

Corporate transparency requirements:

An inadequate form of regulation in the context of global supply chains



Charlotte Villiers

University of Bristol Law School
Wills Memorial Building
Queen's Road
Bristol
BS8 1RJ

bristol.ac.uk/law/research/legal-research-papers

The Bristol Law Research Paper Series publishes a broad range of legal scholarship in all subject areas from members of the University of Bristol Law School. All papers are published electronically, available for free, for download as pdf files. Copyright remains with the author(s). For any queries about the Series, please contact researchpapers-law@bristol.ac.uk.

Why corporate transparency requirements are an inadequate form of regulation in the context of global supply chains

Charlotte Villiers, University of Bristol

Charlotte Villiers is Professor of Company Law and Corporate Governance at the University of Bristol Law School. E-mail: c.villiers@bristol.ac.uk.

Work in progress. Comments welcome. Please do not cite without author's permission.

Abstract

Global supply chains present major challenges for company law and corporate governance, nationally and internationally. Their increasing relevance in international business has led to a serious regulatory gap, especially in light of the reality of corporate involvement in human rights abuses, labour exploitation and environmental degradation. Alongside a number of international norms such as the UN's Guiding Principles on Business and Human Rights, there has been a proliferation of "hard" and "soft" disclosure provisions, mandatory and voluntary, national and international, demanding greater transparency in response to these challenges. In this paper I argue that disclosure is not a sufficient answer to such problems and does not adequately fill the regulatory gap in this context. I describe the structural complexities of supply chains and I argue that whilst potentially important, the disclosure requirements have added to the complexities and failed to make companies up, down and within the chains any more accountable. At best, this disclosure landscape may be viewed as a starting point for the development of a transnational regulatory order for multinational corporations and global supply chains. At worst, it could be seen as exacerbating the problems. In this paper, I explore the strengths and weaknesses of some of these disclosure initiatives and I consider their potential contribution to a more effective transnational regulatory infrastructure.

Introduction

Global supply chains present major challenges for company law and corporate governance, nationally and internationally. Their increasing relevance in international business has led to a serious regulatory gap, especially in light of the reality of corporate involvement in human rights abuses, labour exploitation and environmental degradation. What, then does it take to achieve the accountability needed in global supply chains? Kate MacDonald suggests five necessary steps: (1) to establish recognised standards that define business responsibilities for respecting and protecting labour rights, with capacity of businesses to fulfil those responsibilities and for providing some avenues for redress when rights are violated; (2) to promote transparency in order to be able to monitor business' compliance with its responsibilities, and means of grievance and complaints; (3) to create sources of leverage or sanctions to compel or motivate businesses to comply with agreed responsibilities, either through rewards or incentives and through monitoring and incentivising compliance, (4) establishing effective grievance systems and multiple and cumulative pressure; and (5) development of pro-accountability coalitions internationally as well as nationally and sub-nationally.¹ This paper focuses on the second of these steps, transparency, as disclosure appears to have become the leading

¹ Kate Macdonald, Five steps to business accountability in global supply chains, Open Democracy 7 July 2016, available at <https://www.opendemocracy.net/.../gscrt/.../five-steps-to-supply-chain-accountability>

regulatory response to the challenges presented by supply chains. As Chilton and Sarfaty observe: 'Given the relative ease of enacting mandated disclosure as compared to more direct and intrusive techniques, this tool has become "the principal regulatory answer to some of the principal policy questions of recent decades."' ² Alongside a number of international norms such as the UN's Guiding Principles on Business and Human Rights, there has been a proliferation of "hard" and "soft" disclosure provisions, mandatory and voluntary, national and international, demanding greater transparency in response to these challenges.

In this paper I argue that disclosure does not adequately fill the regulatory gap in this context. I describe the structural complexities of supply chains and I suggest that these structures not only present obstacles for an effective disclosure system, but they also make accountability more difficult to achieve especially within a market oriented regulatory framework. From this perspective it is not clear entirely what we can ask of disclosure. To whom are the disclosures to be made and who then is expected to hold any misbehaving supply chain actors to account? I suggest that we should approach this with a different conceptualisation of these business structures. If we regard them as global poverty chains such a perspective brings about a moral response to the processes that cause or contribute to human rights abuses and global inequality. This response is to recognise that we have a collective responsibility to eradicate the poverty and suffering caused by the supply – or poverty - chains. Under this response the transparency requirements must be altered and accompanied by a regulatory framework that empowers those victims of poverty to be able to escape it. Those who are privileged at the expense of the poor have a duty to end that poverty but in a way that emancipates those victims of poverty. Part 1 looks at the structural complexities found in supply chains. Part 2 identifies the problems arising in these chains, concentrating especially on labour exploitation and human rights abuses. Part 3 examines the regulatory approach typical in neoliberal corporate governance regimes – transparency. The GRI, IIRC, OECD Guidelines Disclosure and due diligence legislation demonstrate recognition of the problems. However, these regulatory measures have not succeeded in solving the problems. Part 4 identifies the limitations of the disclosure system that has developed around multinational and transnational companies and their supply chains – lack of comparability, marketization of disclosure, power imbalances, corporate control, lack of enforcement or sanctions, lack of accountability. It is clear that the transparency requirements as they are currently constructed are not sufficient to end the problems of global corporate chains. Part 5 puts forward a suggestion to reconceptualise these chains as global poverty chains as suggested by Selwyn, or perhaps more accurately still, as global exploitation chains, drawing attention to the poverty and labour exploitation perpetuated in these chains, with the lead companies earning vast profits, global inequality rising, an immiserated labour in the global south and an undermined and threatened labour force in the global north.

Denoting these chains as global poverty chains or as global exploitation chains demands a collective and moral regulatory response. This would lead to a different approach to disclosure in which disclosure should be part of a system that enables stakeholders to hold companies to account and to act together to end the structural injustices in this business and regulatory system and work genuinely to end the poverty and human suffering that blights so many regions of the world in the name of profit

² Chilton A. S., and Sarfaty, G. A., 'The Limitations of Supply Chain Disclosure Regimes', Winter, 2017 Stanford Journal of International Law 53 Stan. J Int'l L. 1, at 21, citing Ben-Shahar, O., and Schneider, C., *More than you wanted to Know: The Failure of Mandated Disclosure* (2014) at 4

and economic growth. This requires a multi-dimensional but cohesive international legal and regulatory system rather than a fragmented collection of demands for information.

Part 1 - The structural complexities of supply chains

Global value chains are an established and widely used production arrangement and they are used in many industries, including manufacturing, energy, agri-food industry, and a myriad of financial and business services.³ They are characterised by their predominant feature which is that of an ‘international fragmentation of production’⁴. Since 2011 Global Value Chain trade has accounted for 60–67% of global trade in value-added terms.⁵ The United Nations Conference on Trade Development (UNCTAD) in its report, World Investment Report suggested that global value chains shaped by transnational corporation ‘account for some 80% of global trade’⁶ and the ILO has estimated that more than 450 million people work in supply chain-related jobs.⁷

Their predominance in global trade highlights the importance of the global value chains but it also presents a regulatory challenge. Global value chains spread themselves across geographic boundaries and across different legal systems and jurisdictions, leading the IGLP Working Group to observe that , ‘mapping GVCs from a legal perspective ... poses complex challenges for basic questions of positive legal analysis, including matters of territorial jurisdiction, governing law, private regulation through contract and sovereign authority.’⁸ One outcome of their global reach is that global value chains have given rise to regulatory and governance gaps leaving them to be conduits for profit but by means of environmental damage, labour exploitation and human rights abuse.

A major cause of the regulatory gap is the complexity of many global value chains. They have multiple tiers without being strictly linear and they have horizontal, vertical and spatial complexities that interact and lead to uncertainties and production disruptions⁹ and regulatory challenges. The fragmented nature of the production processes leads many chains to require multiple layers of suppliers. Whilst companies may be able to locate their first-tier suppliers, the suppliers in the lower tiers are often less easy to identify.¹⁰ Sarfaty reveals that one company required more than a year to map its supply chain¹¹, and quotes an employee of technology company Philips explaining that, “for electronic components, the supply chain can easily be 50 tiers deep, many of which may provide us

³ Michael Rawling, ‘Legislative regulation of global value chains to protect workers: A preliminary Assessment’ (2015) 26(4) *The Economic and Labour Relations Review*, 660, at 663.

⁴ Organisation for Economic Co-operation and Development (OECD) the World Trade Organisation (WTO) and the United Nations Conference on Trade and Development (UNCTAD) (2013) *Implications of Global Value Chains for Trade, Investment, Development and Jobs* 6 August 2013. *Prepared for the G-20 Leaders Summit*, Saint Petersburg, September, at 11.

⁵ WTO and Others, *Global Value Chain Development Report 2017: Measuring and Analyzing the Impact of GVCs on Economic Development*, September 2017 at 2, available at https://www.wto.org/english/res_e/publications_e/gvcd_report_17_e.htm

⁶ UNCTAD (2013) iii.

⁷ International Labour Organization, “Forced labour, human trafficking and slavery,” undated, <http://www.ilo.org/global/topics/forced-labour/lang-en/index.htm>

⁸ The IGLP Law and Global Production Working Group, ‘The role of law in global value chains: a research manifesto’ (2016) 4:1 *London Review of International Law*, 57–79, at 61-2.

⁹ Bode, C., & Wagner, S. M. (2015). Structural drivers of upstream supply chain complexity and the frequency of supply chain disruptions. *Journal of Operations Management*, 36, 215-228.

