvious strength of the worker-driven model is the centrality of rights holders (Principles 1 and 2, section 7.1). Chapter 6 argued that MSIs perform particularly poorly when it comes to stakeholder representation and lack of worker voice. MSIs should emulate at least some elements of the worker-driven model to increase their legitimacy in this regard. Its market enforcement mechanism also reflects a stronger form of accountability in respect of buyer purchasing practices.

Finally, some interviewees argued that only the worker-driven model is capable of addressing more complex rights. Apparel MSIs, with their continued reliance on social audit have, in the past twenty years, made virtually no inroads into rights such as discrimination, freedom of association and the payment of a living wage. Some MSIs have sought to move beyond audit by addressing these complex rights through piecemeal projects and advocacy efforts. Chapter 6 argued that in order to maintain legitimacy, MSIs must tackle these issues in a more systematic and consistent way. However, there is a live question as to whether MSIs have the legitimacy, expertise and mandate to provide for a systematic form of accountability in respect of (at least some) complex rights at all. According to IndustriALL representative, Christina Hajagos-Clausen, the form of collectivity offered by MSIs is simply not sufficient. For while MSIs might play a role in education and awareness, ‘they don't have the ability to do industrial relations [and further] they are in Western countries, [whereas] the production is happening somewhere else…’. She argued that:

... local actors have to be involved [and] that's something that trade unions can bring because we're all over the place, we might not be strong everywhere but we are actors in the supply chain, we represent workers and their interests and that's our traditional role. (Hajagos-Clausen Interview).

She considered that absent a mature industrial relations system, a living wage and advances in freedom of association can only be achieved through the ACT approach, which links purchasing practices to industry-wide collective agreements. Owen Tudor of the Trades Union Congress was also supportive of ACT, suggesting that it represented ‘the next step forward from the MSI approach’ in its promotion of collective bargaining (Tudor Interview).

Based on these insights, and the discussion in Chapter 6, this thesis concludes that it is time for MSIs to directly acknowledge their inherent limitations in addressing certain complex rights. The most striking example being freedom of association: a political right, which requires effective worker representation, engagement with local stakeholders and the ability to negotiate and
bargain. MSIs have never adequately represented workers, have had limited success in engaging with local stakeholders, and are not capable of facilitating industrial relations bargaining. It is only national level collective bargaining, or at least national level co-ordination, that can achieve comprehensive results (Locke 2013; ACT n.d.1; Hajagos-Clausen Interview).

For this reason, MSIs should cease attempting to ensure ‘compliance’ with complex rights such as freedom of association. While MSIs may continue to conduct discrete projects in this regard, they should carefully consider whether the time and resources involved are worth the, to date, very moderate gains. Instead, this thesis argues that MSIs should ‘outsource’ the pursuit of these rights to worker-driven initiatives such as ACT or to local efforts, while at the same time undertaking sustained and co-ordinated lobbying with host states.

The weaknesses of Apparel MSIs have been set out extensively in this thesis. Despite these challenges, this thesis has concluded that Governance Apparel MSIs remains a legitimate form of regulation. A majority of interviewees also viewed Apparel MSIs as a relevant vehicle for improving working conditions in global apparel supply chains. This is because, despite its limitations, a global, membership-based approach to regulation still offers advantages that the targeted worker-driven model cannot deliver on its own. Of the various advantages cited by interviewees in Chapter 6, section 6.3, this thesis posits that Governance Apparel MSIs offer two unique functions which the worker-driven model cannot replace.

First, as noted by a number of interviewees, MSIs have the ability to convene a range of stakeholders to act collectively in respect of complex problems. At its most basic level, this ‘convening power’ may operate simply as a networking, learning and exchange function. While a positive, this does not in and of itself amount to regulation. However, if MSIs transform their convening power into a form of ‘orchestration’, they will arguably be seen as increasingly legitimate regulators. As set out in Chapter 3, new governance scholars consider that decentred systems of regulation should be ‘orchestrated’ either by the state or, at the transnational level, by intergovernmental organisations. This thesis argues that in the particular context of global apparel supply chains, orchestration should be conceived of in the reverse. That MSIs, due to their significant convening power and global reach, are best placed to orchestrate public and private actors.

Such orchestration could occur on many levels. It could involve outsourcing the fulfilment of certain rights (as just discussed), the devolution of certain regulatory functions, outsourcing the collection of information, and calling for stronger public and private regulation. This does not mean that MSIs will cease to regulate. Recalling that, according to the decentred vision of regulation, the three elements of regulation - standard-setting, compliance, and enforcement - need not emanate from a single regulator. Rather, these functions may be undertaken by different actors within a regulatory regime. Thus, MSIs may continue their standard-setting...
function, and perform some compliance and enforcement functions, while outsourcing others. That is, MSIs should harness their convening power and increasingly view themselves as orchestrators or co-ordinators of private (and, where relevant, public) regulation in respect of apparel supply chains.

Second, as discussed in Chapter 6, Governance MSIs seek to exert control over buyer members at the headquarter level, through oversight of company policies, systems and procedures. Many interviewees specifically noted that MSIs had played a significant role in improving the integrity of company processes and reporting through this function. As argued in Chapter 6, this form of oversight needs to be strengthened in many respects. MSIs must be more than a ‘safe space’ for companies to network and learn if they are to be characterised as regulators. In particular, buyers must be pushed further to look inwards and address the impacts of their own purchasing practices and business models. Further, the buyer-supplier relationship must evolve from one based on compliance and policing to one of partnership and trust. Given their relationship and engagement with buyers, MSIs remain best placed to push corporate accountability in these areas. This corporate headquarter level oversight function will become increasingly important as mandatory human rights due diligence laws become more widespread (Chapter 4, section 4.3.2).

Although the worker-driven model is no doubt a promising innovation, this thesis concludes that it is unlikely to supplant MSIs as a form of private regulation. By viewing the worker-driven model and MSIs as complements, rather than competitors, MSIs can both model and enrol worker-driven initiatives in order to become better regulators, and ultimately maintain their legitimacy.

**Conclusion**

The worker-driven model has been put forward by critics as a more effective alternative to MSIs. They argue that only through the inclusion of workers and their representatives and the use of market and legal enforcement mechanisms can the inherent power disparities between buyers on the one hand, and workers and civil society on the other, be overcome. While this thesis agrees that Apparel MSIs can and should learn from the worker-driven model, this chapter has argued that the model is not capable of completely replacing the private regulatory function of MSIs.

First, MSIs perform an important convening function, which the worker-driven model does not. If utilised to its full extent, MSIs have the potential to convene, orchestrate and better co-ordinate public and private nodes within the broader apparel supply chain regulatory system. Second, MSIs have developed significant expertise in assessing the headquarter level compliance programs of buyers. This is a critical component of corporate regulation, and with more stringent controls, MSIs still have the potential to perform a powerful accountability role in this regard.
Further, at present, there are only three active worker-driven agreements in the apparel sector. The International Accord (replacing the Bangladesh Accord) focuses on building safety (at present only in Bangladesh). The Lesotho Agreement (due to expire shortly) focuses on one set of rights in the factories of one supplier in one country. ACT, although broader, has not yet resulted in tangible outcomes. The creation of new worker-driven agreements requires a willingness on the part of buyers to enter into additional binding commitments, which, without specific impetus will prove challenging. Thus, at present, the worker-driven model reflects only discrete, piecemeal inroads into human rights protection in global apparel supply chains. The global, more comprehensive approach of MSIs is still necessary.

This chapter has argued that rather than presenting the two models as competitors, as MSI critics have done, MSIs and the worker-driven approach should be treated as complementary initiatives, which, if effectively co-ordinated can lead to regulatory outcomes greater than the sum of their parts. First, Apparel MSIs can and should learn from and seek to incorporate key elements of the worker-driven model into its own functions. Second, Apparel MSIs should actively seek to enrol worker-driven initiatives in order to both strengthen their own legitimacy, but more importantly, to strengthen the entire system of apparel supply chain human rights regulation. Chapter 8 makes specific recommendations as to how this may be achieved.
Chapter 8  Recommendations

This thesis has argued that Apparel MSIs are standing on the precipice of a legitimacy crisis. From a normative perspective, they struggle to fulfil the key legitimacy criteria. Chapter 6 concluded that Governance Apparel MSIs meet the criteria at a threshold level. From a sociological perspective, although Apparel MSIs still have the overwhelming support of internal stakeholders, they are subject to increasingly vocal critiques from key civil society organisations. Nonetheless, for the reasons outlined in Chapter 7, this thesis also argues that Governance Apparel MSIs still perform valuable and unique regulatory functions.

This thesis has argued that one of the most significant legitimacy challenges facing Apparel MSIs is their ongoing reliance on social audit as a regulatory tool. Other key legitimacy challenges include a lack of diverse participation (and in particular the failure to meaningfully incorporate workers and local stakeholders), the disproportionate influence of member buyers, fragmentation, a failure to address complex systemic rights, a failure to demonstrate impact, and the lack of attention to human rights issues beyond the first tier. This chapter makes nine interconnected recommendations as to how Apparel MSIs can innovate their regulatory model and address these concerns. These recommendations draw upon the analysis of the worker-driven model in Chapter 7, interviews conducted for the purpose of this thesis, and the updated networked theory of responsive regulation. Given Chapter 6’s conclusion that only Governance Apparel MSIs are legitimate, these recommendations are directed principally towards these MSIs.

The table below summarises these recommendations and highlights their connection to other recommendations. The discussion that follows sets the recommendations out in full.

<table>
<thead>
<tr>
<th>Recommendation</th>
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<tr>
<td>1. <strong>Cease social audit</strong></td>
<td>Recommendations 2, 4, 6</td>
</tr>
<tr>
<td>Apparel MSIs should no longer use social audit as a control mechanism. In place of social audit, Apparel MSIs should collate a range of data points to monitor human rights conditions in supplier factories.</td>
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<tr>
<td>2. <strong>Incorporate worker voice into oversight functions</strong></td>
<td>Recommendations 3, 6</td>
</tr>
<tr>
<td>Apparel MSIs should better include workers in monitoring processes by embracing worker-voice technology and ensuring a more structured role in traditional mechanisms such as inspections, complaints processes and training.</td>
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<tr>
<td>3. <strong>Apply a partnership model to oversight mechanisms</strong></td>
<td>Recommendations 2, 6, 7, 8</td>
</tr>
<tr>
<td>The oversight mechanisms of Apparel MSIs should be informed</td>
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by a partnership approach, not a compliance based mentality. To this end, Apparel MSIs should:

1) actively regulate the buyer-supplier relationship
2) impose more stringent controls in respect of purchasing practices
3) formalise opportunities for leverage, and
4) incorporate suppliers into membership structures.

4. **Enrol worker-driven initiatives**
   Apparel MSIs should actively encourage buyer members to join worker-driven initiatives. They should also consider outsourcing certain functions, such as accountability for complex political rights, and inspections of local facilities.

5. **Enrol host and home states**
   Apparel MSIs should undertake more sustained political advocacy with host and home states.

6. **Establish local multi-stakeholder hubs**
   Local hubs can facilitate co-ordination among Apparel MSIs by playing four key roles:
   1) engaging with vital local stakeholders
   2) centralising certain functions
   3) facilitating dialogue and political engagement, and
   4) facilitating the exercise of greater leverage by buyers.

7. **Enrol new stakeholders: suppliers, investors and consumers**
   Supplier associations, large institutional investors and investors associations should be invited to join as members at the global governance level. Apparel MSIs should also become more consumer-facing.

8. **Improve transparency and impact reporting**
   Apparel MSIs should establish more detailed and clearer performance indicators for corporate members, and corporate members should be required to maintain supply chain transparency. MSIs should also set clear performance indicators in respect of their own performance and undertake regular self-reviews.

9. **Move beyond tier one**
Recommendation 1: Cease social audit

This thesis has argued that Apparel MSIs should cease using social audit as a control mechanism, because it is a weak regulatory tool. This is not to say that MSIs should no longer be involved in monitoring working conditions at all. They still need a mechanism by which to gain an overall understanding of conditions in members’ supplier factories. This recommendation contends that MSIs can monitor in a less resource-intensive, more efficient manner, which at the same time overcomes many of the inherent flaws of social audit, including lack of inclusion of workers and civil society. They can do so by viewing themselves as collators of data, combining a range of data points to reach an independent view on the situation in supplier factories.

This new function would require enrolling other initiatives to gain access to data. For example, data could be sourced from the SLCP, worker-voice technologies (Recommendation 2), inspections undertaken by worker-driven initiatives (Recommendation 4), independent outsourced inspections (including interviews) undertaken by civil society or a local hub inspectorate (Recommendation 6), and complaints mechanisms.

As described in Chapter 5, section 5.1.3, the SLCP aims to provide a common data point in respect of conditions in supplier factories. Sharon Hesp of the SLCP suggested that it should be seen as ‘an enabler’, rather than competitor to other MSIs, as it is not intended to be a standard, nor does it to come to any conclusions. She argued that ideally, other organisations, including MSIs, would use SLCP’s raw data to make their own assessments in respect of working conditions in specific factories (Hesp Interview). One FLA company member explicitly argued that different repositories of data were preventing ‘analysis on systemic and industry-wide problems’ and that data needed to be streamlined. In her opinion, SLCP presented a potential solution:

Everyone should be getting behind the social labour convergence project tool and should be making it better and … organisations like WRAP and so on should just down their tools and get behind thinking about how to drive supplier ownership and facilitating getting the right kind of information … (Company 22 Interview).

The SLCP is still in the early phase of operations. It is aiming to expand to 25,000 verified assessments per year by 2023, estimating that this could result in annual savings of audit-related resources of up to $134 million (SLCP n.d.4). Given its relatively large coverage (with over 252 signatories), the SLCP has the potential to transform the manner in which audits are conducted. Apparel MSIs, rather then being dragged along, could lead the sector in this transformation.
It should be recalled that the SLCP relies on supplier self-assessments, which are then verified by independent external monitors. Sharon Hesp argued that this approach promoted supplier ownership. However, this also gives rises to a risk of misrepresentation and/or fraud and relies heavily on the expertise of external verifiers, who are in no better position than social auditors to verify conditions. In fact, SLCP verifiers include the very same major audit firms mentioned in Chapter 5 (SLCP n.d.5). Further, workers and civil society are clearly absent from the SLCP process. For this reason, SLCP should only be viewed as one data point, which should then be supplemented with additional information. The main advantage of using SLCP would be to provide an initial overview of a facility and also to obtain information in respect of core business processes such as supplier management systems, policies, accounts and human resources, which civil society may not be best placed to assess.

