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Collective bargaining and MNEs (and their supply chains)

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1. *Introduction*

The issue of collective bargaining *vis-à-vis* multinational companies[1] and their supply chains[2] has always been a delicate one, and the Covid-19 pandemic has only contributed to exacerbate this situation.

In fact, labour law, as well as collective bargaining, are highly permeable to a country's history, as well as its social, economic, and political conditions. This leads to their features varying greatly from jurisdiction to jurisdiction and their reach being mostly defined by states' frontiers.

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[1] According with the ILO's *Tripartite declaration of principles concerning multinational enterprises and social policy*, multinational enterprises include "enterprises – whether fully or partially state-owned or privately owned – which own or control production, distribution, services, or other facilities outside the country in which they are based. They may be large or small; and can have their headquarters in any part of the world".

[2] The term supply chain refers to the network of organizations that cooperate to transform raw materials into finished goods and services for consumers – see Sisco, Chorn, Prunzan-Jorgensen, Prepscius, Booth, *Supply chains and the oecd guidelines for multinational enterprises*, 2010, p. 4, available at https://www.oecd.org/investment/mne/45534720.pdf, (consulted on 10/08/2021).

This poses a problem when discussing multinational enterprises since, due to their characteristics and configuration, they transcend national borders. In addition, it also means that these companies can "vote with their feet", *i.e.*, they can move their operations to more favourable jurisdictions if the conditions applied by one country become less appealing[3].

In this scenario, employees and trade unions, and even countries, are placed in a very weak position (in a way, reminiscent of the one experienced during the "social issue" era), not only because they lack efficient means of pressure, but also because they have to compete with the labour conditions observed in other countries[4].

This is the reason why some Literature points out that, instead of leading to the convergence of industrial relations' systems, economic globalization has led to their estrangement, allowing multinational companies to benefit from these differences through phenomena such as law shopping and social dumping[5].

It is, therefore, imperative, to establish rules that ensure that international commercial relations are not developed at the cost of low labour standards on exporting countries and the degradation or loss of jobs in importing countries[6].

[3] Since if they become unsatisfied with a country's policies, they can, simply, move to another one – see D'ANTONA, *Labour law at the century's end: an identity crisis»*, in CONAGHAN, FISCHL, KLARE, *Labour Law in an Era of globalization, transformative practices and possibilities*, Oxford University Press, 2002, p. 34. Underlining this same issue and the problems and challenges it brings to millions of employees and employers, see ILO, *Rules of the game. A brief introduction to international labour standards*, 2014, pp. 8 and 10, available at https://www.ilo.org/global/-standards/information-resources-and-publications/publications/WCMS_318141/lang—en/index.htm (consulted on 1/12/2018).

[4] See ESTANQUE, *Trabalho, sindicalismo e acção colectiva: desafios no contexto da crise*, in ESTANQUE, COSTA, *O sindicalismo português e a nova questão social. Crise ou renovação?*, Almedina, 2011, p. 51.

[5] See CARVALHO, *Breves considerações sobre o envolvimento dos trabalhadores nas organizações transnacionais no direito da União europeia*, in *Questões laborais*, 2013, 42, special number, p. 118. Also, according to HECQUET, *Essai sur le dialogue social européen*, L.G.D.J, 2007, p. 175 and PAPADAKIS, *Introducción,* in PAPADAKIS, *Diálogo social y acuerdos transfronterizos: ¿Un marco global emergente de relaciones industriales?*, Ministerio de Trabajo e Inmigración, 2009, p. 23, the absence of a legal framework contrasts with economy's globalisation and it confers a privileged setting to international companies since there is a mismatch between their transnational position and the markedly national action of social partners.

[6] See SÁNCHES, *Condicionalidad y aplicación de las normas internacionales del trabajo*, in BONET

Collective bargaining could play a very important role to prevent this panorama, but, as we will point out, this is not an easy solution.

These observations do not mean that multinational companies are devoid of benefits. In fact, it is quite the contrary. According to the ILO[7], through international direct investment, trade, and other means, these enterprises can bring substantial benefits to home and host countries by contributing to the more efficient utilization of capital, technology, and labour. They can also make an important contribution to the promotion of economic and social welfare; to the improvement of living standards and the satisfaction of basic needs; to the creation of employment opportunities, both directly and indirectly; and to the enjoyment of human rights, including freedom of association, throughout the world.

In fact, as revealed by the IndustriAll Global Union[8], a global framework agreement signed, in 2015, between this union and H&M was an accelerator in reinstating sacked workers at garment factories in both Myanmar and Pakistan just a couple of months after it came into force.