¹⁰ Galit A Sarfaty, *Shining Light on Global Supply Chains*, (215) 56: 2 *Harvard International Law Journal* 419, at 431.

¹¹ Shift Project, *Respecting Human Rights through Global Supply Chains*, 7 (2012) cited by Sarfaty, at fn 78, 431.

with limited or no information.”¹² In 2015, Clarke and Boersma reported that Apple had 785 suppliers in 31 countries worldwide contributing to the production of the iPhone.¹³ Some commentators identify different types of complexity: static complexity - the structure of the supply chain, the number and the variety of its components and strengths of interactions between these; and dynamic complexity - uncertainty in the supply chain on aspects of time and randomness.¹⁴ In summary, a global value chain is a system, comprising of the integrated components of design, production and retail, that constitutes the product or service across either a few or thousands of firms.¹⁵

Global value chains have fluid arrangements and they lack predictability, making them vulnerable to political instability, technological changes, and new legal requirements. Such changing conditions give to them a dynamic nature but makes it difficult to maintain updated lists of suppliers and sub-suppliers. Global value chains have the opportunity of regulatory arbitrage, giving rise to governance and regulatory gaps.¹⁶ Thus, while MNCs might be incorporated and headquartered in a particular jurisdiction, many of their economic activities occur abroad in areas that are beyond the regulatory reach of their home jurisdiction. The potential regulatory problems arising from the extraterritorial reach of those activities are not necessarily resolved by the efforts of international or intergovernmental institutions because their regulatory capacities are limited. Furthermore, they may operate in developing countries which do not have sufficient resources or structures for effective regulation.¹⁷ Indeed, as Chilton and Sarfaty observe, where host states lack the political capacity, rule of law, and/or will to enforce human rights norms and provide redress to victims of human rights violations such regulatory gaps open up.¹⁸ As they note, those host states are primarily concerned with attracting foreign investment, so they turn a blind eye to domestic law violations or they shy away from passing human rights regulations, fearing that companies might shift their business elsewhere to avoid regulatory burdens.¹⁹ Weak governance paves the way for corruption and human rights violations.²⁰

From a labour and human rights perspective global supply chains present a special challenge. According to the Business and Human Rights Resource Centre, 2017, up to 94 percent of the global workforce of 50 major corporations is hidden because responsibility has been outsourced multiple times. Workers are then placed in a vulnerable situation, facing ‘weak legal frameworks that fail to

¹² Sarfaty, at 431.

¹³ Clarke, Thomas, and Martijn Boersma. "The governance of global value chains: unresolved human rights, environmental and ethical dilemmas in the apple supply chain." *Journal of Business Ethics* 143.1 (2017): 111-131, at 115.

¹⁴ Serdarasan, S. (2013). A review of supply chain complexity drivers. *Computers & Industrial Engineering*, 66(3), 533-540. See also Sarpong, S. (2014). Traceability and supply chain complexity: confronting the issues and concerns. *European Business Review*, 26(3), 271-284.

¹⁵ Sobel-Read, K. B. (2014). Global Value Chains: A Framework for Analysis, *Transnational Legal Theory*, 5(3), 364-407, at 369.

¹⁶ Sarfaty, at 433.

¹⁷ Kolben, K. ‘Transnational labor regulation and the limits of governance’, *Theoretical Inquiries in Law* 12.2 (2011): 403-437, at , 407.

¹⁸ Chilton and Sarfaty, at 8, citing U.N. Guiding Principles and Susan Marks, *Empire’s Law*, (2003) 10 *Ind. J. Global Legal Stud.* 449, at 461.

¹⁹ Chilton and Sarfaty, at 8, citing Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, (2001) 111 *Yale L.J.* 443, 460, 463.

²⁰ Chilton and Sarfaty, at 8, citing OECD, *Risk Awareness Tool For Multinational Enterprises In Weak Governance Zones* (2006).

protect and uphold labour standards; business operations driven by the search for ever-lower labour costs; and the increasingly complex nature of supply chains.²¹ The governance gap means that relying on extraterritorial application of labour laws and intergovernmental organizations rather than domestic regulation²², leaves affected workers without adequate legal or regulatory protection.

Part 2 - Examples of supply chain human rights problems

Global supply chains have brought with them some benefits, such as employment and economic growth to developing economies. However, such chains are also frequently linked to 'exploitative employment relations, environmental irresponsibility and recurrent ethical dilemmas'.²³ Commentators have detailed many examples of human rights abuses, labour exploitation and other wrongs performed in the context of supply chains. Human Rights Watch, for example, documents poor working conditions, including minimum wage violations; forced overtime; child labour; sexual harassment, exposure to toxic substances and other extreme occupational hazards; and retaliation against workers who attempt to organize.²⁴ Duhigg and Barboza provide evidence of bleak working conditions throughout much of the electronics supply chain in Asia.²⁵

Clarke and Boersma identify Apple as a classic example of the problems that emerge in global value chains where efforts to eradicate problems and enforce higher standards in all of its suppliers too often fail. Thus, in circumstances in which it was using supplies from China, where labour laws are weak and there are no enforcement procedures Apple tried to fill the governance gap through use of private initiatives, including creation of a Supplier Code of Conduct in 2006 designed to achieve supplier responsibility. In its 2010 annual supplier responsibility report the company stated that it is "...committed to ensuring that working conditions in our supply chain are safe, workers are treated with respect and dignity, and manufacturing processes are environmentally responsible."²⁶ Despite Apple's efforts to ensure adherence to its Code, and the help it enlisted from an independent auditor, since 2006, the company was still 'criticised for sourcing components from producers that have a poor reputation with regard to employment conditions and practices.'²⁷ Apple's customers could not be relied upon to hold the supply chain to account. Rather, they continued to purchase Apple's products generating for Apple record profits.²⁸ The efforts of civil society, media investigations, or independent audits managed to expose the exploitation in Apple's supply chain²⁹ but the awareness was not

²¹ Business and Human Rights Resource Centre, *Modern Slavery in Company Operation and Supply Chains: Mandatory transparency, mandatory due diligence and public procurement due diligence*, September 2017, available at http://www.l20argentina.org/pdf/modern_slavery_in_company_operation_and_supply_chain_final.pdf, (hereinafter BHRRC) at 2.

²² Kolben, at 407.

²³ Clarke, Thomas, and Martijn Boersma. "The governance of global value chains: unresolved human rights, environmental and ethical dilemmas in the apple supply chain." *Journal of Business Ethics* 143.1 (2017): 111-131, at 111.

²⁴ Human Rights Watch, *Human Rights in Supply Chains: A Call for a Binding Global Standard on Due Diligence*, May 2016 available at: <https://www.hrw.org/report/2016/05/30/human-rights-supply-chains/call-binding-global-standard-due-diligence>

²⁵ Duhigg, Charles, and David Barboza. "In China, human costs are built into an iPad." *New York Times* 25 (2012); Barboza DA, Duhigg CH. China plant again faces labor issues on iPhones. *New York Times*. 2012:B1.

²⁶ Apple 2010, see Clarke and Boersma, at 120.

²⁷ Clarke and Boersma, at 117.

²⁸ Clarke and Boersma, at 128.

²⁹ Clarke and Boersma, at 129.

sufficient to energise consumers to challenge Apple. Rather, they appear to have been satisfied by Apple and Foxconn's 'immense marketing efforts focused on the products themselves' and so exploitative practices continued.³⁰

The Apple example highlights the problems that may arise as a result of the regulatory and governance gaps emerging with global value chains. It is possible to see from the case the governance gap in the reach of both national and international law, allowing companies to be free of legal accountability for potential human rights violations.³¹

Part 3 - International and national regulatory responses – towards a requirement for disclosure and due diligence

The 'governance gap' in the global economy occurs because national governments are unable to oversee, regulate, and constrain the activities of corporate actors that have the freedom to move across jurisdictions. Indeed, it appears that MNEs and transnational corporations play a significant role in human rights violations because 'their scope and power expanded beyond the reach of effective public governance systems, thereby creating permissive environments for wrongful acts by companies without adequate sanctions and or reparations.'³² Recognising these problems, a number of international organisations sought to guide corporate behaviour with the introduction of standards and principles. In June 2011, the United Nations Human Rights Council (UN HRC) unanimously endorsed the UN Guiding Principles on Business and Human Rights (UNGPs)³³ and these became the first globally accepted standard on the responsibilities of states and businesses for preventing and addressing business-related human rights abuse. They are regarded as 'the authoritative point of reference ... on the best way forward to ensure that business activities do not cause or contribute to human rights violations.'³⁴ The principles are based on the UN 'Protect, Respect and Remedy' Framework, approved in 2008,³⁵ developed by Professor John Ruggie in his capacity as the Special Representative of the UN Secretary-General for Business and Human Rights. The Framework has three main pillars:

1. The state duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication;

³⁰ Clarke and Boersma, at 130.

³¹ Chilton A. S., and Sarfaty, G. A., 'The Limitations of Supply Chain Disclosure Regimes', Winter, 2017 Stanford Journal of International Law 53 Stan. J Int'l L. 1, at 7

³² Dahan, Y., Lerner, H., and Milman-Sivan, L., The Guiding Principles for Business and Human Rights: Labor Violations and Shared Responsibility, Draft accepted 2016, for *International Journal of Comparative Labour Law and Industrial Relations*, citing John Ruggie, JUST BUSINESS, W. W. Norton (2013), at xxiii

³³ UN Guiding Principles on Business and Human Rights, 2011, http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf

³⁴ Directorate-General For External Policies Policy Department, European Parliament, Implementation of the UN Guiding Principles on Business and Human Rights, (European Parliament, February, 2017) at 10.

