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## Decent work for homeworkers in global supply chains: Existing and potential mechanisms for workercentred governance

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# Decent work for homeworkers in global supply chains: Existing and potential mechanisms for worker- centred governance

Marlese von Broembsen  
Jenna Harvey

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# DECENT WORK FOR HOMEWORKERS IN GLOBAL SUPPLY CHAINS: EXISTING AND POTENTIAL MECHANISMS FOR WORKER- CENTRED GOVERNANCE

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## ABSTRACT

As informal wage-workers who lack recognition and legal and social protections, homeworkers face a range of decent work deficits. This paper analyses the potential of existing national and global governance mechanisms to address four of these deficits for homeworkers in global supply chains: Instability and insecurity of work; unsafe working conditions; poor wages; and a lack of freedom of association and the right to collective bargaining. We construct a typology that assesses each instruments' potential to address these decent work deficits in terms of: (a) the aspects of decent work that the instrument seeks to regulate; (b) the mechanisms that the instrument relies on to ensure compliance; and (c) the extent to which the instrument is legally enforceable, and by whom. Arguing for a plural, over-overlapping concept of governance – hard and soft, operating at national, regional and international levels – we offer suggestions for improving the instruments that hold most promise for protecting homeworkers. The paper concludes that enforcement of the provisions in these instruments that protect homeworkers is contingent upon strong social movements and, most importantly, the recognition and incorporation of representative organizations of homeworkers into governance processes.



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## 1. INTRODUCTION

Since the tragedy of the Rana Plaza building collapse in Bangladesh in 2013, the decent work deficits in global supply chains, and indeed the governance of global supply chains, have enjoyed renewed focus. The tragedy resulted in the Bangladesh Accord on Fire and Building Safety, the Bangladesh Alliance, and ultimately in the ILO's 2016 International Labour Conference (ILC) general discussion on global supply chains. The Conclusions to the ILC on Global Supply Chains states the following:

The ILO should review this issue and convene, as soon as appropriate, by decision of the Governing Body, a technical tripartite meeting or a meeting of experts to:

- (a) Assess the failures, which lead to decent work deficits in global supply chains.
- (b) Identify the salient challenges of governance to achieving decent work in global supply chains.
- (c) Consider what guidance, programmes, measures, initiatives or standards are needed to promote decent work and/or facilitate reducing decent work deficits in global supply chains" – ILO Resolution Concerning Decent Work in Global Supply Chains<sup>1</sup> (ILO, 2016)

Representative homeworker organizations, including the Indian Self-Employed Women's Association (SEWA) – which is a registered trade union confederation– participated in the ILC and succeeded in making homeworkers' contributions to global supply chains, and their decent work deficits, visible to the Conference. The ILO Conclusions recognize that homeworkers are part of global supply chains (GSCs)<sup>2</sup>, and therefore that the regulation of supply chains must include the regulation of homework.

The ILO has developed methodologies for measuring the four dimensions of Decent Work – Rights, Employment and Income, Social Protection and Social Dialogue. In addition, the 17th International Conference of Labour Statisticians (ICLS) (2003) report lists 29 basic indicators of decent work (ILO, 2003)<sup>3</sup>. As informal wage-workers who seldom enjoy legal recognition as workers and who

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<sup>1</sup> Full resolution available here: [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---relconf/documents/meetingdocument/wcms\\_497555.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_497555.pdf)

<sup>2</sup> As this paper emerged out of the 2016 ILC Discussion using the term global supply chains, we use the term global supply chain here rather than global value chains. Other terms, such as global commodity chains, global value chains, and global production networks are used by scholars from different traditions. For example, world systems theory scholars, who deploy a political economy lens on supply chains use the term "commodity chains" to signal the commodification of production. Since a meeting led by Fgary Gereff in Bellagio in 2000, a range of scholars from different disciplines use the term "global value chains". And, mainly geographers use the term "global network production".

<sup>3</sup> Full report available here: <http://www.ilo.org/public/english/standards/relm/gb/docs/gb289/pdf/icls-17.pdf>

lack social protection, homeworkers face a range of decent work deficits. This paper focuses on four of these: lack of stability and security of employment, lack of adequate earnings and productive work, lack of safe and healthy working conditions and lack of social dialogue and representation in collective bargaining forums.

We analyse the potential of existing governance mechanisms at the national and international levels to address these decent work deficits for all workers, including homeworkers. The paper is structured as follows: Part two outlines the sectors in which homeworkers are most prevalent and their decent work deficits; part three discusses the existing strategies of homeworker organisations in realizing aspects of decent work; part four creates a typology of governance mechanisms for global supply chains; parts five to eight review existing governance mechanisms and assesses their potential for addressing homeworkers' decent work deficits; part nine includes a comparative analysis of the governance instruments reviewed previously, which aims to assess the potential of these instruments for protecting homeworkers. Based on this analysis, suggestions for improving or adapting these to better protect homeworkers in global supply chains are outlined in part ten.

## 2. HOMEWORKERS: PREVALENCE, PRINCIPAL SECTORS AND DECENT WORK DEFICITS

From incense sticks to competition-grade soccer balls, a range of goods produced through global supply chains can be traced back to a workforce that is largely invisible, despite numbering in the millions – homeworkers. Homeworkers represent one of two categories of home-based workers. Specifically, homeworkers are sub-contracted home-based workers, meaning that they receive raw materials, specifications and orders for the production of goods from an individual or a firm (often through an intermediary) to produce goods or provide services from their homes (Chen, 2014). In contrast, self-employed home-based workers buy their own raw materials and sell their own finished products, which are usually, but not always, limited to sale in local markets (Chen, 2014). This paper focuses on homeworkers, as they are the group that is most clearly inserted into global supply chains.

Despite absorbing many of the risks and costs of production, most homeworkers earn well below a living wage, and often on an irregular basis. Although they are constrained by a lack of visibility and bargaining power to influence the conditions and terms of their work, their economic contributions to domestic and global supply chains are significant (Chen, 2014). In many ways, homeworkers are emblematic of the increasingly unequal landscape of global production, where workers further down global supply chains face decreased power and earnings and bear increasing costs and risks.

*Trends and magnitude*

Homeworkers produce or add value to goods for a range of different industries. Traditionally, their activities were limited to labour-intensive, and often skilled artisan work such as stitching, weaving, embellishing or craft-making (Chen 2014; ETI 2010). In recent years, however, homeworkers also assemble and package goods for the 'new economy,' including electronics, pharmaceuticals and auto parts (Chen 2014; ETI 2010). In some countries, homeworkers even provide information and communication technology (ICT)-related services such as editing, translating and transcribing (Chen, 2014).

Homeworkers represent a significant share of the workforce in many developing countries, especially in South Asia.<sup>4</sup> Studies<sup>5</sup> from the global research-action network Women in Informal Employment: Globalizing and Organizing (WIEGO) show that home-based workers (both self-employed and sub-contracted) make up a significant share of non-agricultural employment in the South Asian region, including 30 per cent in Nepal, 15.2 per cent in India, 12.1 per cent in Bangladesh, and 5.3 per cent in Pakistan (Raveendran and Vanek, 2013; Raveendran et al. 2013; Mahmud, 2014; Akhtar and Vanek 2013). Most often, statistics do not differentiate between sub-contracted workers and the self-employed.<sup>6</sup> However, estimations are possible. For example, in India, statistics show that of the 37.4 million home-based workers in 2013, 45 per cent are involved in making garments or textiles (Raveendran et al. 2013). When these data are contextualized with 1999 data that shows that 45 per cent of garment and textile workers were sub-contracted, it is possible to estimate that 5 million homeworkers in India are engaged in production for garment and textile supply chains (Raveendran et al. 2013). At a global level, anecdotal evidence from homeworker organizations such as SEWA and HomeNet, suggest that the workforce of homeworkers is large, growing, and constituted largely by women who are from the poorest households.

*Homeworkers in global supply chains: decent work deficits*

Homeworkers are inserted into chains through different sub-contracting arrangements. Generally, contractors provide homeworkers with work orders, specifications and raw materials and homeworkers assume most of the non-wage costs of production. Under some arrangements, contractors deliver raw materials and collect finished goods from homeworkers, although often the cost of travel is

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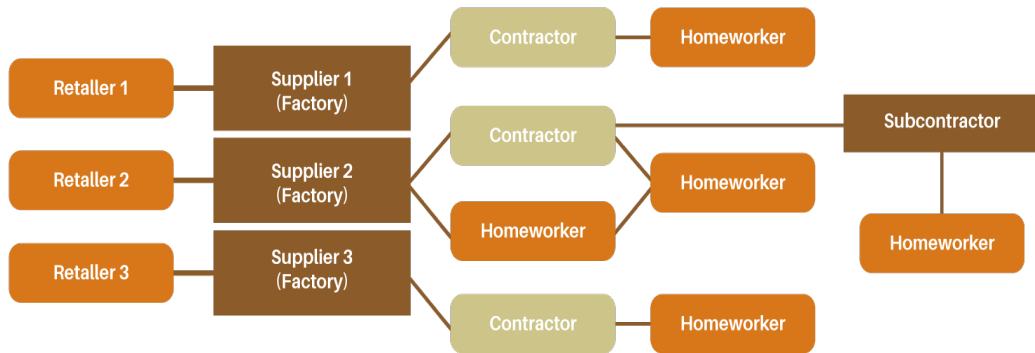
<sup>4</sup> The magnitude of home-based workers in general, and homeworkers in particular, is not captured by labour force surveys and population censuses in most countries, which complicates efforts to estimate their numbers and economic contribution. Often home-based workers are listed as unpaid domestic workers on censuses, to enumerators not being trained to recognize home-based work. This is complicated by many home-based workers not identifying and report themselves as workers.

<sup>5</sup> WIEGO has developed guidelines for measuring home-based work, based on status of employment, type of contract and mode of payment, that have been used to conduct in-depth analysis of labour force data in the four countries included here. For more on the study methods see WIEGO Statistical Briefs Number 9 -12 (listed in bibliography).

<sup>6</sup> The 19<sup>th</sup> International Conference of Labour Statisticians (ICLS), which took place in October 2018 revised the 1993 Employment Classification system and introduced a new category of work, namely "dependent contractor", which includes homeworkers. As countries apply the new International Classification of Status of Employment and include a question on place of work in their labour force surveys, this will hopefully change.

borne by the homemaker (Chen 2014). This also implies an opportunity cost of time spent traveling and not working.

**Figure 1: Possible production arrangement in a global supply chain (ETI, 2010)**



Homeworkers work from their homes, or from workshops around their homes. Their decent work deficits are in part attributable to governments (poor housing, insecure tenure, lack of basic infrastructure, lack of recognition as workers and denial of freedom of association and the right to bargain collectively with the factories and contractors that give them orders). Their decent work deficits are *also* attributable to multi-national enterprises' (MNEs) drive for labour flexibility. According to Standing (1999), labour flexibility has four principal aspects. First, 'production or organisational flexibility' refers to the off-shoring, outsourcing and subcontracting of production and the ability of MNEs therefore to 'contract out their employment function'. Second, 'wage system flexibility' targets the wage-costs of production – firms pursue strategies to reduce their wage costs. Homeworkers are paid less than factory workers, and less than minimum wages. Third, 'labour cost flexibility' targets the non-wage component of labour, including social protection (such as unemployment insurance), compensation for injuries at work, and supervision costs. Fourth, 'numerical flexibility' enables firms to hire when market demand is high and not hire when demand is low, and includes casual or seasonal employment contracts. This is different to outsourcing because there is still an employment relationship.

The aggregate implications of the four aspects of labour flexibility as firms pass down as many of these costs and risks to workers down the chain are particularly severe for homeworkers, even in comparison to factory workers. Specifically, they suffer the following decent work deficits:

- (i) *Instability and insecurity of work:* As homeworkers are only contracted when there is demand, they carry the risk of fluctuating demand and are therefore subject to irregular work and pay (Chen, 2014; ETI, 2010). Insecurity of work is also caused by contractors abusing their power and delivering incomplete raw materials,

arbitrarily rejecting finished products, and cancelling work orders (Chen, 2014).

