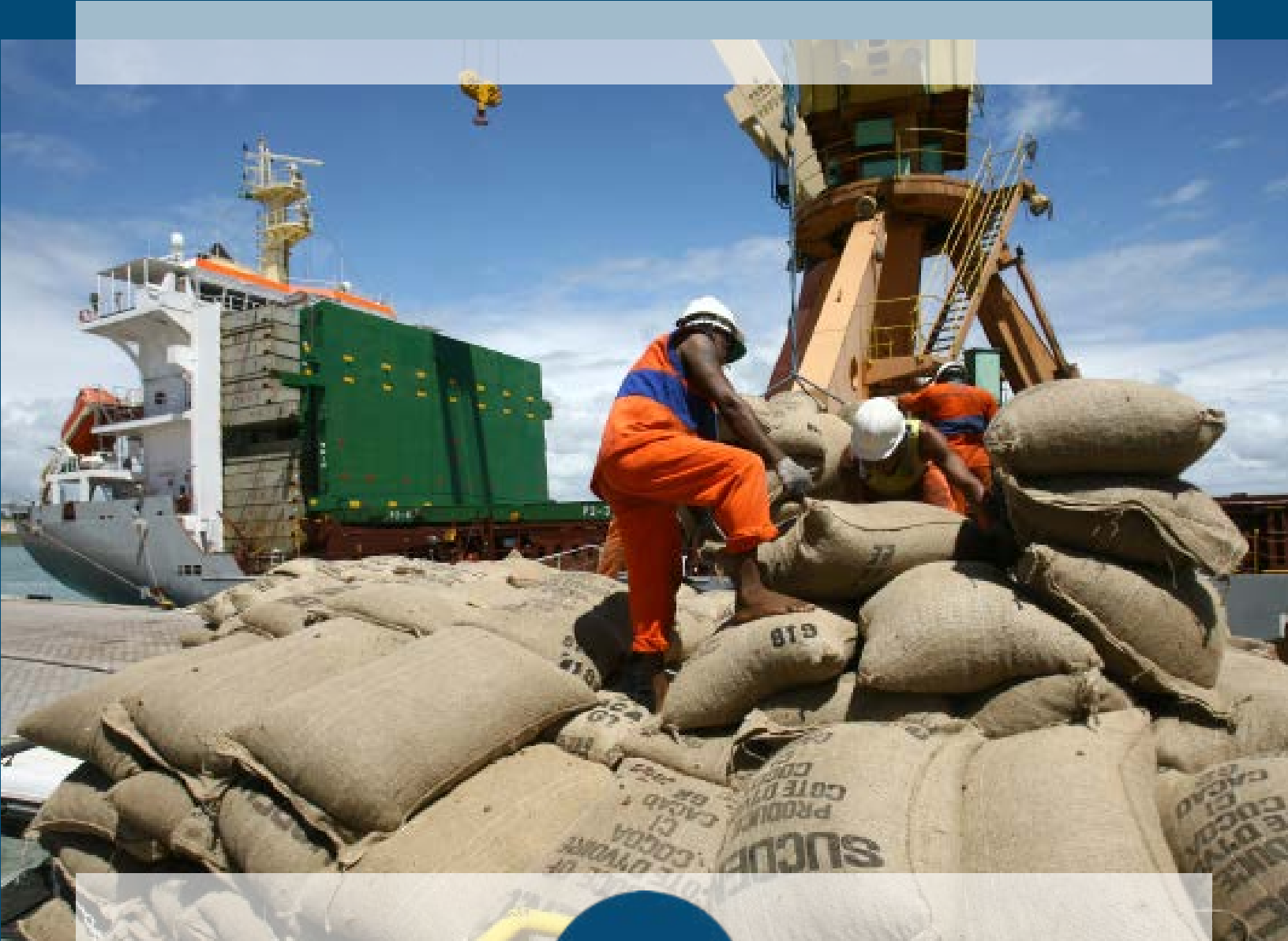

The Global Labour Rights Reporter

Accountability and Remedy in Global Supply Chains:
Considerations for Workers and Unions



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EDITOR'S NOTE

THE ELUSIVE QUEST FOR WORKER JUSTICE

JEFFREY VOGT, ILAW NETWORK CHAIR

Why has accountability and remedy in global supply chains been so difficult to obtain?

For decades, workers, unions, students, and labour NGOs have joined together to try to hold global corporations accountable for the labour violations that have routinely taken place in their supply chains. Multi-faceted and often lengthy corporate campaigns have led to *some* workers in the supply chains of consumer-facing brands getting *some* measure of justice. However, “wins” have often been made on a factory-by-factory basis and have been fleeting due to the absence of meaningful reforms to business practices, weak labour laws and dysfunctional labour justice systems. More recently, binding transnational agreements have started to shift corporate behavior across industries within a country, and litigation in some jurisdictions is putting direct pressure on parent companies and lead firms for what happens upstream. Still, the fundamental rules of the game have not yet been changed, meaning the quest for justice for most workers often remains well beyond reach (and even worse for marginalised groups of workers). Indeed, efforts which have been ongoing since 2016 to negotiate new rules to protect workers in global supply chains at the ILO stalled in 2020 due to concerted employer opposition.

The essays and interviews in this issue of the *Global Labour Rights Reporter* seek to evaluate some of the efforts so far to embed labour rights in global supply chains and look to what might come next.

How Did We Get Here?

The modalities of global production have evolved significantly and continue to do so. In the 1960s-70s, multinational enterprises (MNEs) established wholly-owned subsidiaries overseas in

order to access (cheaper) sources of labour and, often, local consumer markets.¹ The goods were produced by the subsidiary's workforce, which it supervised. The goods were then exported in intra-firm trade to the parent company for sale in the home market or at times in other regional or international markets.² In the 1980s, with technological advances in telecommunications and investments in infrastructure and transportation, developing countries started to develop their own export-oriented industries. To do so, they offered incentives to attract more foreign investment, including setting up low-cost export processing zones in which labour laws were waived or simply not enforced.³ MNEs began to shift from investing in their own production capacity to outsourcing that production to overseas manufacturers and then purchasing those goods through commercial relationships.⁴

Today, a dominant mode of global production is one led by a lead firm, e.g. a consumer brand, which sells the end-product to the consumer. The lead firm itself no longer produces anything, but rather coordinates the production of branded goods through a network of contracts that contain terms including price, product specifications, quality assurances, and in some cases labour standards.⁵ The same can also be said of services used by lead firms, including, e.g., transportation and logistics. In this shift to buyer-driven global production, MNEs gained significant market leverage by being able to pit companies and countries

¹ See, International Labour Organization (ILO), *Decent Work in Global Supply Chains*, 6, ILC.105/IV (2016).

² *Id.*

³ *Id.*

⁴ *Id.* at 6-7.

⁵ *Id.* at 5

against each other in intense global competition on price and volume. MNEs can and do shift orders between suppliers and indeed between countries in search of lowest costs – among other factors. At the supplier level, the purchasing practices of the MNE, including intense price pressures and demands for rapid turn-around times, has encouraged local suppliers already on a tight margin to suppress workers' rights to keep wages low, to hire workers through third-party labour contractors, or to subcontract parts of their production to smaller firms where wages and working conditions are even worse.⁶

As the ILO explained,

Although a global buyer may own few, if any, of the factories producing its sourced products, the sheer volume of its purchases grants it substantial bargaining power in an asymmetrical market relationship where the buyer can negotiate prices and specify what, how, when, where and by whom the goods it sells are produced. In a cascade of subcontracting relationships, supplier firms may seek to extract further price concessions from their own suppliers and subcontractors down the supply chain. In order to respond to the threefold demands for low costs, high quality and speedy delivery, subcontractors often adopt highly flexible production and work patterns, including informality, piece-rate production, home-based work and non-standard forms of employment.⁷

At the same time, national labour authorities have been unsuccessful in preventing labour rights abuses in enterprises linked to global supply chains or in sanctioning employers/providing a remedy to workers once the labour law is violated. In many countries, labour administration and labour inspection are severely understaffed, and inspectors are not provided the resources necessary to perform their work, including basics such as transportation and computers.⁸ Labour ministries receive a small fraction of the national budget and nowhere close to what is necessary to create a culture of compliance. The low pay and priority afforded such jobs also create incentives

for corruption.⁹

For the worker employed by a supplier (or its sub-contractors), the situation has often been bleak. In addition to the lack of adequate labour inspection, an under-resourced and overworked judiciary can mean that claims against an employer can take years to reach resolution. And even when courts rule in workers' favour, enforcing that order has proved difficult as employers ignore such orders with relative impunity in many countries. Corporate capture of the government also serves to insulate key industries from accountability. Furthermore, the segmentation of labour justice means that in many cases, workers are unable to hold accountable downstream firms which are in large part responsible for the violations committed by the direct employer. Lead firms often remain beyond the reach of local courts, and justice can be difficult to obtain in the lead firms home courts as in many countries their business decisions do not give rise to liability – though this is slowly changing.

Where Are We Going?

Starting in the 1990s, as a result of pressure from labour and consumer groups, MNEs adopted various forms of self-regulation including corporate codes of conduct. These codes were included in contracts between the buyer and supplier, requiring the latter to comply with a set of minimum labour standards and to allow for compliance audits. These audits, which are typically conducted by the firm itself, a third-party auditing firm retained by the firm or the supplier, or through an industry-funded multi-stakeholder initiative, have been plagued by problems including lack of competence, slipshod methods, and conflicts of interest.¹⁰ As a result, these programs have been unable to encourage compliance with labour rights or to remediate violations when they occur.¹¹ Yet, these audits still serve as the backbone

⁹ See ILO, *The Global Challenges of Labour Inspection*, Labour Education 2005/3-4, Nos 140-141, VII (2005). ("If a government assigns low status to labour inspection, if the inspectorate is understaffed and undertrained and the inspectors' own employment conditions are deplorable, then they will not be in a position to carry out their tasks properly. And they will easily fall prey to corruption.")

¹⁰ See, e.g., AFL-CIO, *Responsibility Outsourced: Social Audits, Workplace Certification and Twenty Years of Failure to Protect Worker Rights*, April 2013, online at <https://aflcio.org/reports/responsibility-outsourced>

¹¹ See Mark Anner, Jennifer Bair & Jeremy Blasi, *Towards Joint Liability in Supply Chains: Addressing the Root Causes of Labor Violations in International Subcontracting Networks*, 35 Comp. Lab. L. & Pol'y J. 1, 5 (2013) (finding that, "there is a growing consensus, at least among social scientists, that codes of conduct and auditing programs have failed to eliminate, or perhaps even substantially reduce, incidents of labour viola-

⁶ *Id.* at 7.

⁷ *Id.* at 11.

⁸ See, ILO, *Workplace Compliance in Global Supply Chains*, 8 (2017), online at https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---sector/documents/publication/wcms_540914.pdf.

of most compliance efforts today, and including due diligence plans.

Given the relative difficulty of obtaining accountability and remedy in domestic courts, or at least remedies which included lead firms, workers and their advocates have attempted to sue MNEs in their home jurisdictions using a variety of legal bases. In the US, a complaint under the Alien Tort Statute did lead to a settlement in 2005 concerning Unocal's aiding and abetting forced labour in Myanmar (after nearly 10 years of litigation);¹² however, subsequent efforts to hold corporate defendants accountable for labour abuses have largely failed – most recently claims against Nestle and Cargill for forced child labour in the cocoa industry in Cote D'Ivoire.¹³ Tort claims in Germany following a devastating factory fire in Pakistan were dismissed over the statute of limitations, leaving open the possibility that such claims may prevail.¹⁴ In contrast, plaintiffs in English courts are now finding success with tort-based claims, and several important cases have recently survived motions to dismiss.¹⁵ However, while occasionally providing important relief for some plaintiffs, litigation has not yet succeeded in changing the incentive structures driving labour exploitation in supply chains, as the likelihood of facing accountability still remains remote.

Also since the 1990s, significant efforts have been made to include meaningful labour provisions in trade and investment agreements.¹⁶ In the US, complaints against Guatemala and Honduras did lead to the negotiation of detailed action plans to reforms laws and institutions.¹⁷ In Guatemala, failure to implement the plan led to the first trade-related labour arbitration, though the effort resulted in a stunning loss.¹⁸ While the

tions in global supply chains.”)

¹² Marc Lifsher, *Unocal Settles Human Rights Lawsuit Over Alleged Abuses at Myanmar Pipeline*, LA Times, March 22, 2005, online at <https://www.latimes.com/archives/la-xpm-2005-mar-22-fi-unocal22-story.html>

¹³ See *Case Note*, on p. 53 of this issue.

¹⁴ See Miriam Saage Maaß, *Against All Odds – Options for Workers' Transnational Litigation Against Rights Violations In Global Value Chains*, on p. 17 of this issue.

¹⁵ See *Interview with Richard Meeran*, on p. 34 of this issue.

¹⁶ See, e.g., Jeffrey Vogt, *The Evolution of Labor Rights and Trade—A Transatlantic Comparison and Lessons for the Transatlantic Trade and Investment Partnership*, 18(4) *Journal of International Economic Law*, 827–860 (Dec 2015).

¹⁷ See, US Department of Labor, *Submissions under the Labor Provisions of Free Trade Agreements*, online at <https://www.dol.gov/agencies/ilab/our-work/trade/fta-submissions>

¹⁸ In the Matter of Guatemala – Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR, Final Report of

panel determined numerous labour violations, they found that they were not undertaken “in a manner affecting trade”, and thus found no violation of the labour chapter.¹⁹ A recent Expert Panel decision under the EU-Korea FTA did find that several aspects of Korea's labour legislation violated the commitment under the agreement to give effect to the ILO Declaration of Fundamental Principles and Rights at Work.²⁰ While Korea did ratify three ILO conventions following the panel report, it has yet to bring those laws into compliance with these conventions (or the decision of the panel). A new “rapid-response” mechanism under the USMCA, which allows for disputes not against states but against specific companies, has led to two bilateral agreements which promise to force employers to respect freedom of association and collective bargaining.²¹

In another major development, the UN Guiding Principles on Business and Human Rights (UNGPs) were adopted by the UN Human Rights Council on June 16, 2011.²² This followed a previous initiative to articulate binding rules that had failed to garner sufficient support within the then-Human Rights Commission.²³ In the inter-

the Panel, June 14, 2017, online at https://www.trade.gov/sites/default/files/2020-09/Guatemala%20E2%80%93%20Obligations%20Under%20Article%2016-2-1%28a%29%20of%20the%20CAFTA-DR%20%20June%2014%202017_1_0.pdf

¹⁹ Lance Compa, et al, *Wrong Turn for Workers' Rights: The US-Guatemala CAFTA Labor Arbitration Ruling – And What To Do About It*, April 2018, online at <https://laborrights.org/publications/wrong-turn-workers-rights-us-guatemala-cafta-labor-arbitration-ruling---and-what-do>

²⁰ Panel of Experts Proceeding Constituted Under Article 13.15 of the EU-Korea Free Trade Agreement, Report of the Panel of Experts, January 2021, online at https://trade.ec.europa.eu/doclib/docs/2021/january/tradoc_159358.pdf

²¹ On 19 August 2021, workers at a General Motors factory in Silao, Mexico, voted down a “protection contract” signed without the workers consent by GM management and the CTM. The contract “legitimation” process was re-run after the USTR self-initiated a complaint under the USMCA rapid response mechanism due to voter intimidation during the original vote. See, Daina Beth Solomon, *GM workers in Mexico defeat union in first test of U.S. trade deal*, Reuters, 19 August 2021, online at <https://www.reuters.com/business/autos-transportation/gm-workers-mexico-vote-scrap-union-contract-labor-ministry-2021-08-19/>

²² Resolution adopted by the Human Rights Council, Human rights and transnational corporations and other business enterprises, A/HRC/RES/17/4, online at <https://undocs.org/A/HRC/RES/17/4>

²³ Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003), online at <https://undocs.org/en/E/CN.4/Sub.2/2003/12/Rev.2>. For an early post-mortem on the failure of the Norms is Pini Pavel Miretski & Sascha-Dominik Bachman, *The UN 'Norms on the Responsibility of Transnational Corporations and Other Business Enterprises With Regard To Human Rights: A Requiem*, 17

vening decade, the human rights due diligence framework (HRDD) set forth in Pillar II of the UNGPs - the 'Corporate Responsibility to Respect' - has become a conceptual juggernaut, forming a new 'consensus' position on the governance of business conduct in global supply chains. The HRDD framework was subsequently incorporated into the guidance adopted by other intergovernmental organisations, including the 2011 revision of the OECD Guidelines for Multinational Enterprises²⁴ and the 2017 revision of the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy.²⁵ However, the UNGPs are wholly voluntary and leave much discretion to MNEs themselves to determine the scope of application.²⁶ While having set forth a useful conceptual framework, the UNGPs have not yet significantly changed corporate behaviour.²⁷ The Open-ended Intergovernmental Working Group on Transnational Corporations and other Business Enterprises, established by the UN Human Rights Council, has since 2014 sought to negotiate a treaty which would require member states to adopt laws mandating human rights due diligence, though the treaty still faces substantial opposition from many countries.²⁸

To date, two countries have enacted mandatory HRDD legislation -- the French Duty of Vigilance Law of 2017²⁹ and the German Supply Chain Due

Diligence Act of 2021³⁰ -- in an effort to transform the responsibilities into obligations. A public referendum to amend the Swiss Constitution to require HRDD narrowly failed in November 2020.³¹ An EU wide proposal is still under consideration as of this writing.³² Other countries, including Norway, are also now considering HRDD legislation. To date, litigation under the French law concerning labour rights violations has been over the adequacy of the vigilance plans themselves; no claims have yet been brought to hold companies accountable for labour rights violations in their supply chains.

Perhaps the most celebrated development, the Bangladesh Accord created legally binding obligations on MNEs to ensure that their suppliers' factories were safe. Since then, a similar agreement was negotiated in Lesotho to hold MNEs responsible to ensure the elimination of gender-based violence and harassment in the factories owned by Nien Hsing which produce garments for three global brands.³³ This model is being currently pursued in other industries in other countries.

Are We There Yet?

It is worth repeating that all of the initiatives describe above, including the billions spent each year on audits, would be wholly redundant if states simply guaranteed the fundamental rights of workers, as envisaged at the founding of the ILO in 1919, and employers respected those rights in practice. As we know, repressing labour rights has instead been a strategy to gain comparative advantage over other countries by artificially lowering the cost of labour - often at the insistence or at least acquiescence of MNEs. Perhaps what is ultimately needed is for trade unionism, like cap-

Deakin L Rev. No. 1 (2007), online at <https://ojs.deakin.edu.au/index.php/dlr/article/view/68/73>

²⁴ OECD (2011), OECD Guidelines for Multinational Enterprises, OECD Publishing, online at <https://www.oecd.org/corporate/mne/1922428.pdf>

²⁵ Online at https://www.ilo.org/wcmsp5/groups/public/-/ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf

²⁶ See Alejandro García Esteban, Scoping the Framework of Corporate Responsibility in Supply Chains: From Soft Law on Human Rights to Hard Law on Labour Issues, on p. 28 of this issue. The author suggests looking to the Spanish law on subcontracting to fashion a clear duty of care owed by MNEs to workers in their supply chains.

²⁷ Quijano & Lopez, *Rise of Mandatory Human Rights Due Diligence: A Beacon of Hope or a Double-Edged Sword?*, 6(2), Business and Human Rights Journal 241-254, online at <https://www.cambridge.org/core/journals/business-and-human-rights-journal/article/rise-of-mandatory-human-rights-due-diligence-a-beacon-of-hope-or-a-double-edged-sword/34FB600B4B6939BC04895BF871E96BA3>

²⁸ The Third Revised Draft of the treaty was released in August 2021. It is available online at <https://www.ohchr.org/en/hrbodies/hrc/wgtranscorp/pages/igwgontnc.aspx>. For an explanation of the dynamics frustrating the development of the treaty, see Ruwan Subasinghe, A Neatly Engineered Stalemate: A Review of the Sixth Session of Negotiations on a Treaty on Business and Human Rights, 6 Business and Human Rights Journal 384-391 (2021).

²⁹ Loi 2017-399 du 27 mars 2017 relative au devoir de

vigilance des sociétés mères et des entreprises donneuses d'ordre, online at <https://www.legifrance.gouv.fr/jorf/id/JORF-TEXT000034290626?r=r4oZB6BaoU>. An English translation of the law is online at <https://respect.international/wp-content/uploads/2017/10/ngo-translation-french-corporate-duty-of-vigilance-law.pdf>

³⁰ Entwurf eines Gesetzes über die unternehmerischen Sorgfaltspflichten in Lieferketten, June 9, 2021, online at <https://dserver.bundestag.de/btd/19/305/1930505.pdf>

³¹ *En Suisse, l'initiative sur « les multinationales responsables » est rejetée*, Le Monde, 29 novembre 2020, online at https://www.lemonde.fr/economie/article/2020/11/29/en-suisse-l-initiative-sur-les-multinationales-responsables-risque-d-etre-rejetee_6061558_3234.html

³² See European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)), online at https://www.europarl.europa.eu/doceo/document/TA-9-2021-0073_EN.html

³³ See Blaisi, Bair and Vogt, *Bargaining Up the Supply Chain: Lessons From a Cross-Sectoral Study*, on p. 12 of this issue.

ital, to be freed from the limitations of national jurisdictions. The lack of a meaningful legal infrastructure for *transnational* union organising, collective bargaining, strikes and dispute settlement along supply chains is perhaps the most meaningful gap in global labour governance today.³⁴

³⁴ Indeed, courts have often erected obstacles to taking transnational collective action. Perhaps most well-known are the cases of *Viking Line* and *Laval*, in which the Court of Justice of the European Union restricted the exercise of fundamental labour rights in light of the freedoms of movement and establishment protected under EU instruments. See Case C-438/05 International Transport Workers' Federation (ITF) and Finnish Seamen's Union (FSU) v Viking Line ('Viking') [2007] ECR I-10779; Case C-341/05 Laval un Partneri v Svenska Byggnadsarbetareförbundet ('Laval') [2007] ECR I-11767.



Aftermath of Córrego do Feijão dam collapse | Photo © Ilana Lansky/Shutterstock.com

MURDER BY NUMBERS: SEEKING JUSTICE FOR VALE'S VICTIMS FROM BRUMADINHO TO MUNICH

A conversation with Maximiliano Garcez and Ruediger Helm¹



Maximiliano Garcez, *Lawyer, Metabase Brumadinho Union, Brazil*

Maximiliano Nagl Garcez is a lawyer for labour unions and social movements in Brazil and a board member of the ILAW Network. He was the Former Director for Legislative Affairs of ALAL – Asociación Latino Americana de Abogados Laboralistas, Former Legal Adviser and Coordinator of the Advisory Body of the Workers' Party caucus in the Brazilian Chamber of Deputies, and Former Visiting Fellow at the Labor and Worklife Program at Harvard Law School. Max has been litigating on behalf of the union against Vale and Tüv Süd in Brazil, in Germany, and coordinating domestic and international efforts to bring justice to the victims through financial compensation, measures to avoid future deaths, and the imprisonment of the corporate executives responsible for the 272 workers' lives lost.



