

# The value of complaints mechanisms in private labour regulation of

## GVCs: A case study of the Fair Labor Association

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**Abstract:** *Can complaints mechanisms strengthen private labour regulation of GVCs? This article empirically investigates the results produced by the only complaints mechanism where outcomes can be verified from the complainant's perspective; the Fair Labour Association. It discovers that the vast majority of complainants find this complaints mechanism to be valuable. But the mechanism also has a number of significant limitations that seriously affect outcomes for workers. The study utilises the concept of 'grounding' to explore how the FLA complaints mechanism performs for workers in different contexts, unpacking it for the first time into three key dimensions; the national, the social and the corporate. The implications of these findings are then considered for complaints mechanisms in other GVCs.*

**Key Words:** Complaints, Private Regulation, Multistakeholder Initiative, Apparel, Grievance.

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## 1. Introduction

Transnational private regulation describes both processes of industry self-regulation and systems of regulation in which coalitions of non-state actors (companies, NGOs, trade unions, etc.) codify, monitor, and in some cases certify firms' compliance with labour, environmental, human rights and/or other standards of accountability (Abbott and Snidal 2009). Private regulation purports to fill regulatory gaps where governments have been unwilling or unable to regulate. But there is now a strong scepticism towards private regulation, with numerous commentators questioning the potential of private governance systems for effectively improving labour rights (De Bakker, Raasche and Ponte 2019). Commentators also note how lead firms are often responsible for at least some of the labour problems occurring in their supply chains through, for example, 'predatory purchasing practices' (Anner 2019). Thus, transnational corporations (TNCs) are creating governance structures to deal with problems which they themselves generate, thereby "privileging themselves as judge and jury in cases of their own violations" (Morris, Jenkins and Donaghey 2021).

Criticisms of private regulation include weaknesses in the design of private regulatory mechanisms, their governance structures and, most of all, the way they are implemented and enforced (Morris, Jenkins and Donaghey 2021). On the latter issue, there is a widely recognised "enforcement gap" in transnational labour governance whereby there are a lack of effective legal mechanisms by which to hold private actors to account. Audits, in particular, are seen as a very weak form of ensuring compliance with standards (LeBaron 2015; Marx and Wouters 2016). This has led to an increasing focus on enhancing accountability through different forms of implementation and enforcement of labour standards, often using public regulatory

efforts to strengthen private regulatory initiatives (Bartley 2018, Locke, Rissing and Pal 2013; Fransen and Burgoon 2017). This has included harnessing bottom-up monitoring processes that involve local civil society organisations who have knowledge of what is happening on the ground (Bartley 2018).

In theory, complaints mechanisms could have a significant role to play in addressing the enforcement problem. Audits are top-down processes driven by the needs of participating companies in which auditors obtain limited snapshots of what is happening to workers at particular moments when they visit specific locations. Complaints mechanisms, on the other hand, create bottom-up processes and provide for “continuous monitoring since they allow parties to file a complaint whenever a standard has been breached and to hold violators accountable” (Marx and Wouters 2015, p.446). They also potentially disrupt power dynamics within private governance mechanisms by giving a voice to marginalized actors such as workers or communities who can ‘ring the alarm’ when their rights are violated (MacDonald 2020). This article therefore seeks to explore the value of complaints mechanisms in private governance mechanisms and the degree to which they have potential to contribute to closing the enforcement gap in transnational labour governance.

It is a particularly apt moment to study the potential of complaints mechanisms because they are set to become a more prominent phenomenon. In particular, the German Human Rights Due Diligence Supply Chain Act and the (currently draft) EU Directive on Corporate Sustainability Due Diligence both require companies to provide for, or participate in, human rights complaint mechanisms. Amfori, a Europe-based export multi-stakeholder initiative (MSI) with over 2400 member companies who have an annual turnover of €1.6 trillion, has prepared Rules

of Procedure for a complaint mechanism which it is now field testing and which its members will be able to share. In addition, the institution formerly known as the Bangladesh Accord has a complaint mechanism which has handled thousands of worker claims. Its model, including its complaint mechanism, is expanding to additional countries.

However, at the moment there is a lack of research into complaints mechanisms as an aspect of private labour regulation of GVCs. Most studies of private regulatory initiatives ignore complaints mechanisms. Those that do seek to engage with this issue have noted that complaints mechanisms operate with significant diversity in terms of the way they are designed (Landau and Hardy 2021, Marx 2008, Schleifer 2019). So “one size fits all” pronouncements about how they operate, and their potential impacts, are impossible. It is suggested that complaints mechanisms are often relatively little used and that various political and economic factors might affect outcomes including the strength of rule of law in particular countries, local labour market supply and demand, and the strength of sanctions available (Marx and Wouters 2016). But there are a dearth of detailed empirical studies which have investigated how complaints mechanisms operate in practice so these hypotheses remain largely untested (Marx and Wouters 2016; Landau and Hardy 2021).<sup>1</sup>

This is perhaps unsurprising given that the vast majority of complaints mechanisms in private regulatory initiatives do not provide sufficient information for

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<sup>1</sup> One exception is Haines, Fiona and Macdonald, Kate 2020 ‘Nonjudicial Business Regulation and Community Access to Remedy’ 14 Regulation & Governance 840 which focused primarily on community complaints rather than those of workers.

empirical study to be possible. The complete lack of transparency in companies' internal complaints mechanisms means that analysis is restricted to a very small number of high-profile cases (Grama 2022). When it comes to complaints mechanisms of MSIs then there is a little more transparency. However, as we explain in section 2 below, only one MSI has received significant numbers of complaints about labour issues and has sufficient publicly-available detail about its complaints process to allow independent verification of the results from the complainant's perspective; the Fair Labor Association (FLA).

The FLA is an interesting case study because it is a private regulatory initiative which has been the subject of considerable criticism (e.g. Sethi and Rovenpor 2016, MacDonald 2011, Anner 2012). Yet, we find that the FLA's complaint system is considered valuable by the vast majority of complainants who use it (section 2). We then consider limitations with the FLA model at three different stages of the process; problems of accessing the system; problems with the claims process once a claim has been filed; and deficiencies and limitations in enforcement for those whose claims are successful (section 3). Finally, we conclude by considering what we have learnt from our study about the potential and limitations of complaints mechanisms for closing the "enforcement gap" in transnational private labour regulation initiatives (section 4).

While the article identifies some strengths and weaknesses of the FLA complaints mechanism which are of general applicability, it also utilises the concept of 'grounding' (Graz 2022; Bartley 2022) to interrogate the differentiated functioning and results of the FLA complaints mechanism for workers in different contexts.

