

Jon Karl Nickell

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Supervisor: Dr. Shane Godfrey, University of Cape Town

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GLOSSARY OF ABBREVIATIONS

| | |
|----------|--|
| AGOA | African Growth and Opportunity Act |
| ATC | Agreement on Textiles and Clothing |
| BRICS | Brasil, Russia, India, China, South Africa |
| CAFTA-DR | Dominican Republic-Central America Free Trade Agreement |
| CAT | Convention Against Torture |
| CBI | Caribbean Basin Initiative |
| CEDAW | Convention to Eliminate All Forms of Discrimination Against Women |
| CESCR | Committee on Economic, Social and Cultural Rights |
| CMT | Cut, make, trim |
| CRC | Convention on the Rights of the Child |
| CSR | Corporate social responsibility |
| EPA | Economic partnership agreement |
| EPZ | Export processing zone |
| EU | European Union |
| FTA | Free trade agreement |
| GATT | General Agreement on Tariffs and Trade |
| GDP | Gross domestic product |
| GPN | Global production network |
| GVC | Global value chain |
| HOPE | Hemispheric Opportunity through Partnership for Encouragement Act |
| HRC | Human Rights Council |
| ICCPR | International Covenant on Civil and Political Rights |
| ICERD | International Convention on the Elimination of All Forms of Racial Discrimination |
| ICESCR | International Covenant on Economic, Social, and Cultural Rights |
| ICRMW | International Convention on the Protection of the Rights of All Migrant Workers |
| ILO | International Labour Organization |
| IMF | International Monetary Fund |

| | |
|-------|--|
| MFA | Multi-fibre Arrangement |
| NAFTA | North America Free Trade Agreement |
| OEM | Original equipment manufacturing |
| OPSC | Optional Protocol to the Convention on the Rights of the Child |
| OPT | Outward processing trade |
| RoO | Rules of origin |
| RTA | Regional trade agreement |
| SEZ | Special economic zone |
| TPL | Tariff preference level |
| TRIPS | Trade Related Aspects of Intellectual Property Rights |
| UDHR | Universal Declaration of Human Rights |
| UN | United Nations |
| US | United States |
| WTO | World Trade Organization |

INTRODUCTION: RECLAIMING STATE POWER TO BRIDGE GOVERNANCE GAPS IN GLOBAL TRADE

An astute understanding of history is not required to grasp that global trade is not a new phenomenon. As a very young student in American schools, I still recall learning about the caravans of traders trekking across the Silk Road, about the merchant traveller Marco Polo, about the misplaced aspirations of Christopher Columbus and the resulting Columbian Exchange between Europe and the Americas.

This is an oft-mythologized and sometimes flatly fabricated period of history,¹ but there are basic truths at the base of it all. There were certainly men embarking on difficult journeys across vast ocean stretches, carrying goods from one continent to another with the hope of striking it rich (or at least making enough to buy themselves a good time at the next harbour). There were certainly people who profited, and plenty more who were exploited.

But while global trade is not new, the structure and volume of global trade has changed drastically during recent decades. More money is at stake, and so is a greater swath of humanity. Complex global value chains² have sprouted, in which a single product may contain fingerprints from dozens of countries when it finally lands on retail shelves.

In this dissertation I am concerned with the fate of workers that toil anonymously at the base of these global value chains. But my primary focus is to contest a myth, though it has nothing to do with Christopher Columbus. Rather, the dominant narrative surrounding contemporary global trade suggests that regulation of such is beyond our reach. Due to the evolving structure of global trade, ‘governance gaps’ have emerged.

This begs many questions: Who is responsible for achieving a remedy when things go wrong, when a factory collapse kills hundreds of workers or when the makers of high-priced fashion aren’t paid a living wage? Do we turn to the state that shelters the corporation, even if the wrongdoing occurs outside their jurisdiction? What about the state where the operations are based? Can they impose their will on corporations that

¹ This is especially true if one’s own country has a stake in the tale, as we Americans still designate a day on the annual calendar to celebrate a rather distorted version of Columbus’ achievements.

are sheltered elsewhere? Are the corporations themselves responsible, even when they are not directly involved in outsourced operations? Are local manufacturers at fault if they are acting at the behest of a more powerful entity?

The consensus arising from these vexing questions is that states are no longer equipped to regulate trade in a fully globalised world dominated by transnational corporations, thus many have sought remedies in private forms of governance. This dissertation seeks to dispute this common narrative and suggest that, not only have states retained enormous power in global trade, they also remain the most capable entity to regulate it. Democratic regimes persist as our best chance to protect the livelihoods of workers.

This could potentially be construed as a naïve or simplistic argument. Governments in developing economies are unlikely to act in the interest of its citizens, especially those poor enough to endure sweatshop labour conditions. On the other hand, governments in developed economies, where transnational corporations are based, are unlikely to hold those corporations accountable, especially when the bulk of corporate activity occurs abroad. Of course, these are legitimate realities.

However, this dissertation presents two overarching arguments in response. First, I propose that a distinction must be made between a government being ‘unwilling’ to act and a government being ‘unable’ to act. The commonly accepted vexation in global trade is that governance gaps have emerged, which suggests that states are ‘unable’ to regulate global trade. I devote many pages to constructing an argument for just how powerful states remain. The goal is to reveal that states are ‘unwilling’ rather than ‘unable’ to regulate trade and protect workers, thus shifting the conversation entirely. If we accept the argument that states are ‘unable,’ we have conceded a very powerful platform to struggle for improvement. We must reclaim that platform.

Secondly, as I build the argument for the power retained by states, I aim to reveal why this provides a better platform on which to struggle for worker’s rights. Much of this is rooted in Nancy Fraser’s theoretical conception of justice, which she defines as “parity of participation.”³ But there are also signs that developing economies

³ Nancy Fraser, *Scales of Justice: Reimagining Political Space in a Globalizing World* (Cambridge: Polity Press, 2008).

like Nicaragua, emerging economies like China, and developed economies in the EU have begun to harness this power with promising results.

In chapter one, I explore the nuances of global value chains and the various attempts to redress the human rights violations occurring throughout. I lay the foundation for why public institutions should be the focus of attempts to struggle for improvements in worker's livelihoods.

In chapters two and three, I focus almost exclusively on apparel value chains⁴ in order to explore the great extent to which state policies, often created by economic powerhouses, affect the types of work created in the industry. Of course, the rights that workers enjoy are strongly linked to the types of jobs that they are able to secure. In chapter two, I utilise macro statistical data in order to explore how trade arrangements and other forms of public trade regulation have differentiated impacts on various regions and individual countries. In chapter three I continue to explore the impact of trade regimes to grapple with questions of why a certain region – and even a specific country within a region – fares far better than others around it. Again, the aim is to build the argument for just how much power states retain over global trade regulation.

In the fourth and final chapter, I turn to an interesting development within our most visible of human rights institutions – the United Nations. Largely due to the efforts of John Ruggie, the UN has shifted its rhetoric on human rights violations by transnational corporations. The UN once attempted to impose on corporations the same human rights obligations as states under international law. But a shift has occurred, in which the UN clearly prioritises the state duty to protect against corporate abuses. I applaud the shift toward state accountability, but I closely consider the merits and demerits of these efforts thus far, and I consider where we may go from here.

⁴ I chose to focus on apparel for various reasons discussed in that chapter.

CHAPTER 1

I. INTRODUCTION

The structure and volume of global trade has changed dramatically over the past three decades, with highly variable consequences for the actors and institutions involved. This chapter will highlight governance challenges created by these new structures. My primary concern here, however, is the workers that toil anonymously in the basement of global value chains. It is by now well known that global value chains are not always benevolent to these workers – last year’s factory collapse in Bangladesh offered a dramatic reminder of this.⁵ How do we respond to this pressing problem? I argue that, using Nancy Fraser’s conception of justice as ‘parity of participation,’⁶ a radical shift is imperative in the struggle for justice within global value chains.

Global value chain (GVC) analysis offers a top-down understanding of the development of these chains, positing that ‘lead firms’ are the core actors and exert high levels of control over complex and fragmented global chains. I utilise GVC analysis to explore the increasing complexity of global value chains and the development of various types of public and private governance within these chains. My purpose in exploring governance is to arrive at an understanding of the challenges of ‘social upgrading,’ or effects on the welfare of workers, within value chains.

The most prominent response to the injustices of global value chains has been the development of voluntary corporate governance mechanisms that are often monitored by independent NGOs. In this model, companies are responding to pressures from consumers. I will explore how these attempts have largely fallen short of their aims, but I will also argue that they are missing the point entirely. Viewing justice as ‘parity of participation’ demands that workers become central actors in the struggle for their own livelihoods.

Ultimately I propose that efforts to bring justice to global value chains should return their focus to public institutions. The emphasis on private governance emerged because of perceived governance ‘gaps’ among state power. Because of the fragmentation involved in long strands of transnational business transactions, states are

⁵ Julfikar Manik et al, ‘Scores Dead in Bangladesh Building Collapse,’ New York Times, April 24, 2013.

⁶ Nancy Fraser, *Scales of Justice: Reimagining Political Space in a Globalizing World* (Cambridge: Polity Press, 2008).

no longer able to regulate corporate activity – or so the argument goes. I contest the dominant narrative of governance ‘gaps’ as the core problem and argue that these ‘gaps’ are actually what I call ‘consciously created zones of impunity.’

States have participated in rendering themselves unable to regulate corporate activity, and therefore have the ability to reverse this trend, or at least mitigate the negative impacts on workers. I also contest recent arguments that lead firms in global value chains lack the power to regulate their chains, but I conclude that public institutions provide a better platform for the struggle for workers’ rights.

II. ECONOMIC UPGRADING, SOCIAL DOWNGRADING?

Although globalisation is often considered a recent development linked to enhanced communication technologies and cheaper forms of transportation, global trade is not a new phenomenon. Yet the structure of global trade has transformed dramatically during recent decades. US companies began outsourcing manufacturing jobs in the mid-1960s, and retailers joined them in the 1970s and 1980s, searching for cheaper producers of consumer goods.⁷ In addition to transportation and communication improvements, trade liberalisation policies promoted by the World Trade Organization (WTO) further incentivised this process.⁸ This led to a shift from what Gereffi calls ‘producer-driven’ value chains to ‘buyer-driven’ value chains.⁹

Whereas power was held by end-product manufacturers in ‘producer-driven’ chains, ‘buyer-driven’ chains are characterised by retailers and marketers that are able to influence consumers with strong brand names but depend on external manufacturers to produce their goods. ‘One of the key insights that emerges from GVC analysis is the growing importance of global buyers as key drivers in the formation of internationally dispersed production and trade networks.’¹⁰

⁷ Gary Gereffi et al, ‘Why the World Suddenly Cares About Global Supply Chains,’ *Journal of Supply Chain Management* 48:3 (2012): 25.

⁸ Kate Raworth, *Trading Away Our Rights: Women working in global supply chains* (Oxford: Oxfam, 2004), 33.

⁹ Gereffi, ‘Organization of Buyer-Driven Chains.’

¹⁰ Gereffi, ‘Why the World Suddenly Cares,’ 27.

These strong brands, such as Liz Claiborne and Nike, became ‘manufacturers without factories.’¹¹ Initially, there were strong ties between ‘lead firms’ and their suppliers, as described by one of the founders of Liz Claiborne, one of the first companies to develop manufacturing ties with East Asia:

‘Thus, we had to train and develop them by supplying technical help, trim, findings, and virtually all components. While we counted on them for their labor, we had to tell them exactly how to use the basic skills of their people and we had to watch them very carefully, every step of the way.’¹²

What soon emerged, however, was that these same manufacturers began outsourcing the labour themselves, receiving orders from lead firms and contracting the work to low-wage countries like Indonesia and Vietnam. Eventually, sub-contractors in those countries passed on the work to someone else. The result of this ‘triangle manufacturing’¹³ was that lead firms no longer exercised direct control over the production of consumer goods and dealt instead with middle men. Supply chains soon grew exponentially more complex. ‘In essence, marketers now recognize that overseas contractors have the capability to manage all aspects of the production process, which restricts the competitive edge of marketers to design and brands.’¹⁴

However, GVC analysis argues that lead firms still retain control over global supply chains, or governance, with mechanisms such as quality control.¹⁵ ‘Governance is the centrepiece of GVC analysis. It shows how corporate power can actively shape the distribution of profits and risk in an industry, and the actors who exercise such power through their activities.’¹⁶

Governance structures vary across three dimensions.¹⁷ First is the distinction between public and private governance. Public governance is imposed by the state, while private governance consists of various factors, such as societal norms and collective bargaining agreements that affect how market actors manoeuvre. The

¹¹ Gary Gereffi, ‘International trade and industrial upgrading in the apparel commodity chain,’ *Journal of International Economics* 48 (1999), 46.

¹² *Ibid.* 47.

¹³ *Ibid.* 60.

¹⁴ Gereffi, ‘International trade and industrial upgrading,’ 47.

¹⁵ Gereffi, ‘Why the World Suddenly Cares,’ 28.

¹⁶ *Ibid.* 25.

¹⁷ Frederick Mayer and John Pickles, ‘Re-embedding governance: global apparel value chains and decent work,’ *Capturing the Gains Working Paper 1*, June 2010.

emergence of corporate social responsibility (CSR) is an example of private governance.

Secondly, the function of governance can be to facilitate, regulate, or redistribute. Facilitative governance spurs economic activity by aiding the creation of markets and jobs and attracting investment. Regulatory governance seeks to prevent corporate abuse and the exploitation of workers by protecting job security, working conditions, and freedom of association. Finally, redistributive governance attempts to remedy inequalities via taxation, social services, and a minimum wage.

Thirdly, the scale of governance can be local, national, or international, and it can be specific to an industry or more broadly applicable. Public governance tends to be local or national and is not industry specific, while private governance is more flexible in crossing national boundaries and can be fitted for a specific industry or even a specific firm. This final distinction is the reason why many turned to forms of private governance to remedy corporate abuses in global value chains.

What are the effects of governance? This is the question addressed by considerations of ‘economic upgrading.’ While governance is the top-down centrepiece of global value chains, ‘economic upgrading’ considers the bottom-up perspective, or the various ways in which developing countries and local actors manoeuvre to enhance their position in the global economy.¹⁸

Four main types of economic upgrading have been identified:¹⁹ process upgrading involves making production more efficient; product upgrading involves the introduction of advanced products that require more skilled employees; functional upgrading involves a change in activities to increase value added tasks, such as specialization or vertical integration; and chain upgrading involves moving into new industries that demand more technologically advanced production chains.²⁰ With each of these four types of economic upgrading, there is both a capital dimension – new technologies – and a labour dimension – skill development.

¹⁸ Gereffi, ‘International trade and industrial upgrading.’

¹⁹ Stephanie Barrientos, Gary Gereffi, and Arianna Rossi, ‘Economic and social upgrading in global production networks: A new paradigm for a changing world,’ *International Labour Review*, Vol. 150 (2011) 323.

²⁰ Gereffi first, but also Ibid 6.

To deal with the complex intersection between governance and economic upgrading, and in response to criticisms that his conception of buyer-driven chains was overly simplistic,²¹ Gereffi developed five different types of value chain governance: markets, modular value chains, relational value chains, captive value chains, and hierarchy.²² The type of governance used in a particular chain is based on three factors: the complexity of information required for a transaction, whether the information can be efficiently codified, and the capabilities of suppliers.

In the following chapter of this dissertation, I will explore the strong degree to which trade agreements affect these decisions. For now, it is not necessary to discuss these variations in detail, but it is important to acknowledge the complexity, variability, and evolving nature of global supply chains if we are going to consider the rights of workers within these chains. For example, the apparel industry evolved from what was initially a captive chain (small suppliers dependent on big buyers) to a relational value chain (complex interactions based on mutual dependence) in East Asia. Also, produce trade between Kenya and the United Kingdom changed from market coordination (simple transactions in which producers need little guidance from buyers) to a more captive chain as supermarkets become more concerned with the quality of produce.²³

Thus, many middlemen in East Asia have been able to position themselves favourably and capture the benefits of economic upgrading, while produce growers in Kenya have been less successful. All across these various types of chains, however, the impacts on workers are less clear-cut. In short, economic upgrading does not automatically lead to 'social upgrading.' Barrientos has brought this to light by assessing the effects of global value chains on 'social upgrading,' or the ability of labourers within global value chains to access decent work. (Barrientos uses the ILO definition of decent work, which allows 'conditions of freedom, equity, security and dignity, in which rights are protected and adequate remuneration and social coverage is

²¹ Peter Gibbon et al., 'Governing global value chains: an introduction,' *Economy and Society* 37:3 (2008), 315-338.

²² Gary Gereffi et al., 'The governance of global value chains,' *Review of International Political Economy* 12:1 (2005), 78-104.

²³ *Ibid.* 92-94.

provided.²⁴) Barrientos actually utilises analysis of global production networks (GPN) rather than GVCs in order to shift attention to the well being of workers, because GPN analysis incorporates the role of workers – something that GVC analysis neglects.²⁵

While GVC analysis focuses on value creation and capture in the production and distribution processes, GPN analysis drew attention to the social context of interconnected business operations, investigating not just the interaction between lead firms and suppliers but all of the actors involved in shaping global production. This includes national governments, international trade unions, and NGOs, and also places an emphasis on power relations between actors.

There have been some case studies that have assessed employment conditions and rights of workers in GPNs. ‘However, there has been a disjuncture in the literature between a ‘firm focus’ that treats labour as a factor of production, and a “rights focus” that examines conditions and entitlements of workers.’²⁶

In order to address the fracture between economic and social analyses of labour, Barrientos attempts to ‘integrate workers as productive and social agents into the changing dynamics of GPNs in developing countries.’²⁷ The goal is to increase understanding for how economic and social upgrading play out differently for firms and workers in order to maximize benefits for both sides. They look at workers in GPNs on two levels.²⁸

The first is labour as a productive factor. An assumption of conventional economic theory is that firms should operate at the lowest possible cost to maximize competitiveness, but this fails to consider the complex role of labour within GVCs and GPNs. In order to meet both cost and quality pressures, the intensity and skill level of labour must be considered and is affected by local labour market conditions and the requirements of buyers.

²⁴ Stephanie Barrientos, ‘Global Production Systems and Decent Work,’ International Labour Organization Working Paper No. 77 (2007), 1.

²⁵ Ibid. 3.

²⁶ Stephanie Barrientos, Gary Gereffi, Arianna Rossi, ‘Economic and Social Upgrading in Global Production Networks: Developing a Framework for Analysis,’ Capturing the Gains Working Paper 3 (July 2010), 5.

²⁷ Stephanie Barrientos, Gary Gereffi, and Arianna Rossi, ‘Economic and social upgrading in global production networks: A new paradigm for a changing world,’ *International Labour Review*, Vol. 150 (2011), 321.

²⁸ Ibid.

The second is workers as social agents. Workers are largely dependent on access to rights to enhance their own well being – the right to organize, for example – and their ability to access rights is dependent on their position and involvement in GPNs. This view considers both the capabilities and entitlements of workers.

There are challenges of considering work within a GPN context. Employment is affected by both national labour protections and the demands of buyers in terms of quality, price, and production schedule. Also, the labour codes of large buyers, often monitored by private groups, impacts the quality of employment in addition to national labour protections.

Despite all this, the core component of GVC analysis remains: the type of governance exercised by buyers is the primary factor affecting the workings of value chains and the fate of workers. ‘The employment decisions of domestic suppliers are increasingly controlled by meeting the requirements of large overseas corporate buyers.’²⁹

Thus, when concerns came to light regarding sweatshops and other poor working conditions created by global value chains, the problem was understood as a tension between corporate governance and social upgrading.³⁰ Traditionally, this problem – corporate activity versus workers’ welfare – would have been resolved by states implementing regulatory measures or redistributive mechanisms such as labour laws. But the game has changed. When corporate activities reach across state boundaries, and those corporations do not in fact employ the workers being harmed, who is responsible for addressing the problem? Here, we arrive at the logic of governance ‘gaps’ or ‘deficits.’

Governance structures were initially created as a response to the rise of modern industrial economies, and states initially shared a basic commitment to labour regulations and social protections, despite a lack of international regulatory mechanisms. This allowed for stable international trade. But globalisation disrupted this stability. Trade liberalisation and the opening of economies in Asia and Eastern Europe expanded the market to include countries with far lower wages and meagre governance

²⁹ Ibid. 2.

