

Labour standards in global supply chains

The relationship between due diligence and labour inspectories

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Word count: 11,932

A dissertation submitted to the University of Bristol in accordance with the requirements of the degree of Master of Laws by advanced study in LLM Labour Law and Corporate Governance in the Faculty of Social Sciences and Law

Law School

Submitted on 22nd August 2018

Abstract

Global supply chains are a widespread phenomenon and responsible for the majority of current international trade. Although they may benefit companies, consumers and, to some extent, workers, they pose major challenges to labour rights. Recent workplace tragedies and deteriorating working conditions, which relate to the underlying rationale of global supply chains and to supply chain management techniques, have brought attention to the topic. Following a call from NGOs, consumers and states to lead firms to address the problems, private codes of conduct emerged as a possible solution. As a result of their failure, recent international and domestic extraterritorial regulation initiatives are trying to tackle labour issues in global supply chains, bringing due diligence processes to their heart. Although these regulatory initiatives are still in their infancy, they handle due diligence and the most traditional method for enforcing labour rights – labour inspectorates – at arm's length. In this context, they suggest multinational enterprises assess local labour inspectorates while evaluating their risks. Demonstrating how this assessment is easier said than done, this dissertation proposes a different interaction between businesses and labour inspectorates in the context of due diligence processes. This interaction could be beneficial for both labour inspectorates and firms, while bringing more effectiveness to the enforcement of labour law.

Dedication and Acknowledgements

For Júlia, the best part of myself.

For Sílvia and Gustavo, my parents, who have provided me with all the love a son could have. For Fábio and Rodrigo, my brothers and true friends, who have always been by my side.

For Luciana, my spouse, who supported me during this entire process, especially at times when I thought I could not handle it.

I would like also to thank all the people who encouraged me and made me believe in this dream, especially Tia Augusta, Professor Augusto César and my colleague Daniela Fonseca.

Author's Declaration

I declare that the work in this dissertation was carried out in accordance with the requirements of the University's Regulations and Code of Practice for Taught Postgraduate Programmes and that it has not been submitted for any other academic award. Except where indicated by specific reference in the text, this work is my own work. Work done in collaboration with, or with the assistance of others, is indicated as such. I have identified all material in this dissertation which is not my own work through appropriate referencing and acknowledgement. Where I have quoted from the work of others, I have included the source in the references/bibliography. Any views expressed in the dissertation are those of the author.

SIGNED: DATE:

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1. Introduction

“Steve Jobs couldn’t have made the smartphone without a global supply chain.”¹ In 2012, approximately 90% of the iPhone’s components were made outside the United States, according to estimates.² This product, which helped Apple get to the apex of the industry,³ has helped to transform the way “people and machines communicate, create, collaborate and think.”⁴ But if it is true that Apple became a corporate giant, to a great extent, by mastering global supply chains (GSCs),⁵ it is also true that its reliance on an international supply chain is not unique to its industry.⁶

It is also a widespread phenomenon. In 2001, global outsourcing was already a trillion dollar industry, regarded as one of the most important organisational and industrial structural changes of the 20th Century.⁷ GSCs composed of multinational enterprises (MNEs) are responsible for approximately 80% of global trade.⁸ Studies show that more than half the value of global exports is compounded of products commercialised through this system.⁹ According to the International Labour Organisation (ILO), 453 million people were employed under such arrangements in 2013.¹⁰

Through GSCs, consumers might gain access to more affordable products, while workers

¹ Thomas L. Friedman, *Thank you for being late: An optimist's guide to thriving in the age of accelerations* (1st edn, 2016) 199

² Kishanthi Parella, 'Outsourcing Corporate Accountability' (2014) 89 *Washington Law Review* 747, 759

³ *ibid* 759

⁴ Friedman, *Thank you for being late: An optimist's guide to thriving in the age of accelerations* 19-20

⁵ Parella, 'Outsourcing Corporate Accountability' 756

⁶ David Weil, *The Fissured Workplace* (Harvard University Press 2014) 173

⁷ Ga Sarfaty, 'Shining Light on Global Supply Chains' (2015) 56 *Harv Int Law J* 419, 425

⁸ Joonkoo Lee, *Global supply chain dynamics and labour governance : implications for social upgrading* (ILO 2016) 1

⁹ Koen De Backer and Sébastien Miroudot, *Mapping Global Value Chains* (OECD Publishing 2013) 16

¹⁰ International Labour Office, *World employment and social outlook 2015: The changing nature of jobs* (ILO 2015) 132

can be lifted out of extreme poverty.¹¹ But they have also raised awareness of the need for companies to check compliance of their suppliers, assuring responsible and transparent value chains.¹² Foxconn, the world's leading contract manufacturer of electronics, supplies for international brands such as Apple, Dell, Sony and Nokia.¹³ In 2010, it became internationally infamous for a series of suicides which occurred in its facilities near Shenzhen (China),¹⁴ when 18 workers attempted suicide, leading to 14 deaths.¹⁵ The suicides were linked to exhausting working conditions.¹⁶

In 2013, a factory complex at Rana Plaza industrial district in Dhaka, Bangladesh's capital, collapsed, killing 1,129 garment workers.¹⁷ Over 2,500 people were injured.¹⁸ Considered to be the world's "worst industrial accident ever recorded in the global garment industry,"¹⁹ it happened 5 months after the Tazreen Fashions factory fire, which killed around 120 workers.²⁰ This factory was located in the same industrial district of the Rana Plaza and also produced clothes for international brands,²¹ including Walmart.²²

Such tragedies have called attention to the risks of outsourcing to suppliers with poor

¹¹ Sarah Labowitz and Dorothee Baumann-Pauly, *Business as Usual is Not an Option* (NYU Stern School of Business 2014) 44

¹² Sarfaty, 'Shining Light on Global Supply Chains' 419

¹³ Parella, 'Outsourcing Corporate Accountability' 767

¹⁴ *ibid* 767

¹⁵ Malcom Moore, 'Mass suicide' protest at Apple manufacturer Foxconn factory' (2012) The Telegraph <<https://www.telegraph.co.uk/news/worldnews/asia/china/9006988/Mass-suicide-protest-at-Apple-manufacturer-Foxconn-factory.html>> accessed 25 June 2018

¹⁶ Parella, 'Outsourcing Corporate Accountability' 768

¹⁷ Labowitz and Baumann-Pauly, *Business as Usual is Not an Option* 9

¹⁸ Andreas Rühmkorf, 'The Rana Plaza building collapse – corporate social responsibility, private law and the global supply chain', *Corporate Social Responsibility, Private Law and Global Supply Chains* (2015) 213

¹⁹ Anne Posthuma and Arianna Rossi, 'Coordinated governance in global value chains: supranational dynamics and the role of the International Labour Organization' (2017) 22 *New Political Economy* 186 197

²⁰ Labowitz and Baumann-Pauly, *Business as Usual is Not an Option* 9

²¹ Posthuma and Rossi, 'Coordinated governance in global value chains: supranational dynamics and the role of the International Labour Organization' 197

²² Rühmkorf, 'The Rana Plaza building collapse – corporate social responsibility, private law and the global supply chain' 213

working conditions.²³ As news regarding labour abuses in companies participating in GSCs surfaced, consumers and civil society organisations called for the need for assurance of decent working conditions for workers producing goods overseas.²⁴ However, these episodes have even been regarded by some as a natural result of the “highly disaggregated sourcing model” which forms the basis of GSCs.²⁵ The issue is that organisational and industrial structure changes over the last few decades allowed companies to reduce production costs considerably, but led to a “fissured workplace.”²⁶ In such scenarios, companies exert control without carrying responsibility for the observance of labour standards within their network of suppliers in different places around the globe.²⁷

This transformation was mainly enabled by information and communication technologies,²⁸ which allowed production to be performed in emerging economies, while lead firms in developed economies still maintain control over crucial business functions.²⁹ Accordingly, many powerful corporations now arguably control the chain of suppliers and distributors, providing indirect labour.³⁰ The solution to those issues might come from realigning control and responsibility in GSCs.³¹ There is, thus, a growing call for regulation in order to assure responsible supply chains, which might hold corporations liable for human rights violations in their value chains.³² This is not a simple task, as GSCs in different industries have different characteristics.³³ Besides, labour and social laws are set at the domestic level, in

²³ Sarfaty, 'Shining Light on Global Supply Chains' 419

²⁴ Posthuma and Rossi, 'Coordinated governance in global value chains: supranational dynamics and the role of the International Labour Organization' 188

²⁵ Labowitz and Baumann-Pauly, *Business as Usual is Not an Option* 9

²⁶ Weil, *The Fissured Workplace*

²⁷ International Labour Organisation, *The future of work we want : a global dialogue* (ILO 2017) 14

²⁸ *ibid* 13

²⁹ Michael Rawling, Alison Barnes and Raymond Markey, 'Legislative regulation of global value chains to protect workers: A preliminary assessment' (2015) 26 *The Economic and Labour Relations Review* 660, 662

³⁰ *ibid* 662

³¹ Organisation, *The future of work we want : a global dialogue* 14

³² Sarfaty, 'Shining Light on Global Supply Chains' 424

³³ Organisation, *The future of work we want : a global dialogue* 14

such manner that working conditions vary widely inside a global supply chain.³⁴

Following a wave of private corporate codes of conduct and private monitoring, which have arguably failed,³⁵ domestic legislation demanding supply chain transparency³⁶ and mandatory due diligence have surfaced. Furthermore, a working group has been set up by the United Nations (UN) to draw up an internationally binding instrument on business and human rights.³⁷ Alternatives have also been discussed which combine public and private enforcement.³⁸ The question, therefore, is not only about setting rules, but also about enforcing them.³⁹

But whether in international instruments or in domestic legislation, a common feature of recent initiatives to tackle issues related to working conditions in GSCs is the call for due diligence. Nevertheless, international norms on this subject are still in their infancy, and there is a shortage of guidance on the interpretation and implementation of such mechanisms.⁴⁰ So far, standards say little about the interaction of state agencies, such as labour inspectorates, with due diligence processes. In this context, this dissertation will explore this relationship.

It is organised as follows: the next chapter presents the development of GSCs, its basic concepts and the discussions about its impacts on working conditions. It then presents recent governance solutions to address those issues, featuring due diligence. Chapter 3 examines the concept of due diligence. It then highlights its regulation, its current

³⁴ *ibid* 14

³⁵ Julia Zenker, 'Made in Misery: Mandating Supply Chain Labor Compliance Notes' (2018) 51 *Vanderbilt Journal of Transnational Law* 297, 313

³⁶ Sarfaty, 'Shining Light on Global Supply Chains' 424

³⁷ UNGA, *Res. 26/9* (United Nations 2014)

³⁸ Organisation, *The future of work we want : a global dialogue* 14

³⁹ *ibid* 14

⁴⁰ Sarfaty, 'Shining Light on Global Supply Chains' 448

procedural standards in both international and domestic regulation, and how labour inspectorates appear in this process. Chapter 4 examines labour inspectorates in the light of such a standpoint. It then provides a further possible interaction between these two entities. Final conclusions are drawn in the last chapter.

2. Global Supply Chains

2.1 Development and basic concepts

Before globalisation, each community had to produce most of what it consumed, due to low transportation technology – a picture that started changing with the “steam revolution,” which allowed initial separation of production and consumption (“globalisation’s first unbundling”).⁴¹ In that sense, GSCs have existed amongst advanced nations for a long time, as extensive sale and purchase of parts and components by businesses situated in different countries had developed amongst industrialised nations much before recent discussions on the topic.⁴² These transactions (e.g., trade between the US and Canada in the automotive industry) were driven by firm-level specialisation and excellence.⁴³ At this point, the predominant picture was of a horizontal internationalisation of supply chains, developed amongst high-wage and advanced economies.⁴⁴

However, during the 1980s and the 1990s, privatisation of state-owned enterprises, deregulation of national economies, and liberalisation of international trade compounded to create a highly attractive environment for MNEs to run businesses in developing countries.⁴⁵ The growth of global manufacturing capacity and further reduction of

⁴¹ Richard Baldwin, *Global supply chains: Why they emerged, why they matter, and where they are going* (C.E.P.R. Discussion Papers 2012) 2

⁴² Albert Park, Gaurav Nayyar and Patrick Low, *Supply Chain Perspectives and Issues: A Literature Review* (Fung Global Institute and World Trade Organisation 2013) 28

⁴³ *ibid* 28

⁴⁴ *ibid* 29

⁴⁵ Peter Lund-Thomsen and Adam Lindgreen, 'Corporate Social Responsibility in Global Value Chains: Where Are We Now and Where Are We Going?' (2014) 123 *Journal of Business Ethics* 11, 12

transportation costs added to this scenario.⁴⁶ Moreover, new communication technologies allowed international retailers to source products from Asia, Africa, and Latin America, which provided abundant labour supplies (with much lower wages), necessary skills and manufacturing capabilities.⁴⁷ Hence, most of the unskilled and labour-intensive production tasks started being offshored by developed countries' corporations to developing nations which held a comparative advantage in completing these tasks.⁴⁸ At this point, stages of production which were previously developed in close proximity started to be dispersed globally, which was to become known as "globalisation's second unbundling."⁴⁹

Baldwin explains that, at this stage, the information and communication technology revolution allowed the coordination of complex tasks from a distance, while the wage differences between developed and developing countries made that split profitable.⁵⁰ Thus, firms situated in advanced or in developing economies "add value" along GSCs by performing a specific step (e.g., a component or a service) associated with the production of a finished product.⁵¹ Accordingly, the current panorama is that of an "international production fragmentation," in which manufacturing activities and services are the result of a combination of what is performed at home and abroad.⁵²

The term "supply chain" gained momentum in the 1990s, in tandem with the concept of supply chain management (SCM), which was introduced in the 1980s.⁵³ The latter concept refers to the planning, coordination and control of the supplier's activities, especially