³⁵ The 'Protect, Respect and Remedy' Framework developed by the SRSG on Human Rights and Business was endorsed by UN member states in the UN Human Rights Council Resolution on the Mandate of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises (UN Human Rights Council, 2008)

2. The corporate responsibility to respect human rights, that is, to act with due diligence to avoid infringing on human rights and to address adverse impacts with which they, or those with whom they have a business relationship, are involved; and
3. The need for greater access by victims to effective remedy, both judicial and non-judicial.

The Protect, Respect and Remedy Framework was given support with 31 Principles in the UNGPs which are applicable to 'all States and to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure'. The UNGPs require that businesses should respect human rights. 'They should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.' (Principle 11). Business should 'avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur' (Principle 13 (a)) and 'seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts' (Principle 13 (b)) and they should have in place a policy commitment to meet their responsibility to respect human rights (Principle 15(a)); a human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights (Principle 15(b)); and processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute (Principle 15(c)).

These Guidelines support the human rights enshrined within the Universal Bill of Human Rights and the principles concerning fundamental rights in the eight ILO core conventions as set out in the Declaration on Fundamental Principles and Rights at Work. Added to these the ILO has issued other instruments of particular relevance to the activities of MNEs, TNCs and supply chains, including the ILO Protocol to the Forced Labour Convention of 1930 (No 29) with a Supplementary Recommendation 2014 (No 203) (ratified by 18 countries, aiming for 50 ratifications by the end of 2018); and the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy (the MNE Declaration). The Guidelines advise governments on measures they should take against human trafficking for the purposes of forced or compulsory labour and encourage states to ensure that companies address the risk of forced labour in their operations and supply chain links, and the MNE Declaration requires governments to develop national policies and plans of action to prevent and eliminate forced labour and child labour in consultation with employers' or workers' organizations. The UN's Global Compact is a principles-based framework initiative bringing businesses together with UN agencies and civil society actors and encourages them to adopt sustainable and socially responsible policies, and to report on their implementation. The UN Global Compact lays down ten principles in the areas of human rights, labour, the environment and anti-corruption. In particular, businesses should support and respect the protection of internationally proclaimed human rights (Principle 1); and make sure that they are not complicit in human rights abuses (Principle 2); they should uphold the freedom of association and the effective recognition of the right to collective bargaining (Principle 3); they should eliminate all forms of forced and compulsory labour (Principle 4); they should effectively abolish child labour (Principle 5); and eliminate discrimination in respect of employment and occupation (Principle 6). The UN Global Compact has 13000 corporate participants and other stakeholders in 170 countries who aim to mainstream the ten principles in business activities around the world and to catalyse actions in support of broader UN goals, such as the Millennium Development Goals (MDGs) and Sustainable Development Goals (SDGs). Sustainable Development Goal 8 requires the international community to take immediate and effective measures

to eradicate forced labour, end modern slavery and human trafficking and secure the prohibition and elimination of the worst forms of child labour and to end child labour in all its forms by 2025 (Goal 8.7)

These UN initiatives have been very important, but they have been criticised by major non-governmental organisations (NGOs) and academics for their non-binding status as well as their lack of reference to issues such as extraterritorial adjudication, and absence of a central mechanism to ensure their universal implementation.³⁶ Whilst the UNGPs are not binding, the OECD has developed standards that are binding on states such as the OECD Guidelines for Multinational Enterprises. Those Guidelines provide government-backed recommendations to corporations on 'all major areas of business ethics, including corporate steps to obey the law, observe internationally-recognised standards and respond to other societal expectations.' They were revised in 2011 to take into account the UNGPs and the revisions introduced standards on human rights, due diligence and supply chain responsibility. They are especially interesting because they contain a disputes resolution process in which interested parties (including NGOs and trade unions) may make complaints against companies to a National Contact Point who will resolve the dispute. Unfortunately, the potential appears not to be realised in practice, leaving critics to regard the dispute process as no longer fit for purpose. For example, in the UK Amnesty International UK exposes the OECD Guidelines as a system that lets companies off the hook when human rights abuses are alleged against them.³⁷ Similarly, OECD Watch states that 'far too many complaints are rejected outright, and of those accepted, the vast majority do not result in outcomes that end corporate misconduct, provide victims with remedies for harms incurred, or bring about changes to corporate behaviour.'³⁸ The OECD has also issued additional Guidance documents such as the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High Risk Areas but these are non-binding and they do not specify who is responsible for resolving due diligence issues.

It is clear from these international efforts that the possibility of imposing on companies binding standards remains exceedingly difficult. Whilst the goal is to ensure that companies respect human rights they are not required to take specific measures. To give substance to some of these international standards there have been a number of recent initiatives adopted in Europe and nationally. In particular, as is a frequent regulatory mechanism in corporate governance, emphasis has fallen on disclosure and, more strongly also, on due diligence requirements. Indeed, transparency in the form of disclosures to shareholders is an important mechanism for aligning shareholder and management interests³⁹ and is a mainstream feature of corporate governance.⁴⁰ Given the fact that it is the activities of corporations and their supply chains that are a subject of concern it is no surprise that transparency is the most prevalent regulatory approach.

³⁶ Policy Department, Directorate-General for External Policies, at 13.

³⁷ Amnesty International, "Obstacle Course: How the UK's National Contact Point handles human rights complaints under the OECD Guidelines for Multinational Enterprises" (2016).

³⁸ OECD Watch, OECD watchdog calls for reform of failing complaint system, June 15, 2015, and see OECD Watch, *Remedy Remains Rare* (2015)

³⁹ Brennan, Niamh M., and Jill Solomon. "Corporate governance, accountability and mechanisms of accountability: an overview." *Accounting, Auditing & Accountability Journal* 21.7 (2008): 885-906; Hess, David. "Social reporting and new governance regulation: The prospects of achieving corporate accountability through transparency." *Business Ethics Quarterly* 17.3 (2007): 453-476.

⁴⁰ Cioffi, John W. "Corporate Governance Reform, Regulatory Politics, and the Foundations of Finance Capitalism in the United States and Germany." *German LJ* 7 (2006): 533.

At European level the Non-Financial Reporting Directive became the instrument used for introducing a requirement for certain large undertakings (public interest entities) to include in their management reports a non-financial statement containing information relating to environmental matters, social and employee-related matters, respect for human rights, anti-corruption and bribery matters. Under the Directive, the statement should include a description of the policies, outcomes and risks related to those matters and information on the due diligence processes implemented by the undertaking, also regarding, where relevant and proportionate, its supply and subcontracting chains, in order to identify, prevent and mitigate existing and potential adverse impacts.⁴¹ Alongside environmental issues, Preamble paragraph 7 requires information on social and employee-related matters that may concern the actions taken to ensure gender equality, implementation of fundamental conventions of the International Labour Organisation, working conditions, social dialogue, respect for the right of workers to be informed and consulted, respect for trade union rights, health and safety at work and the dialogue with local communities, and/or the actions taken to ensure the protection and the development of those communities. With regard also to anti-corruption, bribery and human rights the statement might include information on the prevention of human rights abuses and on measures taken to prevent bribery or corruption.⁴²

As well as the EU's Non-Financial Reporting Directive, an EU Regulation 2017/821 was introduced, applicable since June 2017, which establishes obligations related to management systems, risk management, and independent third party audits for importers of conflict minerals. Such importers must prepare annual reports on the steps taken to implement those obligations as well as their supply chain due diligence policies and practices for responsible sourcing, and they must make available to their governments third party audit reports or evidence of conformity with a supply chain due diligence scheme. In addition, an EU green card initiative proposes that EU-based companies operate under a duty of care towards individuals and local communities whose human rights or local environment are affected by corporate activities and Motion 2015/2589 requests the European Council to consider new EU legislation to create a legal obligation of due diligence for EU companies outsourcing to third countries including measures to secure traceability and transparency.

At national level also there have been some notable legislative developments in which transparency, either through disclosure and/or due diligence, has made an important contribution to the framework for regulating the activities of global supply chains.

Disclosure

For disclosure-oriented transparency the most widely publicised developments include the California Transparency in Supply Chains Act 2010 and the UK's Modern Slavery Act 2015. The California Transparency in Supply Chains Act requires website disclosure of any actions being taken to eradicate slavery and human trafficking from a corporation's direct supply chain for tangible goods offered for sale. The company must disclose on its website to 'what extent, if any,' it: 1) verifies its product supply chains to evaluate and address risks of human trafficking and slavery; 2) audits its suppliers to evaluate their compliance with company standards for human trafficking and slavery; 3) requires certifications from direct suppliers confirming that materials incorporated into the products comply with laws regarding human trafficking and slavery in the countries in which the suppliers operate; 4) maintains internal accountability through internal standards and procedures for employees and contractors that

⁴¹ Preamble, paragraph 6.