Grounding foregrounds the local in relation to transnational private regulatory

initiatives. It invites us to explore local contexts, cultures and institutions to understand how they ‘ground’ and thereby support or limit the implementation of transnational private regulation (Graz 2022). But the precise range of factors which support or limit the implementation of labour rights on the ground remain under-explored. We therefore unpack ‘grounding’ in the context of our case study by identifying three dimensions - the national, the social and the corporate - that are critical to how complaints mechanisms perform. By the “national” we mean the differentiated legal and political frameworks of the states where complaints are brought. By the “social” we mean the extent of social capital which complainants are able to draw upon to support them in the complaints process. By the “corporate,” we mean the attitudes and relative power of the individual factories and brands whose interrelationships are vital to what the complaints mechanism can achieve. It is our argument that a legitimate and effective complaint system needs to recognise and respond to these grounding issues. We also hope to encourage other scholars to consider the extent to which the dimensions we identify are relevant to unpacking the concept of grounding in other studies of transnational private governance initiatives.

## **2. Methodology**

Our study of the FLA was conducted as one aspect of a larger study of MSI complaints mechanisms (Harrison and Wielga 2023). For the purpose of that study, we defined complaints mechanisms as platforms through which affected individuals and communities (1) can report harms suffered due to a company’s failure to follow requisite labour (as well as, in some cases, broader human rights) standards, and which (2) produce a determination of the validity of the claim and (3) require remedial action where claims are upheld.

We first undertook research to identify complaints mechanisms where sufficient information was publicly available about individual complaints to make an evaluation of the system. We identified six complaints systems where it was possible to find out critical information including whether or not claims were accepted, where the claim took place, a description of the claim, and the current stage of the proceedings, investigation findings, and any remedial action undertaken. The six MSIs were Bonsucro, the Fair Labour Association (FLA), the Fair Wear Foundation (FWF), the Forest Stewardship Council (FSC), the Roundtable on Sustainable Palm Oil (RSPO), and the Bangladesh Accord, (which has since transitioned into the RMG Sustainability Council). We created a database to record information for all the cases from the six MSIs, including the FLA, where this information was available (Nomogaia, no date). The FLA was the only complaints mechanism with a significant number of complaints received on labour issues and where publicly available information included the identity of the claimants who had made the allegations. Uniquely, then, the FLA provided us with an opportunity to verify with claimants that the information provided by the FLA about the resolution of their complaint was accurate and to obtain complainants' views about the process and outcome of complaints. This article therefore focuses primarily on our findings in relation to the FLA complaints mechanism, but it is contextualised with some discussion of our broader findings in relation to the other five MSIs we studied in section 5 below.

We attempted to contact complainants in all forty-eight accepted FLA cases and, between September 2020 and May 2022, managed to conduct forty-six semi-structured interviews of thirty-four interviewees in relation to thirty claims. Some of the interviewees were interviewed several times to expand on their views about

specific cases and the FLA system in general. Those interviewed included worker claimants, claimants who were representatives of a union and individuals from union leagues and other NGOs helping claimants through the FLA claims process. We also interviewed other parties involved in the process, including four people who conducted investigations of claims for the FLA. Finally, we interviewed four FLA staff, including the head of the claims system and the regional managers who handled the claims. In addition, we interviewed four NGO representatives who work on labour rights in the apparel supply chain and were knowledgeable about particular claims submitted to the FLA. We also read any documentation interviewees shared with us. For a few high-profile cases we reviewed NGO and press reports.

Interviews with claimants and/or their representatives were semi-structured and were designed to develop a detailed factual understanding of the claims which had been brought and to explore a range of issues associated with those claims and the FLA system itself. Topics included: Why the claimant had chosen the FLA and what other mechanisms they had used or considered using; What the claimants' experience of utilising the FLA process was, including any positive and negative aspects; Whether the FLA claim process produced any valuable results for them and what that value was; Whether they would utilise the FLA mechanism again; And any ideas for how the mechanism could be improved in the future. Interviews with FLA personnel were focused on the FLA system, how it worked in practice, what its goals were, its strengths and weaknesses, as well as detailed questions on individual claims, and results. Thematic analysis was subsequently used to analyse interviews.

### **3. The FLA's Complaint System - Value and Achievements**



The Fair Labor Association was formed in 1999 and is an association of forty-eight apparel brands (including some world leaders such as Nike, Under Armour, Patagonia and Adidas), twelve manufacturing companies (which supply the brands), over a hundred US and Canadian universities, and eleven labour NGOs. FLA is an MSI. It is committed to labour rights in the apparel manufacturing supply chain.<sup>2</sup>

The large, mostly US-based brands in the FLA are part of the world apparel and footwear supply chain. This has evolved in recent decades so that brands design, market, and sometimes sell products, but outsource their manufacture. The assembly of products is almost always performed in factories not owned or legally controlled by brands. Those factories are usually in Asia and Latin America and are owned by a multitude of companies, some local and some international, ranging in size from enormous complexes with tens of thousands of workers to enterprises with less than a hundred. Typically, these are apparel assembly factories in which the key manufacturing step involves many individuals at sewing machines producing garments one at a time. The workers are mostly women working long hours for low wages. Some of these continue to be classic “sweatshops” with poor, and sometimes dangerous, working conditions. Many of the countries in which apparel manufacturing occurs have weak labour protections (Rossi, Luinstra and Pickles 2014).

FLA’s member companies commit to the FLA Workplace Code of Conduct which include many International Labour Organization standards. Setting aside the

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<sup>2</sup> More recently, it has expanded to include agriculture and now has agricultural labour standards. Nestle and Olam are both member companies (Fair Labour Association, no date). To date, there have not been any agricultural complaints handled by the third-party complaint mechanism.

small group of suppliers who are FLA members, the FLA member brands do not manufacture the clothes they sell, and so the FLA Workplace Code of Conduct does not apply directly to them, but to the thousands of factories that supply apparel to the brands. Thus, the FLA standards are agreed to by one group of companies (the brands) but apply to another group of companies (the suppliers).

FLA's third party complaint procedures are formally laid out in the FLA Charter.<sup>3</sup> The complaints process begins with a complaint which contains "reliable specific and verifiable evidence or information that [an] Alleged Noncompliance [with the Workplace Code of Conduct] has occurred."<sup>4</sup> The FLA then decides whether to accept the complaint, and, if it does, the member brand (or in a few cases, the university licensee) may investigate the complaint itself or allow the FLA to investigate.