⁴⁶ Weil, *The Fissured Workplace* 167

⁴⁷ Lund-Thomsen and Lindgreen, 'Corporate Social Responsibility in Global Value Chains: Where Are We Now and Where Are We Going?' 12

⁴⁸ Park, Nayyar and Low, *Supply Chain Perspectives and Issues: A Literature Review* 31

⁴⁹ *ibid* 31

⁵⁰ Baldwin, *Global supply chains: Why they emerged, why they matter, and where they are going* 4

⁵¹ Park, Nayyar and Low, *Supply Chain Perspectives and Issues: A Literature Review* 29

⁵² *ibid* 29

⁵³ *ibid* 42

through the creation and implementation of standards.⁵⁴ In the 1990s, this concept became very important in business schools, as industries were re-evaluating processes of production, due to the introduction of new information technologies, lower cost of computers and adoption of common communication standards.⁵⁵ At this point, logistics replaced manufacturing as the core of modern industry, providing flexibility and speed across long distances.⁵⁶

The underlying rationale of GSCs thus consists of a two-fold decision process. First, an organisational decision, regarding what ought to be performed inside or outside a corporation's walls – a decision for outsourcing⁵⁷ or “make or buy decision”.⁵⁸ Then there is the decision of geographical relocation of such activities from the corporation's domestic country to a foreign country – “offshoring” or “international outsourcing.”⁵⁹ At this stage, comparative advantage plays an important role in the development of GSCs, as location decisions for firms gravitate around efficiency, i.e., placing each step of the production process in the place with the lowest cost.⁶⁰

This cost calculation balances “direct factor” costs (e.g., wages and capital costs) with “separation” costs (e.g., transmission costs and transportation costs).⁶¹ Thus a corporation located in a developed country tends to offshore the unskilled and labour-intensive stages of producing goods to a low-wage nation, as long as the cost advantage accrued outweighs the costs born with offshoring.⁶² For instance, some studies show that a maximum of only

⁵⁴ Weil, *The Fissured Workplace* 168

⁵⁵ *ibid* 167

⁵⁶ David H. Ciscel and Barbara Ellen Smith, 'The Impact of Supply Chain Management on Labor Standards: The Transition to Incessant Work' (2005) 39 *Journal of Economic Issues* 429, 429

⁵⁷ Weil, *The Fissured Workplace* 167

⁵⁸ Park, Nayyar and Low, *Supply Chain Perspectives and Issues: A Literature Review* 56

⁵⁹ *ibid* 56

⁶⁰ *ibid* 30

⁶¹ *ibid* 30

⁶² *ibid* 30

10 dollars in wages go to the Chinese workers involved in the production of an iPhone.⁶³

Moreover, the option of supply chains still free the entities located at the top of the chain from some of the production costs which include factory ownership and duties towards workers situated at the bottom of the chain.⁶⁴ The result of that decision process is that of a lead firm focussing on core activities and transferring other tasks (e.g., manufacturing and assembly) to other businesses, but assuring that some standards (e.g., technical and quality) are strictly followed by the “subordinate suppliers.”⁶⁵ Thus, businesses participate in GSCs either as lead firms, distributing production tasks outside their home country, or as suppliers, executing those tasks.⁶⁶ Furthermore, these suppliers can be grouped into tiers, according to the degree of separation from the lead business.⁶⁷

In that sense, a supply chain has been defined “as a set of three or more entities directly involved in the upstream and downstream flows of products, services, finances, and/or information from a source to a customer.”⁶⁸ Finally, the ILO defines global supply chains as “demand-supply relationships that arise from the fragmentation of production across borders, where different tasks of a production process are performed in two or more countries.”⁶⁹ But, as shown below, such an arrangement can cause many issues regarding labour conditions.

2.2 Labour standards in GSCs

⁶³ Frederick W. Mayer, 'Leveraging private governance for public purpose: business, civil society and the state in labour regulation' in Anthony Payne and Nicola Phillips (eds), *Handbook of the International Political Economy of Governance* (Edward Elgar Publishing 2014) 349

⁶⁴ Rawling, Barnes and Markey, 'Legislative regulation of global value chains to protect workers: A preliminary assessment' 662

⁶⁵ Weil, *The Fissured Workplace* 168

⁶⁶ Office, *World employment and social outlook 2015: The changing nature of jobs* 132

⁶⁷ Park, Nayyar and Low, *Supply Chain Perspectives and Issues: A Literature Review* 46

⁶⁸ *ibid* 45

⁶⁹ Office, *World employment and social outlook 2015: The changing nature of jobs* 132

2.2.1 Potential benefits

Arguably, GSCs create benefits for the companies that use this model, for consumers who purchase cheaper goods produced as a result of this system, and for the workers who are employed in the companies within the network.⁷⁰ For instance, the garment sector has been regarded as an important driver of development and economic growth in Bangladesh, whose economy has grown almost 6% per year since the mid-1990s and is linked to an increase in human development.⁷¹ This economic growth has arguably led to the empowerment of women, as they started to work in that very sector.⁷² Educational enhancements have also been linked to GSCs, as Vietnamese workers started learning a foreign language when the country began participating in such arrangements.⁷³ Finally, product upgrading which is connected to the chains has possibly contributed to the upgrading of workers' skills.⁷⁴

In that context, some argue that economic globalisation has had little impact on the deregulation of labour markets.⁷⁵ Accordingly, tragedies such as the Rana Plaza accident would not be a necessary corollary of the economics of GSCs, since local weak laws and enforcement are a crucial factor here.⁷⁶ Furthermore, the International Organisation of Employers contends that GSCs are “not intrinsically bad,” for they have created jobs, growth and development, besides lifting a large number of people out of poverty.⁷⁷

⁷⁰ Weil, *The Fissured Workplace* 176

⁷¹ Labowitz and Baumann-Pauly, *Business as Usual is Not an Option* 16

⁷² *ibid* 16

⁷³ World Bank Group, *World Development Report 2019 : The changing nature of work - Working Draft - June 8, 2018* (World Bank 2018) 12

⁷⁴ International Organisation of Employers, “*Global supply chains are intrinsically problematic*” – *true or false?* (IOE 2016)

⁷⁵ Lee, *Global supply chain dynamics and labour governance : implications for social upgrading* 3

⁷⁶ Rühmkorf, ‘The Rana Plaza building collapse – corporate social responsibility, private law and the global supply chain’ 216

⁷⁷ Employers, “*Global supply chains are intrinsically problematic*” – *true or false?*

2.2.2 Deteriorating working conditions

Nonetheless, the early idea that participation and economic upgrading in GSCs would automatically lead to “social upgrading,” i.e., the improvement of workers’ entitlements and rights as social actors and furtherance of their employment quality, has been recently disputed.⁷⁸ Evidence from recent empirical studies suggests that the relationship between participation in GSCs and social upgrading is not always positive.⁷⁹ In fact, economic upgrading in GSCs may be connected to worsening working conditions, as existing jobs in GSCs in developing countries can be insecure, unprotected and lack safety regulations.⁸⁰

Moreover, many workers engaged in GSCs earn a wage which does not meet their basic needs.⁸¹ Yet issues such as child labour, forced labour, unwilling overtime working, the absence of freedom of association and the right to collective bargaining seem to be an accepted practice in such arrangements.⁸² Although informal economy has always existed, the development of GSCs are still linked to its exponential growth.⁸³ Finally, there is a trend towards a concentration of women at the bottom levels of GSCs, usually associated with lower pay and fewer benefits.⁸⁴

The International Organisation of Employers itself recognises that there are unacceptable working conditions in “some GSCs” which need to be addressed “urgently”.⁸⁵ Nonetheless, they regard these problems as reflecting “general challenges in local environment,” so that

⁷⁸ Lee, *Global supply chain dynamics and labour governance : implications for social upgrading* 3

⁷⁹ *ibid* 3

⁸⁰ Rawling, Barnes and Markey, 'Legislative regulation of global value chains to protect workers: A preliminary assessment' 666

⁸¹ *ibid* 666

⁸² *ibid* 666

⁸³ UNGA, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association* (United Nations 2016) 7

⁸⁴ *ibid* 8

⁸⁵ Employers, "Global supply chains are intrinsically problematic" – true or false?

working conditions in GSCs are no worse than those found locally on a domestic level.⁸⁶ They have therefore started emphasising the states' responsibilities in ratifying international labour conventions and in legislating, implementing and enforcing their domestic labour regulation.⁸⁷

Nevertheless, the paradox is that poor home states, which might have been chosen as locations for production precisely for their weak labour regulation, bear the responsibility for protecting their workers.⁸⁸ Besides, multinational corporate wealth can be multiple times greater than that of many nations - a situation which has effectively allowed GSCs to override states' sovereign democracy.⁸⁹ This leads to the analysis of the "law shopping" phenomenon.

2.2.3 Law shopping and the race to the bottom

The freedom of businesses to span the structure of their operations across many actors located in different continents allows them to escape national regulation in favour of a less regulated space.⁹⁰ Supiot has pointed out that the law itself has been transformed into just another product competing in the international market, as legal systems better suited for financial profitability displace the others.⁹¹ "Structural adjustment policies" in developing countries have introduced incentives for foreign direct investment, reduced state programs and weakened labour market regulation.⁹² In this way, corporations evade the laws of

⁸⁶ *ibid*

⁸⁷ Posthuma and Rossi, 'Coordinated governance in global value chains: supranational dynamics and the role of the International Labour Organization', 188

⁸⁸ Rawling, Barnes and Markey, 'Legislative regulation of global value chains to protect workers: A preliminary assessment' 667

⁸⁹ UNGA, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association* 4

⁹⁰ Parella, 'Outsourcing Corporate Accountability', 749

⁹¹ Alain Supiot, 'A legal perspective on the economic crisis of 2008' (2010) 149 *International Labour Review* 151, 155

⁹² Rawling, Barnes and Markey, 'Legislative regulation of global value chains to protect workers: A preliminary assessment' 662

countries where they operate and choose a jurisdiction more compatible with their interests – a phenomenon called “law shopping.”⁹³

This practice seems to have been endorsed by some institutions, such as the World Bank, which has produced an annual report (Doing Business) since 2004, assessing the “economic efficiency” of domestic legal systems and, in particular, providing indicators of the “rigidity” of labour law in each of them.⁹⁴ Although it does not “present rankings of economies on the labour market regulation indicators,” it provides the data for these indicators (e.g., redundancy rules and costs), in a table comparing the “economies” of countries.⁹⁵

Moreover, the possibility of shifting the production of goods and services to companies in countries with lower costs and fewer regulations places pressure on manufacturers and service providers in GSCs to cut costs, which has changed employment relationships globally.⁹⁶ Hepple stresses that the development of GSCs has led national labour laws towards the fragmentation of labour markets, featuring more insecure, irregular and non-unionised forms of employment.⁹⁷ The result is headlines “filled with stories of corporate wrongdoing,” such as Rana Plaza in Bangladesh and Foxconn in China.⁹⁸

Globalisation places the following dilemma for labour law: thorough and effective regulation might encourage MNEs to relocate their operations, which, in turn, would lead to the destruction of jobs and the disappearance of employment benefits.⁹⁹ In the end, very

⁹³ Supiot, 'A legal perspective on the economic crisis of 2008' 156

⁹⁴ *ibid* 156

⁹⁵ World Bank Group, *Doing Business 2018 : Reforming to Create Jobs* (The World Bank 2018) 208

⁹⁶ UNGA, *Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association* 6

⁹⁷ Bob Hepple, 'New Approaches to International Labour Regulation' (1997) 26 353, 354

⁹⁸ Parella, 'Outsourcing Corporate Accountability' 749

⁹⁹ Hepple, 'New Approaches to International Labour Regulation' 356

different levels of labour protection and labour costs across countries lead to social dumping, whereby products are exported at low cost due to the exploitation of workers, and to the “race to the bottom,” in which nations try to outcompete one another with lower labour standards.¹⁰⁰ Supply chain management adds further to this scenario.

2.2.4 Supply Chain Management strategies

Besides the low shopping phenomenon, some lead firms’ practices have been regarded as the main cause of worsening labour conditions at the bottom of GSCs.¹⁰¹ In that sense, many SCM techniques, while set up to deliver efficiency and responsiveness, facilitating “global just-in-time” sourcing and production for the buyers, are linked to issues such as excessive working hours, involuntary overtime,¹⁰² and the extensive use of casual and temporary workers in GSCs.¹⁰³

For example, cracks in the building structure were found the day before the eight-story commercial Rana Plaza building collapsed.¹⁰⁴ While the banks and shops which functioned on the lower floors closed promptly, the workers at the clothing factories which operated on the other floors were ordered to return to work the following day – when the building collapsed.¹⁰⁵ Foxconn’s drive towards shorter delivery times, which arguably led to workers’ exhaustion, was the result of its customers’ demands (e.g. Apple and Nokia).¹⁰⁶ Stop-watches and computerised industrial engineering devices were introduced to assess workers’ capacity to meet targets, which were gradually increased as they succeed in doing

¹⁰⁰ *ibid* 356

¹⁰¹ Lee, *Global supply chain dynamics and labour governance : implications for social upgrading* 4

¹⁰² *ibid* 3

¹⁰³ *ibid* 4

¹⁰⁴ Rühmkorf, 'The Rana Plaza building collapse – corporate social responsibility, private law and the global supply chain' 213

¹⁰⁵ *ibid* 213

¹⁰⁶ Parella, 'Outsourcing Corporate Accountability' 768

so, pushing them beyond their “breaking point.”¹⁰⁷

Sarfaty claims that anthropologists have regarded SCM as an “ethic of detachment” in which companies are frequently establishing boundaries and endpoints to supply chain relationships.¹⁰⁸ These are constructed “around difference and distance,” as contracts are “time-bound and spatially defined.”¹⁰⁹ Those techniques are applied by MNEs in developing countries, which usually neglect social upgrading at the expense of economic growth when engaging in GSCs.¹¹⁰ While the results of these practices have already been shown, the solutions that have surfaced to address these issues are the focus of the next section.