³⁰ Stephanie Barrientos et al., ‘Decent work in global production networks: Framing the policy debate,’ *International Labour Review* 150 (2011), 299-316.

structures. The global value chains that emerged across these countries presented significant challenges to those committed to protecting decent work and preventing corporate abuse.³¹

The majority of production suddenly occurred in countries where regulatory and redistributive mechanisms were weak or absent, and many countries eroded some protections already in place in order to become more attractive investment destinations, such as the special economic zones (SEZs) established in countries like China, Vietnam, and Cambodia (much like *maquiladoras* in Latin America).³²

International trade organizations focused on facilitation, especially the International Monetary Fund (IMF) and WTO, but also the World Bank and World Intellectual Property Organization.³³ Beginning in the 1970s these institutions expanded market access while staving off attempts by trade unions to embed agreements with labour protections.³⁴ Organizations like the ILO were significantly disadvantaged during the shift from national industrial relations structures to global neoliberal trade agreements, according to some.³⁵

Overall, the Bretton Woods institutions have shown little interest in promoting social upgrading and have continued to focus their efforts on facilitation rather than regulation or redistribution. The WTO, for example, has repeatedly refused to consider human rights as part of its core mission.³⁶ World Bank policy has shifted, however, making adherence to International Labour Organization (ILO) standards mandatory to receive funding for infrastructure projects. Yet, in *Doing Business*, the World Bank benchmarking program, labour standards like work hours, minimum wage, and protection from discrimination are described as obstacles to ‘doing business’.³⁷

Regional institutions have shown greater promise for reform – especially the EU – and the American Development Bank and Asian Development Bank have demonstrated stronger commitment than the World Bank.³⁸ Additionally, embedding

³¹ Ibid 3.

³² Ibid.

³³ Ibid.

³⁴ Ibid.

³⁵ Ibid.

³⁶ Ibid 10.

³⁷ Ibid 9.

³⁸ Ibid 10.

labour requirements in free trade agreements is becoming more prevalent, with the EU again demonstrating the greatest commitment. The North America Free Trade Agreement (NAFTA) and Dominican Republic-Central America Free Trade Agreement (CAFTA-DR) include side agreements on labour, but provisions are weak and don't include references to core pillars of ILO.³⁹ Lastly, the G20 has emerged, consisting of emerging economies, and this presents the possibility of pushing for reform of Bretton Woods institutions. Thus, innovations have occurred in linking labour practices to trade agreements, in implanting labour standards into Bretton Woods institutions, and constructing new power blocs in the South.

Still, many argue that traditional state regulation and newer public governance mechanisms no longer retain the capacity to regulate transnational corporate activity. 'Global production systems... have weakened the ability of national government to effectively regulate labour markets and ensure decent work in those sectors given their lack of control of corporate buyers who operate outside their borders.'⁴⁰ The home countries of multinational corporations cannot regulate employment in jurisdictions across the world. Similarly, developing countries, where manufacturing activities are based, do not have control over corporate buyers that are based in the Global North (this paradigm has experienced some transformation lately as domestic markets emerge in the Global South). Likewise, international institutions like the ILO do not have the scope to enforce labour standards. As a result, NGOs emerged to fill the perceived deficits created by the newborn vexations of global production.

Have these efforts been successful? The answer to this question must be considered carefully. In the next section I propose that, while NGOs managed to enhance employment conditions for some workers, their efforts have largely fallen short because they fail to address the radical injustices described by Fraser as 'parity of participation.' Using Fraser's conception of justice, I contest the dominant narrative of governance gaps presented above.

³⁹ Ibid.

⁴⁰ Barrientos, 'Global Production Systems and Decent Work,' 15.

III. THE SHORTCOMINGS OF CORPORATE CODES

When states failed to regulate employment in global value chains, civil society organizations argued that global buyers harness asymmetrical power within global value chains and are therefore themselves responsible for regulating their social effects. NGOs effectively used ‘name and shame’ tactics by mobilising awareness about the ill effects of global chains, thus threatening the brand image of powerful buyers.⁴¹ This has led to the most prominent response to poor employment conditions caused by global value chains, the ‘mushrooming’ of corporate social responsibility (CSR) and labour codes,⁴² which are often monitored by independent groups. Private governance responses include voluntary attempts by firms to implement CSR across their supply chains, consumer calls for ethical sourcing, and investor movements to create socially responsible markets.

When utilising GVC analysis, this response is not illogical. Powerful buyers respond to pressures from shareholders and consumer expectations for quality goods at low prices; these pressures are then pushed down the supply chain and ultimately lead to the exploitation of workers.⁴³ Corporations, therefore, harness the power to ensure that labour standards are met by manipulating governance mechanisms. However, these labour codes do not always have the desired effect. Barrientos has demonstrated that South African fruit growers have responded in multiple ways to simultaneous and often contradictory pressures from buyers for higher quality, lower cost produce that is pushed to market with more stringent employment standards. The result is that some workers benefit from better pay and working conditions, but there is also a ‘noted increase in the use of contract labour,’ meaning that many more workers go unprotected by any standards whatsoever.⁴⁴

This paradigm is seen across various types of chains and especially hurts vulnerable groups like migrants and women.

⁴¹ Stephanie Barrientos and Sally Smith, ‘Do Workers Benefit from Ethical Trade? Assessing codes of labour practice in global production systems,’ *Third World Quarterly* 28:4 (2007), 717.

⁴² Barrientos, ‘Global Production Systems and Decent Work,’ 15.

⁴³ Raworth, *Trading Away Our Rights*.

⁴⁴ Stephanie Barrientos et al., ‘Squaring the Circle: Global Production and the Informalization of Work in South African Fruit Exports,’ *Journal of International Development* 16 (2004), 86.

‘Men... are more likely to hold permanent jobs with higher wages. In contrast, women are concentrated in the “twilight” zone between the two forms of work, increasingly engaged in “informal” types of employment, moving “flexibly” between the productive and reproductive economy as required by dictates of work.’⁴⁵

Indeed, 75 per cent of women in Chile’s agriculture sector are on temporary contracts, less than half of women in Bangladesh’s garment sector have a contract, and women on South Africa’s fruit farms make up 69 per cent of temporary labour and only 26 per cent of long-term employees.⁴⁶

It must be noted that some progress has been achieved due to implementation of corporate codes, most evidently in health and safety, which include ‘clearer procedures, information and training, fire safety, personal protective equipment, safer use of chemicals, lighting and ventilation, toilets and drinking water.’⁴⁷ Also, codes have led to a reduction of working hours and an increase in wages for some workers (although wage increases were not significant enough to guarantee a living wage). Such benefits should not be belittled; any improvements in the lives of workers must be lauded. But to what extent have these improvements actually made a difference? Both industry and anti-sweatshop organizations have begun to question the ability of private monitoring models to protect workers, even in value chains with high-priced, reputation-sensitive brands.⁴⁸

After spending years researching Nike’s attempts at corporate responsibility, Locke arrived at a similar conclusion:

‘But have these private efforts improved labor standards? Not by much. Despite many good faith efforts over the past fifteen years, private regulation has had limited impact. Child labor, hazardous working conditions, excessive hours, and poor wages continue to plague many workplaces in the developing world, creating scandal and embarrassment for the global companies that source from these factories and farms.’⁴⁹

Even further, any improvements that have been realized fall under what Barrientos calls ‘outcome standards,’ or specific conditions of work such as health and

⁴⁵ Stephanie Barrientos et al., ‘A Gendered Value Chain Approach to Codes of Conduct in African Horticulture,’ *World Development* 31:9 (2003), 1515.

⁴⁶ Raworth, *Trading Away Our Rights*.

⁴⁷ Barrientos, ‘Do Workers Benefit?’ 722.

⁴⁸ Barrientos, ‘Decent work in global production networks,’ 307.

⁴⁹ Richard Locke, ‘Can Global Brands Create Just Supply Chains?’ *Boston Review* May/June 2013, 1.

safety, while no gains have been achieved in ‘process rights,’ or the ability of workers to negotiate on their own behalf via freedom of association and the right to collective bargaining. Here, we arrive at what I posit is the primary problem.

NGOs that have resorted to pressuring corporations to fill the governance gaps created by global supply chains must participate in the model created by corporations themselves. This is problematic for multiple reasons. First, external monitoring companies depend on corporations, or suppliers themselves, to fund their activities. This is not inherently problematic, except that:

‘Even well-intentioned monitors may recognize that an overly zealous inspection may prompt companies to look for a different monitor in the future, and when that fear is present, the line between in-house monitoring and “external” monitoring can become blurry.’⁵⁰

Secondly, Barrientos has pointed out that there is a tension between commercial aims and achieving justice for workers.⁵¹ Suppliers often have difficulty implementing codes put forth by buyers due to pressures placed on them by the buyers themselves, which include ‘downward movement in prices, shorter lead times between order and delivery, increasingly stringent demands on product specification (often at the expense of suppliers), and insecurity of orders.’⁵²

Thirdly, when lead firms fail to deliver improvements with corporate codes, this leaves open the possibility for corporations to argue that their own governance power is limited to affect change (private governance gaps), as reflected by a Nike representative in response to Locke’s criticisms of the company’s efforts: ‘The gains we’ve made are fragile, especially considering that these supply chains were not built to cope with the volatility and pace of change we now see across the world.’⁵³ Certainly, ‘volatility and pace of change’ are real concerns, and it is easy to recognize the difficulty with monitoring the kinds of ‘triangle manufacturing’ supply chains that emerged in East Asia and are now prevalent around the world. But it is also essential to recognize that these conditions are not inevitable. Corporations create and participate in these types of

⁵⁰ Gay Seidman, ‘Regulation at Work: Globalization, Labor Rights, and Development,’ *Social Research* 79:4 (2012), 1029.

⁵¹ Barrientos, ‘Global Production Systems and Decent Work,’ 11.

⁵² Barrientos, ‘Assessing Codes of Labour Practice,’ 725.

⁵³ Hannah Jones, ‘A New Conversation on Responsibility,’ *Boston Review* May/June, 2013, 16.

supply chains because it is economically advantageous (as seen with examples given above of companies changing types of governance, from captive to relational value chains, etc., to maximize profits). They often undermine their own codes with the pressures described by Barrientos above, in addition to switching producers frequently and sourcing via middle men rather than directly controlling manufacturing, which would make it simple to guarantee outcome standards – and process rights, for that matter.⁵⁴

Indeed, Gereffi argues that large retailers and major brands are ‘dictating the way the chains are operating,’⁵⁵ and Arthurs proposes that their employment decisions involve a ‘rational calculus: will adhering to decent and more costly labour standards yield a net advantage over the opposite strategy?’⁵⁶ And because corporations have become such dominant institutions on the global stage (the 100 largest global firms exceed the GDP of many countries⁵⁷), they can conceivably be viewed as regulatory agents themselves.⁵⁸ For example, they mobilise favourable research and interest groups to shape public opinion and affect state policies when they threaten to invest elsewhere or move to jurisdictions with fewer regulatory obstacles.

In short, Barrientos concludes that improvements in employment via corporate codes are unlikely to be prioritised and achieved unless it becomes profitable.⁵⁹ And if it is truly a matter of incentives, then of course gaps are not the real obstacle.

Fourthly and finally, NGOs working to monitor corporate codes as a method to address employment problems is problematic because these codes are not built to help workers achieve process rights. ‘Codes constitute outcome standards passed down from buyers or are viewed as part of the prerogative of management which, often from a paternalist perspective, “knows” what is in the best interests of its workers.’⁶⁰ Yet

⁵⁴ Raworth, 57.

⁵⁵ Gereffi, ‘Why the World Suddenly Cares,’ 27.

⁵⁶ Harry Arthurs, ‘Extraterritoriality by Other Means: How Labor Law Sneaks Across Borders, Conquers Minds, and Controls Workplaces Abroad,’ *Stanford Law and Policy Review* 21 (2010), 12.

⁵⁷ Harry Arthurs, ‘Who’s afraid of globalization? Reflections on the future of labour law,’ in *Globalization and the Future of Labour Law*, ed. by John Craig et al. (London: Cambridge University Press, 2006), 51-74.

⁵⁸ Dan Danielsen, ‘Corporate power and global order,’ in *International Law and Its Others*, ed. by Anne Orford (London: Cambridge University Press, 2006), 87.

⁵⁹ Barrientos, ‘Ethical Trade,’ 727.

⁶⁰ Barrientos, ‘Assessing Codes of Labour Practice,’ 725.

achieving process rights for workers is exactly what Nancy Fraser's theory of global social justice demands.

Enforcement of private labour codes is likely unsustainable because it depends on consistent pressure from consumers and NGOs, but more importantly the struggle for justice according to Fraser means ensuring that workers have the ability to, well, struggle. For Fraser, justice requires 'parity of participation.'⁶¹ In general, this radical-democratic conception of justice requires social structures that enable all persons to participate in social life as peers. This is considered in three dimensions: economic, cultural, and political. The economic dimension pertains to distributive justice and addresses the economic structures that can deny persons the ability to interact with others on an equal playing field. The cultural dimension addresses status inequality, or the denial of recognition by established hierarchies of cultural value. The first dimension involves the class structure and the second case involves the status order.

The third dimension is political, which is my primary focus here. The political dimension of justice 'furnishes the stage on which struggles over distribution and recognition are played out.'⁶² In the following section I will discuss why Fraser's theory provides a particularly powerful analysis of attempts to improve working conditions in global value chains.

IV. STRUGGLING AGAINST CONCIIOUSLY CREATED ZONES OF IMPUNITY

Movements that exclude the voices and leadership of workers are unlikely to achieve significant gains. As described above, voluntary corporate regulation has not yielded the desired results, partly because justice for workers is placed in the hands of consumers, civil society organizations, and corporations. It would be incorrect to claim that none of these entities is capable of enhancing the lives of workers. On the contrary, I have argued the exact opposite, and indeed, gains have been achieved – though limited. But sought after transformation has thus far proved elusive, and history instructs us that radical change is unlikely to occur if those with the most at stake are not mobilised (i.e. workers themselves). 'The right to organize is the worker's most effective weapon

⁶¹ Nancy Fraser, 'Reframing Justice in a Globalizing World,' *New Left Review* 36 (2005).

⁶² *Ibid* 75.

against exploitative conditions. It is also one of the basic labor rights established by the International Labour Organization.’⁶³

Still, according to Fraser, even if significant improvements were achieved via corporate codes, bringing higher wages and better working conditions, global value chains would still be rife with injustice. Of Fraser’s three dimensions of justice, this improvement would only impact the first dimension, that of economic distribution (although exponential wage increases would be necessary to be considered real economic redistribution). Of the second dimension, gains realized without the input of workers would likely reinforce the dearth of cultural parity because of the top-down, paternalistic nature of such an approach. Of the third dimension, current efforts seem to actually undermine the political participation of workers by measuring progress according to standards set by corporations. Thus, justice as ‘parity of participation’ in all of Fraser’s dimensions demands that a radical reconceptualisation of tactics used to struggle for workers is necessary.

I should reiterate that I do not mean to discount the small improvements achieved in employment conditions around the world, and I certainly do not intend to suggest the utilisation of an idealistic theory that is unlikely to function in the real world. Quite the opposite, it seems that the failures of the most robust response thus far to injustice in global supply chains has indicated that a radical shift is imperative, that workers must be enabled to participate in the struggle, and participate as equals to others that struggle on their behalf. Fraser argues that justice is not achieved without enabling the political participation of workers, but the analysis thus far suggests that other dimensions of justice cannot be achieved without parity of political participation in the first place.

What does political participation entail? Primarily, it requires a democratic structure accessible to workers. That democratic structure can be private or public, of which there are two potentialities each: home governments to corporations; local governments in developing countries; lead firms in the global North; and local suppliers

⁶³ Richard P. Appelbaum, Edna Bonacich, and Katie Quan, ‘The End of Apparel Quotas: A Faster Race to the Bottom?’ Capturing the Gains Working Paper (February 2005), 3.

in developing countries. Of course, here we are faced with the obstacles created by evolving structures of global trade. Each institution requires a closer look.

We have already established that political access to private structures is limited. Labour occurs in factories or fields that are owned by local entities, not formally connected to lead firms. Even if labourers were allowed to organize against the conditions set by local managers, it would achieve little because employment conditions are created by lead firms. Thus, workers would need access to lead firms, but the chasm between a factory worker in Bangladesh and a brand manager in the United States is vast. Not only is there an absence of a communication method, there is no incentive for the brand manager to take heed of the worker's concerns. NGOs have attempted to remedy this by mobilising consumers and pressuring brands, and monitoring their efforts, to little effect. Workers do not have a platform to struggle against lead firms, and thus far NGOs have attempted to reform from within, which keeps workers on the outside looking in. There does remain some potential for NGOs to bridge the chasm between workers and lead firms by pressuring corporations to grant process rights.

Otherwise, public institutions provide the other path to struggle. Public institutions in general are more likely to respond to the voices of workers – and consumers for that matter. This is not because government leaders are more benevolent than corporate leaders, but rather because states hold the highest responsibility to citizens, while corporations are responsible to shareholders. Thus, corporations respond partly to consumer pressure because it potentially threatens the value of their company, but their ultimate loyalties lie elsewhere. I am not naïve in believing that states are not also influenced by corporate pressures (which I will explore below), but at the very least public platforms are a more level ground for struggle.

Might it be more productive for consumers to pressure their states, rather than their brand corporations, to address injustices created by lead firms in global supply chains? Obviously, workers in developing countries cannot do this. They do not have citizen power to pressure the home states of corporations, but they do retain that power within their own countries. Should justice movements concentrate on these states? Again, I am not arguing that knocking on the door of public officials is a simple and

swift panacea, but I am suggesting that concentrating efforts in these arenas may create better opportunities to struggle for real justice.

However, we must first consider a large obstacle, which is: do states retain the capacity to regulate these types of transnational activities in the first place? A common assumption is that national governments are limited in the global economy,⁶⁴ thus the common narrative of public governance ‘gaps,’ or ‘deficits.’ But are public institutions really that powerless? I suggest that states – both home states to corporations and states where production occurs – have actually participated in the creation of the structures that allow corporations to control global supply chains with impunity. Therefore, these governance ‘gaps’ are not incidental effects of happenstance changes in trade, but are more aptly described as ‘consciously created zones of impunity.’ This is why Mayer and Pickles note,

‘[The] efficacy of state-level governance has been partially eroded by neo-liberal commitments to deregulation and market-based mechanisms and by globalization, particularly as production moves to low-cost producing locations in the global South with less-well-developed facilitative, regulatory, and compensatory capacities.’⁶⁵

Powerful countries like the United States have promoted neo-liberal policies by eroding such redistributive mechanisms as labour law via foreign policy, trade legislation and treaties, and by exercising power in international economic institutions like the World Bank, IMF, and WTO.⁶⁶ In the 1980s and 1990s, loan conditionality from the IMF and World Bank required that states make labour laws more ‘flexible’ by increasing temporary contracts, reducing social security, extending overtime, and cutting minimum wages.⁶⁷ And if the US was able to influence labour deregulation through the World Bank, IMF, and WTO, then there is also the possibility to reverse those policies. More directly, as will be discussed in much greater detail in the

⁶⁴ Barrientos, ‘Ethical Trade,’ 714.

⁶⁵ Mayer and Pickles, ‘Re-embedding governance,’ 11.

⁶⁶ Arthurs, ‘Extraterritoriality,’ 4.

⁶⁷ This is why Rittich has argued that it is a mistake to assume that, if a correction is needed on the adverse social effects of globalisation, it would be misguided to assume that there was no social policy to begin with. The social policy involved dismantling worker protections, and this is why a struggle is necessary to regain such protections. (Kerry Rittich, ‘Global Labour Policy as Social Policy,’ *Canadian Labour and Employment Law Journal* 14:2 (2008), 230.)

following chapters, countries like the US harness the power to implement specific changes in trade policy via regional trade agreements such as NAFTA and CAFTA-DR.