Although there have been occasions when the investigation is done by FLA or brand personnel, the investigator is usually a third-party consultant picked by the brand or the FLA and paid by the brand. These individuals can be legal or non-legal labour experts with experience in factory audits and investigations. Their investigation normally includes both review of records and interviews with claimants and factory management. The investigators gather evidence, decide its weight, and apply the standards in the Workplace Code of Conduct. If the brand does the investigation, the FLA reviews the brand's assessment. This stands unless, as occurred in a few cases, the FLA disagrees with it and orders its own investigation. If a violation is found, the

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<sup>3</sup> Charter Document Fair Labor Association as Amended October 4, 2017, available at <http://hrlibrary.umn.edu/links/flaprecharter.html>, accessed on 17 October 2022

<sup>4</sup> See n.2, page 30.

FLA and the brand develop a Remedial Action Plan (RAP) to remedy any violations. The FLA and brand are then responsible for ensuring that the factory implements the RAP. All of this is reported publicly in a complaint tracking chart on the FLA website (FLA no date).

The first claim reported on the FLA website was received in 2013. Since that date, 68 claims have been received. Twenty were not accepted by the complaints' mechanism (accurate as of 3 June 2022). The most common reason for non-acceptance is that the factory at issue no longer sells product to FLA member brands (FLA representative, Zoom, 6 October 2020; Claimant representative, Zoom, 15 January 2020). There have been 48 complaints accepted from 14 countries. Most claims are from Latin America and the Caribbean (henceforth "Latin America") (29), with El Salvador having the most claims (12), followed by Guatemala (4), Nicaragua (4), Peru (4), Honduras (3) and the Dominican Republic (2). There have been only ten claims from East and South Asia, despite the extensive production occurring in that region (discussed in section 4 below). India (4) had the most claims, with the others occurring in Vietnam (2), Indonesia (1), Bangladesh (1), Myanmar (1) and China (1). Of the remaining claims, most are from Turkey (6), with a few from the United States (2) and Kenya (1).

The great majority of claimants are unions, or workers trying to form a union. Three have also been raised by FLA member university licensors. The claims tend to directly involve unions and the right to unionize (36). But claims also often raise issues such as improper terminations, unpaid compensation, factory conditions, and worker abuse. Three cases are based on factory closures with unpaid compensation left owing to the workers (Nomogaia, no date).

We were able to confirm that the FLA complaint system did provide some meaningful benefit to aggrieved rightsholders in a significant number of cases. 61% of the cases adjudicated by the FLA system involved a determination that an FLA standard had been violated and a remedy was ordered (Harrison and Wielga 2023, Table 3). In more than two thirds of cases where a remedy was ordered, the claimants received some benefit including monetary compensation, recovery of lost jobs with or without seniority, firing of abusive managers, and improved working conditions, hours of work and compensation systems. While there are multiple reasons why these benefits are not effective remedies, which will be discussed in the next section, most rightsholders who “won” their cases identified the results they achieved as valuable and as reasons to keep using the FLA complaint system. For instance, a claimant from Guatemala acknowledged:

FLA’s complaint system is valuable. I would use the FLA complaint mechanism again because it was the main reason we got paid a compensation [after the factory closure]. I would use it again and recommend that others use it (FLA claimant (Guatemala), WhatsApp call, 4 May 2021).

Perhaps the most compelling statistic about the value of the system is that approximately eighty-five percent of interviewed complainants said that they would use it again. Union representatives who had not yet utilised the system were also encouraged to do so after hearing about positive results achieved in other cases. For instance, an interviewee from Guatemala decided to make a complaint because they were aware of successful cases in Guatemala, Honduras, and El Salvador. Although their own case did not work out as they had hoped, the interviewee did believe that the

FLA gave the workers something valuable (partial payment of amounts owed) (FLA claimant (Guatemala), Guatemala City, 22 April 2022).

It is noteworthy that even if claimants did not receive any substantial benefit, a number said that they would continue using the FLA system. This is in part because they felt that there was no alternative complaint system that gave them a realistic chance of obtaining any remedy. Workers and their representatives in most countries where complaints were made perceived national courts as slower, more non-responsive, expensive and pro-business than the FLA system (FLA claimant (El Salvador, Zoom, 16 January 2021; FLA claimant (Guatemala), Guatemala City, 22 April 2022). The FLA's complaint system was therefore most useful to claimants when it is 'grounded' in countries where it is difficult for those claimants to enforce their rights through the state apparatus. As a claimant from Honduras stated:

We use the FLA system because we feel defenceless. Sometimes, with the power vacuums in the country, and the State not protecting workers' rights, we have to try to find out who would help us through these mechanisms. [...] In Honduras, legal proceedings are very lengthy, and getting them to sanction a company is very difficult. Also, they give the companies many ways to [avoid serious consequences]. If there are monetary fines, they can make an arrangement, and that's it (FLA Claimant (Honduras), WhatsApp call, 25 May 2021).

An independent investigator for FLA claims across Central America stated that:

In general, I believe that more is accomplished [by FLA] than with a judge, and court cases last for years and years. The judgment can be finally handed down when the result is no longer meaningful, or the worker has died” (FLA claim independent researcher, Zoom, 1 February 2021).

Claimants choose to go directly to international claim systems such as the FLA’s, rather than to factories or individual brands’ complaint systems, because the latter are either not provided or are perceived as biased (Independent researcher, Google Meet, 9 March 2021). As one repeat user of FLA in India stated:

We first tried to talk to the factory, but got nowhere. Then we tried the brand, but had no contacts we could call. We saw the brand was part of FLA so we thought we would try FLA. FLA responded immediately. [They] were fast and effective. There were a lot of good changes that this claim brought about. . . This case was a success. . . [compared to other MSI complaint systems]. FLA is by far the best (FLA claimant (India), Bangalore, 18 March 2021).

Since the FLA is structured so that powerful brands join as members and respond to complaints made against factories producing products for them, many claimants use the FLA because it is the only way they can make the brands listen (FLA claimant (El Salvador), WhatsApp call, 13 May 2021; FLA claimant (Guatemala), Guatemala City, 26 April 2022). The brands can influence the factories’ behaviour through the leverage of their contracts and commercial agreements. We repeatedly found that, where remedies were achieved, it was by brands who are willing to use this leverage. So, whatever the views of workers about the FLA itself,

they file claims in its system because the brands may take action. For instance, a claimant from Guatemala said:

You have to file the complaint with the FLA... Whether or not the result is favourable. We don't have another option of where to go because that is where the brands are (FLA claimant (Guatemala), Guatemala City, 22 April 2022).