2.3 Addressing the issues

2.3.1 The focus on MNEs

As NGOs, trade unions, student organisations and the media started campaigns bringing attention to labour issues such as child and forced labour in suppliers that produced items destined for developed countries,¹¹¹ the idea of strengthening regulation of GSCs became more broadly accepted.¹¹² The proposed approaches have mainly focussed on the role MNEs play in those arrangements for two reasons. Firstly, labour rights violations in GSCs usually occur where host countries have weak legal institutions,¹¹³ which are particularly “endemic” in developing countries.¹¹⁴ They usually feature public institutions which are inadequate and ineffective and do not bear the power “to engage in effective administrative enforcement.”¹¹⁵

¹⁰⁷ *ibid* 768

¹⁰⁸ Sarfaty, 'Shining Light on Global Supply Chains' 436

¹⁰⁹ *ibid* 437

¹¹⁰ Lee, *Global supply chain dynamics and labour governance : implications for social upgrading* 5

¹¹¹ Lund-Thomsen and Lindgreen, 'Corporate Social Responsibility in Global Value Chains: Where Are We Now and Where Are We Going?' 12

¹¹² Rawling, Barnes and Markey, 'Legislative regulation of global value chains to protect workers: A preliminary assessment' 667

¹¹³ Sarfaty, 'Shining Light on Global Supply Chains' 425

¹¹⁴ Kevin Kolben, 'Dialogic Labor Regulation in the Global Supply Chain' (2015) 36 *Michigan Journal of International Law* 425, 435

¹¹⁵ *ibid* 434

The reasons for that weakness stem from a lack of funding of enforcement bodies, political corruption, a lack of skills and of willingness to regulate - as this could cause them to lose their competitive advantage.¹¹⁶ In either case, MNEs seem to take advantage of it.¹¹⁷

Secondly, the lead firm is arguably the most commercially influential party in the chain, usually located at its pinnacle.¹¹⁸ It often has strong market power, grasps crucial regulatory resources and exerts significant control and influence over smaller firms' behaviour,¹¹⁹ including production process and working conditions.¹²⁰ In this way, they "govern" the other participants in the chain, as they prescribe the conditions of trade and parameters of participation in the GSCs, and define standards to suppliers (e.g., price and quality).¹²¹ On the other hand, local suppliers enjoy little autonomy, which disempowers local management and, in turn, arguably reinforces the disempowerment of national governments.¹²² What now follows is the analysis of the recent attempts to solve those issues.

2.3.2 Private governance

Private voluntary codes of conduct, coupled with private monitoring mechanisms, surfaced as the solution for both MNEs and NGOs concerned with labour rights, which sought for an answer to poor working conditions in GSCs¹²³ - the idea of "private governance."¹²⁴ Accordingly, the adoption of private codes of conduct, drafted by the corporations

¹¹⁶ *ibid* 435

¹¹⁷ Lee, *Global supply chain dynamics and labour governance : implications for social upgrading* 12

¹¹⁸ Rawling, Barnes and Markey, 'Legislative regulation of global value chains to protect workers: A preliminary assessment' 663

¹¹⁹ Tess Hardy and others, 'Chain reaction: A strategic approach to addressing employment noncompliance in complex supply chains' (2015) 57 *Journal of Industrial Relations* 563, 564

¹²⁰ Rawling, Barnes and Markey, 'Legislative regulation of global value chains to protect workers: A preliminary assessment' 664

¹²¹ *ibid* 664

¹²² Hepple, 'New Approaches to International Labour Regulation' 354

¹²³ Richard Locke, Matthew Amengual and Akshay Mangla, 'Virtue out of Necessity? Compliance, Commitment, and the Improvement of Labor Conditions in Global Supply Chains' (2009) 37 *Politics & Society* 319, 320

¹²⁴ Lee, *Global supply chain dynamics and labour governance : implications for social upgrading* 11

themselves, usually relies on self-enforcement and features a wide variation in content.¹²⁵ But the private governance regime, which constitutes a major branch of the Corporate Social Responsibility (CSR) movement,¹²⁶ has failed to avoid tragedies such as the Rana Plaza building collapse.¹²⁷ “Private sector social compliance audits” had taken place in two factories located in the Rana Plaza building some weeks before it collapsed, but had failed to detect any issues.¹²⁸ Apple increased the number of audited facilities between 2007 and 2010 (from 39 to 102), but it did not avoid the cluster of suicides in the latter year.¹²⁹

So while businessmen have insisted on voluntary CSR, adopting and implementing codes of conduct in their supply chains, the situation does not seem to have changed.¹³⁰ Some argue that they provided few incentives for behavioural change.¹³¹ Additionally, the lack of independent monitoring and enforcement mechanisms led to criticisms in terms of greenwashing.¹³² They are still regarded as non-sustainable, limited in scope and democratically illegitimate.¹³³ Some suggest, therefore, that it is already clear that systems of global labour governance, based mainly on private, voluntary and self-regulatory standards and private monitoring, leave “governance gaps.”¹³⁴

¹²⁵ Hepple, 'New Approaches to International Labour Regulation' 364

¹²⁶ Li-Wen Lin, 'Legal Transplants through Private Contracting: Codes of Vendor Conduct in Global Supply Chains as an Example' (2009) 57 *The American Journal of Comparative Law* 711, 718-719

¹²⁷ Rühmkorf, 'The Rana Plaza building collapse – corporate social responsibility, private law and the global supply chain' 220

¹²⁸ Posthuma and Rossi, 'Coordinated governance in global value chains: supranational dynamics and the role of the International Labour Organization' 197

¹²⁹ Parella, 'Outsourcing Corporate Accountability' 779

¹³⁰ Rühmkorf, 'The Rana Plaza building collapse – corporate social responsibility, private law and the global supply chain' 220

¹³¹ Sarfaty, 'Shining Light on Global Supply Chains' 420

¹³² *ibid* 427

¹³³ Kolben, 'Dialogic Labor Regulation in the Global Supply Chain' 439

¹³⁴ Huw Thomas and Peter Turnbull, 'From horizontal to vertical labour governance: The International Labour Organization (ILO) and decent work in global supply chains' (2018) 71 *Human Relations* 536, 537

2.3.3 International regulation

The failure of the private governance to eliminate or reduce labour violations in GSCs¹³⁵ resulted in a search for alternative paths for social upgrading¹³⁶ in the realm of international public governance. To this end, some international instruments have been introduced. The 2011 United Nations Guiding Principles on Business and Human Rights (“UNGP” or “UN Guiding Principles”) states that companies should “seek to prevent and mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business operations,”¹³⁷ including relationships with “entities” in their supply chain.¹³⁸ The Guiding Principles advocate that companies develop supply chain monitoring and due diligence processes.¹³⁹

Another instrument is the Organisation for Economic Cooperation and Development (OECD) Guidelines for Multinational Enterprises (“OECD Guidelines for MNEs”), which “provide non-binding principles and standards for responsible business conduct in a global context consistent with applicable laws and internationally recognised standards.”¹⁴⁰ Although it was first adopted in 1976, its last update took place in 2011 and included a new human rights chapter in harmony with the UNGP.¹⁴¹ Allegedly providing a “comprehensive approach to due diligence and supply chain management,”¹⁴² it states that enterprises should “carry out risk-based due diligence” in order to “identify, prevent and mitigate” adverse

¹³⁵ Rawling, Barnes and Markey, 'Legislative regulation of global value chains to protect workers: A preliminary assessment' 667

¹³⁶ Lee, *Global supply chain dynamics and labour governance : implications for social upgrading* 15

¹³⁷ United Nations, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework* (UN 2011) 14

¹³⁸ *ibid* 15

¹³⁹ Ryan J Turner, 'Transnational Supply Chain Regulation: Extraterritorial Regulation as Corporate Law's New Frontier' (2016) 17 *Melbourne Journal of International Law* 199

¹⁴⁰ OECD, *OECD Guidelines for Multinational Enterprises* (OECD Publishing 2011) 3

¹⁴¹ Ramona Elisabeta Cîrlig, 'Business and human rights: from soft law to hard law?' (2016) 6 *Juridical Tribune Journal* 228, 232

¹⁴² OECD, *OECD Guidelines for Multinational Enterprises* 4

impacts.¹⁴³ Global standards such as the UNGP and the OECD Guidelines for MNEs expect businesses to respect all internationally accepted human rights, which include rights embedded in the 1998 ILO Declaration on Fundamental Principles and Rights at Work (DFPRW).¹⁴⁴

Finally, the ILO's Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy ("ILO MNE Declaration") provides principles to be used "as guidelines for enhancing the positive social and labour effects of the operations and governance of" MNEs to achieve decent work for all.¹⁴⁵ Its 5th edition states that MNEs "should carry out due diligence to identify, prevent, mitigate and account for how they address their actual and potential adverse impacts that relate to internationally recognized human rights," and encompasses the rights set out in the ILO's DFPRW.¹⁴⁶

Hepple, however, highlights that attempts to regulate MNEs through voluntary international guidelines date back to the 1970s and have not shown to have a great impact.¹⁴⁷ Although they have been easily adopted by corporations, they have also been "easily ignored," as it is difficult to monitor compliance and they lack any real sanction for breaches.¹⁴⁸ Sarfaty agrees that these initiatives still have to be translated into mandatory regulation.¹⁴⁹ In that regard, there is neither an ILO Convention nor a binding international treaty regulating GSCs to protect workers.¹⁵⁰ Although some argue that an ILO Convention

¹⁴³ *ibid* 20

¹⁴⁴ Business & Human Rights Resource Centre, *Modern Slavery in Company Operation and Supply Chains : Mandatory transparency, mandatory due diligence and public procurement due diligence* (ITUC 2017) 7

¹⁴⁵ International Labour Office, *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy* (5th edn, ILO 2017)

¹⁴⁶ *ibid* 5

¹⁴⁷ Hepple, 'New Approaches to International Labour Regulation' 358

¹⁴⁸ *ibid* 358

¹⁴⁹ Sarfaty, 'Shining Light on Global Supply Chains' 426

¹⁵⁰ Rawling, Barnes and Markey, 'Legislative regulation of global value chains to protect workers: A preliminary assessment' 666

on GSCs could have a positive impact on promoting decent work, a new ILO standard on that subject does not seem feasible in the short term.¹⁵¹

A broadly ratified international treaty would arguably not only solve “the collective action problem of states,” but also hinder lead firms’ relocating operations, since states would be bound to the same standards, rather than participating in a “race to the bottom.”¹⁵² To this end, the Human Rights Council has established an open-ended intergovernmental working group with the mandate to draw up an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights.¹⁵³ Nonetheless, it is difficult to predict exactly when the instrument will be in force and its precise content. Besides, some suggest that developed countries would not ratify a treaty in case there is “too much pressure” on businesses.¹⁵⁴

2.3.4 Domestic extraterritorial legislation

In the absence of international binding regulation, and as the international voluntary standards have been unsuccessful in holding companies responsible for human rights violations in their GSCs, some advocates are now moving towards domestic law as an alternative.¹⁵⁵ Arguably, domestic regulation for supply chain is a mechanism through which home states might set human rights regulation for third-party suppliers making use of MNEs.¹⁵⁶ Some suggest that such initiatives are promising on “pragmatic grounds,” as the

¹⁵¹ Thomas and Turnbull, 'From horizontal to vertical labour governance: The International Labour Organization (ILO) and decent work in global supply chains' 555

¹⁵² Radu Mares, 'Legalizing Human Rights Due Diligence and the Separation of Entities Principle' in David Bilchitz and Surya Deva (eds), *Building a Treaty on Business and Human Rights: Context and Contours* (Cambridge University Press 2017) 281

¹⁵³ *ibid* 267

¹⁵⁴ Cîrlig, 'Business and human rights: from soft law to hard law?' 240-241

¹⁵⁵ Adam S. Chilton and Galit A. Sarfaty, 'The Limitations of Supply Chain Disclosure Regimes' (2017) 53 *Stanford Journal of International Law* 1, 7

¹⁵⁶ Sarfaty, 'Shining Light on Global Supply Chains' 420

international community remains lethargic with regards to regulating GSCs.¹⁵⁷

Accordingly, some governments are demanding more information about the source of products from their companies – a movement towards supply chain transparency.¹⁵⁸ For instance, recent legislation in the United States (2010 California Transparency in Supply Chains Act – “California Act”) and United Kingdom (2015 Modern Slavery Act – “Modern Slavery Act”) demand that businesses disclose human rights due diligence conducted on their supply chains abroad.¹⁵⁹ From a different standpoint, 2017 French “Loi de Vigilance n° 2017-399” (“French Due Diligence Law”) requires companies of a certain size to establish and implement due diligence plans, in order to identify risks and prevent serious violations of human rights and fundamental freedoms, human health and safety, and the environment in their supply chains.¹⁶⁰ It even establishes basic contents of the “plan de vigilance” (due diligence plan) and requires companies to publish it annually.¹⁶¹

Rawling, however, regards such initiatives as a “precursory measure,” as the exploitation of labour in GSCs should be addressed by the strengthening of international regulation, since workers’ rights should be as transnational as capital.¹⁶² But whether in international regulation or domestic extraterritorial regulation, due diligence is the buzz-word when it comes to protecting human rights, including labour standards, in GSCs. The next chapter of this dissertation will focus on how it works and how it might relate to labour inspectorates.