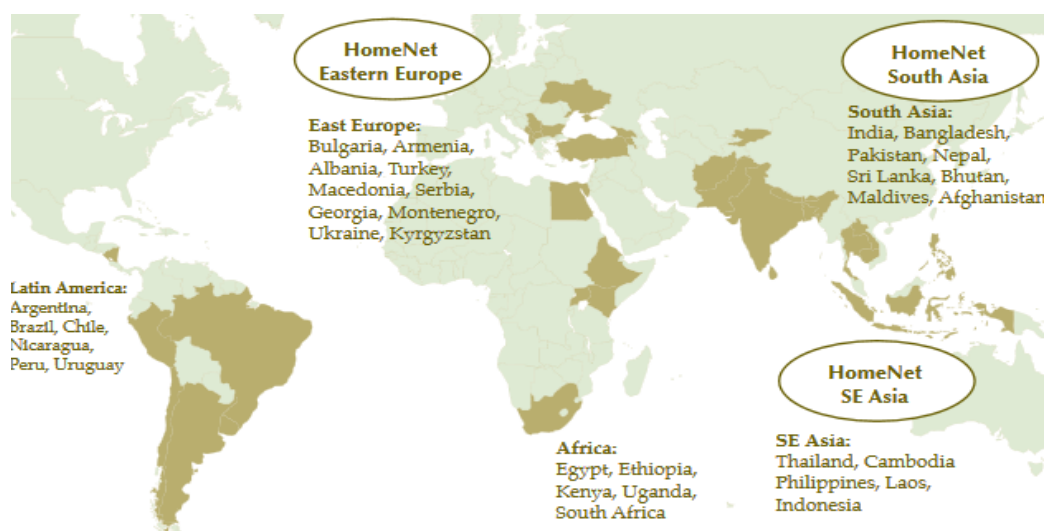
- (ii) *Unsafe working conditions:* Many homeworkers are subject to unsafe working conditions that are created in part by cramped space and a lack of ventilation (Chen, 2014). In addition, homeworkers typically bear the responsibility for ensuring that they are protected from hazardous toxic products and production methods and bear the cost of safety equipment. As discussed in part seven, Thailand has legislated that 'hirers' have a duty to provide and pay for safety equipment.
- (iii) *Poor wages (below a living, and minimum wage):* Most homeworkers are paid by the piece, at a rate set by the contractor. Earnings are usually low and delayed; partial payments are common. Withholding payment is often strategically used to disincentivise homeworkers from switching to other contractors (ETI, 2010). In addition, homeworkers absorb costs that are not reflected in their piece rates. For example, homeworkers carry non-wage costs of labour such as the costs of occupational health and injury, and for training. Whereas factory workers might also carry non-wage costs of labour, homeworkers carry an additional set of *production costs*, such as equipment costs, workplace rental, utilities (such as electricity), transport costs and the cost of safety equipment (Chen, 2014).
- (iv) *Lack of freedom of association and the right to collective bargaining:* The need for consistent work, lack of knowledge of product markets and market prices, and a lack of legal recognition as employees constrain homeworkers' ability to bargain for working conditions and wages (ETI, 2010) and their isolation from each other (by nature of their working from home) makes collective bargaining difficult. Homeworkers therefore stand to gain tremendously from affiliation with representative organizations with the right to collective bargaining. As described in greater detail in the following section, homeworkers *are* organizing – especially in South Asia – and are making progress in realizing decent work, although ongoing support to their organisations is needed.

### 3. LEARNING FROM THE STRATEGIES OF HOME-BASED WORKERS

#### *A global movement of home-based workers*

In the 1980s groups working with homeworkers (primarily in South East Asia and Europe) began to network, share information and exchange experiences within and across regions (Jhabvala and Tate 1996). The Self-Employed Women's Association of India (SEWA), the world's largest trade union of informal workers, facilitated international exchange and dialogue among groups (Jhabvala and Tate 1996). In the mid-nineties SEWA led an effort to form an international network of homeworkers, and to launch an international campaign for a convention on homework. This ultimately resulted in the formation of HomeNet in 1995, which served as a central platform for advocacy around the struggle for an ILO Convention on Homework. After the adoption of ILO Convention 177 on Homework in 1996, (which is described in more detail in part 5 of this paper), HomeNet (based in Europe at the time) dissolved, but organizing and network-building continued at the regional level, with the formation of HomeNet South East Asia (HNSEA) in the late 1990's and HomeNet South Asia (HNSA) in 2007. An additional regional network in the Balkans – HomeNet Eastern Europe – was formed in 2012, and organizing efforts are ongoing in Africa and Latin America.

**Figure 2: Regional networks of homeworkers and countries where homeworker organizations are present (shaded) (WIEGO, 2016).**



Twenty years after the adoption of Convention 177, homeworkers' organizations and their regional networks are active in advocacy efforts at local, national and global levels – lobbying national governments to ratify Convention 177 and legal protection for homeworkers. In addition, the regional HomeNets and SEWA have

provided training, capacity-building and organizing support to their members. The following section highlights some of these efforts by and for homeworkers.

### *National advocacy*

HomeNet Thailand, which forms part of HNSEA, has been at the forefront of national advocacy efforts, calling for progressive legislation and protection specifically for homeworkers. Over the course of 10 years, HomeNet Thailand, with the support of WIEGO, the ILO, HomeNet Southeast Asia, Foundation for Labour and Employment Protection (FLEP) and other allies, campaigned for a national Act that would establish homeworkers' labour rights and social protections (WIEGO, 2015). FLEP and HomeNet Thailand began by conducting an extensive review of existing legal instruments relating to labour rights and lobbying for these to be applied to homeworkers. Eventually these efforts culminated in the passing of the Homeworkers Protection Act in 2010 (described in more detail in part five). After the passing of the Act, HomeNet Thailand recognized that to ensure implementation, homeworkers needed to be informed of their rights under the law. To this end, information was disseminated through their website, newsletters and informational booklets, and public seminars and trainings were held in different parts of the country (WIEGO, 2015).

Other HomeNet organizations have engaged in similar efforts with national and local governments. Most recently, HomeNet Pakistan was instrumental in advocating for a homebased worker policy in both the Punjab and Sindh provinces (WIEGO, 2016a). The Punjab policy was approved in May 2015. However, despite these efforts there is continued resistance to the ratification of Convention 177 (by 2018, only 10 countries had ratified), and the development of progressive national policies for homeworkers. In this context, the regional HomeNets employ a dual strategy of engaging in advocacy at the national level or sub-national level, while continuing to build capacity and organize at the grassroots.

Much of the work of the regional HomeNets and their affiliates focuses on strengthening members' capacity to organize and advocate to realize their individual rights, and to strengthen the global movement of homeworkers. Funding from the Netherlands government for a three-year project called, 'Organized Strength for Home-Based Workers<sup>7</sup>,' meant that together with WIEGO, significant gains were made in building the global movement.

In collaboration with WIEGO, the regional HomeNet organizations and SEWA have produced case studies and carried out survey research, most notably the Informal Economy Monitoring Study on home-based workers in Lahore, Pakistan, Ahmedabad, India and Bangkok, Thailand (Chen, 2014). Most recently, in the context of the 2015 International Labour Conference on Global Supply Chains, HNSA conducted a study through its' membership-based organization (MBO) affiliates on homeworkers conditions. HomeNet Pakistan has also spearheaded a

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<sup>7</sup> For more on the project see: <http://www.wiego.org/wee/home-based-workers>



recent survey study on occupational health and safety conditions of home-based workers and domestic workers in Pakistan (Sinha and Mehrotra, 2016).

## 4. A TYPOLOGY OF GOVERNANCE MECHANISMS

In the 1990's, human rights and environmental abuses within the supply chains of major MNEs came to light, provoking a wave of backlash from consumer and activist groups (Lund-Thompsen and Lindgreen, 2014). In this context, many corporations began to adopt corporate social responsibility (CSR) initiatives to reduce public scrutiny and to build an appealing brand for discerning consumers. In addition, many global initiatives aimed to address decent work deficits in global supply chains, predominantly for factory workers, but also for homeworkers.

Existing typologies of instruments that seek to govern global supply chains tend to categorise them according to the nature of the stakeholders responsible for crafting the instrument. Governance mechanisms crafted by the private sector are called 'private initiatives,' those that are the outcomes of multiparty initiatives (that include civil society, unions and business) are called 'social,' and those that are agreed to by states are called 'multilateral.' This paper is concerned with determining which governance mechanisms are most effective for regulating global supply chains, including homeworkers. In our view, there are several dimensions to efficacy, including: (a) the range or aspects of decent work that the instrument seeks to regulate; (b) the mechanisms the instrument relies on to ensure compliance – which can range from self-regulation to disclosure requirements on websites, to attributing enforcement roles or duties to unions or governments; and (c) the extent to which the instrument is legally enforceable, and by whom. With respect to this last point two distinctions are key: first, the distinction between domestic and international law, and second, the distinction between hard and soft law. Below we explain the legal import of these two distinctions, which form the basis of our typology for evaluating a range of existing governance mechanisms.

### 4.1 International versus national law

International law, simply put, is concerned with relations among nation states, and domestic law is concerned with the relations among the state and its citizens. In the modern world, however, this distinction is not watertight and these two categories, whilst conceptually distinct, interact with one another. In fields such as human rights and environmental law, the same issue may be regulated in both international and domestic law, conflicts between these two areas of law may arise and the same dispute may be adjudicated in both international and domestic courts (Shaw, 2008). Two guiding principles have emerged. First, in the international legal arena, domestic law is subordinate to international law in the sense that a state that violates international law cannot justify its conduct by



claiming that it acted in accordance with its domestic law (Shaw, 2008). It is obvious why – a state could otherwise evade its international law obligations by enacting domestic law that sanctions its conduct. Second, in the domestic legal arena, the impact of international legal principles is complex, but it would be fair to state that there is a trend towards an increasing penetration of international legal rules into domestic legal systems (Shaw, 2008). Take, for example, the status of treaties in the context of domestic law. Treaties (which may also be referred to as Conventions, Declarations, Charters etc.) are a significant source of international law and are essentially no more than written agreements among states where the states bind themselves to act in a particular way.

Does a treaty binding a state automatically bind its citizens as a matter of domestic law? This question is answered differently in different countries. In the United Kingdom, the executive branch of government signs treaties, but the legislature has to enact national legislation for the treaty to form part of domestic English Law. In the United States, the position is different: Article VI, Section 2 of the US Constitution provides that treaties shall be the supreme law of the land and shall bind the judges in every state, notwithstanding anything to the contrary in the constitution or the laws of any state (Shaw, 2008). The US therefore signs few treaties! Most states require ratification of the treaty (usually by the legislature) before it becomes law. These issues must be borne in mind when considering the transnational regulation of supply chains, as the need and desire for international reach inevitably means that both international law and domestic legal systems will be applicable.