Ruediger Helm, *Founding Partner, Law Firm huber.mücke.helm, Human Rights at the Workplace*

Rüdiger is currently the founding Partner of the Law Firm huber.mücke.helm, Human Rights at the Workplace, which represents only workers, works councils and trade unions. He is also a founding board member of the ILAW Network and a founding member of the European Lawyers for Workers Network.. Rüdiger is regarded as the architect of the Mangold/Helm decision at the European Court of Justice (ECJ 22. Nov 2005, C-144/04), won the first case at the Federal Labour Court in Germany that platform workers can be employees (Bundesarbeitsgericht 1. Dec 2020, 9 AZR 102/20), and most recently worked alongside Maximiliano Gacez to bring a civil claim against TÜV Süd in Berlin Munich, Germany.

¹ The following is an edited transcript of an interview between Jeffrey Vogt and Maximiliano Garcez and Ruediger Helm on June 1, 2021, concerning their ongoing litigation against Vale and TÜV Süd.

Jeffrey Vogt: Max, can you start by describing what exactly happened at Vale's iron ore mine in Brumadinho in 2019?

Maximiliano Garcez: 25 January 2019, is the date of the worst industrial homicide in Brazil's history. On that day, the Córrego do Feijão retaining dam, which was holding back millions of tons of mud and iron ore tailings, collapsed almost instantaneously - known as "liquefaction." This dam was owned and operated by Vale S.A. (Vale), the largest iron ore producer in the world, and headquartered in Brazil. When it collapsed, it sent tons of waste cascading onto the company's buildings located below the dam in the town of Brumadinho. The tsunami of waste killed 272 (240 of which were Vale or subcontractor employees) and contaminated land, rivers and streams for miles. Workers had been trained on evacuation in the case of a dam collapse, but those who followed the training and took the designated escape route all died.²

We try to avoid using the term disaster or catastrophe because it conveys the idea that this was an unforeseen accident or an 'act of God', when in fact it was entirely foreseeable and preventable. It is a case of industrial homicide. Indeed, Vale's own staff had also warned that the dam was leaking and unstable but were ignored. We also know that Vale had calculated that it was more profitable to operate in this reckless way, knowing that it would not cost the company that much if the worst happened and then had to pay damages.³ I would note that ever since its privatization in the 1990s, we have seen an increase in worker deaths at Vale.

An important part of this story involves the auditor which was hired to certify the safety of the retaining dam so that the mine could continue to operate. Vale initially sought to hire a French company to certify the safety of the retaining dam, but it refused to do so. However, Vale was able to get German auditing company TÜV Süd to provide a certification of the dam's safety, even though their own engineer had issued a report that the dam presented a hazard and should not be certified. Emails show that Vale intervened and that the TÜV Süd headquarters overruled their engineer's report and certified the operability of the dam in September 2018, just four months before the dam collapsed.⁴

JV: I understand that there are several civil lawsuits were brought against Vale, including one by the State of Minas Gerais, and another by you. Can you explain what these lawsuits are about, and why your clients felt they were not adequately represented in the state's case?

MG: Vale did pay a settlement to family members who opted in, and this included material damages to the families of the victims of the dam collapse, which is meant to compensate for the loss of income and health care, and the moral damages for the mental distress for having lost a loved one. We brought a lawsuit for moral damages on behalf of the workers themselves for the mental distress they suffered having been suffocated by a wall of mud, and for the wrongful death. This would be paid to the heirs of the estate. With one day left before the statute of limitations would have barred the suit, we filed on behalf of the families of 131 victims. We also filed a claim on behalf of the union for having lost several leaders and members of the union. Vale is vigorously opposing both lawsuits.

² International Commission for Labor Rights, *270 Deaths Foretold: Report of the International Independent Commission of Inquiry on the Impact of the January 25, 2019 Brumadinho Dam Collapse*, (2019) (A report on the dam collapse and its impact on workers, families and communities) available at <https://www.ilawnetwork.com/resource/270-deaths-foretold/>.

³ In the days following the dam collapse, federal police found a document in which the company had made several estimates as to how much they would have to pay if a tragedy like this were to happen. The document noted the recent reforms to labor law which capped moral damages at a low level. See, Beatriz Juca, *O valor de uma vida exposta ao risco das barragens da Vale: 2,6 milhões de dólares*, EL PAÍS, (February 17, 2019), available at https://brasil.elpais.com/brasil/2019/02/14/politica/1550171184_562739.html

⁴ See, Fernanda Canofre, *Emails da Vale apontam manipulação de laudo de estabilidade, diz Promotoria*, FOLHA DE SÃO PAULO (February 15, 2019), available at <https://www1.folha.uol.com.br/cotidiano/2019/02/emails-da-vale-apontam-manipulacao-de-laudo-de-estabilidade-diz-promotoria.shtml>

The State of Minas Gerais also filed a lawsuit against Vale in 2019 seeking socio-economic and environmental damages. The dam collapse destroyed the town of Brumadinho leaving the entire community without work and basic services. On February 2021, Vale agreed to a settlement with the state government of Minas Gerais under which it would pay the state R\$37.68 billion (US\$7 billion). However, this settlement was made completely without the participation of those affected. Many groups criticized the settlement because much of the payment was going to the state government and would be used to finance infrastructure projects in parts of the state that will do nothing for the people of Brumadinho.

There is also a criminal case file in January 2020 against the former CEO Fabio Schvartsman and several others accusing them of homicide. A Brazilian judge accepted the charges but, so far, the case has not been concluded as a federal investigation is still continuing. No one has yet been held criminally responsible.

JV: Ruediger, you have been working with Max to bring a civil claim against TÜV Süd in Berlin for their negligence and/or recklessness in certifying the dam as safe. Can you tell me more about the TÜV Süd?

Ruediger Helm: TÜV Süd is a major German-based multinational which specializes in providing technical expertise and certifying that products comply with technical standards. In Germany, they are seen as the “gods” of technical knowledge and have a huge team of technical experts in many areas. So, for example, they would certify that a product like a car is safe or that products manufactured for children are safe. In this case, TÜV Süd had been hired by Vale to certify that the retaining dam was properly constructed and maintained and safe for operation. Though TÜV Süd engineers were hired through a local, wholly owned subsidiary, a team in Munich responsible for certifying dams had direct oversight of the project and worked closely with the Brazilian team.

Here, the local technical team determined that the dam didn’t meet the technical requirements and could therefore not be certified. However, despite the report, TÜV Süd headquarters decided to extend certification, and there is an email to this effect, so there was clearly something shady happening between the issuing of the technical report and the final decision to certify. The decision which leads to TÜV Süd’s potential civil liability clearly took place in Germany. The project manager from Germany also spent 3-4 months a year in Brazil and gave guidance to the local entity. But even if the decision were made in Brazil, Brazilian law provides that when a decision is made by a local subsidiary, the entire corporate group can be held liable. In either case, TÜV Süd Munich wanted the dam certified and is responsible for the damages.

JV: Can you tell me about the litigation in Germany? Who are the plaintiffs and what damages are you seeking?

RH: The civil litigation against TÜV Süd has three groups of claimants, the family members of those who were killed, the family members of those who are missing and presumed dead, and another for workers who survived but who are nevertheless harmed. We sued them for immaterial damages which are not already claimed against Vale. The system under the Rome II Agreement says that as to material law as to the question of who may be liable for damages, Brazilian law applies, but as to questions of procedure German law applies. So, Max provides the material law, and I provide the procedural law. The claim here is founded in the recklessness and/or negligence of TÜV Süd. There is also a criminal investigation as to whether TÜV Süd was bribed in this case. In one email with TÜV Süd, there is an exchange which says that we cannot certify this dam, but we cannot also lose the business with Vale. This is not only a question of negligence - it’s intentional. It may not be that they wanted the workers to die but you know that this is very likely to happen and that they accept this risk.

JV: *Ruediger, in general how receptive are German courts to hear transnational claims such as this one?*

RH: I would say that these kinds of claims are still relatively new for German courts. Transnational strategic litigation on labor or human rights is more common in South Africa, UK, US, and elsewhere. It is not so much developed in Germany, though there are of course German organizations bringing transnational claims on behalf of foreign victims for harms caused overseas. German law clearly allows it, following Rome II. I would say that most transnational litigation involves corporate disputes or insurance disputes, but not involving unions and workers.

JV: *To both of you, how did you find each other and agree to work together to bring claims in both Brazil and Germany?*

MG: We met each other on Tinder (laughing). Actually, we met at the ILAW Network's founding meeting in Brussels in 2018. We started to discuss the case and realized that there were possibilities to find justice for the victims of the dam collapse in Germany as well.

RH: Yes, we are both interested in this area of law and owe our clients quality legal services and to think outside of the box. And we both have a commitment to trade unions, workers and works councils. In fact, the support of trade unions has been absolutely critical to the ability to bring this case. There are elections coming up and the possibility of making this a public issue in this context. There are also heavyweight unions in Germany with access to the political sphere who can move this issue forward. The union ver.di also has people on the board of TÜV Süd and they want there to be a solution. They are shocked that there has been such a violation of technical standards which led to the loss of life in Brumadinho. They have a group on the board of TÜV Süd looking at this case beyond the lawsuit.

MG: What happened was incredible luck. Without the ILAW Network it would have been difficult to find the right German partner in this litigation. You need the person with experience in transnational litigation, but also in the union world and human rights and politics and willing to take on a powerful company.

RH: IGBCE, the chemical workers' trade union has helped finance the litigation. You have high costs in litigation because if you lose the case you have to pay the opponent their costs. So having the union support, it's critical. For them, they cannot accept that a German company gets away with this. The union posted a bond to cover the potential cost of losing and paying the defendants expenses.



Protest sign says, "How much is a life worth?" in Portuguese.
Photo © Rodrigo S Coelho/Shutterstock.com

UPDATE: *One week after the conclusion of this interview, the regional labor court in Minas Gerais ruled in favor of 131 victims represented by Max Garcez and ordered Vale to pay 1 million reais (US\$ 197,240) in compensation to their respective families. According to Max Garcez, "We are of course pleased that the court has ordered Vale to pay moral damages to the families of the victims of the dam collapse, though we had petitioned the court for 3 million reais per worker. Importantly, the court rejected Vale's argument that the 2019 settlement precluded this award. We note, however, that Vale will be able to pay for the total amount of compensation under this order with less than one half day of profits." Vale has yet to declare*

BARGAINING UP THE SUPPLY CHAIN: LESSONS FROM A CROSS-SECTORAL STUDY

**JEREMY BLASI, JENNIFER BAIR
& JEFFREY VOGT**

Global | Originally written in English

In many global supply chains, powerful brands—such as apparel retailers, supermarkets, and consumer electronics companies—critically affect working conditions through their sourcing and pricing practices. In these “buyer-driven” supply chains, lead firms often exert downward pressure on wages by inducing suppliers to compete with one another based on labour costs, sometimes demanding year-on-year price concessions.¹ This pressure can drive intense and often illegal resistance among suppliers toward unionization as well as labour abuses, including wage theft and health & safety violations. Similarly, lead firm demands for tight delivery deadlines often drive forced and excessive overtime.

Yet, the most common approaches for improving labour conditions at the bottom of supply chains do not address these critical dynamics. Voluntary “corporate social responsibility” (CSR) programs have proven largely ineffective in stemming abuses—in part because CSR programs, which are typically created and controlled by lead firms, focus solely on the conduct of suppliers, leaving unregulated the sourcing and pricing practices of the lead firms themselves.² Traditional collective

bargaining conducted solely with suppliers at the bottom of supply chains can also yield limited results, as unions may find themselves negotiating with companies that are not in an economic position to improve wages and benefits, given the price pressures traveling down the chain.

“Our key takeaway: successful supply chain labour agreements—those that affect standards for a large number of workers across multiple worksites and are able to sustain these improvements over time—tend to incorporate similar policies to hold lead firms accountable and raise standards.”

In light of these challenges, unions and labour advocates have increasingly sought to win binding agreements with brands concerning labour conditions in their supply chains. What makes such agreements most impactful? At the commission of the International Labour Organization, two of the authors—Blasi and Bair—undertook a comparative study of more than a dozen supply chain labour accords ranging across sectors (including garment, electronics, and automotive manufacturing as well as agriculture and services), time-periods (from the 1930’s to the present), and geographies (including international, regional and single-country agreements). This research was recently published in an ILO working paper

¹ In his framework for analyzing global industries, Gary Gereffi distinguishes between buyer-driven chains and producer-driven chains. In buyer-driven chains, the most powerful players are retailers that source the goods they market (e.g. footwear and apparel) from a global supply base of independent contractors. Motor vehicles is a classic producer-driven industry in which multinational manufacturers continue to own and operate key production facilities, such as auto assembly plants. See Gary Gereffi, *The organization of buyer-driven global commodity chains: how US retailers shape overseas production networks*, in *COMMODITY CHAINS AND GLOBAL CAPITALISM*, 95-122 (Gereffi, G & Korzeniewicz, M., eds., 1994).

² Stephanie Barrientos & Sally Smith, *Do workers benefit from ethical trade? Assessing codes of labour practice in global pro-*

duction systems, 28(4) *THIRD WORLD QUARTERLY*, 713-729 (2007); Sarosh Kuruvilla, Mingwei Liu, Chunyun Li & Wansi Chen, *Field Opacity and Practice-Outcome Decoupling: Private Regulation of Labor Standards in Global Supply Chains*, 73(4) *ILR REVIEW*, 841-872 (2020); Richard M Locke & Hiram Samel, *Beyond the workplace: “Upstream” business practices and labor standards in the global electronics industry*, 53(1) *STUDIES IN COMPARATIVE INTERNATIONAL DEVELOPMENT*, 1-24 (2020).

entitled, *An Analysis of Multiparty Bargaining Models for Global Supply Chains*.³

Our key takeaway: successful supply chain labour agreements—those that affect standards for a large number of workers across multiple worksites and are able to sustain these improvements over time—tend to incorporate similar policies to hold lead firms accountable and raise standards.

Notable Supply Chain Labour Agreements

Several agreements in the garment and agricultural sectors are especially noteworthy:

Historical Jobbers Agreements in U.S.: Beginning in the 1930's, the International Ladies Garment Workers Union (ILGWU) negotiated a set of transformative labour agreements with associations of “jobbers”—companies which, much like today's brands, designed garments but contracted out production to independent sewing shops. These agreements—called jobbers agreements—were responsible for largely eradicating sweatshop conditions in the greater New York area for a half century until the regime was eroded by the shift among jobbers from domestic to global sourcing in the 1980's.⁴

Accord on Bangladesh Worker Safety: In the wake of the Rana Plaza disaster, two global unions (IndustriALL and UNI), with the support of the Worker Rights Consortium (WRC) and Clean Clothes Campaign, negotiated a breakthrough agreement with more than 200 global brands and retailers to comprehensively address the worker safety crisis in Bangladesh's garment factories through in-

³ Jeremy Blasi & Jennifer Bair, *An Analysis of Multiparty Bargaining Models for Global Supply Chains*, ILO Conditions of Work and Employment Series No. 105 (2019), available at https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_655541.pdf

⁴ See, e.g., Mark Anner, Jennifer Bair and Jeremy Blasi, *The Relevance of Twentieth-Century New York Jobbers' Agreements for Twenty-First-Century Global Supply Chains* in *ACHIEVING WORKERS' RIGHTS IN THE GLOBAL ECONOMY* (Richard P. Appelbaum & Nelson Lichtenstein, eds. 2018). Under the National Labor Relations Act (NLRA), labour agreements requiring companies to deal only with unionised subcontractors are unenforceable, but the law includes exemptions for the apparel and construction sectors. See 29 U.S. Code § 158(e). The PRO Act, a labour law reform bill currently being considered by the U.S. Congress, would eliminate this provision of the law and other provisions restricting secondary boycotts and picketing.

spections, remediation, and worker empowerment. Unlike the historical jobbers agreements, the Accord did not involve parallel agreements with factory owners.⁵ While the Accord's work remains incomplete⁶—it has had to contend with a hostile government and politically powerful industry association—the initiative has achieved remarkable progress in eradicating the kinds of hazards that had claimed the lives of thousands of garment workers.⁷

Lesotho Agreements on Gender-based Violence: In 2019, a coalition of Lesotho-based garment sector unions and NGOs⁸, together with the U.S.-based Solidarity Center, Workers United, and the WRC, negotiated agreements with the brands Levi Strauss, The Children's Place, Kontoor Brands, and a major supplier in Lesotho called Nien Hsing

⁵ Given the domestic industry's failure to address longstanding health and safety hazards, the Accord's architects worried that including factory owners as signatories of the agreement might undermine its effectiveness. Ashwin et al (2020) note that factory owners were aggrieved by their exclusion from the Accord, while also describing the “hostility” of the main industry association, the Bangladesh Garment Manufacturers and Exporters Association, towards a binding and enforceable approach to securing labor standards. See Sarah Ashwin, Naila Kabeer and Elke SchuBler, *Contested Understandings in the Global Garment Industry after Rana Plaza*, 51(5) DEVELOPMENT AND CHANGE, 1296-1305 (2020).

⁶ The Bangladesh Accord expired at the end of May 2021. Initially, brands balked at a renewal of the agreement and instead proposed a new one without mechanisms for legal accountability or independent monitoring. This led to the unions walking away from negotiations. See UNI Global Union Press Release, Global unions to withdraw from unenforceable garment factory safety scheme in Bangladesh, May 12, 2021, available at <https://www.uniglobalunion.org/news/global-unions-withdraw-unenforceable-garment-factory-safety-scheme-bangladesh>. However, negotiations continued and on 25 August, a new Accord was reached that not only extended the Accord in Bangladesh but will see the Accord extended to other countries. See UNI Global Union Press Release, New, expanded worker safety pact will build on Bangladesh Accord's success, 25 August 2021, available at <https://uniglobalunion.org/news/new-expanded-worker-safety-pact-will-build-bangladesh-accords-success>

⁷ See <https://bangladeshaccord.org>. For background, see, e.g., Jennifer Bair, Mark Anner, and Jeremy Blasi, *The Political Economy of Private and Public Regulation in Post-Rana Plaza Bangladesh*, 73:4 ILR REVIEW 969 (2020).

⁸ These organizations are the Federation of Women Lawyers in Lesotho (FIDA), the Independent Democratic Union of Lesotho (IDUL), the National Clothing Textile and Allied Workers Union, Lesotho (NACTWU), the United Textile Employees (UNITE) and Women and Law in Southern Africa Research and Education Trust (WLSA)-Lesotho.



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Textiles to confront gender-based violence in the workplace. The program involves a reporting system, independent investigation of alleged abuses, and an education and awareness program.⁹ A recent exposé found that gender-based violence is common in other garment factories in Lesotho, as suspected, leading to an effort to extend the agreement to suppliers beyond Nien Hsing.¹⁰

Farm Labor Organizing Committee Agreements with Food Brands: Through multi-year campaigns beginning in the 1970's, the Farm Labor Organizing Committee (FLOC), a labour union for farm workers based in the Midwestern U.S., won comprehensive collective bargaining agreements with food giants such as Campbell Soup Company and Mt. Olive Pickle Company, and associations of the growers that supply these brands. These triangularly-bargained agreements have succeeded in raising labour conditions for workers who harvest and process tomatoes, cucumbers, pickles, and other produce.¹¹

Coalition of Immokalee Workers' Fair Food Agreements: Since 2000, the Coalition of Immokalee Workers (CIW)—a workers movement based in the U.S. State of Florida—has waged successful campaigns to compel major fast food, grocery, and food service companies to sign agreements providing for core labour standards on the farms that supply them. If an independent body created by the CIW—the Fair Food Standards Council—finds that a participating farm has violated these standards, it may be suspended or terminated as a supplier.¹² Inspired by this “worker-driven

social responsibility” model, the Vermont-based organization Migrant Justice has launched a similar program, Milk with Dignity, to raise standards on dairy farms employing migrant workers in the Northeastern United States.¹³

Key Lessons

These agreements and others reviewed in our ILO study tend to follow a similar logic and incorporate several critical elements.

First, in each of these agreements, the worker organization negotiated substantive labour standards—whether comprehensive standards or provisions focused on particular issues like worker safety or gender-based violence—directly with the brands at the top of the supply chain. This distinguishes the efforts from the most common type of supply chain agreements—global framework agreements—which typically include only general standards such as ILO core conventions, not specific terms and conditions of employment. To ensure these commitments are upheld at the worksite, the agreements require that suppliers comply with the standards negotiated with the lead firm as a condition of obtaining access to lead firm business. As a corollary, suppliers found to violate the standards may be suspended or terminated.

The historical jobbers agreements went even further: Under these agreements, the jobber was also required to source from a designated set of suppliers for a three-year period, distribute work evenly among these suppliers, add suppliers only when new capacity was needed, and leave a contractor only for cause (e.g., quality rather than price).

Second, the agreements ensure that brands provide sufficient funds for the supplier to raise labour standards. As we and Mark Anner have explored elsewhere, a root cause of labour violations in supply chains is the pressure that lead firms put on suppliers by demanding ever-lower prices.¹⁴ There are two general approaches to the

⁹ For background, see Tula Connell, *Lesotho Plan Has All the Elements to End GBV at Work*, SOLIDARITY CENTER, AUG. 20, 2019, <https://www.solidaritycenter.org/lesotho-plan-has-all-elements-to-end-gbv-at-work>; Business & Human Rights Resource Center, *Lesotho garment workers struck landmark deals to tackle gender-based violence. Here's how it happened*, Sept. 13, 2019, <https://www.business-humanrights.org/en/blog/lesotho-garment-workers-struck-landmark-deals-to-tackle-gender-based-violence-heres-how-it-happened>; Martha Mendoza, *Report: Levi's, Wrangler, Lee seamstresses harassed, abused*, Associated Press, Aug. 15, 2019, <https://apnews.com/article/8b438186cc154eb399d3af632f1e380b>.

¹⁰ Louise Donovan & Refiloe Makhara Nkune, *Workers in Factory That Makes Kate Hudson's Fabletics Activewear Allege Rampant Sexual and Physical Abuse*, Time, May 5, 2021, online at <https://time.com/5959197/fabletics-factory-abuse-allegations>.

¹¹ See www.floc.com. For background, see W.K. Berger And Ernesto M. Reza, *THE FARM LABOR MOVEMENT IN THE MIDWEST: SOCIAL CHANGE AND ADAPTATION AMONG MIGRANT FARMWORKERS (1994)* (hereinafter “Berger and Reza”).

¹² See <https://ciw-online.org> and <https://www.fairfoodstandards.org>. For background, see James Brudney, *Decent Labour Standards in Corporate Chains* in TEMPORARY LABOUR MIGRATION IN THE GLOBAL ERA: THE REGULATORY CHALLENGES (Joanna Howe and

Rosemary Owens, eds., 2016).

¹³ See <https://migrantjustice.net> and <https://milkwithdignity.org>. For background, see Steven Greenhouse, *Ben & Jerry's Strikes Deal to Improve Migrant Dairy Workers' Conditions*, NY TIMES, Oct. 3, 2017, <https://www.nytimes.com/2017/10/03/business/ben-jerrys-migrant-workers.html>.