¹⁵⁷ Turner, 'Transnational Supply Chain Regulation: Extraterritorial Regulation as Corporate Law's New Frontier' 198

¹⁵⁸ Sarfaty, 'Shining Light on Global Supply Chains' 420

¹⁵⁹ Chilton and Sarfaty, 'The Limitations of Supply Chain Disclosure Regimes' 7

¹⁶⁰ Centre, *Modern Slavery in Company Operation and Supply Chains : Mandatory transparency, mandatory due diligence and public procurement due diligence* 4

¹⁶¹ *ibid* 8

¹⁶² Rawling, Barnes and Markey, 'Legislative regulation of global value chains to protect workers: A preliminary assessment' 673

3. Due Diligence

3.1 Concept

It has been suggested that due diligence bears two different concepts: business people see it as a way to manage risks, whereas human rights lawyers view it as a standard of conduct in order to discharge an obligation.¹⁶³ From a business standpoint, due diligence is viewed as a “process of investigation conducted by a business to identify and manage commercial risks,” commonly used in the areas of mergers and acquisitions, to confirm facts and data and determine value, price and risks of such transactions.¹⁶⁴ Nevertheless, it is not confined to these examples and might be used in any processes run to identify risks, in the company’s own interest.¹⁶⁵ Trebilcock explains that the term “due diligence” surfaced in the US at the time of the 1929 crash in order to improve the protection of investors, with the Securities Act 1933.¹⁶⁶ From then on, the epithet was applied to other transactions and operational activities¹⁶⁷ and, arguably, all companies develop some degree of due diligence, while larger organisations have more structured and formal processes.¹⁶⁸

On the other hand, from a standard of conduct standpoint, its origins date back to Roman Law, under which a person would be considered liable for accidental harm caused to others in case he or she failed to meet standards of a diligent “head of a household.”¹⁶⁹ It then formed the basis for the development of the “reasonable man” test in English law of

¹⁶³ Jonathan Bonnitcha and Robert McCorquodale, 'The concept of "due diligence" in the UN Guiding Principles on Business and Human Rights' (2017) 28 *European Journal of International Law* 899, 900

¹⁶⁴ *ibid* 901

¹⁶⁵ *ibid* 902

¹⁶⁶ Anne Trebilcock, 'Due diligence on labour issues – Opportunities and limits of the UN Guiding Principles on Business and Human Rights', *Research Handbook on Transnational Labour Law* (Edward Elgar Publishing 2015) 93

¹⁶⁷ *ibid* 93

¹⁶⁸ Olga Martin-Ortega, 'Human Rights Due Diligence for Corporations: From Voluntary Standards to Hard Law at Last?' (2014) 32 *Netherlands Quarterly of Human Rights* 44, 52

¹⁶⁹ Bonnitcha and McCorquodale, 'The concept of "due diligence" in the UN Guiding Principles on Business and Human Rights' 902

negligence and similar standards in civil legal systems, and passed into international law.¹⁷⁰ In this context, the term was initially used to define the legal obligations of states to make all reasonable efforts to protect foreigners in host states.¹⁷¹ The standard is not generally defined and has to be examined under the context in which it is applied, featuring some flexibility.¹⁷²

Later, the term began to be used to refer to states' obligation to engage in fact-finding towards non-state actors (such as companies), with regard to international human rights law.¹⁷³ In this sense, its concept plays an important role by setting the extent of a state's obligation to prevent and respond to human rights violations committed by private actors within its jurisdiction.¹⁷⁴ As such, states have the obligation to satisfy a certain standard of conduct (due diligence) in order to prevent and reply to third parties' conducts.¹⁷⁵

Therefore, in the corporate governance scenario, due diligence has customarily been used as a standard to assess corporate risk, whereas in international human rights law it has been viewed as a way to assess states' compliance with international obligations when addressing the behaviour of private actors.¹⁷⁶ One fundamental difference regarding the model adopted for due diligence inside businesses and in the human rights approach is that the former is based upon the corporation's own interest, while the latter refers to norms

¹⁷⁰ *ibid* 903

¹⁷¹ Trebilcock, 'Due diligence on labour issues – Opportunities and limits of the UN Guiding Principles on Business and Human Rights' 93

¹⁷² Martin-Ortega, 'Human Rights Due Diligence for Corporations: From Voluntary Standards to Hard Law at Last?' 53

¹⁷³ Trebilcock, 'Due diligence on labour issues – Opportunities and limits of the UN Guiding Principles on Business and Human Rights' 93

¹⁷⁴ Bonnitcha and McCorquodale, 'The concept of "due diligence" in the UN Guiding Principles on Business and Human Rights' 904

¹⁷⁵ *ibid* 904

¹⁷⁶ Martin-Ortega, 'Human Rights Due Diligence for Corporations: From Voluntary Standards to Hard Law at Last?' 45

which have been internationally defined.¹⁷⁷ This leads to a better understanding of how due diligence surfaced in recent discussions about business and human rights.

3.2 Human Rights Due Diligence

In 2008, John Ruggie, Special Representative of the UN Secretary-General, suggested a framework to address the relationship between business and human rights, which makes it the responsibility of the former to respect the latter.¹⁷⁸ In its “Protect, Respect and Remedy Framework,” the recognition of the “corporate responsibility to respect human rights” requires that companies abstain from violating the rights of others.¹⁷⁹ According to this document, to discharge that responsibility requires due diligence, understood as “steps a company must take to become aware of, prevent and address adverse human rights impacts.”¹⁸⁰ After further consultations and research, in 2011 Ruggie presented the UN Guiding Principles, which were later formally endorsed by the UN Human Rights Council,¹⁸¹ as an attempt to set up pragmatic steps towards the implementation of his previous framework.¹⁸² It could be said that “human rights due diligence” (HRDD) was born at this moment.¹⁸³

The Office of the High Commissioner for Human Rights of the UN later defined HRDD as “an ongoing management process that a reasonable and prudent enterprise needs to

¹⁷⁷ Trebilcock, 'Due diligence on labour issues – Opportunities and limits of the UN Guiding Principles on Business and Human Rights' 94

¹⁷⁸ Bonnitcha and McCorquodale, 'The concept of "due diligence" in the UN Guiding Principles on Business and Human Rights' 899

¹⁷⁹ Parella, 'Outsourcing Corporate Accountability' 773

¹⁸⁰ UNHRC, *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie* (United Nations 2008) 17

¹⁸¹ Douglass Cassell and Anita Ramasatry, 'White Paper: Options For a Treaty on Business and Human Rights' (2016) 6 *Journal of International & Comparative Law* 1, 8

¹⁸² Bonnitcha and McCorquodale, 'The concept of "due diligence" in the UN Guiding Principles on Business and Human Rights' 899

¹⁸³ Martin-Ortega, 'Human Rights Due Diligence for Corporations: From Voluntary Standards to Hard Law at Last?' 51

undertake, in light of its circumstances (including sector, operating context, size and similar factors) to meet its responsibility to respect human rights.”¹⁸⁴ McCorquodale et al argue that such a definition is useful, as it views due diligence from the standpoint of tort law language (of a reasonable or prudent person) – a common approach amongst most jurisdictions.¹⁸⁵

Some argue that due diligence appears in the core of the UNGP as a requirement for companies to respect human rights.¹⁸⁶ In this context, it is understood to be a process whereby companies “manage the risk of human rights harm” in order to prevent it, whilst ensuring compliance with domestic laws.¹⁸⁷ Its use has been suggested as a “clever and deliberate tactic,” as the term was already being used by business people and human rights lawyers.¹⁸⁸ But the idea that due diligence process is “at the heart” of the UN Guiding Principles is contested by Ruggie et al, who regard the “protect, respect and remedy” framework as rather more complex.¹⁸⁹

From a different standpoint, Martin-Ortega states that Ruggie’s Framework proposed a new standard for due diligence, mixing elements from the corporate governance model (e.g., pre-risk identification as a systematic exercise) and from the international human rights one (e.g., the need for remediation of harms).¹⁹⁰ After analysing several international instruments on the topic, she concludes that HRDD for corporate activities is evolving as a “hybrid”

¹⁸⁴ Robert McCorquodale and others, 'Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises' (2017) 2 Business and Human Rights Journal 195, 198

¹⁸⁵ *ibid* 198

¹⁸⁶ Bonnitcha and McCorquodale, 'The concept of "due diligence" in the UN Guiding Principles on Business and Human Rights' 900

¹⁸⁷ Parella, 'Outsourcing Corporate Accountability' 773

¹⁸⁸ Bonnitcha and McCorquodale, 'The concept of "due diligence" in the UN Guiding Principles on Business and Human Rights' 900

¹⁸⁹ John Gerard Ruggie and John F. Sherman III, 'The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale' (2017) 28 European Journal of International Law 921, 923

¹⁹⁰ Martin-Ortega, 'Human Rights Due Diligence for Corporations: From Voluntary Standards to Hard Law at Last?' 56-57

between the “traditional due diligence standard” and that of the international human rights.¹⁹¹

As one can see, the concept of due diligence is still under development.¹⁹² Moreover, a further challenge is to clarify the boundaries and limits of the effort placed by companies and the entities towards it should aim (whether direct contractors only or the entire supply chain).¹⁹³ Besides, in the context of liability, there is an issue as to whether it constitutes an obligation of means or of result.¹⁹⁴ Nevertheless, due diligence requirements are currently one of the most common methods used to attach corporate responsibility to human rights in law.¹⁹⁵ To this end, transparency laws and HRDD regulations have surfaced targeting human rights violations in MNE’s global supply chains.¹⁹⁶ The next section will scrutinise current regulatory approaches.

3.3 Regulation

3.3.1 Disclosure mechanisms

Research has shown that different regulatory approaches towards due diligence can be traced.¹⁹⁷ Firstly, due diligence can be encouraged through disclosure mechanisms.¹⁹⁸ Measures which focus on transparency seek the improvement of accountability through several tools (e.g., consumer awareness and action), which might “push or nudge”

¹⁹¹ *ibid* 72

¹⁹² Radu Mares, 'The Limits of Supply Chain Responsibility: A Critical Analysis of Corporate Responsibility Instruments' (2010) 79 *Nordic Journal of International Law* 193, 197

¹⁹³ *ibid* 197

¹⁹⁴ Trebilcock, 'Due diligence on labour issues – Opportunities and limits of the UN Guiding Principles on Business and Human Rights' 94

¹⁹⁵ S. Cossart, J. Chaplier and T. Beau De Lomenie, 'The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All' (2017) 2 *Business and Human Rights Journal* 317, 318

¹⁹⁶ Mares, 'Legalizing Human Rights Due Diligence and the Separation of Entities Principle', 277

¹⁹⁷ Mark Taylor, 'Due Diligence: A Compliance Standard for Responsible European Companies' (2014) *European Company Law* 86, 87

¹⁹⁸ *ibid* 87

corporations to free their GSCs from labour exploitation.¹⁹⁹ As such, the California Act, the first attempt from a governmental entity to codify supply chain disclosures,²⁰⁰ does not require companies to act against violations of human rights in their supply chains, but to disclose information regarding their efforts on such a path.²⁰¹ It requires companies (retailers and manufacturers operating in California) with annual worldwide gross receipts that exceed US\$100 million to disclose on their websites their efforts to “eradicate slavery and human trafficking from its direct supply chain for tangible goods offered for sale”.²⁰²

The underpinning rationale is that through the information provided, consumers may exercise “ethical shopping,” and NGOs and politicians may use “shame” to improve corporations’ behaviour.²⁰³ It thus relies on non-state actors to exercise public pressure on corporations.²⁰⁴ They also aim to provide organisations with a better understanding of their own risks and impacts in their supply chains.²⁰⁵ The Act increases the pressure on global buyers to perform due diligence along their supply chains,²⁰⁶ without expressly referring to it. It could be said that it embraces “a reflexive law approach” by not being prescriptive as to what steps a firm should take concerning the due diligence of its suppliers.²⁰⁷

Another example is the UK’s Modern Slavery Act, which requires commercial

¹⁹⁹ Marieke Koekkoek, Axel Marx and Jan Wouters, 'Monitoring Forced Labour and Slavery in Global Supply Chains: The Case of the California Act on Transparency in Supply Chains' (2017) 8 Global Policy 522, 523

²⁰⁰ Benjamin Thomas Greer and Jeffrey G. Purvis, 'Corporate supply chain transparency: California's seminal attempt to discourage forced labour' (2016) 20 The International Journal of Human Rights 55, 56

²⁰¹ Koekkoek, Marx and Wouters, 'Monitoring Forced Labour and Slavery in Global Supply Chains: The Case of the California Act on Transparency in Supply Chains' 524

²⁰² California Transparency in Supply Chains Act

²⁰³ Stephen John New, 'Modern slavery and the supply chain: the limits of corporate social responsibility?' (2015) 20 Supply Chain Management: An International Journal 697, 700

²⁰⁴ Parella, 'Outsourcing Corporate Accountability' 804

²⁰⁵ Olga Martin-Ortega, 'Human Rights Risks in Global Supply Chains: Applying the UK Modern Slavery Act to the Public Sector' (2017) 8 Global Policy 512, 514

²⁰⁶ Parella, 'Outsourcing Corporate Accountability' 804

²⁰⁷ *ibid* 804

organisations to “prepare a slavery and human trafficking statement.”²⁰⁸ This statement may include information about its “due diligence processes in relation to slavery and human trafficking in its business and supply chains.”²⁰⁹ There is no prescription as to the procedural steps the company should take. Finally, it leaves companies to decide whether they are going to address forced labour or slavery in their GSCs, as they can be compliant with the law by merely publishing a statement.²¹⁰

Both the California Act and UK’s Modern Slavery Act models can be classified as mandatory transparency, as they require companies to disclose the steps taken (if any) to tackle modern slavery in their supply chains and regular operations.²¹¹ As such, due diligence is not a requirement, but it may feature in the disclosed information. Some flaws in this kind of legislation have been pointed out elsewhere, such as the limited information required to be disclosed, the lack of obligation to report in the jurisdiction where the violation has happened, the poor enforcement structure and the lack of financial penalties in the case of non-compliance.²¹² Furthermore, they do not establish rules for parents of subcontracting companies in terms of liability.²¹³

3.3.2 Public procurement due diligence

Another approach regards due diligence as a conditionality for obtaining benefits from the state, such as the award of public contracts.²¹⁴ In this instance, states may play an important

²⁰⁸ Modern Slavery Act s.54(1)

²⁰⁹ *ibid* s.54(5)(c)