## 4.2 Hard versus soft law

Traditional (hard) law is often called ‘command-and-control’ law. This means that the law, a ‘command’, is backed up by a sanction, which is enforced by the state. Our behavior is also regulated by norms that have the effect of law because there are sanctions for non-compliance and/or incentives to comply, but these are not enforced by the state. Compliance with cultural norms – that women in some countries should be restricted to working in certain sectors or in their homes, for example – are enforced through social sanctions. Business norms might be enforced by consumers or other market actors. These non-state enforced sanctions are referred to as soft law or ‘new governance’ theories.<sup>8</sup>

Soft law is increasingly used in the international realm, and is most advanced in the European Union. Compliance with soft law is pursued in two ways. First, instead of using fines and sanctions to ensure compliance, compliance is encouraged, and incentivized, through other ‘soft’ techniques, such as developing benchmarks and indicators, requiring reports, publishing who has reached the benchmarks, disseminating best practice, and instituting peer review. Second, enforcement – holding the actors accountable – relies on

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<sup>8</sup> Scholars are developing different models and theories of this soft law governing behavior such as ‘responsive regulation’ (see Braithwaite 2006) and ‘reflexive regulation’ (De Schutter and Deakin, 2005). See Lobel (2007) for an expansive list. Lobel introduced the term ‘new governance’ as a collective term.

multiple stakeholders. Civil society, including consumer bodies, unions, NGOs and social movements, for example, are playing a significant role in governing corporations' behaviour toward the environment and labour. Some legal scholars claim that 'governance' is replacing command-and-control regulation:

Where regulatory goals have traditionally been pursued exclusively through statutory enactments, administrative regulation, and judicial enforcement, we now see new processes emerging, which range from informal consultation to highly formalized systems that seek to affect behavior, but differ in many ways from traditional command and control regulation. These processes, which we will collectively label 'new governance', may encourage experimentation; employ stakeholder participation to devise solutions; rely on broad framework agreements, flexible norms and revisable standards; and use benchmarks, indicators and peer review to ensure accountability (Trubeck 2006:541).<sup>9</sup>

The problem with soft law is that it does not legally bind the parties, and one cannot therefore approach a court or adjudicatory body for enforcement. That said, the rhetoric of rights, even in soft law instruments, can and does shift public consciousness on issues, which is often a precursor to hard law. Hard and soft laws interact when the state devolves some of its regulatory power to other actors to negotiate rules between them (for example collective bargaining agreements between unions and employers), or to self-regulate (for example supermarkets in food and safety standards). The state regulates to provide the framework or policy goals that have to be reached, but leaves the content of the goals to other market actors. Table 1 attempts – albeit in a stylized way – to illustrate how we might categorise the governance mechanisms that this paper reviews, from an enforcement perspective:

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<sup>9</sup>

**Table 1: A Typology of Governance mechanisms from an enforcement perspective**

	INTERNATIONAL	NATIONAL
<b>HARD</b>	<ul style="list-style-type: none"> <li>• Convention 177 on Homeworkers (if ratified and translated into domestic law).</li> </ul>	<ul style="list-style-type: none"> <li>• Employment law</li> <li>• UK Modern Slavery Act</li> <li>• Australia's Fair Work Act</li> <li>• Thailand's Homeworker Act</li> </ul>
<b>SOFT</b>	<ul style="list-style-type: none"> <li>• Private CSR initiatives</li> <li>• Multi-stakeholder CSR initiatives (Ethical Trading Initiative, Fair Wear Foundation)</li> <li>• UN Global Compact</li> <li>• UN Guiding Principles on Business and Human Rights (UNGPs).</li> </ul>	
<b>COMBINATION HARD/SOFT</b>	<ul style="list-style-type: none"> <li>• Global Framework Agreements</li> <li>• OECD Guidelines for Multinational Enterprises</li> </ul>	<ul style="list-style-type: none"> <li>• Labour Law: State provides the framework within which parties self-regulate</li> <li>• California Transparency in Supply Chains Act (2012)</li> </ul>

Source: Authors' design

The following section reviews some of the existing supply chain governance mechanisms using the above typology as a framework for analysis. In each case we address four questions:

- (i) What is the mechanism—who are the stakeholders that participate in, or are covered by, the governance mechanism and how does the mechanism work?
- (ii) Which aspects of decent work does it cover?
- (iii) How is it enforced?
- (iv) What is its potential to protect informal workers? With respect to this last question, we are particularly concerned with the mechanisms' potential for extending to homeworkers a living wage, stable and

secure employment, safe and healthy working conditions and freedom of association and bargaining rights.

## 5. INTERNATIONAL, HARD LAW: ILO CONVENTION 177

Historically, the ILO has been resistant to formally recognizing homeworkers as workers: homeworkers' representative organizations are still not offered official status in ILO deliberations. Prior to the adoption of Convention 177 on homework in 1996, the ILO's general stance on homework was that it was exploitative and that homeworkers were too disparate and isolated to be organized (Jhabvala and Tate 1996). The campaign for an international convention on homework was led by SEWA, which together with other homeworker groups coordinated their actions through the newly formed HomeNet, a centralized platform for advocacy toward a Convention. In the absence of formal representation at the ILO, HomeNet advocated homeworkers' demands through formal trade union channels, and received support from the International Union of Foodworkers (IUF), the International Confederation of Free Trades Unions (ICFTU) and the International Textiles, Garments and Leather Workers Federation (ITGLWF). Their principal demand in 1996 is the same today: equality of treatment with other wage workers (WIEGO, 2016).

In 1996, after two years of deliberations, the ILO passed Convention 177 (C177) on Homework. C177 seeks to achieve equality of treatment between homeworkers and other wage earners, and as such establishes homeworkers' rights to freedom of association, occupational health and safety, fair remuneration, freedom from discrimination, social security protection, access to training, minimum employment age and maternity protection (Article 4). C177 also calls for homeworkers to be included in national labour statistics to increase their visibility. The Convention marked the first time that the ILO covered a group of workers consisting primarily of women in the informal economy (WIEGO, 2016b).

The Convention further provides that the domestic laws of ratifying countries must include an inspection system to ensure compliance, as well as adequate remedies for non-compliance (Article 9). However, as pointed out previously, in most countries, Conventions must be ratified and incorporated into domestic law in order to acquire the force of law. This Convention states in terms that each ILO country member that ratifies it shall adopt and implement a policy on homework, which shall be implemented by national laws (Articles 3 and 5).

Unfortunately, this Convention has to date only been ratified by 11 countries. None of these countries are Asian, where homework is most prevalent. HomeNet argues that campaigning for ratification of C177 is important, even where countries (such as Thailand) have enacted domestic legislation to protect homeworkers. Their reasoning for this is that once governments have ratified a

Convention they have a duty to report on their progress to the ILO – which represents an important incentive for governments to enforce legislation.

## 6. INTERNATIONAL SOFT LAW

### 6.1 Corporate Social Responsibility (CSR) Initiatives

#### 6.1.1 Corporate codes of labour practice and private audits

As a part of their Corporate Social Responsibility (CSR) efforts in the 1990s, corporations developed private auditing initiatives based on ‘codes of conduct’ to monitor labour practices within supply chains. These initiatives broadly involved: (1) a corporate code of labour practice to establish social and environmental standards for production, and (2) an auditing process to monitor suppliers’ compliance with the code (Lund-Thompson and Lindgreen 2014).

These initiatives – variously referred to as code-based auditing, private social auditing, or the compliance-based model – vary significantly in scope and content. For example, codes may, or may not, be based on established international standards such as ILO Conventions, and audits may be carried out by first, second, or third party actors. The compliance-based models are enforced by buyers rewarding suppliers (by extending their contracts), or punishing their non-compliance (by reducing or severing contracts) (Lund-Thompson and Lindgreen 2014). Decisions that relate to code content, auditing processes, and enforcement are made by the buyer, and have traditionally been implemented in a top-down fashion.

Over the two decades since private, code-based audits appeared, the results from impact-assessments have led to a broad consensus among civil society and academics concerning CSR initiatives’ limitations to reduce the decent work deficits suffered by workers in global supply chains (Lund Thompson and Lindgreen 2014). In recent years, major retailers have publicly admitted their codes’ shortcomings in improving workers’ conditions (Barrientos and Smith 2007).

Three principal criticisms that are most relevant to evaluating the potential of CRS initiatives for protecting homeworkers are:

- (i) *Corporate practices undermine supplier compliance with codes:* Corporations’ procurement practices – including short lead time for orders, pressure on suppliers to meet price points and demand for quick turn-around and last-minute changes – undermine suppliers’ efforts to comply with codes (Barrientos and Smith 2007). To comply with codes of labour practice, suppliers must absorb the non-wage costs of better health and safety measures. When the pressure to comply is combined with constant pressure to improve production and simultaneously lower costs, many studies suggest that suppliers respond by disaggregating their workers – permanent workers

benefit, and temporary and sub-contracted workers act as a safety valve (Barrientos 2007, Gereffi and Rossi 2010; von Broembsen and Godfrey 2017). In other words, more workers are informalised to carry the costs of improving conditions of others. Logically, homeworkers act as an important safety valve as they have no bargaining power to resist the transfer of additional costs and risks to them.

- (ii) *Auditing deficiencies:* A principal criticism of the compliance-based model is that auditing processes are unreliable and opaque, which is largely attributable to misaligned incentives and power imbalances between buyers, suppliers, auditors and workers. For example, auditors rely primarily on information from management, rather than from workers or unions (Barrientos and Smith 2007). Where workers are consulted, management often tells them what they need to say to appease auditors – sometimes under threat of losing their jobs (Barrientos and Smith 2007). Auditors have also misreported on conditions when their continued business depends on continued relationships with suppliers or buyers (Lund-Thomsen and Lindgreen 2014). Finally, and most importantly for considering the potential of this approach to benefit homeworkers, audits have overwhelmingly focused only on first-tier levels of production, bypassing sub-contracted workers (Mares 2010). With very few exceptions (see the case on IKEA below), code-based audits stop at the factory floor and exclude mechanisms for homeworkers to voice their grievances. Homeworkers are often invisible to international brands, and homeworkers likewise often do not know which brands they produce for.
- (iii) *Prioritization of outcome-based standards over process rights:* Studies show that improvements in labour practice that stem from code-based audits are limited to tangible outcome-based improvements such as payment of a minimum wage and provision of a healthy and safe working environment (Lund-Thomsen and Lindgreen 2014; Barrientos and Smith 2007). Private social auditing has had significantly less impact on realizing workers' enabling rights, such as the right to freedom of association and collective bargaining, and freedom from discrimination (Lund-Thomsen and Lindgreen 2014; Barrientos and Smith 2007; Egels-Zandén and Lindholm 2015).

IKEA's approach to supply chain governance, which is widely touted as a best practice example, is decidedly less top-down than most other brands (Pedersen and Andersen 2006; IKEA and ILO 2015). IKEA's code of practice, called the 'IKEA Way on Purchasing Home Furnishing Products' (IWAY) is based on the eight core conventions that comprise the ILO Fundamental Principles and Rights at Work

Declaration.<sup>10</sup> IKEA works to develop long-term relationships with suppliers, and stresses the importance of communication and trust in this process. For example, rather than terminating contracts on the first instance of code non-compliance, IKEA works with buyers to improve their practices, even providing them with technical and financial assistance (Pedersen and Andersen 2006).

Nevertheless, IKEA concedes that its 'good intentions have not translated into decent work for those in the lowest tiers of its rattan supply chain' (Lim 2015:109). In 2015, IKEA partnered with the ILO to carry out a research initiative (not an audit), on IKEA's rattan supply chain in the Cirebon district of Indonesia. The study included interviews and focus groups with sub-suppliers and sub-contracted workers (both in weaving centres and homeworkers). Complaints cited by homeworkers included: low piece-rates, delayed payments, no platform for negotiating or bargaining with suppliers, unreliable supply and poor quality of raw materials and lack of workspace. Ninety per cent of the homeworkers interviewed in the study had never heard of IKEA's IWAY code. IKEA has responded by incorporating actions such as ongoing mapping of the chain, and instituting ongoing dialogue with homeworkers and suppliers (Lim, 2015).

The IKEA case suggests that even a strong code of labour practice that is implemented by a company committed to upholding worker rights in its supply chain, does not necessarily translate into decent work for homeworkers. Based on the overwhelming evidence that code-based private audits have failed to promote aspects of decent work even for factory workers, we argue that this approach – which can be classified as a 'private governance' measure – does not represent a promising option for protecting homeworkers.

### **6.1.2 Multi-stakeholder initiatives: Ethical Trading Initiative and Fair Wear Foundation**

Largely in response to the shortcomings of private efforts to reduce workers' decent work deficits, a range of multi-stakeholder initiatives have emerged that aim to improve CSR practices, while fostering cooperation and knowledge-sharing (Lund-Thomsen and Lindgreen 2014; Barrientos and Smith 2007). These initiatives include alliances among businesses, civil society and unions such as the UK-based Ethical Trading Initiative (ETI) and Dutch-based Fair Wear Foundation (FWF). Although their approaches differ, the alliances share several basic elements: to become an affiliate, a business must adopt the alliance's code of labour practice and must show demonstrable willingness and progress to comply with the code—the sanction for non-cooperation is termination of its membership.

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<sup>10</sup> The IWAY standards that relate to workers are within the areas of: worker health and safety, housing facilities, wages, benefits and working hours, child labour, forced and bonded labour, discrimination, freedom of association and harassment and abuse.

ETI's Base Code and FWF's Codes of Labour Practice are based on ILO Conventions and reflect seven of the ILO's ten elements<sup>11</sup> of decent work: a safe work environment, stability and security of work, equal opportunity and treatment in employment, decent working time, adequate earnings and productive work, social dialogue and employers' and workers' representation, and work that should be abolished (ETI 2016; FWF 2016). Both ETI and FWF expect members to conduct their own audits, which are evaluated to determine their progress towards code compliance, and identify where improvements are needed. FWF also conducts its own audits, either upon receiving a complaint from a member, or at a randomly chosen factory. Multi-stakeholder initiatives do not extend accreditation or certification to their members, although membership confers additional accountability to private audits.