For instance, in the *CSA Guatemala* case, a factory closed because of a fire and workers were paid only a small fraction (reportedly less than 10%) of the total indemnity owed.<sup>5</sup> After a successful complaint, and work by the FLA and the Worker Rights Consortium (WRC, an NGO), further payments were made by GAP and Hanesbrands (brands and FLA members who sourced from the factory), which resulted in payments of nearly 50% of the total due (excluding compensation for the time the workers had to wait to be paid) (FLA claimant (Guatemala), WhatsApp call, 4 May 2021; WRC, 2017).

As well as the results in individual cases, some claims also contributed to systemic results changing specific behaviours inside factories. For example, a union representative from Honduras recognized regarding the *Delta Apparel* case that:

Things have changed with this company [after the case was upheld]: Tomorrow they are signing their third Collective Bargaining Agreement. There is better communication with the workers; before it was very confrontational. The change can be clearly seen because the claims and the fact they had to

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<sup>5</sup> Fair Labour Association, 'CSA Guatemala' (24 April 2019) <https://www.fairlabor.org/reports/c-s-a-guatemala-ipc-report/>, accessed on 30 May 2022.

compensate the workers, was a big blow. Then they started to create a work environment with adequate conditions. They had to commit and fulfil what they promised (FLA claimant (Honduras), WhatsApp call, 25 May 2021).

Complaints have also led to some changes beyond the factory level. For instance, in El Salvador, there were recurring FLA complaints, as well as problems uncovered in audits, on the issue of paying for the first three days of medical leave (from the fourth day on, the government pays for it), which is deemed compulsory according to FLA standards (FLA 2018). FLA advocated to the Ministry of Labour and published an “issue brief” concerning the first three days of sick leave, recommending that the employer paid them. This created changes in the general practice of the industry in that country, so today, the FLA estimates that approximately 80% of factories with relationships with FLA brands are paying the first three days (FLA representative, Guatemala City, 22 April 2022). While it was relatively rare to find these types of broader systemic changes, we return to consider how complaints systems could achieve this more regularly in section 5.

#### **4. Limitations of the FLA System**

The FLA complaint system has therefore produced significant value for claimants in a number of decided cases. But there are also critical limitations of the system. Below we identify three key types of limitation with the FLA model at three different stages of the process. First there are problems of accessing the system for workers who want to utilise it. Second there are difficulties and problems with the claims process once a claim has been filed. Third there are often inadequate results at the end of the process for those whose claims are successful.



In terms of the first stage of the FLA process – access to the system - seventy three percent of the claims handled by the FLA system were filed by unions and only sixteen percent by workers (Nomogaia, no date). As an FLA representative commented:

Third party complaints come from unions and rather specific kinds of organizations, but workers and other organizations are not using it (FLA representative, Google Meet, 14 April 2021).

In some national contexts, the reliance on unions to bring claims raises fundamental legitimacy issues about the FLA complaints system. The distribution of FLA claims does not match where factories covered by its system are located. FLA claims are mostly from Latin America, while a large percentage of the world's, and FLA's, apparel-manufacturing factories are in East Asia (*see* Table 1.) The location of FLA claims therefore diverges wildly from the location of its factories. While there are doubtless multiple reasons for this, an important one is FLA's strategy of primarily engaging with unions, which is extremely problematic in some countries. For example, FLA has a strikingly small numbers of claims from China (one) and Vietnam (two), despite massive apparel production there. Those two countries do not have legitimate independent trade unions which confront factories over labour rights abuses (albeit with some recent reforms in Vietnam), and so they should not be expected to use a complaint system such as FLA's (Chan 2020). The lack of FLA claims in such countries should therefore not be a surprise, but these numbers raise questions about the legitimacy of a complaints system that focuses on engagement

with unions while having such largescale production in countries where those unions are not effective.

**Table 1: Geographical Distribution FLA Brands' Factories compared to FLA Claims<sup>6</sup>**

<b>Region</b>	<b>Number of Factories (Adidas)</b>	<b>Number of Factories (Fast Fashion, e.g. Uniqlo)</b>	<b>Number of Factories (Under Armour)</b>	<b>Number of complaints in the FLA system</b>
Latin America	4 (2%)	3 (<1%)	21 (14%)	29 (64%)
China and Vietnam	99 (53%)	295 (65%)	55 (38%)	3 (7%)
Rest of World	82 (44%)	157 (35%)	70 (48%)	13 (29%)
Total	185	455	146	45

Even in countries with effective unions, there were still significant barriers to accessing the system. While FLA claims handlers did on one occasion (the *Gildan Star* case in Honduras) respond to controversies by proactively asking if a union wanted to file a claim (FLA claimant (Honduras), Google Meet, 30 April 2021), there is a general lack of outreach and awareness-raising by the FLA to make more unions and workers aware of the grievance mechanism and how they can access it. As one knowledgeable NGO representative commented:

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<sup>6</sup> This table is indicative only. We accessed the distribution of suppliers to three of FLA's large member brands from the Open Apparel Registry ([www.openapparel.com](http://www.openapparel.com)) for the most recent available data, (2020, 2021 and 2022 for Adidas, Fashion and Under Armour respectively). As each factory's production data is not reported, the percentages are only of number of factories.

The FLA's Code of Conduct is posted in the factories, but the workers don't know what it is for, what it does, or what they can do if their rights are threatened. Neither do they know which brands buy from the factory where they work or if they are FLA members. FLA does not train workers on this; it only reacts to their claims (NGO (Guatemala), Guatemala City, 21 April 2022).

Even union officials themselves in a number of Latin American countries where claims were brought often had to rely on other expert organisations to help them find out about the FLA, including NGOs such as COVERCO, the Solidarity Center, the WRC, and trade union federations (FLA claimant (Guatemala), Guatemala City, 21 April 2022; (Nicaragua), WhatsApp call, 26 June 2021; FLA claimant (Dominican Republic), WhatsApp call, 28 July 2021; FLA claimant (Peru), Google Meet, 6 August 2021). Without these expert contacts, which acted as a form of social capital, they would not have been able to bring cases. As one union official in El Salvador commented:

Other El Salvador union organizations, with more experience told us about the FLA because [they are] active in labour issues and in the maquila sector. That is where we found out about the brands' [complaint] mechanisms and we got to know FLA. (FLA claimant (El Salvador), WhatsApp call, 13 May 2021).