¹⁴ See, e.g., Mark Anner, *Squeezing workers' rights in global supply chains: purchasing practices in the Bangladesh garment export sector in comparative perspective*, 27:2 REVIEW OF INTERNATIONAL POLITICAL ECONOMY 320 (2020); Mark Anner, Jennifer Bair

problem. Agreements can require lead firms to contribute a premium on top of the standard purchase price, which is then “passed through” by the supplier to workers. A successful version of this approach is the CIW’s Fair Food Program, where food brands pay a premium for each pound of tomatoes they purchase, with the premium earmarked to supplement worker wages. This model tends to work when lead firms source exclusively or preferentially from participating suppliers and/or when a large share of lead firms in the market participate. Ensuring that the premium is paid on top of most or all of a supplier’s sales is necessary to realize significant raises for all workers.

The other approach is to require the lead firms to ensure that its prices are sufficient to enable the supplier’s compliance with the negotiated labour obligations. This mechanism was used with great success in the historical jobbers’ agreements to ensure that the negotiated piece rates and other standards were adequately funded by the jobber,¹⁵ and in the FLOC agreements where long-term commitments and price adjustments have helped incentivize supplier participation.¹⁶ A similar provision was included in the Bangladesh Accord to ensure funding for safety upgrades at supplier facilities, though compliance with it has been a matter of dispute between union and signatory companies.¹⁷

and Jeremy Blasi, *Towards Joint Liability in Global Supply Chains: Addressing the Root Causes of Labor Violations in International Subcontracting Networks*, 35 *COMPARATIVE LABOR LAW AND POLICY JOURNAL* 1 (2013).

¹⁵ For example, a typical provision stated: “A member of the Affiliated [the employers’ association for dress jobbers] whose garments are made in contracting shops shall pay to such contractors at least an amount sufficient to enable the contractor to pay the workers the wages and earnings provided for in this agreement, and in addition a reasonable amount to the contractor to cover his overhead and profit.” Agreement between ILGWU and Affiliated Dress (1936), at 14.

¹⁶ See Berger and Reza, *supra*, n. 5, at 82.

¹⁷ The Accord includes a provision requiring signatory lead firms to “negotiate commercial terms with their suppliers which ensure that it is financially feasible for the factories to maintain safe workplaces and comply with upgrade and remediation requirements instituted by the Safety Inspector.” 2013 Accord, Section 22. In recent years, the Accord has developed procedures for information-sharing and dispute resolution between brands and suppliers to help implement brand commitments to fund remediation. See Accord, April 2020 Quarterly Report, at p. 18, online at <https://bangladeshaccord.org/updates>. Disputes over remediation eventually resulted in arbitration against two brands, as discussed below.

Third, successful agreements involve ongoing third-party oversight to ensure compliance by an entity co-governed or agreed-upon by the labour signatory that has the authority to impose remedies for violations. The ILGWU’s historical jobbers agreements were overseen by an “independent chairperson,” an arbitrator with the authority to resolve disputes and suspend suppliers. The FLOC agreements are overseen by a jointly-appointed nine-member panel known as the Dunlop Commission, named for former U.S. Secretary of Labor and Harvard professor John Dunlop, who was its initial chair.



Garment workers in Lesotho
Photo © Christopher Johnson/Solidarity Center

The Accord, Lesotho, and CIW agreements are implemented through independent monitoring and worker training by NGOs over which worker and brand representatives share governance. While varying in their details, these arrangements have all served to ensure that compliance at the worksite level is overseen on a day-to-day basis by an entity whom the worker organization trusts.¹⁸

Finally, each of these agreements involves commitments by brand signatories that are legally enforceable. In each case, the parties can submit disputes to final and binding arbitration where the arbitrator’s decisions are enforceable in courts of law. In some cases, such as the jobbers agreements and FLOC agreements, the oversight body has the authority to issue binding awards; in others, such as the Accord and CIW, the decisions of

¹⁸ As reviewed in our ILO working paper, notable examples of co-governance include the Honduran union-confederation CGT’s agreement with Fruit of the Loom, Rana Plaza Arrangement, Tazreen Claims Administration Trust, Indonesia Freedom of Association Protocol, and various global framework agreements.

the oversight body may be appealed to arbitration. In each case, the clear legal enforceability of the brands' commitments is a notable improvement over both CSR approaches, where there are generally no brand commitments that are enforceable by any labour group, and most global framework agreements, which specify no dispute resolution mechanism other than dialogue or non-binding mediation.

Through a project led by professors Lance Compa and Katerina Yiannibas, a coalition of international labour rights NGOs have recently developed model binding arbitration clauses that may be incorporated into enforceable brand agreements.¹⁹ The clauses were prepared in response to the experience of trade unions and NGOs in arbitrating claims against brands for their failure to comply with the factory remediation provisions of the Bangladesh Accord.²⁰ In the absence of other good alternatives at the time, the Accord's drafters agreed that any disputes would be arbitrated pursuant to UNCITRAL Arbitration Rules.²¹ These rules, adopted by the UN in 1976, are more commonly used in state-to-state and international commercial disputes, not human rights disputes. Worker advocates were particularly troubled by the lack of transparency, the length of process, the difficulty of involving workers in the process, and the significant costs involved, among others, and sought to address those in a new model arbitration process.

In 2020, UNI Global Union and IndustriALL Global Union undertook their own project to develop a model arbitration process to resolve disputes arising under agreements negotiated by multi-

national corporations and brands, global unions and NGOs. The provisions drew heavily from the Hague Rules on Business and Human Rights Arbitration, which had been released in December 2019, as well as from the model rules drafted by professors Compa and Yiannibas.²² These rules, like the ones described above, are meant to put a premium on a streamlined process that anticipates an award within 180 days of the notice of arbitration. The rules also contemplate opportunities for conciliation and settlement. Costs are contained by a default to a sole arbitrator rather than the usual three-person panel. Efforts are currently under way to house these Rules with the Permanent Court of Arbitration. If widely adopted, the arbitration rules could help to build meaningful transnational collective bargaining.

Finally, recent years have also seen much progress in winning transparency commitments—such as major brands disclosing their suppliers and the Bangladesh Accord publishing detailed factory-specific remediation reports—enabling labour groups to hold brands' feet to the fire. These precedents are fuelling a broader campaign to compel all brands to publicly disclose their full base of suppliers.²³

Conclusion

The deleterious dynamics of buyer-led supply chains tend to recur across industries, geographies, and time periods. While these dynamics are not new, today's lead firms enjoy unprecedented opportunities to leverage competition among a global base of suppliers vying for their business. When that competition focuses on squeezing labour costs, a race to the bottom can result. Yet those same supply chains can provide labour with new strategic opportunities. As we hope our research demonstrates, there is much we can learn from each other and our predecessors on how to best wield labour's power to raise standards and secure workers' rights.

¹⁹ Clean Clothes Campaign et al. *Model Arbitration Clauses for the Resolution of Disputes Under Enforceable Brand Agreements* (2020), available at <https://laborrights.org/releases/four-major-civil-society-groups-release-dispute-resolution-system-and-model-arbitration>.

²⁰ In July 2016, and again in October 2016, UNI Global Union and IndustriALL Global Union submitted a notice of arbitration against a two garment brands over their failure to require their suppliers to remediate the facilities under the deadline imposed by a corrective action plan and to negotiate commercial terms making it financially feasible for their suppliers to cover the costs of remediation. The arbitration was terminated as a result of a settlement agreement two years later. See Permanent Court of Arbitration, Bangladesh Accord Arbitrations, online at <https://pca-cpa.org/en/cases/152/>; IndustriALL Global Union, *Settlement Reached with Global Fashion Brand in Bangladesh Accord Arbitration*, Dec. 15, 2017, <http://www.industriall-union.org/settlement-reached-with-global-fashion-brand-in-bangladesh-accord-arbitration>.

²¹ United Nations Commission on International Trade Law, UNCITRAL Rules, available at <https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration>.

²² The Hague Rules were developed to give effect to the Third Pillar of the UN Guiding Principles on Business and Human Rights, namely access to a remedy for human rights violations by businesses. Given the substantial obstacles to remedy in national courts, arbitration is seen as an option to obtain a rights-compatible remedy. The Hague Rules are available online here: https://www.cilc.nl/cms/wp-content/uploads/2019/12/The-Hague-Rules-on-Business-and-Human-Rights-Arbitration_CILC-digital-version.pdf.

²³ Human Rights Watch, *Fashion's Next Trend: Accelerating Supply Chain Transparency in the Apparel and Footwear Industry* (Dec. 18, 2019), <https://www.hrw.org/report/2019/12/18/fashions-next-trend/accelerating-supply-chain-transparency-apparel-and-footwear#>.

AGAINST ALL ODDS – OPTIONS FOR WORKERS’ TRANSNATIONAL LITIGATION AGAINST RIGHTS VIOLATIONS IN GLOBAL VALUE CHAINS

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Germany, Italy, & Pakistan | Originally written in English

As companies’ economic activities cross multiple jurisdictions, workers have, at least in theory, the ability to take legal action against the actors involved in the production process in the various jurisdictions in which they are incorporated. Traditionally, workers can and do file claims alleging labour rights violations in local courts against the local employer (supplier) or local authorities. These cases are already difficult enough, as such courts often have significant political and resource constraints that limit their effectiveness. Even more difficult are legal claims against companies down the value chain, as local courts usually do not have jurisdiction over the companies that order goods or services from the local employer.

However, claims against the downstream companies, including the parent company of a corporate group, the buyer company at the end of the value chain, or even a company which certifies compliance with a code of conduct, can be brought by affected workers in courts in, e.g., Europe or North America. There, victims of corporate abuse may file civil claims, including for monetary compensation for harms caused, or in some cases criminal claims to establish the criminal responsibility of the company and its managers.¹ Of course, these legal avenues are far from accessible, but they do present an option for transnational legal interventions. Here, I will use the recent litigation

against Ali Enterprises to illustrate the various avenues through which workers can demand redress and compensation, as well as the difficulty in protecting their interests in global value chains.

“The starting point is the cases in which English courts have recognised that parent companies can be liable under tort law for damages caused by subsidiaries abroad when the harm was foreseeable, when there was sufficient proximity between the parties, and when the imposition of a duty could be seen as fair, just, and reasonable.”

The Developing Legal Order

The Developing Tort Law

In recent years, there has been a growing body of case law in the UK which have held corporate actors along the value chain to account. At the same time, there has been a growing academic debate in continental Europe on extending theories of tort liability to transnational companies. The starting point is the English cases which have recognised that parent companies can be liable under tort law for damages caused by subsidiaries abroad when the harm was foreseeable, when there was sufficient proximity between the parties, and when the imposition of a duty could be seen as fair, just, and reasonable.²

¹ Richard Meeran, *Tort Litigation Against Multi-National Corporations*, 3(1) CITY UNIVERSITY OF HONG KONG LAW REVIEW (2011); Wolfgang Kaleck, Miriam Saage-Maaß, *Corporate Accountability for Human Rights Violations Amounting to International Crimes*, 8 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE, 699–724 (2010).

² Cees van Dam, *Tort law and human rights: Brothers in arms on the role of tort law in the area of business and human rights*, 2 J. EUROPEAN TORT L. 221, 221–254 (2010).



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In *Vedanta Resources PLC v Lungowe*, the UK Supreme Court held that public “corporate social responsibility” (CSR) commitments and company policies are relevant in creating and defining the duties a parent company bears with respect to preventing its subsidiary from causing human rights and environmental harms.³ The Supreme Court built on this case in its recent decision, *Okpabi v Shell*. It emphasised that the principles to be applied when assessing a parent company’s liability were not a distinct or novel category of liability but were orthodox, general principles of tort law regarding the imposition of a duty of care.⁴ The Supreme Court in *Okpabi* approved of the appellants’ characterisation of four different routes under which a duty of care could arise for a parent company:⁵

1. Taking over the management or joint management of the relevant activity
2. Providing defective advice and/or promulgating defective group-wide policies
3. Taking steps to implement group-wide policies
4. Holding out that it exercises a particular degree of supervision and control of a subsidiary.

However, the Supreme Court made it clear that these four routes are not exclusive categories under which liability could arise and that the test for parent company liability is broad and non-restrictive.⁶

³ In *Vedanta*, the UK Supreme Court held, that “the parent may incur the relevant responsibility to third parties if, in published materials, it holds itself out as exercising that degree of supervision and control of its subsidiaries, even if it does not in fact do so. In such circumstances its very omission may constitute the abdication of a responsibility which it has publicly undertaken”. The court also held that “everything depends on the extent to which, and the way in which, the parent availed itself of the opportunity to take over, intervene in, control, supervise or advise the management of the relevant operations (including land use) of the subsidiary. All that the existence of a parent subsidiary relationship demonstrates is that the parent had such an opportunity”. *Vedanta Resources PLC v Lungowe* [2019] UKSC20, [53 and 49].

⁴ *Okpabi and others v Royal Dutch Shell Plc (RDS) and another* [2021] UKSC 3.

⁵ *Id.* at para 26.

⁶ Litigation against brands and auditing firms have been less successful in other common law jurisdictions, such as Canada, where claims against brands sourcing from the Rana Plaza Building in Bangladesh were rejected. *Das v. George Weston Limited*, 2017 ONSC 4129 (Can.), available at <https://www.canlii.org/en/on/onsc/doc/2017/2017onsc4129/2017onsc4129>.

Mandatory Human Rights Due Diligence Legislation

Parallel to the development of tort law in the UK, Human Rights Due Diligence (HRDD) legislation based on the UN Guiding Principles has picked up momentum and is being introduced in continental Europe and on the EU level. Particularly interesting is the French *Loi De Vigilance*, which established a duty of vigilance for French companies to avoid all possible human rights violations along the supply chain and which provides for civil liability for certain cases of non-compliance.⁷ In Germany, a new supply chain law was adopted that obliges companies to exercise Human Rights Due Diligence (*Sorgfaltspflichten*) with regard to their own business, their direct suppliers and, if there are clear indications for potential human rights risks, also suppliers further down the chain. Workers, unions and others negatively affected are given a course of action in administrative law to claim rights violations and to demand mitigation and remediation. The effectiveness of these laws is still largely untested; nevertheless, they do open legal avenues for workers to file claims against the companies along the value chain.

Liability of Social Auditors

Social auditing companies often times replace state-run labour inspections and are a tool for multinational companies to ensure that their codes of conduct on labour rights are adhered to. Corporate codes of conduct have been the textile industry’s reaction to

⁷ <https://www.legifrance.gouv.fr/dossierlegislatif/JORF-DOLE000030421923/> However, this has provoked further thinking about extending liability of lead firms with regards to torts caused by their supplying firms. Ingrid Heinlein, *Zivilrechtliche Verantwortung transnationaler Unternehmen für sichere und gesunde Arbeitsbedingungen in den Betrieben ihrer Lieferanten*, NEUE ZEITSCHRIFT FÜR ARBEITSRECHT, 276–282 (2018); Anna Heinen, *Auf dem Weg zu einem transnationalen Deliktsrecht? – Zur Begründung deliktischer Sorgfalts- und Organisationspflichten in globalen Wertschöpfungsketten*, DURCHSETZUNG MENSCHENRECHTLICHER SORGFALTSPFLICHTEN VON UNTERNEHMEN, 96 (Markus Krajewski and Miriam Saage-Maaß eds., 2018); Ingrid Heinlein, *Zivilrechtliche Verantwortung transnationaler Unternehmen für sichere und gesunde Arbeitsbedingungen in den Betrieben ihrer Lieferanten*, NEUE ZEITSCHRIFT FÜR ARBEITSRECHT, 276–282 (2018).

⁷ LOI n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d’ordre [Law 2017-399 of March 28, 2017 on the duty of vigilance of parent companies and ordering companies] J.O. n° 0074, available at <https://www.legifrance.gouv.fr/dossierlegislatif/JORF-DOLE000030421923/>

consumer campaigns in North America and Europe highlighting the discrepancy between the shiny image of brands in the Global North and the horrifying reality of working conditions in the Global South. In order to ensure compliance, brands and retailers usually employ social auditing firms that visit local supplier factories to verify that they respect their business partners' code of conduct. These audits often fail to accurately describe the situation in factories, however, due both to the methodological restrictions of their approach, as well as to conflicts of interest and corruption. As such, social audits serve the purpose of diffusing responsibility and giving multinational brands and retailers the possibility of pointing to an audit report to claim that they had done everything in their power to avoid the disaster. The auditing company, in turn, can hide behind the technicalities of their mandate, which restricts their assessment and, hence, their responsibility. This mutual finger-pointing further contributes to the system of organised irresponsibility mentioned above. Currently, it is being discussed whether auditors should be liable under criminal or civil law for audit reports that fail to report adequately or truthfully on workplace safety and labour law violations in supplier companies.⁸ In particular, the question has been raised as to whether the concept of third-party beneficiary rights or other tort law concepts can also be applied to social auditors.⁹

The Ali Enterprises Factory Fire Litigation

On the evening of 11 September 2012, a fire broke out on the ground floor of the Ali Enterprises factory.¹⁰ It spread quickly to the other floors and many workers were unable to escape due to the lack of accessible fire exits and the failure of the factory's fire alarm system. At least 258 workers died in the fire and several dozen more were wounded. The main buyer from the factory was the German retailer KiK, According to the company, it had been purchasing around 70% of the factory's production for a period of five years. The German public came to learn about the Ali Enterprises fire mainly through an interview published

⁸ Carolijn Terwindt and Miriam Saage-Maaß, *Liability of Social Auditors in the Textile Industry*, Freidrich-Ebert-Stiftung, (2017), available at <http://library.fes.de/pdf-files/iez/13041.pdf>.

⁹ Carola Glinski and Peter Rott, *Regulating certification bodies in the field of medical devices: The PIP breast implants litigation and beyond*, 27(2) EUROPEAN REVIEW OF PRIVATE LAW, 403–428 (2019).

¹⁰ For a detailed reconstruction of the fire. See, Forensic Architecture, *THE ALI ENTERPRISES FACTORY FIRE*, <https://forensic-architecture.org/investigation/the-ali-enterprises-factory-fire> (last visited June 24, 2021).

by Der Spiegel with KiK's Corporate Social Responsibility Manager.¹¹ In the interview, the manager – expressing dismay about the disaster – described the relationship between KiK and Ali Enterprises as close and long-lasting. He explained how KiK was keen to exercise its corporate social responsibility through the creation of a code of conduct for its suppliers, expecting them to respect health and safety regulations and other core labour standards. Compliance with these standards was to be ensured through on-site visits of company representatives and social auditing firms.



Ali Enterprises' factory after the fire | Photo © Ayesha Mir (The Express Tribune)

In the course of the litigation, KiK produced four social audit reports that had been commissioned by the company between 2007 and 2011. Only the first one in 2007 had shown any concerns regarding fire safety, while the subsequent reports did not reflect any major insufficiencies. Additionally, just a few weeks before the deadly fire broke out, on 21 August 2012, the Italian auditing firm RINA S.P.A. issued the factory with a SA-8000 safety certificate, said to be one of leading social certification standards for factories and organisations worldwide. RINA had been hired by the Ali Enterprises factory owners. Its certification of the factory was preceded by an audit report, which was approved by RINA's technical committee on 3 August 2012. RINA had selected and hired the Pakistani service provider, RI&CA, to conduct the audit. After its verification of the audit report, RINA certified the facility.¹²

¹¹ Hasnain Kazim and Nils Klawitter, *ZUVERLÄSSIGER LIEFERANT*, DER SPIEGEL, <http://www.spiegel.de/spiegel/print/d-89234400.html> (22 October 2012).

¹² In the aftermath of the Ali Enterprises fire, the SA-8000 scheme-holder, the Social Accountability Initiative, conducted an investigation into the incident and concluded that there had been several serious shortcomings and even fraudulent behaviour in the certification process. Social Accountability International, *REPORT ADDENDUM ON FIRE SAFETY IN PAKISTAN*, 16

In autumn of 2012, Pakistani unions and labour rights organisations as well as international human rights and labour organisations started discussing the possibilities for a common legal effort to hold the German brand KiK and the Italian firm RINA to account. Meanwhile the surviving workers and family members of the deceased founded the Ali Enterprises Factory Fire Affectees Association (AEFFAA) with the help of NTUF and the Home-Based Women Workers Federation (HBWWF).

Organisations like the European Centre for Constitutional and Human Rights (ECCHR), NTUF and AEFFAA filed a civil case against KiK in Germany, a criminal complaint against RINA officials in Italy, and, later on, lodged an OECD complaint in Italy. Other organisations like PILER,¹³ the Clean Clothes Campaign (CCC), and IndustriALL focused their efforts on negotiating a long-term compensation fund, in accordance with the standards of the International Labour Organization, similar to the Rana Plaza Compensation Agreement.

After contentious discussions, a common understanding among the different actors was reached that these two strategies would be mutually reinforcing if well-coordinated. The “legal route” would provide an accelerating effect on the ILO negotiations by serving as an implicit incentive for the company to engage in them. The lawsuit deliberately asked only for compensation to cover pain and suffering, while the ILO negotiations demanded compensation to cover the loss of income and medical costs. In this way, the lawsuit in Germany did not provide KiK with an argument for opting out of the ILO compensation talks. Meanwhile, those negotiating with the ILO actively endorsed the legal case as an important additional step.¹⁴ The pending lawsuit did in fact enhance KiK’s willingness to agree to the terms of compensation suggested by the ILO: one week after the Dortmund court granted legal standing to the Pakistani claimants and allowed the

(2013).

¹³ PILER had accomplished an important first step in negotiating with KiK by achieving USD 1 million in immediate relief for workers at the end 2012.

¹⁴ European Centre for Constitutional and Human Rights, *The proceedings against KiK in Germany have contributed significantly to the compensation settlement*, (2018), <https://www.ecchr.eu/en/press-release/hearing-in-kik-case-in-front-of-regional-court-in-germany/>.

case into the discovery phase (*Beweisaufnahme*), KiK agreed to pay an additional US\$ 5.15 million into the ILO Ali Enterprises compensation fund, breaking the almost two-year deadlock in the ILO negotiations.

The litigation against KiK: Procedure and key legal arguments

According to both §17 ZPO (*Zivilprozessordnung*, the German Code on Civil Procedure) and Article 4 of the Brussels I Regulation, the Regional Court of Dortmund (*Landgericht Dortmund*)¹⁵ had jurisdiction over the case. In accordance with Article 4(1) of the Rome II Regulation, the applicable law in this transborder litigation was Pakistani civil law, which is strongly influenced by Indian and English jurisprudence.¹⁶ Following the English case law at the time – the *Vedanta* and *Shell* judgements had not yet been decided – the claimants argued that KiK breached its duty of care towards the employees of the Ali Enterprises factory.¹⁷ The requirements for a duty of care were largely based on the decisions in *Caparo v Dickman* and *Chandler v Cape*¹⁸. According to these cases, a duty of care is established under the following cumulative conditions: the harm that occurred was foreseeable, there was sufficient proximity between the parties, and the imposition of a duty can be seen as fair, just, and reasonable.¹⁹ The Regional Court of Dort-

¹⁵ Regulation No 1215/2012 of the European Parliament and of the Council of 12 December 2012; on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast); Article 4, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02012R1215-20150226&qid=1624960834400>

¹⁶ Khan v. Haleem, (2012) CLD (SC) 6 (2011), 8 (Khilji Arif Hssain, J., concurring) (Pak.); Khanzada v. Sherin, 1996 CLC 1440 (Peshwar) (Pak.), citing Indian law authoritatively in a case alleging medical malpractice.