And the same benefits can also be stated regarding their global supply chains, which, once again according to the ILO[9], have contributed to economic growth, job creation, poverty reduction, and to the transition from the informal to the formal economy. They can be an engine of development, contributing to new production techniques, skills development, productivity, and competitiveness.

However, it is also true that labour conditions in global supply chains, particularly those that extend into developing countries, often fail to meet international standards and national regulatory requirements, and can lead to serious human rights abuses. Such as the denial of freedom of association and collective bargaining, the use of child and forced labour, employee discrimination, excessive work hours, degrading treatment by employers,

Pérez, Olesti Rayo, *Nociones básicas sobre el régimen jurídico internacional del trabajo*, Huygens Editorial, 2010, pp. 90–91.

[7] See the ILO, *Tripartite declaration of principles concerning multinational enterprises and social policy*, 2017.

[8] See http://www.industriall-union.org/agreement-with-hm-proves-instrumental-in-resolving-conflicts-0 (consulted on 10/08/2021).

[9] See the ILO's *Resolution concerning decent work in global supply chains*, adopted on 10 June 2016, available at https://www.ilo.org/wcmsp5/groups/public/—-ed_norm/—-relconf/-documents/meetingdocument/wcms_497555.pdf (consulted on 10/08/2021).

inadequate health and safety protections, improperly paid wages, and so on. The causes are numerous, such as pressures to keep prices low and to meet multinational enterprises' expectations for short production and delivery schedules, as well as poor enforcement of local and national regulations and a low understanding among suppliers and other actors of labour rights standards[10].

And this problem's dimension is put into perspective if we take into account that, according to the International Trade Union Confederation, 50 of the world's biggest multinational companies employ only six per cent of people in a direct employment relationship, relying on a hidden workforce of 94 per cent[11].

2. *The role of collective bargaining*

As we pointed out, collective bargaining can play a very important role towards the rationalization of this phenomenon. Particularly, a transnational collective bargaining, that involves companies, trade unions, and workers from several countries, could standardize the labour conditions applied by these companies, and prevent or reduce the risk of social dumping.

But such transnational collective bargaining is constrained by several circumstances. First of all, one must take into account the social and legal differences in national industrial relations systems, which lead to diverse collective bargaining configurations[12].

[10] As detailed by Sisco, Chorn, Prunzan-Jorgensen, Prepscius, Booth, *op. cit.*, pp. 7 and 8.

[11] See ITUC, *Frontlines report 2016: Scandal inside the global supply chains of 50 top companies,* 2016, p. 4. Available at https://www.ituc-csi.org/IMG/pdf/pdffrontlines_scandal_en-2.pdf (consulted on 10/08/2021).

[12] As pointed out by Glassner, Pochet, *Why trade unions seek to coordinate wages and collective bargaining in the Eurozone: past developments and future prospects*, in ETUI, European Trade Union Institute, *Working paper*, 2011, 3, p. 9, available at https://www.etui.org/Publications2/Working-Papers/Why-trade-unions-seek-to-coordinate-wages-and-collective-bargaining-in-the-Eurozone (consulted on 23/11/2018) and Eichhorst, Kendzia, Vandeweghe, *Crossborder collective bargaining and transnational social dialogue*, 2011, p. 12, available at http://www.europarl.europa.eu/-document/activities/cont/201107/20110711ATT23834/20110711ATT23834EN.pdf (consulted on 20/08/2019). This makes it particularly hard to achieve agreements with more substantiated contents, as Hecquet (*op. cit.*, pp. 13-14) recognises.

In fact, as stressed by several authors, even within Europe, the outline of this institute varies greatly[13]. For instance, while in some countries only trade unions may enter into agreements, in others a few other entities may also subscribe to them. While in some regimes the agreements have an *erga omnes* effect, in others their efficacy is limited by the principle of affiliation. The agreements' legal value also differs, varying from being a source of law to lacking any legal effect.

With such disparity, even in the European continent, it is quite easy to understand why a transnational collective bargaining is so difficult to achieve (even a mirage or a dream, as some point out[14]).

Furthermore, despite the international calling of the union movement, the economic crisis dilutes solidarities, enticing trade unions to adopt protectionist attitudes regarding the employees of their country. And the truth is that this kind of regulation would mean to waive the competitive advantage that results from the differences between regimes[15].