There are certain types of complaints that do not feature in the FLA system. For example, there are no cases regarding gender-based violence, despite the fact that the labour force in the garment industry is highly feminized and gender-based discrimination, including sexual harassment and other forms of violence, is an

“endemic problem in maquila factories throughout Central America and in garment export factories around the world” (Maquila Solidarity Network, no date). However female workers said that they did not know that they can report these cases through the FLA claim system, (FLA claimant (El Salvador), San Salvador, 30 April 2022) demonstrating how their awareness of their legal rights or ‘legal consciousness’ is constrained by how the system is presented to them both by those who manage it and those who assist them to bring cases (Maher, Monciardini and Bohm 2021).

Even for those workers who were made aware of the complaints process, there were still significant barriers to successfully lodging a claim. Instructions and information to file a claim on the FLA’s webpage were only in English. The FLA complaints line was answered only in English, which most workers do not understand, and so they were discouraged from continuing to file a claim (NGO (Guatemala), WhatsApp call, 17 December 2020). Another option was to fill in a form in English on the FLA website, which many workers found very complex, and which they sometimes struggled to do because of internet access problems and language barriers (FLA claimant (El Salvador), Zoom, 16 January 2021; NGO (Guatemala), WhatsApp call, 17 December 2020).<sup>7</sup> Workers and their representatives in Latin America who successfully filed a claim, therefore, often relied heavily on more expert organizations to do so:

We relied on the Center of Labor Support Studies, an NGO formed by unionists in El Salvador, which gave us free technical support. They helped us fill out the

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<sup>7</sup> Most unions and the expert organizations that support them in the claim processes, file their claims via email directly with FLA in Spanish. However, this possibility is not a formal part of FLA’s third-party complaint system process and is not publicly notified to potential claimants.

forms and with all the procedures because we are not very well educated (FLA claimant (El Salvador), Zoom, 16 January 2021).

In other countries where higher numbers of claims were brought, claimants did not rely on external organisations in the same way. However, most cases were brought either by large, sophisticated unions often with strong ties to the FLA (e.g. in Turkey), or by an exceptionally tenacious union leader (India). In Turkey the two main claimants have been the Deritek union, which is over seventy years old and is a major player in the labour movement, and Teksif, which has approximately 50,000 members and had a representative on the FLA Complaint Mechanism Expert Advisory Panel (FLA claimant (Turkey), Zoom, 15 January 2021; FLA claimant (Turkey), Zoom, 20 January 2021). In India, repeat FLA claimant the Garment Labor Union in Bangalore is led by a famously indomitable person who founded the woman-run union despite attacks and severe harassment. She is an extremely strong advocate of FLA's Complaint Mechanism (FLA claimant (India), Bangalore, 18 March 2021).

Overall, FLA claimants were more likely to access the system in national contexts where unions have legitimacy, but lack effective means to achieve remedy for rights violations through government processes, such as through their Ministry of Labour, or courts. However in these national contexts the ability of workers to bring claims was limited by the extent of their social capital including whether they could find representation and expert assistance to navigate the complexities of the FLA system. All of these limitations in terms of accessing the FLA system resulted in the number of accepted cases (48) being very small when compared with the extent of labour rights problems which are well known across the factories which are producing for FLA brand members (Rossi, Luinstra and Pickles 2014).

For those workers who did manage to lodge a claim, there were various impediments and barriers that confronted them while their claims were being considered. Although FLA complaints are much more swiftly decided than when cases are taken through courts, complainants still found that the time taken to address complaints was a serious problem. The FLA complaint mechanism invested time at the beginning of the process in deciding whether to accept the claim, and then, waiting for the brand to decide if they will investigate directly or if the FLA will. The FLA claim system then has a formal limit of 30 days (extendable to 45 days) to investigate and complete the report, but sometimes it takes longer (FLA representative, Google Meet, 14 April 2021; FLA representative, Google Meet, 6 June 2021). The whole process can take a number of months; on average it took 8.4 months between the time the complaint is opened and closed (Harrison and Wielga 2023). In this regard, a Guatemalan NGO knowledgeable about FLA's complaint system commented:

The process remains very slow. In the time that passes as the claim is accepted, deciding on whether to process, asking the brands if they will investigate or if the FLA will do, many times evidence is lost and then FLA dismisses the case for lack of evidence. The FLA should not wait for the brands to decide if they are going to investigate but investigate directly (NGO (Guatemala), WhatsApp call, 17 December 2020).

There could be serious impacts on claimants while they were waiting for their claims to be decided. A claimant from El Salvador described this long wait:

It hurt us a lot that after struggling with the FLA for eight months, to have our brothers starving in the streets” (FLA claimant (El Salvador), Zoom, 16 January 2021).

While cases were ongoing, as well as when cases had been concluded, many claimants also reported reprisals for using the mechanism. Claimant workers and union members reported discrimination from supervisors and co-workers, and even threats to their lives and security (FLA claimant (Peru), Google Meet, 6 August 2021; FLA claimant (Guatemala), WhatsApp call, 28 November 2020). In Guatemala, an NGO that assisted many workers with their cases reported:

In every case, except [one], there have been reprisals against workers for filing cases with the FLA and/or the brands: blacklists, discrimination, threats, kidnapping, and attempted murder, among others (NGO (Guatemala), Guatemala City, 21 April 2022).

Another claimant from Guatemala gave a specific example of the retaliatory action taken against herself and her colleagues: “For filing the FLA complaint, they moved us to other workplaces, they didn’t give us night shifts [where more money can be earned], so that affected us” (FLA claimant (Guatemala), Guatemala City, 21 April 2022). Reprisals could even occur at the domestic level. A claimant woman from Guatemala mentioned in an interview that her husband once beat her for spending too much time on the complaint and neglecting her home (FLA claimant (Guatemala), Guatemala City, 27 April 2022).

Perhaps the most common reprisal identified by FLA claimants is being included in ‘blacklists’. Before hiring workers, factories do background checks including reviewing these blacklists. They do not employ workers included on them. This therefore limits workers’ opportunities to find jobs. A claimant from Guatemala commented on this practice: “They blacklisted workers and they did not hire us at any factory. They did not give us work because they said we were troublemakers. All doors were closed to us” (FLA claimant (Guatemala), Guatemala City, 27 April 2022). Evidence of “backlisting” even appears in the C.S.A. Guatemala case report where the owner of C.S.A Guatemala “confirmed that workers are not given the opportunity for access to employment in some factories because they are . . . considered promoters of unions.”<sup>8</sup>

The FLA did not publicly establish preventive measures for reprisals when filing claims in its system besides the possibility of anonymity. It did not, for instance, include discussion of blacklists in its Code of Conduct or in any other public commitment of brands and factories, nor did it have any public protocol to manage possible retaliations against workers who file claims in the FLA system. The FLA therefore not only failed to take action to address the kinds of reprisals listed above but also created barriers to accessing the complaint system because there were no guaranteed protections for the workers who use it.