²¹⁰ Genevieve Lebaron and Andreas Rühmkorf, 'Steering CSR Through Home State Regulation: A Comparison of the Impact of the UK Bribery Act and Modern Slavery Act on Global Supply Chain Governance' (2017) 8 Global Policy 15, 20

²¹¹ Centre, *Modern Slavery in Company Operation and Supply Chains : Mandatory transparency, mandatory due diligence and public procurement due diligence* 4

²¹² Turner, 'Transnational Supply Chain Regulation: Extraterritorial Regulation as Corporate Law's New Frontier' 204

²¹³ Nicolas Bueno, 'Corporate liability for violations of the human right to just conditions of work in extraterritorial operations' (2017) 21 The International Journal of Human Rights 565, 580

²¹⁴ Taylor, 'Due Diligence: A Compliance Standard for Responsible European Companies' 88

role as economic actors, especially through public procurement, which has the potential to become a powerful avenue to respect, protect and promote human rights in GSCs.²¹⁵ To better understand that potential, one must bear in mind that public procurement accounts globally for one thousand billion euros annually, and governments in OECD countries spend on average just above 19% of their GDP on it.²¹⁶

In that context, the 2014 EU Directive on Procurement requires countries to implement contract performance conditions in which suppliers have to comply with the fundamental ILO Conventions, amongst other social and environmental standards.²¹⁷ County Councils in Sweden require contractors to set up due diligence processes in order to “identify and mitigate risks of adverse impacts in the production of goods or services.”²¹⁸ In Denmark, all suppliers signing a contract with the country’s central purchasing body agree to follow its “Framework Agreement,” which provides a basis for requesting that suppliers undertake due diligence based on the OECD Guidelines.”²¹⁹ Moreover, maintaining policies in order to respect human rights might affect not only the award of public procurement, but also the investment of state funds, and other kinds of trade and investment support.²²⁰

3.3.3 Mandatory due diligence

A third regulatory approach emerges through adopting due diligence as a form of regulatory or legislation compliance.²²¹ In that context, some existing international standards highlight

²¹⁵ Martin-Ortega, 'Human Rights Risks in Global Supply Chains: Applying the UK Modern Slavery Act to the Public Sector' 513

²¹⁶ *ibid* 514

²¹⁷ Centre, *Modern Slavery in Company Operation and Supply Chains : Mandatory transparency, mandatory due diligence and public procurement due diligence* 5

²¹⁸ *ibid* 23

²¹⁹ *ibid* 23

²²⁰ Cossart, Chaplier and Beau De Lomenie, 'The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All' 319

²²¹ Taylor, 'Due Diligence: A Compliance Standard for Responsible European Companies' 88

the role played by due diligence in identifying and preventing human rights violations.²²² For instance, the legally binding ILO's Protocol to the Forced Labour Convention of 1930 expressly refers to the support of due diligence by both the public and private sectors as one of the measures to be taken for the prevention of forced labour.²²³

Furthermore, due diligence might prove beneficial not only by encouraging or requiring companies to implement internal processes of investigation and control, but also by establishing liability.²²⁴ Some regulatory schemes even combine these two ideas in various ways.²²⁵ For instance, the French law builds on the legal concept of “devoir de vigilance” (duty of care) mirroring the definition of business responsibility elaborated by the UN Guiding Principles.²²⁶ It requires companies to develop and implement a disclosed due diligence plan.²²⁷ But it also provides a precise “operational explanation” of how a corporation should behave by taking responsibility for its social impacts – a due diligence provision in essence.²²⁸

Besides the French law, the Swiss Responsible Business Initiative also establishes civil liability for a company's failure to act with due diligence.²²⁹ This initiative achieved the threshold of 100,000 signatures from Swiss citizens and will involve a partial revision of the Swiss Constitution, introducing article 101a, entitled “Responsibility of Business.”²³⁰

²²² Centre, *Modern Slavery in Company Operation and Supply Chains : Mandatory transparency, mandatory due diligence and public procurement due diligence* 4

²²³ ILO, *Protocol P029: Protocol of 2014 to the Forced Labour Convention, 1930 (103rd ILC session Geneva 11 Jun 2014)*

²²⁴ Bonnitcha and McCorquodale, 'The concept of "due diligence" in the UN Guiding Principles on Business and Human Rights' 907

²²⁵ *ibid* 907

²²⁶ Taylor, 'Due Diligence: A Compliance Standard for Responsible European Companies'

²²⁷ Centre, *Modern Slavery in Company Operation and Supply Chains : Mandatory transparency, mandatory due diligence and public procurement due diligence* 17

²²⁸ Taylor, 'Due Diligence: A Compliance Standard for Responsible European Companies' 87

²²⁹ Cossart, Chaplier and Beau De Lomenie, 'The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All' 318

²³⁰ Nicolas Bueno, 'The Swiss Popular Initiative on Responsible Business: From Responsibility to Liability' in LFH Enneking and others (eds), *Accountability and International Business Operations:*

This provision requires corporations to establish due diligence processes, covering human rights and environmental impacts.²³¹ As explained in the text of the initiative, the due diligence provision is based on the UNGP and the OECD Guidelines for MNEs.²³² Both the French Law and the Swiss Initiative set up a duty of care and the opportunity for injured parties to bring tort action and claim remedy, irrespective of where the harm occurred.²³³ These initiatives highlight the role played by due diligence in identifying and preventing risks to human rights, including those related to labour standards.²³⁴ They have henceforth been categorised as “mandatory due diligence.”²³⁵

Finally, a fourth regulatory approach could be said to combine aspects of disclosure with conditionality to access state benefits and binding due diligence rules, in order to establish a framework to tackle non-compliance issues more effectively.²³⁶ For instance, the Dutch Child Labour Due Diligence Law (“Wet Zorgplicht Kinderarbeid”) was adopted by the Dutch Parliament in 2017 and introduced a duty of care to prevent child labour – but the bill has still to be put before the Senate.²³⁷ It compels corporations to develop and carry out an “action plan,” which must be approved by the government, to prevent the use of child labour.²³⁸ Comprising a mandatory due diligence provision, it requires that companies based in the Netherlands comply with the ILO’s Child Labour Guidance Tool for Business.²³⁹

Providing Justice for Corporate Violations of Human Rights and Environmental Standards (Forthcoming edn, Routledge 2018) 12

²³¹ *ibid* 13-14

²³² *ibid* 14

²³³ Cossart, Chaplier and Beau De Lomenie, 'The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All' 319

²³⁴ Centre, *Modern Slavery in Company Operation and Supply Chains : Mandatory transparency, mandatory due diligence and public procurement due diligence* 4

²³⁵ *ibid* 18

²³⁶ Taylor, 'Due Diligence: A Compliance Standard for Responsible European Companies' 88

²³⁷ Centre, *Modern Slavery in Company Operation and Supply Chains : Mandatory transparency, mandatory due diligence and public procurement due diligence* 18

²³⁸ *ibid* 18

²³⁹ Bueno, 'The Swiss Popular Initiative on Responsible Business: From Responsibility to Liability ', 18

Additionally, they must release a “due diligence statement” on the action plan to the Dutch Consumer and Market Authority, and failure to submit one is punishable by fine.²⁴⁰

Nevertheless, some studies suggest that many firms will only implement due diligence if they are able to foresee a short-term economic benefit or when they are compelled by law to implement those processes.²⁴¹ Thus, legislation which requires reporting might not be sufficient to avoid the violation of labour rights, as this requires changes to corporate strategies, through the adoption, *inter alia*, of mandatory due diligence processes.²⁴² The establishment of procedural standards, their content and how they might relate to labour inspectorates is the focus of the next section.

3.4 Procedural standards

3.4.1 In the UN Guiding Principles

According to the UN Guiding Principles, the due diligence process should contain the following steps: a) identification of the enterprise’s possible adverse human rights impacts, which might involve consultation with other relevant stakeholders; b) assessment of such impacts; c) prevention and mitigation of these impacts (remediation in cases where they have occurred); d) accountability for how they have been addressed; e) integration of the assessments across relevant internal functions and processes; f) verification of whether the impacts are being addressed and tracking of responses; g) tracking of the effectiveness of such responses; h) communication on how the impacts were addressed (but it does not

²⁴⁰ Centre, *Modern Slavery in Company Operation and Supply Chains : Mandatory transparency, mandatory due diligence and public procurement due diligence* 18

²⁴¹ Hannes Hofmann, Martin Schleper and Constantin Blome, 'Conflict Minerals and Supply Chain Due Diligence: An Exploratory Study of Multi-tier Supply Chains' (2018) 147 *Journal of Business Ethics* 115, 136

²⁴² Turner, 'Transnational Supply Chain Regulation: Extraterritorial Regulation as Corporate Law's New Frontier' 209

specify to whom).²⁴³

Three primary elements concerning the implementation of due diligence can be identified in the UNGP.²⁴⁴ The first main aspect of HRDD includes the identification of actual or potential human rights impacts, through a “human rights impact assessment.”²⁴⁵ An empirical study showed that this is usually done by desktop research and studies (e.g., internet searches, sanctions lists and other database searches), internal or external audits, investigations, independent expert reports and grievance mechanisms.²⁴⁶ At this stage, it seems to be common practice to hold a consultation with stakeholders, such as local communities, employees, suppliers and trade unions.²⁴⁷ However, whereas the UNGP uses a wide range of stakeholders, which might even include governmental bodies, studies show that companies so far have had a limited view of the concept.²⁴⁸ Besides, it is left to the company to determine the level of engagement with relevant stakeholders, which might lead to superficial exercises which do not have any impact on the assessment.²⁴⁹

A second element of HRDD implementation under the UNGP requires that companies take action to address actual or potential human rights impacts and incorporate any findings from their assessments into their internal functions and processes.²⁵⁰ In this context, the main advantage of HRDD is that it could provide the existing systems of corporate control with

²⁴³ Trebilcock, 'Due diligence on labour issues – Opportunities and limits of the UN Guiding Principles on Business and Human Rights' 99

²⁴⁴ McCorquodale and others, 'Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises' 204-205

²⁴⁵ *ibid* 205

²⁴⁶ *ibid* 208

²⁴⁷ *ibid* 208

²⁴⁸ *ibid* 210

²⁴⁹ James Harrison, 'Establishing a meaningful human rights due diligence process for corporations: learning from experience of human rights impact assessment' (2013) 31 *Impact Assessment and Project Appraisal* 107, 114

²⁵⁰ McCorquodale and others, 'Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises' 212

its conclusions, embedding itself in such mechanisms.²⁵¹ The third main element of HRDD under the UNGP involves monitoring any adverse human rights impacts through tracking and feedback, which can be done by using benchmarking tools and indicators.²⁵² Another tool is the use of grievance mechanisms which could raise disputes about payment or sexual harassment incidents, and whistleblowing channels, targeting other labour issues.²⁵³

All in all, the monitoring procedure drawn up by the UNGP is mainly an “internal affair,” executed by the business with optional involvement of the stakeholders.²⁵⁴ Nevertheless, one must bear in mind that the UNGP is only recommendatory and its due diligence process is voluntary.²⁵⁵ Besides, it seems that HRDD is easier said than done.²⁵⁶ In this regard, there is disparity amongst due diligence practices, as international regulation is just beginning to surface.²⁵⁷ Developments in law are arguably an important factor with regard to how companies implement HRDD, as they would rather have clear regulation instead of “uncertainty and inconsistency.”²⁵⁸ The next section will examine the binding regulation in domestic legislation.

²⁵¹ Trebilcock, 'Due diligence on labour issues – Opportunities and limits of the UN Guiding Principles on Business and Human Rights' 102

²⁵² McCorquodale and others, 'Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises' 218

²⁵³ *ibid* 219

²⁵⁴ Manuel Antonio García-Muñoz Alhambra, Beryl ter Haar and Attila Kun, 'Independent Monitoring of Private Transnational Regulation of Labour Standards: a Proposal for a "Transnational Labour Inspectorate" System' in Edoardo Ales and Iacopo Senatori (eds), *The transnational dimension of labour relations: a new order in the making? Atti dell'11 convegno internazionale in ricordo di Marco Biagi* (Torino: Giappichelli 2013) 261

²⁵⁵ Adelle Blackett and Anne Trebilcock, 'Conceptualizing transnational labour law', *Research Handbook on Transnational Labour Law* (2015) 104

²⁵⁶ Kendyl Salcito and Mark Wielga, 'What does Human Rights Due Diligence for Business Relationships Really Look Like on the Ground?' (2018) 3 *Business and Human Rights Journal* 113, 114

²⁵⁷ Hofmann, Schleper and Blome, 'Conflict Minerals and Supply Chain Due Diligence: An Exploratory Study of Multi-tier Supply Chains' 117

²⁵⁸ McCorquodale and others, 'Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises' 223

3.4.2 In domestic extraterritorial legislation

The California Act demands that companies disclose “to what extent, if any,” whether they:

a) verify their product supply chains; b) audit their suppliers; c) require certifications from direct suppliers; d) maintain internal accountability; e) train employees and management.²⁵⁹

It is thus possible to name five elements in their process: verification, auditing, certification, internal accountability, and training.²⁶⁰ Nevertheless, the Act does not require covered companies to follow any of these five steps,²⁶¹ as decided by California’s court in *Wirth v Mars*.²⁶²

Explicitly referring to the UNGP, the Swiss initiative requires companies to “review all their business relationships and activities to identify potential human rights risks; take effective measures to address the negative impacts identified; and report transparently on the violations and mitigation measures.”²⁶³ On the other hand, the French law does not refer to the UNGP and specifies the due diligence plan content, which must include: a) risk mapping for the identification, analysis and prioritisation of risks; b) procedures for regular assessment of the situation of the company’s subsidiaries, subcontractors or suppliers; c) appropriate actions to mitigate and prevent human rights (and environmental) violations; d) whistleblowing mechanisms; e) tools for monitoring and assessing the effectiveness of the measures taken.²⁶⁴ The plan is intended to be developed in association with stakeholders

²⁵⁹ Centre, *Modern Slavery in Company Operation and Supply Chains : Mandatory transparency, mandatory due diligence and public procurement due diligence*

²⁶⁰ Yoon Jin Ma, Hyun-Hwa Lee and Kylie Goerlitz, 'Transparency of Global Apparel Supply Chains: Quantitative Analysis of Corporate Disclosures' (2016) 23 Corporate Social Responsibility and Environmental Management 308, 310

²⁶¹ Justine Nolan, 'Human Rights and Global Corporate Supply Chains' in David Bilchitz and Surya Deva (eds), *Building a Treaty on Business and Human Rights: Context and Contours* (Cambridge University Press 2017) 250

²⁶² Centre, *Modern Slavery in Company Operation and Supply Chains : Mandatory transparency, mandatory due diligence and public procurement due diligence* 11

²⁶³ *ibid* 17-18

²⁶⁴ *ibid* 17

or within multi-party initiatives.²⁶⁵ Furthermore, a decree of application might provide further details on the content of the plan.²⁶⁶ As one can see, none of the current procedural standards for due diligence establish a clear relationship with local enforcement agencies, which include labour inspectorates. Nonetheless, as shown below, some of the OECD's documents incidentally touch on that point.