Also, the U.S. has enacted ‘business friendly’ policies that shelter corporate managers from the damaging effects of their business decisions.⁶⁸ Such a ‘business judgment rule’ shields managers from potential environmental and human rights violations around the world.⁶⁹ For the purpose of this essay it is not necessary to conclude that managers take advantage of this to harm others purposefully, but rather to point out that this creates a zone of impunity. If home states can create governance that protects managers from decisions affecting people in other jurisdictions, then it is possible to create links that make them liable for damaging activity as well. There are other public governance possibilities as well, such as requiring labour representation on executive boards, as in Germany.⁷⁰

‘The important point here is to recognize that national corporate governance policies do produce global governance effects and that a better understanding of those effects could provide new avenues for policy-makers to shape transnational regulatory policy and global social welfare.’⁷¹

There may be even further opportunities for states that host production to ensure social welfare. Again we must consider, for developing countries, are the governance gaps too large to overcome? And yet again, I assert that, if there are gaps currently, they were consciously created with the help of these states. Governments have ‘actively eroded labour rights’⁷² to attract foreign investment, and in competing with other countries to attract this investment have participated in a ‘race to the bottom.’⁷³ States have also created export processing zones (EPZs) in which workers can be denied many of the protections offered by national laws. And many states fail to enforce the employment laws on the books. ‘Instead of ensuring fair and sustainable gains from

⁶⁸ Danielsen, 92.

⁶⁹ The fictional example provided by Danielsen involves a situation in which a corporate CEO decides to dump toxic waste into fresh water systems in a foreign country rather than dispose of it properly. The CEO settled on this choice because it was a cost-saving measure, therefore maximising profits and share values. Because the decision was made in the best interests of shareholders, these sheltering laws protect the CEO from any legal liability.

⁷⁰ Ibid. 89

⁷¹ Ibid. 90.

⁷² Raworth, 9

⁷³ Arthurs, ‘Who’s Afraid of Globalization?’ 55.

trade for workers, many governments are trading away workers' rights in the hope of a place in global supply chains.⁷⁴

Yet some states have attempted to address the problem. In 2008 China passed the New Labour Contract Law by guaranteeing formal term contracts for employees that protect them from termination without just cause and grants them access to courts to protect these rights. This could have important ramifications in the long term, as it will stabilize employment for millions of workers but also potentially increase labour costs.⁷⁵ This has already led to some buyers shifting to producers in Indonesia, Vietnam, and Cambodia, but it could still be significant in creating new industry standards.

Some public-private governance responses have also emerged. One such hybrid development is the Cambodia Better Factories Initiative, which combines private self-regulation with state and international interventions. This originated with the US-Cambodia Textile Agreement, which granted greater access to US markets for improved labour conditions.⁷⁶ Another example of this is Nicaragua, which has maintained robust state policies in addition to implementing the Better Work initiative, which we will explore in further detail in the third chapter.

And in light of the economic downturn beginning in 2008, Nathan and Sakar have argued that states are beginning to recognize that more robust public governance is crucial not just for workers' rights but for macroeconomic stability.

'This is a generally neglected dimension in the discussion of the ongoing global crisis... a low share of wages needs to be compensated by a correspondingly high level of investment. A key feature of the imbalance in the current global crisis is the rise in profits as a share of total global income. Correcting this imbalance, through an increase in the wages share of income, will be an important part of making global growth more stable.'⁷⁷

It is clear that an increasing number of states are beginning to come to terms with the pitfalls of global trade; and as the entrenched neo-liberal orthodoxy recedes, governments are realizing they need not sacrifice their regulatory regimes and social

⁷⁴ Raworth, 45.

⁷⁵ Mayer and Pickles, 'Re-embedding governance,' 12.

⁷⁶ Ibid 13.

⁷⁷ Dev Nathan and Sandip Sarkar, 'Global Inequality, rising powers and labour standards,' Capturing the Gains Working Paper (February 2012), 3.

protections in order to promote economic upgrading. However, the actualization of such a realization depends both on government responses to domestic social pressures in addition to their leverage relative to other global market actors. ‘Clearly what might be possible for China because of its size might not be possible for Guatemala, for example, and so it will be necessary to develop scale-dependent metrics of effective governance institutions and practices.’⁷⁸

Yet there is a strong argument that even very poor national governments have more power to impose their will than previously thought.⁷⁹ This power has only increased following the global economic crisis, as developing countries are taking on a more prominent role in driving the economy. Large brands are beginning to sell goods back to consumers in the regions where they were produced. This North to South shift in economic power holds great possibilities, if only these rising states are willing to protect workers.⁸⁰ Also, many Latin American countries, such as Venezuela, Brazil, Uruguay, Chile, Argentina, and Bolivia, have recently experienced populist movements against neo-liberal policies and reasserted labour rights.⁸¹

Of course, as mentioned above, the state is not an inherently benevolent actor, but the public stage remains a far more promising arena to struggle for improvements. It is the only stage on which the workers themselves can access political participation, which is a basic tenet of justice according to Fraser. Additionally, citizens of countries where corporations are domiciled can also pressure their governments to provide more robust protections for workers in powerful mechanisms such as trade agreements. The following two chapters will explore in much further detail the extent to which these agreements impact the lives of workers.

V. THE PERSISTENT POWER OF STATES

The notion that states are not able to act as regulators in GVCs due to public governance gaps has been overblown. Deficits still exist, of course, but state power remains far-reaching and holds great potential. I have argued that public institutions offer the most

⁷⁸ Ibid 15.

⁷⁹ Locke, 9.

⁸⁰ Gereffi, ‘Why the World Suddenly Cares,’ 28-29.

⁸¹ Michael Piore and Andrew Schrank, ‘Trading up: An embryonic model for easing the costs of free markets,’ *Boston Review* Sep./Oct. 2006, 2.

promising platform for struggle because states are more responsive to political pressure than corporations. Fraser's theory of justice demands 'parity of participation,' and because political participation is best achieved in a public framework, efforts to achieve economic redistribution and cultural recognition within GVCs must be focused on public regimes.

In the following chapter, I will discuss a plethora of data which reveals the extent to which states have participated in creating the current structures of global trade in order to discuss how it is we might move forward in struggling for workers' rights. Although a global context will always be presented, much of the discussion will centre on developments in Latin America, a region whose fate has largely been determined by US interests. Also, various industries will be considered, but much of this paper focuses specifically on apparel, an industry that has proven essential for economic upgrading around the world due to low barriers for entry and the multitude of preferential access to end markets available to manufacturers.

CHAPTER 2

I. APPAREL IN THE DEVELOPING WORLD

Apparel is a crucial sector for developing countries because it often serves as a gateway to economic development.⁸² Entry barriers are relatively low compared to more sophisticated industries such as IT, and natural resources are minimal compared to agriculture, but labour needs are intensive and therefore bring much needed employment opportunities.

As discussed in the previous chapter, global value chain (GVC) analysis considers the value chain as the unit of analysis, rather than a country, firm, or worker. Meanwhile, different types of GVCs are made up of different levels of low-skill and high-skill production. There are five different types of work considered:⁸³ small-scale household and home-based work (often found at the base of GVCs); low-skilled, labour-intensive work (wage labour on a commercial site); moderate-skilled, varied labour-intensity work (associated with full-package production where buyers control the orders but suppliers do much of the rest); high skilled, technology-intensive work (typically associated with electronics); and knowledge-intensive work (includes services like finance, software, and engineering).

The apparel industry consists mostly of household and low-skilled work, although moderate skilled, high skilled, and knowledge intensive jobs do exist in small proportions (likely due to the rising prevalence of full package production that is largely concentrated in the North). In this sense, apparel is most similar to agriculture. Thus, each industry consists of a different combination of work typologies. Some industries consist of many more knowledge-intensive jobs, but it's also likely that those GVCs create fewer jobs than apparel or agriculture.⁸⁴

Each type of work throughout a value chain has implications for economic and social upgrading.⁸⁵ Irregular workers, often primarily women and migrants, are less likely to have the kinds of enabling rights that lead to measurable standards. Third-party

⁸² Thomas Bernhardt, 'Developing countries in the global apparel value chain: a tale of upgrading and downgrading experiences,' *Capturing the Gains* Working Paper 22 (February 2013).

⁸³ Stephanie Barrientos, Gary Gereffi, Arianna Rossi, 'Economic and Social Upgrading in Global Production Networks: Developing a Framework for Analysis,' *Capturing the Gains* Working Paper 3 (July 2010), 8.

⁸⁴ *Ibid* 10.

⁸⁵ *Ibid* 11.

contract workers are increasingly used in apparel and agriculture, both labour-intensive and seasonal. Contractors are often used to match workers with employers when needed. While contractors can help workers achieve a certain continuity of work by moving them to different sites when needed, they can also expose workers to severe exploitation.⁸⁶

The central theme of this chapter is how state policies impact what types of work are created in the apparel industry. More to the point, this chapter explores the effects of state trade policies on the livelihoods of apparel workers. I begin with a historical explanation of the emergence of apparel trade policies, then transition to a detailed discussion of the various ways in which state policies have affected workers on the ground. The macro data utilised to ground this discussion is by no means ideal – and it is presented with many qualifications – but it is instructive in exploring how state policies relate to broader trends in economic and social upgrading. In general, by exploring the extent to which broad state trade policies impact the individual worker, the goal is to bolster the idea that states retain the ability to address human rights violations in GVCs.

II. HOW WE GOT HERE: APPAREL AND THE HISTORY OF THE QUOTA REGIME

In all global value chains, but especially apparel chains, it is difficult to overstate the impact of state policy initiatives. The apparel industry has long been one of the most involved players in lobbying for national and international trade regulations, and it is also one of the most protected industries.⁸⁷

‘For buyers, suppliers, and workers in global value chains, the sourcing, production, and consumption of clothing is shaped as much by a myriad of complex and often technical details embedded in trade agreements, tariff structures, and customs

⁸⁶ Ibid.

⁸⁷ Gary Gereffi and Stacey Frederick, ‘The Global Apparel Value Chain, Trade, and the Crisis: Challenges and Opportunities for Developing Countries,’ Policy Research Working Paper 5281, World Bank, Washington, DC (2010). Retrieved at: <https://openknowledge.worldbank.org/bitstream/handle/10986/3769/WPS5281.txt?sequence=2>

regulations, as it is by the direct management of inputs supply, assembly, and shipping.’⁸⁸

The result on the ground is that buying and selling arrangements between manufacturers and buyers must be negotiated under the constraints of complex regulations on preferential access, tariffs, and rules of origin, and agricultural subsidies on input materials like cotton, wool, and rayon. Therefore, these complex regulations ultimately impact the manner and avenues in which buyers can exploit the market and manufacturers can participate in economic or social upgrading.

Pickles has identified three primary drivers of bargaining in apparel trade policy: defensive, competitive, and persuasive/coercive.⁸⁹ Apparel companies in developed markets have been defensive in order to protect their advantage over foreign competitors. Specifically, when the quota system and trade liberalisation led to a dramatic rise in outsourcing, US and EU manufacturers lobbied to ensure they remained the primary input suppliers for off-shore sewing operations, which resulted in a series of quotas, safeguards, rules of origin, duties, and tariffs.

Meanwhile, retail and consumer groups became drivers of more competitive trade policies, lobbying for greater trade liberalisation in order to reduce production costs. Many manufacturers in developing countries, interested in upgrading their own industry, joined this chorus, pushing for lower tariffs and duty-free market access. Additionally, developing governments often supported these policies in order to gain access to major markets.

Government agencies and civil society groups have served as the coercive and persuasive forces impacting trade policy, negotiating to ensure that trade policies protect broader social and economic ends. These might include side agreements on labour rights, working conditions, and environmental standards, or punitive measures for human rights abuses or unfair trading practices.

The implementation and eventual removal of quotas on apparel imports into the major markets of the EU, US, and other industrial countries such as Canada, Japan, and Australia is widely considered the most important policy change on apparel trade in the

⁸⁸ John Pickles, ‘Economic and social upgrading in apparel global value chains: public governance and trade policy,’ *Capturing the Gains* Working Paper 13 (November 2012), 35.

⁸⁹ *Ibid* 36.

last 40 years.⁹⁰ These policies protected major economies, increased the growth and dominance of lead firms in global value chains, allowed poor economies to become exporters, and created important geo-political mechanisms for post-colonial states. These mechanisms included a bevy of trade agreements.

Beginning in 1957 Japan voluntarily imposed quotas on cotton textile exports to the US in order to appease US textile manufacturers that had grown concerned about the rise of imports.⁹¹ This served as a model for two temporary quota arrangements created under the General Agreement on Tariffs and Trade (GATT) in 1961 and 1962. These agreements were further extended under the Multi-fibre Arrangement (MFA) in 1974, which evolved further under the Uruguay Round Agreement on Textiles and Clothing (ATC) beginning in 1995. While the original intent of the MFA was to protect jobs in the importing countries, its actual result was to disperse apparel production around the globe.⁹²

The resulting quota regime was complex and product-specific, establishing rules that preserved the use of US and EU fibre, yarn, and fabric inputs, and lowered barriers to market access for producers in developing countries. As a result, traditionally dominant manufacturing centres diminished and gave rise to low-wage employment in export platforms, border zones, and special economic zones (SEZs) around the world. Thus, quotas gave rise to the global fragmentation of apparel value chains, in which manufacturers in low-wage states sewed imported apparel components in order to re-export the finished product. Once a state reached its quota limit, apparel production was sub-contracted to other developing economies. This led to increased employment opportunities around the world. At the same time, apparel wages were squeezed down and resulted in new forms of labour, such as weakened work contracts and dependence on young female and migrant workers.⁹³ Also, many developing economies became highly dependent on exports to industrialised countries, leaving employment gains vulnerable.⁹⁴

⁹⁰ Ibid 37.

⁹¹ Ibid.

⁹² Richard P. Appelbaum Edna Bonacich Katie Quan, 'The End of Apparel Quotas: A Faster Race to the Bottom?' *Capturing the Gains* Working Paper (February 2005), 4.

⁹³ Pickles, 'Economic and social upgrading in apparel global value chains,' 39.

⁹⁴ Wage fluctuations will be explored in detail using data throughout this chapter.

The structure of national trade policies also created barriers for social and economic upgrading in many supplier factories.⁹⁵ Economic upgrading often depends on a shift to full-package production, but opportunities to achieve this were limited by trade policies such as rules of origin (RoO).⁹⁶

The ATC began removing preferential access to major economies in 1995 and allowed producers in the developing world quota-free access to these markets, but the majority of these quotas were not lifted until 2005.⁹⁷ Thus, a seismic shift in production, employment, and trade occurred. While production expanded across developing countries in the 1980s and 1990s, Asian countries were the overwhelming beneficiaries when quotas were removed, and massive unemployment resulted in other dependent regions.⁹⁸ Bangladesh, Cambodia, China, India, Indonesia, and Vietnam experienced economic upgrading, while many countries in Sub-Saharan Africa and Central America lost out.

It is worth mentioning two related developments during this time. First, it is clear that the dependence of many countries on global apparel trade – created in large part by the quota regime – has indirect effects on these countries. The 2008 financial crisis had fewer negative effects on those countries that successfully negotiated the end of quotas, while those that were most negatively affected by quota removals also suffered the most from the economic crisis.⁹⁹ Second, corporate social responsibility (CSR) initiatives failed to counter the deleterious effects of post-quota shifts in the apparel trade or damages incurred by the financial crisis, while state intervention was essential to the positive developments seen in Bangladesh, China, India, and Nicaragua.¹⁰⁰ This points to the increased need for public governance in global trade.

In large part, the removal of quotas led to footloose sourcing and what is often considered a race to the bottom. Buyers were now permitted to source from the country or region that promised the lowest production costs. While this increased employment

⁹⁵ Ibid 11.

⁹⁶ Rules of origin are used in international trade agreements to determine a product's country of origin. The rules can be preferential, which might include tariff concessions, or non-preferential, which may be used for quotas.

⁹⁷ Ibid.

⁹⁸ Ibid 8.

⁹⁹ Ibid 10.

¹⁰⁰ Ibid 11.

in some developing economies, at the same time countries began the rapid removal of social protections to lure buyers. This led to, among other things, poor working conditions, low wages, child labour, and environmental damage,¹⁰¹ not to mention the constant threat of buyer pull-out resulting in the sudden evisceration of jobs. This threat has naturally led to shorter contracts and higher demands without commensurate increases in pay, while responsibility for social protections has been distributed across a growing spectrum of actors.¹⁰²

There are some signs, however, that the race to the bottom is slowing, as some brand-name companies are seeking to improve quality and decrease potential harm to their reputation by condensing supply chains and sourcing from select producers.¹⁰³ In this regard, state initiatives have played an important role in countries such as China, which has enacted proactive labour reforms to improve working conditions.¹⁰⁴ However, we must also consider that many countries do not have the leverage needed to implement stronger governance. We will turn to these countries shortly.

Thus, when we consider arguments for how to approach economic and social upgrading initiatives we must take into account the control exerted by these trade policies. Attempts at social upgrading are limited by the fragmented nature of global value chains – for example, integrated apparel factories hold more potential than disaggregated factories – yet the nature of global value chains was largely created by national trade policies to begin with. Thus, arguments that posit that quota removal has led to a race to the bottom, and that the race is difficult to regulate because of the governance gaps created by the resulting fragmentation, are largely missing the point. That is, the gaps were not happenstance results of an uncontrollable economic phenomenon; rather, they are consequences of targeted policies meant to protect specific interests. If the current state of global value chains is an unwieldy monster, its masters and creators have thus far been protected as intended, while many of those attempting to cross the bridge to economic prosperity are battered and bruised after being swatted away from the riches. In other words, ‘the specific types and geographies

¹⁰¹ Ibid 11.

¹⁰² Ibid 12.

¹⁰³ Ibid.

¹⁰⁴ Ibid.

of production and employment that have been produced by such buyer-driven chains have been tightly conditioned by textile manufacturing interests in the US and EU through trade policy.¹⁰⁵

This points to a wider argument presented throughout this thesis, which is that rampant violations in global value chains are best addressed by public governance mechanisms. Of course, in this short history we have seen examples of governments eroding labour rights, which contributes to the complexity of the issue at hand. As discussed in the previous chapter, governments are not inherently benevolent actors, but still they hold the greatest potential for addressing human rights violations in value chains. Despite arguments that governments are unable to regulate global commerce – i.e. governance gaps – there is repeated evidence that governments participated in this erosion and therefore hold some power to reverse course. Developing countries may be reticent to do so, but this is largely because of pressures from corporations and governments in developed countries. However, close consideration reveals that there is less evidence of a governance gap than consciously created zones of impunity, which enable corporations to act with little restraint. Convincing governments in both developed and developing countries to address these problems may not be a simple task, but this does not mean that they have lost the power to do so.

It is also of great importance to note that, if governance gaps do exist, they are not universally applicable. While some states retain great control over patterns and geographies of trade, some states remain vulnerable and unable to leverage their own interests on an even playing field with the world's most powerful economies.

We turn now from a historical consideration of apparel regulations to a more detailed and complex consideration of quotas and national and international trade policies. This is necessary to grapple with the wide-ranging impacts of state initiatives on economic and social upgrading. For example, end markets in the US and EU differ markedly, in order sizes, delivery timing, quality, penalties for delays, price, and even differences in currency exchange rates.¹⁰⁶ In some cases, dependency on particular end markets is a matter of geography. Latin American countries are highly dependent on the

¹⁰⁵ Ibid 25.

¹⁰⁶ Ibid 14

US, and African countries are dependent on Europe (although there are exceptions, such as increasing African internal trade and other examples of South to South trade).

Yet, we must consider even further the complexity involved in the flourish of multilateral, regional, bilateral and preferential trade agreements that create certain regulations on apparel trade. These lead to such phenomena as differentiated growth patterns and assembly-only contracting in particular areas, such as the maquiladora model in Mexico.¹⁰⁷ In addition to MFA and ATC, these include, for example, the CAFTA-DR, NAFTA, AGOA (African Growth and Opportunity Act), EU EPAs (Economic Partnership Agreements), the US-Cambodia Textile Agreement, and the US-Haiti HOPE agreement. It clearly emerges that despite the removal of quotas, there remains a dominance of regulations such as fabric forwarding rules¹⁰⁸ that continue to present significant obstacles to both economic and social upgrading for many. Despite arguments to the contrary, it is clear that states retain strong regulatory control over global trade.