Another serious limitation of FLA procedures is that they allowed complaints to be investigated, or investigators to be appointed, not only by the FLA itself, but

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<sup>8</sup> Francisco Chicas and Katya Castillo. CSA Guatemala S.A. Investigation Report requested by FLA (2019), page 3 and 22. Available at <https://www.fairlabor.org/reports/c-s-a-guatemala-tpc-report/> (accessed on 21 September 2022).



also by member brands and even by respondent factories who were themselves the direct subject of complaints. While all three groups generally (although not always) used independent consultants to perform the actual investigations, the independence and impartiality of the investigation process is open to question where factories and brands are involved in this way. The problem with factory involvement is self-explanatory and the results of investigations (while based on a small sample-size<sup>9</sup>) should come as no surprise: while 74% of brand-led investigations and 69% of FLA investigations resulted in a report in favour of the claimants, only 29% of factory-led claims were upheld. There were some cases, however, where FLA rejected the factory's investigation and commissioned one of their own (FLA claimant (Turkey), Zoom, 20 January 2021; FLA claimant (El Salvador), WhatsApp call, 13 May 2021).

While these figures suggest that brand-led investigations produced more positive results for claimants, the role of the brands in the process of investigating complaints was still questioned by a number of claimants. As a claimant from the Dominican Republic reflected:

I thought the FLA was more independent and then I realized that it had a lot of limitations with the brands because it is from the brands. And if they see that something is against their interests, they simply don't participate. And that keeps us away from the FLA and it has been many years since we filed a claim in their mechanism (FLA claimant (Dominican Republic), WhatsApp call, 28 July 2021).

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<sup>9</sup> Out of 45 claims, 23 are in first group (brands investigations), 15 are in the second group (FLA investigations), and 7 are in third group (factory investigations). See Nomogaia (no date).

Finally, in terms of the results of the claims process, where a claim was successful, there were limitations in terms of the implementation of the RAPs. The role of the brands and their relationships with individual factories was vital to what the complaints mechanism could achieve. An independent investigator for FLA claims highlighted both the positive and negative aspects of brand behaviour in relation to the FLA system:

It is the brands that get the results or can ensure there are results. If the brands are not committed to remedy, they just implement actions because they have to and the work has no real impact. If the brands don't pressure the factories, nothing happens because it is the business requirements that make things happen (FLA claim independent researcher, Zoom, 1 February 2021).

The FLA's system did not help to ensure that pressure from the brands leads to the necessary action. The complaint mechanism "closed" the cases when the RAPs were finalized, not when a remedy was confirmed as received (FLA claimant (Nicaragua), WhatsApp call, 26 June 2021). Verification of remedy was not part of the claim system but was an independent audit process which only took place in some cases. This means that the system was not intended to systematically monitor whether remedy or partial remedy is provided in all claims. There were many reasons why RAPs may not in fact be fully implemented, such as companies' lack of willingness or resources, factory closures, and more recently, the COVID-19 pandemic.

For example, in the 2015 *Topy Top S.A.* case in Peru, the "union alleged a series of violations of worker rights, principally freedom of association and anti-union

discrimination.”<sup>10</sup> This included the dismissal of 40 officials and union members. An independent consultant hired by Hugo Boss (FLA brand) investigated the complaint and confirmed most allegations. The RAP for this case included rehiring former workers, training workers and supervisors, and, establishing a dialogue table between the factory and the union with a mediator.

In October 2017 the FLA reported that the implementation of the RAP was progressing and called Hugo Boss to “conduct regular assessments to confirm progress.”<sup>11</sup> FLA has not published any further report on this case, but claimants insisted:

If we reread FLA’s recommendations, we would say that not 50% or even 40% has been performed. Only rehiring of the workers. The majority of the remaining recommendations in the RAP have not been acted on. The supervisors did one or two trainings and then that was put aside. The company felt like FLA left and so it did not take responsibility to complete [the Plan] (FLA claimant (Peru), Google Meet, 06 August 2022).

Just as they did when obtaining access to the system, workers and their representatives, particularly in Latin America, therefore often utilised their ‘social capital’ to improve their chances of receiving remedy. Alongside registering their complaints in the FLA system, they notified and directly informed the brands involved, other organizations, such as the WRC, US Embassy, Solidarity Center,

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<sup>10</sup> Fair Labour Association, ‘Topy Top S.A. (11 October 2017) <https://www.fairlabor.org/reports/topy-top-s-a-peru-tpc-report/> (accessed on 30 September 2022).

<sup>11</sup> See n.10.

international unions and labour organizations. Workers have found that this has drawn international attention to complaints, increased the pressure on the brands and factories to act, and improved the results achieved (NGO (Guatemala), Guatemala City, 21 April 2022; FLA representative, Guatemala City, 22 April 2022; FLA claimant (El Salvador), WhatsApp call, 13 May 2021; FLA claimant (Dominican Republic), WhatsApp call, 28 July 2021; FLA claimant (Honduras), WhatsApp call, 25 May 2021).

For instance, a claimant in the *JoeAnne* cases in the Dominican Republic mentioned they obtained tangible results, but it was from a combination of engaged organizations (more than five international organizations participating, such as WRC, university students, and the Union League) and the brand's commitment, not just because of the FLA (FLA claimant (Dominican Republic), WhatsApp call, 28 July 2021). In this case, the claim alleged that seven workers were dismissed from the company because they participated in union meetings, affecting their right to freedom of association. After the claim was upheld, all the workers that pursued reinstatement were rehired, although they allege that discrimination against them continued.

But successful cases did not always lead to successful longer-term outcomes for workers. Factories could avoid taking action if the costs of compliance and unwanted publicity became too great. Sometimes factories preferred to close their operations in certain countries or to stop supplying certain brands rather than respecting labour rights. For instance, in the 2015 *Petrallex* case in Honduras, it was found that workers had been illegally fired. The FLA and the WRC developed a joint RAP, which was agreed to by the factory. Illegally fired workers were reinstated. Petrallex's management paid for most of the wages which workers lost during their dismissal,

and the remediation plan was under implementation. However, the factory ‘closed’, and according to interviewed union members and former workers, they continued to operate in the same location under another name and hired a number of workers from Petralex (FLA claimant (Honduras), WhatsApp call, 5 May 2021). So, the third-party complaint initially provided substantial benefit to the workers laid off in 2015 for unionizing but, in the end, there was no gain since the company closed and the union could not function there. A number of important brands sourced from Petralex.<sup>12</sup> We do not know if these brands continued to place orders from the alleged “new factory”.

