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# presentation

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The *Diritti Lavori Mercati* Journal has come of age by turning eighteen: a remarkable and very significant milestone for a subject that lives essentially in the world of ideas. It all depends on who promotes, encourages, and disseminates those ideas. This includes not only the Editors, but also the entire team, all of whom are incessantly dedicated to the Journal, and even more so the many authors who throughout the years have believed in the potential and success of the original initiative. Thanks to all these fundamental contributions, the Journal was able to reach the age of majority and the fullness of its purpose. This is demonstrated by both its quarterly publications – with its punctual quantitative (thanks also to the publisher's tolerance for some excess) and qualitative rhythms, as well as the new series (since 2015) of the "Monographic Notebooks", which runs at high speed. Not only are the "Notebooks" practically responsible for the doubling of the volumes, but above all, they act as a propellant for the scientific study of important issues, not always enabled by the normal periodical. With regards to Journal programming, they allow also for a greater presence of specialisations and skills (for example of judges or other professionals) that only occasionally have found adequate space in the original setting.

Strengthened by these results, the authors of the endeavour – starting with the Editors and the Publisher – could have lived peacefully, perhaps limiting themselves to the always indispensable commitment to refine the quality of the many stages of processing, required by a Journal that for ten years has been conferred class A in the National Agency for the Evaluation of the University and Research System (ANVUR) rating. Perhaps a few decades ago all of this would have been enough. But nowadays the results achieved are not deemed satisfactory: a journal with the aforementioned characteristics cannot afford to

age in serene indolence. Scientific communities, in particular, cannot rest on their laurels, although well deserved. The cheap maxims are wasted in this regard and there is no need to even mention them; except one: publish or perish! A maxim which, if cruel for the individual researcher – in that it condemns him to sacrifice in-depth study to the dissemination of his elaborations – for a journal it represents so much as the condition of its very existence: either it publishes with contents and methods that allow it to be present and timely in the high-level global scientific debate, or it must resign to a merely apparent existence.

For this reason, rather than celebrating the coming of age and therefore the past, the Editors, the Publisher and Collaborators have decided to look towards the future and face it in the best possible way, despite the unknown and the unique difficulties experienced in the last two years due to the pandemic.

Although the success of scientific journals is essentially still entrusted to paper publication, at its best making use of digitalisation, it is impossible to ignore that their future depends on the appropriate use of the most modern electronic means. Ideas must be born and live in spaces as ample as possible without being confined to a single dimension. Therefore, the good old paper – also very much transformed in the processes that look at it as a vehicle of current research – must coexist with the infosphere which adds many materials and immaterial benefits (not least the commercial one, which is rightly the primary interest of the Publisher). It is undoubtedly important to always be able to count on readers – public and private – who guarantee continuity and conservation of printed publications. As a rule, when putting together a new article or preparing reports, lectures, interventions, all scholars and researchers relish leafing through the relatively recent years' issues of a journal. However, it is very useful to be able to read an interesting article while also having at one's disposition another channel that opens the mind and offers a unique standpoint from which to look at the subject matter of the study, all thanks to the association of ideas that seems to have germinated from the written pages. Indeed, the sadness of shelves suddenly emptied of the sequence of volumes and colours seems to open a mental void that cannot be filled by the virtual extension. The foregoing is obviously the thoughts and feelings of those born in the analogue era. But until there are publishers (like ours) who share them, it would be wrong to annul them and not pass them onto new generations of scholars and researchers.

Nonetheless, it would be equally wrong to disregard dramatic changes affecting both publishing and the world of research, even the legal sphere. Consequently, it is inconceivable not to use the infosphere to optimize the work of processing and disseminating ideas. The demand for research published in open access is growing accordingly, guaranteeing almost permanently the utmost use to students or those who need to have their research examined in-depth or cross-checked. This is a great challenge, very dangerous for the survival of the old "containers", which a modern journal cannot fail to accept. In fact, thanks also to the Publisher's initiative and foresight, *Diritti Lavori Mercati* has already begun to take up the challenge by offering in open access – albeit temporarily – the *Quaderni della Rivista* (which, however, remaining "out of subscription", must earn their enduring existence in the "paper world").