III. DEFINING ECONOMIC AND SOCIAL UPGRADING, BY THE NUMBERS

Bernhardt has utilized data on imports and exports, national employment, and wages in order to map out specific country trends in economic and social upgrading or downgrading.¹⁰⁹ There are, of course, serious limitations on what these types of data can reveal about economic and social upgrading. Bernhardt admittedly uses narrow definitions of economic and social upgrading for the practical purposes of data availability. Also, the data collected for social upgrading is sectoral rather than value chain data, which can create a false picture.¹¹⁰ However, Bernhardt's data remains useful because it offers a unique perspective on macro trends relating to the impact of state policies and trade agreements on the success of developing economies. Thus, although this presents a very constricted version of social upgrading, the macro trends still provide interesting insight.

¹⁰⁷ Ibid.

¹⁰⁸ This is an example of a preferential ROO, in which tariff-free access is granted to all apparel sewn in a signatory country from inputs that derive from within a designated region.

¹⁰⁹ Bernhardt, 'Developing countries in the global apparel value chain.'

¹¹⁰ For example, if only a fraction of firms in a sector export, their economic performance is still reflected in economic upgrading data. However, data for social upgrading still uses the entire sector, including firms that don't export, thus creating a skewed representation.

Bernhardt characterizes economic upgrading according to two data sets.¹¹¹ First, economic upgrading occurs when there is an increase in a country's world export market share, which is reflective of its international competitiveness. Second, there is an increase in a country's export unit value, indicating the production of higher-value products. Of course, rising export unit values do not necessarily imply higher-value products; there is also the possibility of higher production costs caused by a multitude of factors (including changes in preferential trade agreements). At the same time, increasing world export market share does not itself imply economic upgrading, as a country could simply be surging ahead in terms of total exports without actually upgrading their economic development. Therefore, it is crucial for Bernhardt's data to consider export unit value in addition to export market share.

Similarly, Bernhardt uses two indicators to measure social upgrading: an increase in sectoral employment and an increase in sectoral real wages. Again, the use of sectoral data must be qualified because exports – the products considered in GVCs – are bunched together with domestic production. However, the data still provides an interesting macro consideration of general trends in the industry. According to Bernhardt,

‘The rationale for choosing these two indicators of social upgrading is fairly straightforward: through the creation of jobs, labour is given the possibility to earn income – which potentially helps workers in developing countries move out of poverty and thereby contributes to social well-being.’¹¹²

The justification for using real wages as complementary data is that they indicate how much workers actually benefit from increased employment. Essentially, there is a stark difference between a job and a good job, or between sweatshop labour and employment that enables a worker to provide for his or her family. But Bernhardt goes even further, claiming that real wages ‘give an idea of labour's bargaining power and an indication of how much of the (sectoral) value added generated is appropriated by labour.’¹¹³

¹¹¹ Ibid 5.

¹¹² Ibid 6.

¹¹³ Ibid 6-7.

Bernhardt does offer a qualification here, stating that real wages ‘are not always and not necessarily an indication of improved working conditions.’¹¹⁴ However, he points to research that indicates a strong positive relationship between wages and working conditions.¹¹⁵

Before moving further, greater nuance must be considered for this definition of social upgrading. The goal of exploring a broader view of social upgrading is not to discredit Bernhardt’s indicators of social upgrading, but rather to pinpoint its limitations (which Bernhardt himself is well aware of). Sen is commonly used as a base understanding of social upgrading,¹¹⁶ and although Sen’s conception could never be captured using quantitative data, it is worth considering what that view looks like.

IV. SEN AND SOCIAL UPGRADING

To address the distributive problems associated with measuring development according to gross domestic product (GDP), poverty lines have been established to determine whether economic policies are mitigating the breadth and severity of poverty. Those falling below the line can thus be targeted with development policies. While this may solve some of the issues related to GDP as a measurement tool, even more problems become immediately evident. There are no objective criteria to set a poverty line, so value judgments must be made.¹¹⁷ Where should the line be drawn? Are we only to consider extreme poverty, or can poor peoples in developed countries also fall below the line based on their relative income? Even further, there remain distributional problems to consider. Each person cannot convert equivalent goods into equivalent livelihoods, so should the poverty line be weighted to consider those with disabilities, or those with higher metabolisms that require more calories, or women that suffer from gender discrimination within family units? To push the point a bit further, this measurement of poverty fails to consider the basic humanity of the persons involved.

¹¹⁴ Ibid.

¹¹⁵ Cael Warren and Raymond Robertson, ‘Globalization, wages, and working conditions: A case study of Cambodian garment factories,’ Working Paper 267, Washington, DC: CGD (2011).

¹¹⁶ Amartya Sen, *Development as Freedom*, (New York: Anchor House, 1999).

¹¹⁷ Martha Nussbaum, ‘Counter Theory,’ in *Creating Capabilities* (Cambridge: Harvard University Press, 2011).

The poverty line does not consider whether a person is able to paint a picture, read a novel, vote in an election, or take a walk in a tree-lined park.

Sen has provided the most powerful argument against this dominant narrative of poverty and development. He argues that poverty is capability deprivation, or the inability of a person to reach their ‘full human potential’ due to lack of resources or structural barriers of all sorts.¹¹⁸ This extends far beyond financial realms to include considerations of education, gender bias, and political participation. The aim of development, according to Sen, is not to raise GDP but to expand human freedoms. This is partly why the kinds of quantitative data utilised by Bernhardt will always fail to capture the full picture of social upgrading.

The key to understanding the radical shift proposed by Sen’s capabilities approach is his conceptualisation of the ends and means of development, or what he terms the ‘constitutive and instrumental roles of freedom.’¹¹⁹ In Sen’s approach, increasing freedom is both constitutive and instrumental to development. The constitutive role of development includes basic freedoms like proper nourishment and avoiding preventable death, but also education, political participation, and the enjoyment of gender equity. Meanwhile, these freedoms are also instrumental to development, because they may bolster economic progress. Countries with robust education systems, for example, may experience growth as a result of their public investment, but providing education constitutes development in itself, regardless of whether economic progress follows. The distinction is crucial in our understanding of development, but also in how we view poverty. Poor persons are no longer the charitable beneficiaries of economic growth, but rather deserve freedoms simply because they are human. Also, when considering global trade, this therefore challenges the assumption that social upgrading must follow economic upgrading.

This conception of poverty literally turns on its head the traditionally held view of development, in which access to basic systems of education and health care were seen as luxuries to be enjoyed by all only after the requisite economic growth had occurred. Sen cites several examples of the backwardness of this approach, in which he

¹¹⁸ Sen, ‘Poverty as Capability Deprivation,’ in *Development as Freedom*.

¹¹⁹ Sen, ‘The Ends and Means of Development,’ in *Development as Freedom*.

points out that not only are expanded freedoms often the foundation of successful economies but also that growth is not necessary for substantial investment in social programs.¹²⁰ The Indian state of Kerala is one such example. Despite limited growth the government decided to invest in social programs that yielded remarkable expansion of freedoms. Sen also points to wartime Britain, which created its National Health Service and decreased undernourishment in spite of a sluggish economy. This also challenges the idea that small, developing countries are unable to protect the human rights of their citizens in GPNs, that they are powerless when faced with the demands of powerful corporations and the economies where they are based. That challenge remains significant, but this notion points to potential alternatives.

Sen's theory is not without critics, however. For our purposes, it is important to note that there are serious questions as to whether any kind of data can be used to measure Sen's understanding of development – which is often conceived as the base understanding of social upgrading – not just Bernhardt's data. One of the central problems with Sen's theory is that it is not clearly measurable in any way, and this is why Bernhardt's data, though limited, is still helpful in improving our understanding of broad trends in economic and social upgrading.

Factors contributing to social upgrading or downgrading include the position of workers, different types of work, and employment status. Employment conditions are consistently better for permanent workers, and often women have less access to these kinds of work.¹²¹ Also, conditions are better for workers in factories that are monitored regularly. Social upgrading in low-skilled assembly plants is more challenging than full-package production because the latter requires more skilled employees and permanent work. Also, chains led by brand names are more likely to promote social upgrading out of concern for their image.

When considered in the proper context, the data contributes to an understanding of just how much the economic health of trade in the developing world depends upon state policies in the US and EU. This understanding enables us to further clarify that focusing on public governance is imperative to remedy the abuses that occur throughout

¹²⁰ Ibid.

¹²¹ Ibid 332.

global value chains. The kinds of restrictions or preferential access spelled out in bilateral and regional trade agreements contributes to the ability of developing economies to promote economic and social upgrading. In effect, even if trade agreements bolster economic growth in a developing country (and this is not always the case), obstacles to social upgrading may remain entrenched due to the types of trade promoted or discouraged in trade agreements. Abuses in global value chains cannot be addressed without first considering these complexities at the core of trade.

V. ECONOMIC UPGRADING IN THE APPAREL INDUSTRY

Bernhardt considers countries in three regions – Africa, Asia, and Central America and the Caribbean – paying particular attention to the ruptures and structural changes that occurred in the wake of quota removals. The dramatic evolution of value chains following quotas reveals the extent to which state policies shaped international trade under the old regime. These changes led to the increasing emphasis on production and labour costs, lead times, and flexibility. However, we will also see that states still play a significant role in the post-quota world by shaping markets and trade patterns through tariffs and various trade agreements. Apparel production falls nicely under what Gereffi has termed buyer-led value chains, thus it's not surprising that developing countries are 10 of the world's top 15 apparel exporters.¹²² All but two of those developing countries are Asian, with Mexico (11th) and Morocco (15th) being the exceptions.

In general, apparel exports in Asian countries have trended upward throughout the 2000s, while African and Latin American and Caribbean countries have trended downwards.¹²³ Yet, there are some exceptions to these patterns. In Asia, Sri Lanka lost market share. In Latin America and the Caribbean, Haiti and Nicaragua gained market share. In Africa, Kenya and Lesotho increased their share. For many Asian countries, such as China, India, and Bangladesh, growth can be linked directly to the end of the MFA because they were no longer limited by quotas. But the more complex trends of other regions suggests that state trade policies maintain a strong hold on the structure of

¹²² Bernhardt, 'Developing countries in the global apparel value chain,' 8.

¹²³ Ibid 10.

value chains. This emerges clearly when considering the first of Bernhardt's two indicators of economic upgrading: world export market shares (see Table 1 below).

Table 1: Apparel exports (\$US millions) and world export market shares¹²⁴

| Country | 2000 | 2004 | 2005 | 2009 | 2010 | % change 2000-2004 | % change 2000-2010 | % change 2000-2010 |
|--|-----------|-----------|-----------|-----------|-----------|-----------------------|-----------------------|-----------------------|
| Africa | | | | | | | | |
| Kenya | 50.34 | 306.80 | 297.16 | 212.98 | 222.50 | | -27.48% | 341.97% |
| <i>Market share</i> | 0.03% | 0.12% | 0.11% | 0.07% | 0.07% | | -44.56% | 160.62% |
| Lesotho | 152.51 | 494.27 | 421.70 | 303.47 | 317.74 | 224.08% | -35.71% | 108.34% |
| <i>Market share</i> | 0.08% | 0.20% | 0.16% | 0.10% | 0.10% | 150.00% | -50.86% | 22.85% |
| Mauritius | 961.11 | 958.52 | 807.37 | 817.51 | 769.25 | -0.27% | -19.75% | -19.96% |
| <i>Market share</i> | 0.49% | 0.38% | 0.30% | 0.27% | 0.23% | -23.07% | -38.65% | -52.80% |
| South Africa | 396.00 | 476.66 | 335.12 | 166.32 | 177.03 | 20.37% | -62.86% | -55.29% |
| <i>Market share</i> | 0.20% | 0.19% | 0.12% | 0.05% | 0.05% | -7.15% | -71.61% | -73.64% |
| Asia | | | | | | | | |
| Bangladesh | 4,862.64 | 7,956.99 | 8,041.71 | 14,252.64 | 16,632.82 | 63.64% | 109.03% | 242.05% |
| <i>Market share</i> | 2.50% | 3.15% | 2.98% | 4.70% | 5.04% | 26.23% | 59.79% | 101.70% |
| Cambodia | 1,215.12 | 2,435.78 | 2,699.84 | 3,489.22 | 4,195.39 | 100.46% | 72.24% | 245.27% |
| <i>Market share</i> | 0.62% | 0.97% | 1.00% | 1.15% | 1.27% | 54.63% | 31.66% | 103.60% |
| China | 48,065.05 | 71,240.18 | 89,933.26 | 124,555.5 | 140,539.1 | 48.22% | 97.28% | 192.39% |
| <i>Market share</i> | 24.70% | 28.24% | 33.38% | 41.05% | 42.58% | 14.34% | 50.80% | 72.42% |
| India | 5,133.91 | 7,308.36 | 9,482.59 | 11,945.00 | 12,895.70 | 42.35% | 76.45% | 151.19% |
| <i>Market share</i> | 2.64% | 2.90% | 3.52% | 3.94% | 3.91% | 9.81% | 34.88% | 48.12% |
| Indonesia | 4,689.85 | 5,298.07 | 5,690.19 | 7,182.95 | 7,913.87 | 12.97% | 49.37% | 68.74% |
| <i>Market share</i> | 2.41% | 2.10% | 2.11% | 2.37% | 2.40% | -12.85% | 14.18% | -0.49% |
| Jordan | 68.23 | 1,030.52 | 1,157.48 | 826.38 | 873.41 | 1410.31% | -15.25% | 1180.05% |
| <i>Market share</i> | 0.04% | 0.41% | 0.43% | 0.27% | 0.26% | 1065.07% | -35.21% | 654.82% |
| Sri Lanka | 2,519.67 | 2,975.61 | 3,084.93 | 3,541.67 | 3,732.82 | 18.10% | 25.45% | 48.15% |
| <i>Market share</i> | 1.29% | 1.18% | 1.14% | 1.17% | 1.13% | -8.90% | -4.11% | -12.64% |
| Vietnam | 1,684.50 | 4,493.65 | 4,831.45 | 9,523.39 | 11,088.37 | 166.76% | 146.76% | 558.26% |
| <i>Market share</i> | 0.87% | 1.78% | 1.79% | 3.14% | 3.36% | 105.79% | 88.63% | 288.16% |
| Central America and the Caribbean | | | | | | | | |
| Domin. Rep. | 2,480.84 | 2,113.70 | 1,908.20 | 670.55 | 675.86 | -14.80% | -68.02% | -72.76% |
| <i>Market share</i> | 1.27% | 0.84% | 0.71% | 0.22% | 0.20% | -34.28% | -75.56% | -83.94% |
| El Salvador | 1,689.00 | 1,818.48 | 1,718.49 | 1,422.13 | 1,770.90 | 7.67% | -2.62% | 4.85% |
| <i>Market share</i> | 0.87% | 0.72% | 0.64% | 0.47% | 0.54% | -16.95% | -25.56% | -38.17% |
| Guatemala | 1,561.39 | 2,068.74 | 1,939.22 | 1,231.36 | 1,293.88 | 32.49% | -37.46% | -17.13% |
| <i>Market share</i> | 0.80% | 0.82% | 0.72% | 0.41% | 0.39% | 2.21% | -52.19% | -51.13% |
| Haiti | 267.68 | 358.08 | 459.88 | 572.37 | 578.24 | 33.77% | 61.48% | 116.02% |
| <i>Market share</i> | 0.14% | 0.14% | 0.17% | 0.19% | 0.18% | 3.19% | 23.44% | 27.38% |
| Mexico | 8,925.97 | 7,286.73 | 6,684.33 | 3,928.56 | 4,201.98 | -18.36% | -42.33% | -52.92% |
| <i>Market share</i> | 4.59% | 2.89% | 2.48% | 1.29% | 1.27% | -37.03% | -55.92% | -72.24% |
| Nicaragua | 351.60 | 624.16 | 753.55 | 960.33 | 1,096.20 | 77.52% | 75.63% | 211.78% |
| <i>Market share</i> | 0.18% | 0.25% | 0.28% | 0.32% | 0.33% | 36.94% | 34.25% | 83.85% |

In Africa, for example, Kenya and Lesotho experienced significant growth in apparel exports and market shares from 2000 to 2010. Kenya exported about \$50

¹²⁴ Chart from Bernhardt, 'Developing countries in the global apparel value chain,' 10.

million in apparel in 2000, and that number rose to over \$220 million in 2010 (world export market share rose from 0.03 to 0.07 per cent). In Lesotho, apparel exports totalled over \$150 million in 2000 and nearly \$320 million by 2010 (market share rose from 0.08 to 0.10 per cent). However, a more nuanced picture emerges when trends are considered before and after quota removals in 2004. For both of these countries, apparel exports increased dramatically from 2000 to 2004, largely due to the African Growth and Opportunity Act (AGOA) in 2000, which granted preferential access to US markets for several African countries. The benefits of this clearly emerge in the data. Kenya apparel exports jumped from \$50 million in 2000 to over \$300 million in 2004 (market share rose from 0.03 to 0.12 per cent). Similarly, Lesotho apparel exports skyrocketed from just over \$150 million in 2000 to nearly \$500 million in 2004 (0.08 to 0.20 per cent). However, when quotas were removed these countries lost their comparative advantage to Asian countries, and many ‘MFA quota-hopping firms’ relocated as a result.¹²⁵ Since 2004, therefore, Kenya and Lesotho steadily declined in apparel market share.

In terms of Bernhardt’s second economic upgrading indicator, growth of export unit values, increases are more pervasive (see Table 2 below). Nearly all countries exported apparel at a higher cost per unit in 2010 than in 2000. The only exceptions are found in the Latin American and Caribbean region, where the Dominican Republic, El Salvador, Haiti, and Nicaragua saw decreasing apparel export unit values, while Guatemala was essentially stagnant in this regard. However, when considering only the second half of the decade, gains are even more widespread: even El Salvador and Haiti increased their export unit values. This is itself a surprising trend considering that the MFA phase-out was expected to ramp up competition and force downward pressure on prices.

¹²⁵ Cornelia Staritz, ‘Making the cut? Low-income countries and the global clothing value chain in a post-quota and post-crisis world,’ Washington, DC: World Bank (2011), 55.

Table 2: Apparel export unit values (\$US/kg)¹²⁶

| Country | 2000 | 2004 | 2005 | 2009 | 2010 | % change 2000-2004 | % change 2004-2010 | % change 2000-2010 |
|--|--------------|--------------|--------------|--------------|--------------|-----------------------|-----------------------|-----------------------|
| Africa | | | | | | | | |
| Kenya | 11.89 | 12.97 | 12.34 | 12.47 | 12.20 | 9.08% | -5.94% | 2.61% |
| Lesotho | 12.29 | 12.55 | 13.20 | 12.63 | 13.35 | 2.12% | 6.37% | 8.62% |
| Mauritius | 19.57 | 22.72 | 23.15 | 29.95 | 30.65 | 16.10% | 34.90% | 56.62% |
| South Africa | 11.70 | 13.25 | 15.32 | 17.68 | n.a. | 13.25% | 33.43% | 51.11% |
| Asia | | | | | | | | |
| Bangladesh | 12.52 | 12.09 | 11.64 | 15.26 | 15.42 | -3.43% | 27.54% | 23.16% |
| Cambodia | 16.91 | 16.63 | 16.36 | 17.86 | 18.18 | -1.66% | 9.32% | 7.51% |
| China | 12.35 | 15.95 | 14.53 | 18.54 | 18.54 | 29.15% | 16.24% | 50.12% |
| India | 19.25 | 17.00 | 18.30 | 21.30 | 21.70 | -11.69% | 27.65% | 12.73% |
| Indonesia | 18.57 | 17.80 | 17.02 | 21.34 | 20.43 | -4.15% | 14.78% | 10.02% |
| Jordan | 18.36 | 16.00 | 15.95 | 17.68 | 18.94 | -12.85% | 18.38% | 3.16% |
| Sri Lanka | 21.03 | 19.41 | 20.72 | 25.12 | 24.91 | -7.70% | 28.34% | 18.45% |
| Vietnam | 16.87 | 16.38 | 16.85 | 20.06 | 20.45 | -2.90% | 21.36% | 21.22% |
| Central America and the Caribbean | | | | | | | | |
| Dominican Rep. | 16.52 | 16.68 | 16.05 | 16.87 | 14.96 | 0.97% | -10.31% | -9.44% |
| El Salvador | 12.33 | 10.87 | 10.37 | 11.84 | 11.46 | -11.84% | 5.43% | -7.06% |
| Guatemala | 16.84 | 14.67 | 14.78 | 16.77 | 17.26 | -12.89% | 17.66% | 2.49% |
| Haiti | 10.79 | 7.58 | 6.90 | 7.64 | 8.44 | -29.75% | 11.35% | -21.78% |
| Mexico | 12.34 | 12.29 | 12.59 | 13.52 | 13.72 | -0.41% | 11.64% | 11.18% |
| Nicaragua | 13.28 | 13.20 | 11.51 | 11.14 | 11.26 | -0.60% | -14.70% | -15.21% |
| World average | 15.76 | 18.23 | 16.97 | 19.81 | 20.39 | 15.67% | 11.85% | 29.38% |

According to Bernhardt's matrix of economic upgrading, which requires increases in both market share and export unit values, seven countries are considered economic upgraders. Six of these are Asian, with Haiti being the only exception. Haiti has benefitted from duty-free access to US markets and less stringent (RoO) due to the Hemispheric Opportunity through Partnership for Encouragement (HOPE) Act.¹²⁷ For Bangladesh, Vietnam, and Cambodia, economic upgrading following 2004 was not inevitable, since their apparel industries were developed largely as a result of quota hopping before 2004 and the removal of quotas presented a serious threat of job removal.¹²⁸ However, these countries successfully manoeuvred to turn low labour costs into a competitive advantage and enjoy preferential access to EU markets. Also, the apparel industry in Bangladesh and Vietnam benefitted from state initiatives that

¹²⁶ Chart from Bernhardt, 'Developing countries in the global apparel value chain,' 11.