⁴² See also Article 1(1) and 1(3).

fail to meet company standards regarding human trafficking and slavery; and 5) trains company employees and management who have direct responsibility for supply chain management on human trafficking and slavery.⁴³ A company may comply with the law by posting only one statement ever, since the Act does not specify how frequently a statement must be made.⁴⁴ The California Attorney General has exclusive authority to enforce the legislation leading a civil action for injunctive relief. Companies do not face a monetary penalty for failure to disclose, but the Attorney General may order them to take specific action. Citizens have no private right of action under the Act. A Federal US Business Transparency in Trafficking and Slavery Bill targets all businesses with revenues above US\$100 million and if enacted will require them to describe in their annual reports how they assess and address slavery in their supply chains.⁴⁵

In the UK, section 54 of the Modern Slavery Act 2015 requires any commercial organisation, which supplies goods or services, carries on a business or part of a business in the UK, and whose annual turnover is £36 m to produce a slavery and human trafficking statement for each financial year. The report must provide details of what the organisation is doing to 'ensure that slavery and human trafficking is not taking place in any of its supply chains, and in any part of its own business.' Section 54 contains a non-exhaustive list of the issues that the statement 'may' cover: the organisation's structure, its business and its supply chains; its policies in relation to slavery and human trafficking; its due diligence processes in relation to slavery and human trafficking in its business and supply chains; the parts of its business and supply chains where there is a risk of slavery and human trafficking taking place, and the steps it has taken to assess and manage that risk; its effectiveness in ensuring that slavery and human trafficking is not taking place in its business or supply chains, measured against such performance indicators; and the training and capacity building about slavery and human trafficking available to its staff. If a company fails to produce a slavery and human trafficking statement for a particular financial year the UK Secretary of State may seek an injunction from the High Court requiring the organisation to comply. Failure to comply with the injunction would put the company in contempt of a court order, which is punishable by an unlimited fine.

Commentators have remarked on the weaknesses in both the California Act and the UK Act stating that 'neither law requires that companies report on the prevalence or known incidences of modern slavery in their operations or supply chains, nor do they include any positive obligation for a company to implement measures or introduce any policies or operational changes to ensure that their operations and supply chains are free from slavery. In fact, under both laws companies can comply by stating they have taken no steps to address the risk of modern slavery in any form in their business and supply chain.'⁴⁶ Furthermore lack of statutory sanctions will do little to encourage companies to report or to implement robust due diligence processes.⁴⁷ The UK Joint Committee on Human Rights has recommended the UK government to propose legislation to make reporting on due diligence for all human rights compulsory for large businesses, with a monitoring mechanism and an enforcement procedure, and the strengthening of the UK National Contact Point.

⁴³ See Business & Human Rights Resource Centre (BHRCC), " Modern slavery in company operations and supply chains: mandatory transparency, mandatory due diligence and public procurement due diligence, (September 2017) at 8.

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Ibid, at 10.

⁴⁷ Ibid, at 11.

Due Diligence

Going further than disclosure, some legislative efforts have focused on due diligence. A steer in this direction comes in some of the international standards explored above. For example, Principle 15(b) of the UNGPs states that companies should have in place ‘a human rights due diligence process to identify, prevent, mitigate and account for how a company addresses their impacts on human rights’. Similarly, Article 2(e) of the ILO Protocol urges member states to take measures ‘supporting due diligence by both the public and private sectors to prevent and respond to risks of forced or compulsory labour.’ The OECD Guidance on MNEs also recommends in Chapter IV, paragraph 5 on human rights, that enterprises ‘carry out human rights due diligence as appropriate to their size, the nature and context of operations and the severity of the risks of adverse human rights impacts.’ The Guidance describes this due diligence process as assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses as well as communicating how impacts are addressed.⁴⁸

From these international steps it is possible to see that mandatory due diligence laws put the onus on companies to demonstrate that they are taking all necessary measures to identify, prevent and mitigate incidences of modern slavery in their operations and supply chains.⁴⁹ Some of these provisions have inspired national efforts to require due diligence by parent and subcontracting companies. A notable example is the new French Law 2017-399 on the corporate duty of care for parent and subcontracting companies. This law requires companies to develop and implement a ‘plan de vigilance’ describing the company’s oversight mechanisms for identifying and mitigating any violations of human rights and fundamental freedoms, severe bodily or environmental damage or health risks resulting from the company’s activities or the activities of companies it controls or any of its subcontractors or suppliers. The French law specifies the contents of the due diligence plan: a risk mapping to identify, analyse and prioritise risks; processes for regular evaluation of subsidiaries, subcontractors and suppliers; appropriate actions to mitigate and prevent human rights and environmental violations; alert and whistleblowing mechanisms related to existing and potential risks; mechanisms for monitoring and assessing the effectiveness of the measures implemented. Companies must disclose their due diligence plan annually.⁵⁰ The Netherlands is currently in the process of legislating for a duty of care to prevent child labour - the “Wet zorgplicht kinderarbeid”. Under this legislation, companies selling products or services to Dutch end users will be required to identify whether child labour is present in their supply chain and if so to develop a plan of action to address it and issue a due diligence statement. Switzerland is also working towards a potential article 101(a) Responsibility of Business in the Federal Constitution with the goal of obliging Swiss companies to incorporate respect for human rights and the environment in all their activities. If enacted this law will have extraterritorial effect by applying also to Swiss-based companies’ activities abroad. The Australian government has also announced its intention to introduce a Modern Slavery in Supply Chains Reporting Requirement. This will include a report on due diligence processes relating to modern slavery in its operations and supply chains and their effectiveness.⁵¹

It is clear from the above account that there has been a lot of activity in the development of transparency legislation. As stated above, this might be explained by the fact that in corporate

⁴⁸ OECD Guidance on MNEs, Chapter IV, para 45.

⁴⁹ BHRRC, at 4.

⁵⁰ BHRRC, at 17.

⁵¹ BHRRC, at 17.

governance transparency is a key regulatory device. Why might disclosure be considered an effective regulatory tool for supply chains? According to Mol, ‘the common idea is: the more transparency, the better. That is: better for the environment, better for democracy and better for the empowerment of the oppressed’.⁵² In corporate governance disclosure is a well used regulatory mechanism, resting on the famous quote by Justice Louis D Brandeis: ‘Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.’⁵³ Disclosure is regarded as a “regulation by revelation”.⁵⁴ Transparency is said to generate greater trust, more participation, a more efficient administration⁵⁵ and less corruption.⁵⁶ A moral basis for the demand for disclosure is the need to account for the impact of corporate activities on others.⁵⁷ Gupta observes different rationales, ranging from *improving* state-led mandatory regulation to *avoiding* state-led mandatory regulation, that will have different implications for accountability, legitimacy and effectiveness of ‘governance-by- disclosure’.⁵⁸ The Global Reporting Initiative presents disclosure as a win all regulatory approach: ‘Now is the time to build a culture of decision-making that is conducive to long-term economic, environmental and social well-being in the world. Sustainability reporting is a tool that can help to achieve this goal as it facilitates transparency and accountability, enables like-for-like comparison between organizations’ sustainability performance, and through the process of gathering data and information, it creates optimal conditions for new sustainability systems to be established within organizations.’⁵⁹

Arguably the strongest theoretical justification for transparency is that it is a step towards corporate accountability. Thus, by reducing information asymmetries, transparency may empower weaker parties, enabling them to participate more effectively and hold the corporate actors to account more easily.⁶⁰ Transparency and accountability thereby connect with democracy and participation by making it possible for bottom-up civil society and consumers to engage and build a counter-veiling power against the dominant market and state powers.⁶¹ The information could be used by advocates in public relations campaigns, lawsuits, or other forms of advocacy.⁶² Bovens suggests that accountability is based on the idea of power transmission and delegation and always consists of at least three stages or elements: the actor is obliged to inform the forum about his or her conduct (information phase); the forum can question the adequacy of the information or the legitimacy of the

⁵² Mol, Arthur PJ. "The future of transparency: Power, pitfalls and promises." *Global Environmental Politics* 10.3 (2010): 132-143, at 133.

⁵³ Brandeis L (1913) What publicity can do? *Harper’s Weekly*. New York, NY: Harper & Brothers, pp. 10–13.

⁵⁴ Aarti Gupta, Transparency Under Scrutiny: Information Disclosure in Global Environmental Governance (2008) 8:2 *Global Environmental Politics*, at 2 quoting Florini, Ann.1998. The End of Secrecy. *Foreign Policy* 111 (Summer): 50–63.

⁵⁵ Pasquier, M. (2014). La transparence : de la lumière à l'aveuglement?, *Huffington Post*, 26 August 2014.

⁵⁶ Mabillard, V., & Zumofen, R. (2017). The complex relationship between transparency and accountability: A synthesis and contribution to existing frameworks. *Public Policy and Administration*, 32(2), 110-129 at 111-2, citing Etzioni A (2010) Is transparency the best disinfectant? *Journal of Political Philosophy* 18: 389–404.

⁵⁷ Dingwerth, Klaus, and Margot Eichinger, ‘Tamed transparency: How information disclosure under the Global Reporting Initiative fails to empower’ *Global Environmental Politics* 10:3 (2010): 74-96, at 79.

⁵⁸ Gupta, at 2.

⁵⁹ GRI, 2008a. News 2008: Financial Crisis—Driver for Sustainability, Not a Dampener.

Available at: <http://www.globalreporting.org/NewsEventsPress/LatestNews/2008/NewsOctober08> cited by Dingwerth and Eichinger, at 80

⁶⁰ Mol, 154.

⁶¹ Mol, 154.

⁶² Chilton and Sarfaty, at 5-6.

conduct (debating phase); the forum may pass judgment on the conduct of the actor (consequences phase).⁶³

Part 4 - The problems and limitations of transparency

Disclosure regulation is based on an 'assumption that information matters and information can empower.'⁶⁴ However, such empowerment depends on information is that valuable, accessible, comprehensible and comparable.⁶⁵ Yet, the capacity of transparency provisions nationally and internationally to regulate supply chains effectively is limited, not least because supply chains are complex and fluid, with many layers and complicated power dynamics between buyers and suppliers.⁶⁶ Other difficulties stand in the way of effective and empowering disclosure regulation, including proliferation of measures that may compete or contradict each other, conflicting stakeholder interests and information demands, information overload, commodification of information and lack of enforcement or remediation.