¹⁷ Carolijn Terwindt et al., *Supply chain liability: Pushing the boundaries of the common law?*, 8(3) J. EUROPEAN TORT L. at 276 (2018) [hereinafter Terwindt 2018].

¹⁸ *Caparo Industries plc v. Dickman* [1990] 2 AC 605; *Chandler v Cape Plc* [2012] EWCA Civ 525 (25 April 2012).

¹⁹ See *Chandler*, *supra* note 18 at para 80 (provides key indicators of when a duty of care is owed by a multinational corporation parent, namely when: 1) the businesses of the parent and subsidiary are, in a relevant respect, the same; 2) the parent has or ought to have superior knowledge on some relevant aspect of health and safety in the particular industry; 3) the subsidiary’s system of work is unsafe, which the parent knew or ought to have known; and 4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using its superior knowledge for the

mund was asked to assess the relevant duty of care and thereby had to ascertain the nature of the relationship between KiK and Ali Enterprises, the applicable industry CSR standards, the relevant standards for safety audits, and KiK's duty in relation to such audits.²⁰

The claimants argued that there was a clear economic dependence between KiK and Ali Enterprises, as KiK had purchased almost three quarters of Ali Enterprises' production output over the five-year period preceding the fire. The claimants also argued that such an economic dependence created KiK's ability to influence and control the health and fire safety conditions under which Ali Enterprises ought to have conducted its business in Pakistan. The claimants further constructed KiK's obligation through a review of its 2009 code of conduct²¹ and a statement by KiK's Managing Director weeks after the factory fire that "the monitoring of adherence to safety and fire prevention is obligatory for us as a buyer".²² As KiK's code of conduct was incorporated into the terms and conditions of every purchasing order, the claimants argued that the company's public pledges on safe and ethical working conditions caused legal obligations: self-regulation must lead to legal obligation.²³ Finally, the claimants also argued for vicarious liability, which provides for the strict liability of the employer, but also of the principal in a relationship "akin to employment". The concept of vicarious liability under

common law is more flexible than it is under German law, as it is not necessarily based on a formal contractual relationship but instead rests on the overall circumstances of a business relationship between two parties.²⁴

KiK defended itself by restating its corporate social responsibility narrative, which presents the company as truly committed to improving working conditions in its suppliers' factories and as taking concrete efforts to achieve this end. At the same time, KiK denied any form of liability, arguing that, as a fully independent legal entity, Ali Enterprises was the only duty bearer for its employees' safety. KiK admitted to having sent its own personnel to visit the production site, to having commissioned several social audits of the Ali Enterprises factory, and to having obliged its suppliers to sign the company's code of conduct. Despite all of this, KiK claimed to have no ability to influence, let alone control, the fire safety standards of the Ali Enterprises factory. Referring to the social audit reports that KiK itself had commissioned, which displayed little to no deficiencies in fire safety, the company additionally claimed that they could not have possibly known about the real state of fire safety and, therefore, could not be legally liable. KiK insisted that corporate social responsibility measures do not imply any legal responsibility. The social audit reports served as a proof of the fact that KiK was under the assumption that general working conditions, and fire safety in particular, were in accordance with their code of conduct. KiK's legal briefs follow the classic industry narrative: "We are concerned about workers' rights and do all we can, but we do all of this purely voluntarily, and take no responsibility."

employee's protection. The Court also clarifies that for the purpose of (4), it is not necessary to show that the parent is in the practice of intervening in the health and safety policies of the subsidiary. Instead, the court should look at the relationship between the companies more widely. It may be enough to show that the parent has a practice of intervening in the trading operations of the subsidiary, for example, in production and funding issues.)

²⁰ Terwindt 2018, *supra* note 17 at 268.

²¹ Here, KiK stated in the section titled "Standard for Employment" regarding "Health and Safety at Work" that: "The workplace and the practice of the work must not harm the employees' or workers' health and safety. A safe and clean working environment shall be provided. Occupational health and safety practices shall be promoted, which prevent accidents and injury in the course of work or as a result of the operation of employer facilities. These safety practices and procedures must be communicated to the employees as well as the workers; they have to be trained in effective usage [...]." KIK TEXTILIEN UND NON-FOOD GMBH, CODE OF CONDUCT, revised version, at 3 (1 August 2009) <https://docplayer.net/49661979-Kik-textilien-und-non-food-gmbh-code-of-conduct.html>

²² KiK Textilien und Non-Food GmbH, Statement on the Panorama Program of 06.12.2012, translation by the author.

²³ Anna Beckers, *Legalization under the premises of globalization: Why and where to enforce corporate social responsibility codes*, 24(1) INDIANA JOURNAL OF GLOBAL LEGAL STUDIES, 15–43 (2017).

"KiK's legal briefs follow the classic industry narrative: 'We are concerned about workers' rights and do all we can, but we do all of this purely voluntarily, and take no responsibility.'"

While the claimants in the KiK case had negotiated a waiver of the statute of limitations in pre-trial negotiations, KiK claimed in the litigation that the case was time-barred under Pakistani law. In a decision based on the expert opinion of a British law professor it had commissioned, the Dortmund court eventually held that the waiver negotiated pre-trial was invalid because the case was

²⁴ E v English Province of Our Lady of Charity [2012] EWCA (Civ) 938, [2013] 2 W.L.R. 958, 19, 70.

governed by Pakistani law, which does not provide for the possibility of such a waiver. The claimants attempted to argue that the question of the waiver was exclusively governed by German law as the parties had come to the agreement in pre-trial negotiations that German law overrule Pakistani law on the waiver question because both the representatives of the claimants and the defendant were German lawyers using German legal language therefore clearly not considering to apply Pakistani law. The court did not follow this line of reasoning. As a result, the court only superficially dealt with the question of which duties of care a buyer may owe towards the employees of a subsidiary.²⁵ This procedural decision ultimately ended the litigation in Germany, without getting to the merits of the case against KiK.

The legal interventions against the social auditing firm RINA

Parallel to the legal action against KiK, Italian lawyers filed criminal charges against the managing director of RINA on behalf of the AEFFAA, NTUF, and ECCHR in 2014. The allegation was that the top managers of RINA, who had allowed for the issuance of the SA-8000 certificate weeks before the fire in 2012, were liable under Italian criminal law for the crime of giving false certification and falsification of documents.²⁶ The investigating judge in Turin opened the criminal proceedings and ordered expert opinions on the causes of the fire, but then handed the case over to the public prosecutor in Genoa for jurisdictional reasons. There, the

²⁵ LG Dortmund, 7 O 95/15, Beschluss vom 10.1.2019. Landgericht Dortmund Urteil vom 10.01.2019 – 7 O 95/15 (Ger.), available at <https://openjur.de/u/2155292.html>.

²⁶ Art. 477, 479, 480, 481, 482 Codice Penale (C.p.) (It.).

investigative judge closed the proceeding in December 2018 after an appeal,²⁷ holding that it would be hard to argue in court that the issuing of the SA-8000 certificate had been causal to the fire. In her view, RINA Services could not have prevented the factory's continued operation in the absence of adequate safety conditions for workers, and therefore RINA could not have prevented the fire. Further, the judge did not see sufficient evidence to indicate that the top management had been aware of the alleged falsification of the audit report, which was the basis for the issuance of the SA-8000 certificate. Furthermore, in her assessment, RINA managers did not commit the crime of giving a "false statement", as the certification was not legally mandatory, but only issued upon the voluntary request of individual companies, mostly driven by market demand.

As RINA's activities are also subject to the OECD Guidelines for Multinational Enterprises because Italy is an OECD member state, the above-mentioned organisations, together with a broader international coalition, filed a complaint against RINA with the OECD National Contact Point in Italy in September 2018. However, RINA management proved very reluctant to accept responsibility under the OECD Guidelines and therefore the parties could not reach a mediated agreement.

Conclusions

The different legal proceedings against KiK and RINA must be seen in the broader context of the economic, social, and legal realities of globalised value chains. While international and national trade and commercial law generally enable lead firms in the Global North to maximise their profits, with these lead firms, in turn, bearing no legal responsibility for the exploitation of workers or the destruction of the environment. They also open up possibilities for legally challenging the status quo. In the litigation against KiK, it was German civil procedure and Pakistani tort law that allowed four Pakistani workers to go to court in Germany to claim that lead firms actually do bear a duty of care for the workers in their globalised supply chains

²⁷ Tribunale de Genova, Ufficio del Giudice per le Indagini Preliminari, Decreto di Fissazione dell' Udienza a seguito di opposizione – art. 409 c2 c3 c.p.p., N 3240/16 / N 10400/16, 11 December 2018.



Top Photo © ECCHR
Bottom Photo © NTUF/AEFFAA
and ECCHR

who they usually try to externalise.

Despite the fact that the proceedings against KiK failed, it is clear that the case had positive effects on KiK's willingness to engage in the ILO compensation negotiations and, eventually, to pay the workers a substantial amount of money. So, even if the court cases did not deliver compensation, the claimants and all other affected persons eventually received further compensation from KiK, though without recognition of legal responsibility.

Further, the lawsuit in Germany had an impact on German policy and legal debate, as it brought up several paradigmatic problems of liability in global value chains and made clear that more cases of this kind, raising similar questions of liability, are likely to come.²⁸ There is also reason to believe that the legal and public debates around the KiK case influenced a law reform process in Germany. The first formal proposal for a Supply Chain Liability Law in Germany was published just a few weeks after the KiK case was dismissed. In the debates around the supply chain law (*Lieferkettengesetz*) in Germany as well as on mandatory Human Rights Due Diligence at the EU level, the KiK case is often cited as a reference point, as the case's dismissal proves the point that law reform is needed.²⁹ Nasir Mansoor of NTUF and Saeeda

Khatoon of the AEFFAA contributed a video statement in support of law reform in Germany for the launch of the civil society campaign and also spoke before the European Parliament.³⁰

The lawsuit against KiK also had emancipatory effects on the Pakistani unions and the AEFFAA because their efforts were not only focused on winning the legal case itself. All of the actors involved understood the legal case to be an opportunity for building a transnational alliance based on solidarity and a commitment to work together on an equal footing. They anticipated the potential shortcomings of the law and legal procedures and aligned the legal strategies with broader political goals of public outreach campaigning, advocacy efforts, and engagement in alternative political processes. This was only possible due to the cooperation of diverse actors from Pakistan and Germany, collectively comprising a diverse range of perspectives beyond legal expertise.³¹ Indeed, it was precisely the non-lawyers who played the most crucial roles, because they helped the legal debate become socially and politically relevant: from the Pakistani workers, who as a group and individually, were prepared to expose themselves and take a public stance, to the courageous trade unions and civil society organisations that accompanied the self-organisation of those affected and had the willingness and skills to enter into the ILO negotiations, to the art and media professionals who made the case and the injustice perceptible to a broader public.

²⁸ See Gerhard Wagner, *Haftung für Menschenrechtsverletzungen*, 80(4) *RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALS PRIVATRECHT*, 717–782 (2016); Marc-Phillippe Weller et al., *Haftung deutscher Unternehmen für Menschenrechtsverletzungen im Ausland*, 216(3–4) *ARCHIV FÜR DIE CIVILISTISCHE PRAXIS*, 387–420 (2016); Chris Thomale and Leonhard Hübner, *Zivilgerichtliche Durchsetzung völkerrechtlicher Unternehmensverantwortung*, 72(8) *JURISTENZEITUNG*, 385–397 (2017); Mathias Habersack et al., *MÜNCHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH BGB VOL. 7, § 823* (2017); Marc-Phillippe Weller and Chris Thomale, *Menschenrechtsklagen gegen deutsche Unternehmen*, 46(4) *ZEITSCHRIFT FÜR UNTERNEHMENS- UND GESELLSCHAFTSRECHT*, 509–526 (2017); Christoph Wendelstein, *Menschenrechtliche Verhaltenspflichten im System des Internationalen Privatrechts*, 83(1) *RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALS PRIVATRECHT*, 111–153 (2019); two of four articles in the special issue “Human Rights Violations in Global Supply Chains” of the *J. European Tort L.* start their discussion with the example of the litigation against KiK. See Martin Spitzer, *Human Rights, Global Supply Chains, and the Role of Tort*, 10(2) *J. EUROPEAN TORT L.*, 95–107 (2019); See also Mark Geistfeld, *The Law and Economics of Tort Liability for Human Rights Violations in Global Supply Chains*, 10(2) *J. EUROPEAN TORT L.*, 130–165 (2019).

²⁹ Misereor, *Dismissal of complaint in KiK case shows serious gaps in the German legal system* (10 January 2019) <https://www.misereor.de/presse/presse-meldungen-misereor/klageabweisung-im-kik-fall-zeigt-gravierende-luecken-im-deutschen-rechtssystem/>; European Commission, *Study on due diligence requirements through the supply chain*, at 215, (2020) <https://op.europa.eu/en/publication-detail/-/publication/8ba0a8fd-4c83-11ea-b8b7-01aa75ed71a1/language-en>; European Parliament, *Study: Access to le-*

gal remedies for victims of corporate human rights abuses in third countries, at 59–65, (2019) [https://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU\(2019\)603475_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2019/603475/EXPO_STU(2019)603475_EN.pdf).

³⁰ European Center for Constitutional and Human Rights, *SIEBEN JAHRE NACH DEM BRAND BEI KIK-ZULIEFERER: BETROFFENE BERICHTEN*, (2019) <https://www.youtube.com/watch?v=PbrqRZMod-A#action=share>.

³¹ Wolfgang Kaleck, *In the legal battle for human rights you have to seize every opportunity and develop a broad strategy*, OPEN GLOBAL RIGHTS, (26 February 2019) <https://www.open-globalrights.org/seizing-opportunities-and-broad-strategy-both-essential-in-human-rights-litigation/?lang=German>.

RECENT TRENDS IN TRANSNATIONAL REGULATION OF CORPORATE RESPONSIBILITY IN GLOBAL VALUE CHAINS

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Global | Originally written in Spanish

At the end of the 20th Century, the dominance of Transnational Corporations (TNCs) in the global arena was expressed through the unilateral regulation of fundamental labor rights, recognized in the ILO core standards, through corporate codes of conduct. However, since the beginning of this century, global trade unions have progressively gained relevance, taking the global regulation of these labour rights with a richer and more detailed content into the area of contractual negotiation through Global Framework Agreements (GFAs). The onset of the financial and debt crisis in the 2009-2014 cycle would have seemed set to prevent the transnational regulation of basic labour rights and, in general, to blur the agreements derived from Corporate Social Responsibility (CSR). Still, this has not happened; rather, there have been some transformations in this area that are undoubtedly of interest. The purpose of this article is to identify the current trends, which can be summarised as the adaptation of global contractual instruments to the reality of transnational value chains, the emergence of global territorially-based multilateral agreements and finally, the consideration of labour rights as human rights within the framework of initiatives intended to anchor the responsibility of TNCs in national legal systems or in public international law through a binding treaty.

Firstly, it is worth noting the increasingly considerable presence of transnational value chains into which production is broken down by transnational corporations, i.e. the so-called supply chains and the outsourcing of their production, as the new operating space of transnational corporations. This is defined as a “complex multi-scale configuration” since “among its fundamen-

tal elements are both networks of subsidiaries in remote parts of the planet and the concentration of strategic functions in a single location or in a few places.”¹ Although some studies choose to address this issue through the parent company’s unilateral imposition of contract clauses with their suppliers that establish their exemption of liability for violations of human rights in their supply chains, what is most noteworthy is the attempt to adapt the Global Framework Agreement to this new situation.²

“Therefore, the challenge is to define a responsibility extension mechanism along the supply chain. The point is how to regulate the value chain starting from the parent company as the subject of the rules that must govern the process in order to obtain the appropriate result entailing respect for human labour rights and the basic labour standards principles.”

The particular structure of the transnational corporation based on the development of a chain of contracts and subcontracts seriously hinders both unilateral corporate social responsibility articulated through the code of conduct, and the contractual relationship established through a collective agreement commonly stipulated between the global sector federations and the transnational corporation, since Outsourcing the

¹ Saskia Sassen & María Victoria Rodil, *UNA SOCIOLOGÍA DE LA GLOBALIZACIÓN* (Katz ed., 2007).

² David V. Snyder, *The New Social Contracts in International Supply Chains*, 68 *AMERICAN UNIVERSITY LAW REVIEW*, 1869, 1869 – 1931, (2019); Kishanthi Parella, *Improving Human Rights Compliance in Supply Chains*, 95 *NOTRE DAME LAW REVIEW*, 727 – 794 (2019).



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production also implies outsourcing the responsibility. Therefore, the challenge is to define a mechanism to extend responsibility along the supply chain. The point is how to regulate the value chain starting from the parent company as the subject of the rules that must govern the process in order to obtain the appropriate result entailing respect for human labour rights and the basic labour standards principles. The solution has been sought through the establishment of information obligations on the company in order to identify the contractors and subcontractors at its service, which will make it possible to follow the paths taken by the product along the supply chains. This has come to be known as product “social traceability.” Along with this, it includes, as a condition attached to the product’s manufacturing instructions, respect for the contents of the agreement as a condition for the establishment of commercial relations with the transnational company.³

The adoption of a sort of “duty of influence” on the parent company which, in the event of non-compliance by the contractor companies with the obligations contained in the Agreement, undertakes to terminate the supply contract, has been the solution included into some particularly interesting GFAs, such as that of Inditex, on which there is abundant literature.⁴ But, this problem is also transferred to the national regulatory level through some state regulations that incorporate these same “good governance”

rules for supply chains.⁵

Secondly, the existence of a territorial concentration of companies supplying large transnational corporations in the textile sector led, after the terrible tragedy of Rana Plaza in Bangladesh, to the signing of a global multilateral agreement in 2013 between 39 European companies and two large global trade union federations together with eight local trade unions in the country.⁶ This new expression of collective autonomy in the global space is different from framework agreements or those concerning the responsibility of transnational companies in global supply chains. The commitment is different in this type of a multilateral agreement because it focuses exclusively on the prevention of risks arising from workplaces, considering the issue of working conditions or standards on occupational safety and health, rather than the application in the private sphere of the company the ILO fundamental labour rights, as is the case in the rest of the Global Framework Agreements.

Consequently, the commitment of the signatory parties is focused on prevention and personnel training obligations, as well as on the organization of selective inspections of workplaces, the outcome of which must be ensured by the companies themselves through the exercise of their duty to influence contracting companies. The last resort is the termination of the contractual relationship with the contracting transnational. In turn, and as is often the case in this type of regulatory instrument, the information and transparency of the results obtained is connected with the effectiveness of the

³ Wilfredo Sanguinetti Raymond, *Los alcances de la responsabilidad social de las empresas Multinacionales: del grupo a la cadena de producción*, 22 REVISTA GENERAL DE DERECHO DEL TRABAJO Y DE LA SEGURIDAD SOCIAL, 10-25 (2010); See also, Antonio Pedro Baylos Grau, *La responsabilidad de las empresas transnacionales en los procesos de externalización: las cláusulas sociales internacionales*, in LA EXTERNALIZACIÓN PRODUCTIVA A TRAVÉS DE LA SUBCONTRATACIÓN EMPRESARIAL: ASPECTOS LABORALES Y DE SEGURIDAD SOCIAL, 115-132 (Comares, Granada eds., 2018) [hereinafter Baylos, A. (2018)].

⁴ Sergio Criado Canalda, *ACUERDOS MARCO INTERNACIONALES Y DERECHOS SOCIALES* (Tirant Lo Blanch ed., 2016); Baylos, A. (2018), *supra* note 4; Wilfredo Sanguinetti Raymond, *Las cadenas mundiales de producción y la construcción de un Derecho del Trabajo sin fronteras*, AA.VV., *El futuro del trabajo: cien años de la OIT. (XXIX Congreso de la Asociación Española de Derecho del Trabajo y la Seguridad Social*. Salamanca), 23-77 (2019); Isidor Boix Lluch and Victor Garrido Sotomayor, *Balance sindical de los 10 años del Acuerdo Marco Global con INDITEX: Una experiencia de Acción Sindical por una Globalización sostenible 4 de octubre de 2017 - 10º Aniversario de la firma del Acuerdo Macro*, 10 TRABAJO Y DERECHO (2019).

⁵ Jaakko Salminen and Mikko Rajavuori, *Transnational sustainability laws and the regulation of global value chains: comparison and a framework for analysis*, 26(5) MAASTRICHT JOURNAL OF EUROPEAN AND COMPARATIVE LAW, 602-627 (2019).

⁶ Agreement on building safety and fire safety in Bangladesh that was signed in 2013 with 39 European companies, but remained open so that transnational textile companies relocating their production to Bangladesh could adhere to it, which has indeed happened and so far, two hundred multinational companies have done so, transcending its fundamentally European character, with the inclusion of companies from North America, Asia and Australia. The Agreement was renewed, with some difficulty, in 2017 and expires in May 2021. See Manuel Antonio García-Muñoz Alhambra, *Acuerdos Marco Globales multilaterales. Una nueva expresión colectiva del derecho transnacional del trabajo*, 70 REVISTA DE DERECHO SOCIAL, 199-216 (2015) [hereinafter García-Muñoz, 2015].

agreement.⁷ The symbolic significance of the Accord on Fire and Building Safety in Bangladesh (Bangladesh Accord) has led to initiatives to extend this model to address the problems raised in the garment industry at the global or regional level.⁸

“The aim is to address the fact that there are no hard law standards that may hold international corporations accountable for serious international wrongdoing perpetrated extraterritorially in their supply chains, and thus to move from social responsibility to legal liability of corporations for human rights violations.”

Lastly, and from the debate between voluntary compliance or enforceability of the obligations that shape the content of the global agreements to which transnational corporations commit themselves, there has been a shift from the strictly labour focus of the rights that must be guaranteed by transnational corporations in any of the territories in which they are located, to the universal and generalist consideration of the rights protected, on the basis of their definition as human rights. This new determination - “convergence”⁹ or “meeting”¹⁰ of concepts - should not actually entail a substantial content change, except for a greater emphasis on the various modalities of forced labour, human trafficking and child labour, but without the rest of the core labour standards recognised by the ILO ceasing to be considered as objectives of the corporate commitments made in the private contractual space of global

agreements.¹¹ That is also a debate that is often intertwined with that of the responsibility of transnationals in supply chains and the systems that regulate them.

The shift of attention to human rights¹² is completed by an operation that aims to shift the responsibility of transnational corporations by placing it in the public international sphere, i.e., by anchoring it through an international instrument to state coercion of a series of commitments set out in the standard that corporations must be forced to follow. The aim is to address the fact that there are no hard law standards that may hold international corporations accountable for serious international wrongdoing perpetrated extraterritorially in their supply chains,¹³ and thus to move from social responsibility to legal liability of corporations for human rights violations.¹⁴ These initiatives ultimately incorporate the concept of “due diligence” as a standard for compliance by transnational corporations in third countries,¹⁵ and to some extent are limited to fulfilling a compliance obligation or compliance with the general framework of rights enforcement. This obligation is resolved by making a business plan in which the transnational corporation undertakes to respect human rights and other fundamental international obligations. The important

¹¹ Janice R. Bellace, *Human Rights at Work: The Need for Definitional Coherence in the Global Governance System*, 30 INT'L J. COMP. LAB. L. & INDUS. REL. 175 (2014) (insists that the emphasis on the universality of the notion of labor human rights implies that transnational corporations must accept that society has entrusted them with “certain responsibilities” in the implementation of human rights in their sphere of control).