This thesis acknowledges that some kind of physical monitoring will always be necessary. One company member indicated it was vital that third party neutral inspections take place (Muth Interview). Brian Finnegan of the AFL-CIO agreed that in the absence of an effective system of labour laws and inspections some kind of monitoring was still necessary, however argued that this should be undertaken by workers and unions rather than the audit industry (Finnegan Interview). Further, as discussed in section 7.1, the worker-driven model itself envisages a system of monitoring, which is independent and inclusive of workers. Similarly, the WRC, which emerged as an alternate model to the FLA and SAI, also monitors supplier factories (Chapter 4, section 4.1.2). It distinguishes itself from MSIs on the basis of its independence (buyers are not WRC members) and worker inclusion. Crucially, the WRC – described by some as the ‘gold standard’ of monitoring (Outhwaite & Martin-Ortega 2017, 11) - interviews workers offsite and also relies on a global team of field investigators who are connected to a network of unions, human rights organisations and other civil society groups (WRC n.d.4).

Apparel MSIs should emulate these examples and outsource physical inspections to local actors such as civil society, trade unions, and trained workers. Ideally, this would occur in a co-ordinated manner, with local multi-stakeholder hubs (Recommendation 6) facilitating local inspections and generating reports, which could then be used by all MSIs. To the extent that inspections already occur via a worker-driven initiative, Apparel MSIs should seek access to their inspection data (if it is not publicly available). MSIs could also collate data from worker-voice technology applications (Recommendation 2) and local complaints mechanisms, which would also be administered via a local hub (Recommendation 6).

This recommendation reflects the networked responsive regulation theory of enrolment, with Apparel MSIs enrolling other actors and initiatives within the broader regulatory system to gain access to information. Through this type of data triangulation, MSIs are likely to gain an accurate picture of local factory conditions. To the extent possible, MSIs should seek to share the burden of data collection. By replacing social audit with other forms of monitoring, MSIs will
go some way to addressing the problem of audit fatigue and free up valuable resources to better focus on remediation (Company 22 Interview) and regulating the buyer-supplier relationship (Recommendation 3).

**Recommendation 2: Incorporate worker voice into oversight functions**

This thesis has argued that Apparel MSIs have completely failed to incorporate the voice of workers. This recommendation acknowledges that it would be logistically challenging (and arguably unrepresentative) for MSIs to directly include workers in high-level governance structures, noting that worker-driven initiatives themselves do not do so. Rather, this recommendation contends that MSIs should emulate the worker-driven approach and incorporate worker voice into multiple oversight processes.

The most obvious area for improvement is to better include workers in monitoring efforts. As noted in Chapter 6, section 6.2.2, a number of interviewees raised this point. Independent expert Amol Mehra argued that more worker interviews could provide for ‘a more regularised feedback loop rather than a fly by helicopter in helicopter out social audit approach’ (Mehra Interview). Independent expert Doug Cahn suggested:

> … a different way to look at impact of company policies and procedures is to think about worker voice and how the voice of workers can determine whether those policies and procedures are working and potentially to do it without the filters of a social auditor, and potentially to do it in a much more replicable sustainable way. (Cahn Interview).

The FLA itself has acknowledged the need to strengthen the voice and concerns of workers, including by exploring ‘new and innovative methods to amplify worker voice’, and incorporate their perspective in compliance (FLA 2018a). As alluded to by Doug Cahn above, one means by which MSIs could seek to directly incorporate worker voice into their monitoring work is through the use of technology. This is not a new concept, with a number of mobile phone based applications and other digital platforms already being trialled in the apparel sector. Such applications allow workers to, for example, provide details in respect of working conditions and wages, rate suppliers, lodge complaints, and even promote worker collectivity (Farbenblum et al. 2018; WEST Principles 2019).

There are a number of risks and challenges connected to the use of technology. Most importantly, it should be a secure and trusted mechanism for workers, which does not carry unintended negative consequences, such as retaliation from suppliers. The technology should be inclusive and accessible to workers. Steps should be taken to ensure that data is representative, complete, credible and reliable. Further, the data provided must lead to remediation and change in some form, as otherwise workers will lose trust in the tool and no longer participate. Data protection should also be ensured. Addressing these issues is no small feat. Experts argue for a range of strategies including worker-centric and inclusive design,
ongoing worker involvement and communication, ensuring workers have a clear understanding of how their data will be used and what outcomes are likely, ongoing assessment of the technology’s impact and levels of engagement, and ensuring buy-in from suppliers and buyers (Issara 2017; Farbenblum et al. 2018; WEST Principles n.d.).

Some are highly critical of worker voice initiatives. They characterise them as a continuation of the social audit model of ‘standards without enforcement’ and instead, advocate for the worker-driven model (Kyritsis et al. 2019). Others argue that this criticism is misplaced in that worker voice technology does not profess to solve structural problems, but rather, should simply be viewed as another tool. In particular, it may be able to address some of the inherent flaws of social audit, such as lack of worker voice and supplier falsification, and can also reach the workforce on a larger scale, on a more regular basis. It can also be used as a means of triangulating other data, and to verify whether corrective actions have been implemented (Heuty 2019). Proponents do not suggest that technology is a panacea or a single solution. However, it can be an effective tool to gather better data in relation to working conditions, and to facilitate better communication between workers and employers (WEST Principles n.d.). As noted by Farbenblauem et al. (2018), ultimately technology must be connected to strong offline programs to be useful.

This recommendation views worker-voice technology as but one component of potential reform and innovation for MSIs. Its purpose would be to include worker-voice in MSI monitoring activities on a regularised, ongoing basis, assisting in the assessment of both factory conditions and progress on remediation. It would also free up MSI resources, if used as a (complete or partial) replacement for social audit (Recommendation 1). Ideally, MSIs would collaborate in the development of worker-voice technology and data use. In order to overcome the issue of worker trust, local hubs (Recommendation 6) could play a role in seeking worker input into design, explaining and disseminating the technology, and encouraging worker feedback on its operation.

Beyond simply being another data point, or ‘one-way collection of feedback,’ (Heuty 2019) worker-voice technology should facilitate a more structured, two-way relationship between workers and suppliers. Two interviewees specifically cited the need for more dialogue. One NGO representative argued:

... there needs to be an environment where the workers can have a constructive conversation in the process so that they are the best individuals who know what the problem is. They can really have a space for such a conversation to happen with their owners and if necessary with the buyers ... (NGO 12 Interview).
A company representative made a similar point, emphasising that it was essential for structured representations and conversations to occur between workers and suppliers, and for suppliers to take greater responsibility, arguing that they should be encouraged to:

… think of their workforce as this valuable asset made up of people that can really be used in a way that we think about modern HR systems today in that you invest in them and they do well, they perform well because they are doing better because they are feeling better in the workplace and so on. And so if you can find a way to measure that and measure it directly from the worker voice, have the suppliers be really responsible for that and then have brands essentially buy based on information like that and other information as well then your system is much more reasonable. So my view is get something that has worker voice directly, get it owned by suppliers, get the brand still held to account but in that buying relationship, rather than in monitoring production of a company they don’t own. (Company 22 Interview).

This thesis considers that MSIs should adopt and expand this suggestion. They should act as a trusted data intermediary and send worker voice data to both suppliers and their buyers. Buyers should then be required to take this information into account on a regular basis when assessing its purchasing practices and supplier relationship, with MSIs performing an oversight function (Recommendation 3). The supplier and/or the buyer should be obligated to respond to workers (for example to a factory worker committee) in respect of the concerns raised, including any actions taken. A local hub (Recommendation 6) could act as a data intermediary and potentially perform some of the oversight function. Ideally, *aggregated* (not individual) data would also be made public, or at least provided to civil society stakeholders for comment.

Otherwise MSIs should seek to improve worker voice through existing mechanisms, such as more off-site interviews, inclusion in inspection processes, input into monitoring reports, access to trusted complaints mechanisms and regular worker training. They should seek to emulate the worker-driven model in this regard. As discussed further in Recommendation 6, such involvement would be best facilitated through local multi-stakeholder hubs.

**Recommendation 3: Apply a partnership model to oversight mechanisms**

This thesis has argued that a unique regulatory advantage of Governance Apparel MSIs is their oversight function in respect of the policies and management systems of buyers at the headquarter level. This form of oversight goes some way to addressing the failure of social audit to address broader structural issues such as business models and purchasing practices. However, the systems of oversight utilised by Apparel MSIs do not perform a sufficiently strong accountability function at present. This recommendation contends that Apparel MSIs should strengthen this critical oversight function by: (1) actively regulating the buyer-supplier relationship; (2) imposing more stringent controls in respect of purchasing practices; (3) formalising opportunities for leverage; and (4) incorporating suppliers into MSI membership structures.
3.1 Regulate the buyer-supplier relationship: a values-based partnership approach

Chapters 5 and 6 argued that in order to move beyond audit and beyond a compliance mentality, buyers must, among other things, tackle the question of purchasing practices. At a higher level, as pointed out by the Executive Director of ETI, buyers must be pushed to re-think their entire business model and relationship with suppliers (Chapter 6, section 6.2.5). In a similar vein, Kathmandu (an FLA member) representative Gary Shaw acknowledged the limitations of a ‘white and very Western company coming in and saying you need to do this, this and this’ and highlighted the need for the relationship between suppliers and buyers to evolve from one of compliance to one of partnership:

So it's basically saying look we're imperfect, you're imperfect, but if we're willing to trust each other and be transparent about what our imperfections are now we can, based on that trust sit around the same side of the table and let's work on the solutions together. (Shaw Interview).

He also emphasised the importance of that partnership being 'values-based', where 'you align and you do business with people that believe what you believe'. Two Fair Wear company representatives also raised the issue of values (Lang Interview; Lindholm Interview). Henrik Lindholm of Sandqvist argued:

... the strange thing that I have found is not covered in any of this is actually the values of the people involved. And I don't know how to include this in a management system or in a systematic evaluation. But if the factory management or the people working at the brand are not genuinely interested in these issues, then change will be so difficult, if not impossible.

Similarly, another FLA company member argued that two-way commitment between buyers and suppliers was important, and that if buyers commit to long-term relationships, suppliers must also commit to (and invest in) increasing their own capabilities (Company 22 Interview).

This recommendation is consistent with a spectrum of existing research. For example, Rasche has argued that a partnership-based approach built on deliberation between suppliers and buyers is critical to improving rule implementation (Rasche 2010). Recent market research shows that apparel executives are increasingly cognisant of the need to develop stronger relationships with suppliers to meet human rights challenges: 73% expected that companies would reduce transactional relationships and enter into closer partnerships with suppliers (Business of Fashion & McKinsey 2021). This trend is supported by the research of Locke and his colleagues on the benefits of companies adopting ‘commitment’ or ‘capacity-building’ business models (Chapter 5, section 5.2.3.1). Other research, including by industrial relations scholars and NGOs suggests that knowledge transfer and greater accountability is more likely to occur through collaborative, and trusting relationships (Dutch Agreement 2020; Short et al. 2020). Similarly, responsive regulation argues that regulators are more likely to be effective where there is a pre-existing relationship of understanding and trust (Chapter 3, section 3.3.2).
Accordingly, this thesis posits that Apparel MSIs should actively seek to regulate the buyer-supplier relationship. This would include promoting due diligence - by both buyers and suppliers - and facilitating a values-based partnership approach. Governance Apparel MSIs are particularly well positioned to undertake this function given that they already have deep relationships with member buyers and extensive knowledge of headquarter level policies and practices. In order to legitimately perform this type of oversight function in respect of suppliers, MSIs will also need to grant suppliers some kind of membership status (Recommendation 3.4).

Apparel MSIs could perform this proposed new regulatory function in a variety of ways. An important starting point would be to develop - in consultation with buyers and suppliers - guidelines for a partnership-based approach. This might include for example, requiring buyers and suppliers to undertake two-way assessments of each other prior to entering into a commercial relationship. However, unlike the social audit approach, the assessment would not be about ‘looking for’ problems, which belies the widespread reality that almost all suppliers are likely to have some kind of human rights issues (McQuade Interview). Instead, buyers and suppliers should acknowledge upfront that problems exist, and undertake a needs assessment or gap analysis (in respect of working conditions). Such an analysis could be informed both by the data collection process envisaged in Recommendation 1, but also through direct engagement and discussion with the supplier. Suppliers would in turn assess a buyers’ purchasing practices (Recommendation 3.2) and the extent to which a buyer is willing to support training and capacity-building.

The buyer and supplier, with assistance from the MSIs could then work together to build capacity and address the issues identified. MSIs might also require members to incorporate contractual clauses requiring parties to consult, collaborate and provide technical assistance. As discussed in recommendation 3.2, a partnership approach would also incorporate tangible commitments from buyers in respect of purchasing practices. The extent to which members are adopting a partnership approach could then be assessed by the MSI on an annual basis, with both suppliers and buyers able to lodge complaints in respect of any failures to progress the partnership.

3.2 Greater accountability in respect of purchasing practices

This recommendation acknowledges that companies face two distinct obstacles to addressing purchasing practices: the pursuit of profit and the disconnect between sourcing and compliance personnel. In order to achieve corporate buy-in and therefore ensure the success of stronger accountability measures, Apparel MSIs must address these issues. The first heading proposes how this might be done and the second proposes stronger forms of accountability.
Overcoming obstacles: the need for better data

As demonstrated in Chapter 5, section 5.2.3, a majority of companies interviewed considered that purchasing practices were a significant issue. Yet most indicated that they were only just beginning to internally consider their own impact. As alluded to in Chapter 6, companies face a number of obstacles in addressing purchasing practices, two of which this thesis considers to be particularly significant.

First, purchasing practices are directly connected to how a business makes its profit. The most obvious example being that an increase in purchase price will have a direct impact on profit margins. As noted by Marsha Dickson of Better Buying:

... in an extremely competitive and extremely disruptive business right now with all kinds of pressures, financial and otherwise on companies, it's really hard to start thinking about OK let's just fiddle with the way we make money and see what happens. (Dickson Interview).

The second major obstacle to addressing purchasing practices is the disconnect between compliance and sustainability personnel on the one hand and those performing core business functions on the other. Compliance and sustainability personnel are often unable to influence the strategic direction of a business, yet these are the people that member buyers most commonly send as representatives to MSIs. Thus, while these employees may agree with the requirements imposed by MSIs, they may not have sufficient clout within the core business to actually implement a program of change.

Apparel MSIs will only be able to play a stronger regulatory role if they directly address these two challenges. As noted by a Fair Wear company member and an independent expert - both of whom considered that MSIs should play a more active role in regulating purchasing practices - MSIs risk losing their membership base if they impose stricter standards in this area. For ‘if you raise up the requirements nobody will follow you’ (Muth Interview) particularly if you ‘cut into the profit of one of your member companies … [t]hey’ll just say no, we’re not about to give up some of our profits so we’ll just go to another organisation, and some of them do …’ (Independent Expert 29). Thus, MSIs need to provide a compelling case to their members to justify greater accountability in respect of purchasing practices.

The first obstacle – the fear of cutting into profits - can be addressed by providing a clear evidence base for the need for, and advantages of, addressing purchasing practices. One FLA member stated that while purchasing practices are increasingly topical, there is as yet little hard, quantitative data in relation to their impacts. She argued there was a need for studies to ‘actually show objective data going from brand did this and it resulted in labour conditions x,’ noting that to date data was principally anecdotal (Company 22 Interview; see also IOD Parc 2015, 18). Although data is nascent, the studies cited in Chapter 2 (in particular the ILO global
survey (Vaughan-Whitehead & Caro 2017)) are already building an evidence base. Apparel MSIs can contribute by commissioning further studies.