Their multi-stakeholder structure and soft law compliance mechanisms (such as guidelines, support, and opportunities for knowledge sharing on best practices), mean these alliances represent a shift from a compliance-based to a cooperation-based, 'social' model of supply chain governance (Lund-Thomsen and Lindgreen 2013). Several studies show, however, that they nevertheless have so far shown limited impact on addressing workers' decent work deficits (Egels-Zandén and Lindholm 2015; Mares 2010). An independent 2006 evaluation of ETI members' supply chains by the UK Institute of Development Studies found some improvements in health and safety conditions, but little progress with respect to rights to freedom of association and freedom from discrimination (Barrientos and Smith 2006). Moreover, despite ETI offering detailed guidelines for integrating homeworkers into audits, the study found that any gains were restricted to permanent or regular workers in the upper tiers of production (Barrientos and Smith 2006).

A 2015 study of FWF member companies similarly reports that while there were improvements in overall supplier performance, these improvements were marginal and did not include the realization of rights to freedom of association and collective bargaining (Egels-Zandén and Lindholm 2015). Together these findings suggest that many multi-stakeholder initiatives suffer from the same shortcomings as private code-based audits. This might be attributable to ETI and FWF requiring only incremental, intentional progress of member companies towards codes of labour practice, rather than full compliance. Nevertheless, these and other multi-stakeholder initiatives (such as the Fair Labour Association), have served as platforms for dialogue, research and sharing of best practices among business, civil society, unions, and academics that can shift public consciousness—which plays a significant role in generating the political will to make hard law in this area.

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<sup>11</sup> The ILO established ten elements of decent work (that correspond to the four pillars of the decent work agenda) in 2008. The three elements not reflected in the labour codes of ETI and FWF are: combining work, family and personal life; social security and employment opportunities.



Moreover, these alliances have the potential to produce projects that hold some promise for addressing homeworkers' decent deficits. For example, for over a decade the ETI has engaged in local-level work in Northern India, establishing the multi-stakeholder National Homeworker Group, which works directly with actors throughout the supply chain, offering training, linking homeworkers with government services, and promoting dialogue between homeworkers, suppliers and retailers (ETI, 2016). Based on this on-the-ground experience and engagement with organizations of homeworkers like SEWA, ETI has developed a range of resources for retailers and suppliers to address issues with homeworkers in supply chains, including online courses, toolkits, case studies and informational guides.

### 6.1.3 United Nations Global Compact

The United Nations Global Compact (the 'Compact') was launched in 2000 as an effort by the United Nations to encourage businesses to adopt ten principles relating to human rights, labour, environment and anti-corruption, and to report on the implementation of practices related to these. The Compact is allegedly the world's largest 'corporate sustainability initiative' with approximately 12 000 participant organizations, including approximately 8 000 businesses. Notable multinational companies that have signed the Compact include: Starbucks, L'Oréal, Bayer, Coca-Cola, 3M and Deloitte.<sup>12</sup> The Compact principles relevant to home-workers include the following:

- (i) Principle 1: businesses should support and respect the protection of internationally proclaimed human rights;
- (ii) Principle 2: make sure that they are not complicit in human rights abuses;
- (iii) Principle 3: businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining;
- (iv) Principle 4: the elimination of all forms of forced and compulsory labour;
- (v) Principle 5: the effective abolition of child labour; and
- (vi) Principle 6: the elimination of discrimination in respect of employment and occupation.

The Compact is not a binding international legal instrument, rather it is a forum for social dialogue among governments, companies, labour organisations and civil society. The Compact has been criticised for this clear lack of enforceability. Most importantly for the purposes of this analysis, the Compact does not

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<sup>12</sup><http://www.starbucks.com/responsibility/learn-more/un-global-compact>  
<http://www.loreal.com/group/governance/acting-ethically/l%E2%80%99or%C3%A9al-supports-the-united-nations-global-compact>; <http://www.bayer.com/en/global-compact.aspx>; 'Archived copy'. Archived from the original on February 4, 2016. Retrieved January 26, 2016.  
<https://web.archive.org/web/20160204121704/http://www.cocacolaellenic.com/sustainability/unglobalcompact>; [http://www.3m.com/3M/en\\_US/sustainability-us/policies-reports/global-compact/](http://www.3m.com/3M/en_US/sustainability-us/policies-reports/global-compact/)

explicitly recognise homeworkers as workers. In the absence of mechanisms for ensuring corporate accountability, and without an explicit recognition of homeworkers, the Compact does not provide a promising approach for expanding decent work for homeworkers within global supply chains.

## **6.2 Multilateral initiatives**

### **6.2.1 United Nations Guiding Principles on Business and Human Rights**

The United Nations' Guiding Principles on Business and Human Rights ('Guiding Principles') were endorsed in 2011 and represent the first UN endorsed *corporate* human rights responsibility instrument (Ruggie, 2011). Like the MNE Declaration and the OECD Guidelines, the Guiding Principles do not constitute international law in that they cannot be ratified by a national state for domestic application. The principles therefore do not impose any binding legal obligations upon states or corporations. Nevertheless, the Guiding Principles represent an important instrument as the first framework that outlines the responsibilities of corporations to respect human rights, based on human rights treaties. Specifically, the Guiding Principles have three pillars: 1) the state's duties to protect human rights; 2) the corporation's responsibilities to respect human rights and 3) access to remedy (Ruggie 2011). The key principles that relate to the state's duties are to:

- (i) Regulate the activities of their corporations in other countries. This is a form of extra-jurisdictional exercise of state power, and is significant, as it is not required by international law.
- (ii) Enforce existing laws – including labour laws – that protect human rights, and to encourage, and even require corporations to 'report on their human rights impacts'. Reporting may take the form of 'informal engagement with affected stakeholders to formal public reporting' (Ruggie 2011:6).
- (iii) Ensure that human rights are respected in their own supply chains (public procurement chains).
- (iv) Establish adequate complaints mechanisms to deal with alleged human rights violations.

To establish a framework for the responsibilities of businesses, the Guiding Principles refer to two international legal instruments: The International Declaration of Human Rights and the ILO Declaration on Fundamental Principles and Rights at Work. Businesses have the responsibility to address 'human rights impacts' which they have caused or contributed to through their activities, and also to 'prevent or mitigate' behavior by other actors in their supply chains (such as suppliers or subcontractors) that violate workers' rights, even where they have not contributed to those violations. Business is expected to fulfill this responsibility by:

- (i) Drafting a policy *commitment to human rights* that is communicated to all of its stakeholders, and that is reflected in its business practices;
- (ii) Undertaking a *due diligence process* to translate this commitment into practice and by addressing behavior that impacts on workers' human rights;
- (iii) Implementing a *remediation process* for people who are subject to a human rights abuse to have recourse to a remedy. Specifically, businesses must establish an operational level grievance mechanism (Ruggie 2011).

Homeworkers are not explicitly referred to, although they are covered implicitly. Of particular significance to homeworkers is the requirement for businesses to engage in 'meaningful consultation' with '*individuals* from groups or populations that may be at heightened risk of vulnerability or marginalization' and with *groups* that might potentially be at risk (Ruggie 2011:19). The Guiding Principles stipulate that business should take the following steps to identify potential human rights impacts on vulnerable populations: 1) Identify which groups might be affected; 2) List the 'relevant human rights standards' that apply to this group and 3) Identify potential adverse human rights impacts for the group based on the specific production activity that they perform, and the business relationship underpinning it (Ruggie 2011:20). Presumably the provision suggests that a sub-contracting relationship, for example, has greater potential for human rights abuse than an employer/employee relationship.

The Guiding Principles outline various ways in which business should act to prevent or mitigate potential human rights violations, including 'capacity building'. If the corporation does not enjoy the necessary 'leverage', it should consider terminating the relationship. While the Guiding Principles recognize that the supplier might be critical to the corporation's business, they state that 'for as long as the abuse continues and the enterprise remains in the relationship, it should be able to demonstrate its own ongoing efforts to mitigate the impact *and be prepared to accept any consequences – reputational, financial or legal – of the continuing connection*' (our italics) (Ruggie 2011:22).

In terms of remedies, states have the responsibility to ensure that individuals are protected against possible human rights abuses stemming from business activities through appropriate legislation, access to civil and criminal courts, administrative bodies, human rights institutions, national contact points, labour tribunals, mediation, 'or other culturally appropriate and rights compatible processes' (Ruggie 2011:30). Additional remediation measures include: 'an apology, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition.' Businesses must establish 'operational-level grievance mechanisms' that can serve as the first port of call. Parties cannot enforce the Guiding

Principles through a court case before a national or international tribunal based on the Guiding Principles themselves. Only to the extent that the Guiding Principles have been incorporated in domestic legislation could the Principles (or, more correctly, the domestic legislation in question) be enforced in the applicable domestic tribunal. This ‘soft law’ status of the Guiding Principles may, however, be in the process of change.

In September of 2013, Ecuador (backed by 84 other governments), proposed that a binding legal instrument be created for the operations of transnational companies in order to provide appropriate remedies to the victims of human rights abuses arising from their activities. The call was supported by more than 530 civil society organisations and, on 26 June 2014, the United Nations Human Rights Council passed a resolution to establish an intergovernmental working group mandated to draft a binding instrument on human rights and transnational corporations. The UN Open-ended Intergovernmental Working Group on Transnational Corporations and other Business Enterprises has held three consultative sessions. States, Employer groups, trade unions and NGOs participated in discussions. A draft instrument was discussed at its third session in October 2017. Comments by states and other stakeholders on this draft instrument were due in February 2018. The Working Group’s fourth session, which is to be held later this year, is meant to draft the final document for submission to the Human Rights Council.

The Worker Group at the ILC on supply chains proposed that the Principles be incorporated into the MNE Declaration and that the Declaration become a Convention. As the next section explains, in the eight months since the Conference, the ILO MNE Declaration has been revised to incorporate the Guiding Principles, but has not translated to a Convention.

### **6.2.2 ILO Multinational Enterprise (MNE) Declaration**

In November 1977, the ILO adopted the ‘Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy’ (‘the Declaration’) (ILO, 2017). The Declaration was agreed to by the tripartite body at a time when production was mostly vertically integrated and the principles related therefore to MNEs, their subsidiaries, and their respective employees; at that time homeworkers were not covered by the Declaration. The Declaration lays down principles in four areas—employment, training, conditions of work and life and industrial relations—that conform ILO Conventions that were then in existence. In 2000 and 2006, amendments to the Declaration were approved that reflected changing international labour standards and shifts in the nature of global production. The most recent change to the Declaration came in 2017, when, following the ILC on global supply chains, the Declaration was updated to incorporate the UN Guiding Principles (ILO, 2017). As a result, the Declaration now implicitly covers homeworkers in the same way as the Guiding Principles described above.

The Declaration is a voluntary instrument, meaning that it cannot be adjudicated by any international adjudicatory body.<sup>13</sup> MNEs are merely ‘invited to observe the principles embodied’ (paragraph 2). However, while not binding, the Declaration does recommend for national focal points to be established to promote tripartite dialogue and for information sharing between governments, employers and workers.

### **6.2.3 The OECD Guidelines for Multinational Enterprises**

The most recent version of the OECD Guidelines for Multinational Enterprises (‘the Guidelines’) were adopted in May 2011 by the 42 OECD and non-OECD countries that adhere to the OECD Declaration on International Investment and Multinational Enterprises.<sup>14</sup> Like the MNE Declaration and the UN Guiding Principles, the Guidelines are non-binding (in the form of ‘principles’ and ‘standards’), but apply specifically to businesses that are operating from, or in signatory countries to the Guidelines. The Guidelines are intended to cover ‘all major aspects of corporate behaviour,’ not only industrial relations (OECD 2011:37).

The 2011 version of the OECD Guidelines incorporates the UN Guiding Principles. Specifically, a chapter on human rights was added to the Guidelines, which directly incorporates the UN Guiding Principles “protect, respect and remedy” framework. Under this framework, the duties of businesses to respect human rights and remediate human rights abuses are the same as those outlined in the UN Guiding Principles (described in the previous section), and are grounded in international instruments including: the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights and the Declaration on Fundamental Principles and Rights at Work.