¹² The loss of the centrality of labor as the axis of the fundamental rights that must be preserved in the global space by Transnational Corporations or from the international standard has been criticised as a depoliticisation of the protection mechanism, in addition to questioning the concept of universality of rights in the context of post-colonialism. See Kumar 2014, *supra* note 9.

¹³ Lorena Sales Pallares and Maria Chiara Marullo, *El «ángulo muerto» del Derecho Internacional: las empresas transnacionales y sus cadenas de suministro*, 78(1) REVISTA PERSONA Y DERECHO, 261- 291 (2019).

¹⁴ Carlos Lopez, *El camino hacia un instrumento jurídicamente vinculante en el área de empresas y derechos humanos: ¿de la responsabilidad social de la empresa a la responsabilidad legal de la empresa por vulneraciones a los derechos humanos*, in DERECHOS HUMANOS Y EMPRESAS: REFLEXIONES DESDE AMÉRICA LATINA, 119-135 (Instituto Interamericano de Derechos Humanos, 2017).

¹⁵ OECD, *Responsible business conduct for institutional investors: Key considerations for due diligence under the OECD Guidelines for Multinational Enterprises*, <https://mneguidelines.oecd.org/RBC-for-Institutional-Investors.pdf> (Due diligence is defined as the process by which companies can identify, prevent, mitigate or ascertain what may adversely affect their performance by negatively impacting human rights in the places where they are located.)

⁷ See also García-Muñoz, 2015, *supra* note 7; Baylos, A. 2018, *supra* note 4; Adoracion Guaman and Arturo Luque Gonzalez, *Cadenas de suministro, Derechos Humanos, Empresas Transnacionales e industria textil: de los AMI a un Instrumento Internacional Jurídicamente Vinculante*, 37(2) CUADERNOS DE RELACIONES LABORALES, 393-418 (2018) [hereinafter Guamán and Luque, 2019].

⁸ Naila Kaber, Lopita Huq, and Munshi Sulaiman, *Multi-stakeholder initiatives in Bangladesh after Rana Plaza: global norms and workers' perspectives*, 1 GARMENT SUPPLY CHAIN GOVERNANCE DISCUSSION PAPER SERIES (2019), available at https://www.wiwiss.fu-berlin.de/forschung/Garments/Medien/Discussion-Paper-Garment-Governance-01-2019_Multistakeholder-initiatives-in-Bangladesh-after-Rana-Plaza.pdf

⁹ Vidya Kumar, *Rethinking the Convergence of Human Rights and Labour Rights in International Law: Depoliticisation and Excess*, in LAW IN TRANSITION: HUMAN RIGHTS, DEVELOPMENT AND RESTORATIVE JUSTICE 127- 140 (Ruth Buchanan and Peer Zumbansen eds., 2014) [hereinafter Kumar, 2014].

¹⁰ Guy Mundiak, *Human rights and labor rights: why don't the two tracks meet?*, 34(1) COMPARATIVE LABOR LAW & POLICY JOURNAL, 217 - 43 (2012).

thing is that those duties are included in the legislation of the country in which the headquarters of the transnational corporation are located and therefore constitute a legal obligation for that corporation.¹⁶

On the one hand, these initiatives can be understood as the development of the conditions for the enforceability of corporate responsibility, including public mediation in order to press for compliance, as the voluntary execution of their human rights commitments is considered lacking. On the other hand, it implies driving domestic legal systems of obligations hitherto located in the global space as a private sphere to territoriality, not subject to the national state legal framework or to the possibility of opening up a field of enforceable obligations even before an international court. In this regard, controversy exists over the possibility of an International Legally Binding Instrument on Transnational Corporations and other business enterprises with regard to human rights, which is being negotiated following the mandate of Resolution 26/9 within the framework of the United Nations Human Rights Council.¹⁷ This has been very well received by both the European Parliament and the European Economic and Social Council¹⁸ although the

United States, Japan and the European Union voted against the aforementioned resolution, and the outcome of this regulation, which is still being negotiated at the international context, is therefore uncertain.

¹⁶ E.g. The California Transparency in Supply Chains Act, Cal. Civ. Code §1714.43 (2010); Modern Slavery Act 2015 (U.K.); LOI n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, [Law 2017-399 of 28 March 2017 on the duty of care of parent companies and ordering companies.] J.O. n° 0074 (Fr.).

¹⁷ Adoración Guamán Hernández and Gabriel Moreno González, *Empresas Transnacionales y Derechos Humanos. La necesidad de un instrumento vinculante* (2018); See also Guamán and Luque 2019, *supra* note 7.

¹⁸ "The EESC strongly supports the resolutions adopted by the European Parliament (EP), in particular its call for full commitment to the development of a binding instrument and specifically the need for an international complaints and monitoring mechanism. The EESC points out that there are international systems, such as the ILO complaints procedure, which can serve as a model for more ambitious implementation internationally, since binding standards will not be effective without a firm commitment on the part of States and without enforcement mechanisms. (...) It would ensure that victims of business-related human rights violations would be guaranteed uniform human rights standards, jurisdiction and applicable law, as well as equal and effective access to justice, worldwide. In addition, this will create a level playing field for business, create legal certainty and contribute to fairer international competition". European Economic and Social Committee, *EESC Opinion: Binding UN treaty on business and human rights (own-initiative opinion)*, 2019, REX/518-EESC-2019, available at <https://www.eesc.europa.eu/en/our-work/opinions-information-reports/opinions/binding-un-treaty-business-and-human-rights-own-initiative-opinion>.

SCOPING THE FRAMEWORK OF CORPORATE RESPONSIBILITY IN SUPPLY CHAINS: FROM SOFT LAW ON HUMAN RIGHTS TO HARD LAW ON LABOUR ISSUES

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Europe, Spain | Originally written in Spanish

The Guiding Principles on Business and Human Rights, unanimously adopted by the UN Human Rights Council in 2011, recognise the fundamental role of businesses in the respect for human rights. This *soft law* instrument addresses not only the state's duty to protect human rights from potential abuses by private actors and to ensure access to an adequate remedy, but also the responsibility of businesses to respect these rights.

The document, in Principle 15, enshrines the duty of businesses to have “a human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights.” This refers both to their direct impacts through their own operations and to the impacts to which they may contribute or with which they may be linked through their business relationships with third party companies.

In recent years, steps have been taken to transform these principles into legally binding rules on the due diligence of enterprises. These efforts include the ground-breaking French law on the duty of care of parent companies, which will be discussed below, as well as other processes underway, both within the UN and, more recently, at the EU level.

The main purpose of this emerging legislation is to hold companies accountable for compliance with minimum human rights and environmental standards, both by their subsidiaries and by their foreign subcontractors and suppliers.

The problem is that, despite the existence of a consolidated *soft law*, there are still many open

questions regarding its legislative configuration, which are both numerous and controversial, as normative precedents are scarce. Although the Guiding Principles offer a more or less exhaustive description of what should constitute the action of companies in each of the phases of the suggested due diligence process, they are much less precise with regard to the consequences that could arise from non-compliance with these Guiding Principles.¹

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One of the most recurrent and debated questions is what should be the extent of responsibility of enterprises bound by this potential legal due diligence obligation for human rights and environmental impacts that may occur in their global value chains. In other words, to what extent and under what conditions could a large company be held legally responsible for these impacts?

Scope of the new global corporate responsibility to respect human rights

Logically, and as recognised by *soft law* instru-

¹ Nicolas Bueno and Claire Bright, *Implementing Human Rights Due Diligence Through Corporate Civil Liability*, 69(4) INT'L AND COMPRAR. L. Q., 789-818 (2020).

ments, not all companies will be able to identify and address all the negative impacts of their activities, relationships and/or business links along their global value chains.² It would therefore seem unreasonable to require that due diligence obligations always extend, without limit or reservation, *ad infinitum*.

However, these instruments do not clearly define a scope of the disputed obligations. Instead, they present a principle of prioritisation. For example, the Guiding Principles provide that where it is “too difficult” to exercise due diligence on each entity in the value chain, the lead company should identify the areas of greatest human rights risk and prioritise due diligence in those areas. The prioritisation, according to the OECD guidelines,³ should be based on the severity and likelihood of the impacts identified.

The task of defining the scope of their due diligence is therefore delegated to the companies themselves, based on the inevitable subjective assessment of a series of criteria that are complicated to evaluate *a posteriori*.

The creation of a legal responsibility framework, not just a voluntary code of conduct, may require a different, objective approach to the scope of that responsibility. It does not seem ideal, from the point of view of legal certainty, that the scope of such responsibility should depend on an assessment, conducted by the company concerned, of the severity and likelihood of each impact on its value chain at any given time.

Therefore, contrary to what the above-mentioned *soft law* instruments seem to seek, human rights due diligence and legal responsibility (and especially civil responsibility for impacts that may occur) will hardly apply along the value chain without restrictions. Most likely, as suggested by current legislative initiatives in various jurisdictions,

² U.N. Office of the High Commissioner, *Guiding Principles on Business and Human Rights – Implementing the United Nations ‘Protect, Respect and Remedy’ Framework*, Principle 17 commentary (2011) (For companies with many entities in their value chain, it may be too difficult to conduct human rights due diligence at the level of each entity.)

³ OCDE, *Guía de la OCDE de Debida Diligencia para una Conducta Empresarial Responsable* (2018), <https://mnne-guidelines.oecd.org/Guia-de-la-OCDE-de-debida-diligencia-para-una-conducta-empresarial-responsable.pdf> (consultado el 16 de marzo de 2021).

legislators will opt to circumscribe this responsibility based on well-defined attribution criteria.

The solutions proposed so far to account for the gap encapsulated by the main laws and legislative initiatives are varied.

One example is the Responsible Business Initiative,⁴ which proposed third-party responsibility based on a presumption of fault on the part of those who have the power of choice or supervision over the offender. Such a system would have required a relationship between direct and vicarious responsibilities, which in the case of the Swiss initiative took the form of control by the latter over the former as a necessary condition for liability to arise.

French Law No. 2017-399 of 27 March 2017 on the duty of care of parent companies⁵ - currently the most prominent embodiment of the positive qualities of due diligence principles in the field of human rights - on its part established the civil liability of some French companies for damages that could have been avoided by the performance of their due diligence obligations. Unlike the Swiss initiative, the French rule extends the scope of civil liability beyond the sphere of controlled companies, potentially covering subcontractors and suppliers with whom the principal has an “established business relationship.” However, unlike the Swiss initiative, French law does not establish a liability system for the acts of third parties, but a direct responsibility for violation of an obligation which does not entail a presumption of fault on the part of the parent company. Thus, the parent company can only be held liable if the omission of the duty of care is the cause of the damage.⁶

⁴ Swiss Coalition for Corporate Justice, *The initiative text with explanations*, available at https://www.ius.uzh.ch/dam/jcr:d9aaa6bf-f789-4c0b-816b_4c94003029d8/responsible_business_initiative_text.pdf (accessed on 16 March 2021).

⁵ LOI n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, [Law 2017-399 of 28 March 2017 on the duty of care of parent companies and ordering companies.] J.O. n° 0074, texto n° 1, (Fr.) available at <https://www.legifrance.gouv.fr/loda/id/JORF-TEXT000034290626/>

⁶ Charley Hannoun, Le devoir de vigilance des sociétés mères et entreprises donneuses d'ordre après la loi du 27 mars 2017, *DROIT SOCIAL*, 806 (2017); Adoración Guamán Hernández, *Diligencia debida en derechos*



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More recently, on 10 March 2021, the European Parliament adopted a resolution containing recommendations to the European Commission on due diligence and corporate responsibility,⁷ which supports the adoption of an EU directive whose Article 19.2 would exceptionally circumscribe the civil liability of the company concerned to damages caused by the company or its subsidiaries. The latter notion being understood as the possibility of exercising decisive influence over a company through (a) rights of ownership or use of all or part of the assets of a company, or (b) rights or contracts which open up the possibility of exercising decisive influence on the composition, deliberations or decisions of the organs of a company. It is therefore proposed that the responsibility system be limited to damages caused by companies over which it has decisive influence, which is rarely the case in subcontracting relationships.

Scope of the combined liability of major companies in the subcontracting chains in Spain

Although there is currently no legislation or legislative proposal in Spain on due diligence and corporate responsibility for human rights and environmental impacts in global value chains, the Spanish subcontracting framework, for reasons that will be explained below, provides an interesting precedent in this regard, and could be a reference model for the design of laws on this potential responsibility.

Article 42 of Real Decreto Legislativo 2/2015, 23 October, on the adoption of the revised text of the Workers' Status Act (ET),⁸ which regulates the subcontracting of works or services, lays down the duty of the principal company to monitor compliance with certain obligations by contracting companies and subcontractors. It therefore requires a certain degree of vigilance on the part of the principal company, which varies depending on whether or not the work or service contracted or subcontracted corresponds to its main activity.

humanos y empresas transnacionales: de la ley francesa a un instrumento internacional jurídicamente vinculante sobre empresas y derechos humanos, 8(2) LEX SOCIAL: REVISTA DE DERECHOS SOCIALES, 216–250 (2018).

⁷ European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability, 2020/2129(INL), available at https://www.europarl.europa.eu/doceo/document/TA-9-2021-0073_EN.pdf.

⁸ R.D.L. 2/2015, de 23 de octubre, por el que se aprueba el texto refundido de la Ley del Estatuto de los Trabajadores, B.O.E. 255-11430 (Spain), available at <https://www.boe.es/eli/es/rdlg/2015/10/23/2/con>.

The vague concept of “main activity” is understood by the public as “works or services that constitute part of the productive cycle of the company, i.e. those that are part of the company’s main activities.” This notion, viewed in the context of private companies, takes the form of operations or duties that are “inherent in the production of specific goods and services which it intends to supply to the public or place on the market, excluding complementary or peripheral duties.”⁹

Consequently, the degree of due diligence required of the principal company is higher where “the works and services would have had to be carried out/provided by the parent company itself if it [the activity] had not been consented to, otherwise its business would have been significantly impaired.”¹⁰

The Supreme Court of Spain¹¹ considers that the activities of the production cycle, as opposed to the indispensable activities not related to the production cycle, “are incorporated into the final product or result of the principal company or entity, whether they were performed directly or entrusted to a contracting company,” which justifies, in its opinion, the financial responsibility of the main company or entity for the salaries of the workers employed in the contract (one of the consequences derived from the subcontracting of works and services of its main activity, as we will see later).

In the case of a peculiar relationship of production outsourcing or subcontracting of the main activity by a main company to a contractor or subcontractor, the Article provides, on the one hand, for the joint and several liability of the parent company for Social Security obligations incurred by the contracting companies and subcontractors during the term of the contract, and, on the other hand, for the joint and several liability of the parent company for the salary related obligations borne by the contracting companies and subcontractors vis-a-vis their workers.

⁹ T.S. Juz. Soc., January 18, 1995 (Recurso No. 150/94, ECLI:ES:TS:1995:127) (Spain); T.S. Juz. Soc., October 29, 1998 (Recurso no. 1213/1998; ECLI:ES:TS:1998:6296) (Spain); T.S. Juz. Soc. November 24, 1998, (Recurso No. 517/98, ECLI:ES:TS:1998:6980) (Spain); T.S. Juz. Soc., November 22, 2002 (Recurso No. 3904/01, ECLI: ES:TS:2002:7792) (Spain); T.S. Juz. Soc., July 20, 2005 (Recurso No. 2160/2004, ECLI:ES:TS:2005:5043).

¹⁰ T.S. Juz. Soc., January 18, 1995 (Recurso No. 150/94, ECLI:ES:TS:1995:127) (Spain).

¹¹ T.S. Juz. Soc., October 29, 1998 (Recurso no. 1213/1998; ECLI:ES:TS:1998:6296) (Spain).

Meanwhile, Article 24.3 de la Ley 31/1995, of 8 November 1995, on the prevention of occupational risks (LPRL) within the framework of the coordination of company activities, stipulates that the duty of parent companies is to ensure compliance with the regulations on the prevention of occupational risks by contracting companies and subcontractors of works or services related to their main activity executed in their place of business.

There is therefore a specific duty of care for workers providing services in the context of work and services which meet two distinct requirements: (1) works that constitute part of the principal activity of the parent company and (2) works that are executed at the place of business of the parent company. However, the courts have given a flexible interpretation to the concept of “place of business” when determining whether or not this second condition is met, extending it to all places where the parent company carries out its principal activity,¹² even if the employees of the parent company do not work there.¹³

When the above requirements are met, this principle obliges the parent company, prior to the start of the activity, to require contractors and subcontractors to declare in writing that they have carried out, for the works and services contracted, the risk assessment and planning of their preventive activity and that they have fulfilled their obligations in terms of information and training with regard to the workers who must provide the services at the place of business. In addition, the parent company must check that the contracting companies and subcontractors working at the place of business have developed the necessary means of coordination between them.

It is on the basis of this duty of care that the parent company may be held jointly and severally liable for occupational accidents suffered by employees of contracting companies and subcontractors, for the cost of the corresponding health benefits and for the overtaxation of the economic benefits resulting from occupational accidents or diseases.

¹² STSJ de Cataluña (Sala de lo Contencioso), de 11 de enero de 2006 (Recurso No. 731/2000, ECLI: ES:TSJ-CAT:2006:2417) (Spain).

¹³ T.S. Soc. Juz., May 26, 2005 (Recurso No. 3726/2004 ECLI: ES:TS:2005:3398) (Spain).

Subcontracting of labour as a precedent and benchmark for a possible global corporate responsibility for human rights

Given the growing awareness of the need to develop governance mechanisms for global value chains and the evolution of the law in this regard, which tends to impose new duties of due diligence on companies with international standing, there is an urgent need to reflect on the design of this emerging regulation.

Although the existing *soft law* instruments, so often mentioned, offer an extremely useful starting point, their translation into *hard law* terms requires a reformulation that should not ignore but rather build on the very important precedent of labour law (with all its peculiarities and limitations).

While their areas of application differ considerably, the Spanish subcontracting regime offers an interesting basis for reflection on the positive qualities of the Guiding Principles and, in particular, on the extent of legal responsibility that companies should assume for human rights and environmental impacts in their global value chains.

“When positing the principles of corporate human rights due diligence and, in particular, configuring the scope of potential joint and several liability of companies for failure to comply with such due diligence for impacts occurring along global value chains, it may be useful to distinguish between the main activity and the complementary activity, in the same way that subcontracting regulations do.”

When positing the principles of corporate human rights due diligence and, in particular, configuring the scope of potential joint and several liability of companies for failure to comply with such due diligence for impacts occurring along global value chains, it may be useful to distinguish between the main activity and the complementary activity, in the same way that subcontracting regulations do.

This approach helps to distinguish between different phenomena that may require different regimes: in very general terms, on the one hand, outsourcing of the main or core activities of the parent company's production process (which would include all transnational relationships of subcontracting the

production of goods abroad, in accordance with the instructions, standards, specifications and/or technical and production conditions dictated by the parent company) and, on the other hand, the mere supply of products or the mere outsourcing of secondary services.

This differentiation is possible because, in contrast to the essentially uniform approach of *soft law*, the translation of non-binding guiding principles into legal provisions may require different legislative combinations adapted to each of the phenomena to be regulated.

A concrete example illustrates the fundamental differences between the relationships described above: the textile industry, which is particularly labour-intensive and subject to an intense process of relocation to the South. A sector that has recorded tragedies such as the collapse of the Rana Plaza building in Bangladesh, and has stirred the debate on the global responsibility of Western companies more than any other.

The outsourcing and offshoring of textile manufacturing activities by the sector's major brands to countries with much lower social, labour and environmental standards and/or countries that lack effective public institutions, is evidence of a phenomenon that, strictly speaking, does not correspond to the mere acquisition of foreign products put on the market by third-party companies, but to a genuine subcontracting of the "core business," i.e. the main or core activities of the parent company's production process. More precisely, the transformation of inputs into pre-designed products and then marketed by the parent company,¹⁴ with the production of the ordered goods being carried out in accordance with the instructions, standards, specifications and/or technical-production conditions dictated by the latter. In short, this is a service relation that is perfectly comparable to the one governed by articles 42 AND 24.3 of the LPRL.

In view of the above, the concept of "main activity," on which articles 42 AND 24.3 of the LPRL are based, as a criterion for the attribution of a possible joint and several liability (and, consequently, as a limit to it) is convenient for several reasons. Firstly, it seems desirable not to tie the liability of the parent company to a subjective feature such as "control" over the contracting company or subcontractor, which poses enormous problems in

the practical activation of such liability. If "control" were defined in terms of ownership, it would be limited mainly to damage in the context of the activities of the affiliated companies, excluding any liability in the case of mere subcontracting. Secondly, if "control" were defined in terms of economic dependence, the parent company could escape liability by using business partners with a diverse customer base (in which case none of the customer or parent companies would be potentially liable). Third, if "control" were defined in terms of management and/or supervision, not only would it be difficult to prove, but the parent company might seek to avoid liability simply by minimising its supervision of its business partners (precisely the opposite of the objective of the due diligence principles).

Conversely, there is an urgent need to find an objective factor, the suitability of which is not left to the goodwill of the parent company, and which makes it possible to clearly define the scope of application of the liability regime, offering at the same time a reasonable justification for the extension of this liability, in line with the regulations in force.

Secondly, the concept of "main activity" extends liability beyond the first level of subcontracting, potentially covering all contracting companies and subcontractors in the parent company's supply chain that carry out activities related to its production cycle.

As the courts have rightly suggested when interpreting Article 42 of the ET, in general terms, the concept of "main activity" circumscribes joint and several liability to those service providers who produce products (or provide services) specific to the parent company (as in the case of textile workshops responsible for the production of garments which are first designed and then marketed by the industry's brands), but not beyond.

Thirdly and finally, it should be noted that the rationale provided by legal precedents for the joint and several liability under the current regime obviously remains valid in cases of transnational subcontracting. The Spanish Supreme Court has argued, as explained above, that this is justified by the incorporation of subcontracted tasks of the main activity into the final product or result of the parent company.

However, it should be added that the proposed model of imputation of joint and several liability would not only be justified by the fact that the

¹⁴ Vibe Ulfbeck and Andreas Bloch Ehlers, *Tort Law, Corporate Groups and Supply Chain Liability for Workers' Injuries: The Concept of Vicarious Liability*, 13(5) EUROPEAN COMPANY LAW (2016).

tasks of the “main activity” play a central role in the production process of the parent company¹⁵ and are incorporated in its final product or result, but as the Court points out, also, by the fact that this same circumstance presupposes: (1) greater foresight of potential damage on the part of the parent company, as it is aware of the risks inherent in the activity in question, which is its own, and (2) greater proximity between the parent company and the contracting company or subcontractor (and, consequently, between the former and the workers of the latter), demonstrated by the special production relationship maintained in cases of subcontracting of its own main activity, generally characterised by the prescription, from the parent company, of instructions, standards, specifications and/or minimum technical-production conditions to be followed by the subcontractor.