Proliferation of measures

At the national and international level there are multiple standards and frameworks focusing on different or overlapping areas and activities. Companies may for example, adopt and follow the GRI, and/or the international reporting framework, and they may also be subject to specific reporting requirements implemented in their home countries or in countries in which they operate. This multiplicity of measures contributes to inconsistencies and lack of coherence. This has been the experience in the area of environmental reporting where multiple frameworks, and tension between the corporate and stakeholder objectives in transparency have 'produced a number of governance systems that might be applied simultaneously and to different effect and for different constituencies.'⁶⁷ The resulting proliferation of standards do not speak to each other and thus verification is not reliable. As Backer observes, 'In the aggregate, these transparency systems are incoherent, making miscommunication likely and assessment across systems difficult.'⁶⁸

This incoherence increases compliance costs as companies are required to modify their disclosure systems as their production trails over different territories each with their own legal or governance requirements. Companies then have to 'produce multiple metrics, or abandon disclosure, or substitute their own'.⁶⁹ CSR framework developers, including companies themselves, are also given the opportunity to turn the transparency requirements 'into a far more versatile technique of corporate reification'.⁷⁰ Even individual frameworks result in complex disclosures that may then become incomprehensible to the recipients or to the public who are then less able or willing to challenge the company or seek to use the enforcement processes. As Backer observes, the GRI

⁶³ Bovens M (2007) Analysing and assessing accountability: A conceptual framework. *European Law Journal* 13: 447–468; Hood C (2010) Accountability and transparency: Siamese twins, matching parts, awkward couple? *West European Politics* 33: 989–1009. See also Mabillard and Zumofen, at 114.

⁶⁴ Gupta, at 3.

⁶⁵ Dingwerth, Klaus, and Margot Eichinger. "Tamed transparency: How information disclosure under the Global Reporting Initiative fails to empower." *Global Environmental Politics* 10.3 (2010): 74-96, at 75.; citing Fung, Archon, Mary Graham, and David Weil. 2007 *Full Disclosure. The Perils and Promise of Transparency*. Cambridge: Cambridge University Press.

⁶⁶ Sarfaty, at 430-1.

⁶⁷ Backer, at 48.

⁶⁸ Backer, 49-50.

⁶⁹ Backer, at 52.

⁷⁰ Backer, at 59.

framework has become a disclosure regime that is ‘frequently updated and requires adherents to read multiple manuals to attain basic levels of comprehension, and the GRI’s ‘complex methodology resembles a regulatory classification system as complex as some US federal regulatory regimes’ and therefore is ‘virtually indecipherable to the lay public’, so that ‘enforcement of effective disclosure may sometimes slip through the cracks’.⁷¹

Marketization

Transparency has become more important politically. The existence of different disclosure systems to answer these political demands has led to disclosure becoming increasingly marketized or commodified with information and transparency systems being marketed to internal and external stakeholders.⁷² Consequently the systems compete and are shaped by investor and consumer tastes rather than by science and policy.⁷³ To what extent then can the information be trusted? These different systems have also generated new intermediaries/powerbrokers tasked with facilitating, translating, certifying, interpreting and articulating information in order to make it available and useful for different participants inside and outside value chains and networks.⁷⁴ Many firms sell and market environmental information and certification services, but they also try to market transparency and trust. For example, environmental NGOs seek financial compensation for their logos and endorsements designed to enhance reputation, trust and legitimacy for the companies who use them.⁷⁵ As Mol remarks, all kinds of public and private labeling, auditing and certification organizations form examples of this marketing of information and trust. NGOs become also market parties and in other countries (e.g. the Netherlands) consultancy firms profile themselves also as being rooted in a civil society community.⁷⁶ This marketization is exacerbated by the emphasis on business case arguments for disclosure, causing the processes to be a means for corporations to secure market leadership.⁷⁷

Transparency reinforcing power imbalances rather than empowering the less powerful

The marketization of information and transparency processes has encouraged companies to seek to control the processes and in supply chains lead companies have used these processes to reinforce their power over the actors further down the supply chain.⁷⁸ For example, Backer has highlighted the example of Walmart’s success in filtering information through its management of its own supply chain. Walmart has managed to control the flow and coordination of supplier information, and to dictate supplier behaviour through the leveraging of its market power in coordination with an internally developed set of supplier sustainability standards. The presence of clear, strict supplier standards allows Walmart to present practice failures along its supply chain as failures at the supplier and not the distributor level.(Backer at 47) When a company is able to control its direct suppliers and has the power to switch among suppliers, it can more easily monitor and influence their behaviour. In supply

⁷¹ Backer, Larry Catá. ‘Transparency between norm, technique and property in international law and governance: The example of corporate disclosure regimes and environmental impacts.’ *Minn. J. Int’l L.* 22 (2013): 1, at 38.

⁷² Backer, 66.

⁷³ Backer, 70.

⁷⁴ Mol, (2015)at 155.

⁷⁵ Mol, 2010, at 139.

⁷⁶ Mol (2015) at 160, citing also SustainAbility, (2003) *The 21st Century NGO. In the Market for Change*. London, and Anshelm, J., Hansson, A., 2011. ‘Climate change and the convergence between ENGOs and business: on the loss of Utopian Energies’ *Environ. Values* 20 (1), 75-94.

⁷⁷ Dingwerth and Eichinger, at 80.

⁷⁸ Mol (2015) 157.

chains, lead firms have the ability to ‘drive coordination, enforce agreements, transmit environmental and human rights norms, and conduct due diligence along their supply chains.’⁷⁹ Sometimes, however, the suppliers could have power over the buyer firms, such as when the buyer or lead firm faces high switching costs or lacks the purchasing power to hold its suppliers captive, and/or cannot transmit tailored incentives that motivate cooperation. In such circumstances the lead firm has less influence and greater difficulty exercising due diligence, so that it is forced to tolerate non-compliant and opportunistic behaviour by suppliers, especially those located at a distance from the lead firm.⁸⁰

The power of the larger market actors is reinforced by the complex and sophisticated requirements of the transparency regimes that demand measurement, auditing and verification and more detailed reports because they are better able to afford such levels of sophistication than are the smaller, less well-resourced firms situated in less developed states.⁸¹ These power imbalances are deepened when sanctions and restricted market access occur.⁸²

The recipients of information

In theory, transparency enables stakeholders to make informed decisions; and it extends their choices. As Dingwerth and Eichinger observe, in a transparent system, organizations with relevant economic, environmental, social or other impacts must “completely disclose” all information that stakeholders need to make a decision to buy or not to buy, to invest or not to invest, or to collectively organize against a company or refrain from doing so.⁸³ However, the information provided is not always useful or relevant in practice. In terms of human rights interests of consumers, the disclosures made are not always sufficient to enable consumers to identify which companies are making comprehensive efforts to protect human rights and which are not.⁸⁴ Nor are they able to determine from the information given to them the extent of human rights abuses in supply chain processes. Chilton and Sarfaty note that instead, consumers are given information on the due diligence processes for minimizing the risk of human rights violations in those supply chains, which does not necessarily provide them with an opportunity to make full judgements about the companies they are dealing with. In addition, the variety and complexity of the different supply chains and where they operate, makes comparability very difficult to achieve. These observations lead Chilton and Sarfaty to conclude that for consumers, supply chain disclosures are ineffective⁸⁵ because they do not enable the consumers to exert influence to force better behaviour by the companies and their suppliers. Another reason for this lack of effectiveness is that consumers are not best placed to be of influence, since the evidence suggests that they ignore or do not read the disclosures. Indeed, Chilton and Sarfaty cite one study which found that only one or two out of every thousand retail software shoppers actually read the small print in end user license agreements online. Another problem they face is information overload, being swamped by too many or too technically complex disclosures.⁸⁶ Too much information and

⁷⁹ Sarfaty, 432.

⁸⁰ Sarfaty, 433.

⁸¹ e.g. Haufler, V. (2010). Disclosure as governance: the extractive industries transparency initiative and resource management in the developing world. *Global Environmental Politics*, 10(3), 53-73; Glin, L.C., Mol, A.P.J., Oosterveer, P., Vodouhê, S.D., 2012. Governing the trans- national organic cotton network from Benin. *Global Net*. 12 (3), 333-354.

⁸² Mol, (2015) 157.

⁸³ Dingwerth and Eichinger, at 79.

⁸⁴ Chilton and Sarfaty, at 46.

⁸⁵ Chilton and Sarfaty, at 5-6.