Equally as important is convincing buyers that addressing purchasing practices will not only improve human rights outcomes but is also good for business. Several interviewees highlighted the synergies between improved purchasing practices and efficient business practice. For example, independent expert Doug Cahn suggested that there was:

... a strong correlation between poor purchasing practices and many inefficient business processes, which isn’t something that a lot of brands and retailers have the capacity to measure but which probably cost them a lot of money.

Independent expert Dorotheé Baumann-Pauly suggested that where buyers adopted partnership sourcing models, changing purchasing practices could ‘pay off in the end’, or at least not cost. An ETI company member echoed this sentiment, arguing that applying best practice standards would lead to returns-on-investment including better quality and stronger loyalty from suppliers (Company 20 Interview; see also ETI 2017a, 12).

Yet there is virtually no hard data on these asserted correlations (although see Baumann-Pauly et al. 2020 for an emerging case study). This thesis posits that MSIs should undertake, commission or facilitate studies that clearly demonstrate the business advantages of improving purchasing practices. Clear data in this regard would both cement MSIs as a centre of expertise on the issue, and also assist MSIs in making a case to their company members for the need for greater action and accountability.

Once MSIs gather data, they face the second obstacle of convincing commercial (and not just sustainability) teams to implement changes. As noted by several interviewees, including civil society, companies and independent experts, MSIs are typically engaging with sustainability people, who do not make purchasing decisions, do not lead corporate strategy, or ‘make the decisions that will make a difference’ (Tudor Interview), or ‘have the weight to go in and influence [the necessary] people’ (Dickson Interview). As an FLA company member stated:

... so here's the optics of that. So you have sourcing teams or planning teams or purchasing teams. All commercial folks who've been working in this business for a long time and then you have sustainability people come in from some NGO who have said you should be doing this because it's good for the workers. It's the wrong people speaking. It's not the right dynamic just to set up at the beginning. (Company 22 Interview).

Chris Harrop of Marshalls suggested that MSIs needed to engage ‘with legal counsel and the end of the C-suite’. Martin Buttle of the ETI acknowledged that ‘[w]e increasingly need to have conversations with commercial people.’ Accordingly, Apparel MSIs should make an active effort
to engage with company representatives other than social compliance and CSR personnel. Arguably MSIs should go even further and make engagement at C-suite level, or with commercial teams, a requirement of membership.

**Stronger accountability measures**

Drawing upon the worker-driven model, and in particular ACT, Apparel MSIs can increase accountability through four inter-connected measures. First, they should impose detailed, streamlined metrics. Second, MSIs should provide companies with more guidance on how to practically implement the metrics. Third, supplier assessments should be used to assess how buyers are performing against the metrics. Fourth, buyers should face clear consequences for failure to improve purchasing practices over time.

As Chapter 6 demonstrated, at present, the Governance MSIs provide for varying levels of detail in their purchasing practices assessments. The FLA obligations are aimed at a reasonably high level, Fair Wear’s Brand Performance Check is more detailed, while the precise extent to which the ETI actually assesses purchasing practices of its member is unclear. Independent expert Doug Cahn argued that more specific metrics such as those offered by Better Buying (of which he is co-founder) would assist with assessing impact:

> They’ve [FLA] got the principle. It’s an obligation … my hope is that they will adopt the kinds of metrics that Better Buying offers them to put a number on it. Because what gets numbered gets measured and what gets measured gets managed right. So, you know a company can articulate all kinds of policies and procedures but how well is it really working? (Cahn Interview).

In addition, ACT and NYU Stern Center for Business and Human Rights have also released their own metrics (O’Connor 2018; ACT n.d.3). One FLA company member specifically noted that the diversity of indicators was already becoming problematic and expressed the need for an alignment of questions, informed by commercial, as well as sustainability expertise:

> … we are getting asked by 13 or 14 different organisations to assess ourselves on this and some of them to report publicly on it. What are we being held to account on? What are we going to have to do on this? How is this actually helping us? Is this taking time that we’re just not going to be able to use on anything else? It’s not that we don’t want to talk about this or get it right. It’s just like can we please have 3 or 4 instead of getting into the teens there. (Company 22 Interview).

Private regulation in the apparel sector is already highly fragmented. It is in the interests of the entire industry for the major players to come together and attempt to settle on a unified set of purchasing practices metrics, which will act as a global industry-standard. In order to have an impact, purchasing practices must be addressed on an industry-wide scale. Such large-scale transformation requires leadership, which MSIs, with their powers of orchestration, are in the best position to provide.
Accordingly, this recommendation contends that Apparel MSIs should come together with Better Buying, ACT and other key players and agree to one set of indicators to be applied across the sector. In 2020 a group of Apparel MSIs including Fair Wear, ETI, the Dutch Agreement and German Partnership and initiatives such as ACT and Better Buying formed a working group directed at precisely this goal (Fair Wear 2020c). They are aiming to develop a common framework to define responsible purchasing practices, although to date, there have been no updates on progress.

In addition, even if an aligned set of indicators is achieved, as argued by three company representatives (one FLA and two Fair Wear members), MSIs do not have the commercial expertise to actually assist member buyers to look internally and change their processes. Henrik Lindholm of Sandqvist thought that the Brand Performance Check comments were often ‘too generic’ and that while Fair Wear performed a positive function in forcing companies to think about purchasing practices ‘they’re not saying anything that will give any of the members an epiphany’ (Lindholm Interview). The two other company members argued that many buyers needed practical assistance to reform their purchasing departments and suggested that consultancies with expertise in supply chain management would be much better suited to the task (Stochaj Interview; Company 22 Interview). Mariusz Stochaj of Continental Clothing suggested that MSIs could assist implementation by developing guidelines for consultancies to offer this form of technical assistance. This thesis adopts this suggestion and recommends that MSIs, again preferably jointly, draft guidelines to this effect.

Once clear and streamlined indicators have been established and guidelines for implementation drafted, it is important to assess not just the extent to which a company has altered its practices, but the actual impact of those changes. As noted by Marsha Dickson of Better Buying:

> So if you look at FLA in Principle 8 … it’s all about the management systems that a company has in place to make sure that their purchasing practices don’t have negative contributions to worker hours and wages. And that’s great you know, but again it’s the stuff a company does. Now Better Buying comes along and says OK how is that working from a supplier point of view, the issues that matter to them. So we’re a piece of data that can fuel all those initiatives and help them verify and understand the impact and value of what they’re doing … (Dickson Interview).

That is, it is important to assess whether the particular changes made by a buyer are actually easing the various pressures on suppliers discussed in Chapters 2 and 5. The Better Buying initiative performs precisely this function. Similarly, the ACT initiative relies on anonymous supplier assessments (in addition to self-assessment by buyers) to assess progress on purchasing practices. Suppliers also have access to a complaints mechanism. Martin Buttle of the ETI indicated that the ETI was already on this path:
... in practice we are asking our brands to encourage their suppliers to do this, anonymously rate them and then we're using that data that's generated to have a conversation about, 'these are what your suppliers have told us about your purchasing practices we know that you don't give enough lead time, we know that suppliers are complaining that you're not giving enough in terms of price.' It gives us the tools to have a much more granular discussion … (Buttle Interview).

This is no doubt a positive step. However, Apparel MSIs should adopt a much more rigorous and transparent approach. First, company members should be required (as opposed to encouraged) to request their suppliers to assess them. As is already the case with Better Buying, and as anticipated by ACT, these assessments would be anonymous and aggregated. However, additional measures may need to be put in place to avoid supplier fear of retaliation. For example, MSI buyer members could include a condition in their contracts with suppliers that the supplier must undertake an anonymous assessment on the understanding that the supplier will not suffer any negative economic consequences as a result of a negative assessment. Any alleged breaches of this condition could then be assessed, at least in the first instance, by the MSI.

Supplier surveys could be undertaken by the MSI itself, or in collaboration with Better Buying or ACT, which have already established the administrative and technological architecture. The MSI would then use this information to assess a company’s actual progress and real life impact against its stated policies and procedures in respect of purchasing practices.

The final critical step in ensuring accountability is providing for clear consequences when a buyer is not sufficiently progressing its purchasing practices commitments (noting that ACT itself does not make this clear at this stage). One independent expert considered that it was critical for MSIs to perform this function:

I think to remain relevant they need to be able to hold brands, their members accountable for the way they source their production …They need to do that through auditing the relationship and being transparent about the findings and saying you know here are our members and here are the scores of the audits and here are the results. This one does it better this one does it worse … (Independent Expert 29).

The theory of democratic legitimacy establishes that transparency is a key component of accountability. Accordingly, this thesis posits that Apparel MSIs should publish annual separate indices assessing and ranking their members’ progress on purchasing practices. Such information could influence the behaviour of investors and consumers (Recommendation 7). Another potential accountability mechanism is to require buyers to set out purchasing practices commitments in its contracts with suppliers (Lan Interview; Human Rights Watch 2019). Such commitments could then be monitored by the MSI, through a specific (potentially anonymous) local level complaints mechanism for suppliers in relation to purchasing practices. Buyers would
be required to remedy their purchasing practices, and face the prospect of suspension of membership, in particularly serious cases.

3.3 Formalise leverage

The partnership approach envisaged here should also be connected to direct efforts to increase leverage. As noted in Chapter 5, section 5.2.3.1, interviewed buyers reported positive outcomes from collaborating with other buyers in respect of common suppliers. However the extent to which MSIs directly facilitate collaboration and leverage among their membership base is unclear. Accordingly MSIs should adopt a much more pro-active approach in this regard. Given that some MSIs (the FLA and Fair Wear) already receive supplier lists from their membership base, MSIs should actively connect members with common suppliers, and require them to consider collaboration. Ideally this would be done within and across Apparel MSIs. Buyers could then jointly pursue a partnership-based approach with common suppliers, thereby saving significantly on training, remediation and capacity-building costs.

3.4 Supplier accountability and inclusion

Some interviewees raised concerns that even when a buyer adjusts its purchasing practices, suppliers will not pass on the benefits to workers. Henrik Lindholm of Sandqvist (a Fair Wear member) described his company’s own experiences with suppliers where wages and production planning had not improved, despite the company being willing to pay higher prices, and reserving production capacity in advance. Similarly, Ben Vanpeperstraete of the Clean Clothes Campaign highlighted the need to work with suppliers to ensure that improvements in purchasing practices were in fact passed on to workers, as otherwise, ‘it’s just an increase in margin for the factory owner’. The worker-driven initiative response is to require buyers to apply market enforcement mechanisms, namely reducing or withdrawing orders. This thesis posits that MSIs should adopt precisely this approach. Market enforcement terms should be set out in contracts between buyers and suppliers, which MSIs can oversee as part of their role in facilitating a values-based partnership between buyer and supplier.

More generally, the partnership model suggests that it is time for suppliers to be incorporated as active members of MSIs, rather than passive regulatees. Suppliers should also have the right to make complaints in respect of buyers who are not fulfilling their side of the bargain in respect of purchasing practices specifically, or the partnership more generally.

This thesis acknowledges that it may not be realistic for tens of thousands of suppliers to be become MSI members or to participate in MSI headquarter level governance structures. Instead, this thesis recommends that suppliers can be incorporated in two distinct ways. First, individual suppliers should be encouraged to participate in local multi-stakeholder hubs (Recommendation 6). Second, national supplier associations should be invited to become members, and sit on the boards of, MSIs (Recommendation 8).
**Recommendation 4: Enrol worker-driven initiatives**

This thesis has argued that MSIs should seek to enrol the worker-driven model. This can be achieved by establishing direct collaborative relationships between MSIs and worker-driven initiatives. This will increase the legitimacy of MSIs, potentially expand the coverage of worker-driven initiatives and decrease the risk of greater fragmentation. It could also result in greater efficiencies to the extent that MSIs choose to outsource specific functions to worker-driven initiatives.

It should first be acknowledged that each of the three Governance Apparel MSIs already publicly support the worker-driven model in some capacity. Fair Wear refers to ACT as a positive example of attempting to initiate ‘triangular’ social dialogue between buyers, factories and trade unions (Fair Wear 2017a), and has allowed ACT to use its labour costing tool (Fair Wear 2019b). The ETI has stated that ACT has the potential to play an important role in driving national, industry-wide collective bargaining connected to purchasing practices (ETI 2018). The FLA has acknowledged that ACT is ‘increasingly seen as a way for industry actors and unions to bring pressure on governments while also taking an active role in addressing wage issues’ (FLA 2018b, 19-20) and that ‘such an approach might benefit workers’ (FLA 2019e, 11).

Governance Apparel MSIs could go much further in supporting and engaging with worker-driven initiatives. For example, they could actively encourage their members to join ACT and effectively outsource their oversight role in respect of purchasing practices, freedom of association and payment of a living wage. That is, to the extent that Governance Apparel MSIs impose stricter requirements in respect of purchasing practices (Recommendation 3.2), they could offer members the option of joining ACT as a means of meeting such requirements, as an alternative to being subject to the MSI’s own assessment process. At a more piecemeal level, Governance MSIs could collaborate by aligning their purchasing practices indices with ACT’s (Recommendation 3.2), utilising ACT’s supplier complaints mechanism instead of establishing their own and sharing purchasing practices data. Further, this thesis has argued that social audit and MSIs more generally are incapable of adequately addressing complex rights such as freedom of association. A company member who joins ACT could be deemed to be taking serious measures to address their freedom of association obligations, at least in the specific ACT countries in question. In effect, MSIs could ‘outsource’ the pursuit of complex rights to initiatives which are arguably far more suited to addressing them.

It should be noted that the German Partnership has already entered a strategic partnership with ACT (German Partnership 2017). While the precise details are not clear, the German Partnership has adopted an online purchasing practices self-assessment tool for member companies that is based on the content of the ACT self-assessment process. It has also established a ‘country module’ in Cambodia in which German Partnership member companies commit to maintaining or increasing their sourcing volume in Cambodia at a constant level until
2022 and to take into account increased wage costs in the purchase prices (ACT n.d.). That is, member companies commit to some of the ACT country commitments in Cambodia. While the co-operation is not comprehensive, it illustrates how this recommendation can be put into practice.

From a regulatory theory perspective, collaboration represents a form of mutual enrolment, with MSIs potentially realising greater levels of legitimacy, and ACT standing to increase its coverage. At present, ACT has attracted only 21 buyers as signatories. The commitments of signatories only take effect once an industry-wide collective agreement has been signed between independent employers' organisations and trade unions in a particular country. While signatories will not be a party to these agreements, ACT envisages that they will support negotiations. The underlying assumption being that the promise of a range of commitments from signatory buyers - including country sourcing preferences, longer commitments to suppliers and fair purchasing prices - will provide otherwise weak local unions with greater bargaining power in their claims for higher wages and respect for freedom of association. Yet it is questionable whether 21 signatory buyers will have sufficient leverage to incentivise a sufficient amount of local suppliers to participate in collective bargaining agreement negotiations. Through mutual enrolment, MSIs could assist ACT to attract more signatories, ultimately resulting in greater leverage to achieve the outcomes it seeks to promote.