¹²⁷ Stacey Frederick and Gary Gereffi, 'Upgrading and restructuring in the global apparel value chain: Why China and Asia are outperforming Mexico and Central America,' *International Journal of Technological Learning, Innovation and Development* 4 (2011): 67-95.

¹²⁸ Staritz, 'Making the cut?'

invested in supply chains and improved delivery times and competitiveness.¹²⁹ Success in China and India are less surprising, as both countries have invested heavily to improve their infrastructure and textile productions, while they also benefitted from a growing domestic market due to a rising middle class.¹³⁰

On the other hand, Bernhardt's data suggests that only two of the countries sampled were outright economic downgraders: Kenya and the Dominican Republic.¹³¹ Bernhardt attributes Kenya's poor performance to the turnabout of quota-hoppers after the MFA removal, while he argues that the Dominican Republic lost out after the quota phase-out because their primary competitive advantage was proximity to the US.¹³² The resulting dependency on US markets proved troublesome after the phase-out when US buyers looked elsewhere. Also, the Dominican Republic has been hurt by unfavourable components of the DR-CAFTA, which will be considered more closely in a later section.

All remaining countries were deemed 'intermediate cases,'¹³³ and all but one experienced rising export unit values and declining market shares. (Nicaragua is the only intermediate case that experienced the inverse phenomenon – decreasing unit values and increased market share – and it will be explored in further detail later on.) The experiences of the apparel industries in each of these countries vary widely, however. South Africa, for example, has lost export market share but has increased domestic sales dramatically, signalling a shift towards South to South production and end markets.¹³⁴ Also, Sri Lanka has moved from lower-value to higher-value export products, such as lingerie, so export market share has been lost while unit values are increasing.¹³⁵ Mexico's situation is quite different, however. Bernhardt concludes that rising export unit values reflect increasing production costs rather than product upgrading, largely due to the legacy of NAFTA and the *maquiladora* model. Of course,

¹²⁹ Bernhardt, 'Developing countries in the global apparel value chain,' 12.

¹³⁰ Ibid 13.

¹³¹ Ibid 14.

¹³² Ibid.

¹³³ Ibid.

¹³⁴ Nancy Morris and Justin Barnes, 'Globalization, the changed global dynamics of the clothing and textile value chains and the impact on Sub-Saharan Africa,' Research and Statistics Branch Working Paper 10. Vienna: UNIDO (2009).

¹³⁵ Bernhardt, 'Developing countries in the global apparel value chain,' 14.

such generalisations are not conclusive because Bernhardt is using sectoral rather than value chain data. Overall, he concludes that post-MFA economic upgrading is widespread.¹³⁶

VI. SOCIAL UPGRADING IN THE APPAREL INDUSTRY

His findings were less promising for social upgrading. Considering the first indicator of social upgrading (Table 3), increases in apparel employment, patterns are not surprising. Since the MFA removal, Asian countries have enjoyed widespread gains in employment, with the lone exception of Indonesia. However, after quota removal Indonesia experienced an employment increase of 6 per cent. On the other hand, Sri Lanka experienced a zero per cent change in employment during the same period, with a loss in jobs from 2004 to 2009. Yet, with Sri Lanka's shift to higher-value apparel production discussed above, a small loss of employment is to be expected. The remaining Asian countries experienced tremendous job growth.

Table 3: Employment in the apparel sector¹³⁷

| Country | 2000 | 2004 | 2005 | 2008 | 2009 | % change | | |
|--|-----------|-----------|-----------|-----------|-----------|-----------|-----------|-----------|
| | | | | | | 2000-2004 | 2004-2009 | 2000-2009 |
| Africa | | | | | | | | |
| Kenya | 25,288 | 34,614 | 34,234 | 25,766 | 24,359 | 36.88% | -29.63% | -3.67% |
| Lesotho | 16,866 | 47,998 | 37,608 | 41,753 | 33,742 | 184.58% | -29.70% | 100.06% |
| Mauritius | 72,810 | 59,691 | 52,659 | 50,924 | 42,355 | -18.02% | -29.04% | -41.83% |
| South Africa | 124,001 | 99,558 | 76,792 | 55,892 | 49,698 | -19.71% | -50.08% | -59.92% |
| Asia | | | | | | | | |
| Bangladesh | 1,600,000 | 2,000,000 | 2,000,000 | 2,800,000 | 3,100,000 | 25.00% | 55.00% | 93.75% |
| Cambodia | 168,824 | 269,846 | 283,906 | 324,871 | 281,855 | 59.84% | 4.45% | 66.95% |
| China | 2,156,300 | 3,202,600 | 3,460,600 | 4,587,000 | 4,493,100 | 48.52% | 40.30% | 108.37% |
| India | 329,401 | 447,466 | 538,615 | 622,913 | n.a. | 35.84% | 39.21% | 89.10% |
| Indonesia | 479,155 | 438,045 | 451,938 | 495,192 | 464,465 | -8.58% | 6.03% | -3.07% |
| Jordan | 14,216 | 18,002 | 18,427 | 22,410 | 29,460 | 26.63% | 63.65% | 107.23% |
| Sri Lanka | 280,000 | 306,984 | 273,600 | 270,000 | 280,000 | 9.64% | -8.79% | 0.00% |
| Vietnam | 231,948 | 498,226 | 511,278 | 758,274 | n.a. | 114.80% | 52.19% | 226.92% |
| Central America and the Caribbean | | | | | | | | |
| Dom. Rep. | 141,945 | 131,978 | 91,491 | 49,735 | 41,285 | -7.02% | -68.72% | -70.91% |
| El Salvador | 131,300 | 123,300 | 105,400 | 107,100 | n.a. | -6.09% | -13.14% | -18.43% |
| Guatemala | 88,255 | 113,272 | 87,682 | n.a. | 56,702 | 28.35% | -49.94% | -35.75% |
| Haiti | n.a. | n.a. | n.a. | n.a. | n.a. | n.a. | n.a. | n.a. |
| Mexico | 640,000 | 482,396 | 409,910 | 314,343 | 289,351 | -24.63% | -40.02% | -54.79% |
| Nicaragua | 32,220 | 40,940 | 56,335 | 50,712 | 51,850 | 27.06% | 26.65% | 60.92% |

¹³⁶ Ibid 15.

¹³⁷ Chart from Bernhardt, 'Developing countries in the global apparel value chain,' 18.

Meanwhile, for countries in Africa and Central America and the Caribbean, apparel job losses have been nearly as dramatic as Asian gains. The Dominican Republic, Mexico, and South Africa have seen the sharpest declines, at 70 per cent, 60 per cent, and 59 per cent respectively. Many of these countries began suffering from losses in 2000, but job loss accelerated swiftly after 2004. For example, the Dominican Republic lost 7 per cent of its apparel jobs from 2000 to 2004, but it lost 68 per cent from 2004 to 2009. Guatemala actually experienced a 28 per cent employment increase from 2000 to 2004, then a 49 per cent loss from 2004 to 2009.

In these two regions, however, there are two exceptions. Lesotho saw employment increases of 100 per cent over the entire decade, but that was due to growth experienced prior to quota removal (spurred by AGOA), as it actually lost 29 per cent of jobs from 2004 to 2009. Nicaragua has actually maintained the most consistent job growth of any country – 27 per cent from 2000 to 2004 and 26 per cent from 2004 to 2009 – but that is largely attributable to preferential access to US markets that will be explored in further detail in a later section.

Using Bernhardt's second indicator of social upgrading, real wages, patterns were more varied. Asian countries again performed the best, with the notable exceptions of Bangladesh and Sri Lanka. Bangladeshi apparel wages have decreased by 43 per cent over the decade, although decreases slowed dramatically after 2004 (a decline of 4 per cent from 2004 to 2009). Declining real wages have been steadier, though far less damaging, with a 10 per cent loss from 2000 to 2009. China, India, Indonesia, and Jordan have made impressive improvements in average annual real wages. Chinese wages have received a huge bump, nearly 200 per cent between 2000 and 2009. This is largely due to strengthened labour laws, currency appreciation and general economic growth in the country. While wages have increased, China has also been able to maintain employment gains and increase market shares due to substantial investments in value chains and infrastructure.¹³⁸

In the African region, each country saw rises in real wages in apparel from 2000 to 2009, though increases were slowed substantially or reversed after 2004. From 2004 to 2009, real wages in Kenya and Lesotho declined, while Mauritius had a zero per cent

¹³⁸ Ibid 19.

increases and growth in South Africa slowed from 37 per cent during 2000 to 2004 to 17 per cent from 2004 to 2009.

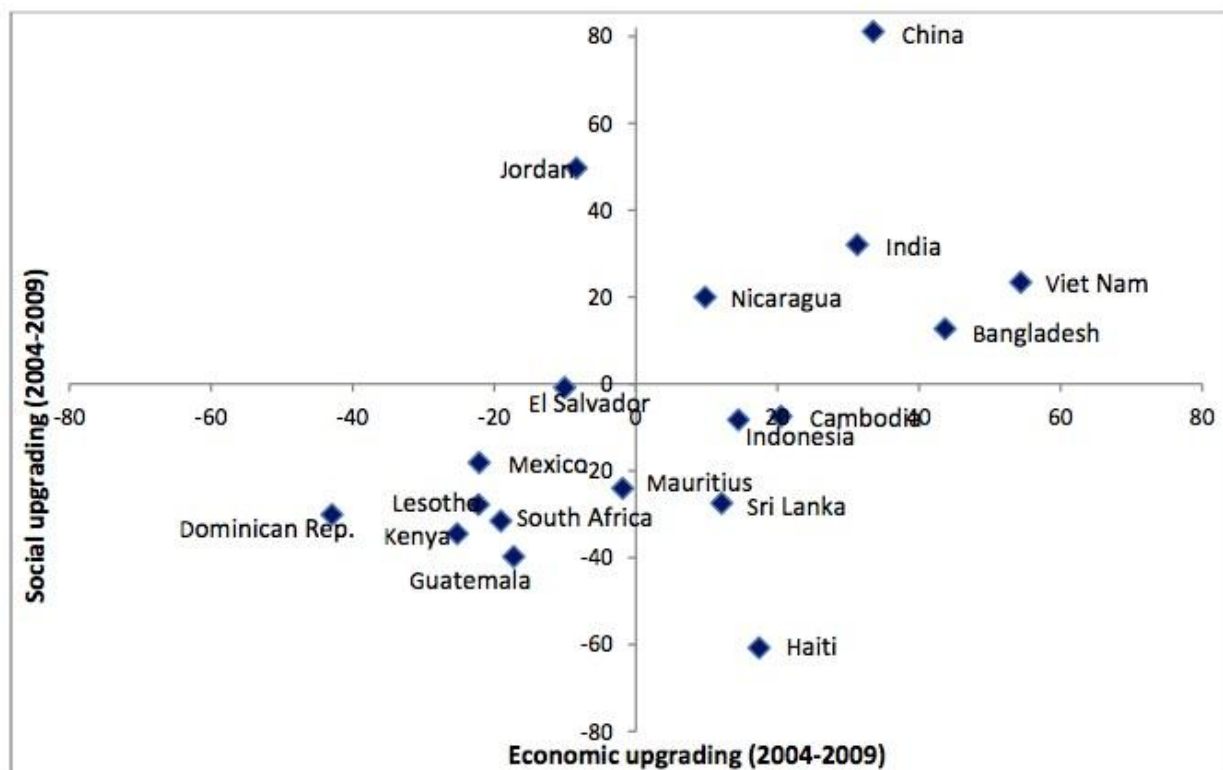
In Central America and the Caribbean, patterns of real wage increases and decreases moved in the opposite direction than in Africa. Real wages declined or increased slowly from 2000 to 2004 and increased substantially after 2004. The Dominican Republic was the only country whose real wages declined between 2000 and 2009, but that is due to a 41 per cent decline from 2000 to 2004. After quota removal, real wages increased 62 percent through 2009. (These fluctuating numbers in the Dominican Republic may be due in large part to capricious currency exchange rates over time rather than strictly apparel production practices.¹³⁹) During these two periods, real wage increases jumped from 4 per cent to 36 per cent in El Salvador, 2 per cent to 7 per cent in Mexico, and 29 per cent to 77 per cent in Nicaragua.

VII. A LINK BETWEEN ECONOMIC AND SOCIAL UPGRADING?

Bernhardt concludes that, considering the two indicators of social upgrading in tandem, social upgrading is much more elusive than economic upgrading following the MFA phase-out (Table 4 below).¹⁴⁰ Only four countries were categorical social upgraders: China, India, Jordan, and Nicaragua all experienced increases in employment and real wages in the apparel sector during this period. All of the sampled African countries, plus Guatemala and Sri Lanka, were clear-cut social downgraders, while the remaining countries were intermediate cases. The remainder of Asian countries increased employment and wages declined. Meanwhile, Mexico, the Dominican Republic, and El Salvador saw a decline in employment but a rise and wages. When compared with the economic upgrading indicators, a clear pattern emerges with this final group of countries. In El Salvador and Mexico, export market share losses resulted in job losses, and rising wages resulted in higher export unit values. Also, the Dominican Republic experienced both the biggest decline of export market shares in addition to the largest job loss.

¹³⁹ Ibid 20.

¹⁴⁰ Ibid.

Table 4: Overall upgrading and downgrading in the apparel sector¹⁴¹

However, because social upgrading was much more difficult to achieve, it is clear that the link between economic and social upgrading is tenuous. Five countries achieved overall economic and social upgrading between 2004 and 2009, and Nicaragua was the only non-Asian country to do so. On the other hand, four countries managed to become economic upgraders without social upgrading. One of these countries, Haiti, actually performed the absolute worst in social indicators despite economic upgrading. As mentioned earlier, many other countries realized better economic gains than in the social realm. Increasing apparel export competitiveness reveals little about how gains are distributed, thus the importance of considering the links between economic and social upgrading is paramount. Much research relies on the assumption that economic

¹⁴¹ Chart from Bernhardt, 'Developing countries in the global apparel value chain,' 23.

upgrading leads directly to social upgrading, but Bernhardt's data reveals that this is not necessarily true. Other research has supported this.¹⁴²

There are even some cases of economic downgrading linked to social upgrading.¹⁴³ Yet it is also crucial to note that patterns of economic and social upgrading vary widely across different industries.¹⁴⁴ It is more common in apparel and horticulture to find a positive correlation between economic and social upgrading. The mobile phone industry often leads to economic upgrading without social upgrading, while in tourism there are cases of social upgrading without economic upgrading.

In all major export industries except apparel, for example, evidence suggests that growth in world export market share generally brings about economic upgrading.¹⁴⁵ Also, in apparel and horticulture, there is a positive link between economic and social upgrading, while this is not the case in mobile phone and tourism value chains.¹⁴⁶ Social upgrading was the most elusive in the mobile phone sector, where employment gains were consistent but did not coincide with wage increases.¹⁴⁷ Social upgrading was common in the tourism industry and widely varied in the apparel industry. Across all industries, gains in employment were much more common than wage growth.

Recall that the previous chapter discussed multiple types of economic upgrading.¹⁴⁸ There is both a capital dimension – new technologies – and a labour dimension – skill development. There is therefore a connection between economic and social upgrading, but they involve different dimensions, and economic upgrading does not automatically lead to social upgrading. There is also a range of possible trajectories for social upgrading.¹⁴⁹ For example, one such trajectory is small-scale worker upgrading, in which workers continue with home-based production but benefit from improvements in working conditions. In labour-intensive upgrading, workers move to

¹⁴² Gladys Lopez-Acevedo and Raymond Robertson (eds.), 'Sewing Success? Employment, Wages, and Poverty following the End of the Multifibre Arrangement,' Washington, DC: World Bank (2012).

¹⁴³ Thomas Bernhardt and William Milberg, 'Economic and social upgrading in global value chains: Analysis of horticulture, apparel, tourism and mobile telephones,' *Capturing the Gains Working Paper* (November 2011), 3.

¹⁴⁴ *Ibid* 62.

¹⁴⁵ *Ibid* 4.

¹⁴⁶ *Ibid*.

¹⁴⁷ *Ibid* 37.

¹⁴⁸ Barrientos et al., 'Developing a Framework for Analysis,' 7.

¹⁴⁹ *Ibid*.

better types of labour intensive work, such as moving from subsistence agriculture to factory jobs with responsible labour codes. In higher-skill upgrading, workers move into better paid, higher skilled sectors such as tourism and IT.

Correlations between economic and social upgrading are interesting to consider, because there are competing pressures when buyers demand both higher quality and lower costs.¹⁵⁰ Functional upgrading to achieve higher quality products, such as full package production, might imply social upgrading because it formalizes the labour force, but continued pressures to decrease costs may lead to social downgrading.

In the apparel industry the data suggests there may be some positive correlation between economic and social conditions. Bernhardt points to the fact that, within his sample set, social and economic performance does coincide in thirteen out of eighteen countries.¹⁵¹ Yet due to the variation found in the five other cases, he concludes that ‘economic upgrading does not automatically translate into, but seems to be conducive to, social upgrading.’¹⁵²

It is also worth noting that the worst social performers were those most strongly affected by the MFA phase-out and the 2008 economic crisis. More to the point, the evidence points to the notion that those most harmed by quota removals were left even more vulnerable to the economic downturn, while those that benefitted from quota removals were not as negatively affected by the financial crisis as was expected.¹⁵³

VIII. WHY ASIA WINS AND CENTRAL AMERICA LOSES

What is missing from the discussion thus far is a deeper exploration of why certain countries experienced better results than others. It is clear that results are highly varied across and even within regions. While the removal of quotas explains a great deal about the fragmentation of supply chains, and even something about the diversification of trade across the globe, there is more to be explored regarding why certain regions and individual countries have performed better than others in the apparel trade. What clearly emerges in this highly diversified picture is that state policies – both domestic laws and

¹⁵⁰ Ibid.

¹⁵¹ Bernhardt, ‘Developing countries in the global apparel value chain,’ 27.

¹⁵² Ibid 28.

¹⁵³ Pickles, ‘Economic and social upgrading in apparel global value chains,’ 45.

international trade agreements – continue to hold great power over the fate of developing (and developed) economies. This will be explored in the following chapter.

CHAPTER 3

I. UNEVEN FREE TRADE

It would seem that the removal of quotas in 2004, the elimination of a slew of trade restrictions, and increased liberalisation would have ushered in an era of simpler sourcing, buying, and selling across apparel value chains. However, the opposite has occurred. The elimination of quotas has given rise to the implementation of multiple regional, bilateral and unilateral trade agreements in their wake. These agreements included preferential schemes with specific apparel clauses that complicated trade even while quotas were being phased out. Rules of origin, differential tariffs, and the specific demands of markets – US versus European, and increasingly Southern economies like Brazil, South Africa, and India – have meant that the role of state policy in the global apparel trade is as decisive as ever.