In addition, the updated version of the Guidelines includes a focus on supply chain management, and apply the risk-based due diligence process to every area covered by the Guidelines. Specifically, the Guidelines stipulate that in order to meet their responsibility to respect human rights, MNEs should undertake human rights due diligence including in its supply chain, to assess whether any act or omission in the production process might be causing human rights violations to workers (these rights being found in the above mentioned international instruments). The commentary in Chapter II on General Principles clarifies that due diligence involves identifying, preventing, mitigating and accounting for ‘actual and potential adverse impacts,’ which are ‘caused or contributed to by the enterprise or are directly linked to their operations, products or services by a business relationship’ (OECD 2011:23). Further, the term ‘business relationship’ is defined as ‘relationships with business partners, entities in the supply chain and any other non-state or state entities directly linked to its operations, products or

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<sup>13</sup> If, however, a particular principle in the Declaration reflects an ILO convention that has been ratified by particular countries and the countries promulgated legislation to give effect to the ratification then that principle would be binding in those countries and capable of adjudication and enforcement.

<sup>14</sup> The OECD Guidelines were first signed in 1976. Today there are 47 adhering countries.

services' (OECD 2011:23). Through establishing a responsibility for companies to account for adverse human rights impacts that they could have caused, contributed to or be linked to - through not only their direct actions but also those of *other entities in the supply chain* - the Guidelines implicitly cover homeworkers.

Chapter V on Employment and Industrial Relations establishes key labour rights including the right to freedom of association and collective bargaining. The chapter outlines the following responsibilities for corporations to realize these rights:

- (i) Provide worker representatives with the facilities necessary to organise workers for purposes of collective bargaining;
- (ii) Provide representatives with the information they need to conduct meaningful negotiations;
- (iii) Take 'adequate steps' to provide occupational health and safety 'in their operations.'

In its discussion of the employment relationship, Chapter V further establishes that the Guidelines cover workers throughout the supply chain by referencing the supply chain provisions outlined in Chapter II (described above). Specifically, the commentary for Chapter 5 states that 'in the absence of an employment relationship, enterprises are nevertheless expected to act in accordance with the risk-based due diligence and supply chain recommendations [in Chapter II] (OECD 2011:38).' The Commentary on Chapter II explains that if the MNE has many suppliers, it should assess 'where the risk of adverse impacts is most significant' and identify particular suppliers for a due diligence investigation (OECD 2011:24). If the company has contributed to the violation, it should stop and remedy the human rights violations that occurred as a result of its contribution. If there is a rights abuse by a supplier, to which the MNE has not contributed but is directly linked, then the MNE is tasked with 'using its leverage' so that the supplier to 'mitigate' the 'adverse impact' (OECD 2011:24) Failing this, the MNE is expected to cease production relations with the supplier.

However, the Guidelines also urge companies to consider possible negative impacts of disengagement: 'The enterprise should also take into account potential social and economic adverse impacts related to the decision to disengage' (OECD 2011:25). The Commentary suggests that the MNE's course of action should be guided by how much leverage it has over the guilty actor, how serious a human rights impact would be attributable to the act or omission, how important the relationship is to the supplier, and whether termination of the relationship with the offending party might have adverse impact on human rights. If the supplier is critical to the MNE's operations, the MNE is not obligated to remedy the human rights violation.

Enforcement, which is ‘soft’, takes two forms. First, countries that adhere to the Guidelines must establish a ‘National Contact Point’ (NCP) that can take a number of institutional forms (including one or more government ministries or officials, an independent body or others). NCPs are tasked with promoting and implementing the Guidelines. The NCP’s role is limited, however, to assisting MNEs with implementation of the Guidelines, including by serving as a forum for dialogue, and by providing mediation/conciliation services.

Trade unions and NGOs are able to submit complaints to these NCPs concerning violations of the Guidelines by MNEs. In countries with an effective NCP these complaints have had some success. For example, in a case brought against the UK-based company Vedanta Resources plc, by the indigenous rights organization Survival International, the UK NCP ruled against the company for having not engaged in “meaningful consultation” with an Indian indigenous community before proposing the construction of a mine on proximate land (Backer 2009). Also, businesses are encouraged to have internal ‘operational-level grievance mechanisms’ and to use to NCPs mediation/conciliation services as well as ‘international dispute settlement mechanisms, including arbitration’ and courts (Ruggie, 2011: 24).

In 2017, the OECD published the “OECD Due Diligence Guidance for Supply Chains in the Garment and Footwear Sector” that applies the OECD Guidelines for Multinational Enterprises and the UN Guiding Principles to a sector in which homeworkers are most prevalent, and includes provisions on homeworkers (OECD, 2017). Specifically, the module on “responsible sourcing from homeworkers” includes a framework for “preventing and mitigating human rights and labour abuses when engaging homeworkers” (OECD 2017:182). The framework advocates the gradual formalization of homeworkers and legalization of their work through the issuance of contracts and/or authorizations, recognition of worker status and provision of legal identity. In line with the UN Guiding Principles, the recommendations for enterprises include identifying potential and actual harms to homeworkers, and preventing and mitigating harms to homeworkers present within the supply chain – whether they were directly or indirectly caused by the enterprise. These guidelines emphasize the importance of organization for homeworkers but do not include reference to the importance of recognizing existing organizations of homeworkers are partners in the due diligence process.

Also, although these recommendations do represent progress in recognizing the role of homeworkers in supply chains, its potential to motivate businesses to provide protections is limited by the fact that it is a voluntary, non-binding set of recommendations. However, it does have potential to serve as an advocacy tool for homeworkers organizations and allies and to lend legitimacy to their rights claims.



## 7. INTERNATIONAL LAW: COMBINATION HARD AND SOFT LAW

### 7.1 Legal status of the Global Framework Agreements

Global Framework Agreements (GFAs) are agreements that are concluded between global union federations (international workers' organisations that operate at a sectoral level), and individual multinational corporations (Papadakis et al. 2007). Their purpose is two-fold: First, to establish an institutional framework for the union and the particular corporation to negotiate issues – either specific to production in particular countries, or with respect to industrial relations in general, and on an on-going basis. Second, to agree to working conditions, in particular recognition of the right to freedom of association and collective bargaining (Papadakis et al. 2007).

Most often GFAs are considered 'soft law' because there is no international legal framework that recognizes collective agreements at the international level, and they are not recognized at the domestic level. Therefore, if the agreement is breached, the offending party cannot be taken to court. However, while this view is accurate, there are ways in which GFAs can be adjudicated, which is why we argue that GFAs constitute a combination of hard and soft law. GFAs are regarded as soft law for two reasons (Sobczak 2007):

- (i) Domestic labour law generally recognizes two categories of collective agreements –sectoral agreements and company or plant-level agreements. The signatory to a GFA is usually a sectoral union, on the one side, and a corporation (as opposed to a sector), on the other. A GFA therefore does not fit into either recognized category.
- (ii) Usually a GFA is signed by a holding company on behalf of its subsidiaries, subcontractors and suppliers. In law, the holding company does not have the authority to make commitments on behalf of the subcontractors and suppliers, who therefore cannot be held legally accountable.

Sobczak (2007) argues that GFAs can be translated into 'hard' law if national level unions co-sign the GFA and if the holding company integrates the GFA terms into its supply contracts with subsidiaries, suppliers and sub-contractors. The GFA can then be recognized as a collective bargaining agreement in the national union's country. A GFA signed by H&M and IndustriALL in 2015 specifically provides that the parties 'will jointly promote signing of collective agreements both at factory, company and industrial level between relevant social partners' (IndustriALL 2016:7).

Typically, GFAs include the ILO core standards, including the right to freedom of association and collective bargaining, workplace equality, health and safety standards, right to information and training, environmental protection, and a ban on child and forced labour (Schmidt et al. 2007). Some GFAs, such as the



agreement between Faber-Castell Corporation and the International Federation of Building and Woodwork Workers, which was signed in 2000, includes additional provisions relating to HIV/Aids prevention and housing, for example (Hellmann 2007).

## **7.2 Global Framework Agreement between H&M and IndustriALL**

The IndustriALL/H&M agreement is a Best Practice GFA that explicitly includes homeworkers. This next section outlines the key features of the agreement – both to explore how it works, and how it might include homeworkers more effectively. The agreement has specific provisions that relate to freedom of association and collective bargaining, non-discrimination, child and forced labour, ‘recognised employment’, ‘fair living wages’, working hours and health and safety. Under each of these provisions, the agreement mentions the relevant ILO Conventions and Recommendations, which are incorporated as terms of the agreement. While the agreement specifically includes homeworkers, ILO Convention 177 on Homeworkers is not referred to under any of the above provisions and is therefore not explicitly part of the agreement.

H&M ensures that the agreement is enforceable against its direct suppliers, which are required to sign its ‘Sustainability Commitment’. Both parties agree to facilitate plant level collective agreements and to provide training to their respective constituencies to promote compliance with the GFA. An innovative provision ‘encourages’ employers to ‘provide alternative insurance for employees, including medical and retirement insurances’ if social security provision in the country in question is inadequate (IndustriALL 2016:3).

GFAs often include monitoring systems (e.g. by a special committee of the co-signatories, meetings between management and worker representatives) and grievance procedures, which also cover agreements with suppliers and subcontractors (Hellmann 2007; Sobczak 2007). The IndustriALL and H&M GFA provides for three-tiered monitoring and grievance system: at global level a six-person committee comprised of union and corporate representatives; country-level committees with representatives of workers and employers; and plant-level committees. The parties provide for information dissemination and training (which is ‘encouraged’ rather than mandatory), and a grievance mechanism is put in place that enables employees to put forward complaints, without risk of retaliation.

H&M undertakes that it ‘will actively use all its possible leverage to ensure that its direct suppliers respect human and trade union rights in the workplace’ (IndustriALL 2016:1). For example, when IndustriALL affiliates in two factories in Pakistan and Myanmar reported abuse to IndustriALL, H&M’s local office put pressure on its suppliers to engage in social dialogue with dismissed workers, who were ultimately reinstated with back-pay. In the case of Myanmar, the dispute was resolved when the supplier recognized the workers’ union (IndustriALL 2016).

While homeworkers are covered by the GFA, there is no duty on H&M to oblige its suppliers to disclose the details of its sub-contractors' arrangements, nor on sub-contractors to disclose the details of homeworkers. With no disclosure requirement, homeworkers remain invisible. Moreover, homeworkers could easily lose their work were they to attempt to enforce the provisions of the GFA. While the GFA has potential to protect homeworkers, its current formulation is unlikely to have a meaningful impact on reducing homeworkers' decent work deficits, including for these reasons:

- (i) *Most homeworkers don't know which label they are supplying for:* WIEGO's partners (SEWA and regional HomeNets) report that attempts to identify actors further up the chain stopped at the third level when homeworkers received threats that they would lose their work if investigations continue. In a recent multi-country study, the homeworkers knew and disclosed the brand they were working for. Later, the workers refused to be interviewed for fear of losing their work. Workers who finally agreed to interviews did so on condition that the brand would not be named (Mehrotra and Sinha 2016).
- (ii) *Membership-based organizations of homeworkers are not currently represented in governance structures responsible for monitoring and/or addressing grievances:* Collective bargaining agreements for homeworkers are critical to this endeavor. Homeworkers must therefore be represented in the governance structures, at least at city-level.
- (iii) *Lack of clear information about implementation:* The agreement does not make provision for, or indeed even mention, how the 'know-your-rights' information and training will be implemented for homeworkers, who are dispersed and therefore 'invisible', nor how a living wage for homeworkers, who are paid piece-rates, will be implemented.

The GFA between Inditex and IndustriALL provides that suppliers have to have written consent from Inditex to sub-contract and suppliers are responsible for their subcontractors' compliance with the terms of the GFA (IndustriALL 2016). In the absence of any disclosure requirements, grievance procedures and no homeworker representatives on the monitoring committees, it is difficult to see how this is enforced effectively. However, GFAs certainly have the potential to protect homeworkers, and in Section 10 we make specific proposals for how this potential might be realized.