Apparel MSIs could also benefit substantially from enrolling the International Accord and establishing clear co-ordination. For example, in line with Recommendations 1 and 6, MSIs could completely outsource their health and safety monitoring function to such initiatives. This would not only free up valuable resources, but also boost legitimacy provided such initiatives appropriately reflected the worker-driven model.

Although MSIs could not force members to join worker-driven initiatives, they could actively influence them to do so and provide special recognition for those that do.

**Recommendation 5: Enrol host and home states**

This thesis has argued that it is unrealistic to expect private transnational regulatory initiatives to, on their own, solve the complex ramifications of what is ultimately the failure of states to protect (Chapter 4, Chapter 5, section 5.2.3.2). This recommendation contends that Apparel MSIs must enrol home and host states to provide for better systems of human rights protection. They can do so by taking on an active role in orchestrating public regulators.

Many scholars have written about the need for, and benefits of, greater interaction or ‘complementarity’ between public and private regulation (Seidman 2007; Locke 2013; Toffel et al. 2015; Amengual & Chirot 2016; Distelhorst et al. 2017). Similarly, scholars have argued that

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36 These activities have been suspended while Cambodia is subject to review under Europe’s GSP process.
the focus of earlier global value chain literature on the power of buyers (Chapter 2) has come at the expense of analysing the role of public actors such as states and international organisations. Consequently these scholars now argue for ‘a more encompassing vision of politics and agency in a GVC world’ (Mayer et al. 2017, 130). The UNGPs specifically refer to the need for states to consider a ‘smart mix’ to advance business respect for human rights, including ‘national and international, mandatory and voluntary’ measures (UNGPs, Principle 3). The UN recently noted that weak involvement from governments may be one reason that MSIs have not reached their full potential (UN 2018b).

From a regulatory theory perspective, nodal governance scholars argue that once it is recognised that many actors are engaged in regulation, both state and non-state auspices should promote, and where possible collaborate, to achieve what may be traditionally conceived of as public goods (Johnston 2006). Transnational new governance scholars argue that private transnational regulatory efforts are largely uncoordinated and lacking in important regulatory authority and capacities, and thus require that national and international agencies facilitate or ‘orchestrate’ their regulatory efforts. Such ‘orchestration’ is seen as essential for transposing responsive regulation to the transnational level. In their view, inter-governmental organisations are particularly well-placed to play this role (Abbott & Snidal 2013).

At present, intergovernmental organisations have not shown any willingness to take on an orchestrating role. Further, it is arguably unrealistic to expect them to do so (beyond developing frameworks and guidance) in the context of resource constraints, and the proliferation of multiple MSIs in multiple sectors. Home states have played an orchestrating role in setting up MSIs, which has been limited primarily to funding and initial convening.

This thesis contends that instead of relying on public regulatory actors to regulate private transnational actors, in this context, orchestration is better conceived of in the reverse. That is, Apparel MSIs should seek to orchestrate home and host states to become more powerful regulators. Or, applying the theory of networked responsive regulation, they should seek to enrol the regulatory power of home and host states. Such enrolment can be best achieved through stronger and more consistent political advocacy – with both home and host states - by MSIs, a view that was supported by almost half of interviewees.

As pointed out in Chapter 6, Apparel MSIs have undertaken intermittent collective advocacy with host states. Further, the ETI has explicitly cited ‘influenc[ing] policy and practice’ as one of its five strategic goals (IOD Parc 2015), with ETI Executive Director Peter McAllister arguing that:

We’ve brought back into focus the role of governments to create a protective environment for workers and therefore being more active on advocacy … we do need to get governments to put in place appropriate laws for building protection or trade unions or wages … (McAllister Interview).
Similarly, the FLA in its recent strategic plan indicated that it would seek to ‘[e]ngage governments to address priority issues in ways that will both improve conditions for workers and allow affiliates to better fulfil their FLA commitments’ (FLA 2018a, 4).

In order to be effective, existing advocacy efforts must be sustained, and supported by as large a coalition of buyers as possible. In addition, such advocacy should, where relevant, incorporate the voice and demands of local civil society.

From the home state perspective, advocacy efforts should, at least at present, be directed towards promoting mandatory due diligence legislation. The ETI played a significant role in bringing about the precursor to mandatory due diligence, the UK Modern Slavery Act (IOD Parc 2015, 17; Tudor Interview; McQuade Interview, McAllister Interview). As highlighted by Aidan McQuade of Anti-Slavery International (an ETI NGO member):

[The ETI] was able to harness the power of business and NGOs and unions to bring about changes. NGOs and trade unions had been calling for those changes for a long time and were roundly ignored by government. It was only a function of throwing business into the mix and having them calling for changes that led to those changes being instituted … (McQuade Interview).

As outlined in Chapter 4, mandatory due diligence laws are only just now beginning to gain momentum, with a handful of European countries having passed such laws and the EU Parliament presently considering a draft legislative proposal. In September 2020, the ETI, along with 26 companies, business initiatives and associations expressed explicit support for the EU’s proposal (ETI et al. 2020b). Fair Wear has also been actively lobbying members of the European parliament to vote in favour of the draft mandatory due diligence law (Fair Wear 2020c). Prior to that, hundreds of European companies and numerous business associations (representing thousands of company members) had, in various letters and statements already expressed support for mandatory due diligence laws (BHRRC n.d.). In April 2020, a group of 105 international investors co-ordinated by the Investor Alliance for Human Rights and representing US$5 trillion in assets under management, called on all governments to put in place mandatory due diligence laws (Investor Alliance for Human Rights 2020).

This thesis posits that all Apparel MSIs should come together to co-ordinate a concerted and ongoing campaign for mandatory due diligence laws, not only in the EU, but in the US and other major importers of apparel including Canada, Australia and Japan.

Mandatory due diligence, reflecting an ‘escalation’ along the enforcement pyramid (Chapter 3, section 3.2.1) is the more stringent extension of non-financial reporting obligations. Mandatory due diligence also has the potential to strengthen MSIs as companies subject to regulatory
requirements would be more likely to turn to MSI membership to support their compliance efforts. If MSIs increasingly focus their regulatory expertise on due diligence and partnership (Recommendation 3), they can cement their position as centres of excellence and significantly expand their membership base, and therefore coverage.

The EU draft mandatory due diligence law specifically contemplates the potential of multi-stakeholder co-ordination. The resolution adopting the draft, notes that ‘certified industry schemes offer small and medium-sized undertakings opportunities to efficiently pool and share responsibilities’ (European Parliament 2021). Article 11 of the draft law suggests that states may encourage companies to adopt ‘voluntary sectoral … due diligence action plans … aimed at coordinating the due diligence strategies of [companies]’. It provides that such plans should include trade union participation and might also provide for a single grievance mechanism. While not explicitly referring to MSIs, this envisaged co-ordination is precisely what MSIs offer.

Article 5 of the draft directive sets out the clear expectation that companies will consult with relevant stakeholders, including trade unions, when creating and implementing due diligence plans. It will be challenging if not impossible for civil society to individually consult with hundreds of thousands of companies. The MSI, a structured vehicle for consultation (Lindholm Interview), is perfectly placed to assist companies to meet any future mandatory due diligence obligations. The EU draft law notes that participating in MSIs should not, in and of itself be seen as evidence that a company has undertaken sufficient due diligence. However MSIs, particularly if they evolve their accountability mechanisms in the manner recommended here, have a clear role to play in supporting companies in their due diligence efforts.

Looking further to the future, this thesis posits that the next legislative evolution might impose purchasing practices requirements on buyers. One company representative argued that addressing purchasing practices would only become an industry standard if it was a mandatory legal requirement (Company 23 Interview). Another alternative increasingly put forward by civil society are ‘failure to prevent’ laws which impose a duty (and attendant liability) on companies to prevent harm, with reasonable and appropriate due diligence operating as a defence against liability (BHRRC & Modern Slavery Registry 2021). While it may be too early to advocate for such laws at present, these are areas of legal reform that MSIs should be mindful of.

Another area where MSIs can fruitfully influence home states is in advocating for stronger enforcement of human rights provisions under international trade treaties. As noted in Chapter 4, the EU recently withdrew preferential market access for Cambodia’s apparel exports due to serious human rights concerns. The ETI and FLA joined 31 other civil society organisations in signing an ‘open letter’, calling on other governments, including Australia, the US and the UK to adopt a similar position to the EU (ETI et al. 2020a).
This is another positive example of how MSI can connect to, and enrol state power. Apparel MSIs should undertake similar advocacy with home states in respect of the human rights challenges in a broader range of apparel producing countries. While such advocacy may not lead to a withdrawal of preferences as in the case of Cambodia, it could lead to greater human rights engagement between home and host states. Independent expert Amol Mehra highlighted the power of more formal engagement by home state governments. Referring to MSIs in the private security and extractive sector context that included host and home state governments, he stated that ‘it was really helpful to have governments to be able to leverage other governments’ (Mehra Interview).

International trade is an area where home states can clearly exercise greater leverage and engagement with host states, and MSIs should play a more distinct role in encouraging this. Such efforts should be more concerted than simply writing open letters, and extend to meetings and briefings. Relatedly, MSIs should also lobby home state governments to enact domestic trade restrictions by banning imports from certain countries, regions or manufacturers (in the case of particularly egregious human rights concerns), similar to the US Trade Facilitation and Trade Enforcement Act of 2015 (Chapter 4, section 4.1.4).

Second, MSIs should seek to connect to host states. Perhaps unsurprisingly, the literature points to improved outcomes for private regulatory initiatives in countries that have stronger labour laws and enforcement mechanisms (Toffel et al. 2015). This thesis has recognised the advocacy efforts of Apparel MSIs to date (Chapter 6, section 6.2.5.3). However, it argues that like home state advocacy, efforts should be more co-ordinated and consistent. The local hub concept discussed in Recommendation 6 would serve as an ideal base for such activities, bringing together a multitude of buyers across MSIs, providing the opportunity for collaboration between buyers, local civil society and workers, as well as acting as a vehicle for more consistent pressure on host governments.

A critique of MSIs over the years has been that they may prevent the introduction of public regulation (Seidman 2012; Van Huijstee 2012). Most recently, MSI Integrity called for more public regulation, cautioning that MSIs should not be seen as a substitute, and arguing that with growing calls for hard law, the influence of MSIs ‘appear to have peaked’ (MSI Integrity 2020, 48-50). This thesis posits that such a position misconceives the dynamics between MSIs and public regulation. No interviewee expressed the view that MSIs were an adequate substitute for public regulation. As noted by Henrik Lindholm of Sandqvist (a Fair Wear company member):

It's not what you do instead of good governance in the supplying countries. It is what you do to encourage improvements and hoping that there will be improvements locally so that it's not up to the individual brands to do this. (Sandqvist Interview).
In fact, five out of eleven interviewed company representatives explicitly advocated for stronger government (home and host state) regulation. Further, as demonstrated in Chapter 6, MSIs have (at least to some extent) already participated in advocacy for more stringent regulation. MSIs are a powerful institutional voice that, through their convening power, can bring together multiple stakeholders to demand that states exercise more regulatory power. This reflects both an enrolment of state power, and the orchestration of a global regulatory system.

Rather than declining in influence, if MSIs participate in greater advocacy, and position themselves as actors that can assist companies to meet their obligations under law, MSIs will only increase their legitimacy over time.

**Recommendation 6: Establish local multi-stakeholder hubs**

This thesis has argued that Apparel MSIs have failed to engage with local stakeholders. Their potential to influence is also lessened by an increasingly fragmented regulatory environment. This recommendation contends that Apparel MSIs can address these challenges by jointly establishing local multi-stakeholder hubs. Such hubs would not replace Apparel MSIs themselves (noting that merging MSIs overnight is not a realistic goal). Rather, they would facilitate co-ordination among Apparel MSIs by playing four key roles: (1) engaging with vital local stakeholders; (2) centralising certain functions, thereby avoiding duplication and fragmentation; (3) facilitating dialogue and political engagement; and 4) facilitating the exercise of greater leverage by buyers.

**Engage with local stakeholders**

Chapter 6 demonstrated that Apparel MSIs do not provide sufficient opportunities for workers and civil society to participate. Stakeholder engagement is critical to MSI legitimacy and an essential element of due diligence under the UNGPs (Principles 18-21). It will also be increasingly reflected in domestic reporting obligations (Australian Border Force 2018, 49; European Parliament 2021, Articles 5, 11). As argued in Chapter 6, section 6.2.2, local civil society and workers do not have the resources and capacity to engage with complicated governance structures that are located overseas. Recommendation 5 further pointed out that meaningful engagement will become increasingly unsustainable as more individual businesses adopt due diligence programs and new initiatives emerge. Civil society will not have adequate resources to provide ongoing input into all these processes and initiatives.

These constraints can be overcome by centralising and localising engagement efforts. Gopinath Parakuni of CiviDep argued that ‘[l]ocal stakeholder engagement in a structured fashion is essential’ (Parakuni Interview). Henrik Lindholm of Sandqvist (a Fair Wear company member) noted that facilitating structured stakeholder dialogue was a particular strength of MSIs.

A local hub would create opportunities for participation in a structured manner, facilitating greater civil society and worker involvement and more locally driven solutions. For example, the
hub could ensure that workers and civil society are systematically included in local inspection processes (which, as outlined below could become a centralised hub function). This would include participating in monitoring and remediation processes. The hub could collate data from worker-voice technology applications (Recommendation 2) and seek ongoing worker input in respect of their operation. It could also conduct regular large-scale off-site worker interviews, and initiate joint fact-finding missions where necessary. This information could then all be fed back to both the member buyers in question, as well as their respective Apparel MSIs.

The Indonesia Protocol (chapter 4, section 4.6) although not without flaws, has been cited as an example of positive local engagement. Its focus on local actors is said to have lent it greater legitimacy in the eyes of workers, leading to greater ‘socialisation’ and engagement with its mechanisms. Further, the fact that Protocol meetings occur locally, in the local language allow for much greater levels of participation (Connor et al. 2016a; Siegmann et al. 2017). Similarly, local MSI hubs would provide an opportunity for meaningful and structured participation and thus ameliorate some of the legitimacy concerns in relation to local representation.

As flagged in Recommendation 3.4, the local hub could also provide an opportunity for greater supplier engagement. Buyers seeking to foster a partnership-based approach (Recommendation 3.1) could encourage their suppliers to become members of the hub, which could perform a number of oversight functions. For example, the hub could facilitate greater worker-supplier engagement by acting as a trusted third party intermediary that provides worker-voice technology data to suppliers. It could then ensure that suppliers engage in dialogue with workers (or worker committees) (Recommendation 2). Suppliers could also complain to local hubs if they considered that buyers were not living up to their partnership obligations. All relevant data and complaints could be gathered at the local hub level, and then fed through to buyers and the global MSI level. A practical manifestation of this local approach is the inclusion of suppliers in the new RMG Sustainability Council, which recently took over the functions of the Bangladesh Accord.