While there were fewer than 25 free trade agreements (FTAs) in 1958, they exceeded 300 by 2003.¹⁵⁴ The variety and complexity of FTAs has led to highly differentiated levels of employment growth and decline in developing economies, not to mention multifarious patterns of economic and social upgrading overall. Some of the most prominent regional trade agreements (RTAs) include NAFTA and CAFTA-DR, and significant unilateral preference arrangements include the AGOA and the EU's GSP.

Even a value chain's end market harbours a significant impact on that network's labour conditions. For US buyers, China is the closest Asian market, but for EU buyers China is the furthest destination. Distance to market creates certain advantages via shipping time and costs, so geography can determine which end market a country might become most dependent on. In turn, that impacts apparel production practices. For example, EU and US buyers differ in the size of their orders. EU buyers tend to contract for smaller volumes than US buyers, so this determines which suppliers are able to

¹⁵⁴ John Pickles, 'Economic and social upgrading in apparel global value chains: public governance and trade policy,' *Capturing the Gains* Working Paper 13 (November 2012), 50.

leverage their position for certain types of upgrading.¹⁵⁵ Larger volume and longer contracts for suppliers may create opportunities to pass down some gains to employees.

Supplier industries also develop in different ways based on the duty rates of importers. The EU maintains higher import duties for China than most Asian countries, while US duty rates are flat among Asian exporters. US preferential access rules have strict rules of origin dictating that US suppliers use US yarns in their production – raising costs – or they must follow complicated application procedures to US Customs and Border Control, which can slow the production process. On the other hand, EU rules of origin tend to encourage suppliers to strengthen local or regional backward linkages.¹⁵⁶

The consequences of state policies can also have more immediate and dramatic consequences. Following quota removal at the end of 2004, Chinese apparel exports increased so dramatically that the US and EU utilised the safeguard clause in China's WTO accession and restricted import growth in the three years after 2004. Chinese suppliers reached the full year's quota almost immediately, and in August 2005 75 million items were held in European ports, leading to job loss in Chinese factories.¹⁵⁷

Beginning in the 1980s the US and EU implemented special customs that allowed companies to export textiles to developing countries, where low-wage workers would sew them into garments, then re-import the completed item. Duties were only charged on the value added (i.e. the cost of labour), the effect of which was to maintain the high value yarn and fabric portions of the apparel industry in wealthy countries and outsource low value labour to the poorest countries. These policies also made economic upgrading more elusive because full-package production became prohibitively more expensive, also leading to less sustainable and lower quality employment.

The European outward processing trade (OPT) accomplished this by shipping fabric and trim to nearby developing countries in North Africa and Eastern Europe. The US 807 trade law, implemented under the Caribbean Basin Initiative (CBI) in 1984, exempted US fabrics from import duties. The import savings were so advantageous that *maquiladora* production quickly expanded across Central America, a boon for

¹⁵⁵ Ibid 54.

¹⁵⁶ Ibid 55.

¹⁵⁷ Ibid.

American textile producers. By 2004 over half of US textile exports were sent to the CBI countries and Mexico, and 76 per cent of imports to the US under the CBI utilised US inputs.¹⁵⁸

There are multiple types of import rules utilised by the US and EU:

- Yarn forward rules grant receive duty free benefits to imports only if the apparel is made from yarn within the free trade area.
- Tariff preference levels (TPLs) qualify a limited number of units for duty relief with inputs from outside the free trade area.
- Commercial necessity rules allow inputs from countries outside the free trade area if it can be demonstrated that suitable inputs are not available from qualifying countries.
- Rules of non-reciprocal preferential agreements enable duty relief from qualifying countries as long as the majority of inputs originate in the US. This was utilised in the CBI and AGOA.
- Lastly, qualifying industrial zones (QIZs) offer the highest levels of access to US markets. Tariff and quota free access is granted to US markets, and this supersedes any other free trade agreements. The stated aim of designing QIZs was to bolster the Middle East peace process, and designated zones are in Egypt, Israel, and Jordan.¹⁵⁹

Overall, the impacts of trade policies originating in the Global North clearly emerge:

‘At the regional level, North-South RTAs structured the conditions under which “the economy” of the global value chain emerged, creating complex regulatory and governance landscapes of opportunity and constraint for firms and countries... In this sense, we can argue that these content rules (that is, inputs sourced from the preference-giving country) produced the global value chain and the fragmentation of production activities on which it is predicated.’¹⁶⁰

¹⁵⁸ Ibid 56.

¹⁵⁹ Munir Ahmad, ‘Impact of Origin Rules for Textiles and Clothing on Developing Countries,’ ICTSD Programme on Competitiveness and Sustainable Development Paper No. 3, December, Geneva (2007). Retrieved at: <http://ictsd.org/downloads/2009/02/impact-of-origin-rules-for-textiles-and-clothing-on-developing-countries1.pdf>

¹⁶⁰ Pickles, ‘Economic and social upgrading in apparel global value chains,’ 59.

This arrangement has been immensely beneficial to EU and US fibre, yarn, and fabric manufacturers, while it has severely limited the apparel manufacturers to which they outsource labour, taking advantage of ‘assembly work that has *only ever had limited opportunities to upgrade economically or socially.*’¹⁶¹

Therefore, preferential market access was beneficial to a limited degree in that it enabled developing countries to expand apparel industries and, as a result, employment. However, the type of employment was extremely limited and stifled both economic and social upgrading. A few countries, such as Japan, Korea, and Taiwan, were able to leverage these advantages into backward linkages that allowed them to become major players in the apparel business.¹⁶² However, for most MFA and post-MFA apparel exporters, rules of origin requirements prevented them from establishing similar backward linkages.¹⁶³ As a result, the benefits of industrialised apparel production have been limited to low-wage assembly employment.

In Jordan, the advantages of QIZ led to the creation of the apparel industry. Over 90 per cent of the country’s apparel exports are destined for the US, and, because of limited labour supply, many of the newly created positions were staffed by a sudden influx of Chinese and South Asian workers.¹⁶⁴

Morocco became a prime partner of the EU apparel industry due to its proximity and the subsequent advantages offered in terms of lead times and shipping costs. Due to OPT arrangements Morocco is now heavily dependent on EU markets. While OPT led to a consistent stream of orders, it also restricted the development of backward linkages and limited the possibilities for higher value work.¹⁶⁵

II. APPAREL TRADE IN THE AMERICAS

The 807 trade law passed in 1984 provided preferential access for countries that used US inputs in apparel exports. In 1986, the law was amended (known as the ‘Special Access Program’ and offered to CBI countries) to provide further benefits to countries

¹⁶¹ Ibid.

¹⁶² Ibid.

¹⁶³ For example, apparel manufacturers in a CAFTA country would have been unable to create advantageous partnerships with cotton producers due to rules of origin that required use of US inputs.

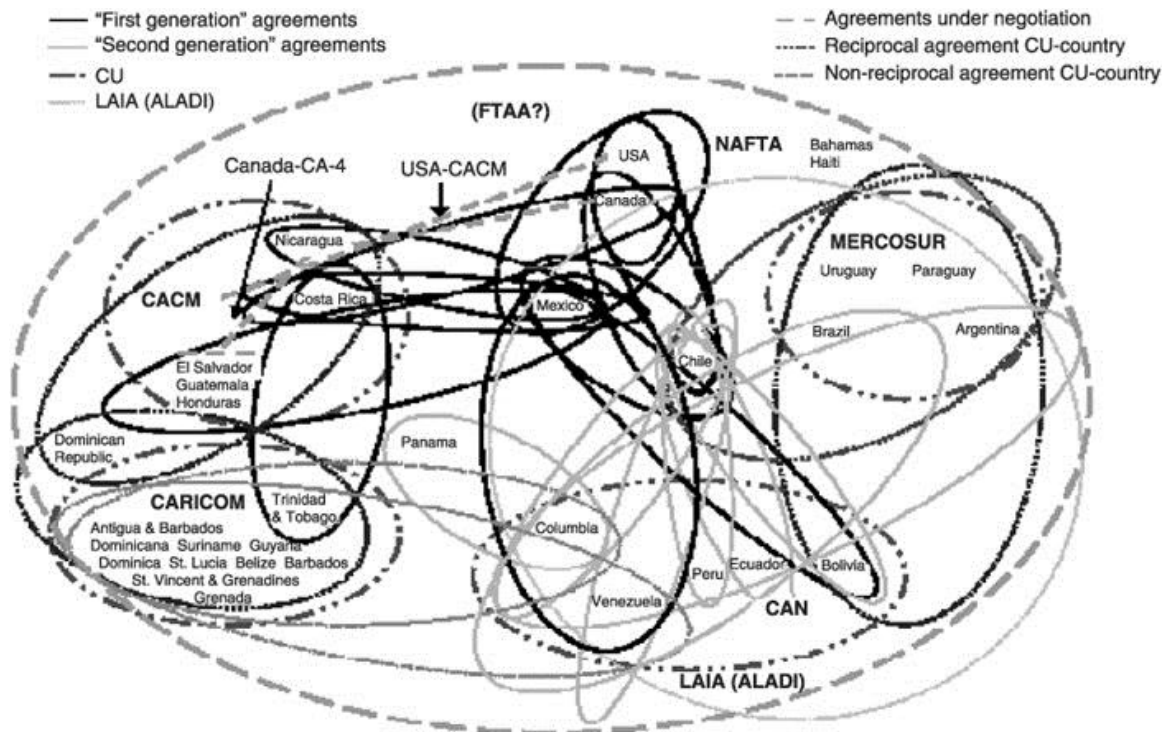
¹⁶⁴ Shame Al-Azmeh. ‘Working Conditions in Egypt’s and Jordan’s Garments Industry,’ Scoping Report for *Capturing the Gains* Project (2011).

¹⁶⁵ Munir Ahmad, ‘Impact of Origin Rules for Textiles and Clothing on Developing Countries.’

in the Americas by essentially removing quotas if countries exported apparel that was produced with fabrics both cut and formed in the US. The same benefits were extended to Mexico in 1988. These agreements were then replaced beginning in the 1990s, first with NAFTA in 1994, CAFTA in 2000 and CAFTA-DR in 2004. (The complexity of trade in the Americas is illustrated in Figure 1 below.)

NAFTA liberalised free trade among Canada, the US, and Mexico but preserved strict rules of origin that protected yarn and fabric companies within the signatory countries. This bolstered Mexico's position as a prominent apparel exporter to the US and led to the swift rise of *maquiladora* production along the US Mexico border.

Figure One: Trade Agreements in the Americas¹⁶⁶



In the wake of NAFTA, Central American and Caribbean countries lobbied for trade parity in order to compete with Mexico, which eventually led to CAFTA-DR. The ramifications were highly uneven for various countries. Apparel exports increased in

¹⁶⁶ Source: 'Regional Trade Integration and Conflict Resolution,' *Routledge Advances in International Political Economy*, edited by Shaheen Rafi Khan (New York: Routledge) 2009. Retrieved at: <http://web.idrc.ca/openebooks/414-7/>

Honduras, Guatemala, and Nicaragua, while the Dominican Republic and Costa Rica experienced declines. But even for those countries that successfully manoeuvred to improve market share under CAFTA-DR, export unit values were sacrificed, with the lone exception of Nicaragua. As we saw in the previous chapter, Nicaragua stood out as a singular success story in Central America and the Caribbean.¹⁶⁷

Over 80 per cent of Nicaragua's apparel exports received duty-free access to US markets.¹⁶⁸ However, the majority of preferential access exports were not protected under CAFTA-DR provisions. Only 35 per cent of exports were exempted from tariffs by rules of origin under CAFTA, while 47 per cent were imported under TPLs that were granted to non-originating exports. Therefore, it is clear that the special access granted to Nicaragua has played an essential role in the success of their apparel industry. However, the TPLs, including the one-to-one rule that has benefitted Nicaragua, are set to expire in 2014, thus the country's success is liable to suffer serious damages when those benefits are lost. I further discuss Nicaragua's condition at the conclusion of this chapter.

III. THE QUESTION OF ASIAN DOMINANCE

The three most prominent types of upgrading in apparel value chains include increasing functional capabilities and backward linkages, export market diversification; and shifting from export markets to emerging domestic markets.

Increasing functional capabilities and establishing backward linkages is the most important upgrading strategy, and the most common avenue to accomplish this is the shift from assembly (CMT: cut, make, trim) to original equipment manufacturing (OEM).¹⁶⁹ This shift often comes with the development of a domestic textile industry, which frees an industry from depending on foreign textiles that are controlled by tariffs and rules of origin. Most CAFTA countries remain restricted to CMT production, while

¹⁶⁷ Thomas Bernhardt, 'Developing countries in the global apparel value chain: a tale of upgrading and downgrading experiences,' *Capturing the Gains* Working Paper 22 (February 2013), 23.

¹⁶⁸ Jennifer Bair and Gary Gereffi, 'Better Work in Central America: assessing the opportunities for upgrading in Nicaragua's apparel sector,' *Capturing the Gains* Working Paper 17 (February 2013), 10.

¹⁶⁹ Stacey Frederick and Gary Gereffi, 'Upgrading and restructuring in the global apparel value chain: Why China and Asia are outperforming Mexico and Central America,' *International Journal of Technological Learning, Innovation and Development* 4 (2011): 73.

countries such as Vietnam, Bangladesh, Indonesia, and Mexico have upgraded to OEM, although the textile base in Mexico is generally limited to US market demand.¹⁷⁰

Successful upgrading to export market diversification is limited mostly to Asian exporters, while Latin American countries remain dependent on US markets. Diversification is crucial for continued growth of apparel exports as demand has slowed in end markets in the US and EU and picked up steam in the global South.

Apparel suppliers in China and India have successfully transitioned some production activities to target emerging domestic and regional markets.¹⁷¹ These markets present opportunities for functional upgrading into original brand manufacturing that target the strongest growth rates in the global apparel industry.¹⁷² While China's apparel industry has risen to dominance over the past two decades – not only capturing a huge swath of export market share but also producing for domestic and regional markets – Mexico's industry has declined and is highly dependent on the US. China has diversified not only its end markets but also the products that it exports.

Why has China succeeded and Mexico failed? First, China began developing its apparel and textile industries around 1980 by investing in spinning technology, new looms, quality control, and logistics technology.¹⁷³ While China continues to lead the way in apparel machinery investments, Mexico's investments have remained stagnant. Secondly, China's investments have resulted in their global reputation as the highest quality producer of apparel.¹⁷⁴ Thirdly, while both countries have made efforts to keep workers' wages down, China still offers cheaper labour, and overall costs have remained much lower in China due to high productivity.¹⁷⁵ Fourthly, China has successfully achieved scale economies by creating 'firm-specific clusters' in which all supply chain sectors are based in one location – the Guangdong area – so as to reduce lead times and minimise transaction costs. Fifthly, China has benefitted from regionally integrated development. While the US used regional trade agreements to maintain domestic textile manufacturing and outsource labour to low-wage countries, Asian

¹⁷⁰ Ibid 75.

¹⁷¹ Ibid 76.

¹⁷² Ibid.

¹⁷³ Ibid 84.

¹⁷⁴ Ibid.

¹⁷⁵ Ibid 85.

countries benefitted from a more integrated model that enabled upgrading. US trade policy, on the other hand, fostered competition rather than integration among regional suppliers.¹⁷⁶ Lastly, China's domestic apparel market has grown much faster than Mexico's, and Mexico has thus far failed to foster a local market for domestic brands.¹⁷⁷

While Mexico and Central America maintain two advantages over Asian suppliers – proximity and preferential access – they have failed to transform this into a lasting advantage. As seen above, this is attributable to decisions made by the Mexican government, but is also due to regional arrangements designed by the US to protect their own industries. The larger point here is that these global inequalities in apparel trade suggest a great deal about the extent to which states retain control over these fragmented value chains.

Throughout this thesis I have mentioned Nicaragua as a singular success story in the Central America and Caribbean region. We now turn fully to the case of Nicaraguan apparel, an anomaly in Central America and the Caribbean, to illuminate important takeaways and further illustrate how much state policies control transnational trade.

IV. LEARNING FROM NICARAGUA

Nicaragua presents an interesting case to consider in light of developments throughout Central America and the Caribbean. As we have seen above, Nicaragua is one of the few countries that have achieved economic and social upgrading in the post-MFA world of apparel production, and it is the only country to do so in Central America and the Caribbean. Since 2005, the US has steadily imported less from the Americas and more from Asian markets, and China has become the world's largest apparel exporter. Yet Nicaragua's apparel industry has still prospered. Nicaragua's share of the region's apparel exports to the US rose from 8 percent in 2005 to 17 percent in 2011, this at a time when all other CAFTA countries except El Salvador experienced a decline.

Also, Nicaragua is the only Central America country to implement the Better Work programme (Haiti is the only other in the Americas), although – unlike many Better Work countries – Nicaragua has not experienced widespread abuses to begin

¹⁷⁶ Ibid 88.

¹⁷⁷ Ibid 91.

with. The 2007 election of Daniel Ortega, a Sindinista leader, has yielded positive trends in labour law enforcement, and Better Work is seen as a way to publicize their position as a ‘high road’ exporter rather than a way to improve working conditions in free trade zones (FTZs).¹⁷⁸ The merits of Nicaragua’s approach must be considered with some qualifications, however. Turnover rates at Nicaraguan apparel factories are consistently high – one reported an annual turnover rate of 120 per cent.¹⁷⁹ Bair and Gereffi reported that benefits like transportation to the work site and subsidized on-site lunch greatly reduced turnover,¹⁸⁰ but if fringe benefits have such a strong effect, it seems unlikely that real social upgrading has occurred. At the same time, many managers regard high turnover as inevitable in the export business and therefore do not offer much formal training,¹⁸¹ and Nicaragua already offers the lowest labour costs of all the CAFTA countries.¹⁸²

Nonetheless it is critical to consider why Nicaragua has enjoyed singular success in a region hit hard by the shift to Asian exporters. Nicaragua’s success is partly attributable to CAFTA-DR.¹⁸³ A sampling of relevant regulations follows:

- The rule of origin is yarn-forward, so preferential access is granted to all apparel sewn in a signatory country from inputs that derive from within the CAFTA region.
- Additionally, *de minimus* allows inputs from outside the CAFTA region as long as the weight does not exceed 10 per cent of the entire garment.
- Tariff preference levels (TPLs) are special provisions for Nicaragua, allowing their exports preferential access to US markets for apparel that does not satisfy CAFTAs rules of origin. More specifically, Nicaragua is allowed preferential access for non-originating garments up to 100 million square meters per year. TPLs were only granted for 10 years and are therefore set to expire in 2014.
- The one to one rule is an additional stipulation for TPLs to ensure that the US benefits from the arrangement. The rule applies to pants that are imported under

¹⁷⁸ Bair and Gereffi, ‘Better Work in Central America,’ 3.

¹⁷⁹ Ibid 17.

¹⁸⁰ Ibid 18.

¹⁸¹ Ibid.

¹⁸² Ibid 21.

¹⁸³ Pickles, ‘Economic and social upgrading in apparel global value chains,’ 73.

Nicaragua's TPL allowance, requiring that each shipment be matched by pants made from fabric that is woven in the US and extruded from the US. Any shortfall to this arrangement is then deducted against the allowed TPL for the following year.

- The rule of cumulation allows apparel woven with fabric from Mexico and Canada to qualify as originating in the CAFTA region.
- Finally, the commercial availability provision, or short supply, allows preferential access for garments that don't meet rules of origin if the fabric cannot be acquired from the CAFTA region or is not available in a timely manner.