⁸⁶ Chilton and Sarfaty, at 22.

misinformation becomes a form of disinformation, what Shenk calls 'data fog'.⁸⁷ As Gupta suggests, if recipients are bombarded with large volumes of disclosed information they do not know how to find the "needle in the hay-stack" or even what to look for.⁸⁸ The effect is that rather than to empower the information recipients, they become further disempowered.⁸⁹

Lack of accountability

Transparency should, in theory, lead to a process through which the recipients can hold the actor to account and impose sanctions or obtain remedy for bad behaviour revealed by the transparency.⁹⁰ However, Mabillard and Zumofen point out that media and stakeholder accountability through transparency can be considered a reality, while citizen accountability remains an illusion.⁹¹ Cooper and Owen, reveal that corporate disclosures, voluntary or mandatory, offer little opportunity for facilitating action on the part of organizational stakeholders and therefore do not give rise to accountability. In the UK, for example, where shareholder primacy prevails, management of organizations, and governments, use hierarchical and coercive power within the decision-making process to favour shareholders over other interested groups, leaving those other groups without opportunity for discussion and dialogue and the reporting is viewed in isolation from any necessary institutional reform that would enable those stakeholders to hold the directors to account.⁹²

In light of the need for enforceability the verdict for international level voluntary standards is negative, showing these to be ineffective in providing a positive influence on corporate behaviour because they lack independent monitoring and enforcement mechanisms and are vulnerable to being used by corporations for greenwashing.⁹³ So too are the national level requirements for information. Indeed, the Modern Slavery Act appears so far not to have led to full and effective disclosure by corporations. In 2016, the Business & Human Rights Resource Centre found that only 15 of 27 statements analysed (56%) complied with the minimum requirements. Their analysis showed 'patchy compliance with the substantive provisions of the Act.'⁹⁴ Only a small number of the 27 FTSE 100 companies analysed, including Marks & Spencer (M&S) and SAB Miller, provided information on risks they identified in their operations and supply chains, and explained how they addressed them. Most companies provided little information on the structure and complexity of their supply chains, and very few provided information on specific risks in those chains. Only two companies (M&S and Vodafone) reported developing performance indicators.⁹⁵ Subsequently published research supports these findings. A briefing released in June 2017 by CORE Coalition revealed that only around 14% out of over 2,100 statements under the MSA comply with the minimum requirements and most of them provide little

⁸⁷ Shenk, D., (1997) *Data Smog. Surviving the Information Glut*. Harper Collins, New York.
Shenk, 1997, cited by Mol, (2015) at 158.

⁸⁸ Gupta at 4.

⁸⁹ Mol, (2015) at 158.

⁹⁰ Mabillard and Zumofen, at 116-121. See also Fox J (2007) 'The uncertain relationship between transparency and accountability', *Development in Practice* 17: 663-671; and Meijer A (2014) 'Transparency', in: Bovens M, Goodin RE and Schillemans T (eds) *The Oxford Handbook of Public Accountability*, Oxford: Oxford University Press, pp. 507-524.

⁹¹ Mabillard and Zumofen, at 118.

⁹² Cooper, S. M., & Owen, D. L. (2007). Corporate social reporting and stakeholder accountability: The missing link. *Accounting, Organizations and Society*, 32(7), 649-667.

⁹³ Sarfaty, at 426-7:

⁹⁴ BHRRC, at 13.

⁹⁵ BHRRC, at 13.

information on the six areas the Act suggests companies to report on.⁹⁶ According to a 2016 review by Ergon Associates of 230 MSA company statements, most fail to comply with minimum requirements. 40% had not been signed by a director, and about 30% were not accessible via a link easily found on the company's web-site.⁹⁷ Ergon's review also noted poor reporting on key performance indicators, and that 35% of statements 'say nothing on the question of their risk assessment processes'.⁹⁸ These disappointing results highlight that the disclosure regime has a number of limitations.

In light of these weaknesses it is no wonder that commentators conclude, as does Mol, that 'transparency-in-practice has many shortcomings, practical limitations, dysfunctions or pathologies. Consider only the absence of standardization of disclosure rules/practices, the limited categories for which disclosure is mandatory, a focus on disclosing procedures rather than outcomes, and the (power) inequalities accompanying transparency.'⁹⁹

The weaknesses exposed by such commentators are manifested also by the fact that they appear to have been ineffective in reducing the number of those experiencing exploitation. Still we witness human rights abuses, environmental damage, and labour exploitation. Indeed, the Modern Slavery Index of 2017, which assesses 198 countries on the strength of their laws, the effectiveness of their enforcement and the severity of violations, reports an increased risk of slavery in 20 EU countries and across the world, as the migration crisis increases the possibility of human trafficking and forced labour.¹⁰⁰ The *Global Estimates of Modern Slavery Report*, published by Alliance 8.7, an alliance between the ILO, Walk Free Foundation and the International Organisation for Migration, found that in 2016 across the globe there were an estimated 40.3 million men, women and child victims of slavery, 20.4 million of these being in forced labour, 16 million in forced labour in the private sector and 4.1 million in state labour.¹⁰¹ According to the ITUC's Global Rights Index 2017, the number of countries experiencing physical violence and threats against workers rose by ten percent in the previous year, with corporate interests being prioritised and workers being denied labour law protections across the global economy. The ITUC Secretary General remarked that this situation created a hidden workforce with states and corporations refusing to take responsibility, and the result being that fundamental rights are undermined by corporate interests.¹⁰²

Ultimately, we see that the main regulatory approach falls short of its goals of respecting human rights or furthering sustainable business behaviour. This may be a result of the neo-liberal underpinnings of this system in which the preference for a market-led regime leads to voluntary, or soft law approaches

⁹⁶ CORE, Modern Slavery reporting: Weak and Notable Practice, June 2017, available at http://corporate-responsibility.org/wp-content/uploads/2017/06/Core_ExamplesFINAL.pdf

⁹⁷ Ergon Associates, Reporting on Modern Slavery: The Current State of Disclosure, May 2016, available at <http://ergonassociates.net/wp-content/uploads/2017/06/Reporting-on-Modern-Slavery2-May-2016.pdf?x74739> and see also Ergon Associates, Modern Slavery Statements: One Year On, April 2017, available at http://ergonassociates.net/wp-content/uploads/2016/03/MSA_One_year_on_April_2017.pdf?x74739

⁹⁸ Mol (2015) at 155.

⁹⁹ Mol, (2015) 155.

¹⁰⁰ Alliance 8.7, ILO, Walk Free Foundation: *Global estimates of modern slavery: Forced labour and forced marriage* 2017. See also Modern Slavery Index 2017, Verisk Maplecroft.

¹⁰¹ Alliance 8.7, *Global estimates of modern slavery: Forced labour and forced marriage* 2017.

¹⁰² See ITUC, *Global Rights Index* 2017.

to regulation that are not strong enough to guarantee adherence to the moral responsibilities of the market actors.¹⁰³

Part 5 - Some solutions

What do we need to do to make the regulation of multinational companies and supply chains more effective? In this section I argue that the power relationships are integral to the regulatory response to supply chain activity. As the ILGP Group recognises, 'law constitutes the power relations between actors that give rise to particular forms of governance and engender particular distributive effects.' From this perspective, the ILGP tells us that 'this focus on the role that legal frameworks play at different levels of a particular chain, and on the politico-economic power dynamics that operate behind competing legal norms, can help facilitate a critical assessment of the structural and distributional dimensions of GVCs—and the global economy more broadly—that are often taken for granted or normalised. Such an imaginative legal exercise can then help to elucidate alternative and potentially more progressive sites of intervention by scholars, policymakers and civil society groups.'¹⁰⁴ From this perspective it becomes important to examine what is really going on in these supply chains. Named as global supply chains or global value chains, it is easy to overlook the exploitative behaviours that underlie many of these structures.

Selwyn argues that a reformulation of global value chains as global poverty chains provides a concept that comprehends better the global dynamics of wealth concentration, and the (re)production of poverty and inequality.¹⁰⁵ Whilst the term global value chain shows how lead firm chain governance impacts upon supplier firm upgrading strategies and illuminates effectively how corporate decisions and practices in one part of the world impact upon developmental processes in another part of the world, it contains developmental bias in which the supplier firm is presented as 'upgrading' to provide a route to poverty reduction and development.¹⁰⁶ However, in these global value chain structures, lead firm monopolistic, value-capturing and profit-maximising strategies are combined with exploitative supplier-firm strategies of capital accumulation to provide employment with deleterious effects upon workers, including poverty pay and unfree labour.¹⁰⁷ Thus rather than seeing global value chains as developmental organisations that raise people from poverty, the capitalist exploitation of labour within these structures 'immiserates' those working for them and keeps them in situations of poverty. The Schumpeterian search by firms for new technologies, new markets, new sources of supply, and new ways of making things, may have the goal of improving supplier firm efficiency, competitiveness, adaptability and ability to link-up to dynamic lead firms in 'value-adding' ways¹⁰⁸, but it is also driven by profit-maximisation leading to cost cutting and attempts to reap greater value and productivity from the workers by exploiting their labour. This might be seen as another example of the global south effectively subsidising the wealth of the global north, as was recently argued by

¹⁰³ Nadesan, Majja Holmer. "Transparency and neoliberal logics of corporate economic and social responsibility." *The handbook of communication and corporate social responsibility* (2011): 252-275.

¹⁰⁴ The IGLP Law and Global Production Working Group, 'The role of law in global value chains: a research manifesto' (2016) 4:1 *London Review of International Law*, 57–79, at 61.

¹⁰⁵ Benjamin Selwyn, 'Global Value Chains or Global Poverty Chains? A new research agenda', University of Sussex, Centre for Global Political Economy, *Working Paper No 10*, June 2016, at 2; See also Selwyn, B., 'Social Upgrading and Labour in Global Production Networks: A Critique and An Alternative Conception' (2013) 17:1 *Competition and Change* 75-90.

¹⁰⁶ Selwyn, at 4.

¹⁰⁷ Selwyn, at 5.

¹⁰⁸ Selwyn, at 35.