Centralise functions
Many of the proposed functions above reflect the centralised role that a local hub would adopt. For example, the participation in inspections envisaged above could occur through a local permanent inspectorate co-ordinated by the local hub (similar to the Bangladesh Accord model). This inspectorate might include a combination of local inspectors and a set quota of worker and local civil society representatives. The monitoring might focus specifically on health and safety issues, which are more suited to physical inspections. Like the Accord, inspection reports would be made public, and workers and local civil society would be afforded the formal right to provide input. As contemplated in Recommendation 1, individual MSIs could outsource inspections to this hub and then use the information to inform assessments of their members. Alternatively, to the extent that an Accord-like mechanism already exists in the host state, the local hub could connect to that.
The hub could also operate a centralised complaints system in relation to different rights violations, which could be utilised by all Apparel MSIs. The author notes that some limited movements are already occurring in this regard. In 2020, Fair Wear announced the launch of a partnership, in which members of the Dutch Agreement and German Partnership will be able to access Fair Wear’s complaints systems (Fair Wear 2020c). Worker training would also benefit from centralisation. The hub could conduct regular training for workers about their rights, the existence of MSIs and the various mechanisms and processes available to them.

A local hub, by centralising certain functions, would avoid duplication. It would also ensure that valuable local civil society resources were directed towards one effort, which different MSIs and their respective members could tap into, rather than civil society spreading already thin resources in an attempt to engage with numerous initiatives and buyers.

Foster dialogue and facilitate political engagement
A local hub could foster dialogue in respect of a range of rights, most notably freedom of association. As noted by the General Secretary of CiviDep, Gopinath Parakuni in Chapter 6, there needs to be more pressure from buyers and MSIs ‘on suppliers to respect collectiveness and the collectivity of workers’ (Parakuni Interview). Such pressure would be far more effective through a centralised and local framework, which facilitates direct dialogue between a large group of buyers and local suppliers. Buyers could engage in consistent dialogue and representations to suppliers, and to the host government (as contemplated in Recommendation 5), collectively through this hub. Such advocacy would be bolstered if buyers could point to their commitment to the partnership model (Recommendation 3). Efforts at this local hub level could also support and connect to the ACT approach (Recommendation 4).

Facilitate greater buyer leverage and engagement
From the buyer perspective, local hubs are a much more efficient way of exercising leverage. Recommendation 3.2 suggests how individual MSIs might enhance leverage. Such efforts could be expanded further through the local hub, with buyers across MSIs with common suppliers joining together. One ETI company representative which was also a signatory to the Bangladesh Accord, highlighted both the increased leverage and economies of scale for signatory buyers when a large number of buyers were able to come together:

The benefit of the Accord … is that we're moving in numbers. So we are all together in the Accord, all of the European brands are in the Accord, there’s a nominated lead brand in every factory. We trust that that lead brand is going to remediate issues for us with the supplier.
(Company 21 Interview).

Similarly, IndustriALL representative Christina Hajagos-Clausen argued that building industrial relations in supply chains required being ‘able to harness the power of the brands … to pool the
leverage of the brands to solve a systemic problem in the industry’. In her view, the success of the Bangladesh Accord was due to this collective, leveraged approach, where brands collectively conducted ‘real negotiations’ with unions. A local hub could seek to replicate this form of leverage, but in relation to a much broader range of issues.

The local hub as a node

It is worth noting that some Governance Apparel MSIs already promote a local focus. For example, Fair Wear currently has operations in 11 countries, and only allows buyers with more than 50% of production in those countries to become members. The ETI, in its recent strategy paper explicitly cited supporting ‘an emerging international network of local ethical trade platforms’ as one of its strategic pillars, including developing and supporting local tripartite structures or ‘ethical trading hubs’ in key sourcing countries (ETI 2015). An ETI company member indicated that the ETI’s local regional platforms and associated programs were the most valuable aspect of ETI membership (Company 21 Interview).

The local hub approach recommended here is in some respects, similar to the ILO’s Better Work program (chapter 4, section 4.1.2). An independent expert (who formerly worked at Better Work), noted that this was the original idea behind Better Work:

... it would be helpful if FLA, SAI and WRAP came to the table and said let’s become one organisation and let’s have a model that all three of us work and if we can get another 3 or 6 to do the same thing … and it was also the model that Better Work intentioned in the first place. That instead of doing it for brands, they would do it per country and people would just join the better work programme in different countries. (Independent Expert 29).

Many argue that the effectiveness of Better Work has diminished since the incentive structure shifted from the promise (to suppliers) of access to export markets, to the promise of increased orders from buyers. In its new incarnation, Better Work does not require suppliers to participate nor does it elicit concrete commitments from buyers. In contrast, the local hub approach proposed here would connect to the compliance mechanisms of Apparel MSIs and worker-driven initiatives. The local hub should be conceived of as a node, which supports these initiatives.

**Recommendation 7: Enrol new stakeholders: suppliers, investors and consumers**

This thesis has argued that a major legitimacy challenge facing MSIs is the issue of corporate capture. Even those MSIs considered to reflect a reasonably diverse level of participation - such as the ETI and Fair Wear - remain, in practice, limited by the power of corporate members. To the extent that MSIs are able to attract more local and global NGO and trade unions members, this will only increase their legitimacy. However, given the influence of funding, additional civil society members will be unlikely to shift power relations. Advocates of the worker-driven model argue that only agreements binding on buyers can restore the balance of power within MSIs.
Chapter 7 argued that the binding element may not be as significant as contended by advocates, noting that resort to these mechanisms has been limited. This recommendation contends that an alternate means of shifting the present power dynamics of Apparel MSIs is to enrol three new critical stakeholders: suppliers, investors and consumers.

Suppliers
Recommendation 3 recommended that MSIs foster a partnership approach between buyer and supplier and actively regulate the buyer-supplier relationship, including, but not limited to, the impact of purchasing practices. In order to legitimately and effectively regulate suppliers, they must be included within governance structures. The SLCP has already done so with representative Sharon Hesp highlighting this as a key factor differentiating SLCP from other MSIs:

... because we have manufacturers as one of the really important signatory groups, they’re placed on the same level as brands so we’re having this equal conversation here. And that’s something that they mention themselves the manufacturers, we almost never have that because it’s the brand that stands above us and demands things, they have the power and in this MSI we have the opportunity to speak to each other equally and we can also let them know what it is then that we need, how we are able to do things better. (Hesp Interview).

Chapter 6 noted that some Apparel MSIs have started to incorporate suppliers into their membership structures. This thesis supports these developments, as did several interviewees. However, the inclusion of suppliers should not operate merely as an extension of the social compliance model. As already explored in Recommendations 3, 4 and 6, suppliers should be invited to become part of local multi-stakeholder hubs which could, among other things perform an oversight function in respect of the buyer-supplier partnership.

At the global MSI level, it may be administratively more manageable, and also more powerful, for supplier associations (for example the Bangladesh Garment Manufacturers and Exporters Association) to be incorporated as members. At this level, supplier representatives could advocate for, among other things, overarching principles and standard contractual terms to better govern the relationship between buyers and suppliers.

Investors
Increasingly, investors are integrating environmental, social and governance (ESG) factors into investment processes and decision-making. Today, it is estimated that ESG investing accounts for over $20 trillion in assets under management, amounting to a quarter of all professionally managed assets around the world (Kell 2018). As pointed out by an NGO representative ‘there is obviously leverage from the huge investors who are investing into these apparel companies’ (NGO 12 Interview). Similarly, ETI Director, Peter McAllister argued:
I think we need to challenge ourselves and our members to say how do we drive change, how do we become an irritant or a disruptor by pushing the business model conversations or by engaging with shareholders more so that shareholders are asking more pointed questions. If you look at what drives business, it isn't CSR, it's either value, it's money, it's customers, it's shareholders, it's innovation, it's regulation. So I think we've got to be much smarter about how we use those various levers to drive change … (McAllister Interview).

By way of illustration, in 2020 Aberdeen Standard Investments (a member of the Investor Alliance for Human Rights) sold off two thirds of its shares (worth £80 million) in fast fashion retailer Boo Hoo after allegations of below minimum wages and poor working conditions in its Leicester supplier factories emerged (Butler 2020). Investors are clearly in a position of power in respect of buyers, and MSIs should directly enrol this power in two ways. First, they should provide accurate and reliable data to investors, and second, they should directly invite investors to become MSI members.

A critical obstacle for ESG investors is the lack of accurate and transparent data, particularly in relation to social impacts (Kell 2018). A recent report by New York University found that current social reporting frameworks and corporate disclosures were not providing investors with meaningful information in relation to company social impacts (O’Connor & Labowitz 2017). Relatedly, FLA Chair, Mike Posner recently argued that FLA accredited companies should receive greater recognition and support from investors (Posner 2019). That is, he appeared to be arguing that MSIs such as the FLA could fill the investor information void. This thesis agrees. However, as outlined in Chapter 6, transparency and demonstrating impact remains a challenge for MSIs. In order to assist investors to take into account human rights impacts, MSIs must improve their reporting processes (Recommendation 8).

In addition, MSIs should invite institutional investors, or umbrella organisations such as the Investor Alliance for Human Rights to become MSI members. This new category of members will potentially hold significant sway over buyer members, with the ability to demand more transparency, better reporting, and more stringent forms of accountability.

Consumers

The other stakeholder group that exerts commercial pressure over buyer companies is the consumer. At present, consumer power is predominantly harnessed by NGOs through advocacy and calls for boycotts. This type of pressure played a significant role in the emergence of MSIs and the signing of the Bangladesh Accord. It is not the role of MSIs to conduct such campaigns. Instead, MSIs should seek to influence long-term, consistent consumer behaviour.

Consumer attention in respect of social issues, even if captured, is difficult to sustain. The literature on ethical consumerism points to a number of challenges in harnessing the power of
the ‘ethical consumer’. First, information about a company’s ethical practices must be accurate, and emanate from a trusted source. It must also translate complex information into an easily digestible manner to the consumer (Berry & McEachern 2005). This becomes challenging when, as described in Chapter 6, membership in a Governance Apparel MSIs means that a buyer has effective systems and policies in place to address human rights impacts. It does not mean that a buyer’s supply chain is free of human rights violations. As noted in the research of Marsha Dickson (also interviewed for this thesis), marketing this nuance to consumers is challenging:

... is there a segment of consumers willing to support companies that are publicly attempting to solve sweatshop problems but cannot guarantee that their products are ‘No Sweat’? (Dickson 2005).

Further, even if consumers are armed with adequate information, the literature points to the difficulty of translating ethical consciousness into action. A 2015 global survey by Nielsen found that 66% of consumers were willing to pay more for sustainable goods (Nielsen 2015). However research shows that such ‘ethical intentions’ do not necessarily translate into practice. A 2005 UK study found that 30% of UK consumers had ethical purchasing intentions, but only 3% actually went on to make ethical purchases (Futerra 2005). Some scholars argue that changes in behaviour are incredibly difficult to achieve, as ‘[m]ost consumers continue to make their purchasing decisions primarily on the basis of price, quality, and convenience’ (Vogel 2008, 268). More recent research suggests that the ‘ethical purchase intention-behaviour gap’ can be overcome if consumers can be guided to clearly prioritise their ethical concerns (Carrington et al. 2014).

In its strategic plan, the FLA specifically refers to the need to ‘[r]aise consumers’ and other public constituencies’ awareness of FLA accreditation of companies for compliance with labor rights in their supply chains’ and to ‘become a more consumer-facing organization’ (FLA 2018a). Anupama Pasricha of Educators for Socially Responsive Apparel Practices argued that ‘when I think about multi-stakeholder, I also think about the consumer as a stakeholder’ (Pasricha Interview).

The preceding discussion has raised some of the difficulties in influencing consumers. Apparel MSIs can enrol consumer power, by positioning themselves as providers of clear, accurate and trusted data to consumers. The first step in this process would be to conduct or commission further research on the information needs of consumers. What information about brand practices and supply chains do consumers want? What information would influence consumers to at least intend to purchase a brand’s product? How do consumers want to receive this information, for example at the point of sale or in a phone application? What are the obstacles consumers face in actually purchasing ethically? What would help them overcome these obstacles? These are but examples of the types of questions MSIs should be asking. If Apparel MSIs become a credible consumer tool (and collect data to prove this), they will be able to use
their influence over consumers to leverage better performance and accountability by their corporate members.

**Recommendation 8: Improve transparency and impact reporting**

This thesis has argued that transparency, in particular in relation to impact, is another major legitimacy challenge facing Apparel MSI. This recommendation contends that Apparel MSIs should publish more information about the performance of their members. This includes full supply chain transparency and more detailed and clearer performance indicators. MSIs should also set clear performance indicators in respect of their own performance and undertake self-reviews in 3-5 year cycles.

Global civil society is presently pushing for supply chain transparency. In 2016, a coalition of unions and NGOs came together to form the Transparency Pledge, which asks companies to publish details of (at least) their first tier suppliers (Transparency Pledge n.d.). The FLA Board recently voted to require member companies to publish factory lists in accordance with the Transparency Pledge, effective from 31 March 2022 (Clean Clothes Campaign et al. 2019).

Currently, Fair Wear member companies supply factory lists to Fair Wear, however Fair Wear only publicly discloses these lists where a buyer has agreed to do so (Fair Wear n.d.4.). Company signatories to the Dutch Agreement also supply factory lists, which are published in aggregated form every year (Dutch Agreement n.d.2.). One FLA company member specifically noted that general expectations around transparency were rapidly changing (Company 22 Interview).

Supply chain transparency cannot solve human rights problems on its own, however it performs a critical accountability function. It allows civil society organisations to conduct investigations, workers to make complaints, and consumers to potentially be better informed. Full supply chain transparency also facilitates better co-operation between buyers, leading to greater leverage, and greater efficiencies through joint monitoring and remediation efforts. For these reasons, this thesis posits that like the FLA, all Apparel MSIs should adopt full supply chain transparency in accordance with the Transparency Pledge by incorporating it into membership requirements.

This thesis has argued that Apparel MSIs should cease audits. However, to the extent that they continue, all audit results should be published. Alternatively, if MSIs adopt a co-ordinating function (as per Recommendation 1), they should publish regular public reports, collating key information in respect of supplier facilities. Finally, all Apparel MSIs should publish regular detailed assessments of buyer performance in respect of its policies, management systems and human rights due diligence practices (similar to the Fair Wear’s Brand Performance Check and the FLA’s Accreditation Check). They should also publish separate indices in respect of purchasing practices and the adoption of a partnership model (Recommendation 3). Such assessments should clearly demonstrate the member’s progress over time.
This thesis has demonstrated that no Apparel MSI provides satisfactory information in relation to the performance of the MSI itself. This is a critical component of legitimacy (Chapter 6, sections 6.2.4 and 6.2.5) and from a responsive regulation perspective forms part of the necessary process of systemic reflection and evaluation (Chapter 3, section 3.3.2). As noted by Mariusz Stochaj of Continental Clothing, it is also integral to the very survival of MSIs:

… if over time they show effectiveness and they show that they are actually achieving results and delivering them then they will survive. If they just whittle away and … they are there and the problems are also there and nothing actually changes then I think that will defeat them. They will defeat themselves in fact. (Stochaj Interview).