3.4.3 Labour inspectorates in the scope of risk assessment

Due diligence should meet nationally or internationally recognised standards, such as those provided by the OECD,²⁶⁷ “a global forum for all types of issues, including social ones.”²⁶⁸ Although the documents it produces are categorised as promotional and encouraging (mere “soft law”), some of them have been promoting, explicitly and incrementally, principles that support international labour law.²⁶⁹ In the context of GSCs and labour issues, two recent documents intend to provide businesses with specific guidance on due diligence.

The first, the 2017 OECD's Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector, states that due diligence should be risk-based, and conducted based on the likelihood and the severity of the harm.²⁷⁰ The same document states, as an example, that “if an enterprise is sourcing from a country with a weak labour inspectorate, the measures that the enterprise will need to take to prevent child labour, forced labour and other labour impacts will be more extensive than the measures an enterprise may need to take if sourcing from a supplier operating in a jurisdiction with a

²⁶⁵ Cossart, Chaplier and Beau De Lomenie, 'The French Law on Duty of Care: A Historic Step Towards Making Globalization Work for All' 320

²⁶⁶ *ibid* 320

²⁶⁷ Sarfaty, 'Shining Light on Global Supply Chains' 422

²⁶⁸ Thouvenin Jean-Marc, 'Diffusion and leveraging of transnational labour norms by the OECD' in Adelle Blackett and Anne Trebilcock (eds), *Research Handbook on Transnational Labour Law* (Edward Elgar Publishing 2015) 386

²⁶⁹ *ibid* 391

²⁷⁰ OECD, *OECD Due Diligence Guidance for Responsible Supply Chains in the Garment and Footwear Sector* (OECD 2017) 21

strong labour inspectorate.”²⁷¹ Another document with such a view is the 2018 OECD Due Diligence Guidance for Responsible Business Conduct (RBC), which uses the “strength of inspectorates” as an example of geographic risk factors for companies, in terms of governance.²⁷²

Both documents seem to reinforce the perspective of due diligence as managing firms’ risks, bearing in mind the idea that an incident of harm outside the company could lead to reputational loss.²⁷³ They are also in line with the General Policies of the OECD Guidelines for MNEs which define due diligence as a risk assessment tool.²⁷⁴ However, these statements also seem to support the following: a) labour inspectorates are the traditional method in terms of enforcement of labour standards and b) the possibility of assessing the “strength” of labour inspectorates. Although the OECD Due Diligence Guidance for RBC does mention that businesses should encourage “relevant authorities in the country where the impact is occurring to act,”²⁷⁵ in general, labour inspectorates and due diligence processes seem to be treated at arm’s length. This standpoint is analysed in the following chapter, which still proposes a different relationship between those institutions.

4. Labour Inspectorates

4.1 According to the OECD’s guidance

4.1.1 Traditional method of enforcement

Labour law research does not only encompass “forms and legalities,” but also the idea of effectiveness of regulation in terms of achieving its objectives, i.e., the link between

²⁷¹ *ibid* 21

²⁷² OECD, *OECD Due Diligence Guidance for Responsible Business Conduct* (OECD 2018) 63

²⁷³ Trebilcock, 'Due diligence on labour issues – Opportunities and limits of the UN Guiding Principles on Business and Human Rights' 102

²⁷⁴ Martin-Ortega, 'Human Rights Due Diligence for Corporations: From Voluntary Standards to Hard Law at Last?' 56

²⁷⁵ OECD, *OECD Due Diligence Guidance for Responsible Business Conduct* 31

regulation and compliance.²⁷⁶ In that sense, the design of labour market institutions is only one side of the coin; the other side concerns enforcement and making those institutions work.²⁷⁷ Nevertheless, not only regulatory, but also enforcement gaps around labour standards in GSCs have been broadly reported in the literature.²⁷⁸ In the absence of an adequate system of enforcement, labour law might remain “declarations of good intentions.”²⁷⁹ A crucial component of such system is labour inspection,²⁸⁰ especially in developing countries.²⁸¹

Labour inspectorates are, overall, agencies responsible for enforcing labour law.²⁸² In 1919, the ILO’s Constitution required nations to set up systems of labour inspection to assure compliance with domestic labour legislation.²⁸³ The ILO’s Labour Inspection Convention number 81 (1947) sets up the basic features of that system, such as inspectors’ accountability to a central authority, free entrance in any workplace and without prior notice, the possibility of applying adequate penalties for non-compliance, and the possibility of providing advice concerning compliance.²⁸⁴ This instrument arguably serves as a “good guide to common features” of labour inspectorates around the world.²⁸⁵

However, some states have favoured some features contained in the ILO’s guidelines at the

²⁷⁶ John Howe, Rae Cooper and Keith Townsend, 'Labour regulation now and in the future: Current trends and emerging themes' (2017) 59 *Journal of Industrial Relations* 209, 215

²⁷⁷ Matthew Amengual, 'Pathways to Enforcement: Labor Inspectors Leveraging Linkages with Society in Argentina' (2014) 67 *Industrial & Labor Relations Review* 3, 5

²⁷⁸ Lebaron and Rühmkorf, 'Steering CSR Through Home State Regulation: A Comparison of the Impact of the UK Bribery Act and Modern Slavery Act on Global Supply Chain Governance' 20

²⁷⁹ Mark Anner, 'Meeting the Challenges of Industrial Restructuring: Labor Reform and Enforcement in Latin America' (2008) 50 *Latin American Politics and Society* 33, 42

²⁸⁰ *ibid* 42

²⁸¹ Howe, Cooper and Townsend, 'Labour regulation now and in the future: Current trends and emerging themes' 215

²⁸² Amengual, 'Pathways to Enforcement: Labor Inspectors Leveraging Linkages with Society in Argentina' 5

²⁸³ Anner, 'Meeting the Challenges of Industrial Restructuring: Labor Reform and Enforcement in Latin America' 42

²⁸⁴ *ibid* 42

²⁸⁵ Giuseppe Casale, *The fundamentals of labour administration* (Geneva : ILO 2010) 44

expense of others.²⁸⁶ For instance, while some countries have opted for decentralising their inspection (e.g., UK and US), others feature more centralised structures (e.g., Brazil and Spain).²⁸⁷ While the former might provide a higher degree of specialisation, the latter could allow more coordinated enforcement procedures.²⁸⁸ Besides, some countries provide inspectors with more discretion when applying penalties than others, prioritising employer training.²⁸⁹ This model, the pedagogical approach, differs from the deterrence model, which mainly tries to raise the costs of non-compliance.²⁹⁰

Despite the different approaches found worldwide, some suggest that labour inspection is the main response to the existing gap between formal regulations and the improvement of workers' conditions across the globe.²⁹¹ These state regulators hold the monopoly of coercive powers that might be used to induce compliance, while setting standards and influencing firms' behaviour.²⁹² In that context, they may demand information, carry out inspections in facilities and check records.²⁹³ Furthermore, they might not only issue penalties and determine firm shutdowns, but also deny licences.²⁹⁴

More recently, the 2008 ILO Declaration on Social Justice for a Fair Globalization expressly mentioned the need for member states to build effective "labour inspection systems" in the context of the Decent Work Agenda.²⁹⁵ In the context of GSCs, the ILO

²⁸⁶ Anner, 'Meeting the Challenges of Industrial Restructuring: Labor Reform and Enforcement in Latin America' 42

²⁸⁷ *ibid* 43

²⁸⁸ *ibid* 43

²⁸⁹ *ibid* 43

²⁹⁰ Roberto Pires, 'Promoting sustainable compliance: Styles of labour inspection and compliance outcomes in Brazil' (2008) 147 *International Labour Review* 199, 200

²⁹¹ Matthew Amengual and Janice Fine, 'Co-enforcing Labor standards: the unique contributions of state and worker organizations in Argentina and the United States' (2017) 11 *Regulation & Governance* 129, 129

²⁹² *ibid* 132

²⁹³ *ibid* 132

²⁹⁴ *ibid* 132

²⁹⁵ International Labour Office, *ILO Declaration on Social Justice for a Fair Globalization* (ILO 2008) I.A(iii)

MNE Declaration explicitly refers to public labour inspection as one of the policies, measures and actions to be adopted by governments to further the aim of that document, especially regarding minimising and resolving “difficulties” that may arise due to MNEs’ operations.²⁹⁶ Thus, and in accordance with OECD’s guidelines, it seems that labour inspectorates are indeed the most traditional method of enforcement of labour regulation and they may play an important role in enhancing working conditions in GSCs. But is it possible to measure their “strength”?

4.1.2 The strength of labour inspectorates

The OECD Guidelines highlight the strength of labour inspectorates as a risk factor to be assessed by MNEs. However, assessing local labour inspectorates might not be a simple task. Firstly, it might be difficult to find objective parameters for such an evaluation. Although article 10 of ILO’s Convention 81 asks for a “sufficient number” of inspectors, there is no precision in that number, as many factors need to be taken into account (e.g., number and size of establishments and size of the workforce).²⁹⁷ Moreover, the ILO’s statistical dataset (ILOSTAT) only provides information on the number of inspectors and inspections per year concerning labour inspectorates for 53 countries.²⁹⁸ This information is still limited in what it tells us.

There seems to be a lack of information not only regarding the qualification and wages of inspectors, but also concerning inspection resources (e.g., computers and vehicles).²⁹⁹ Besides, some countries collect data about the total number of inspections, whereas others

²⁹⁶ Office, *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy* 2

²⁹⁷ International Labour Office, *Strategies and practice for labour inspection* (ILO 2006) 4

²⁹⁸ Kanbur Ravi and Ronconi Lucas, 'Enforcement Matters: The Effective Regulation of Labor (Accepted Author Manuscript)' (2018) Forthcoming *International Labour Review* 53

²⁹⁹ Lucas Ronconi, 'Globalization, Domestic Institutions, and Enforcement of Labor Law: Evidence from Latin America' (2012) 51 *Industrial Relations: A Journal of Economy and Society* 89, 92

raise data on the number of fines imposed or workers covered by inspections.³⁰⁰ Yet, information about the effective collection of fines applied seems to be scarce.³⁰¹ Furthermore, data concerning the qualitative aspect of the inspection (e.g., thoroughness) is also unavailable.³⁰² So, the ability to measure the capacity of labour inspectorates is hardly feasible in the absence of systematically collected data from a large number of countries over a sufficient period of time.³⁰³

Secondly, there is an issue regarding who is responsible for making the assessment of labour inspectorates' strength. Although the ILO's Committee of Experts on the Application of Conventions and Recommendations (CEACR), set up in 1926 to examine government reports on ratified conventions, publishes reports requested and replies to its comments on the Labour Inspection Convention,³⁰⁴ it does not provide an overall assessment of labour inspectorates. Besides, countries in which GSCs operate might not have even ratified that specific convention, which is the case for China, as an example.³⁰⁵

Nevertheless, labour inspectorates have generally been facing diminishing budgets and shrinking staff across the globe.³⁰⁶ In 2006, the ILO raised concern about labour inspection services in many countries not being able to perform their functions, as they were

³⁰⁰ *ibid* 92

³⁰¹ *ibid* 92

³⁰² Sabina Dewan and Lucas Ronconi, 'U.S. Free Trade Agreements and Enforcement of Labor Law in Latin America' (2018) 57 *Industrial Relations: A Journal of Economy and Society* 35, 45

³⁰³ Daniel Berliner and others, 'Building Capacity, Building Rights? State Capacity and Labor Rights in Developing Countries' (2015) 72 *World Development* 127, 129

³⁰⁴ Reports requested and replies to CEACR comments: C081 - Labour Inspection Convention, 1947 (No. 81) <

http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:14001:0::NO::P14001_INSTRUMENT_ID:312226> accessed 17 July 2018

³⁰⁵ Ratifications of C081 - Labour Inspection Convention, 1947 (No. 81)

<http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312226> accessed 6 August 2018

³⁰⁶ David Weil, 'A strategic approach to labour inspection' (2008) 147 *International Labour Review* 349, 349

“understaffed, underequipped, undertrained and underpaid.”³⁰⁷ This situation is made worse by the existence of “intricate value chains,” which demand more from inspectors.³⁰⁸ Thus, the limitations of labour inspectorates have become more evident in the current economic context, which features labour market fragmentation, informality, outsourcing and global competitive pressures.³⁰⁹ Smaller and more dispersed workplaces arguably require more inspectors in relation to the size of the workforce than an economy featuring large and geographically concentrated workplaces.³¹⁰

While labour inspectorates might play a crucial role in improving labour standards through enforcement, this is not always the case.³¹¹ Some suggest that almost every country which hosts GSCs has passed strict laws to regulate working conditions and protect workers’ rights, although in many of them inspectorates are “weak, underfunded and, at times, corrupt.”³¹² Recognising an international crisis in labour inspection, the ILO has asked states to strengthen and modernise their labour inspectorates.³¹³