Hickel in his book *The Divide*.¹⁰⁹ In short, Selwyn tells us that these chains effectively reinforce poverty through exploitative arrangements: ‘First, lead firms use their oligopoly power to capture the lion’s share of the value created in each chain. Second, employment in these industries does not represent ‘the first rung on the ladder out of extreme poverty’), but, on the contrary, generates new forms of poverty. Third, lead firms play a significant part in generating these poverty-inducing conditions which in turn enables them to capture the majority share of value created in these chains.’¹¹⁰ The formation and expansion of super-exploited labouring classes across the global south facilitates northern firm accumulation strategies. The latter can threaten ‘their’ workers with outsourcing in order to repress wages, lengthen the working day, and intensify work. The production of very cheap goods by super-exploited workers across the global south enables northern workers to maintain relatively high levels of consumption whilst experiencing stagnant/falling wages.¹¹¹ Thus, the impact is felt by workers in the global south and the global north, since the poverty wages paid to those in the south lead to a driving down of wages in the north too as a result of the offshoring.¹¹²

Exploitation

These global poverty chains are coordinated by powerful, multinational lead firms that source quality goods and services at the lowest cost and thus through their own profit seeking behaviour they exploit the workers at the base of their value chains.¹¹³ Such firms operate by externalising the responsibilities for the production process and for how the workers are treated. At the same time, they impose their powerful position to keep the production costs low and to maximise their profits. Clarke and Boersma’s case study of Apple provides an example of this dynamic. They highlight how Apple externalises its responsibilities through its Supplier Code of Conduct and therein demanding that: “...suppliers are required to provide safe working conditions, treat workers with dignity and respect, act fairly and ethically, and use environmentally responsible practices wherever they make products or perform services for Apple Apple will assess its suppliers’ compliance with this Code, and any violations of this Code may jeopardize the supplier’s business relationship with Apple, up to and including termination”.¹¹⁴ Alongside this Code of Conduct requirement, Apple imposes on its suppliers high quality demands at the lowest prices it can pay. The supplier is then left with little choice but to cut its own production costs and to pass those on by paying lower wages to the workers and leaving them to work in unsafe production facilities. The externalising of responsibilities is pushed onto those who have no way to externalise them further and those are the workers who have little labour law protection, who are forbidden to form independent trade unions or to strike, as is the case for the workers in Apple’s Chinese suppliers.¹¹⁵

This exploitative form of organisation is an essential feature and by focusing on this it may enable us to adopt an alternative approach, thinking more in terms of analytically prioritizing workers’ attempts to ameliorate their conditions.¹¹⁶ Selwyn compares a social upgrading analysis with an analysis of the labour process and concludes: ‘While advocates of social upgrading and Decent Work represent a ‘top-

¹⁰⁹ Hickel, J., *The Divide: A Brief Guide to Global Inequality and its Solutions* (2017, Heinemann).

¹¹⁰ Selwyn, at 17. See also Sachs 2005, 11.

¹¹¹ Selwyn, at 36.

¹¹² Selwyn, at 33.

¹¹³ Rawling, at 661.

¹¹⁴ Apple 2014, and Clarke and Boersma, at 115-6.

¹¹⁵ Clarke and Boersma, 115-6.

¹¹⁶ Selwyn, 2013, at 87.

down' approach to addressing problems of labour's mal-treatment by capital, a more critical chain/network framework, rooted in an analysis of the labour process, represents a 'bottom-up' approach to these issues. The first perspective allocates labour a subordinate 'partnership' role to capital's profit orientation and states' attempts at regulating the capital-labour relation. The second perspective analytically prioritizes workers' struggles to ameliorate their conditions through collective action.'¹¹⁷

Selwyn's alternative approach is much more likely to result in an emancipatory agenda than the top down approach, which has enabled the lead companies in supply chains to retain their power and has resulted in weak provisions that have given little participatory opportunity to the affected stakeholders. In addition, the terminology, changing to exploitation or poverty calls up the need for acceptance of responsibility in this global system on the part of the lead companies as well as on the part of others who participate in the system as producers, or consumers or facilitators. Dahan et al present a set of five principles as a general guide for allocating responsibility in the context of global chains of production:

The principle of connectedness: this principle is grounded on the special relationship, or connectedness, that exists amongst certain people, be it based on shared identity (such as membership in a community, nation, or tribe) or on participation in a joint activity (such as the production and supply of a given product).

The capacity principle: this principle relates to the capacity of individuals or institutions to prevent and remedy unjust working conditions.

The beneficiary principle: in the context of global labor, this refers primarily to the economic gain actors derive from the labor connection. For example, in an international chain of production, MNEs benefit more than subcontractors or managers of local factories in developing states from production carried out under unjust conditions.

The contribution principle: this principle factors in conduct by individuals or institutions that is causally related to the unjust working conditions in question. Determining actual contribution to the violation of labor rights requires a detailed empirical investigation regarding the actor's part in creating the unjust labor conditions, directly or indirectly, by actual actions or omissions.

The control principle: this final principle takes into account the extent of control an individual or institutional actor maintains over the conditions of an unjust situation and the conduct of the participants in creating this situation. In the context of a global chain of production, this principle can apply, for example, to the extent to which an MNE's actions and policies are determinative of unjust conditions in the factories and the conduct of participants, such as subcontractors, that results in workers' rights abuses.¹¹⁸

Against this set of principles, it is easy to see that lead companies may be attributed responsibility but so also would other participants in the system including end consumers under the connectedness,

¹¹⁷ Selwyn, 2013, at 88.

¹¹⁸ Dahan, Y., Lerner, H., and Milman-Sivan, L., The Guiding Principles for Business and Human Rights: Labor Violations and Shared Responsibility, Draft accepted 2016, for *International Journal of Comparative Labour Law and Industrial Relations*. Acknowledging also Christian Barry, "Global Justice: Aims, Arrangements, and Responsibilities." In *Can Institutions Have Responsibilities*, (Toni Erskine, Ed., Palgrave) 218-238 (2003).

beneficiary and contribution principles. Indeed, Iris Marion Young, highlights the responsibility that arises from our social connections in global justice arrangements. The structural injustices inherent in these poverty chains is a collective problem. Young presents a “social connection model” of responsibility which says that ‘all agents who contribute by their actions to the structural processes that produce injustice have responsibilities to work to remedy these injustices.’¹¹⁹ Pointing to the example of sweatshops in global supply chains Young observes that the ‘workers at the bottom of this system suffer injustice in the form of domination, coercion, and need- deprivation within a global system of vast inequalities.’¹²⁰ Young sees this arrangement as a form of structural injustice in which social processes put large categories of persons under a systematic threat of domination or deprivation of the means to develop and exercise their capacities, whilst others may dominate or have a wide range of opportunities for developing and exercising their capacities. The injustice occurs as a consequence of many individuals and institutions acting in pursuit of their particular goals and interests, within given institutional rules and accepted norms. All participants in the ongoing schemes of cooperation that constitute these global structures are responsible for them, in the sense that they are part of the process that produces unjust outcomes¹²¹: ‘We bear responsibility because we are part of the process. Within this scheme of social cooperation, each of us expects justice toward ourselves, and others can legitimately make claims on us.’¹²² An illustrative example is the potential of consumers and civil society organisations who can act collectively to achieve social and economic change. Clarke and Boersma argue that ‘pressure by civil society organisations harnessing consumer power is one of the driving forces behind changes in social and environmental practices.’¹²³ This gives rise, according to Young, to a political responsibility that is forward-looking and collective and demands us to change through communication and discourse the institutions and processes so that they generate less unjust outcomes. In this model workers share responsibility for combating exploitative conditions.

The model is emancipatory and demands that the workers be organized in order to participate in a transformative process. However, in reality, especially where freedom to organize is not recognized or not enforced, such workers may be able to discharge their responsibilities only with the support of others, often faraway and relatively privileged others, who make public the workers’ grievances, put pressure on the agents that would block their unionization, and give them material aid.¹²⁴ Young presents a positive non-blame model of responsibility and in this she differs from Thomas Pogge, whose model is more fault based and imposes liability, particularly on ‘the institutions and social processes in which most of the world’s people are embedded as a system that is *imposed* by some on others. Pogge finds a small global elite—affluent citizens and holders of political and economic power in resource-rich developed countries—who “enforce a global poverty regime under which we may claim the world’s natural resources for ourselves and can distribute these among ourselves on mutually agreeable terms.” He refers to “the design of a global economic order” which is determined by a tiny minority of participants, and finds that a global economic order is being imposed on people

¹¹⁹ Young, I. M. (2006). Responsibility and global justice: A social connection model. *Social philosophy and policy*, 23(1), 102-130, at 102-3; see also Young, I. M., Responsibility and Global Labor Justice, (2004) 12:4 *The Journal of Political Philosophy* 365-388.

¹²⁰ Young, at 111.

¹²¹ Young, at 114.

¹²² Young, at 119.

¹²³ Clarke and Boersma, at 130.