This kind of transparency requires aggregate information and impact assessments and clear measurable performance indicators. The reports of the Fair Food Program provide a good example of clear impact reporting, with their annual reports including indicators such as average compliance scores of participating growers over time, numbers of training conducted and complaints received (and responded to), and amount of money paid directly to workers in the form of the Fair Food Premium. Of course, not all of these indicators can be directly transposed to this particular context, however they are a useful initial guide.

In order to maintain legitimacy, Apparel MSIs must publicly demonstrate that they have contributed to improvements in member companies’ practices over time, that the relationship between buyers and suppliers has evolved to one of partnership, and that there have been overall human rights improvements among members’ supplier bases over time. Many of the recommendations discussed in this chapter could feed into these assessments. For example, data from worker-voice technology (Recommendation 2), SLCP reports (Recommendation 1) and information from local hubs (Recommendation 6) could be used to generate an average score or index for a facility, which would then be linked to MSI members. Reports on buyer practices should be compared to provide a clear picture of a buyer’s performance over time, and then aggregated for all MSI buyers, to show the MSI’s overall impact. Similarly, the relationship between buyers and suppliers should be given an index and then assessed over time, with each buyer given an overall score, and the MSI then calculating an aggregate score for all members. It is beyond the scope of this thesis to provide further detail as to what such indicators and assessments might look like and how they might be compiled. However, it is incumbent on MSIs to begin considering concrete indicators.

The thesis acknowledges the many challenges associated with measuring impact. Further, distilling complex human rights situations and commercial relationships to single indices could be challenged as a reductionist approach. However, the reality is that MSIs need to be able to present information to all stakeholders in an easily digestible manner. While they should continue detailed and nuanced reporting on their membership base, it is critical for them to publish more condensed indices. This need not necessarily be undertaken on an annual basis,
but might occur in 3-5 year cycles. To the extent that investors and consumers are incorporated as new MSI stakeholders (Recommendation 7), they will provide impetus for this next, critical, stage of transparency.

**Recommendation 9: Move beyond tier one**

As outlined in Chapter 5, section 5.1.2, some Apparel MSIs look beyond the first tier of suppliers and others don’t. This thesis has suggested that focusing solely on tier one is becoming increasingly untenable due to the interconnected nature of all tiers and the widespread recognition that a company’s human rights due diligence obligations extend throughout its entire supply chain and operations. Accordingly this recommendation contends that Apparel MSIs should move their activities beyond the first tier of the apparel manufacturing supply chain.

Moving beyond the first tier is a complex issue, and it is beyond the scope of this thesis to make detailed recommendations in this regard. However, there are at least three preliminary steps that MSIs could take.

First, in conducting their assessment of company policies, practices and human rights due diligence processes, MSIs should consider how a company is assessing and responding to the risk in its entire supply chain, not just its first tier. The Dutch Agreement and German Partnership already appear to do this to some extent.

Second, Apparel MSIs cannot be expected to monitor conditions beyond the first tier themselves. However, similar to Recommendation 1, they can begin to build a network of data sources to assist in this process. This might include sharing information with suppliers and connecting to existing MSIs that focus on other stages of the supply chain.

Third, Apparel MSIs could look to the local hubs proposed in Recommendation 6 to assist to support their efforts. A local hub could focus on sectors beyond the first tier relevant to the country or region in question (for example, spinning mills in Tamil Nadu) and allow buyers from various MSIs to directly collaborate with those suppliers, in conjunction with civil society and workers.
Chapter 9 Conclusion

The central inquiry of this thesis has been: what limits the regulatory legitimacy of Apparel MSIs, and how can these limitations be addressed? This thesis has identified three categories of MSIs - Learning MSIs, Certification MSIs and Governance MSIs (Chapter 2) - and concluded that only Governance Apparel MSIs (those that follow the Governance MSI model) are legitimate.

Learning MSIs do not utilise oversight mechanisms or provide for any meaningful form of accountability, and therefore do not amount to systems of private transnational regulation. Certification and Governance MSIs perform an oversight function and are appropriately characterised as private transnational regulators. The critical distinguishing feature between the latter two models is that Certification MSIs focus their oversight activities on suppliers, while Governance MSIs focus predominantly on buyers at the apex of global supply chains.

This distinction has given rise to the conclusion that Governance Apparel MSIs meet the normative requirements of democratic legitimacy at a threshold level, whereas Certification Apparel MSIs (those that follow the Certification MSI model) do not. Both are viewed as sociologically legitimate by a sufficiently broad spectrum of stakeholders. Governance Apparel MSIs also perform two critical functions – convening stakeholders and overseeing the corporate policies, systems and procedures of buyers – which, at present, no other private (or public) regulator credibly does. Accordingly, this thesis concludes that Governance Apparel MSIs remain a constructive institutional means of contributing to greater corporate accountability and addressing complex challenges, which cannot be solved by individual actors. Nonetheless, Governance Apparel MSIs face significant challenges, which they must urgently address in order to preserve their effectiveness and legitimacy as regulators.

This thesis has reached this conclusion by addressing the ten questions outlined in chapter 1, section 1.3. The analysis has been guided by two theoretical frameworks, which were identified as best placed to address the question of MSI legitimacy (question 3): the political science theory of democratic legitimacy, and the regulatory theory of responsive regulation.

The theory of democratic legitimacy posits that in order for regulation beyond the state to be justified, the assumption of regulatory functions by private actors must be democratically legitimate. This means that private systems of transnational governance, such as MSIs, must establish legitimacy – comprised of a normative and sociological dimension – in order to justify their regulatory scheme. This theory has provided a direct framework for the legitimacy analysis undertaken by this thesis.

The theory of responsive regulation, which explicitly contemplates the rise of private transnational regulators such as MSIs, has facilitated a broader analytical perspective. By acknowledging the increasingly de-centred and pluralistic nature of the regulatory system as a
whole, the theory emphasises the importance of viewing MSIs within their broader context. It argues that for regulators to be effective they must, among other things, respond to the constraints faced by regulatees, build relationships of trust with regulatees, regularly assess and reflect on their own performance, and incorporate multiple stakeholders. In relation to the latter, influenced by the theory of nodal governance, the theory posits that MSIs can overcome the challenges of regulating a powerful industry by enrolling a broad range of actors into their regulatory project. The theory of new governance supplements this theory, by positing that in order for responsive regulation to be effective at the transnational level, orchestration by public actors is also necessary.

Together, these theories have played a critical role in framing the problem addressed by this thesis. Combined, they emphasise that in order to become more effective and legitimate regulators, it is important to understand the intricacies of how Apparel MSIs function, and to view Apparel MSIs within their broader economic and regulatory context.

Chapter 2 outlined the relevant economic context by introducing the key characteristics of global apparel supply chains (question 2). It demonstrated that the human rights impacts of global apparel supply chains are driven by their inherent structure and power dynamics. Characterised by global value chain scholars as ‘buyer-driven’, the apparel supply chain is marked by deep power imbalances between buyers and suppliers. Buyers dictate the commercial terms of production and capture a majority of profits. Suppliers, trapped in the low-skilled, low value-added portion of the supply chain are expected to comply with the increasingly onerous terms set by buyers. Chapter 2 demonstrated that a significant manifestation of this dynamic is the imposition of unfair purchasing practices by buyers on suppliers. These practices come in the form of short lead times, poor planning, inaccurate technical specifications, last minute changes, late orders and low prices. In addition, relations between buyers and suppliers are predominantly short-term and transactional. Suppliers are not supported (financially or otherwise) to improve social compliance and are also not necessarily rewarded (through greater commitment) for improvements. Suppliers respond to these commercial pressures by squeezing and exploiting their own workforce, entering into unauthorised subcontracting arrangements and engaging informal and precarious labour. Ultimately, it is workers who bear the brunt, through the daily experience of multiple interconnected human rights breaches.

Chapter 4 introduced the relevant regulatory context (question 4). As posited by the theory of responsive regulation, it demonstrated that Apparel MSIs are but one actor in a decentralised and fragmented system, with both public and private actors performing a regulatory function. It highlighted the relatively weak role of public regulators to date. Host states are unable or unwilling to provide and implement effective systems of human right protection. Home states are under no duty to regulate the extraterritorial impacts of corporations domiciled in their jurisdiction. Accordingly the primary form of regulation emanating from home states is the
imposition of social reporting obligations on buyers, with mandatory human rights due diligence still at a nascent stage. International law, which does not impose human rights obligations on corporations, only provides normative guidance through soft law frameworks. In response to these ‘governance gaps’, a multitude of private initiatives have emerged: at present, there are at least nine Apparel MSIs, two other private initiatives, one hybrid initiative, three worker-driven initiatives, five global framework agreements, two host state sector level agreements, and the countless social compliance and auditing programs of individual buyers.

This systematic mapping of the regulation of the human rights impacts of the apparel sector reflects an original contribution to MSI scholarship. To date, the literature has ignored the broader regulatory context within which MSIs sit. This thesis has invoked responsive regulation to highlight the relevance of this broader context to Apparel MSIs. Specifically, the mapping undertaken in Chapter 4 highlighted the unfulfilled regulatory potential of a range of actors or ‘nodes’, which, as is later argued, Apparel MSIs should seek to enrol.

Chapter 5 classified the nine identified Apparel MSIs according to the MSI typology set out in Chapter 2 (question 1). It argued that the SAC, SLCP, Dutch Agreement and German Partnership did not perform a strong oversight and accountability function. Therefore, they could not be said to be regulating and were best characterised as Learning MSIs, which according to the theory of democratic legitimacy, are not required to establish legitimacy. It characterised two of the remaining Apparel MSIs as Certification MSIs (SAI and WRAP), and three as Governance MSIs (FLA, Fair Wear and ETI). These five MSIs all provide for some form of oversight, and as regulators, are required to establish legitimacy, according to the theory of democratic legitimacy introduced in Chapter 3.

Significantly for the purpose of this thesis, Chapter 5 highlighted that almost all of the Certification and Governance Apparel MSIs (save the ETI) rely heavily on social audit as a compliance tool. It argued that this reliance was problematic, given the growing recognition among academics and advocates that social audit is a weak and ineffective form of regulation (question 6).

It demonstrated the inherent problems in how social audit is conducted, namely: inspections are superficial and only reflect a snapshot in time; audit fails to meaningfully include workers and civil society; audit is subject to widespread fraud and generates audit fatigue; auditors often lack independence and appropriate expertise; audits are not sufficiently transparent; and audits fail to pick up unauthorised subcontractors and temporary workers. It also argued that social audit is incapable of addressing the broader context in which global apparel supply chains sit. Social audit does not address the economic dynamics and associated purchasing practices of buyers outlined in Chapter 2. It is also incapable of addressing complex systemic rights, such as
freedom of association, which are connected to the broader social and political context in which production occurs.

Original empirical research undertaken for the purpose of this thesis confirmed these critiques. All 33 interviewees agreed that social audit was an imperfect and, at times, problematic tool. Between them, they referred to both the inherent, and broader, structural limitations of social audit raised by the literature. The empirical evidence also revealed subtleties not reflected in the literature to date. First, interviewees provided an alternative narrative to the view that companies undertake social audit purely as a cynical, reputation saving exercise. Instead, company interviewees showed an awareness that social audit must be complemented by a range of other tools and approaches. Second, interviewees highlighted the importance of social audit to the fulfilment of basic corporate functions, such as undertaking risk-assessments, justifying corporate decision-making, and managing relationships with suppliers.

This nuance is an original contribution to the literature on social audit, which led the thesis to distinguish between the use of social audit by companies, and its use by Apparel MSIs. The thesis accepted that social audit, although problematic, may still be required by companies at present. It argued that the position for MSIs however, is entirely different. Their primary purpose is to improve corporate accountability in respect of human rights impacts, while also maintaining their legitimacy. They are expected to promote best practices, and are not required to justify internal corporate processes. Ongoing reliance on an ineffective regulatory tool inhibits their effectiveness as regulators, and also severely inhibits their ability to claim legitimacy.

This argument was further developed in Chapter 6. It demonstrated that the MSI typology and supply chain dynamics set out in Chapter 2, combined with the critique of social audit set out in Chapter 5 have significant implications for the legitimacy of Apparel MSIs.

Chapter 6 outlined the specific elements of legitimacy and assessed the normative and sociological legitimacy of Certification and Governance Apparel MSIs. As first set out in Chapter 3, normative legitimacy is constituted by both input and output legitimacy. Input legitimacy considers to what extent regulations are perceived as justified or credible, in light of their procedures and governance structures. Chapter 6 identified four key criteria of input legitimacy: the extent to which the MSI reflects diverse and meaningful participation; levels of transparency; the nature of control exerted in respect of regulatees and the MSI itself; and the MSI’s source of funding. The latter criteria is not typically discussed in the political science literature, and thus its inclusion in this thesis reflects an original contribution to theory. Output legitimacy is outcome focused, and is concerned with the extent to which regulation effectively regulates the issue being targeted. Chapter 6 identified three key criteria of output legitimacy: the efficacy of an MSI’s rules; the extent to which the rules are implemented; and the level of coverage.
Chapter 6 considered these seven criteria in combination, highlighting their interconnected nature. In conducting the legitimacy analysis central to this thesis, Chapter 6 detailed the key tools, techniques and strategies used by Apparel MSIs to ensure compliance with human rights standards in global apparel supply chains (question 5). Chapter 5, in introducing the Apparel MSIs, had already identified that the Certification and Governance Apparel MSIs (save the ETI) relied heavily on social audit as a regulatory technique. Chapter 6 elaborated, by considering in detail the extent to which MSIs operating under these two distinct models rely on social audit as a control mechanism.

It demonstrated that the Certification Apparel MSIs – SAI and WRAP - rely almost exclusively on social audit to control suppliers (the target regulatees). It also highlighted that the appropriateness and effectiveness of an MSI’s control mechanism affects its ability to ensure that its rules are followed and applied in practice. That is, control (a component of input legitimacy) is inherently connected to rule implementation (a component of output legitimacy). Certification Apparel MSIs do not perform an oversight function in respect of the conduct of buyers. Accordingly, they are unable to address the power dynamics, including buyer purchasing practices, that drive the human rights impacts of apparel supply chains.