We must go even further, precisely in consideration of the developments and metamorphoses that affect legal research in general and, in particular, the labour law area. This "going beyond" is the very essence of the origin of the Journal's new editorial line named *Diritti Lavori Mercati International* (abbreviated to DLM.int.). It will constitute a specific section of *Diritti Lavori Mercati*, characterized by contents (more extensive information on this point shortly), languages (primarily Spanish and English), and means of dissemination (everything and always in open access). In this section the Editors will retain their role and relative responsibility, and moreover will make use of two well-known scholars as Scientific Directors – Edoardo Ales and Massimiliano Delfino – who are younger, immersed in the new era, and therefore prepared for the new task. The Journal's organization chart will inevitably be enriched by specialized editorial staff, including representatives from foreign legal systems and expert referees. Furthermore, the necessary adjustment of the general organization chart will entail Paola Saracini working alongside Massimiliano Delfino, both in the role of editor-in-chief.

The new section meets the necessity to offer authors and readers wider participation in the scientific debate on the regulation of work: wherever it takes place and whatever aspect it concerns. When it comes to times, languages and users, *DLM.int* proposes to assure such participation by virtue of its open and entirely digital design, namely by not restricting its use to subscribers of the printed journal or to buyers of individual issues/essays on the Publisher's website. That is being obviously done always in full compliance with all the rules and procedures that a class A

journal must guarantee (starting with the condition of using a system of double-blind referees).

The style of the international section of the Journal involves the use of two essential tools: digital interface and the most popular languages worldwide in the field of labour law, bearing in mind the increased relevance of interdisciplinary scholarship. The qualification of *International* is therefore based on these two aspects without precluding the possibility to publish in the same section the contributions relating to national law if they may be utilised by a wider scientific community than that of students and scholars who think and read in languages of lesser diffusion in the world. From this point of view, the decision to create a new editorial line starts from the simple belief that today, to be truly effective, the ideas that animate the research must spread more rapidly and with fewer physical space constraints. Moreover, nowadays the "international" and digital dimensions have virtually merged in one: the latter thanks to the open-access formula that gives everyone the opportunity to read and write without worrying about borders, postal deliveries, archives, accesses and everything related to the physical world.

It goes without saying that a scientific journal must in any case guarantee the quality of the published content. The contributions therefore cannot have exclusively informative and popular content and must always respond to the elementary purpose of science: namely, critical and problem-oriented reflection on the existing issues. There is no need to deny that this is more arduous on a global scale, if only because information alone is often more difficult, and the critical-reconstructive study is much more complicated. Yet, that must not constitute a qualm. We, therefore, tried to equip ourselves by asking for a further contribution from those who already practice scientific research at the supranational and comparative level.

Our intent, however, goes beyond this: we hope that the challenge will be taken up by younger colleagues who enthusiastically appreciated the inauguration of the new section. The intent can be summarized in these terms: the international dimension – understood in a broad sense, that is, including the study of supranational systems and the comparison between different systems – has acquired in the last twenty years a depth that does not allow any scholar to consider it as an ornament or a niche in the national research landscape. This is perhaps one of the most relevant effects of market globalization, but at this point, it is not a phenomenon that can be traced

back to purely economic dynamics. Technology and information – as well as, or rather above all, "false" information – can tear down borders, while simultaneously eroding and transforming the logic and behaviour of all social classes. No class, least of all intellectuals and researchers, are protected from this tsunami. Therefore, the labour law of the future – and with it, those who cultivate it – will have to arise and move in very broad cultural contexts, absolutely not reducible to the borders of a single State or a single macro-region of the vast world; perhaps even for the sole purpose of returning later with greater awareness to deal with the specific problems that still afflict this or that country, *in primis* our fluctuating Italian Republic. *Diritti Lavori Mercati* with the new editorial line wants to be at the forefront in tackling these transformations without any limitations.