¹²⁴ Young, at 124.

in developing countries by Western governments acting in the name of their citizens, which presses many people into grinding poverty and exposes them to domination.¹²⁵

Arguably, it is possible to adopt a mixed system of liability-based responsibility and collective social-connection responsibility. The liability-based responsibility would focus on the exploitative role played by lead corporations and the social-connection responsibility would focus on the roles of individuals and organisations that participate in ways that support or leave the exploitation unhindered. The responsibility in both senses is to seek to eradicate the exploitation and to find systems that reduce or eliminate global inequality and poverty and protect against human rights abuses or unsafe work practices.¹²⁶ This approach would demand a number of changes to the existing body of principles and standards. The UNGPs for example, might be altered to reflect more accurately the moral responsibility of lead companies and MNEs/TNCs by being expressed not just in terms of a duty to respect human rights but positively to protect such rights, as states are required to do, and such corporations should also be given an express duty to protect, assist and potential and actual victims of human rights abuses, remedying and compensating if abuses or violations do occur.¹²⁷ This could be shaped as a duty shared by all participants in the global production chains.¹²⁸

A first step is to deal with the current mix of reporting standards which requires to be streamlined in order to avoid inconsistency and confusion for the participants and to make comparability more achievable and in turn improve access to legal action and remedy. As the BHRRC observes, “the successful, but disparate, initiatives by governments.... if brought together, and applied internationally, these initiatives would form a powerful global force to combat modern slavery.”¹²⁹ The currently uncoordinated actions could ‘become a robust, and harmonised international standard for national legislations. Acting in concert, governments would have far greater impact on modern slavery and workers’ rights, and raise the floor of minimum corporate behaviour. Acting together, governments would also avoid a “spaghetti soup” of incoherent legislations, and instead create the international predictability that global business seeks.’¹³⁰ Common regulation would ‘allow better monitoring by workers, trade unions, NGOs and investors and, in case of non-compliance, targeted litigation’¹³¹ allowing them to make comparisons across companies more easily.¹³²

If we accept the joint responsibility approach it would lead to more fundamental changes to the required disclosure process. The aim would be for disclosures to be 1) steps towards prevention of labour exploitation or human rights abuses, 2) bases for dialogue between corporate actors and workers and consumers and their representatives and 3) part of the apparatus for accountability and/or remediation. This would require such disclosures to inform recipients (including all participants in the chain) with details of the whole chain’s structure and identity and contacts of all participant

¹²⁵ Young, 2004, at 342, and Thomas Pogge, *World Poverty and Human Rights* (Cambridge Polity Press, 2002), p. 142.

¹²⁶ Yossi Dahan, Hanna Lerner, and Faina Milman-Sivan "Shared Responsibility and the International Labor Organization." 34 *Michigan Journal of International Law* 675 (2013)

¹²⁷ Dahan, et al.

¹²⁸ Alan Hyde, "Legal Responsibility for Labour Conditions Down the Production Chain." In *Regulating Work: Challenging Legal Boundaries*, edited by J. Fudge, S. McCrystal, and K. Sankaran (Oxford: Hart Publishing, 2012)

¹²⁹ BHRRC, at 2.

¹³⁰ BHRRC at 4.

¹³¹ BHRRC, at 24.

¹³² Chilton and Sarfaty, at 43-4.

suppliers and their lead personnel within the chain, contractual terms and conditions and production processes across or throughout the chain, terms and conditions of workers' contracts and prices and wages paid at all levels. There should be made available details of policies to prevent or end human rights abuses, including forced labour, trafficking and breaches of international conventions. Such details should include activity around such policies, showing how they are being acted upon and the outcomes of such actions, including details of where there have been problems. The disclosure and due diligence laws implemented in the UK and in France are important steps in this direction. This additional suggestion would require the involvement of participants at all areas within the supply chain to be involved in the continuous updating and revision of the available information. There are external technological resources that could be used to enable this ongoing process such as Transparency One, which is claimed to be able to simplify a complicated network with a complete set of dashboards that connects facilities with products, including indirect suppliers throughout every level. Use of an external information provider might be a way of preventing too much control of the disclosure process by the lead company and might be a way of inviting participation of workers and consumers and their representatives in the process. A participative disclosure might well be possible under the blockchain technology that has come to the attention of actors in financial services and capital markets, following its success in the bitcoin cryptocurrency. Moyce summarises the features of blockchain: 'the immutability, immediacy and transparency of information captured within a blockchain means that all necessary data can be recorded in shared ledgers and made available near real time. In such a world, stakeholders will no longer be simple recipients of post-hoc reports; instead they can be part of the real-time process.'¹³³ The technology acts as a cryptographically assured immutable and irreversible 'distributed ledger or database running simultaneously on many (possibly millions) of nodes that can be distributed geographically and across many organizations or individuals.'¹³⁴ It would allow users to keep an audit trail for regulators to verify compliance and it would be possible for regulators to have a 'read only, near real time access into the private blockchain of the supply chain. The regulator could therefore have a more proactive role and analyse information in real time mode.'¹³⁵ Whilst it is early days and the blockchain technology is still at an experimental stage, its potential is clear, especially for complex structures such as supply chains.

This sophisticated technology could in turn be a first stage in providing representatives of workers or consumers through the chain with information that they need to start a process of investigation and discussion not just with local suppliers but further up the chain toward the lead companies where the resources make possible positive action to remedy any forms of human rights abuses or labour exploitation that have been identified. The potential for a meaningful and positive participation by consumer and worker/trade union networks is illustrated by the example provided by the Bangladesh Accord on Fire and Building Safety agreed in May 2013, in the wake of the Rana Plaza collapse. The Accord is an independent, legally binding agreement between signatory brands and trade unions designed to work towards a safe and healthy Bangladeshi Ready-Made Garment Industry. The agreement consists of six key components: a five year legally binding agreement between brands and trade unions to ensure a safe working environment in the Bangladeshi RMG industry; an independent inspection program supported by brands in which workers and trade unions are involved; public

¹³³ Moyce, C., 'How Blockchain Can Revolutionize Regulatory Compliance' (2016) *Corporate Compliance Insights* (10 August 2016)

¹³⁴ Ibid.

¹³⁵ Ibid.

disclosure of all factories, inspection reports and corrective action plans (CAP); a commitment by signatory brands to ensure sufficient funds are available for remediation and to maintain sourcing relationships; democratically elected health and safety committees in all factories to identify and act on health and safety risks; and worker empowerment through an extensive training program, complaints mechanism and right to refuse unsafe work. Importantly, the signatories to the Accord are required to assist in providing the supplier factories with the financial resources necessary for maintaining safe workplaces and to carry out requisite structural repairs and safety improvements.¹³⁶ The Accord has been observed by commentators as a game changer¹³⁷ and as a new paradigm model for enforcing labour and human rights.¹³⁸ Whilst it has great potential, and indeed its success has meant that its time period has been extended, the Accord still has some limitations, such as its failure to lead to changes in buyer practice and also the fact that lead companies retain high leverage with regard to funding.¹³⁹

Similar to the Bangladeshi Accord, the current efforts toward creation of a binding treaty on business and human rights emphasises the participation of civil society representatives in that work. Whilst the ongoing work towards this binding treaty are beyond the scope of this paper, it is worth noting that the current draft text includes provisions that would recognise the participatory relevance of affected individuals and communities and their representatives. Thus draft clauses 28-35 contain commands for TNS to 'respect the collective processes, associations, organisations, movements and other forms of representation communities as legitimate interlocutors for dialogue; to provide precise and detailed information to the public on: a. the purpose, nature, scale and terms of the leasing contracts for their operations and/or other contracts, as well as the terms of those contracts; b. the activities, structure, ownership and governance of the TNCs; c. the financial situation and performance of the TNCs; d. the availability of grievance and redress mechanisms and the procedures for their use; to make public their corporate management structures, the individuals who are responsible for making decisions and their respective responsibilities in the supply chain; to disseminate information through all appropriate means (print, electronic and social media, including newspapers, radio, television, mailings, local meetings etc.), taking into account the situation of remote or isolated and non-literate communities, and ensure that notification and consultation are carried out in the language(s) of the affected individuals and communities; to publish adequate information on the conditions of employment of migrant workers throughout their supply chains; to guarantee the participation of the affected individuals or communities in the management of the situation, while ensuring collective representativeness.¹⁴⁰

¹³⁶ Dahan, et al, at 76.

¹³⁷ Ryan, T. (2013) 'Experts: Bangladesh Accord is a Game Changer'. Washington, DC: Solidarity Center. www.solidaritycenter.org/experts-bangladesh-accord-is-a-game-changer/

¹³⁸ Anner, M., J. Bair and J. Blasi (2013) 'Toward Joint Liability in Global Supply Chains: Addressing the Root Causes of Labour Violations in International Subcontracting Networks', *Comparative Labour Law & Policy Journal* 35(1): 1–43, at 2.

¹³⁹ Scheper, C. (2017) Labour networks under supply chain capitalism: The politics of the Bangladesh Accord. *Development and Change*, 48(5), 1069-1088, at 1081-2.

¹⁴⁰ Treaty On Transnational Corporations and Their Supply Chains With Regard To Human Rights Treaty Text Proposal Global Campaign To Reclaim Peoples Sovereignty, Dismantle Corporate Power And Stop Impunity, October 2017 edition.

Conclusions

The way in which we conceptualise supply chains is important for the potential regulatory structure. Clearly, the history until now is one of persistent 'corporate impunity' and despite progress in business awareness of the issues, and in policy frameworks and due diligence procedures, this has not been matched by progress in actual business compliance in respecting human rights or in effective access to remedies, whether formal or informal, legal or non-legal, or judicial or non-judicial.¹⁴¹ In this paper I have followed Benjamin Selwyn's suggestion of renaming these business arrangements as global poverty chains or as global exploitation chains. Using such terminology highlights the normative requirements for both collective and liability-based responsibility on lead firms and other participants in the production processes. The quest for transparency remains of central importance but under my suggested route we would look for a more coordinated disclosure process that invites participation of affected parties as well as the lead firms. Using new technologies opens up these possibilities and so would be a major dimension of the regulatory structure, that must include enforcement procedures and remediation. My paper plays a small part in the debate concerning a much bigger process of urgently needed reform.

¹⁴¹ Pitts, C., *Progress Toward a Treaty on Business and Human Rights*, Civicus State of Civil Society Report 2017.