In contrast, this thesis demonstrated that the Governance Apparel MSIs – FLA, Fair Wear and ETI – have each acknowledged the limitations of social audit. Most significantly, the three Governance Apparel MSIs employ an additional control mechanism that focuses on the policies and management systems of buyers. In the case of the FLA and Fair Wear, this includes oversight in respect of the purchasing practices of buyer members. In the case of the ETI, the process is driven by the UNGPs, although the extent to which purchasing practices are addressed is unclear. The thesis argued that these headquarter level assessments, which reflect a significant shift beyond audit, represent a potentially powerful form of control, if utilised to their full extent.

This difference in control mechanisms underpinned this thesis’ conclusion that Governance Apparel MSIs are legitimate regulators and Certification Apparel MSIs are not. Chapter 6 argued that the virtually exclusive reliance on an increasingly discredited tool to ensure control and, therefore rule implementation, was fatal to the legitimacy of Certification Apparel MSIs. Governance Apparel MSIs, through their buyer oversight function reflected a move beyond social audit. This thesis acknowledged that this additional form of control did not presently perform a sufficiently strong accountability function. It argued that this oversight process needed to, among other things, include consistent criteria, apply to all members, and be reported in such a way as to allow a comparison of the relative performance of buyers (noting that Fair Wear did meet some of these criteria to some extent). Further, there needed to be some means of assessing whether changes in purchasing practices had eased pressures on suppliers in practice, and clear consequences for buyers failing to improve their purchasing practices.
Nonetheless, Governance Apparel MSIs, already performing a buyer oversight function at a basic level, have the potential to address these limitations by improving their processes. Certifications Apparel MSIs, with their focus on suppliers, without substantially overhauling their functional model, cannot.

In addition to over-reliance on social audit as a control mechanism (which in turn has consequences for rule implementation), this thesis identified five other legitimacy challenges faced by Apparel MSIs (question 7). Governance Apparel MSIs perform better than Certification Apparel MSIs in respect of almost all these remaining legitimacy criteria. The only criteria that both Certification and Governance Apparel MSIs perform reasonably well on is rule efficacy.

Certification Apparel MSIs barely meet the most basic criteria of participation, given that they do not formally incorporate diverse stakeholder interests into their governance structure. In contrast, all three Governance Apparel MSIs reflect at least some level of participatory diversity. Nonetheless, civil society, workers and suppliers do not hold enough power within their governance structures, nor are they sufficiently incorporated into monitoring and remediation processes.

Certification Apparel MSIs provide virtually no transparency, whereas the Governance Apparel MSIs (other than the ETI) provide a basic level of performance related transparency in respect of each of their members. Nonetheless all MSIs perform poorly on transparency in respect of their own performance and impact. This assessment highlighted the link between transparency (input legitimacy) and rule implementation (output legitimacy). Without proper transparency, stakeholders are unable to assess whether an MSI has contributed to, among other things, improved buyer purchasing practices over time, consistent improvements by suppliers over time, and whether such changes have contributed to better working conditions across a members’ supplier facilities over time.

Certification Apparel MSIs appear to reflect a low level of coverage given that they cover a very small proportion of the estimated total number of global manufacturing facilities. In contrast, Governance Apparel MSIs reflect a not insignificant level of coverage, given that combined, they amount to approximately 13% of the sector’s total revenue.

Finally, Chapter 6 argued that excessive reliance on corporate funding was a challenge for all MSIs. Original empirical research revealed a common perception among diverse stakeholders that corporate members would resist reforms that increased oversight or affected their profits. Interviewees also emphasised that where an MSI is reliant on funding from corporate members, civil society stakeholders are less likely to be able to influence an MSI to adopt strategies that are perceived to be against corporate interests. This highlighted another important connection between legitimacy criteria: the link between effective participation and funding.
In summary, Certification Apparel MSIs, with their exclusive reliance on social audit as a control mechanism, complete lack of transparency, non-representative levels of participation, excessive corporate funding and limited coverage of production facilities, only clearly satisfy one element of legitimacy: rule efficacy. For these reasons, this thesis concluded that from a normative perspective the Certification Apparel MSIs – SAI and WRAP - are not a legitimate form of transnational private regulation. In contrast, Governance Apparel MSIs employ control mechanisms additional to audit, provide for at least a baseline level of diverse stakeholder participation through their governance structures, provide some transparency, and reflect a not insubstantial level of coverage of the sector. Accordingly, the thesis concluded that the Governance Apparel MSIs – the FLA, Fair Wear and the ETI - meet the criteria for normative legitimacy at a threshold level.

This analysis of normative legitimacy was supported by an assessment of the sociological legitimacy of Apparel MSIs. The interviewees, between them, raised each of the normative criteria as a challenge facing MSIs. That is, the theoretical framework for legitimacy was supported by the real life concerns of stakeholders. Also, as noted above, the source of MSI funding emerged as a significant theme among diverse stakeholders, justifying its inclusion as an additional criteria.

Despite the concerns raised, the empirical research also revealed that 90% of stakeholders considered that Apparel MSIs remain a legitimate and relevant vehicle for addressing the human rights impacts of global apparel supply chains. Most stakeholders had either an existing or prior relationship with MSIs. Only 18% of interviewees had no connection to MSIs, and of these, half viewed MSIs legitimate, while the other half considered that MSIs were not legitimate at all. The inherent bias within the sample limited the breadth of the sociological conclusion that could be drawn. Accordingly, the strongest conclusion on sociological legitimacy made by this thesis is that internal stakeholders (that is member brands and member NGOs and trade unions) continue to see Apparel MSIs as legitimate, albeit flawed, regulators. Put another way, from a sociological perspective, Apparel MSIs are not yet perceived as illegitimate by a sufficiently broad and diverse group of stakeholders. That is, sociologically, Apparel MSIs have not completely lost their legitimacy yet. However, the fact that those in support of MSIs raised many challenges, also suggests that from a sociological perspective, the legitimacy of MSIs is becoming increasingly precarious.

The thesis relied on this data to support the conclusion that Governance Apparel MSIs meet the requirements of normative legitimacy at least at a threshold level. Notably, interviewees did not distinguish between Certification and Governance MSIs (most likely because they tended to express views on the particular MSI that they were most familiar with). Despite this lack of differentiation, the thesis argued that the sociological position (which, as noted above, is subject
to data limitations) was not sufficient to overcome the almost complete failure of Certification Apparel MSIs to meet the criteria of normative legitimacy.

This comprehensive and interconnected legitimacy analysis is an innovative contribution to MSI scholarship. Although the connections between input and output legitimacy, as well as its normative and sociological dimensions has been acknowledged in the literature, they have rarely been employed in analysis. This thesis contributes to existing scholarship by relying on each of these components of legitimacy to reach its final conclusion. Further, the contribution is innovative in its emphasis on the importance of the function performed by MSIs. Although some scholars have noted functional distinctions, they have not considered the consequent implications for legitimacy in detail. Relatedly, although the literature suggests that reliance on social audit is a challenge facing MSIs, the extent to which this reliance impacts on MSI legitimacy has also not been explored. Accordingly, this thesis contributes to MSI scholarship and the literature on social audit, by demonstrating that the extent to which an MSI relies on social audit, which is in turn determined by its functional model, is absolutely critical to assessing MSI legitimacy, in all its relevant dimensions.

The assessment of normative legitimacy, supported by the majority sociological view, underpins the overall conclusion that Governance Apparel MSIs are still an appropriate and legitimate regulatory vehicle, while Certification Apparel MSIs are not. Nonetheless, this thesis also demonstrated that Governance Apparel MSIs still face a number of legitimacy challenges. First, the attempts by Governance Apparel MSIs to move beyond audit are seen by many stakeholders as an insufficiently radical departure from the manner in which MSIs have operated since their inception. In addition, Governance (and Certification) Apparel MSIs have failed to adequately assess and publicly demonstrate their impact over time. Their limited (although not insubstantial) coverage and failure to move beyond the first tier in a comprehensive manner further compound the question of impact. The issue of corporate capture has arguably prevented more meaningful evolution. To date, diverse participation has not been able to counteract the power of corporate influence. This highlights the reality that existing stakeholders are not sufficiently empowered within the process. Further, many critical stakeholders - including workers, suppliers and investors - are not sufficiently incorporated into MSI structures.

From a responsive regulation perspective, these legitimacy challenges reflect a failure on the part of Apparel MSIs to realise their full potential as responsive regulators. The ongoing reliance on social audit reflects a failure to respond to the broader commercial context and constraints faced by suppliers. It also reflects a failure to assess whether the compliance mentality underpinning social audit is an appropriate ‘logic’ for achieving the regulatory aim of improving human rights outcomes. The limited participation of diverse stakeholders reflects a failure by Apparel MSIs to enrol a sufficient number of nodes from the broader regulatory landscape to
increase their overall regulatory power. Further, the dearth of impact assessments by Apparel MSIs reflects a failure to be responsive to their own performance. The thesis, by analysing Apparel MSIs through the lens of responsive regulation makes an original contribution to MSI scholarship. In considering how MSIs might become more responsive, and therefore more effective, regulators, it brings a new perspective on how MSIs might also become more legitimate regulators.

Although this thesis found that 90% of stakeholders still viewed Apparel MSIs as legitimate, it argued that it was also important to address the views of a growing cohort of civil society who view MSIs as completely illegitimate tools of regulation. This is especially so, given that a majority of stakeholders who viewed MSIs as legitimate also had an existing or prior connection to MSIs.

The legitimacy challenges described in this thesis were raised by both groups of stakeholders. The main difference was that the 90% of interviewees who viewed MSIs as legitimate also considered that MSIs had made at least some contributions to human rights protection to date, and further that there was no other viable regulatory alternative. In contrast, the remaining 10% of interviewees argued that all Apparel MSIs have completely failed to provide a sufficient level of corporate accountability and consequent advances in human rights. They considered that MSIs will forever remain stuck in compliance-based modes of regulation, and will never adequately represent the interests of workers or create sustainable systemic change. These critiques arguably extend beyond questions of effectiveness and legitimacy, and reflect the broader paradigmatic and ideological differences among stakeholders as to appropriate modes of regulation.

The emergence of the worker-driven model as a potential regulatory alternative is further important regulatory context, which MSI scholarship has not yet addressed. If the worker-driven model is truly an adequate replacement for MSIs (question 9), it reflects a significant challenge to the authority and future legitimacy of Apparel MSI. This thesis has further innovated by critically engaging with this question.

Drawing upon original empirical research, Chapter 7 compared Governance Apparel MSIs (given the prior conclusion that Certification Apparel MSIs were not legitimate) to the worker-driven model. It argued that the worker-driven model reflected many attributes, which, if adopted by Governance Apparel MSIs, would boost their legitimacy.

It argued that the worker-driven model presented greater opportunities for participation by workers and local civil society in monitoring and remediation. Its strong ‘market enforcement’ mechanisms, which required buyers to provide incentives for compliance and consequences for non-compliance, reflected a stronger form of accountability in respect of purchasing practices. It
also argued that the worker-driven model was better placed to address complex rights such as freedom of association. Chapter 5 had demonstrated that social audit was completely incapable of addressing these rights and Chapter 6 highlighted that Apparel MSIs had not put in place any other systematic forms of control directly designed to address complex rights. Instead, they relied on piecemeal projects, training and limited political advocacy, which to date, have had limited impact. As argued by proponents of the worker-driven model, and supported by this thesis, the worker-driven model, with its focus on worker and civil society representation and national level co-ordination is better placed to achieve advances in respect of complex rights such as freedom of association.

Chapter 7 also concluded that MSIs bring unique value, which the worker-driven model cannot easily replicate (question 8). First, MSIs perform an important convening function, which the worker-driven model does not. If utilised to its full extent, MSIs have the potential to convene, orchestrate and better co-ordinate public and private nodes within the broader apparel supply chain regulatory system. Worker-driven models, as discrete, local initiatives do not have sufficient reach to perform this function. Second, as Chapter 6 had already argued, Governance Apparel MSIs have developed significant expertise in assessing the headquarter level compliance programs of buyers. This is a critical component of corporate regulation, and with more stringent controls, MSIs still have the potential to perform a powerful accountability role in this regard.

Given their different strengths, the chapter concluded that rather than presenting the two models as competitors, as MSI critics have done, MSIs and the worker-driven approach should be treated as complementary initiatives. Better co-ordination between the two will lead to regulatory outcomes greater than the sum of their parts.

In light of the totality of ongoing legitimacy concerns, increasingly strident civil society critique and the rise of the worker-driven model, this thesis argued that Apparel MSIs must reform as a matter of urgency. It presented nine interconnected recommendations in direct response to the challenges set out in the thesis: its final original contribution. As far as this author is aware, no study has made detailed recommendations for the reform of Apparel MSIs in this manner.

This thesis has recommended that Apparel MSIs should completely cease conducting social audit. Instead, they can monitor conditions in supplier factories by collating a range of data sources, including data collected by the SLCP, worker-driven initiatives, from worker voice applications, and inspections undertaken by local hubs (Recommendation 1). Further, the compliance-based mentality of social audit should be replaced with a new partnership approach (Recommendation 3). The approach envisages that Apparel MSIs will actively regulate the buyer-supplier relationship, impose more stringent controls in respect of purchasing practices, formalise opportunities for leverage, and incorporate suppliers into membership structures.
Through strengthened accountability mechanisms and greater inclusion of suppliers, Apparel MSIs will be better equipped to address the economic power dynamics of the apparel supply chain.

Apparel MSIs should address the challenge of diverse participation through a range of efforts. They should better incorporate worker voice into oversight functions by employing digital technologies and facilitating greater participation in existing mechanisms, similar to the worker-driven model (Recommendation 2). They should also establish local hubs in which workers, local civil society and suppliers are able to participate (Recommendation 6), and include supplier associations at the governance level (Recommendation 7).

Apparel MSIs should enrol the worker-driven initiative model, by actively encouraging buyers to join worker-driven initiatives. In doing so, they should also consider outsourcing certain functions, such as accountability for complex political rights, and inspections of local facilities (Recommendation 4). This has the potential to simultaneously enhance the legitimacy and reach of both MSIs and worker-driven initiatives.

Apparel MSIs can increase their regulatory power, and also coverage, by orchestrating and enrolling home and host states (Recommendation 5). Instead of relying on public regulatory actors to orchestrate private transnational actors (as posited by new governance theorist) Apparel MSIs should themselves become orchestrators. They can do this by enrolling the regulatory power of home and host states through stronger and more consistent political advocacy. Local hubs can facilitate advocacy at the host state level (Recommendation 6). Improved host state regulation will complement MSI efforts. Meanwhile more stringent home state laws, such as mandatory due diligence, has the potential to expand the coverage of MSIs, as more companies turn to them for their expertise.

Apparel MSIs can overcome the problem of corporate capture by enrolling new stakeholders at a governance level, including investors and suppliers. Consumers should be enrolled through better engagement. Together, these stakeholder groups have the ability to exert greater pressure on member buyers (Recommendation 7).

Apparel MSIs should improve their impact reporting by establishing more detailed and clearer performance indicators for corporate members, and corporate members should be required to maintain supply chain transparency. MSIs should also set clear performance indicators in respect of their own performance and undertake regular self-reviews (Recommendation 8).