## 8. NATIONAL HARD LAW

The national legal strategies reviewed here fall into two categories that target different ends of the supply chain. The first category addresses the bottom of the chain – homeworkers – and seeks to provide them with legal recognition as workers, and to establish rights and protections (these strategies include the

inclusion of homeworkers in national employment legislation and specific legislation for homeworkers). The second category addresses the top of the chain – lead firms or MNEs – and seeks to regulate their business practices that lead to ‘violations’ that are set out in the legislation, by creating disclosure and other duties (this includes supply chain legislation).

### **8.1 Inclusion of homeworkers in existing national employment legislation**

As stated by the ILO’s Recommendation 198 on the Employment Relationship, ‘worldwide, there is increasing difficulty in establishing whether or not an employment relationship exists in situations where (1) the respective rights and obligations of the parties concerned are not clear, or where (2) there has been an attempt to disguise the employment relationship, or where (3) inadequacies or gaps exist in the legal framework, or in its interpretation or application’ (ILO, 2006:3). Several countries have extended rights and protections contained in their employment and/or labour relations to homeworkers.

Most often the legislation creates a presumption that the homeworker is an employee, which triggers statutory and collective bargaining rights enjoyed by employees. These countries include Belgium (Act on Employment Contracts 1978); Morocco (Labour Code 2004); and New Zealand (Employment Relations Act No. 24 of 2000). Some countries, such as the Netherlands, have a legal presumption that all work relations are employment relations and workers are not required to produce evidence of a formal worker-employer relationship. Other countries that have amended their Labour Relations Act to include presumptions that indicate economic dependence include South Africa (Section 200 of the Labour Relations Act) and Argentina (Section 62 of the Labour Code). The Canadian and Tanzanian legislation have different criteria that workers need to meet to show dependency. It is beyond the scope of this paper to evaluate the effects of formal inclusion on the rights of homeworkers.

### **8.2 Specific legislation for homeworkers**

#### *Thailand’s Homeworkers Protection Act of 2010*

Thailand has specific legislation for homeworkers that represents a major victory for Thai activists and for homeworkers around the world. In 2004, under pressure from HomeNet Thailand and other allied groups, the Thai government issued a Ministerial Regulation for the Protection of Homeworkers. As the regulation failed to address fair wages and social protection, HomeNet Thailand continued to pressure the Thai Ministry of Labour (WIEGO, 2015). As a result of the efforts (described in more detail in Section III of this paper), of HomeNet Thailand and allies, in 2010 the Thai Parliament passed the Homeworkers Protection Act. The Act offers wide-ranging and practical protection for home workers. It is innovative in a number of respects:

- (i) First, the Act stipulates that contracts must be written (which they often are not) and that a copy must be given to the homeworker.

This stipulation addresses a common complaint from homeworkers—that they sign a contract, (the terms of which are unilaterally decided on by the contractor), and are subsequently not given a copy.<sup>15</sup> Further, the Act has the unusual provision that where such a contract gives the hirer an ‘undue advantage’, the court has the power to order that the terms of the contract only be enforced in so far as the terms of the contract are reasonable (sec 8).

- (ii) Second, the Act states that payment to homeworkers must be made within seven days of delivery of the finished products at the homeworkers’ place of work, and that only limited deductions may be made from such payment (sec 19).
- (iii) Third, the homeworker must be informed that work is hazardous or involves toxic substances, if that is the case, and the hirer must provide safety equipment. Hirers are required to pay for medical expenses, rehabilitation or funeral expenses where the Act’s provisions concerning hazardous work are contravened (sec 24).
- (iv) Fourth, oversight of the Act is carried out by a tripartite committee comprised of Director Generals from several Ministries, three homeworker representatives, and three ‘hirers’.
- (v) Fifth, the Act facilitates litigation by home workers. Section 6 provides that where it is believed that a particular case by a homeworker against a hirer is ‘*for the common good*’, the State will appoint a legal representative to conduct the case on behalf of the home worker in the Labour Court.

Enforcement of these significant and far-reaching provisions relies on homeworkers knowing what their rights are, and having the ability to access the complaint mechanisms. To this end, HomeNet Thailand has conducted ‘know-your-rights’ training for its members and the ILO is supporting the government and homeworkers to conduct a pilot in two provinces to enforce the Act.

### 8.3 Specific legislation for supply chains

#### *California Transparency in Supply Chains Act, 2010*

The California Transparency in Supply Chains Act stipulates that all retailers and manufacturers that do business in California, have a turnover of more than 100 million USD, and are identified by the State Tax Board are required to (Harris 2015):

- (i) *Publish information* on training, auditing, verification processes and certification of their suppliers, as well as report on accountability mechanisms within the company.

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<sup>15</sup> See Platform of Homeworkers’ Demands (<http://wiego.org/resources/decent-work-homeworkers-global-supply-chains-platform-demands>) drafted by homeworker representatives from 12 countries in Ahmedabad in March 2016. One of the authors was in the working group that focused on contracts.

- (ii) *Report* on whether they have acted against violations in the chain. They are not however, required to take action.

The Act stipulates that company disclosures should be published on the company's website or within 30 days of a consumer's request for information. The only state remedy for enforcement is for a union or consumer body to report the company to the Attorney General (AG) for failure to disclose. Subsequently, the AG would issue an injunction for the company to comply. The Act uses soft law compliance techniques, by providing examples of good practice disclosures, for example.

#### *United Kingdom Modern Slavery Act of 2015*

The UK's Modern Slavery Act (2015) requires 'any commercial organization which carries on business in the United Kingdom' with an annual turnover greater than Sterling 36 million to prepare a 'slavery and human trafficking statement' each financial year. The statement must include:

- (i) A description of the steps which the organization has taken during the financial year to ensure that slavery and human trafficking is not taking place in any of its supply chains or a statement that the organisation has taken no such steps.
- (ii) Information about the organisation's policies and due diligence processes in relation to slavery and human trafficking in its supply chains, its effectiveness in preventing these, and the training that it offers to its staff.
- (iii) Information about the parts of its supply chains where there is a risk of slavery and human trafficking.

The reporting procedures are similar to those required by the Californian Act (statements must be published on a company's website if it has one). Businesses are subject to the Act for carrying on business, or part of a business in the UK – irrespective of their place of incorporation or formation.

The Act is a legal instrument of the UK Parliament and is therefore enforceable domestic law in the UK. Section 54 (11) makes clear that the Secretary of State can enforce the duties imposed upon commercial organisations in this section by bringing civil proceedings in the High Court. The remedy for non-compliance is therefore potentially considerably more powerful than the 'soft law' pressures of the Californian Act.

However, the actual requirement is lacks substance: section 55(4) makes it clear that an organisation has a choice whether to publish a statement setting out the steps which it has taken to ensure that slavery and human trafficking does not take place in its supply chains or, quite extraordinarily, whether to publish a '*statement that the organisation has taken no such steps.*' (Section 55(4)(b)). An organisation would therefore be in full compliance with the legal requirements of section 54 by simply publishing a statement declaring that it has not taken any

steps to ensure that slavery and human trafficking did not take place in its supply chains in the past financial year. However, such a statement may obviously have adverse consequences for a company's reputation.

Moreover, section 54 does not impose any obligation on an organisation with respect to the content of its slavery and human trafficking statement. Section 54(5) is phrased permissively in that it states that '*an organisation's slavery and human trafficking statement may include information about ...*' (our underlining). While it is predictably impossible to draw any clear link between the enactment of the Act and decent work in the supply chains of organisations which carry on business in the United Kingdom, it is clear that the reputational risk of non-compliance for such businesses would in all probability have some effect on the manner in which such businesses manage their supply chains. However, the provisions only relate to forced labour, and do not extend to any other rights.

*Australia: The Fair Work Act of 2009 and the Ethical Clothing Trades Extended Responsibility Scheme 2001 (New South Wales Code)*

In the early 2000s, Australia pioneered supply-chain legislation – in New South Wales in 2001, Victoria in 2003, and in Queensland and South Australia in 2005 – to protect migrant women engaged as outworkers or homeworkers in the textile, clothing and footwear industries from exploitation (Rawling 2006). In 2009, the federal Fair Work Act was passed, which provided for the enactment of a federal mandatory code (Rawling 2014). While a federal mandatory code is yet to be enacted, three states have retailers' codes – New South Wales ('NSW Code'), South Australia and Queensland. The Queensland code was repealed in November 2012 and, as the South Australia code largely mirrors the ground-breaking NSW Code; here we focus on the NSW Code in particular (Rawling 2014).

The 'Ethical Clothing Trades Extended Responsibility Scheme' (referred to as the NSW Code), was enacted in terms of the Industrial Relations (Ethical Clothing Trades) Act 2001 on 17 December 2004. The NSW Code is subordinate legislation, enacted by way of proclamation under the Industrial Relations (Ethical Clothing Trades) Act 2001. It is therefore a mandatory code where compliance is obligatory as a matter of law.

The NSW Code is not only applicable to the 'lead firm' or 'effective business controller' at the top of the supply chain but also applies to lower levels of the supply chain, namely suppliers and contractors (including subcontractors such as homeworkers). This broad coverage in itself is an innovative provision. The terms 'retailer', 'supplier' and 'contractor' are widely defined so as to make it difficult for these market actors to escape their obligations through creative corporate structuring. Like the UK Slavery Act and the California Transparency in Supply Chains Act, the Code regulates corporations incorporated in NSW *and* retailers that sell clothing in NSW, (which includes all international brands). Retailers and suppliers have the following obligations under the Code:

- (i) Before entering into an agreement with a supplier, the retailer must ascertain whether the supplier or any of its subcontractors will contract work to an outworker (homeworker) (NSW Code sec 10 (1)).
- (ii) Where an outworker is to be engaged, the retailer must obtain a *contractual undertaking* from the supplier that the outworkers' contracts will meet the standards prescribed under the relevant industry instrument and that the supplier will disclose all the addresses where all work on the clothing products is to be performed. The retailer must inform the supplier if one of its subcontractors fails to comply, or the retailer can terminate the agreement (NSW Code sec 10(2) (a) and (b)).
- (iii) Retailers have various *information gathering and record keeping obligations*. For example, before a retailer enters into an agreement with a supplier, the retailer must request from the supplier the names and addresses of each contractor and, if outworkers are used, the name and address of each outworker and the name and address of the employer of the outworkers (NSW Code sec 10 (1) (b) read with Part B of Schedule 2 to the NSW Code). Retailers must keep records of various details, including the number of clothing products to be supplied and the wholesale price paid for each product (NSW Code sec 12 (1)).
- (iv) Retailers have important *disclosure obligations*. For example, retailers must disclose to the government and the NSW branch of the Textile Clothing and Footwear Union of Australia (the NSW Union) details of all the names and addresses of suppliers and whether outworkers are engaged (NSW Code sec 12(3), read with Schedule 1). Also, 'where a retailer becomes aware that an outworker has been engaged on less favourable terms than the conditions described under the applicable award or other industry instrument, the retailer is obliged to report the matter to the NSW Union or the government' (NSW Code sec 11).
- (v) Suppliers must provide retailers with all the information which they require to comply with their information gathering obligations and to enable the retailers to take steps to ascertain compliance with the NSW Code throughout the supply chain (NSW Code sec 14).
- (vi) Contractors are obliged to provide their subcontractors with details of the contract between the retailer and the supplier, including all the details that the supplier was obliged to furnish the retailer.

Section 7 of the NSW Code clearly stipulates that the provisions of the code are mandatory and apply to all persons engaged in the manufacturing of clothing products in Australia *and* the supply and retail sale of those products in NSW. Breaches of the NSW Code may therefore be prosecuted by the State. We are not aware of any prosecutions in terms of the NSW Code but according to Rawling



(2014), the regulator frequently deploys the threat of prosecution and retailers comply in order to avoid prosecution and the risks of negative media exposure.

## 9. WHICH GOVERNANCE INSTRUMENTS HOLD THE MOST POTENTIAL FOR PROTECTING HOMEWORKERS IN GLOBAL SUPPLY CHAINS?

### *International soft law: corporate social responsibility initiatives*

The evidence shows that soft law instruments have enjoyed limited success in addressing decent work deficits. While private governance, or corporate social responsibility (CSR) initiatives have made some difference to improving health and safety conditions for workers in factories, there has been far less progress in advancing enabling conditions such as freedom from discrimination and collective bargaining, and no evidence of improvements for homeworkers (Barrientos and Smith 2007). Further, CSR efforts have historically been driven by consumer demands, *not worker demands*. In many ways, CSR can be thought of as a commitment that companies make to consumers, not to workers.