While the general benefits of CAFTA-DR are significant, these advantages alone are not sufficient to outcompete Asian markets. Otherwise, industries throughout Central America would be achieving similar success to Nicaragua. Rather, because Nicaragua is the least developed country of all those participating in CAFTA-DR, it was granted an additional advantage. Specifically, preferential treatment through TPLs allowed apparel exporters to skirt some restrictive rules of origin.¹⁸⁴ TPLs are granted to Nicaragua for a specified amount of apparel, allowing preferential treatment for apparel that does not meet CAFTA's rule of origin as long as it is sewn in Nicaragua. This means that Nicaragua is not compelled to use fabrics produced in the region, a significant advantage considering the dearth of cost-competitive fabrics locally available.¹⁸⁵ In interviews conducted by Bair and Gereffi, all but one of the knit manufacturers depended on TPLs for at least some of their fabric.¹⁸⁶

These TPLs will expire in December 2014 (while Haiti keeps theirs until 2018), which has caused great concern in a country highly dependent on trade for its development.¹⁸⁷ This yields an interesting environment for the challenges of economic upgrading and social upgrading. Nicaragua has shown an interest in using apparel to generate both economic and social upgrading, but is restricted by CAFTA-DR regulations. Without extension of TPLs, economic gains may contract, making it

¹⁸⁴ Ibid.

¹⁸⁵ The 'one-to-one' rule was created to ensure the US benefitted from TPLs. For trousers shipped from Nicaragua to the US, half must be made from fabrics that are extruded and woven in the US.

¹⁸⁶ Ibid 14.

¹⁸⁷ Ibid 3.

difficult to sustain gains in social upgrading – wages, working conditions, and job security.

In interviews with Bair and Gereffi, many companies asserted that their future in Nicaragua depended on the renewal of TPLs,¹⁸⁸ and some companies hinted at the possibility of moving production to Haiti in order to continue to take advantage of TPLs.¹⁸⁹

It is worth reiterating here that apparel production has a long history of being driven by trade policy, and it has been one of the most protected industries in global trade, including agricultural subsidies on cotton and wool, to quotas under the General Agreement on Tariff and Trade (GATT) then under the WTO – first the MFA and then the Agreement on Textiles and Clothing (ATC).¹⁹⁰

Global trade liberalisation has been the dominant factor affecting the garment industry, but regional agreements like NAFTA and CAFTA-DR have bolstered the relationship between the US (the largest apparel market) and its trading partners. US apparel imports tripled between 1990 and 2005, fell from 2005 to 2009 due to the global recession, but surged again by 2011.¹⁹¹ China was the leading exporter to the US in 1990, but the CAFTA-DR countries – as a collective – were close behind. By 2011, however, China nearly quadrupled the market share held by CAFTA-DR countries, while it held eight times that of Mexico's share.¹⁹² Also, Vietnam, Bangladesh, and Cambodia collectively held two percent of market share in 1990, but that surged to 18 percent in 2011.

But can these trade agreements lead to economic and social upgrading? Lead firms are increasingly turning to full-package production arrangements, in which a company is responsible for financing the purchase of raw materials, for production tasks beyond sewing such as screen printing and embroidery, and for pre-production jobs

¹⁸⁸ Ibid 15.

¹⁸⁹ Ibid 17.

¹⁹⁰ Ibid 6.

¹⁹¹ Ibid 8.

¹⁹² Mexico is interesting, however, because it held only 2 percent of the share in 1990 but 15 percent in 2000, largely due to the implementation of NAFTA in 1994.¹⁹² That number dropped back down to 5 percent by 2011 because CAFTA was implemented (largely due to worries that exclusion from NAFTA was harming their garment export industry) and led to greater parity in the region.¹⁹² This seesaw effect demonstrates just how powerful are the trade agreements.

such as creating patterns or designs. This suite of tasks far exceeds the typical *maquiladora* model seen in Latin America, and because of the resources and capabilities necessary it is seen as a form of economic upgrading.¹⁹³

Apparel is vital to Nicaragua's economic health. It is the country's biggest manufacturing sector and accounted for over one-third of exports to the US in 2011.¹⁹⁴ In 2012, apparel factories made up 34 per cent of businesses in the FTZ, and garment firms accounted for 69,000 jobs – 67 percent of employment in the FTZ. Nearly two-thirds of jobs in Nicaragua are informal, so these jobs are essential.¹⁹⁵

While Nicaragua may not be able to out-compete Asian companies in terms of cost of production if the TPLs expire, the country does offer some advantages. Most notable is its potential to become a 'high road' exporter. Lead firms that fear the negative publicity associated with labour violations, or those that are fully committed to ethical sourcing, could potentially turn to Nicaragua due to its positive history of compliance with labour rights. The government recently passed the Tripartite Agreement, which could strengthen commitment to labour rights by fostering discussions among the industry's stakeholders about how to ensure that workers benefit from growth.¹⁹⁶ And the election of Ortega has brought with it notable improvements in labour law enforcement and employer practices. There are, however, justified concerns about workers' rights to freedom of association and collective bargaining.¹⁹⁷

Still, the Nicaraguan government has demonstrated strong support for the Better Work programme, and Gereffi and Bair were enthusiastic about its potential there:

'Specifically, Nicaragua offers a unique opportunity for working with industry stakeholders, including foreign buyers, to develop an understanding of the factors creating downward pressure on wages and working conditions in global supply chains, and to search for ways to reduce these pressures. In this sense, Better Work has the potential to go beyond the standard approach towards labour compliance, represented

¹⁹³ Gary Gereffi, 'International trade and industrial upgrading in the apparel commodity chain' *Journal of International Economics* 48 (1999): 37-70.

¹⁹⁴ Bair and Gereffi, 'Better Work in Central America,' 10.

¹⁹⁵ Ibid.

¹⁹⁶ Ibid 22.

¹⁹⁷ Ibid.

by corporate code of conduct programmes, third party auditors or existing multi-stakeholder initiatives.¹⁹⁸

One of the most difficult labour violations to monitor and correct is freedom of association.¹⁹⁹ This is partly because the interests of workers as represented in unions are perceived to be contrary to the goals of employers. Also, violating the right to freedom of association is not perceived to be as damaging to a company's reputation as, for example, child labour or safety issues. Finally, freedom of association is difficult to monitor because it is an inherently dynamic process that is difficult to measure through objective data.

Despite these obstacles, Bair and Gereffi remain optimistic that Better Work can improve even labour rights that are not so easily standardized, largely because the Tripartite Commission has created a foundation of social dialogue on which to build.²⁰⁰ They report that participation is high and the conversation is robust. There are, however, reasons to be sceptical. While factory managers can make important improvements in the lives of workers, it is also clear that buyers play an important role. Without their buy-in, factory managers are unable to remedy the vexations caused by short lead times and squeezed pricing. Local stakeholders such as government, trade unions and employers play a crucial role, but, due to power asymmetries, meaningful improvements will prove elusive without the participation of lead firms.

One interviewee expressed that 'the brands have to understand that they need to be involved in this process. If it [Better Work] doesn't generate contracts for companies, no one is going to participate because it won't have any value added for them.'²⁰¹ Thus far, meaningful brand participation has been scant.

V. WHERE DO WE GO FROM HERE?

By now we have seen the great extent to which states have retained control over global trade and therefore have retained significant ability to affect social upgrading for workers in value chains. In the opening chapter I argued that, even in the context of

¹⁹⁸ Ibid 23.

¹⁹⁹ Ibid 24.

²⁰⁰ Ibid 25.

²⁰¹ Ibid.

globalisation, democratic national institutions best protect citizen rights. The question of how to ensure that national institutions protect citizens' rights in a globalised world, however, presents a difficult problem. Thus far, the majority of efforts to protect workers in global value chains have focused on working within a private corporate governance model, but these efforts, though commendable, have largely failed.

But where do we turn next? I proposed that Fraser's theory of justice is the best tool to frame the workers' struggle. Using this theory, it is clear that NGOs must refocus their efforts on ensuring the participation of workers. This could mean using 'name and shame' tactics to pressure corporations for process rights, but it also means that many more efforts should be focused on grassroots movements in the developing world. States have much more power within global value chains than GVC analysis initially claimed, and this is one arena in which workers already exercise some 'parity of participation,' simply because they are citizens of those countries. Of course, this is not a simple course. Labour ministries in developing countries are often underfunded and corrupt,²⁰² but there is potential for NGOs to bolster state regimes rather than trying to work around them.²⁰³

Also, consumers still play an important role in the struggle for justice in global supply chains due to what Fraser calls the 'all-affected principle.'²⁰⁴ Because consumers participate in the structure that creates injustice, they have a responsibility to continue to fight for the small improvements that have been achieved, by pressuring corporations and even to lobby governments to make corporations more liable for their behaviour. There is also great potential for citizens of developed countries to lobby for trade agreements that promote rather than hinder economic and social upgrading for developing trade partners. This is not the typical 'aid for trade' view of development, which argues for increased liberalisation, but rather it calls for a more closely considered understanding of how 'free' trade can impact developing economies in highly differentiated ways.

²⁰² Kevin Kolben, 'Transnational Labor Regulation and the Limits of Governance,' *Theoretical Inquiries in Law* 12:2 (2011), 77.

²⁰³ Ibid 79.

²⁰⁴ Nancy Fraser, 'Reframing Justice in a Globalizing World,' *New Left Review* 36 (2005), 82.

As previously discussed, there is an increasing awareness among governments that responsibility for social protections in global value chains should fall to states. The most prominent effort to hold states accountable for corporate abuses was undertaken by the United Nations Working Group on the issue of human rights and transnational corporations and other enterprises, which has also attempted to incorporate the role of corporate actors. The merits and demerits of this effort are considered in the final chapter.

CHAPTER 4

I. INTRODUCTION

Transnational corporations domiciled in the Global North (and increasingly in the Global South, notably Brazil, India, and South Africa) conduct operations all over the world, creating difficulties as to who is capable of holding them to account when human rights violations occur. Due to the rise in social consciousness regarding the deleterious effects of transnational corporate activity, business and human rights issues became a permanent fixture on the global policy agenda in the 1990s.

The types and severity of human rights violations at stake vary greatly depending on industry and region. In a survey on the scope and patterns of abuse,²⁰⁵ a wide swath of human rights violations were identified using four core conventions: the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social, and Cultural Rights (ICESCR), and the International Labour Organization (ILO). The survey revealed that both labour and non-labour rights were impacted, and the impacts were not discreet. For example, violations of child labour law affect right to education, the right to health and right to life. In South Africa, extractive industries discriminated against women in employment, thus many women resort to prostitution, thereby increasing community risk to HIV/AIDS infection. Freedom of association, right to equal pay, right to rest and leisure, right to self-determination, right to social security, right to a fair trial, and freedom from torture or cruel, inhuman or degrading treatment were but a few of the rights impacted. Violations of the right to physical and mental health were common.

²⁰⁵ Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. Addendum: Corporations and human rights: a survey of the scope and patterns of alleged corporate-related human rights abuse (23 May 2008) UN Doc. A/HRC/8/5/Add.2.

Almost 60 per cent of violations involved direct company involvement; the other 40 per cent were indirect. 90 per cent of indirect cases involved a firm benefitting directly from state abuse of human rights. Indirect cases impacted workers more than communities (often because indirect cases are the result of complex global supply chains in the food, garment, and IT industries), while direct cases impacted communities more (due to extractive companies that often release toxic chemicals into surrounding environments²⁰⁶). Further, communities were directly impacted just as often as workers, contrary to the notion that workers suffer the majority of violations.²⁰⁷ Lastly, some cases of abuse affected up to 60,000 people, and almost all cases involved more than 100 people.²⁰⁸

The United Nations initially responded to these crises with the Norms on Transnational Corporations and Other Business Enterprises, drafted by the then Commission on Human Rights, which attempted to impose on corporations the same human rights obligations as states under international law. This resulted in divisive contention between businesses and human rights groups and received little buy-in from states, and the Commission never acted on the Norms. Instead, in 2005 the Commission established a mandate for a Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. John Ruggie was named the Special Representative, and he has received widespread praise for his tireless efforts over the following six years.

Because of the contentious history of business and human rights initiatives, the Special Representative was first charged with identifying and clarifying current practices, which he argued were too fragmented and incoherent to ever achieve scaled up results.²⁰⁹ He was then asked to submit recommendations, and he recommended adoption of his 'Protect, Respect and Remedy' Framework, a much more inclusive and holistic model than was proposed by the Norms on Transnational Corporations, which

²⁰⁶ Ibid para 69.

²⁰⁷ Ibid para 69.

²⁰⁸ A survey of the scope and patterns of alleged corporate-related human rights abuse (23 May 2008) UN Doc. A/HRC/8/5/Add.2 para 33-4.

²⁰⁹ Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises on Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework (21 March 2011) UN Doc. A/HRC/17/31 para 4-5.

targeted corporations only. Ruggie's Framework proposed three pillars to address the issue: state duty to protect against third parties, corporate social responsibility, and access to remedy for victims of human rights abuse. Eventually, he was tasked with operationalising the Framework, which resulted in the Guiding Principles on Business and Human Rights.

To promote the effective implementation of the Guiding Principles, the Human Rights Council (HRC) established the Working Group on the issue of human rights and transnational corporations and other enterprises in March 2011.²¹⁰ In this resolution, the HRC stressed that 'the obligation and the primary responsibility to promote and protect human rights and fundamental freedoms lie with the State.'²¹¹ Here, the dramatic shift between the original Norms and the newly developed Guiding Principles is stark: from direct corporate responsibility for human rights to state obligation for protecting human rights abuses by corporations (although corporate social responsibility does remain a pillar of the Guiding Principles).

This background is important context for considering the merits and demerits of both the Guiding Principles and the Working Group's efforts. Clearly, the work of the Special Representative was designed not to alienate corporate actors for fear of repeating the collapse suffered by the Norms, and this has serious consequences for the resulting Guiding Principles. Is shifting the primary responsibility for corporate human rights abuses to the state a positive development, or a step backward? Also, because the Norms imploded, Ruggie has stated that the two main achievements of the Principles are, first, an enhanced shared understanding of business and human rights challenges and, second, widespread engagement with the implementation of the Principles.²¹² He further argued that preserving these accomplishments should be the primary task of the Working Group. But is this approach too soft? Does this undermine the purpose of a

²¹⁰ Human Rights Council, Agenda item 3, Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development (6 July 2011) UN Doc. A/HRC/RES/17/4.

²¹¹ Guiding Principles on Business and Human Rights (21 March 2011) UN Doc. A/HRC/17/31 Preamble.

²¹² Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises on Recommendations on Follow-Up to the Mandate (11 February 2011) Retrieved at: <http://www.business-humanrights.org/media/documents/ruggie/ruggie-special-mandate-follow-up-11-feb-2011.pdf>.

human rights document, which by its very nature must challenge power, especially in the context of business and human rights?

In this chapter I will address these concerns with a critique of both the Guiding Principles and the efforts of the Working Group thus far, which include the first annual Forum on Business and Human Rights and three country visits. I argue that shifting the primary responsibility for corporate human rights abuses to the state is a crucial step in the right direction. However, part of holding states responsible involves strongly challenging the pathways of power, both government and corporate, especially if we are to struggle for parity of participation for workers throughout value chains.

II. GUIDING PRINCIPLES AND THE CORPORATE RESPONSIBILITY TO RESPECT HUMAN RIGHTS

In the late 1990s, the perceived ineffectiveness of states to regulate global corporations due to governance gaps led to the ‘mushrooming’ of corporate social responsibility and labour codes.²¹³ Corporate codes are typically monitored by independent groups that utilise ‘name and shame’ strategies to encourage compliance.²¹⁴ Although the Guiding Principles stepped back from placing exclusive obligations on corporations, corporate responsibility remains one of the three pillars, including the requirement for human rights impact assessments and sunset clauses. Guiding Principle 13 requires that businesses ‘should 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.’²¹⁵ The specificity of this article suggests that businesses cannot be excused from violations that occur far down the chain of a global value chain. Also of note, the Commentary under Guiding Principle 17 addresses the rampant practice of drafting exploitative agreements with developing countries, pointing out that violations often occur before a business begins operating.

These are promising developments. There is evidence that the implementation of these types of corporate codes has led to progress, especially in health and safety, but

²¹³ Stephanie Barrientos, ‘Global Production Systems and Decent Work,’ International Labour Organization Working Paper No. 77 (2007), 15.

²¹⁴ Stephanie Barrientos and Sally Smith, ‘Do Workers Benefit from Ethical Trade? Assessing codes of labour practice in global production systems,’ *Third World Quarterly* 28:4 (2007), 717.

²¹⁵ Guiding Principles on Business and Human Rights (21 March 2011) UN Doc. A/HRC/17/31.

also in reduction of working hours and an increase in wages for some workers (although not significant enough to guarantee a living wage).²¹⁶ Yet many have begun to question whether corporate codes are truly effective in protecting basic labour standards, including Locke, who spent years researching Nike's attempts at corporate responsibility.²¹⁷

Also, while limited improvements have been documented for specific conditions of work such as health and safety, negligible improvements have been seen in 'process rights,' or the ability of workers to negotiate on their own behalf via freedom of association and the right to collective bargaining.²¹⁸

The failure of private enterprises to guarantee the enjoyment of human rights on their own should not be surprising. Businesses are designed to maximize profits. This sentiment is strongly reflected in the Working Group's statement at the conclusion of its visit to the United States:

'There was suspicion and even outright rejection of important elements of the human rights framework, particularly as it relates to labour rights, and the content of individual rights. This raises the concerns about the likely extent of implementations of the corporate responsibility to respect all internationally recognised human rights, particularly in locales or industries where regulation and protection of rights is lacking... It was of some concern to note that the 'realities' of national laws and cultural contexts generally prevail over human rights criteria when evaluating whether to do business in certain places.'²¹⁹

Thus, while continued efforts in the realm of corporate responsibility are a worthwhile endeavour and the improvements experienced are not insignificant, the evidence suggests that they must be strongly buttressed by other safeguards, which leads us to another pillar of the Guiding Principles: the state duty to protect human rights. States are more capable structures for guaranteeing human rights because, while corporations are responsible to shareholders for profit margins, states hold the highest responsibility to citizens (though clearly states are also influenced in significant ways by corporate powers). Of course, states are the traditional protectors of rights, and

²¹⁶ Barrientos, 'Do Workers Benefit?' 722.

²¹⁷ Richard Locke, 'Can Global Brands Create Just Supply Chains?' Boston Review May/June 2013, 1.

²¹⁸ Barrientos, 'Do Workers Benefit?'

²¹⁹ Statement at end of US visit.

corporate codes are a response to the perceived powerlessness of states to regulate business activity across borders. The next section explores state responsibility in international law regarding private enterprises, how states may actually harness more power than is commonly assumed, and whether the Guiding Principles reflect this adequately.

III. THE STATE DUTY TO PROTECT

Do states have a duty to protect from human rights abuses by private enterprises?

Special Representative Ruggie argued that there is clearly emerging customary law in this regard, based on the fact that ‘more recently-adopted treaties explicitly mention private businesses in this respect.’²²⁰ Also, references to business violations are included in the Concluding Observations (increasingly over the last 10 years) from the Committees for the following treaties: ICCPR, ICESCR, ICERD, CEDAW, CRC, OPSC, ICRMW, and CAT.²²¹

The HRC has stated the necessity for states to act with ‘due diligence’,²²² which can be generally understood in the context of *Velazquez Rodriguez*, which holds states responsible for private violations if it did not act to prevent them or respond appropriately.²²³ In August of 2013, the Secretary General stated this clearly: ‘The duty to protect implies that States must take measures to prevent or end infringement upon the enjoyment of a given human right caused by third parties.’²²⁴

In General Comment 18, ‘The Right to Work,’ the Committee on Economic, Social and Cultural Rights (CESCR) stated that states have the duty to protect and that human rights obligations could be violated if states fail to ‘regulate the activities of

²²⁰ Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. Addendum: State responsibilities to regulate and adjudicate corporate activities under the United Nations core human rights treaties: an overview of treaty body commentaries (13 February 2007) A/HRC/4/35/Add.1 Introduction.

²²¹ In order: International Covenant on Civil and Political Rights, International Covenant on Economic, Social, and Cultural Rights, International Convention on the Elimination of All Forms of Racial Discrimination, Convention to Eliminate All Forms of Discrimination Against Women, Convention on the Rights of the Child, Optional Protocol to the Convention on the Rights of the Child, International Convention on the Protection of the Rights of All Migrant Workers, and Convention Against Torture.

²²² Commission on Human Rights on Compilation of General Comments and general recommendations Adopted by Human Rights Treaty Bodies (12 May 2004) UN Doc. HRI/GEN/1/Rev.7 para 192.

²²³ *Velazquez Rodriguez Case*, Judgment of July 29, 1988, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988).