Finally, Apparel MSIs should move beyond a focus on the first tier of supply chains actors (Recommendation 9). This can be done by, among other things, explicitly requiring buyers to adopt due diligence throughout their entire supply chain, connecting with other MSIs that focus
on other portions of the supply chain, and utilising local hubs to facilitate collaboration with suppliers beyond tier one (Recommendation 6).

This thesis and its recommendations come at a critical moment for Apparel MSIs. More than two decades since their emergence, they have failed to demonstrate substantial or consistent human rights advances for global apparel supply chain workers, and debate over their relevance and legitimacy has only intensified. This thesis is significant because it demonstrates the precise normative and sociological challenges that Apparel MSIs face. In doing so, it has shown that although the critiques levelled at Apparel MSIs are significant, they have not yet tipped the scales of legitimacy, at least in relation to Governance Apparel MSIs. Nonetheless, Apparel MSIs are in a precarious position, and if they do not urgently reform, they will fast lose the legitimacy that remains.

The recommendations presented here, informed by theoretical and empirical analysis, provide Apparel MSIs with a blueprint for action. If they do not act now, they will, in the previously cited words of a company MSI member ‘defeat themselves’. If, however, they innovate and reform, they will bolster their own legitimacy and effectiveness. Private regulation plays an important role in the regulatory system as a whole, and will likely continue to do so for the foreseeable future. Accordingly, the willingness and ability of Apparel MSIs to reform impacts the effectiveness of the entire regulatory system. Ultimately, and most importantly, it impacts the human rights and dignity of millions of apparel supply chain workers worldwide.

As with any body of research, this study is subject to limitations. The author acknowledges that it would have benefited from insights from a broader spectrum of stakeholders. Specifically, due to the limitations of resources and access, the author did not interview some of the critical stakeholders identified in this thesis, including workers (directly), suppliers, investors or consumers. Such broader empirical research would no doubt have generated additional insights. Further, the analysis and conclusions in this thesis are limited to Apparel MSIs. The critical distinction between Certification MSIs and Governance MSIs, and its consequent implications for legitimacy may not apply to other sectors. This is because the appropriateness of regulatory techniques must be assessed against the particular context and dynamics particular to each sector. Finally, this thesis’ recommendations are not necessarily a guarantee for success. They are presented here as the best option for reform, in light of the challenges faced by MSIs. Their ability to overcome these challenges is by no means certain.

These limitations also reflect opportunities for further study. Additional empirical research could be undertaken to ascertain the views of more stakeholders on Apparel MSIs. Such research could also test and support the ability of these stakeholders to counteract corporate power (as set out in Recommendation 7). For example, it would be useful to explore whether investors, would in practice, be willing to play an active role within MSIs, and how consumers can be
better engaged. Another area for potential research is to apply a similar legitimacy analysis to MSIs in other sectors, in order to test whether the proposition that Certification Apparel MSIs are not legitimate applies more broadly. Other potential areas for research, hinted at in this thesis, include: how can buyers be better incentivised to change their purchasing practices; how can the impact of such changes - both on working conditions and the profits of companies - be measured; and how can MSIs clearly and meaningfully demonstrate impact?

This thesis has maintained that MSIs are an important regulatory tool, with the potential to ensure greater accountability in respect of the human rights (and environmental) impacts of business. In order to preserve their legitimacy, effectiveness and relevance, MSIs must be subject to ongoing appraisal, and be willing to evolve accordingly. For this reason, they will remain an important and fruitful area of study for many years to come.
## Annex A Interviewees

<table>
<thead>
<tr>
<th>Name</th>
<th>Organisation &amp; Position</th>
<th>Date of Interview</th>
<th>Notes</th>
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<tbody>
<tr>
<td><strong>Civil society representatives (NGOs and trade unions)</strong></td>
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<tr>
<td>1. Nazma Akter</td>
<td>Sommilito Garments Sramik Federation (SGSF) President</td>
<td>16 June 2019</td>
<td>FLA member</td>
</tr>
<tr>
<td>2. Syed Sultan Uddin Ahmmed</td>
<td>Bangladesh Institute of Labour Studies Executive Director</td>
<td>11 October 2018</td>
<td></td>
</tr>
<tr>
<td>3. Brian Finnegan</td>
<td>American Federation of Labor and Congress of Industrial Organization Global Worker Rights Coordinator</td>
<td>11 July 2018</td>
<td></td>
</tr>
<tr>
<td>4. Theresa Haas</td>
<td>Worker-Driven Social Responsibility Network Director of Outreach and Education</td>
<td>26 September 2018</td>
<td></td>
</tr>
<tr>
<td>5. Christina Hajagos- Clausen</td>
<td>IndustriALL Apparel Sector Director</td>
<td>10 October 2018</td>
<td></td>
</tr>
<tr>
<td>6. Aidan McQuade</td>
<td>Anti-Slavery International Director</td>
<td>4 March 2019</td>
<td>ETI member</td>
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<td></td>
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<td>Mr McQuade was Director of Anti-Slavery International from 2006 – 2017 and an ETI Board member for part of this time. He was interviewed in his capacity as former Director of ASI.</td>
</tr>
<tr>
<td>7. Gopinath Parakuni</td>
<td>CiviDep India General Secretary</td>
<td>19 March 2019</td>
<td>FLA member</td>
</tr>
<tr>
<td>8. Anupama Pasricha</td>
<td>Educators for Socially Responsible Apparel Practices</td>
<td>19 March 2019</td>
<td>FLA member</td>
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<tr>
<td>Name</td>
<td>Organisation &amp; Position</td>
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<tr>
<td>9. Owen Tudor</td>
<td>Trades Union Congress (UK) (TUC)</td>
<td>26 February 2019</td>
<td>ETI member&lt;br&gt;Mr Tudor was at the TUC from 2014-2018. In December 2018, he became Deputy General Secretary of the International Trade Union Confederation (also an ETI member). He was interviewed in his capacity as a former TUC representative.</td>
</tr>
<tr>
<td>10. Pham Tu Lan</td>
<td>Institute for Workers and Trade Unions (Vietnam) Deputy-director</td>
<td>28 August 2018</td>
<td>The IWTU is a subordinate agency of the Vietnam General Confederation of Labour. Its primary remit is to conduct research.</td>
</tr>
<tr>
<td>11. Ben Vanpeperstraete</td>
<td>Clean Clothes Campaign Lobby and Advocacy Coordinator</td>
<td>15 June 2018</td>
<td>Fair Wear member</td>
</tr>
<tr>
<td>12. NGO 12</td>
<td>Anonymous</td>
<td>8 June 2018</td>
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</tbody>
</table>

**Company representatives**

<p>| 13. William Anderson        | Adidas Vice President Global, Social and Environmental Affairs | 6 June 2019            | FLA member                                                           |
| 14. Chris Harrop            | Marshalls Marketing &amp; Sustainability Director                | 8 March 2019           | ETI member&lt;br&gt;Marshalls is not an apparel sector company. Contact was made through snowball sampling. This interview provided general insights into the ETI. |
| 15. Sandya Lang             | Nudie Jeans Sustainability Manager                           | 24 October 2019        | Fair Wear member                                                    |
| 16. Henrik Lindholm         | Sandqvist Sustainability Manager                             | 11 November 2019       | Fair Wear member                                                    |</p>
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<th></th>
<th>Name</th>
<th>Organisation &amp; Position</th>
<th>Date of Interview</th>
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<tbody>
<tr>
<td>17.</td>
<td>Lavinia Muth</td>
<td>Armed Angels Corporate Responsibility Manager</td>
<td>20 December 2019</td>
<td>Fair Wear member</td>
</tr>
<tr>
<td>18.</td>
<td>Gary Shaw</td>
<td>Kathmandu Corporate Social Responsibility Manager</td>
<td>29 October 2019</td>
<td>FLA member</td>
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<tr>
<td>19.</td>
<td>Mariusz Stochaj</td>
<td>Continental Clothing Head of Product and Sustainability</td>
<td>3 December 2019</td>
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<td>20.</td>
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<td>11 October 2018</td>
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<td>4 July 2019</td>
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<td>22.</td>
<td>Company 22</td>
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<td>13 December 2019</td>
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<td>13 September 2019</td>
<td>FLA member</td>
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<tr>
<td></td>
<td><strong>Independent Experts</strong></td>
<td><strong>Geneva Center for Business and Human Rights Director</strong></td>
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<tr>
<td>24.</td>
<td>Dorotheé Baumann-Pauly</td>
<td>Geneva Center for Business and Human Rights Director</td>
<td>12 April 2018</td>
<td>Dr. Baumann-Pauly previously worked at the FLA.</td>
</tr>
<tr>
<td>25.</td>
<td>Doug Cahn</td>
<td>Independent CSR consultant</td>
<td>25 June 2019</td>
<td>Mr Cahn previously served as a board member of the FLA. He is also co-founder of Better Buying.</td>
</tr>
<tr>
<td>26.</td>
<td>Marsha Dickson</td>
<td>Better Buying President &amp; co-founder</td>
<td>24 March 2019</td>
<td>Ms Dickson is Irma Ayers Professor of Human Services in the Department of Fashion and Apparel Studies at the University of Delaware. Ms Dickson previously served as a board member of the FLA.</td>
</tr>
<tr>
<td>27.</td>
<td>Bennett Freeman</td>
<td>Business for Social Responsibility Senior Advisor</td>
<td>30 August 2018</td>
<td></td>
</tr>
<tr>
<td>28.</td>
<td>Amol Mehra</td>
<td>Laudes Foundation Director of Industry Transformation</td>
<td>6 June 2018</td>
<td>Mr Mehra was the Executive Director of International Corporate Accountability Roundtable (2011-2018) (ICAR). ICAR is a member of the FLA and also the</td>
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<td>Name</td>
<td>Organisation &amp; Position</td>
<td>Date of Interview</td>
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<td>29. Independent Expert 29</td>
<td>Anonymous</td>
<td>7 July 2018</td>
<td>Independent Expert 29 previously worked for the FLA.</td>
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<td>30. Independent Expert 30</td>
<td>Anonymous</td>
<td>19 September 2018</td>
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<td><strong>MSI representatives</strong></td>
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<td>31. Martin Buttle</td>
<td>ETI</td>
<td>24 August 2018</td>
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<tr>
<td></td>
<td>Category Lead, Clothing and Textiles</td>
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<td>32. Peter McAllister</td>
<td>ETI</td>
<td>13 March 2019</td>
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<td></td>
<td>Executive Director</td>
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<tr>
<td>33. Sharon Hesp</td>
<td>Social &amp; Labor Convergence Program</td>
<td>3 May 2019</td>
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<tr>
<td></td>
<td>Senior Operations Manager</td>
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# Annex B  Codes and themes

<table>
<thead>
<tr>
<th></th>
<th>Social audits only reflect a snapshot in time</th>
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<th>Social audit is a flawed compliance tool</th>
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<tbody>
<tr>
<td>2</td>
<td>Social audits do not meaningfully engage with local stakeholders, including workers</td>
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<td>Companies must address their purchasing practices</td>
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<tr>
<td>3</td>
<td>Multiple audit requirements give rise to audit fatigue</td>
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<td>MSIs fail to meaningfully include diverse stakeholders</td>
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<td>4</td>
<td>Social auditors lack sufficient expertise</td>
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<td>MSIs are not sufficiently transparent</td>
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<tr>
<td>5</td>
<td>Social audits are incapable of addressing complex systemic rights</td>
<td></td>
<td>MSIs fail to demonstrate impact</td>
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<tr>
<td>6</td>
<td>Social audit is a cynical exercise designed to avoid real change</td>
<td></td>
<td>MSIs fail to address complex rights</td>
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<tr>
<td>7</td>
<td>Social audit, although limited, performs a necessary corporate function</td>
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<td>MSIs fail to move beyond the first tier of suppliers</td>
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<tr>
<th></th>
<th>Buyers exert significant cost pressures on suppliers</th>
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<th>MSIs fail to demonstrate impact</th>
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<tr>
<td>9</td>
<td>Buyers must provide greater levels of commitment to suppliers</td>
<td></td>
<td>MSIs fail to address complex rights</td>
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<tr>
<td>10</td>
<td>Buyers should address their purchasing practices in a co-ordinated manner with other buyers, including by exerting greater leverage over common suppliers</td>
<td></td>
<td>MSIs fail to move beyond the first tier of suppliers</td>
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<tr>
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<th>MSIs do not incorporate enough trade union representation</th>
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<th>MSIs fail to address complex rights</th>
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<td>12</td>
<td>MSIs do not incorporate enough local stakeholders</td>
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<td>MSIs fail to demonstrate impact</td>
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<td>13</td>
<td>Worker voice is missing from MSI structures and activities</td>
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<td>MSIs fail to move beyond the first tier of suppliers</td>
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<thead>
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<th>MSIs do not provide enough information on the performance of member companies</th>
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<td>MSIs fail to demonstrate impact</td>
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<th>MSIs do not employ data in a clear way to demonstrate their impact</th>
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<tr>
<td>17</td>
<td>MSIs have not achieved sufficient levels of improvement in working conditions, in particular in relation to critical areas such as living wages and freedom of association</td>
<td></td>
<td>MSIs fail to move beyond the first tier of suppliers</td>
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<td>18</td>
<td>MSI members constitute a small proportion of the entire apparel sector</td>
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<td>MSIs fail to move beyond the first tier of suppliers</td>
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<thead>
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<th>MSIs fail to address complex rights</th>
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<td>19</td>
<td>MSIs cannot be expected to solve complex local and political problems on their own</td>
<td></td>
<td>MSIs fail to move beyond the first tier of suppliers</td>
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<td>MSIs fail to move beyond the first tier of suppliers</td>
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<tr>
<td>22</td>
<td>Corporate members exert excessive control in respect of MSIs</td>
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<td>23</td>
<td>MSIs are reluctant to undergo significant change out of fear of alienating their corporate member base.</td>
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<td>24</td>
<td>MSIs block meaningful reform</td>
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<tr>
<td>25</td>
<td>MSIs will never give rise to enforceable standards</td>
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<td>26</td>
<td>The worker-driven model is a better private regulatory alternative to MSIs</td>
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<tr>
<td>27</td>
<td>MSIs have the ability to convene a range of stakeholders to act collectively in respect of complex problems</td>
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<tr>
<td>28</td>
<td>Some MSIs provide rigorous headquarter level assessments of the systems and processes of member buyers</td>
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<tr>
<td>29</td>
<td>MSIs should advocate with home states for greater legislative oversight in respect of buyer companies.</td>
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<td>30</td>
<td>MSIs should advocate with host states for better human and labour rights protections for workers</td>
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<td>8</td>
<td>MSIs are subject to corporate capture</td>
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<td>9</td>
<td>MSIs are unreformable and not fit for purpose</td>
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<td>10</td>
<td>MSIs are good convenors</td>
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<td>11</td>
<td>MSIs provide good oversight of corporate processes</td>
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<td>12</td>
<td>MSIs should act as political advocates</td>
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