4.2 Responding to the crisis: a win-win game

In order to respond to the labour inspectorate crisis, two solutions usually arise. The first is to increase the number of inspectors, since studies have shown a direct relationship between the size of inspectorates and the positive outcomes.³¹⁴ For instance, in the aftermath of the

³⁰⁷ Office, *Strategies and practice for labour inspection* 4

³⁰⁸ Amengual and Fine, 'Co-enforcing Labor standards: the unique contributions of state and worker organizations in Argentina and the United States' 130

³⁰⁹ Anner, 'Meeting the Challenges of Industrial Restructuring: Labor Reform and Enforcement in Latin America' 44

³¹⁰ *ibid* 44

³¹¹ Amengual, 'Pathways to Enforcement: Labor Inspectors Leveraging Linkages with Society in Argentina' 29

³¹² Greg Distelhorst and others, 'Production goes global, compliance stays local: Private regulation in the global electronics industry' (2015) 9 *Regulation & Governance* 224, 232

³¹³ Weil, 'A strategic approach to labour inspection' 349

³¹⁴ Amengual and Fine, 'Co-enforcing Labor standards: the unique contributions of state and worker organizations in Argentina and the United States' 130

Rana Plaza tragedy, the government of Bangladesh started a “National Tripartite Plan of Action on Fire Safety” which identified the relevant issues necessary to change the garment sector, including the recruitment of additional factory inspectors.³¹⁵

The second standpoint relies not on the quantity of inspectors, but on the efficacy of the way they work.³¹⁶ GSCs pose a massive challenge for these regulatory bodies, especially in times of constrained resources, as they make non-compliance detection difficult and burdensome.³¹⁷ Furthermore, the existence of a great number of workplaces challenges the “workplace-by-workplace” model of investigation.³¹⁸ In that sense, enforcement agencies should focus their attention on where incentives for low-tiered employers begin, rather than where problems occur.³¹⁹ For instance, Weil calls the “strategic approach” for labour inspection a standpoint that focusses on where, when and how interventions are made.³²⁰ This response to limited resources and the variety of current workplace situations is based on four pillars: prioritisation, deterrence, sustainability and systemic effects.³²¹

This is one of the theoretical models that have emerged in the last 15 years in the context of “responsive regulation,” which mixes deterrence and persuasive approaches.³²² Besides stemming from the lack of adequate resources of enforcement agencies, these theories recognise that social problems, interests and interactions are complex and that knowledge, information and regulatory powers are fragmented.³²³ Finally, they incentivise a regulatory

³¹⁵ Labowitz and Baumann-Pauly, *Business as Usual is Not an Option* 35

³¹⁶ Amengual and Fine, 'Co-enforcing Labor standards: the unique contributions of state and worker organizations in Argentina and the United States' 130

³¹⁷ Hardy and others, 'Chain reaction: A strategic approach to addressing employment noncompliance in complex supply chains' 564

³¹⁸ Weil, *The Fissured Workplace* 220

³¹⁹ *ibid* 220

³²⁰ Weil, 'A strategic approach to labour inspection' 353

³²¹ *ibid* 353

³²² Ockert Dupper, Colin Fenwick and Tess Hardy, *The interaction of labour inspection and private compliance initiatives : a case study of Better Work Indonesia* (ILO 2016) 5

³²³ *ibid* 6

approach that may “harness and exploit the resources of non-state actors,”³²⁴ which could be achieved through a more effective interaction of labour inspectorates with businesses, through due diligence processes. Such a standpoint seems to be in line with the complexity of GSCs.

The “pro-active function” of labour inspectorates, targeting compliance through positive support,³²⁵ is also compatible with the ILO’s current regulation on labour inspection systems. According to the ILO Convention 81, the “effective co-operation between the inspection services and ... private institutions engaged in similar activities” should be promoted.³²⁶ However, the participation of labour inspectorates in due diligence processes could also be desired by businesses.

Firstly, although due diligence processes are “self-reflective” by nature, there is a clear need for companies to engage with “actors outside the corporation.”³²⁷ Such a standpoint is more coherent with the HRDD idea, which focusses on the prevention of the impact on the rights-holder, rather than only on “enterprise-related business risks.”³²⁸ As HRDD is not specific to the company (or its economic group), it should include third parties with which it has relationships.³²⁹ Corporations should therefore acknowledge that they have a new compliance challenge to tackle, which requires the deployment of new tools and a shift towards a compliance culture.³³⁰ Labour inspectorates could provide a necessary help.

³²⁴ *ibid* 6

³²⁵ García-Muñoz Alhambra, Haar and Kun, 'Independent Monitoring of Private Transnational Regulation of Labour Standards: a Proposal for a "Transnational Labour Inspectorate" System' 262

³²⁶ ILO, *Convention C081: Labour Inspection Recommendation (Convention concerning Labour Inspection in Industry and Commerce)* (30th Conference Session Geneva 11 July 1947) Art. 5(a)

³²⁷ Harrison, 'Establishing a meaningful human rights due diligence process for corporations: learning from experience of human rights impact assessment' 113

³²⁸ McCorquodale and others, 'Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises' 199

³²⁹ *ibid* 200

³³⁰ Sarfaty, 'Shining Light on Global Supply Chains' 458

Secondly, the interaction with labour inspectorates could lead to the improvement of their reputation, especially amongst consumers and investors.³³¹ Transnational private monitoring focusses on brands and on their GSCs, features a non-hierarchical governance structure, and bears a networked and multi-stakeholder approach, which usually includes the management of the lead-company, representatives of workers and NGOs.³³² Conversely, state-based labour inspectorates are usually branch/sector/factory-centred and have a hierarchical organisational structure.³³³ Their independence could provide some assurance for transnational and private forms of monitoring which feature a high level of economic dependence in relation to the MNEs.³³⁴

Thirdly, while state labour inspection is usually perceived as a burden on businesses' productivity and competitiveness, it may also have a beneficial impact on social and economic development, as it can lead to constructive changes in firms (e.g., through legal and managerial advancement).³³⁵ This could result not only in management improvement and reduction of costs,³³⁶ but also the mitigation of potential risks.³³⁷ The interaction between these two entities could still reduce adversarial costs.³³⁸

Besides being beneficial to both labour inspectorates and businesses, there are further reasons for that interaction in terms of the effectiveness of labour law. According to Doorey, empowering local states is one of the most effective ways to improve labour

³³¹ *ibid* 459

³³² García-Muñoz Alhambra, Haar and Kun, 'Independent Monitoring of Private Transnational Regulation of Labour Standards: a Proposal for a "Transnational Labour Inspectorate" System' 257

³³³ *ibid* 257

³³⁴ *ibid* 262

³³⁵ *ibid* 266

³³⁶ Sarfaty, 'Shining Light on Global Supply Chains' 460

³³⁷ *ibid* 459

³³⁸ Dupper, Fenwick and Hardy, *The interaction of labour inspection and private compliance initiatives : a case study of Better Work Indonesia* 7

practices, as they develop countervailing powers to those of global and domestic capital.³³⁹ In this context, the literature suggests that the particular features of private regulatory efforts have limited effects on improving working conditions, which are driven rather by domestic states' institutions.³⁴⁰ Nevertheless, private regulation can enhance local regulatory institutions by, for instance, either calling attention to violations or by incentivising management to address them in order to avoid state regulatory sanctions.³⁴¹ Arguably, neither state regulation nor private voluntary regulation alone is efficient, thus a combination of both is needed in order to enhance labour standards in GSCs.³⁴² The following section will explore this standpoint.

4.3 A way forward: due diligence as an avenue for interaction

4.3.1 “Dialogic”³⁴³ approach

Rather than considering inspectorates as a mere factor of risk in due diligence processes, they could be seen from a complementary perspective. Kolben argues that complementary interaction between public and private regulatory regimes is possible, in which both systems promote the same objectives, while coexisting in the same policy field.³⁴⁴ Complementarity might describe the phenomenon that occurs when a private regime fills the regulatory gaps left by inadequate public regimes, allowing both regimes to target areas in which they enjoy comparative advantage.³⁴⁵ Amengual argues that this is the main driver for complementary regulation which portrays mutually supportive actions from both the

³³⁹ David J. Doorey, 'Who Made That?: Influencing Foreign Labour Practices through Reflexive Domestic Disclosure Regulation' (2005) 43 Osgoode Hall Law Journal 353, 400

³⁴⁰ Distelhorst and others, 'Production goes global, compliance stays local: Private regulation in the global electronics industry' 235

³⁴¹ *ibid* 235

³⁴² Salo V. Coslovsky and Richard Locke, 'Parallel Paths to Enforcement: Private Compliance, Public Regulation, and Labor Standards in the Brazilian Sugar Sector' (2013) 41 Politics & Society 497, 498

³⁴³ Kolben, 'Dialogic Labor Regulation in the Global Supply Chain' 445

³⁴⁴ *ibid* 443

³⁴⁵ *ibid* 444

state and private regulators.³⁴⁶ Since these entities have different structures and suffer different pressures, they make use of different tools and focus on issues which they are better suited to address, creating a “positive-sum” gain.³⁴⁷

However, complementarity also might refer to a process in which private regimes help to improve the state’s regime performance through the use of private regulatory enforcement tools.³⁴⁸ This interaction might lead to a level of hybridity in which public and private regimes are used in a holistic and integrated manner - the climax of a “new governance” model.³⁴⁹ However, in such a “hybrid system of regulation,” different forms of governance and actors have to reinforce and rely on one another.³⁵⁰ In that regard, whilst interacting they should maintain the normative value of such interaction and highlight both the theoretical and practical importance of the state in the labour governance of supply chains.³⁵¹ By reinforcing the state regulatory institutions, private transnational initiatives can be more than just “stopgap measures.”³⁵²

Kolben thus develops a “dialogic regulatory framework” to analyse the different ways in which private and public regimes interact with one another, classifying them in terms of formality (formal/informal) and intentionality (intentional/unintentional).³⁵³ While formality reflects both the setting in which the interaction happens and the level to which it is designed in the policy, intentionality reflects the “subjectivity” and performance of the

³⁴⁶ Matthew Amengual, 'Complementary Labor Regulation: The Uncoordinated Combination of State and Private Regulators in the Dominican Republic' (2010) 38 *World Development* 405, 412

³⁴⁷ *ibid* 412

³⁴⁸ Kolben, 'Dialogic Labor Regulation in the Global Supply Chain' 444

³⁴⁹ *ibid* 445

³⁵⁰ Lee, *Global supply chain dynamics and labour governance : implications for social upgrading* 19

³⁵¹ Kolben, 'Dialogic Labor Regulation in the Global Supply Chain' 429

³⁵² Matthew Amengual and Laura Chirot, 'Reinforcing the State: Transnational and State Labor Regulation in Indonesia' (2016) 69 *ILR Review* 1056, 1075

³⁵³ Kolben, 'Dialogic Labor Regulation in the Global Supply Chain' 447

individual actors concerning their interaction with their counterparts (public or private).³⁵⁴

Although these interactions might happen at the level of norm creation,³⁵⁵ the focus of this dissertation is on how it takes place at the level of enforcement.

Interactions might occur with different degrees of intentionality and formality, in various combinations, while providing positive outcomes.³⁵⁶ Nevertheless, this dissertation argues that due diligence might be used as a formal and intentional mechanism of interaction, in which the parties interact in a formal institutional setting.³⁵⁷ This is in line with the experience of previous interactions between the state and employers, where it has been shown that more formal processes are necessary in order to foster compliance.³⁵⁸ The interaction of labour inspectorates with due diligence processes could be further developed within that framework, especially given the role of the lead businesses in the economy and the shifts in modern employment.³⁵⁹ In this context, some “mechanisms of interaction”³⁶⁰ are now provided.

4.3.2 Interaction in practice

A major gap seems to exist in regulatory literature describing, both theoretically and empirically, how public and private regulatory regimes interact with each other.³⁶¹ However, the ILO’s Better Work Program could provide some insights in that regard.³⁶² The program constitutes a partnership between the ILO and the International Finance Corporation, which

³⁵⁴ *ibid* 447-448

³⁵⁵ *ibid* 448

³⁵⁶ *ibid* 448-450

³⁵⁷ *ibid* 448

³⁵⁸ Tim Bartley, 'Re-centering the State: Toward Place-conscious Transnational Governance?', *Rules without Rights* (Oxford University Press 2018) 277

³⁵⁹ Weil, *The Fissured Workplace* 287

³⁶⁰ Kolben, 'Dialogic Labor Regulation in the Global Supply Chain' 445

³⁶¹ *ibid* 441

³⁶² Shelley Marshall, 'Using Mixed Methods to Study Labour Market Institutions: The Case of Better Factories Cambodia' (2018) 27 *Social & Legal Studies* 475, 476

targets enhancing working conditions in the global garment industry.³⁶³ As of the time of writing this dissertation, it is running in nine countries around the world (Bangladesh, Cambodia, Haiti, Jordan, Lesotho, Nicaragua, Vietnam, Indonesia and Egypt – in the latter, as a pilot).³⁶⁴ It derived from the Better Factories Cambodia, a project developed in 2001 by the US government and the ILO, as the result of a trade agreement between those countries.³⁶⁵ It aimed at improving both labour conditions and the capacity of local labour inspectorates.³⁶⁶ The global Better Work program model is based on providing three kinds of services: assessment, advisory and training.³⁶⁷ The assessment of factories is conducted by Better Work employees (“Enterprise Advisors”), concerning compliance with international and domestic labour law.³⁶⁸ These assessments are used by the advisors to create and develop improvement plans, and who also conduct training using a module developed by Better Work.³⁶⁹ The program can be said to provide governments with increased market access, a better reputation for investment and enhanced capacity in labour administration.³⁷⁰

Using this program as background, this dissertation now shows that the participation of labour inspectorates in due diligence processes can happen in some ways, such as through information sharing and partnership in training. The exchange of information between inspectorates and businesses could be a game-changer whilst addressing the risks. For instance, under the Better Work Jordan program, a protocol was established in which any

³⁶³ Dupper, Fenwick and Hardy, *The interaction of labour inspection and private compliance initiatives : a case study of Better Work Indonesia* 15

³⁶⁴ BetterWork <<https://betterwork.org>> accessed 26 July 2018

³⁶⁵ Marshall, 'Using Mixed Methods to Study Labour Market Institutions: The Case of Better Factories Cambodia' 476

³⁶⁶ *ibid* 476

³⁶⁷ Kolben, 'Dialogic Labor Regulation in the Global Supply Chain' 454

³⁶⁸ *ibid* 454

³⁶⁹ *ibid* 454

³⁷⁰ Lilian Miles, 'The ‘integrative approach’ and labour regulation and Indonesia: Prospects and challenges' (2015) 36 *Economic and Industrial Democracy* 5, 17

major human rights violations (e.g, child and forced labour) would be reported by the private auditors to the local Ministry of Labour.³⁷¹ In the same way, a “Zero Tolerance Protocol” has been discussed between the Ministry of Manpower and Transmigration (to which the local labour inspectorate is linked) and Better Work Indonesia, whereby labour inspectors are to be informed within 24 hours (in writing) of the violation of important rights (e.g., sexual violence and forced labour).³⁷²

According to the literature, the combination of information gathered and shared by private auditors with state regulation has led to improved working conditions, as suppliers have a greater incentive to respond to violations (identified by private auditors) when faced with the threat of fines or other sanctions.³⁷³ This seems to be addressed in the UNGP when it states that, when lead firms lack the leverage to prevent or mitigate an adverse impact in the supply chain, they should seek to increase it by, for instance, collaborating with other actors³⁷⁴ – potentially including enforcement agencies, such as labour inspectorates.