²²⁴ Note by the Secretary General on Human rights and transnational corporations and other business enterprises (6 August 2013) UN Doc. A/68/279 para 6.

individuals, groups or corporations so as to prevent them from violating the right to work of others’.²²⁵

A significant obstacle in state responsibility to prevent corporate abuse is extraterritoriality, wherein states may not have the power to prosecute private enterprises that are either domiciled or conducting activities outside of their traditional jurisdiction. Regarding extraterritorial jurisdiction, most treaty bodies do not require states to act on businesses abroad, but Ruggie concluded that there is an emerging pattern of treaties recommending they influence businesses where possible. Also, there is certainly no prohibition of extraterritorial jurisdiction (although non-intervention must be preserved).²²⁶

Though lacking specificity regarding legal powers, other UN documentation bolsters the notion that states have at least some extraterritorial powers. For example, in General Comment 14, the CESCR addresses the potential widespread violations to health, as seen in examples of actions by extractive companies mentioned above:

‘State parties have to respect the enjoyment of the right to health in other countries, and to prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law.’²²⁷

In addition, it is suggested that states have strong extraterritorial obligations regarding investment agreements. The CESCR ‘Right to Work’ document says that states can violate the duty to protect if they don’t consider Covenant obligations ‘when entering into bilateral or multilateral agreements with other States, international organizations and other entities such as multinational entities.’²²⁸ Again, the Secretary General recently bolstered this argument by claiming that, while investment treaties can strengthen economic growth, there is also the danger that ‘they can weaken States’ abilities to regulate domestically, and as a consequence, restrict the ability of States to implement international human rights obligations, or to adhere to new obligations or

²²⁵ Committee on Economic, Cultural, and Social Rights on The Right to Work, General Comment 18 (24 November 2005) UN Doc. E/C.12/GC/18 para 35.

²²⁶ An overview of treaty body commentaries (13 February 2007) A/HRC/4/35/Add.1.

²²⁷ Committee on Economic, Cultural, and Social Rights on The right to the highest attainable standard of health, General Comment 14 (8 November 2011) UN Doc. E/C.12/2000/4 para 34.

²²⁸ ‘The Right to Work’ para 33.

evolving standards.²²⁹ This provides substantial support for the notion that states are responsible for human rights throughout global value chains, and this could apply to both the home and host countries of corporations.

Thus, while the development of corporate social responsibility is seen as a response to the state's lack of power within the current globalised economic regime, there is also the clearly resurgent notion that states have retained the power to regulate private enterprises. This is itself a commendable achievement by the Special Representative and is reflected strongly in the Guiding Principles.

In light of this, Guiding Principle 9 is one of the most crucial components of this human rights document, which requires states to 'maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts.'²³⁰ This single item, however, denotes some of the greatest strengths and weaknesses of the Guiding Principles.

First, an obvious weakness of Principle 9 is the 'soft' language, which does not explicitly hold states accountable for human rights obligations in investment treaties but instead requires that they 'maintain adequate domestic policy space' to do so. In fact, it does not even require that human rights language be instilled in the agreements, only that adequate policy space remains viable.

Secondly, Principle 9, and the Guiding Principles in general, make no attempts to challenge the conventional economic wisdom inherent in investment treaties, particularly the emphasis on trade liberalisation as propagated by the WTO. There is no consideration that these agreements may themselves be in violation of human rights standards. For example, Stiglitz argues that two major tenets of the WTO platform hinder the right to development because developing countries are now playing by different rules than those utilised by the current economic superpowers to achieve their status.²³¹ When the superpowers' markets were emerging, there was no strict protection of intellectual property (as seen in the Agreement on Trade Related Aspects of

²²⁹ Note by the Secretary General on Human rights and transnational corporations and other business enterprises (6 August 2013) UN Doc. A/68/279 para 16.

²³⁰ Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework (21 March 2011) UN Doc. A/HRC/17/31.

²³¹ Joseph Stiglitz, *Globalization and Its Discontents*, London: Penguin (2008).

Intellectual Property Rights, or TRIPS), and they liberally ‘borrowed’ ideas and technology in order to advance their own economies. Now that developed countries have a monopoly on intellectual property, developing countries are not allowed the same freedom. Also, the current superpowers imposed high tariffs while their economies were still emerging in order to protect domestic industries, but, again, current developing countries are not allowed the same protection in the name of free trade. In addition to potentially violating the right to development, this also impacts the right to an adequate standard of living (Arts. 11 and 12 of the ICESCR) and the right to self-determination (Article 1 of the ICCPR and ICESCR).

Thirdly, Guiding Principle 9 does not address the power imbalances in trade agreements that inhibit many countries in the Global South from maintaining ‘adequate domestic policy space.’ In the previous chapter, I explored the great extent to which these trade agreements can limit protections of rights for workers in developing economies. In a response to a draft of the Guiding Principles made available for comment, the Kenya National Commission on Human Rights noted exactly this problem:

‘We propose that the power relations between states should be explicitly stated. Developing countries that are negotiating bilateral trade and/or investment agreements may not be in a position to retain their domestic policy space due to power imbalances and development aid conditionalities.’²³²

This is a crucial point to consider if we are going to prevent corporate abuse in GVCs. As we have seen in the previous two chapters, powerful states exercise strong influence on the livelihoods of workers in developing countries by way of trade regulations negotiated in their favour. If we are to see any improvements for workers, governments in both developed and developing nations must both be held accountable to protect the vulnerable labourers in GVCs.

Of course, here we arrive at the core tension in the Guiding Principles, which is the fine line between not alienating powerful actors from participating in the process

²³² Kenya National Commission on Human Rights, ‘Comments on the Draft Guiding Principles for the Implementation of the United Nations ‘Protect, Respect and Remedy’ Framework: Business and Human Rights in the Context of Kenya. Retrieved at: <http://www.business-humanrights.org/SpecialRepPortal/Home/Protect-Respect-Remedy-Framework/GuidingPrinciples/Submissions>.

while still achieving progress for human rights. Ruggie clearly believes that striking a balance between maintaining inclusivity and challenging power is key to the Working Group's success. While an open process was essential for developing the Guiding Principles, this also leaves the Principles open to manipulation to the point that it becomes too soft to impact any real change. It is clear that the Special Representative erred on the side of inclusivity, at least in this instance, because he ignored the concerns of the Kenya National Commission – and the wealth of data already presented in this dissertation – and kept the Principle as is. Principle 10 does hint at some of these power imbalances in trade agreements, albeit in an equally soft manner.

This has exposed the Guiding Principles to strong criticisms. Ruggie responded to some of these criticisms in an open letter:

‘So let [Amnesty International] and HRW hold out the promise to victims that something good may come their way in another generation. My aim, as I have stated explicitly from the beginning, is to reduce corporate-related human rights harm to the maximum extent possible in the shortest possible period of time.’²³³

This response points to several potential advantages to this softer, more inclusive approach. While this strategy is never going to topple the power imbalances inherent in, for example, the WTO, there is the possibility that open dialogue can still greatly enhance the opportunities to implement more robust human rights mechanisms.

For example, if multilateral trade agreements can open borders for private enterprises to crisscross with ease, might this dialogue carve a path for reaching an agreement on multilateral cooperation that would hold private human rights abusers accountable across borders? Indeed, the blatant imbalances between the robust liberalised trade structure versus the complete lack of accountability suggests that the dearth of state power may be largely a problem of political will, and the efforts of the Working Group in implementing the Guiding Principles may harness the potential to build momentum for such will.

The Working Group has clearly stated what they perceive as the primary obstacle to achieving respect for human rights throughout business operations:

²³³ John Ruggie, ‘Response to Human Rights Watch,’ (28 January 2011). Retrieved at: <http://www.business-humanrights.org/media/documents/ruggie/ruggie-response-to-letter-by-arvind-ganesan-28-jan-2011.pdf>.

‘Governance gaps lie at the core of the human rights and business challenge.’²³⁴ As such, the Working Group must consider its primary task the building of bridges across governance gaps. This cannot be accomplished if all the actors involved are not in the room. However, if the actors are in the room, certain realities can be accounted for.

Also, it is significant that, while the Working Group uses the narrative of governance gaps – which I have contested – it urges states to bridge such governance gaps. This implies what I posited in the opening chapter: states are able to act but have thus far been unwilling.

A survey by the Special Representative revealed that the majority of states focus on corporate social responsibility, rather than on human rights specifically, and states rarely include human rights language in bilateral investments treaties and free trade agreements (the EU being a notable exception).²³⁵ Yet it is well known that countries in the Global North have long promoted neo-liberal policies that erode such redistributive mechanisms as labour law via foreign policy, trade legislation and treaties, and exercising power in international economic institutions like the World Bank, IMF, and WTO.²³⁶ Also, although issues of extraterritoriality are complex, the United States actually has passed legislation that shelters corporate actors from the harmful effects of business decisions overseas, rather than pushing for access to remedy for victims.²³⁷ Further, other governance bridges could be included in multilateral treaties and regional trade agreements, such as requiring labour representation from host states on executive boards that operate in home states.²³⁸

All of these point to the fact that states can and must be more engaged in addressing governance gaps, and the Guiding Principles provide a promising platform for this to occur. Guiding Principle 2 states that home states ‘should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction

²³⁴ Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises (10 April 2012) UN Doc. A/HRC/20/29 para. 20.

²³⁵ Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Addendum: Human Rights Policies and Management Practices: Results from questionnaire surveys of Governments and Fortune Global 500 firms (28 February 2007) A/HRC/4/35/Add.3.

²³⁶ Arthurs, ‘Extraterritoriality,’ 4.

²³⁷ Dan Danielsen, ‘Corporate power and global order,’ in *International Law and Its Others*, ed. by Anne Orford (London: Cambridge University Press, 2006), 92.

²³⁸ *Ibid* 89.

respect human rights throughout their operations.²³⁹ Again, the language is soft, but it demands the beginnings of an important dialogue.

It is also important to point out that, even when accounting for power imbalances, developing countries have been complicit in allowing many violations to occur in their own territories. Governments have ‘actively eroded labour rights’ to attract foreign investment and created zones of impunity that are ripe for abuse.²⁴⁰ In addition, in the wake of the global economic crisis, the power dynamics between the Global North and Global South are rapidly shifting, largely due to the increasing prominence of the BRICS countries. This shift holds great promise for enabling states to reassert power over private enterprises that are domiciled elsewhere. Thus, Guiding Principle 1, which demands that states are responsible for violations by private enterprises, forces dialogue on how best to fulfil this obligation.

IV. ACCESS TO REMEDY

The third pillar of the Guiding Principles deals with access to remedy and promotes the importance of state-based and non-state-based judicial mechanisms. This pillar receives the least attention in the Guiding Principles, and I will spend little time discussing it here, though not because I deny its significance. Indeed, access to remedy is at least as important as the other two pillars, if not more important, because this is the one mechanism that actually gives power to those whose rights are violated and promotes parity of participation, if implemented appropriately. However, I grant it little space here because the problems inherent in this pillar of the Guiding Principles intersect strongly with issues presented above, which I need not repeat in detail.

In general, the Principles for access to remedy offer an interesting platform on which to discuss problematic issues, but I do not believe they go far enough. For example, regarding state-based judicial mechanisms, Principle 25 asserts that states have a duty to ensure that victims of abuse within their territory have access to remedy. Because corporations have so much power across the world, in both North and South,

²³⁹ Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework (21 March 2011) UN Doc. A/HRC/17/31 Guiding Principle 2.

²⁴⁰ Kate Raworth, *Trading Away Our Rights: Women working in global supply chains* (Oxford: Oxfam, 2004), 9.

access to remedy is often blocked, even when states have the necessary jurisdictional reach. However, the Guiding Principles make no effort to promote state-based remedy across jurisdictions, which ignores what the Working Group declared as the most central obstacle to achieving human rights protection throughout business operations: governance gaps.²⁴¹

In the final section of this chapter, I discuss the Working Group's actual efforts thus far, which consist of the first annual Forum on Business and Human Rights and three country visits, to Mongolia, the US, and Ghana. In his final report to the HRC, Special Representative Ruggie spelled out the overall thrust of his work and looked to the future:

‘What do these Guiding Principles do? And how should they be read? Council endorsement of the Guiding Principles, by itself, will not bring business and human rights challenges to an end. But it will mark the end of the beginning: by establishing a common global platform for action, on which cumulative progress can be built, step-by-step, without foreclosing any other promising longer-term developments.’²⁴²

If the Guiding Principles are the ‘end of the beginning’, then the efforts of the Working Group entail the difficult task of moving the Principles into action. I critique the Group's progress based on the rubric they have set for themselves: Can they challenge the powers necessary to address the governance gaps that enable continued impunity for abuses, and at the same time maintain widespread buy-in for the Principles?

V. IS THE WORKING GROUP WORKING?

In December 2012, at the first annual Forum on Business and Human Rights, 50 governments, 150 businesses, 170 civil society organizations, 5 international trade union networks, and 20 national human rights groups met to discuss the promotion and implementation of the Guiding Principles.²⁴³ This kind of forum, with this level of participants, is itself commendable for the reasons discussed above: it encourages

²⁴¹ *Supra* note 32.

²⁴² Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework (21 March 2011) A/HRC/17/31 para 13.

²⁴³ Summary of the discussions of the Forum on Business and Human Rights, prepared by the Chairperson, John Ruggie (23 January 2013) UN Doc. A/HRC/FBHR/2012/4 para 4.

dialogue about the complex issue of businesses and human rights and brings greater clout to the issue.

In the opening remarks, UN High Commissioner for Human Rights, Navanethem Pillay, ‘called on Governments to step up to close the governance gaps that had played a large part in both facilitating and sustaining the current economic crisis’,²⁴⁴ thereby reinforcing what I have argued is a strength of the Guiding Principles: emphasising that state structures provide the most promising avenue for progress.

In addition, the Forum allowed for civil society organizations to speak to structural power issues. Terra de Direitos asserted that companies hire third parties to externalize risks and avoid liability for human rights violations,²⁴⁵ and Amnesty International argued that judicial remedy is restricted by foreign investors that shape regulation.²⁴⁶ The International Trade Union Confederation argued that business violations in Africa are largely due to the fact that ‘businesses pressure politicians to restrict labour rights and implement business-friendly laws.’²⁴⁷ Victims of abuse by extractive companies operating in Peru and the Democratic Republic of Congo were able to bring light to specific violations.²⁴⁸ Again, this points to one of the strengths of the Guiding Principles soft approach, which allows NGOs and victims the rare chance to address powerful players when they are a captive audience.

Of course, criticism can and should be levelled. Dialogue does not necessarily lead to concrete change. At the Forum, several civil society organizations, such as the Africa Centre for Corporate Responsibility, noted that action rather than talk was needed going forward.²⁴⁹ Yet it should not be denied that bringing these actors together in one room can potentially build momentum for significant change, even if that progress is slow. The Forum, while not revolutionising the arena of business and human rights, seemed to perform somewhat as intended. Structural power issues were challenged and debated, yet the process remained inclusive enough so as not to alienate those powers.

²⁴⁴ Ibid para 11.

²⁴⁵ Ibid para 46.

²⁴⁶ Ibid 48.

²⁴⁷ Ibid 85.

²⁴⁸ Ibid 44-5.

²⁴⁹ Ibid 29.

The Working Group's country visits are more difficult to judge at this point. They only received funding to conduct two country visits per year, which is not sufficient to investigate the activities of a single large corporation, and it may be too early to arrive at such sweeping conclusions. However, the documents produced from the three country visits thus far indicate the unwillingness (or inability) to assess structural issues that must be addressed in order for true reform to occur (although the full country visit reports are not yet available for the US and Ghana). While there is clear evidence that states can do much to improve working conditions domestically, it is also imperative to keep in mind that many corporate abuses are the result of power imbalances between states.

In its report on the visit to Mongolia, the Working Group noted:

'The key challenge for any country, especially one that is undergoing rapid economic development like Mongolia, is to maximize the positive effects of business (e.g. economic development, building infrastructure, employment) while minimizing the negative impacts (e.g. damage to the environment, violation of labour rights, reduced access to public services).'²⁵⁰

What the report did not mention is that these ill effects are typically the result of investment by foreign companies that are difficult to hold accountable due to power imbalances and problems of extraterritoriality. The issue of governance gaps was not specifically addressed, nor was the lopsided leverage between wealthy corporate actors and the government officials striving for economic growth. Again, when dealing with human rights violations by transnational corporations, it is essential for both the developed and developing states to play a role.

The report notes many of the negative impacts on workers employed by mining operations, specifically impacts on health, family life, and ability to participate in the political process as workers do not get time off to vote in elections.²⁵¹ This of course leaves room for rampant corruption as it gives mine operators great political power. It is promising that government remedies were promised to the visiting expert,²⁵² but the

²⁵⁰ Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, Visit to Mongolia (2 April 2013) A/HRC/23/32/Add.1 para 4.

²⁵¹ Ibid para 61.

²⁵² Ibid 64-5.

report fails to point out that government remedies are unlikely to occur as long as mining companies maintain such strong political clout.

On the other hand, the report was successful in pointing out some harmful practices that could be addressed under the immediate scope of Mongolian jurisdiction. Mongolian legislation requires seeking the opinions of local residents before issuing mineral licenses, but this is rarely done in practice. One group of nomadic herders lamented that they discovered a mining operation was coming to their area only after the machinery had arrived, and many herders have lost access to their traditional lands.²⁵³ This is an issue with a rather simple remedy, and time will only tell if the country visit impacts implementation of such a remedy. There exists the possibility for citizens to be empowered through the country visit and begin to pressure the government for important changes.

Although the full report of the visit to the US is not yet available, the statement at the end of the visit offers some indication that governance gaps will be addressed, if only briefly. The statement concludes: ‘Significant gaps appear to remain in regulation, oversight and enforcement in areas where business activities may adversely impact human rights.’²⁵⁴ The statement also reminded the US government that they are not prohibited from preventing or addressing rights violations by companies domiciled in their jurisdiction – an encouraging sign, indeed. However, the statement fails to note that US legislation actually protects corporate actors, and that they participate in numerous multilateral agreements that dismantle some labour rights.

In its statement at the end of the country visit to Ghana, the Working Group specifically addresses Guiding Principle 9, discussed at length above, regarding the state’s obligation to maintain policy space to enforce human rights obligations. ‘Bilateral trade and investment treaties should not constrain the Government of Ghana’s policy space for evolving the regulatory framework to protect rights, or for ensuring the progressive realization of economic and social rights.’²⁵⁵

²⁵³ Ibid 49-62.

²⁵⁴ Statement at end of US visit.

²⁵⁵ Statement at the end of visit to Ghana by the UN Working Group on Business and Human Rights Accra, 17 July 2013. Retrieved at: <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13547&LangID=E>.

This assertion from the Working Group is an appropriate statement on which to close this chapter, because it indicates the difficulties explored throughout the thesis. While it is important to note the significant human rights consequences of trade and investment treaties, these discussions are only beneficial if they ultimately reveal the power structures that are subverting the ability to protect human rights. As noted above, in many cases Ghana may be unable to maintain policy space due to power imbalances in these agreements. If Ghana's trade partners are listening, this may create a path for progress. But so far there is no one to hold them to account.

CONCLUSION

A clear arch has emerged across this dissertation. In the introduction and opening chapter, I argued that, while most posit that states have lost the ability to regulate global trade, it is crucial for states to reclaim their power to bridge governance gaps. In the second and third chapters, I presented a detailed argument for just how much power states wield in affecting the lives of workers in GVCs. In the final chapter, I discussed a promising turn in the UN, which is now prioritising state accountability for human rights violations by corporate actors. This latest movement reflects much faltering thus far, but I reaffirm that it is a promising development.

Of course, there are no simple solutions to a dilemma that seems to constantly grow more complex and, in turn, more vexing. However, any momentum towards prioritising state responsibility is important to sustain. At the same time, I do not suggest terminating efforts that utilise private governance. These efforts have made some crucial progress, and, just as importantly, they have already built a grassroots foundation that could be used to lobby states – both developed and developing – to seek remedies.

In truth, it is most likely that a hybrid form of public-private governance is our best bet. The problem is substantial enough that uncommon alliances must be forged. It is clearly not sufficient to simply boycott those brands that mistreat their labourers. Much like the corporations that penetrate so many state boundaries, communities must also be united across oceans and continents to struggle together on whichever democratic platform we can reach.

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