Foresight and proximity are precisely two of the three requirements of the *Caparo* test, which Anglo-Saxon jurisprudence applies to determine the existence or absence of duty of care justifying liability for negligence.¹⁶ Although the analysis of this legal precedent deserves a separate detailed study, it should be noted that, in the Anglo-Saxon legal sphere, various judicial decisions have recently recognised, on the basis of the application of the above-mentioned test, the possibility of establishing the liability of companies for damage caused to third party companies abroad.¹⁷

Conclusion

In summary, the Spanish regulation on subcontracting and, in particular, the aforementioned notion of “main activity,” represents a relevant criterion for the attribution of liability, perhaps more convenient than other criteria that have been proposed, such as the restrictive and problematic notion of “control” or the circumscription of chain levels (for example, the limitation of the scope

of responsibility to the first level, i.e. to direct subcontractors), which is equally problematic in that, however essential the subcontracted activity may be, it would break the chain of responsibility as soon as the subcontracted activity crosses a level below the threshold of subcontracting defined as borderline.

Notwithstanding the above, the subcontracting framework developed here cannot serve as a model for all types of liability for human rights due diligence violations. While it is a useful starting point in the debate on corporate responsibility in global subcontracting and supply chains, it is less useful in determining the responsibility of parent companies for damages caused by their subsidiaries. In the latter case, the close link between the two (in terms of ownership, but often also in terms of management and control) may well justify a differentiated liability framework. In addition, the above-mentioned subcontracting system refers to injuries suffered by workers under a contract or subcontract. Due diligence is supposed to cover any potential impact on human rights (not only of workers in the global value chains of the companies concerned, but also of any third party affected) and on the environment, thereby opening up a myriad of additional issues to be resolved, and these will be the subject of the intense debate expected to be raised as a result of the proposal for a directive on sustainable corporate governance that the European Commission is due to put forward this year 2021.¹⁸

¹⁵ Miriam Saage-Maaß, *Labour Conditions in the Global Supply Chain. What Is the Extent and Implications of German Corporate Responsibility?*, FRIEDRICH-EBERT-STIFTUNG (2011).

¹⁶ Penelope Bergkamp, *UK Supreme Court enables expansive supply chain liability*, CORPORATE FINANCE LAB (March 16, 2021), <https://corporatefinancelab.org/2019/04/30/uk-supreme-court-enables-expansive-supply-chain-liability>.

¹⁷ *Chandler v. Cape PLC* [2012] EWCA Civ 525; *Lungowe v. Vedanta Resources PLC* [2019] UKSC 20.

¹⁸ European Commission, *Sustainable Corporate Governance*, <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12548-Sustainable-corporate-governance> (last visited March 16, 2021).



Ship breakers in Bangladesh | Photo © Bayazid Akter/Shutterstock.com

A COMMENTARY ON THE LAWS OF ENGLAND: HOLDING UK FIRMS ACCOUNTABLE FOR WORKER RIGHTS VIOLATIONS ABROAD

A conversation with Richard Meeran¹



Richard Meeran, *Partner, Head of International Department, Leigh Day*

Richard is the Head of the International Department at Leigh Day where he has been a partner for 30 years, practising in the field of multinational human rights litigation. He conceived and pioneered the firm's ground-breaking cases against UK multinational parent companies and has published extensively on the topic. He has appeared on numerous occasions as a legal expert at the UN Forum on Business and Human Rights, the Committee on Economic, Social and Cultural Rights, and at the Open-Ended Intergovernmental Working group on Transnational Corporations. He was a member of the drafting team of the Hague Rules on Business and Human Rights Arbitration.

Jeffrey Vogt: *The UK has distinguished itself in recent years for developing the common law of torts to hold accountable the conduct of UK companies and their overseas subsidiaries, with Vedanta² and Okpabi³ the only most recent examples but going back to Cape PLC.⁴ Can you walk us through these developments?*

Richard Meeran: In the UK, we had two major challenges to successful litigation - the corporate veil and forum non-conveniens. The first cases that I did entailed long, drawn-out forum battles. Fortunately, though, we established important House of Lords (Supreme Court) precedents in the

¹ The following is an edited transcript of an interview between Jeffrey Vogt and Richard Meeran on June 21, 2021.

² Vedanta Resources PLC & Anor v Lungowe & Ors [2019] UKSC 20 (10 April 2019), online at <https://www.bailii.org/uk/cases/UKSC/2019/20.html>

³ Okpabi & Others v Royal Dutch Shell Plc & Another [2021] UKSC 3, online at <https://www.supremecourt.uk/cases/docs/uksc-2018-0068-judgment.pdf>

⁴ Lubbe and Others and Cape Plc. and Related Appeals [2000] UKHL 41 (20th July, 2000), online at <https://www.bailii.org/uk/cases/UKHL/2000/41.html>

Connelly v Rio Tinto and *Cape PLC* cases (in 1997 and 2000), which haven't yet been followed in any other country, that a forum non conveniens motion will be dismissed if the claimants can show that the absence of funding for legal representation and experts would result in a substantial denial of access to justice in the local court system.⁵ That's significant, as that is going to be the case in a lot of places, especially in the Global South.

In the first lot of cases that I was involved in, the courts made it clear that it was certainly arguable that the corporate veil could be overcome by a claim alleging a tort-based duty of care against the parent company. There was however no determination of this issue, and no legal precedent, until 2012 in *Chandler v Cape PLC*.⁶ The case involved a UK asbestos worker employed by a UK subsidiary of a UK parent company, and this really got things going in terms of establishing a precedent. It was the first trial verdict imposing liability on a parent company based on its negligent omission to advise on precautionary measures to protect the health of workers at its UK subsidiary against asbestos related disease. A duty of care to provide such advice stemmed particularly from the parent company's awareness of the risks to the workers, its superior knowledge of health and safety and its awareness that the subsidiary was relying on the parent to provide that superior knowledge. Of course, subsequent defendants argued that the decision only applied where there is a UK subsidiary of a UK parent company and only to cases involving health and safety breaches. Of course, that clearly wasn't what was intended but it wasn't until the *Vedanta* case then that the principles were properly laid down. The important point that emerges from that case is that it's not to be narrowly construed in the way that companies wanted the Chandler case to be interpreted. Rather, the duty of care can result not only from negligent control of operational aspects of subsidiary operations but also from the involvement of the parent company in formulating and requiring adherence to policies on health and safety and the environment which are defective. Perhaps most dramatic was the decision that a parent company can owe a duty of care in respect of public statements it makes even if it doesn't actually do those things.⁷ The fact that it's told the public that it's going to do those things is sufficient to impose an obligation on it to do them. Things have progressed very favourably over that period in England. It has been a slow process, but the principle of a parent company duty is now firmly entrenched and so those initial barriers that we faced with respect to the corporate veil have been broken down substantially. Whether there is a duty in any particular case and its precise nature and scope are still issues, obviously, because you need to demonstrate, factually, that the parent company had a role or a responsibility in relation to subsidiary operations that warrants the imposition of a legal obligation.

Where we've gone backwards now is on jurisdiction due to the UK's departure from the EU. When we were part of the EU we were covered by the Brussels Regulation⁸ and there was a case in 2005 in which the European Court of Justice decided that the provision in the Brussels Regulation which gave the courts mandatory jurisdiction over defendants that were domiciled in their countries precluded the application of forum non conveniens, so that an English court couldn't decline jurisdiction over a case against an English company on the grounds of forum non-conveniens any more than a court in another EU country could do.⁹ But now that we've left the EU, we've also left the Brussels Regulation and we're back into the territory that we were in before that 2005 so courts can in principle stay proceedings against UK domiciled corporations on forum non conveniens grounds. Fortunately, we have those earlier decisions which enable us to maintain jurisdiction if we can show that the absence of funding for legal representation and for experts would result in a substantial denial of justice. So, while we have taken a lot of steps forward on the corporate veil front with the parent company duty of care, we have taken a step backwards on forum non-conveniens as a result of leaving the EU.

⁵ *Id* at paras 24-30.

⁶ *Chandler v Cape Plc* [2012] EWCA Civ 525 (25 April 2012), <https://www.bailii.org/ew/cases/EWCA/Civ/2012/525.html>

⁷ *Vedanta*, *supra* note 2 at paras 52-3.

⁸ REGULATION (EU) No 1215/2012 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 2012 O.J. (L 351) 1, <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:351:0001:0032:en:PDF>

⁹ *Andrew Owusu v N. B. Jackson* (Case C-281/02) [2005] ECR I-1383, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62002CJ0281&from=EN>

We may see defendants raising forum non-conveniens if they think they have a chance so that we could well go back to the days of having protracted disputes about whether access to justice is possible in the local courts. To give you an illustration of the impact of this, in the *Cape PLC* case, we had 7,500 clients, mainly former miners, and 1,000 of them died during the forum dispute because of serious asbestos-related diseases. It was a massive injustice that even though the case was successful, it was little consolation when the person who had been affected hadn't benefited from the compensation. In the silicosis litigation we were involved in against *Anglo-American* in South Africa, we started that in 2004 and the first lot of cases were settled in 2013.¹⁰ The biggest settlements were 2016 in 2018. It's an outrage that while that's going on you've got the companies with their lawyers taking every procedural point to draw things out. The longer they can avoid paying out, the smaller the pool of victims is going to become because they're dying. The more the more of them that die the smaller the bill gets.

JV: I want to turn to one of Leigh Day's current cases. It has recently sued British American Tobacco (BAT) on behalf of over 7000 Malawian tobacco farmers claiming the widespread use of unlawful child labour, unlawful forced labour, and the systematic exposure to extremely hazardous working conditions with minimal protection against industrial accidents, injuries, and diseases.

An interesting and perhaps novel aspect of the case is that you are arguing, in addition to the common law tort of negligence, a contract claims for unjust enrichment. I understand that BAT is currently seeking to dismiss on the basis that the plaintiffs cannot prove that the tobacco they harvested ended up in the cigarettes produced by BAT. At the same time, BAT is sitting on the very documents that would likely demonstrate that the plaintiffs did in fact supply the company.

RM: It does seem incredibly brazen to try to strike out the case due to the absence of proof of a link between particular claimants and BAT when they are sitting on the documents and refusing to hand them over. That would be incredibly unjust if that were to be allowed to succeed. One of the points that emerged in both *Vedanta* and *Okpabi* cases was the court's recognition, and it was also noted in the *Cape PLC* judgment, that the claimants are starting off from a position pre-discovery pre-disclosure where they don't have access to internal corporate documents which you need to prove these kinds of connections. Therefore, to strike out their cases at this stage would be incredibly unjust. Fortunately, the English courts have been quite conscious of that and are not willing to allow that kind of injustice to prevail.¹¹ Other European countries like Germany, the Netherlands, even France have very limited disclosure compared to common law jurisdictions. Certainly, at the initial stage the courts don't seem to be inclined to strike out cases unless the claim has no significant evidence of anything at all.

The BAT case is partly based on unjust enrichment, though negligence is the main allegation. In the case, we argue that defendants have been significantly enriched at the expense of the claimants, and this is unjust given the unconscionable exploitation of the claimants' weakness, duress, undue influence, failure of consideration pursuant to void, unenforceable or non-existent contracts and/or illegality giving rise to claims in restitution. Unjust enrichment is quite a novel legal approach and we're hoping it will be attractive to the courts to develop the law



Tobacco farmer in Malawi
Photo © africa924/Shutterstock.com

¹⁰ See, LEIGH DAY, *ANGLO-AMERICAN SILICOSIS LITIGATION*, <https://www.leighday.co.uk/latest-updates/cases-and-testimonials/cases/anglo-american-silicosis/> (last visited July 13, 2021).

¹¹ Days after this interview, the High Court dismissed BAT's motion to dismiss, allowing plaintiffs to pursue discovery. See, *Josiya & Ors v British American Tobacco Plc & Ors* [2021] EWHC 1743 (QB) (25 June 2021), <https://www.bailii.org/ew/cases/EWHC/QB/2021/1743.html>

in that way. It would open all kinds of possibilities. We were initially advised by an academic who is an expert on unjust enrichment. He started off as one of our counsel on the case but has recently been appointed to the Supreme Court.

JV: *You have written previously on the UN Treaty on Business and Human Rights. Do you have a reaction to the Second Revised Draft¹² and whether in the end this will be a useful tool for the promotion and defence of human rights?*

RM: The drafts, including the most recent, have included very important elements, including parent company duty of care, the abolition of forum non-conveniens, the reversal of the burden of proof, and so on. We've just been talking about access to documents. There is an imbalance where the company has all the documents, and the victims are required to go through quite extensive and expensive exercises to extract that information from the companies. It would be a great improvement if the onus was on the company to produce the necessary evidence of its involvement, and awareness of the risks, relating to its local operations failing which it will be deemed to owe a duty of care. Principles about collective or class actions are also important. While you have class actions in the US, Canada, Australia, South Africa, for example, in the UK we don't have class actions and that has been a hindrance and makes the cases more expensive and cumbersome to bring. The draft also includes measures like witness protection, which is also important, especially in certain places where people have a well-founded fear of persecution.

However, it's difficult to be optimistic about the binding treaty. I'm totally convinced that there should be one but there's so much opposition from the EU, the US, and most other developed countries. On the other hand, you've got a few countries like South Africa, Brazil and Ecuador who are supporting it, though not always helpfully on all points such as initially resisting its application to domestic corporations. Of course, there's great support in the EU for voluntary UNGPs, and governments have been put under a lot of pressure by corporations not to make those principles legally binding. The problem is obviously that they become a bit of a tick box exercise. You get companies playing lip service to the principles and not much else. Even with the positive legal developments in the UK there are many cases that we cannot bring against UK companies. But the position is significantly worse in other countries where legal representation for victims is unrealistic. That's why you need a legally binding treaty. In the end, I think maybe in 10-15 years' time we will have some binding international laws regulating the behaviour of multinational companies, but I just don't think it's going to come about through this process.

JV: *To follow up, the UN Guiding Principles on Business and Human Rights (UNGPs) are turning 10 years old this year.¹³ I'm interested in the different approaches, the UK common law approach on the one hand and due diligence, as adopted in France and recently Germany, on the other. Do you see these approaches differ substantively, or do they converge or reinforce each other?*

RM: I think there has been in large part a convergence between human rights due diligence principles in the UNGPs and the common law tort duty of care. I think these are really important developments and probably more important than the binding treaty discussions. You have due diligence laws passed in France and Germany, and almost in Switzerland. I'm not sure what is going to happen in the wider world, whether they going to follow suit or see this as giving their companies an edge in that they are not covered by such regulation.

¹² OEIGWG Chairmanship, *Legally Binding Instrument to Regulate, In International Human Rights Law, the Activities of Transnational Corporations and other Business Enterprises*, Second Revised Draft, (2020) https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/OEIGWG_Chair-Rapporteur_second_revised_draft_LBI_on_TNCs_and_OBEs_with_respect_to_Human_Rights.pdf

¹³ UN, *Guiding Principles in Business and Human rights*, Doc HR/PUB/11/04 (2011), https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf

An important factor in the progress that's been made in the UK has at least partly been some fairly liberal judges at the higher levels of our courts. They are not all like that, but we've had a reasonably high proportion and we've had the luck quite often that the on these important decisions we get one of them. If we had a slightly different bench the law may have developed unfavourably and the potential to bring such cases in the UK could have ended 25 years ago. In Australia, for instance, they've got lawyers with the same kind of expertise and companies involved in the same misconduct, but they have had a very conservative High Court for a long time. Then you look at a country like South Africa where the Constitutional Court has been inspirational. If you're a corporation, you might get worried about going in front of the Supreme Court of Appeal and the Constitutional Court because they really bend over backwards to ensure access to justice. It makes a huge difference.

JV: I think you are aware of the highly political charged nature of judicial elections in the United States, which has led to a 6-3 highly conservative bench. How are judges selected in the UK?

RM: We don't have political or politically appointed judges at all. There used to be a bit of an "old boys" club but that has changed in the last 20 years, so they have an open process of applications and there's certainly no involvement of government or political affiliation in the appointment of judges. Why there have been more progressive judge, well it's hard to know really. There are some very conservative ones still that you know you hope to avoid if you can help it, but I'd say by and large they've been open-minded. At least most of them want to do the right thing and if they see some serious injustice, they'll want to do something about it.

*JV: I want to discuss another of the firm's recent cases – the **Hamida Begum v. Maran UK** case, which recently survived a motion to dismiss.¹⁴ The labour rights community has for a long time tried to figure out how to clean up the shipbreaking industry, which is extraordinarily hazardous, and the industry apparently takes almost no effort to provide protection or a safe workplace of any kind.*

RM: It's a remarkable case and a really important issue. It's the third case that we've done for the family of a deceased worker in Bangladesh. It's an opaque industry, where you have all these different layers of ownership and transfer of ownership before the ship finally gets beached and then dismantled. In this case, the Court of Appeal applied an exception to the rule that a duty of care is not owed for harm caused by a third party. The exception applies when the harm arises from a dangerous activity for which the defendant was responsible, and which may be exploited by a third party. That is really the basis of this case - that the defendant put this ship into the system knowing because of the price that it was sold at where it was likely to end up and knowing what kind of conditions exist in in the breakup of those ships. These cases can be quite difficult in terms of providing the chain of ownership of a ship and also because individual workers and their families are typically very poor and will be under real financial pressure to accept a confidential settlement.

Interestingly, we've been talking to some other EU-based lawyers about shipbreaking. We are obviously in England and can only sue English domiciled companies, though a lot of these ship owners are from Germany and the Netherlands. However, the harm often occurs in Pakistan, Bangladesh, or India, all of which have English systems of law. The EU choice of law regime stipulates that the applicable law is that of the place where the harm occurred. So, if a German ship owner sells its ship and it is broken up in Bangladesh, then the German company can be sued in Germany, but English law is going to apply just as it did in the Maran case. So, an English law decision applies to German companies and Dutch companies who've done the same thing in Bangladesh. We've been talking to our friends in those countries about collaborating to widen the net a bit.

¹⁴ Begum v Maran (UK) Ltd (Rev 1) [2020] EWHC 1846 (QB) (13 July 2020), <https://www.bailii.org/ew/cases/EWHC/QB/2020/1846.html> and affirmed in part on appeal at [2021] EWCA Civ 326 (March 10, 2021), <https://www.bailii.org/ew/cases/EWCA/Civ/2021/326.html>

If you look at the *Vedanta* case and the *Okpabi* case, those are cases that happened in Zambia and Nigeria. Why are we talking about developing English law when under the Rome II regulation¹⁵, the choice of law regulation, it should be Zambian law or Nigerian substantive law that applies? It's because in those cases the companies had to accept that those legal systems were based on English law and that English law would be applied. So, through those cases English law has developed. It would have been pointless to develop German law because Germany does not have former colonies with German-based systems of law, and consequently German law is never going to apply. There is much wrong associated with the British Empire, but one of the spin-offs is that we've got English law everywhere.

JV: Finally, as you know, the US Supreme Court recently handed down its decision in *Nestle v Doe*.¹⁶ Do you have a reaction to the decision?

RM: This is of course disappointing. They haven't completely shut the door, and there's still the possibility to bring a claim if you can show a sufficient connection with the US. Fortunately, the one thing that Nestle weren't successful on was arguing that US corporations could not be liable under the Alien Tort Statute (ATS). But, from when I first started doing multinational cases in 1993, I think everyone felt that the real hope was with the ATS. There were some important successes in the initial period, and at a time when the law was progressing quite slowly in the UK. Without ATS, it's hard to envisage many US cases relating to corporate human rights abuses outside the US being able to sustain jurisdiction or a forum challenge.

Other Related Resources

Vedanta Resources PLC & Anor v Lungowe & Ors

Francisco Javier Zamora Cabot, *Acceso a la justicia y empresas y derechos humanos: importante decisión del Tribunal Supremo del Reino Unido en el Caso Vedanta v. Lungowe*, October 1, 2020, *CUADERNOS EUROPEOS DE DEUSTO*, Number 63, online at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3703249

Hopkins, Samantha, *Vedanta Resources PLC and Another v Lungowe and Others* [2019] UKSC 20 (2019). NILQ 70(3): 371–375, 2019, online at <https://ssrn.com/abstract=3836800>

Okpabi & Others v Royal Dutch Shell Plc

Dalila Palombo, *Okpabi v. Shell And Lungowe v. Vedanta Dispel Three Myths*, March 30, 2021, online at <https://corporatejusticecoalition.org/news/okpabi-v-shell-and-lungowe-v-vedanta-dispel-three-myths/>

Nadia Bernaz, *Lowering the Bar (in a good way): the UK Supreme Court decision in Okpabi v. Shell*, February 17, 2021, online at <https://rightsasusual.com/?p=1395>

Begum v Maran (UK) Ltd

Sameeul Haque, *Hamida Begum v. Maran (UK) Limited: Shipbreaker's Death Turning The Tide In Third-Party Liability Claims Under English Law*, May 17, 2021, online at <https://corpaccountabilitylab.org/calblog/2021/5/17/hamida-begum-v-maran-uk-limited-shipbreakers-death-turning-the-tide-in-third-party-liability-claims-under-english-law>

¹⁵ REGULATION (EC) No 864/2007 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), 2007 O.J. (L. 199) 40, <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:199:0040:0049:EN:PDF>

¹⁶ *Nestle v. Doe*, 593 U.S. __ (2021), https://www.supremecourt.gov/opinions/20pdf/19-416_i4dj.pdf (see also case brief in this issue).

Josiya & Ors v British American Tobacco Plc & Ors

Sara Boseley, UK tobacco firms fail in bid to have Malawi child labour case struck out, The Guardian, June 25, 2021, online at <https://www.theguardian.com/business/2021/jun/25/uk-tobacco-firms-fail-in-bid-to-have-malawi-child-labour-case-struck-out>

THE IMPACT OF A NEW FRAMEWORK OF FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK ON GLOBAL SUPPLY CHAINS

MARTA PUJADAS & MÓNICA TEPFER

Global | Originally written in Spanish

Fundamental principles and rights at work are enshrined in the ILO Constitution and the Declaration of Philadelphia. The ILO Declaration on Fundamental Principles and Rights at Work, adopted in 1998, commits ILO Member States to respect and promote four categories of principles and rights, whether or not they have ratified the relevant conventions. These categories are: freedom of association and the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation. The ILO's fundamental principles and rights at work enshrine universal human rights and have been recognised as human rights in the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights.

The purpose of the ILO Declaration on Fundamental Principles and Rights at Work, adopted in 1998, is to explicitly recognise, through a solemn statement adopted by the International Labour Conference, the consensus reached by the international community on the special significance of certain fundamental rights and to express the commitment of its constituents to strengthen the universal application of these rights.¹ This text thus recognises that the core values set forth in the Constitution and the Declaration of Philadelphia imply a commitment on the part of Members to respect, promote and realise them. It is to be expected that the inclusion of safe and healthy

working conditions in the framework of fundamental principles and rights at work would have the same effect.