Brands themselves could also take actions which frustrated the remedy provided through an FLA case, for instance, because they have decided to stop sourcing from the factory where the violations had occurred. One example of this is the *Biunno* case in Guatemala, where workers forming a union filed a complaint with the FLA in January 2020 for various labour rights violations at the factory, including discrimination against those forming the union. Because of the pandemic, work stopped at the factory, and then resumed after several months. According to the workers, the company called most of the workers back, leaving out a group of 40-45 people, including the committee which was forming a union. In January 2021, the committee sent a letter to the FLA letting them know about this situation. The FLA report says that Hanesbrand (the brand) confirmed the allegations and developed an RAP, but its implementation was suspended by the pandemic. FLA encouraged Hanesbrand to work with the factory in implementing the RAP. However, Hanesbrand stopped buying from this factory in December 2020 so, according to the FLA report,

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<sup>12</sup> These included Box Seat Clothing, Dallas Cowboys Merchandising Ltd., Gear for Sports (under license from Under Armour), Outerstuff (under license from adidas Group), and VF Corporation. Information accessed from FLA website, Petralex, Honduras. 2015. <https://www.fairlabor.org/reports/petralex-honduras/>, (accessed on 21 September 2022).

they do not have a basis to proceed with the implementation of the RAP (FLA claimant (Guatemala), Guatemala City, 26 April 2022).

Overall then, in this final stage of the claims process, the results achieved were influenced significantly by both their social and, in particular, their corporate grounding. From a social perspective, complainants could deploy their networks to increase the pressure on the brands and factories to provide remedies. But even more importantly, the complex interrelationships between brands and factories influenced outcomes in decisive ways that we are only just beginning to uncover.

## **5. Discussion of Findings and Implications for the Future of complaints systems**

There is a widely recognised “enforcement gap” in transnational private regulation of labour. Can complaints systems be part of the solution? Our empirical investigation of the FLA is the first detailed attempt to understand how a complaints system works in practice from the perspective of complainants. Given scepticism about the performance of the FLA in addressing labour rights issues more generally (e.g. Sethi and Rovenpor 2016, MacDonald 2011, Anner 2012), it is surprising that our study found that the FLA complaints system did address cases in a way that was generally seen as valuable by complainants who used the system. As a bottom-up mechanism for uncovering and addressing labour rights issues, it therefore may have some potential in closing the enforcement gap.

But there were a number of critical flaws in the FLA complaints system which seriously undermined that potential. Considering these flaws sequentially, they can be

categorised as (1) serious issues in accessing the system for workers who wanted to utilise it, (2) various difficulties and problems with the claims process once a claim had been filed and (3) inadequate results at the end of the process for those whose claims were successful. The individual problems which we have identified in section 4 above are too numerous for us to repeat again here. We concentrate on considering how outcomes differed depending on localised contextual factors. We utilised the concept of ‘grounding’ (Graz 2022; Bartley 2022) to explore the differentiated functioning and results of the FLA complaints mechanism for workers in different contexts. We argued that the concept could be usefully unpacked into three key dimensions; the national, social and corporate. Nationally, we identified how the FLA system is unable to function effectively in countries with legal and political frameworks that do not allow genuine trade unions (e.g. Vietnam and China). The massive apparel production in those countries compared to the minimal number of complaints from them raised fundamental legitimacy concerns about the FLA system. In national contexts where legitimate trade unions did exist and state-based legal processes were seen as ineffective, the FLA system was considered valuable. But complainants must still have sufficient knowledge and expertise to access and then navigate the FLA system. Those with sufficient social capital were more likely to access the FLA system and be able to pressurise for remedies for rights violations. But even when cases were won, whether remedies were provided depended on the corporate dimension – the attitudes of the individual factories and brands involved in the cases, and their willingness to resist or enforce FLA judgments. The unevenness of outcomes for complainants was related to various aspects of both individual brand and factory behaviour which the FLA struggled to control.

Unpacking the concept of grounding into these three dimensions has allowed for precise and focused attention on what we would argue are the three key types of contextual factors that most significantly affect outcomes for workers; the national, social and corporate dimensions of grounding all need to be understood if fully informed judgments about complaints mechanisms are to be reached. Previous deployment of the concept of grounding in other studies of private governance initiatives have not attempted to delineate its sub-elements so clearly and, we would argue, our typology creates greater clarity and precision that enhances the explanatory potential of this concept in the future. We therefore encourage scholars studying other aspects of transnational private regulatory initiatives to investigate whether these three dimensions also work in those contexts.

Moving from the academic to the policy implications of our study, two key questions remain which dictate how useful this study will be to those who are interested in the potential of complaints mechanisms for addressing the enforcement gap in private governance initiatives. First, how likely is it that a complaints mechanism, such as that of the FLA, will produce outcomes that are valued by complainants in other GVC settings? And second, is there potential for the limitations and deficiencies we have found in the FLA system to be overcome in future?

In relation to the first question, we have identified the harnessing of brand power by the FLA to pressurise factories into compliance with requisite labour standards as a necessary (although by no means sufficient) aspect of how the FLA complaint system functions. In other GVCs where complaints mechanisms involve complainants making complaints directly against sites of production and the MSI harnessing brand power to help address those issues, we see the potential for