In terms of partnership in training, the California Act expressly identifies training as one possible stage of due diligence processes. It can be important at all stages of HRDD, but especially while identifying and responding to human rights impacts.³⁷⁵ In the Better Work Jordan, there is some engagement of private auditors with the local Ministry of Labour, consisting of quarterly joint training sessions, in which best practices are shared.³⁷⁶ In July 2010, the two entities agreed on a collaboration plan which would include supplementary

³⁷¹ Kolben, 'Dialogic Labor Regulation in the Global Supply Chain' 459

³⁷² Dupper, Fenwick and Hardy, *The interaction of labour inspection and private compliance initiatives : a case study of Better Work Indonesia* 17

³⁷³ Distelhorst and others, 'Production goes global, compliance stays local: Private regulation in the global electronics industry' 235

³⁷⁴ Nations, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework* 22

³⁷⁵ McCorquodale and others, 'Human Rights Due Diligence in Law and Practice: Good Practices and Challenges for Business Enterprises' 216

³⁷⁶ Kolben, 'Dialogic Labor Regulation in the Global Supply Chain' 458-459

training and quarterly meetings between the advisors of the program and the local labour inspectorate.³⁷⁷ The importance of such actions has resulted in, for example, better interview skills and enhanced sampling methods for the local inspectorate.³⁷⁸ But this can be a two-way interaction. In Indonesia, labour inspectors worked temporarily in the Better Work team in Geneva to update Better Work's training modules.³⁷⁹ As they returned to Indonesia, they trained workers and managers of factories participating in the program.³⁸⁰

Labour inspectorates could still play an important role in other phases of the due diligence processes, such as during the design and implementation of strategies to respond to risks. In this context, the literature has recently argued that the state may collaborate with private actors through the provision of technical assistance and the support of initiatives that build local capacity, in order to avoid the “low road”.³⁸¹ This is in line with the ILO's Convention 81, which states that the functions of the labour inspection system comprise, *inter alia*, supplying “technical information and advice to employers and workers concerning the most effective means of complying with the legal provisions.”³⁸² Outside the scope of the Better Work program, but still in the context of a developing country, Brazil provides such an example.

There, labour inspectors (and prosecutors) helped small farmers to create “employers’ consortia” in order to promote the hiring of informal and temporary workers, where the farmers share some fixed costs associated with the hiring process and with the provision of

³⁷⁷ *ibid* 459

³⁷⁸ *ibid* 459

³⁷⁹ Dupper, Fenwick and Hardy, *The interaction of labour inspection and private compliance initiatives : a case study of Better Work Indonesia* 25

³⁸⁰ *ibid* 25

³⁸¹ Gary Gereffi and Joonkoo Lee, 'Economic and Social Upgrading in Global Value Chains and Industrial Clusters: Why Governance Matters' (2016) 133 *Journal of Business Ethics* 25, 34

³⁸² ILO, *Convention C081: Labour Inspection Recommendation (Convention concerning Labour Inspection in Industry and Commerce)* (30th Conference Session Geneva 11 July 1947) Art. 3.1(b)

personal protection equipment, food and transportation.³⁸³ Through this arrangement, the former temporary workers became formally employed all year long, merely moving between farms to meet the farmers' specific demands.³⁸⁴ By 2001, 3,446 farms had created 103 consortia employing 65,587 workers who became entitled to all the benefits of formal employees (e.g., social security benefits and unemployment insurance).³⁸⁵ However, this was only possible after labour inspectors (and prosecutors) convinced social security officials and labour courts that this was an innovative and lawful solution to address informality in the rural sector.³⁸⁶ This example shows that it is possible for state agents to go beyond the enforcement model (based on finding violations and imposing fines) and devise local arrangements which realign interests, reshape conflicts and redistribute businesses' risks, costs and benefits, while complying with the law.³⁸⁷ Certain caveats will nonetheless be necessary.

4.3.3 Caveats

First of all, the participation of the labour inspectorate in due diligence processes should not, in any case, be regarded as a dismissal of either later sanctioning or of further inspections, as this could undermine the deterrence principle.³⁸⁸ Arguably, the lack of possible future government sanctions leads to less willingness to establish and support ongoing monitoring regimes.³⁸⁹ Moreover, Pires shows that sanctions produce a productive dialogue and learning process, which in turn encourages a climate for change.³⁹⁰ In that

³⁸³ Salo V. Coslovsky, 'Flying Under the Radar? The State and the Enforcement of Labour Laws in Brazil' (2014) 42 *Oxford Development Studies* 190, 203

³⁸⁴ *ibid* 203

³⁸⁵ *ibid* 203

³⁸⁶ *ibid* 203

³⁸⁷ *ibid* 210

³⁸⁸ Hardy and others, 'Chain reaction: A strategic approach to addressing employment noncompliance in complex supply chains' 578

³⁸⁹ *ibid* 578

³⁹⁰ Pires, 'Promoting sustainable compliance: Styles of labour inspection and compliance outcomes in Brazil' 223

sense, sustainable compliance solutions emerge, as a combination of deterrent and pedagogical enforcement is adopted by inspectorates.³⁹¹

Secondly, the proposed interaction of labour inspectorates with due diligence processes might not be suitable for the enforcement of all labour standards. This is mainly for two reasons, the first being the natural focus of the HRDD on the “core labour standards,” which have been regarded as human rights.³⁹² Those are listed in the ILO’s Declaration of Fundamental Principles and Rights at Work, and encompass the freedom of association and the right to collective bargaining, the prohibition of discrimination regarding employment and occupation, the prohibition of forced labour and the abolition of child labour.³⁹³ Other labour rights (such as wages, working time, and occupational safety and health) could therefore be left out in this context. For instance, the California Act aims to tackle the use of forced labour and human trafficking in GSCs, but does not pursue the protection of other labour rights.³⁹⁴

Furthermore, there is an issue regarding the suitability of the proposed interaction and this model of enforcement for specific standards – for instance, those relating to discrimination and collective labour law. As enforcement of labour law is not only delivered through workplace inspection, some issues could require other avenues for enforcement, such as labour courts.³⁹⁵ A “well-functioning judiciary system” is therefore another important tool for enforcing labour regulation, especially if courts are accessible to workers and solve

³⁹¹ *ibid* 200

³⁹² Nations, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework* 22

³⁹³ Tonia Novitz and Colin Fenwick, 'The Application of Human Rights Discourse to Labour Relations: Translation of Theory into Practice' ' in Tonia Novitz and Colin Fenwick (eds), *Human Rights at Work: Perspectives on Law and Regulation* (Hart Publishing 2010) 27-28

³⁹⁴ Koekkoek, Marx and Wouters, 'Monitoring Forced Labour and Slavery in Global Supply Chains: The Case of the California Act on Transparency in Supply Chains' 523

³⁹⁵ Anner, 'Meeting the Challenges of Industrial Restructuring: Labor Reform and Enforcement in Latin America' 44

cases in a reasonable time frame.³⁹⁶ However, examining other methods of labour law enforcement in GSCs falls beyond the scope of this dissertation.

It also falls beyond the scope of this dissertation to address the analysis of co-enforcement of labour laws with organisations of workers³⁹⁷ and other forms of “social governance” driven by civil society organisations (e.g., NGOs)³⁹⁸ and the “synergistic governance,” in which private, public and social governance all work together.³⁹⁹ While it is not yet clear what lies within the reach of due diligence in terms of improving labour conditions in GSCs, it does seem to constitute one important tool amongst many.⁴⁰⁰ However, it still requires “further refinement,” especially concerning the participation of state agencies, such as labour inspectorates, in the process.⁴⁰¹

5. Conclusion

Some suggest that GSCs are approaching their maturation stage,⁴⁰² as their growth has stagnated for the first time in 30 years.⁴⁰³ Yet, as technology changed the geography of jobs in the past, leading to the expansion of GSCs, it might now have the opposite effect, where automation in developed countries means that activities which were previously outsourced can be brought home – “reverse offshoring”.⁴⁰⁴ Nevertheless, at the time of writing, Apple

³⁹⁶ Ravi and Lucas, 'Enforcement Matters: The Effective Regulation of Labor (Accepted Author Manuscript)' 7

³⁹⁷ Janice Fine, 'Enforcing Labor Standards in Partnership with Civil Society: Can Co-enforcement Succeed Where the State Alone Has Failed?' (2017) 45 Politics & Society 359, 361

³⁹⁸ Lee, *Global supply chain dynamics and labour governance : implications for social upgrading* 12

³⁹⁹ Mayer, 'Leveraging private governance for public purpose: business, civil society and the state in labour regulation' 354

⁴⁰⁰ Trebilcock, 'Due diligence on labour issues – Opportunities and limits of the UN Guiding Principles on Business and Human Rights' 107

⁴⁰¹ *ibid* 107

⁴⁰² International Labour Office, *World Employment and Social Outlook: Trends 2016* (ILO 2016) 9

⁴⁰³ UNCTAD, *World Investment Report 2018 : Investment and new industrial policies* (United Nations 2018) 88

⁴⁰⁴ Group, *World Development Report 2019 : The changing nature of work - Working Draft - June 8, 2018* 20

became the first public company to be worth 1 trillion dollars.⁴⁰⁵ Its “globe-spanning supply chain,” which amounted to 3 million workers in 2017,⁴⁰⁶ is regarded as one of the main drivers of such an achievement.⁴⁰⁷ This shows that GSCs are here to stay for a while.

In this context, massive workplace tragedies and worsening working conditions in GSCs are a reminder that there is a need to reconcile markets with the idea that labour is a not a commodity, as stated in the Declaration of Philadelphia towards the end of the Second World War.⁴⁰⁸ The private governance based upon corporate codes of conduct and private monitoring systems have failed in such an endeavour. In the context of public governance, the two mainstream models which are currently being developed – domestic extraterritorial legislation and international regulation – both use due diligence as a core mechanism to foster compliance with human rights (including some labour rights) in global supply chains.

Nevertheless, these initiatives vary widely. While some consist of transparency requirements, others go further and try to establish standards for due diligence procedures. Even amongst the initiatives for setting up standards, the content is still not consistent. But all in all, they seem to give little emphasis to the role that state enforcement agencies might play in those processes. The reductionist standpoint, that the strength of local labour inspectorates should be assessed in the context of risk assessment, might not prove very helpful.

Stemming from Kolben’s dialogic regulation approach, this dissertation has proposed a

⁴⁰⁵ Chris Johnston, 'Apple is first public company worth \$1 trillion' BBC <<https://www.bbc.co.uk/news/business-45050213>> accessed 6 August 2018

⁴⁰⁶ Apple, *Apple Supplier Responsibility: 2018 Progress Report* (Apple 2018) available at <https://images.apple.com/supplier-responsibility/pdf/Apple_SR_2018_Progress_Report.pdf> accessed 13 June 2018

⁴⁰⁷ Jack Nicas, 'Apple Is Worth \$1,000,000,000,000. Two Decades Ago, It Was Almost Bankrupt.' (2018) The New York Times <<https://www.nytimes.com/2018/08/02/technology/apple-stock-1-trillion-market-cap.html?rref=collection%2Fsectioncollection%2Fbusiness>> accessed 6 August 2018

⁴⁰⁸ Supiot, 'A legal perspective on the economic crisis of 2008' 160

possible complementary relationship between labour inspectorates and firms throughout due diligence processes. This relationship could be explored at various stages of the process, encompassing partnership in training, information sharing and even the design of responses to adverse human rights impacts. Examples of these kinds of initiatives have been provided with positive outcomes, working as two-way avenues in other contexts.

However, the enforcement of labour regulation requires countries to have both capacity and political will.⁴⁰⁹ Although this dissertation expands on the idea of due diligence fostering capacity building and reinforcing local labour inspectorates, ultimately this relies on the political willingness of states to enforce labour rights. The absence of this component will be fatal to any attempt in that direction. Perhaps a good place to start would be for international financial institutions such as the World Bank to provide developing countries with the necessary incentives to follow that path, rather than nudging them towards the deregulation of labour markets.

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⁴⁰⁹ Dewan and Ronconi, 'U.S. Free Trade Agreements and Enforcement of Labor Law in Latin America' 36

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