The purpose of this article is, firstly, to review the discussions that are currently taking place within the ILO, especially at the ILO Governing Body meetings; secondly, to discuss the legal consequences that could result from such treatment and subsequent elevation of OSH standards to legal status and, thirdly, to anticipate the impact that this would have on compliance with decent work in global supply chains.

Discussions on Treatment Within the ILO

At the ILO Centenary Session, the International Labour Conference proclaimed in the ILO Centenary Declaration for the Future of Work that “safety and healthy working conditions are fundamental to decent work”² and adopted a resolution requesting the Governing Body “to consider, as soon as possible, proposals to include safe and healthy working conditions in the ILO framework of fundamental principles and rights at work.”³

Let us recall briefly here that during the discussions at the Centennial Conference, language had been proposed in the text of the draft outcome document stating, “Occupational safety and health is a fundamental principle and right at work, which is in addition to all the principles and rights set out in the ILO Declaration on Fun-

¹ ILO, Declaration on Fundamental Principles and Rights at Work and its Follow-up, Adopted by the International Labour Conference at its Eighty-sixth Session (18 June 1998) [hereinafter ILO Declaration on Fundamental Principles].

² ILO, Centenary Declaration for the Future of Work, Adopted by the conference at its 108th session (21 June 2019) [hereinafter ILO Centenary Declaration].

³ *Id.* at para 1.

damental Principles and Rights at Work (1998).⁴ The Conference Committee, where discussions were held, did not reach consensus on the proposed text, since it had not been possible to dispel certain legal, technical and practical concerns about declaring safe and healthy working conditions a fundamental principle and right at work.⁵

Following the mandate of the Conference, the Governing Body, at its meeting in November 2019, examined the possible treatment and adopted a step-by-step procedure⁶ to consider proposals to include the issue of safe and healthy working conditions in the ILO framework of fundamental principles and rights at work, considering the guidance provided in the discussion at the Conference.

In this step-by-step procedure, it was proposed that the Governing Body examines: “substantive questions resulting in the identification of possible building blocks; based on the discussions in the Committee of the Whole as well as further discussion in the Governing Body, these questions may address among others whether a fundamental right to a safe and healthy working environment could be recognized, promoted and realized in the same manner as the four existing fundamental principles and rights at work, the identification of the corresponding Conventions, the ratification rates and the implications of the recognition of a fifth category of fundamental principles and rights, including on the reporting arrangements both as regards the submission of reports under article 22 of the Constitution and under the follow-up to the 1998 Declaration pursuant to article 19 of the Constitution.”⁷

At the March 2021 meeting of the Governing Body, the steps to be taken regarding this

⁴ ILO, Report IV: ILO Centenary outcome document, International Labour Conference 108th session, ILC.108/IV (2019).

⁵ ILO, Provisional Minutes No. 6B (Rev.), International Labour Conference, 108th Session (2019), paras. 986, 1014, 1327-1333 [hereinafter Provision Minutes].

⁶ ILO, Follow-up to the resolution on the ILO Centenary Declaration for the Future of Work – Proposals for including safe and healthy working conditions in the ILO’s framework of fundamental principles and rights at work, para 21, GB.338/INS/3/2 (March 2020), available at https://www.ilo.org/wcmsp5/groups/public/-ed_norm/-relconf/documents/meetingdocument/wcms_736700.pdf

⁷ *Id.*

treatment were discussed. It is worth noting that this discussion took place one year after the outbreak of the COVID-19 pandemic.

The pandemic highlighted the importance of ensuring health and safety to protect the health and lives of workers, stop the spread of the disease, return to work and ensure the recovery of companies. Undoubtedly, the discussions during this last Governing Body reflected the need to settle the debt owed by the international community to occupational health and safety and to take urgent action to place OSH at the center of global and national responses to address the pandemic, prepare for recovery and build resilience to future global emergencies.⁸

This time, the Governing Body reached the necessary consensus and approved the adjustment of the staged procedure as follows:

- In November 2021, at its 343rd session, the Governing Body would consider issues related to the process and possible forms that the decision of the Conference may take, including the inclusion of a technical item on the agenda of the 110th session (2022) of the Conference;
- In March 2022, at its 344th Session, the Governing Body would examine the elements of a possible draft outcome document to be considered by the Conference at its 110th Session (2022) and preparations would be made for the Conference discussion. Finally, a possible outcome document on the inclusion of safe and healthy working conditions in the ILO framework of fundamental principles and rights at work would be considered at the 110th Conference in 2022.⁹

Possible avenues for including safe and healthy working conditions in the framework of fundamental principles and rights at work

In the discussion that took place at the ILO

⁸ ILO, Follow-up to the resolution on the ILO Centenary Declaration for the Future of Work – Proposals for including safe and healthy working conditions in the ILO’s framework of fundamental principles and rights at work, GB.341/INS/6 (March 2021) [hereinafter ILO Follow-up 2021], available at https://www.ilo.org/wcmsp5/groups/public/-ed_norm/-relconf/documents/meetingdocument/wcms_769712.pdf

⁹ *Id.*



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Governing Body in March of this year, two possible avenues for including safe and healthy working conditions in the framework of fundamental principles and rights at work were presented, namely:

A first option would be that the International Labour Conference could adopt an amendment to the 1998 Declaration adding to it a new principle and right on safe and healthy working conditions. This option would be legally feasible since the Conference is empowered to amend and expand the text of declarations it has adopted.¹⁰

The second option would be for the International Labour Conference to adopt a separate declaration recognising safe and healthy working conditions as a fundamental principle and right at work. This option is also legally viable, as the Conference has promulgated several declarations in recent decades, such as the 1998 Declaration, the ILO Declaration on Social Justice for a Fair Globalization, 2008 (Declaration on Social Justice) and the Centenary Declaration.¹¹

The decision to include safe and healthy working conditions in the ILO framework of fundamental principles and rights at work would not impose an obligation on member states to ratify any international labour standards. However, it would have an impact on Member States' reporting obligations.

Why?

Firstly, the follow-up could be based on a decision of the Governing Body, taken in accordance with article 19, paragraph 5(e), of the Constitution, requiring Member States that have not ratified all the fundamental OSH conventions to submit annual reports on the initiatives they have taken to respect, promote and realise in good faith the fundamental principles and rights at work.¹²

The representative organisations of workers and employers, when submitting comments on the reports, could provide their observations on the efforts made and reported. The purpose of

the annual reports would also be “to help identify areas in which the Organization’s assistance, through its technical cooperation activities, could be useful to its Members in helping them to give effect to these fundamental principles and rights.”¹³

Second, the Governing Body could decide on the periodicity of the reporting cycle for conventions that could be classified as fundamental OSH conventions. The Governing Body could decide to adopt the three-year cycle currently applied for the eight fundamental conventions, or propose a different cycle.¹⁴

It is important to bear in mind that a fundamental principle directly reflects a constitutional value or objective, and standards are one of the primary means available to the Organization to achieve these objectives.¹⁵ The formal elevation to the status of a fundamental principle and right is usually associated with the determination of international labour standards that give specific content to that principle.

This decision to associate OSH principles with one or more conventions and thus elevate them to the status of fundamental conventions can be taken by the tripartite constituents at the annual meeting of the Conference or at a meeting of the Governing Body.¹⁶ It would not appear to be necessary for such a decision to be taken simultaneously, since the ILO Office itself, in its background document for the discussion, reports that the determination of seven of the eight fundamental conventions¹⁷ was made at a date prior to the official recognition of the four categories of fundamental principles and rights at work established in the 1998 Declaration, while the determination of Convention No. 182 on the elimination of the worst forms of child labour was made after the adoption of the Declaration.¹⁸

¹³ ILO Follow-up 2021, *supra* note 8.

¹⁴ *Id.*

¹⁵ ILO Centenary Declaration, *supra* note 2 at part IV(A), and Declaration on Social Justice, preamble; ILO Follow-up 2021, *supra* note 8.

¹⁶ Provisional Minutes, *supra* note 5 at para. 1002.

¹⁷ ILO Follow-up 2021, *supra* note 8, at para 26; Provisional Minutes, *supra* note 5 at para 1013; ILO, Matters arising out of the work of the 108th Session (2019) of the International Labour Conference, 337th session, GB.337/INS/3/2, at paras. 12-14 (2019); ILO Committee on Legal Issues and International Labour Standards, Standard-setting policy: Ratification and promotion of fundamental ILO Conventions, GB.277/LILS/5, párr. 2 (2000).

¹⁸ Provisional Record, *supra* note 5 at para. 1013; ILO, Matters arising out of the work of the 108th Session (2019)

¹⁰ *Id.*

¹¹ *Id.*

¹² ILO Follow-up 2021, *supra* note 8. In 2010, the Conference revised the annex to the 1998 Declaration. See ILO, Provisional Record 10: Seventh item on the agenda: Review of the follow-up to the 1998 ILO Declaration on Fundamental Principles and Rights at Work, 99th session (2010). The annex to the 1998 Declaration provided that the Conference would re-examine the operation of its follow-up.

Among the possible standards in force that could be selected are Conventions Nos. 155 (Occupational Safety and Health Convention), 161 (Occupational Health Services Convention) and 187 (Promotional Framework for Occupational Safety and Health Convention), as well as the Protocol to Convention No. 155, which are classified as up-to-date instruments that are binding and contain “general provisions” on OSH, thus reflecting the relevant OSH principles and rights. Conventions Nos. 155 and 187 describe the fundamental OSH principles and rights.¹⁹ The Protocol to Convention No. 155 also constitutes a general OSH standard and is of particular importance for the collection and analysis of data to support preventive work. Convention No. 161 lists general OSH principles and highlights a key element of any OSH system, namely the establishment of occupational health services for all enterprises with essentially preventive functions.²⁰ This decision will be a particularly important item on the agenda of upcoming sessions.

The impact of a revised version of the framework of fundamental principles and rights at work on global supply chains

The COVID-19 pandemic has further exposed gaps in the global governance of supply chains and highlighted the fragility of supply chains and the enormous risks to workers’ human and trade union rights.

As the International Trade Union Confederation has opportunely pointed out, in global terms, 80 percent of global economic profits are currently in the hands of only 10 percent of existing companies, i.e., large transnational corporations structured in long global production chains along which millions of workers are inserted.²¹ Global trade relies on a hidden labour force that represents up to 94 per cent²² of the world’s total labour force

of the International Labour Conference, 337th session, GB.337/INS/3/2, at paras. 12-14 (2019); ILO Committee on Legal Issues and International Labour Standards, Standard-setting policy: Ratification and promotion of fundamental ILO Conventions, GB.277/LILS/5, párr. 2 (2000).

¹⁹ ILO Follow-up 2021, *supra* note 8.

²⁰ *Id.*

²¹ International Trade Union Confederation (ITUC), *ITUC Frontlines and Priorities 2018*, available at https://www.ituc-csi.org/IMG/pdf/17gc_s_06.1_-_frontline_and_priorities-es.pdf.

²² *Id.*

- condemning people to accept low-paying, unsafe and sometimes hazardous work.

The international trade union movement has been raising the issue of the absence of an appropriate international regulatory framework that effectively protects the rights of workers in global supply chains.

A new framework of fundamental principles and rights including health and safety would, strengthen regulation through collective bargaining and social dialogue; since safe and healthy working conditions would be, like the current framework of fundamental principles and rights, a priority and unquestionably an issue at the negotiating table at the company, sectoral, national and cross-border levels.

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This would also make it possible to encourage the signing of global framework agreements with clauses on occupational safety and health in the chapters on fundamental principles and rights. It is particularly important to establish mechanisms for the active participation of workers in the management of risk prevention throughout the supply chain, empowering trade union representatives in the main company to monitor compliance with regulations in all companies in the chain.²³

With the establishment of the new regulatory framework of fundamental principles and rights, multinational companies could be required to comply with each country’s labour legislation on health and safety, regardless of whether or not the country where the supply chain is located has ratified one or more ILO conventions on health and safety. This is because, like the already recognised fundamental principles and rights at work, guaranteeing health and safety would also be a requirement of universal application.

²³ Confederación Sindical de Trabajadores y Trabajadoras de las Américas (CSA), *Estrategia Sindical en salud laboral para las Américas* (2010), available at <http://csa-csi.org/wp-content/uploads/2020/01/15-Estrategia-Sindical-en-Salud-Laboral-para-las-Américas.pdf>.

It is important to remember that, since 2009, the labour chapters in most international trade agreements contain direct and indirect references to the 1998 ILO Declaration on Fundamental Principles and Rights at Work.²⁴ Moreover, more recent trade agreements and treaties have considered the ratification and application of other instruments such as the ILO Fundamental Conventions, other updated ILO Conventions, and the Decent Work Country Programs.²⁵

While the ILO Declarations have binding legal effects for the organisation's different entities and for the Governing Body and Office itself, they have no automatic influence or scope of application in the content of such trade agreements or treaties, which remain under the exclusive control of the signatory parties.²⁶

Under the assumption that OSH standards ultimately become integrated into the framework of fundamental principles and rights, the signatory states in trade agreements would have to declare their express willingness to include this new principle through the incorporation of a revised version of the 1998 Declaration or a new ILO declaration in which WHS standards are added as a new fundamental principle and right.

The impact of this debate may also affect the scope of application of the UN Guiding Principles on Business and Human Rights, specifically with respect to national action plans on business and human rights.

Therefore, it is essential that the national action plans on business and human rights be carried out through social dialogue, with the necessary tripartite participation of social leaders both in their creation and in their monitoring, implementation, and evaluation.

By updating the new framework of fundamental principles and rights, companies could be required to address OSH in their voluntary due diligence plans, as well as other fundamental principles and rights, granting them similar status quo.

Due diligence on human rights must be understood as the minimum responsible attitude that

companies should be required to take on for the purpose of establishing scaled levels of binding responsibility.

Without a doubt, if the new framework of fundamental principles and rights is approved, health and safety should be included within the set of minimum standards required of companies.

“With the establishment of the new regulatory framework of fundamental principles and rights, multinational companies could be required to comply with each country’s labour legislation on health and safety, regardless of whether or not the country where the supply chain is located has ratified one or more ILO conventions on health and safety. This is because, like the already recognised fundamental principles and rights at work, guaranteeing health and safety would also be a requirement of universal application.”

In this way, we must recognise that the international community has begun to settle its past debts in terms of work health and safety. Today, the current reality shows the fundamental role of OHS standards for reactivation and resilience.

The current debate within the ILO is an achievement and a victory for the international workers’ union movement. These workers’ claims are now more relevant than ever within the present pandemic context.

²⁴ ILO, Handbook on Assessment of Labour Provisions in Trade and Investment Arrangements (2017), available at https://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_564702.pdf.

²⁵ *Id.*

²⁶ ILO Follow-up 2021, *supra* note 8.

THE MULTIPLE CHALLENGES OF GLOBALISATION FOR UNION ACTION: THE CASE OF GLOBAL SUPPLY CHAINS

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Global | Originally written in Spanish

In the context of globalisation, corporate power is expressed primarily through the freedom and mobility of capital and the economic, financial and political conditions that make it possible.¹ The political-economic links between central states and transnationals, as well as the pressure they exert on international organisations, make the latter an essential instrument for the reproduction of their hegemony vis-à-vis states and social, trade union and human rights organisations. In this context, there is a frontal attack on social and labour rights, *turning poverty and authoritarianism into comparative advantages to attract investment and capital.*²

Under so-called global governance, concentrated power groups control globalization as a process, with some autonomy from states, in a kind of independent but integrated historical setting.³ This leads to an incompatibility of traditional notions of democracy and citizenship with the new global reality, with a clear impact on social, labour, women's and other rights.⁴ One of its fundamental aspects is the displacement of the power of the national state, as it originally developed. The

loss of its hegemony in the creation of norms and jurisdiction, in the face of new external sources of creation of law, not only through international pacts or treaties, but also through norms emanating from supranational bodies, as well as from para-statal or non-state organisations.

“At the legal level, transnational corporations have become agents that directly or indirectly condition state and international normative production, through formal and informal agreements at the global level and specific conflict resolution mechanisms, protecting their contracts and investments through a multitude of norms, conventions, treaties and agreements that constitute a new global corporate law that effectively serves their interests.”

In this context, the so-called *lex mercatoria*,⁵ appears as an autonomous order from the state, which is constituted as a right created by the corporate power, without the mediation of the legislative powers of the states, and formed by rules intended to discipline in a uniform manner, beyond the national political units, the commercial relations that take place within the economic unit of the markets.⁶ Large transnational economic groups create law - as coercive norms based on a consensus imposed by a carefully constructed ideological hegemony⁷- and this law is effective.

¹ Alejandro Medici, *La Globalización como trama jerárquica*, en DEREITOS HUMANOS E GLOBALIZAÇÃO. FUNDAMENTOS E POSSIBILIDADES DESDE A TEORIA CRÍTICA, (PUCRS and Porto Alegre, eds. 2010).

² José Eduardo Faría, *Los derechos humanos en el contexto de la globalización*, en DERECHOS HUMANOS Y ORDEN GLOBAL: TRES DESAFÍOS TEÓRICO-POLÍTICOS (Joaquín Herrera Flores y Alejandro M. Medici eds., 2003).

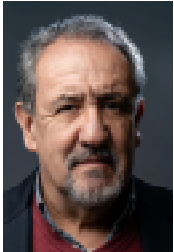
³ Héctor Alegría, *Globalización y derecho* (2012), available at <http://www.derecho.uba.ar/publicaciones/pensar-en-derecho/revistas/0/globalizacion-y-derecho.pdf>

⁴ José Luis Bolzan de Moraes, *Direitos Humanos, Globalização e Constituição. Vínculos Feitos, Desfeitos e Refeitos*, 25(56) REVISTA DE PROCURADORIA-GERAL DO ESTADO DO RIO GRANDE DO SUL, 117-136 (2002).

⁵ The name refers to the regulations imposed in the late Middle Ages by the emerging bourgeoisie as part of the process of replacing feudal institutions.

⁶ Alegría, *supra* note 3.

⁷ In this context, *anti-globalisation movements* have been



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Legislation bases its legality on effectiveness, either in the sense of a concrete attitude of regulating complex contracts, in relation to which domestic legal systems are deemed inadequate, or in the sense of being able to impose itself as legally binding on economic operators.⁸

At the legal level, transnational corporations have become agents that directly or indirectly condition state and international normative production, through formal and informal agreements at the global level and specific conflict resolution mechanisms, protecting their contracts and investments through a multitude of norms, conventions, treaties and agreements that constitute a new global corporate law that effectively serves their interests.⁹

In this context, and supported by constant and widespread technological progress, capital has made use of globalisation in multiple dimensions, moving investment and enterprises across continents and regions, but particularly to areas of primary development and where labour law protection is limited.

These relocations of the production sites of large companies to peripheral countries implied in a way an early and relative break with some of the characteristics of the Fordist social model, insofar as in many of these cases, *there is no necessary equation between production and wages*, since production is mainly destined for the population of other countries and wealthy local sectors, which means that the requirement of high wages as a guarantee of mass consumption to ensure the reproduction of the productive process disappears.

In these settings, Fordism is not necessarily accompanied by workers' social democracy, insofar as the local working classes are not the recipients of production and, at the same time, the demand for massive imports of equipment, new technologies and capital, obliges them to compensate for the costs by lowering the remuneration of the industrial

relatively successful in their attempts to challenge the ideological underpinnings of the hegemony of power groups in the globalisation phenomenon.

⁸ Alegría, *supra* note 3.

⁹ See Juan Hernández Zubizarreta y Pedro Ramiro, *Lex Mercatoria vs Derechos Humanos. Las empresas transnacionales y la arquitectura jurídica de la impunidad*, 26 REVISTA GS, GACETA SINDICAL, REFLEXIÓN Y DEBATE (2016).

workforce.¹⁰

Within this complex historical framework, large multinationals have come to coordinate all subsidiaries through the concept of global networks, closely integrated through management, production, marketing and technology.¹¹

New information and communication technologies allow the production process to develop on a global scale, in the so-called *global factory*, where trade or the movement of goods among countries, or the control of the production process by the technological field associated with investments, has been replaced by the distribution of production tasks across the planet.¹²

Global supply chains, global value chains or global production networks - the names are numerous and hardly reveal the scale of the phenomenon - are one of the most comprehensive and complex expressions of the current global reality.

Their importance has reached such a point that UNCTAD, according to the 2013 ILO report, estimated at the time that 60 to 80 per cent of world trade passed through them, and that more than 50 per cent of the world's working class was integrated into the production-distribution networks of multinationals.¹³

Attempts to bring global supply chains within a human rights framework that would ensure even minimal safe and dignified working conditions have so far met with seemingly insurmountable limitations.

The opposition of the great powers and transnational lobbies to the creation of rules that could jeopardise their commercial pros-

¹⁰ Samir Amin, *La desconexión* (1989).

¹¹ Giovanni Alves, *O novo (e precário) mundo do trabalho* (Bontempo, ed., 2000).

¹² Juan Ignacio Palacio Morena, *Derecho y economía: antagónicos o complementarios*, en *Estudios Críticos de Derecho del Trabajo* (Moisés Meik, ed., 2014) (which points out that those who accumulate more knowledge and information reserve the most profitable tasks or phases of production for themselves and outsource the rest to those who offer better quality and cost conditions.).

¹³ ILO, *La promoción del trabajo decente en las cadenas mundiales de suministro en América Latina y el Caribe: Principales Problemas Buenas Prácticas, Lecciones Aprendidas y Vision Política* (2016); See also Patricia Nieto Rojas, *Cadenas mundiales de suministro y trabajo decente: instrumentos jurídicos ordenados a garantizarlo*, CUADERNOS DE RELACIONES LABORALES (2019).

pects is simply explained: they secure their rights through supranational rules of a multilateral, regional and bilateral nature that violate the sovereignty of recipient states and, on the contrary, their obligations are in line with national legislation previously subject to the logic of capital.¹⁴

The strong asymmetry between the lack of safeguards and legal effectiveness of international human and labour rights and the strength of the WTO dispute settlement system or arbitration systems in trade and investment treaties places the rights of multinational companies above the rights of social majorities.¹⁵

All attempts to legally bind transnationals through international treaties or agreements have clearly failed. Among them, the approval of a binding treaty within the United Nations, promoted for decades by various NGOs, grouped in the *Global Campaign to Reclaim Peoples' Sovereignty, Dismantle Transnational Power and End Impunity*.¹⁶

Pressure from transnational corporations prevented the approval of a code to regulate the obligation of transnational corporations to respect human rights, proposed by the UN Centre for Transnational Corporations, replacing the proposal with non-binding declarations and recommendations, which ended up being reflected in the expansion of useless corporate responsibility policies.¹⁷

Ecuador's proposal to the UN Human Rights Council to create a binding instrument establishing the human rights responsibilities of transnational corporations has also failed.¹⁸

The supposed - and ineffective - alternative consisted of declarations and programmatic documents that have done little to solve the problem.

Initial responses include the *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy* (ILO, November 1977, updated March 2017), which expresses the objective of providing direct guidance to enterprises on social

policy and inclusive, responsible and sustainable workplace practices.