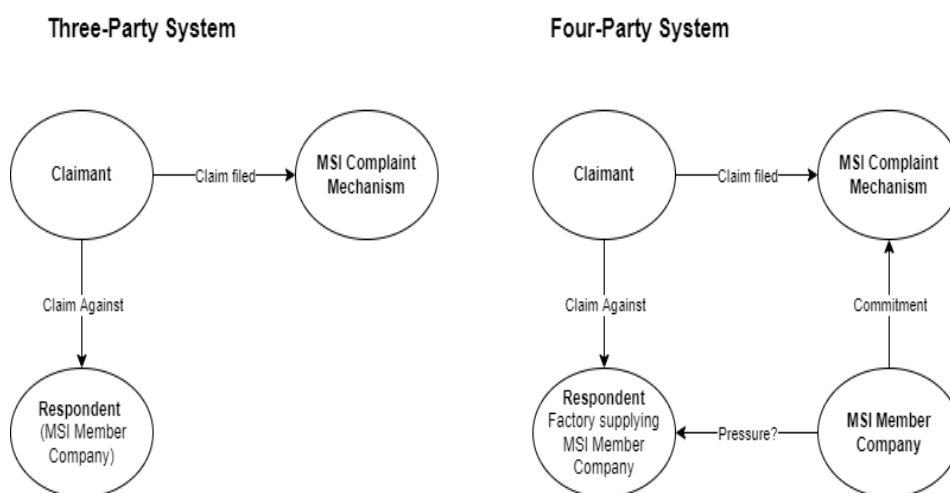
complaints mechanisms to play a similar role. This finding is confirmed by our broader study of six MSI complaint mechanisms mentioned above. In the two other MSI complaint mechanisms (the FWF and Bangladesh Accord) that involved workers or their representatives making complaints to a complaints body which harnessed the power of brands to enforce labour standards against factories, we found relatively high numbers of accepted claims which produced some significant benefits for workers; 58% for the Bangladesh Accord and 56% for FWF as opposed to 41% for FLA (Harrison and Wielga 2023). These figures suggest the potential of this type of complaints systems to perform some meaningful role. But, unlike our FLA research, we were unable to independently verify from a complainant's perspective whether outcomes from the Bangladesh Accord and FWF were actually seen as valuable by complainants and had to rely on the MSI's own view of whether remedy had been provided. However, both of these systems have a standard practice of contacting the claimant to confirm that the remedy ordered had actually been provided (Claims system representative, Zoom, 18 June 2021; Claims system representative, Zoom, 21 December 2021).

On the other hand, we also studied three MSI complaints mechanisms where the system involves claims made directly against the member companies themselves because it is they who are responsible for the production process (RSPO, Bonsucro and the FSC). In these systems, there was not a single successful complaint which upheld labour violations and produced a remedy for claimants (Harrison and Wielga 2023; Wielga and Harrison 2021). While we identified many differentiated deficiencies and limitations of these three complaint systems, the most fundamental problem was that each MSI was seeking to enforce standards against its own (voluntary) members. It was therefore perhaps unsurprising that none of these systems did sufficient work to ensure their systems were well-utilised by workers. Nor was it

surprising that they also did not look capable of addressing violations on the rare occasions when complaints were made (Harrison and Wielga 2023).

We would therefore argue that complaints systems which involve what we term a ‘four party system’ have far greater potential than their ‘three-party’ counterparts to play a significant role in enforcing labour standards. In four-party systems (e.g. FLA, FWF and Bangladesh Accord), complaints are made to the MSI (party one) by a complainant (party two), but the claims are not made against a member company (party three). Instead, they are made against a company which usually operates a factory connected through a global value chain to an MSI member. That company is the fourth party in the system. We define a three-party system as one where complaints are made to the MSI (party one) by a complainant (party two) against a member company (party three) for violating the MSI’s standards (e.g. RSPO, FSC and Bonsucro).

### Three- and Four-Party Systems



There are, of course, other forms of private grievance mechanisms. The most common is the so-called “operational level grievance mechanism” in which an

employee or affected community member files a claim directly with the company whom they allege is causing them harm. This would reduce to a “two party system” with the inherent weakness of having the company as the investigator, judge and jury. Virtually all the factories covered by FLA, for example, have factory level complaints systems. Their recognized failings are a major reason for the FLA creating its own grievance mechanism.

In relation to our second question, considering our FLA study in the context of our broader assessment of how other complaints mechanisms are functioning also provided some useful insights. Other complaints systems which we studied appear to be performing better than the FLA on a number of key issues. For instance, on access to the system, the Bangladesh Accord (as it was formerly known) and FWF do much more work to publicise their complaint system and make it more easily accessible to a wider range of workers (Harrison and Wielga 2023). Amfori’s supply chain grievance mechanism, which is currently being tested in a one-country pilot, has independent third-party investigators, which can harness the power of the brands, but ensures that they are kept at arm’s length from the investigation process (Amfori 2022). Further research should systematically review existing practice in established and emerging complaints systems to identify elements of best practice that address the deficiencies we have identified. These should then become fundamental attributes of any well-respected system. A critical part of this analysis will be to understand the requisite cost of running such a complaints system. Outreach, independent and timely investigation, taking action on reprisals, etc. all require significant expenditure if they are to function effectively. A complaints system can look good on paper, but it must also be funded effectively to perform its role.

Beyond this, there is the question of whether complaints mechanisms can do more than address individual instances of violation and start to address systemic problems which underpin many of the individual labour violations which are the subject of complaints and which we know are endemic in production processes such as apparel (Rossi, Luinstra and Pickles 2014). Can cases lead to wider changes in corporate culture in individual factories or even on a wider sectoral or national scale? Being a catalyst for this type of systemic change is certainly necessary if MSIs such as the FLA are to overcome fundamental concerns about the power of dominant stakeholders in MSIs and the outcomes such MSIs are achieving for more marginalised stakeholders, including workers (MSI Integrity 2020). We saw limited examples of individual cases leading to broader changes in our study. But there is a need for further careful analysis of the kind of institutional structures and practices which ensure that key learnings across cases are systemically addressed. This includes looking beyond the behaviour of sites of production and tackling the power of the brands themselves who are often part of the problem; it is well-recognised that it is often pressure from the brands for cheap products and quick turn-around times, which leads factories to reduce costs and timescales of production and in so doing violate the rights of workers (Anner 2019). If complaints mechanisms are to address the broader structural imbalances in GVCs, then they cannot simply deal with individual complaints in isolation but must be the ‘canary in the coal mine’ and a catalyst for structural reforms where the brands change their practices and also pay for their fair share of fixing the problems. Private governance initiatives must ensure that, in harnessing brand power to address individual complaints, they do not neglect the structural problems for which those same brands bear significant responsibility.

## 6. Conclusion

Our exploration of the FLA's complaint system has found, somewhat surprisingly, that it has often produced results which claimants using the system find valuable. But it also has fundamental flaws in terms of complainants' ability to access the system, navigate the complexities of the claims process, and then achieve meaningful remedies. If these flaws are to be overcome in the FLA, as well as in the complaints systems of other private governance initiatives, then reformers need to pay serious heed to the national, social and corporate grounding of those systems. Unpacking the concept of grounding into its national, social and corporate dimensions may also be valuable for studies of other aspects of private regulatory initiatives in the future.

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