And while at European level, the EU could potentially facilitate the creation of a legal framework for a European transnational collective bargaining, at international level it becomes more challenging. In fact, not only is there more room for disparity in the collective bargaining national regimes, but the absence of any legal framework leads to more fluid interactions and to the celebration of agreements with a more dubious legal meaning, not only regarding their effects, but also the entities to whom they may apply.

Nonetheless, these difficulties have not prevented the conclusion of *international framework agreements* or *global framework agreements*.

Usually, their contents are more imprecise than the ones of typical collective agreements since they don't regulate issues such as salaries or work schedules[16]. Instead, they try and create a framework that will allow the

[13] For more information on this topic, see, for all, Rebhahn, *Collective Labour Law in Europe in a Comparative Perspective (Part II)*, in *International Journal of Comparative Labour Law and Industrial Relations*, 2004, 20, 1 and Rebhahn, *Collective Labour Law in Europe in a Comparative Perspective (Part I). Collective Agreements, Settlement of Disputes and Workers' Participation*, in *International Journal of Comparative Labour Law and Industrial Relations*, 2003, 19, 3.

[14] See Weiss, *European labour law in transition from 1985 to 2010*, in *International Journal of Comparative Labour Law and Industrial Relations*, 2010, 26, 1, p. 13.

[15] See Molina Garcia, *La negociación colectiva europea. Entre el acuerdo colectivo y la norma negociada*, Tirant lo Blanch, 2002, p. 94; Valdés Dal-Ré, *La negociación colectiva entre tradición y renovación*, Comares Editorial, 2012, p. 451 and Pernicka, Glassner, *op. cit.*, p. 2.

[16] More than defining working conditions, these instruments create the space in which

development of harmonious labour relations, stating some of the basic ILO principles, such as the prohibition of forced labour, the prohibition of discrimination, freedom of association, and so on[17].

However, the legal value of these agreements is variable, depending on how both parties intended to bind themselves[18]. And the binding of third parties (such as the supply chains) will depend on the multinational company having the necessary bargaining powers. Otherwise, their only effect regarding supply chains is that the multinational enterprise will have the obligation to, *a posteriori*, impose such conditions on these companies. In this case, and assuming the agreement contains a legal commitment, in case of breach, the other parties will only be able to act against the multinational company, for failing the impose these conditions to the supply chains. It will not be possible to act directly against the latter[19].

Still, there is a very interesting agreement, which is the *Accord on fire and building safety in Bangladesh*, which was expressly given binding legal value. This agreement was entered into by several apparel brands, and it not only ensures better safety conditions, but also training, and a complaints mechanism at the employees' disposal. And it has significantly

those may be bargained between the employees' representatives and the company – see ILO, *Freedom of association: lessons learned. Global report under the follow-up to the declaration on fundamental principles and rights at work, International labour conference, 97th session 2008. Report I (B), 2008. Available at http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_096122.pdf (consulted on 5/01/2017)*, pp. 32 and 33; DROUIN, *El papel de la OIT en la promoción del desarrollo de los acuerdos marco internacionales*, in PAPADAKIS, *Diálogo social y acuerdos*, cit., p. 279 and PAPADAKIS, CASALE, TSOTROUDI, *Acuerdos marco internacionales como elementos de un marco transfronterizo de relaciones industriales*, in PAPADAKIS, *Diálogo social y acuerdos*, cit., pp. 96 and 100.

[17] See SOBCZAK, *Aspectos legales de los acuerdos marco internacionales en el campo de la responsabilidad social de las empresas*, in PAPADAKIS, *Diálogo social y acuerdos*, cit., p. 156 and SOBCZAK, *Legal dimensions of international framework agreements in the field of corporate social responsibility*, in *Industrial relations*, 2007, 62, 3, p. 473; BONI, *Introduction*, in AA.VV., *Transnational collective bargaining at company level*, ETUI, 2012, p. 11 and CLAUWERT, *European framework agreements: "nomina nuda tenemus" or what's in a name? Experiences of the European social dialogue*, in AA.VV., *Transnational collective*, cit., p. 117.

[18] See PAPADAKIS, CASALE, TSOTROUDI, *Acuerdos marco internacionales,* cit., pp. 106-107 and SANGUINETI, *Eficacia jurídica de los produtos de la acción sindical transnacional*, in *Ius V*, 2012, 45, p. 155. According to SOBCZAK (*Legal dimensions of international*, cit., p. 479), the legal value of these instruments is uncertain, depending mostly on the powers of the signatories, particularly when aiming at binding third parties.