The *2000 United Nation's Global Compact* called on transnational corporations to respect ten universal principles relating to human rights, labour and environmental standards, but in signing it, companies were only required to submit annual activity reports and were not subject to any compliance audit. Signatory companies, such as Nike, Shell, Chevron, Novartis and others, have committed serious violations of human, labour and environmental rights, casting doubt on the effectiveness of the pact, which is more useful for improving their image than their policies.

In 2002, the ILO established the World Commission on the Social Dimension of Globalisation, which published the report titled *For a fair Globalisation* in 2004. The report already noted the emergence of global production systems where some 65,000 multinational companies, with about 850,000 foreign affiliates, coordinate global supply chains that link companies in all countries, including local subcontractors working outside the formal industrial system and subcontracting to home-based workers.

"The strong asymmetry between the lack of safeguards and legal effectiveness of international human and labour rights and the strength of the WTO dispute settlement system or arbitration systems in trade and investment treaties places the rights of multinational companies above the rights of social majorities."

In 2008 the *ILO Declaration on Social Justice for a Fair Globalisation* deepened the analysis of the impact of global supply chains on the challenges of protecting working conditions.

At the October 2013 session, the Governing Body decided to include a general discussion item on decent work in global supply chains on the agenda of the 105th Session of the International Labour Conference. The findings adopted by this conference, which took place between May and June 2016, resulted in progress in describing the problem, but little in developing effective proposals that go beyond mere declarations and reliance on the goodwill of companies.

The *Guiding Principles on Business and Human Rights*, adopted by the UN Human Rights Council in Resolution 17/4 of June 2011, are somewhat

¹⁴ Hernández Zubizarreta y Ramiro, *supra* note 9.

¹⁵ *Id.*

¹⁶ Patricia Nieto Rojas, *Cadenas mundiales de suministro y trabajo decente: instrumentos jurídicos ordenados a garantizarlo*, CUADERNOS DE RELACIONES LABORALES (2019).

¹⁷ María del Mar Maira Vidal, *La dimensión internacional de la responsabilidad social empresarial. Actores y disputas en el contexto de la economía neoliberal globalizada* (Bomarzo, Albacete, ed. 2015).

¹⁸ Alejandro Teitelbaum, *El papel de la clase trabajadora en la lucha contra las sociedades transnacionales*, LA ALIANZA GLOBAL JUS SEMPER (2017) (which refers to successive failed attempts at regulation by political and economic powers).

more concrete in terms of challenges and possible alternatives.

While initially focusing on the obligation of States to protect against human rights violations committed on their territory and/or under their jurisdiction by third parties, it then moves fully towards the obligation of States where transnational corporations are domiciled to respect human rights in all their activities, thus echoing the recommendations of certain international bodies to adopt measures to prevent abuses abroad by corporations registered in their jurisdiction.¹⁹

In this regard, and partly based on these Principles, the French law on the duty of vigilance of parent companies and subcontractors, in force since March 2017, constitutes an interesting response in that it legally obliges parent companies and subcontractors to identify and prevent human rights and environmental abuses resulting not only from their own activities, but also from those of the companies they control, as well as from the activities of their subcontractors and suppliers with whom they have established business relationships. Companies should implement annual public monitoring plans, which allow human rights groups, environmentalists, trade unions and directly affected citizens and communities to hold transnational companies accountable and - if necessary - bring them to justice. So far, no other country has gone down this road, which seems to be a slightly more effective alternative to declarations and goodwill advice.

Transnationals are opposed to a real shift from the declarative to the normative level,²⁰ and prefer to use the concept of *corporate social responsibility* as a clever way to avoid a legal framework that could oblige them to comply with minimum standards of respect for basic human rights.

It was pointed out that the term “corporate social responsibility” is said to have originated in the United States in the 1950s, in the context of World War II, and refers to the eth-

ical responsibilities that companies voluntarily assume and is not a form of legal responsibility.²¹

Corporate social responsibility policies appear to be a useful instrument for substituting public regulations from the state or international organisations with private standards drawn up unilaterally and unconditionally by the companies themselves, and without the possibility of sanctions for non-compliance.²²

Given the impossibility, as has been demonstrated so far, of signing international treaties or agreements that oblige - and not recommend or advise, which is not the same thing - transnational companies to respect international principles and standards on human rights, labour rights and environmental rights, with external auditing mechanisms, international tribunals having jurisdiction and sanctions for non-compliance, the debate on possible alternatives is expanding. This has led to a proliferation of interesting responses with certain limitations and weaknesses that deserve reflection.

These are conflicts and pressures exerted, depending on the case, by workers, local and international trade unions, human rights organisations and citizens’ and consumers’ associations in different countries and regions, but which mainly try to influence the population of the core countries, where the big brands are widely consumed.

A very brief overview of some of these experiences can help us note the differences and commonalities, and draw some conclusions.

In Mexico, a major dispute broke out in the maquila industry of the Korean company Kukdong Internacional in 2002, in the state of Puebla, when the employer signed a collective agreement with a union that the workers did not even know existed.²³

¹⁹ The paper highlights, for example, global reporting requirements for parent companies, non-binding multilateral instruments such as the Organisation for Economic Co-operation and Development Guidelines for Multinational Enterprises, and standards of conduct required by institutions that support foreign investment. Other approaches clearly amount to extraterritorial regulation and enforcement.

²⁰ With the element of coercion that this implies in any legal rule.

²¹ María del Mar Maira Vidal, *La responsabilidad social empresarial como parte del proyecto político y económico neoliberal*, 28 REVISTA DE RELACIONES LABORALES (2013) (She added that 75% of the US Fortune 500 companies in 1986 had developed a code of conduct as a form of corporate social responsibility, to show that they accepted the general idea that they were subject to responsibilities, so it was recognised that no new national or international regulations were needed).

²² *Id.* (Company rhetoric on stakeholders has not matched reality as codes of conduct have been developed unilaterally and unconditionally and without external audit control).

²³ Common practice in the maquilas in Mexico. In this case, the FROC-CROC union, which signed a collective contract (so-called *employer protection contracts*), with-

When the workers - all very young and mostly students - found out about the union and the signed agreement, a serious conflict broke out. In the absence of real support from the main trade union centres, they turned to a chain of solidarity, including student centres in the US and NGOs in various parts of the world, which put pressure on Kudgong's corporate clients (including Nike) through an aggressive campaign. The strike lasted for a long time despite the manoeuvres of the government, the company and the shadow union that had signed the collective agreement, and thanks to the international pressure they were able to organise - especially on the big companies - they managed to make the bosses give in. The triumph of the workers, after a long confrontation, was complete, as they not only obtained the recognition of their own union and a collective contract actually negotiated by them, but also a significant wage increase.²⁴

In 2005, the Argentinian subsidiary of the transnational Visa decided to dismiss a pregnant worker who was employed - like many other employees - on a precarious basis, as an employee of a temporary services agency. The union representatives tried unsuccessfully to take direct action, and with the advice of the NGO Taller de Estudios Laborales (TEL) they mounted an international solidarity campaign with the tagline "*Visa No. 1 in discrimination.*" This action was successful in the US and other core countries, forcing the company not only to reinstate the worker, but also to make her a permanent employee and to make all previously subcontracted employees permanent.²⁵

In January 2008, the conflict in the Honduran subsidiary of the transnational Russel Athletic, Jerseys de Honduras, where 1,200 workers who had just organised themselves into a union were dismissed, gave rise to a major solidarity campaign when the local union asked two NGOs for help, the Maquila Solidarity Network and the Clean Clothes Campaign, joined by the US organisation United Students Against Unfair Factories, which in turn gained the support of US and Canadian universities that threatened the parent company with the

out any consultation, ensuring low wages.

²⁴ About this conflict, in more detail: Jeff Hermanson y Enrique de la Garza Toledo, *El corporativismo y las nuevas luchas en las maquilas de México*, in *SINDICATOS Y NUEVOS MOVIMIENTOS SOCIALES EN AMÉRICA LATINA* (E. de la Garza Toledo ed., 2005).

²⁵ *VISA despidió a empleada embarazada*, AMÉRICA LATINA EN MOVIMIENTO (last visited July 8, 2021), <https://www.alainet.org/es/articulo/112461>; María Luján, *una trabajadora de VISA S.A., fue despedida por estar embarazada*, ANRED (last visited July 8, 2021), <https://www.anred.org/2005/07/18/maria-lujan-una-trabajadora-de-visa-s-a-fue-despedida-por-estar-embarazada/>.

termination of its sportswear licences. The escalation of the conflict and its serious implications for the multinational forced it to reopen the factory, reinstate the dismissed workers, pay wages for the time not worked and ensure respect for the principle of union neutrality.²⁶

An emblematic case - which can illustrate the possibilities and difficulties of any international trade union action - is the Bangladesh Agreements. The first of these - at least of those recorded - was in 2012. It was signed between IndustriAll and the local unions of some multinational companies²⁷ and was an attempt to respond to the major accidents with serious mass consequences that had occurred in several industrial plants in Bangladesh.²⁸ At the end of the same year, further major accidents on company premises led to discussion of a new initiative. But the very serious accident in April 2013, when the Rana Plaza building collapsed in Dhaka, Bangladesh, with 1,129 workers reported dead and nearly 2,000 seriously injured, made international pressure become much greater and forced the May 2013 Agreement. Pressure from consumer groups, human rights organisations and trade unions forced the Bangladeshi government to pass a law, albeit an inadequate one,²⁹ and the multinationals and their local suppliers to sign a new agreement, stronger and more comprehensive than the previous one. The agreement was signed by trade unions - both international and local - and large multinationals, not by local companies, although large compa-

²⁶ More details on the conflict in: Antonio Ojeda-Avilés, *Las funciones del sindicato en un mundo globalizado*, BIBLIOTECA ONLINE DE CORNELL UNIVERSITY ILR SCHOOL (2014).

²⁷ Mainly the German chain Tchibo, based in Hamburg, and the American group PVH Corp (Phillips Van Heusen Corporation), based in New York and owner of brands such as Tommy Hilfiger, Calvin Klein and True & Co. Several international human rights groups were also involved, lobbying for its realisation. Most multinationals refused to sign it and continued to agree with local companies on totally ineffective unilateral policies to control the security of facilities.

²⁸ Notably the fire at the Tazreen clothing factory, which produces for brands such as El Corte Inglés, Walmart, Disney and C&A, in November 2012, when workers were trapped inside the building because exits were closed and windows on the lower floors were barred; workers who were able to escape through windows on the upper floors suffered serious injuries. In this case, as in the case of the Ali Enterprises trouser factory fire in Pakistan, a subcontractor of the German multinational Kik, although the tragedies were not prevented, the Clean Clothes network of organisations lobbied for and obtained millions of dollars in compensation from the major companies.

²⁹ Antonio Ojeda Avilés, *La aplicación de los acuerdos laborales internacionales. El paradigma del acuerdo de Bangladesh 2013*, 4 REVISTA DERECHO SOCIAL Y EMPRESA (2015) (its characterisation as a 'tantalum law' is questionable, as it oversimplifies and omits the responsibility of Core States and transnationals).

nies may put pressure on them to comply with the various points. But the ILO did not sign it, which led to strong criticism.³⁰ Despite its obvious limitations in terms of safety conditions, which are ultimately far inferior to those of the core countries, the agreement led to real improvements and saved the lives of thousands of workers.³¹ Due to expire in 2018, it has been extended until now, despite strong resistance from business groups and the Bangladeshi government.³²

In 2019, Spain-based multinational textile manufacturer and retailer Inditex³³ renewed a global framework agreement signed in 2007 with IndustriAll Global Union, with the aim of strengthening labour rights protection for workers in the company's supply chain. The signing of this agreement is not unrelated to the actions of the NGO Setem,³⁴ which in 2011 bought the minimum number of shares in the Inditex group necessary to have a voice and a vote in the shareholders' meeting and which has been denouncing the working conditions in supplier companies located in countries with the weakest worker protection.³⁵

In 2019, an international campaign against harassment and gender-based violence by the Lesotho Independent Trade Union in the local branch of the Taiwanese company Nien Hsing Textile, where managers forced female employees to have sex in order to keep their jobs, led to the signing of an agreement³⁶ applicable not only to this company but also to others, with a commitment to compliance by

³⁰ *Id.*

³¹ The International Federation of Trade Unions IndustriAll Global Union, which played a leading role in the signing of the agreement and its extension, as well as in its implementation, says that agreement mechanisms permitted to oversee the introduction of many improvements, including the installation of fire doors, sprinkler systems and improved electrical wiring in nearly 1,700 factories producing garments for some of the world's biggest brands.

³² In 2019, in the face of strong pressure from local contractors to end international inspections of factory safety conditions, an action by several multinationals won a Bangladesh Supreme Court rule extending the validity of the agreement for one year, and in 2020 an agreement was signed with some variations, but essentially maintaining the inspection scheme.

³³ Owner of Zara and Oysho, among other well-known brands.

³⁴ Based in Spain, it is a member of the NGO network Clean Clothes Campaign (CCC), which also had an impact on the Bangladesh agreements.

³⁵ Patricia Nieto Rojas, *supra* note 16.

³⁶ Other trade unions in the country also participated.

the brands in the country where they are domiciled,³⁷ with the participation of the trade union in that country.³⁸ The parties agreed to establish a complaints and abuse investigation committee, as well as to implement a policy of education and training of workers, supervisors and managers on sexual harassment, and that brands are also responsible for ensuring that their suppliers comply with gender policies.

In early 2021, the Sindicato Único de Trabajadores del Neumático Argentino (SUTNA), faced with the refusal of Bridgestone's Argentine subsidiary to comply with safety protocols in the face of the COVID pandemic, resorted to an international campaign, obtaining declarations of solidarity from trade unions in several countries,³⁹ which put pressure on the employers.

These are just a few examples of policies aimed at forcing multinationals to respect human and labour rights.

An obvious point of weakness - apart from the limited organicity and low institutionalisation of these experiences - is the extreme dependence, in most cases, of human rights organisations and consumer associations, as a substitute for trade union action by workers, which reveals a class weakness. On the other hand, many of these measures are only taken in very extreme cases of job insecurity.

It is clear that the voluntary but limited action of some trade unions and NGOs has not adequately addressed the huge and serious phenomenon of precarious working conditions in global supply chains.

And while this is an obvious improvement on the 'goodwill' agreements and treaties that urge transnationals to comply with what they will not comply with, the French duty of vigilance law does not seem to be an effective solution either, given the difficulty of spreading the example and the difficulties inherent in this type of alternative.

It seems that only articulated trade union action at the global level, lobbying states and international bodies - such as the UN and ILO - could really advance a more effective response through international regulations governing the obligations of transnationals

³⁷ Corresponding to US multinationals Levi Strauss, Children's Place and Kontor Brands.

³⁸ Workers United, WRC and Solidarity Center.

³⁹ Including Japan, the United States and Brazil.

and their supply chains at the global level.

But it is also clear that beyond these regulations, the workers through their trade unions are those responsible for building multiple alternative tools to compete for power with transnationals.

The experience of trade union networks set up in the context of international solidarity links, where different organisations⁴⁰ are linked, is valuable, despite their limited impact and the complexity that sometimes arises when the strategy promoted by the international trade union movement conflicts with the positions defended by local trade unionism, which is corporatist in nature.⁴¹ In this variant of a global trade union response, there is a long way to go.

⁴⁰ In this regard, Julia Soul, *Globalización y organización sindical: de la solidaridad sindical al poder sindical global*, REVISTA COMÚN (2019) (which cites the example of an international network of unions in the steel sector).

⁴¹ *Id.*

RÉSUMÉ DU CAS

NESTLE ET CARGILL V. DOE¹

On 17 June 2021, the US Supreme Court handed down its latest decision interpreting the Alien Tort Statute (ATS),² a law adopted as part of the Judiciary Act of 1789 and which laid largely dormant until the 1980s when it began to be used to advance federal civil claims for human rights violations that occurred outside of the United States.³ In recent years, federal courts have consistently limited the scope of the ATS. In 2005, plaintiffs, who were child laborers from Mali, filed suit under the ATS claiming that they were trafficked and forced to work on cocoa plantations in Cote D'Ivoire. They allege that Cargill and Nestle, which buy cocoa from the Cote D'Ivoire, aided and abetted that forced labor by providing the farms resources (financial, training, and tools) despite knowledge that the farms were using child slave labor. In 2010, the District Court for the Central District of California dismissed the case finding that corporations could not be liable under the ATS.⁴ In 2014, the Ninth Circuit reversed, finding that corporations could be held liable and remanded the case.⁵ In 2017, the District Court again dismissed the case, this time on the basis of extraterritoriality.⁶ The Ninth Circuit again reversed in 2018, citing *Kiobel*,⁷ finding that the plaintiffs' claims "touch and concern" the U.S. as they alleged that the violations in Cote D'Ivoire were perpetrated from the corporate headquarters in the U.S.⁸ This decision was then appealed to the U.S. Supreme Court.

In *Nestle*, the US Supreme Court issued a patchwork opinion, though eight of the nine justices agreed to reverse the Ninth Circuit on the basis that the respondents failed to plead facts sufficient to support a domestic application of the ATS. Specifically, the Court found that all of the activity alleged to aid and abet in child slavery occurred in Cote D'Ivoire and the operational decision-making by Nestle and Cargill which took place in the US was insufficient to establish domestic application of the ATS.

The Court explained that it will analyze the extraterritoriality applicability of ATS under a two-part test established in *RJR Nabisco, Inc. v. European Community*:⁹ (1) whether the statute gives a clear, affirmative indication that rebuts this presumption against extraterritoriality, and (2) if not, whether "the conduct relevant to the statute's focus occurred in the United States." Applying the second prong, and without determining the statute's focus, the Court found that the plaintiffs had not pled sufficient facts to make the connection between domestic conduct and the actions abroad, because general corporate activity was not found to be clear and specific enough

¹ *Nestle & Cargill v. Doe*, 593 U.S. ___ (2021), available at https://www.supremecourt.gov/opinions/20pdf/19-416_i4dj.pdf. Case summary written by Monika Mehta, Senior Program Officer, Solidarity Center and ILAW Network and edited by Jeffrey Vogt, Director of Solidarity Center's Rule of Law Department and Chair of the ILAW Network.

² See 28 U.S.C §1350 (The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.)

³ The watershed case was *Filártiga v. Peña-Irala*, 630 F.2d 876 (2nd Cir. 1980).

⁴ *Doe I v. Nestle, S.A., Doe v. NESTLE, SA*, 748 F. Supp. 2d 1057 (C.D. Cal. 2010).

⁵ *Doe I v. Nestle USA, Inc*, 766 F.3d 1013 (9th Cir. 2014).

⁶ *Nestlé v. Nestlé S.A.*, No. 05-5133, 2017 U.S. Dist. LEXIS 221739, at *4, 2017 WL 6059134, at *1 (C.D. Cal. Mar. 2, 2017).

⁷ *Kiobel v. Royal Dutch Petroleum*, 569 U.S. 108, 124-25 (2013). In *Kiobel*, the Court applied a presumption against extraterritoriality, holding that ATS claims must "touch and concern the territory of the United States... with sufficient force to displace the presumption against extraterritorial application and mere corporate presence in the United States is not enough."

⁸ *Doe v. Nestle*, 906 F.3d 1126 (9th Cir. 2018).

⁹ *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090 (2016), available at <https://casetext.com/case/rjr-nabisco-inc-v-european-cmty>

to prove applicability of the ATS in this case.¹⁰ The decision leaves it now for the plaintiffs to seek leave to amend their complaint to assert additional facts beyond general corporate activity and start over -- nearly sixteen years after filing its initial complaint.

The decision is also notable for what it did not do. It was widely expected that the Supreme Court would decide whether the ATS applied to corporations. Indeed, the Supreme Court decided in 2018, in *Jesner v. Arab Bank, PLC*, that the ATS did not apply to foreign corporations.¹¹ And, much of the oral argument in *Nestle* turned on the question of corporate liability. However, while dicta, five of the nine justices appear to support the ATS liability for U.S. corporations. Were the issue to come before the court again, it is likely that corporations will not be exempt from such lawsuits.

There remains some question as to which claims are cognizable under the ATS. In *Sosa v. Alvarez – Machain*,¹² the Court recognized an implied, federal common-law cause of action for violations of modern international law in limited circumstances. However, a minority of the Supreme Court in *Nestle*, only three of the justices, held that only three historical torts which were recognized in 1789 could be actionable under the ATS, namely “violation of safe conducts, infringement of the rights of ambassadors, and piracy.” While the scope of the ATS remains elusive, it appears clear that ATS encompasses claims beyond the historical three.

In the end, the Supreme Court has not shut down the opportunity to hold corporate actors liable for human rights violations throughout their supply chain under the ATS, but it has set a very high bar for a corporate liability for human rights violations to be found justiciable under the ATS. The Court requires plaintiffs to rebut the presumption against extraterritoriality through ‘sufficient connections between the actions of the corporate actor domestically’ to the harm caused abroad. To do so, plaintiffs must show actions and conduct within the US beyond ‘general corporate activity’ of US corporations in managing and conducting their business operations outside the US.

Commentary & Additional Resources

- [Supreme Court Rejects Human Rights Lawsuit Against U.S. Corporations, But Leaves Door Open For Future Claims](#) (July 1, 2021), National Law Review
- [CAL AND IRADVOCATES PROVIDE NEW EVIDENCE OF FORCED CHILD LABOR IN THE COCOA SECTOR IN WAKE OF SUPREME COURT DECISION IN NESTLE V. DOE](#) (June 25, 2021), Corporate Accountability Lab

Just Security has a series of legal commentary devoted to this case:

- [Nestlé & Cargill v. Doe: What’s Not in the Supreme Court’s Opinions](#) (June 30 2021), Just Security
- [The Surprisingly Broad Implications of Nestlé USA, Inc. v. Doe for Human Rights Litigation and Extraterritoriality](#) (June 18, 2021), Just Security
- [Nestlé & Cargill v. Doe Series: The Economic Folly of Human Trafficking for American Business](#) (December 4, 2020), Just Security
- [Nestlé & Cargill v. Doe Series: A Canadian Perspective – Takeaways from Nevsun Resources Ltd. v. Araya.](#), (December 3, 2020), Just Security
- [Nestlé & Cargill v. Doe Series: Rethinking the Alien Tort Statute](#) (December 2, 2020), Just Security
- [Nestlé & Cargill v. Doe Series: Toward a Harmonized Test for Complicity of Corporate Officials?](#) (November 30, 2020), Just Security
- [Nestlé & Cargill v. Doe Series: No Safe Harbor for Enablers of Child Slavery – Secondary Liability and the ATS](#) (November 25, 2020), Just Security
- [Nestlé & Cargill v. Doe Series: The Prohibitions on Slavery, Forced Labor, and Human Trafficking Meet the Sosa Test](#) (November 23, 2020), Just Security

¹⁰ Nestle, *supra*, note 1 at 5.

¹¹ *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1407 (2018).

¹² *Sosa v. Alvarez – Machain*, 542 U.S. 692, 724 (2004).

The International Lawyers Assisting Workers (ILAW) Network is a membership organization composed of trade union and workers' rights lawyers worldwide. The core mission of the ILAW Network is to unite legal practitioners and scholars in an exchange of information, ideas and strategies in order to best promote and defend the rights and interests of workers and their organizations wherever they may be.