For CSR efforts to be effective in reducing workers' decent work deficits, the consumer-driven dynamic would need to fundamentally shift. Specifically, workers (through trade unions and, in the case of informal workers also associations and cooperatives) need to have a central role in identifying their primary decent work deficits. Monitoring and grievance processes should be made accessible to homeworker organisations which are able to engage on behalf of their members. Remedies for non-compliance must be substantial enough to incentivize corporations to comply.

As this paper has shown, even multi-stakeholder initiatives that represent a move towards a 'social governance' approach to CSR (such as the Ethical Trading Initiative and the Fair Wear Foundation) have not shown to significantly improve outcomes for homeworkers. To be more effective these should increasingly extend beyond factory workers to focus on the inclusion of homeworkers. For example, following ETI's example in India, multi-stakeholder initiatives should aim to provide platforms for connecting homeworkers and their organizations with businesses. As the analysis of private CSR efforts has shown, even businesses like IKEA, which are widely recognized as having 'good practices' in terms of labour code compliance, have been unable to extend benefits to the homeworkers in their supply chains. This can in large part be attributed to a lack of information about, and dialogue with the workers themselves. Moreover, as the case of IKEA also highlights, most homeworkers do not know which companies they are supplying to and/or whether these companies have committed to labour codes. Multi-stakeholder initiatives therefore could contribute in facilitating information exchange and mutual problem-solving between homeworkers, their representative organisations and business.



Finally, as previously mentioned, in the absence of mechanisms for ensuring corporate accountability, and without an explicit recognition of homeworkers, the UN Global Compact does not constitute a promising approach for expanding decent work for homeworkers within global supply chains.

While multi-stakeholder initiatives may have the potential to contribute to a new culture of CSR practice, this approach still hinges on the benevolence of corporations to join these alliances, cooperate and implement. For this reason, we do not consider CSR initiatives – whether they take the form of ‘private’ or ‘social’ governance – to be the strongest potential instrument for protecting workers, including homeworkers..

#### *International soft law: multilateral initiatives*

This paper has discussed the following social and multilateral initiatives: The ILO’s MNE Declaration; The OECD’s Guidelines (and associated Guidance for Responsible Supply Chains in the Garment and Footwear Sector) and the UN’s Guiding Principles. Both the ILO MNE Declaration and the OECD Guidelines have been updated to incorporate the Guiding Principles, thus all three instruments now implicitly cover homeworkers and have some potential in contributing to their protection and improved conditions. However, of these, the OECD Guidelines have the strongest potential to be used as a tool to hold companies to account for non-compliance, because of the requirement on signatory governments to establish national contact points, which could be used by homeworkers and allied organizations to hold companies to account for violations of the guidelines. The requirement for “meaningful consultation” with affected groups in particular holds potential for homeworkers to pursue access to remedy through the NCPs. However, there are many challenges inherent in this process – including the fact that NCPs take many different forms across countries and are not bound by a set of consistent, strong procedural standards. Also, to bring cases under the NCPs, homeworker organizations need support to build and strengthen their organizations and capacity.

Ultimately, all three of these instruments are limited by their non-binding, voluntary nature. A stronger instrument could come in the form of an ILO Convention, based on the Guiding Principles, which are now recognized as the landmark global standard in establishing the responsibilities of companies to protect against human rights abuses in their supply chains. However, if they were to serve as a basis for an ILO Convention, or even a Recommendation, modifications to the Guiding Principles would be critical to shift the implicit coverage of homeworkers to one that explicitly outlines guidelines for their protection. These modifications might include, for example, developing a definition of Workers’ Human Rights Due Diligence that explicitly covers homeworkers and improves their access to rights. In the concluding chapter of this paper, we make suggestions along these lines.

*Combination hard/soft law: Global Framework Agreements (GFAs)*

GFAs differ from the other soft law instruments reviewed in this paper in three important ways. First, the management of specific multinationals concludes an agreement with a specific union. The moral and legal incentives to honour an agreement are significantly stronger than is the case if a multinational corporation signs a soft law instrument. Second, the best GFAs have translated environmental and labour protection into clear, objectively verifiable and internationally defined standards (Schmidt et al. 2007), as opposed to the vague objectives of the soft law instruments. For multinational corporations, the advantage of signing GFAs is that transgressions are identified by local unions, who have to follow the grievance mechanisms stipulated by the agreement, and give the multinational an opportunity to address the issue. The primary enforcement mechanism is therefore not ‘naming and shaming,’ with the attendant risks to the multinational’s reputation (Hellmann 2007). Although GFAs represent a promising instrument for supply chain governance, modifications are still needed to make them work more effective for homeworkers. Recommendations to this end are outlined in the following section.

*National, hard law: specific legislation for supply chains and homeworkers*

We have reviewed national legislation that specifically targets homeworkers (in the case of the Thailand Homeworker Act), and that specifically target lead firms (in the case of the UK’s Modern Slavery Act, the Californian Transparency in Supply Chains Act, and the Australian New South Wales Industrial Relations (Ethical Clothing Trades) Act).

The Thailand legislation is ground-breaking in that it seeks to regulate the contract between contractors and homeworkers. Thailand goes as far as to legislate that the courts will not enforce contract provisions that give contractors ‘undue advantage’. This legislation directly addresses the issue of unequal bargaining relations and the ubiquitous situation where homeworkers’ economic need coerces them to accept contracts that are unfair. If, therefore, a homeworker reports (to government, which can litigate on her behalf), or sues a contractor for non-payment (payment has to take place within seven days), and the contractor relies on a contract term that legally allows him to hold onto payment, the court can decide that the contract gives the contractor ‘undue advantage’ because the term that allows the contractor to withhold payment is unfair. In this case, the court can ignore that contract provision and decide that the contractor must pay the homeworker. In this way, the Thailand Homework Act directly addresses homeworkers’ decent work deficits and represents a best practice model in this area.

Of the supply chain legislation reviewed (addressing lead firms), the most promising and sophisticated example is Australia’s Fair Work Act. The UK and Californian Acts seek only to regulate one aspect of supply chains, namely the use of forced labour. Their disclosure requirements are weak since they only require corporations to report on whether or not they have undertaken a due diligence in

their supply chains. There is no mandatory requirement for corporations to address forced labour if found in the supply chains. Further, they both rely on the ‘court of public opinion’ for enforcement (i.e soft law measures) rather than hard law sanctions, such as fines, or being brought to account through tribunals, for example.

The innovation of these Acts, however, lies in their extra-territorial effect: they are regulating the behaviour of their corporations’ business practices in other countries. These statutes demonstrate that with sufficient political will, governments, including of industrialised countries, can regulate the activities of both multinationals that are incorporated in their territories that do business in other countries, *and* multinationals that are not incorporated in their jurisdiction, but sell to their markets. These activities could also be extended to incorporate other rights violations.

The New South Wales ‘Industrial Relations (Ethical Clothing Trades) Act’ not only regulates corporations domiciled in its territory, it also has more substantive disclosure requirements and stronger enforcement mechanisms than any of the other national, or even international instruments reviewed here. Specifically, it manages to regulate GVCs in three ways: (1) It targets not only lead firms, but also their suppliers and subcontractors. All three could therefore be guilty of statutory violation, not only the lead firm; (2) It creates disclosure requirements for all three groups, and the disclosure requirements are extensive – including the names and addresses of all homeworkers and the contract terms, and how many items were contracted for and at what price. The disclosures have to be made both to government and to the union, and both have statutory rights to inspect any premises; (3) it protects not only homeworkers in NSW, but also homeworkers in all of Australia. It does this by creating disclosure duties for any MNE that sells clothing in NSW and where part of that clothing is produced by homeworkers in other Australian states.

It seems that there is no legal impediment for national legislation—like the Australian legislation—to extend its protection to all homeworkers, in all countries. In other words, from a legal, if not political perspective, it seems that industrialised countries could require all MNEs that sell clothes (and other goods) in their country to have the same disclosure requirements as in the Australian model if they have any homeworkers in their supply chain. In this case, the disclosure requirement would need to apply to factory workers as well, or the legislation could create an adverse incentive for MNEs not to use any homeworkers at all. Homeworkers want to be recognised and protected. They don’t want to become factory workers.

Based on the previous review and analysis, we have four over-arching arguments that should be borne in mind in any attempt to regulate corporations’ behaviour in the context of global supply chains:

(1) *Plural governance mechanisms are essential:* Because of the complex, transnational form that production relations now take, especially GVCs, no one instrument can provide effective regulation. We need plural, over-lapping governance mechanisms—at global, national and regional levels.

(2) *Corporations' purchasing practices must be challenged:* The mal-distribution of the costs and risks of production are embedded in MNEs procurement practice. Each of the instruments reviewed assumes that decent work deficits can be addressed through a combination of disclosure requirements and MNEs using their 'leverage' to regulate their suppliers' behaviour. None of the existing instruments challenge the corporations' practice to pass down risks and costs – the four forms of labour flexibility discussed – through their procurement practices. The pressure for lower and lower prices, the placing of last-minute orders, the demand for quick turn-around, all of which are common corporate practices – undermine suppliers' attempts to uphold labour standards. These pressures from retailers cause suppliers and contractors to download these costs and risks to workers. To be sure, suppliers' and their contractors' behaviour must be regulated, but so must the contractual terms between MNEs and their suppliers.

(3) *Trade unions of informal workers must be recognized and supported:* A law – whether hard or soft – is as effective as the strength of the collective to enforce it. Laws that protect homeworkers will therefore only be effective to the extent that informal workers are mobilised and organised. Trade unions must therefore support the legal recognition of trade unions for informal workers.

(4) *Homeworkers must have access to social protections:* It is critical to note that, in addition to organizational support, homeworkers need individual support in the form of social protection. Even in the comprehensive codes of labour practice developed by multi-stakeholder initiatives such as ETI and FWF described previously, social protection is consistently the pillar of decent work that is left out. States and corporations must begin to think creatively about how to extend social protections – health insurance, pensions, disability benefits, maternity benefits – to homeworkers specifically, and informal workers in general.

In the section that follows, we make specific recommendations with reference to the instruments that we have identified in this paper as holding the most promise for protecting homeworkers in global supply chains, and for which there is some political valence: the UN Guiding Principles and Global Framework Agreements. As neither of these approaches alone, in their current forms, present an adequate solution for protecting homeworkers in global supply chains, we propose a series of recommendations for improving each below. We follow a discussion of these international instruments by highlighting the most promising aspects of the national legal strategies reviewed, and finally we make the case for regional instruments.

## 10. CONCLUSION AND SUGGESTIONS FOR IMPROVING ACCESS TO RIGHTS FOR HOMEWORKERS IN GSCS

The UN Guiding Principles have gained traction by their incorporation into the ILO MNE Declaration, the OECD Guidelines and the associated OECD Guidance for Responsible Supply Chains in the Garment and Footwear Sector. Moreover, in March 2017, France enacted a Corporate Duty of Vigilance Law, which makes supply chain due diligence mandatory for its corporations. This concluding section seeks to make specific recommendations on how these instruments might protect homeworkers and address some of their decent work deficits. Specifically, we address each component of businesses' responsibility to address the human rights violations in their supply chains – to identify, prevent, mitigate, and remedy and account for – and make specific recommendations on steps that corporations could, and should take, to realise their responsibilities to the homeworkers in their supply chains.

### 10.1 Realising the UN Guiding Principles to protect homeworkers

The ITUC's primary strategy for regulating GVCs is to frame decent work in terms of human rights, and to advocate for the realisation of these rights through an ILO Convention. However, it is important to note that as an instrument of International Public Law, Conventions regulate relations among states, not corporations. Corporations can only be held accountable to the terms of a Convention if states ratify it, and if ratification is followed by national legislation that puts it into effect. Subsequently corporations can be held accountable by means of national legislation.