[19] See SANGUINETI, *op. cit.*, pp. 155-156.

contributed to improve the safety of millions of employees on this sector[20].

The covid-19 pandemic, however, has put a strain on these efforts, since, due the cancelation or delaying of several orders and payments, the garment industry in Bangladesh went into a crisis[21]. And, naturally, the instability brought by the pandemic will only contribute to factories and companies' weariness to take on more obligations.

3. *The importance behind consumers' perception and concluding remarks*

Despite these obstacles, public perception may be of help at this instance (but also in the future) since there has been a gradual but steady movement towards a more conscientious way of consuming. Therefore "naming and shaming" may be used to denounce companies and countries which still rely on poor labour practices, negatively impacting the consumers[22]. While the opposite, a "naming and applauding" of sorts may be used to point out the companies and countries with better practices, generating the consumers' respect (and interest).

In a way, this public perception was behind the successful *Accord on fire and building safety in Bangladesh*. The accord was brought on by the Rana Plaza factory building collapse, on 23 April 2013, which killed over a 1000 people and let several others in critical condition. This disaster was greatly divulged in media outlets and, less than a month later, the document was signed.

Another way to act against bad conditions verified in supply chains is when the respect for good labour standards is part of the multinational's publicity policy. In this case, consumers may act against them claiming misleading publicity. This happened, for instance, in the *Nike vs. Kasky* case[23].

[20] As mentioned on the instrument's website: https://bangladeshaccord.org/ (consulted on 10/08/2021).

[21] See, among others, https://www.reutersevents.com/sustainability/how-brands-can-ensure-more-responsible-garment-industry-bangladesh-post-covid-19 (consulted on 10/08/2021).

[22] IndustriAll also remarks on the vulnerability of brand image, as stated in http://-/www.industriall-union.org/multinationals-are-responsible-for-their-supply-chains (consulted on 10/08/2021).

[23] For more information on this case, see https://www.law.cornell.edu/supct/html/02-

And since companies are increasingly aiming at presenting themselves as socially responsible, environmentally engaged, and surrounded by good practices, in order to keep making such statements, without incurring in misleading publicity, they must ensure that their supply chains respect these conditions.

But, aside from these avenues, trade unions can also, and should also, develop conjoint strategies with other organizations, such as environmental groups, and consumers groups, in other to expose the conduct of multinationals and their supply chains, as a means of pressure. Multinationals and their supply chains also present shortcomings in other domains and a concerted action could be more effective in bringing the public's and other countries' attention to this matter, pressuring for a change in the status quo.

Furthermore, direct collective bargaining between the suppliers and trade unions is also essential to help improve the life and working conditions of people employed by these supply chains. The problem is that the social, economic, and political environment may not be favourable to these practices.

In this instance, public pressure and the action of global trade unions can be an incentive for multinationals to ensure that such practices effectively take place. Still, the individual action of multinationals is also far from effective, since even if they threat to stop their orders and move to other suppliers, factories can always find another multinational, less stringent on these matters. And even if the factories were, by themselves, open to such negotiation, without the multinationals support, it still would be very difficult to conduct such negotiations, when these companies can simply move to suppliers with lower standards and lower labour costs[24]. In the words of the IndustriAll Union[25], industry bargaining is, therefore, key.

575.ZC.html (consulted on 10/08/2021) and GASMI, GROLLEAU, *Nike face à la controverse éthique relative à ses soustraitants*, in *RFG*, 2005, 157, p. 123; DROUIN, *op. cit.*, pp. 297-298 e SOBCZAK, *Aspectos legales de*, cit., pp. 159-160.

[24] See http://www.industriall-union.org/industry-bargaining-for-living-wages (consulted on 10/08/2021).

[25] See http://www.industriall-union.org/industry-bargaining-for-living-wages (consulted on 10/08/2021). See also http://www.industriall-union.org/workers-rights-in-global-supply-chains-holding-companies-accountable (consulted on 10/08/2021).

Abstract

The present article deals with the issue of collective bargaining *vis-à-vis* multinational companies and their supply chains. In fact, the national propensity of collective bargaining places this phenomenon at odds with the transnational character of those companies. And even though their supply chains foster economic growth and job creation, it is also true that, particularly in developing nations, they often fail to meet statutory requirements and to observe labour rights. We explore, therefore, the contribution that transnational collective bargaining could provide towards this issue (and the difficulties it faces), as well as other avenues, particularly consumer's perception and pressure.

Keywords

Multinational companies, supply chains, collective bargaining, working conditions.