The obvious weakness of this strategy is that it relies on states to ratify the Convention, which assumes the political will do so. Nevertheless, Conventions can play two important, political roles. First, international instruments create norms, which workers—including homeworkers—use in their advocacy campaigns for legal change at domestic level. Indeed, while no Asian countries have ratified ILO Convention 177 (C177) on Homework, HomeNet Thailand used C177 as leverage in its 10-year campaign, which resulted in the Thai Homeworker Protection Act. Second, the rhetoric of human rights is particularly effective in shifting public consciousness. For example, a shift in consciousness about the issue of forced labour led to law reform in California and the UK. The 'court of public opinion' can and does shift corporate behaviour. Third, ratification means that member states have to report their progress in implementation to the ILO.

If a Convention for protecting workers in global supply chains were to be developed, the UN Guiding Principles represent a promising foundation for this. Indeed, the UN Guiding Principles are the likely departure point for a

Convention— since its concept of human rights due diligence has been incorporated into the ILO MNE Declaration and the OECD Guidelines.

First a brief note to give meaning to human rights applicable to homeworkers. Apart from the ILO's Fundamental Principles and Rights at work, according to the UN Guiding Principles (and the OECD Guidelines), human rights include the Universal Declaration of Human Rights. Articles 23-25 include the following provisions: Everyone has the right to:

- (i) Just and favourable conditions of work and to protection against unemployment.
- (ii) equal pay for equal work.
- (iii) Just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
- (iv) Join trade unions for the protection of his interests.
- (v) Rest and leisure, including reasonable limitation of working hours and holidays with pay.
- (vi) A standard of living adequate for the health and well-being of himself and of his family

Below we disaggregate the different responsibilities that comprise a Human Rights Due Diligence – to identify, prevent, mitigate and account for human rights abuses – and under each we make suggestions for what corporations might do if they are to protect the most vulnerable workers in their supply chains – homeworkers – from human rights' abuses.

#### *The responsibility to identify human rights violations*

In order to be able to identify labour rights' violations and improve homeworkers' pay, social protection and working conditions, the businesses should:

- (i) Make a policy commitment to protecting homeworkers in their supply chains.
- (ii) Promote transparency in their global supply chains by demanding that their brand is mentioned in all supplier and sub-contracting agreements. This enables workers to identify the brand, research its commitments to decent work, and to register complaints through complaint mechanisms.
- (iii) Map their supply chains to understand where and how homework occurs within them by requiring suppliers and their subcontractors to disclose the names, addresses and contract details of homeworkers with whom they contract. This information should be disclosed both to the corporation and the union—there is precedent for this in the Australian model.

- (iv) Insist in its contracts with suppliers that suppliers and sub-contractors conclude *written mutually agreeable contracts* with homeworkers, give homeworkers a copy of their contract, and *include the name of the buyer* in the contract.
- (v) Establish appropriate operational level grievance mechanisms in consultation with unions and homeworkers, on which homeworkers have equal representation to that of other workers in the supply chain. Grievance mechanisms must be designed so that workers will not have to fear losing their work if they raise a grievance.
- (vi) Consult with representative bodies, not with individual workers chosen by employers. These representative bodies may choose for unions and/or civil society organisations to assist them with these consultations, and business should bear the costs of these consultations.

*The responsibility to prevent rights' violations*

- (i) Recognise representative organisations of homeworkers (either unions, associations, or cooperatives) as legitimate partners, together with unions, for collective bargaining.
- (ii) Fix terms and conditions of the contract in consultation with homeworkers. Piece-rates for work of home workers must be determined according to well laid down norms and must match at least the minimum wages (where they exist).
- (iii) Insist on specific contract provisions with homeworkers including:
  - a. Payment within seven days of receipt of goods accompanied by a written statement of calculations of the payment.
  - b. No withholding of parts of payment or deductions without written consent.
  - c. Contact details of the contractor or subcontractor to be provided.
  - d. Safety equipment must be provided by the contractor/sub-contractor.
  - e. A homeworker may not lost his/her job without written reasons.
  - f. A homeworker can always bring a complaint to a body set up to hear complaints [a grievance mechanism].
- (iv) Recognise homeworkers as workers and support capacity building of homeworkers' organisations and know-your-rights training of homeworkers.

*The responsibility to mitigate rights violations*

- (i) Negotiate grievance procedures with union and homeworkers organizations (including regional representative organizations) so that there are processes to protect homeworkers from losing their work if they complain.
- (ii) Ensure that homeworkers' organisations participate in discussions together with unions on steps to mitigate the rights' violations i.e. they must co-decide what the remedies should be, and how they should be operationalized.
- (iii) Consider remedies that include some form of restitution (as per the UN Guiding Principles) such as buyers contributing to a social protection fund for homeworkers and other informal (factory) workers. For example, India has modeled sector-based social protection funds to which corporations in the sector contribute.

*The responsibility to account for rights violations*

- (i) Report formally (as opposed to an 'informal engagement with affected stakeholders' as suggested by the UN Guiding Principles). Like the Australian model, reporting should be made both to a state institution and to unions, in addition to being made available on publicly accessible platforms, such as company websites.
- (ii) Report on workers'—including homeworkers'— social protection in the states from which they source goods, and on their initiatives to contribute to social protection where state protection is insufficient. This provision mirrors the IndustriALL/H&M Global Framework Agreement. Innovative social protection (that do not rely on an employer/employee relationship) , which is discussed elsewhere in this paper.

In addition to the duties ascribed to the state in the UN Guiding Principles, the state should do the following to protect homeworkers:

- (i) Recognise homeworkers as employees.
- (ii) Give legal recognition to organized homeworkers as unions and recognize them as legitimate social partners .
- (iii) Collect statistics on homeworkers.

### **10.3 Recommended modifications to Global Framework Agreements**

The best GFAs include homeworkers, yet are weak in terms of reducing homeworkers' decent work deficits. We propose using the IndustriALL and H&M GFA as a best practice basis and include the following provisions to protect homeworkers more effectively:



- (i) They should make specific reference to Convention 177, as they make specific reference to many other ILO Conventions.
- (ii) The monitoring system in IndustriALL's GFAs with H&M and Inditex include a global, national and plant level committee. Homeworker representative organisations (whether associations, trade unions or cooperatives) should also serve on these committees. For example, HomeNet South Asia or HomeNet South East Asia could serve on the global committee, and their country affiliates, or other representative organisations on the country and plant level committees.
- (iii) IndustriALL's GFA with H&M has an innovative clause that states that the supplier is encouraged to provide alternative social protection to workers if not available in the country concerned. Two potential models include:
  - a. A social protection fund can be established for the sector, which can be jointly managed by government, unions and the private sector. India has modelled this in several sectors. Under this model, workers do not have to establish an employment relationship with a particular employer, but merely register as a worker in the sector; this provision therefore covers homeworkers.
  - b. In Argentina, the trade union for informal workers, CTEP (Confederación de Trabajadores de la Economía Popular), collects dues from workers on behalf of government, which then entitles workers to social protection, including healthcare and unemployment insurance and pensions.
- (iv) The IndustriALL and H&M GFA includes a provision that 'encourages' the parties to provide training to their constituencies on the agreement. It should be mandatory to provide such 'know your rights' training and specific provision should be made to provide all homeworkers with such training.
- (v) The retailer should agree to a budget for strengthening homeworker organisations to mobilize and organise members.
- (vi) GFAs should include special provisions that relate to the issues that homeworkers face – unfair contractual terms, poor piece rates, unreliable work, and abuse of power, such as provision of poor quality raw materials, arbitrary rejection of goods, cancellation of orders and delayed or partial payment. In other words, unions must challenge the transfer of production costs and risks, and non-wage costs to homeworkers.
- (vii) Grievance mechanisms should be designed together with homeworkers so that they are made accessible to them as

individuals and through their associations. Further, whistle blower protections should be built into the GFA.

### *National legislation*

Here we have reviewed national legal instruments focused on both homeworkers and lead firms. We argue that Thailand's Homeworker Act presents a strong best practice example of a national policy for homeworkers, and one that should serve as an example for other countries. Not least of all because it addresses the practical problems that homeworkers face—lack of social protection, of written contracts, withholding of payment, occupational health and injury caused by hazardous work and a lack of protective equipment and unfair contract provisions. The Act is innovative: unfair contract provisions will not be enforced and the state will litigate on behalf of homeworkers if it is 'for the common good.'

### *National legislation with extraterritorial reach*

Industrialised countries, in which the majority of transnational corporations that source from global supply chains are domiciled, should *also* be legislating for decent work in supply chains. As the Australian, UK and California Act show, governments can regulate companies that are not incorporated (registered) in the country, but sell their goods in the country. In other words, a retailer that is incorporated in the US, for example, but sells products in the UK has to comply with UK legislation, even though it is a US company. While the UK and California Acts only seek to regulate the use of forced labour (and use only soft law enforcement mechanisms, namely disclosure with the intention that consumers may refuse to buy these products), Australia seeks to regulate contracts with homeworkers, including collective bargaining rights and wages. As we have stated previously, the Australia Act is a best practice example in large part because of its strong disclosure requirements and enforcement mechanisms. Specifically, we recommend that the following elements of the Act be mirrored by national legislation:

- (i) First, the disclosure requirements apply not only to the lead firm, but also to all suppliers and subcontractors.
- (ii) Second, substantive disclosure requirements—the parties must provide the names, addresses and contract terms of suppliers, subcontractor and homeworkers. This means that the aspects of decent work that can be addressed go to the heart of homeworkers' decent work deficits that we outlined in the first section, namely unfair remuneration, lack of safe and healthy working conditions and lack of social dialogue (it does not necessarily address lack of stability or security of earnings).
- (iii) Third, significant mechanisms of enforcement – disclosures are made to the state and to unions and are formal disclosures—this means that the workers themselves, rather than the

public/consumers can hold lead firms, their suppliers and subcontractors to account.

We would add the following:

- (iv) Fourth, the name of the brand for which workers are producing must appear in all contracts between suppliers, and their contractors or subcontractors; between contractors and subcontractors and in contracts with homeworkers. Such transparency addresses many coercive practices and gives workers some form of redress, if only access to the media and the court of public opinion.

### *Regional instruments*

Finally, even if there is effective national law, such as in Thailand or Australia, capital is mobile and can move to another country with less onerous regulation. HomeNet Thailand reports that homework is moving from Thailand to Cambodia. As Humphrey and Schmitz (2005) argue, in the case of ‘captive supply chains’, which are labour-intensive, require little technical skill on the part of the supplier, and therefore few sunk costs on the part of retailers, retailers can and do easily move from one country to procuring from suppliers in another. Efforts at creating regional pacts—for example countries in a region agreeing to legislate and enforce minimum living wages (see the Asia Minimum Wage Campaign)—are therefore as important as focusing efforts on international or national law.

### *Conclusions*

In conclusion, in this paper we have highlighted several promising approaches to governance of global supply chains at the international level (Convention 177, GFAs, UN Guiding Principles, ILO MNE Declaration, OECD Guidelines). We have also reviewed positive examples of legislation for homeworkers at the national level in Thailand, and supply chain legislation at the national and sub-national levels in the UK, Australia and California. Of these, we identified GFAs, the UN Guiding Principles and the OECD Guidelines as international instruments with particular promise for protecting homeworkers, and we have proposed building on these to facilitate decent work for homeworkers in global supply chains. We have also highlighted elements of progressive national legislation – in Thailand and Australia – that present best-practice examples in this area.

However, even with improvements and modifications to individual instruments, it is through a combination of these instruments – hard and soft, at national, regional and international levels – that we may move closer to advancing decent work for homeworkers; there is no silver bullet. As we have argued here, achieving decent work for homeworkers also depends on a range of factors, including fundamental changes in corporate procurement practice, strong social movements that can push for the enforcement of the law (whether soft or hard), and most importantly, the recognition and incorporation of representative organizations of homeworkers into governance processes.

As section three showed, homeworkers are already organizing and engaging in advocacy to advance their struggle for decent work. They are building regional networks, sharing experiences across regions, and constructing alternative models of production. Through research, dialogue and work with their members, representative organizations of homeworkers represent the critical source of information on workers' conditions and demands. For all of these reasons, any initiative to put a governance mechanism in place to protect homeworkers must *build on their existing efforts and knowledge*. This would involve not only granting their organisations (whether trade unions, co-operatives or associations) formal recognition, but also actively supporting their ongoing organization through the allocation of financial and other resources.

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