La revista *Diritti Lavori Mercati*, a la edad de dieciocho años, ha alcanzado la mayoría de edad (según la ley italiana). Un logro notable y muy significativo para un sujeto que vive esencialmente en el mundo de las ideas. De hecho, no existe un automatismo biológico que impulse su crecimiento y, menos aún, su maduración. Todo depende de quién promueva, fomente y difunda esas ideas. Han sido no solo – y no tanto – los Directores sino todo el equipo que se ha dedicado incesantemente a la Revista y, más aún, los muchos autores y autoras que han creído en el éxito de la iniciativa. Gracias a todas estas aportaciones fundamentales, la revista ha podido alcanzar la mayoría de edad y la plenitud de sus intenciones. Así lo demuestra tanto la cadencia trimestral – con sus ritmos puntuales cuantitativos (gracias también a la tolerancia de la editorial por algunos excesos) y cualitativos, como la nueva serie (de 2015) de los "Cuadernos Monográficos", que corre a gran velocidad. De hecho, los Cuadernos no solo realizan en la práctica la duplicación de archivos, sino que sobre todo actúan como propulsores para el estudio científico de cuestiones importantes, no siempre permitidas por la periodicidad normal. Y también permiten una mayor presencia, en la programación de la revista, de especialidades y habilidades (por ejemplo, las de magistrados u otros operadores) que en el escenario original solo de vez en cuando han encontrado el espacio adecuado.

Fortalecidos por estos resultados, todos los arquitectos de la empresa, comenzando por los Directores y la Editorial, podrían haber vivido en paz, quizás limitándose a la siempre indispensable apuesta por el refinamiento cualitativo de las múltiples etapas de procesamiento, que requiere una revista que ha sido en categoría A en la calificación de la Agencia Nacional de Evaluación del Sistema Universitario y de Investigación (ANVUR). Quizás

hace unas décadas todo esto hubiera sido suficiente. Hoy, los resultados obtenidos no son satisfactorios: una revista con estas características no puede permitirse envejecer con una serena pereza. Las comunidades científicas, en particular, no pueden dormirse en los laureles, incluso si se lo merecen. Las máximas baratas se desperdician en este sentido y ni siquiera hay necesidad de recordarlas. Excepto una: ¡publica o muere! Máxima que, si bien es cruel para el investigador individual – por cuanto lo condena a sacrificar el estudio en profundidad a la difusión de sus elaboraciones – para una Revista es incluso una condición de existencia: publica con contenidos y métodos que permiten que esté presente y oportuna en el debate de la ciencia global de alto nivel o se resigna a no existir realmente.

Por ello, Directores, Editores y Colaboradores, más que celebrar la mayoría de edad, que es el pasado, han decidido mirar al futuro y afrontarlo de la mejor manera posible, a pesar de las incógnitas y las singulares dificultades vividas en los últimos tiempos, debidas a la pandemia.

En general, aunque el éxito de las revistas científicas sigue estando ligado a la publicación en papel, a lo sumo mediante la digitalización, es imposible ignorar que su futuro depende del uso adecuado de los medios telemáticos más modernos. Las ideas deben nacer y vivir en espacios lo más amplios posible, sin limitarse a una única dimensión. Por tanto, el buen y antiguo papel – también tan transformado en los procesos que lo ven como vehículo de la investigación actual – debe convivir con la infoesfera, que suma muchas ventajas de carácter inmaterial y material (entre ellas la comercial, que con razón es muy importante para el editor). Sin duda, es importante poder contar siempre con lectores, públicos y privados, que garanticen la continuidad y conservación de las publicaciones impresas. Es cierto que todos los estudiosos e investigadores, a la hora de poner en marcha un nuevo artículo o preparar informes, conferencias, intervenciones, hojean con gusto los años de una revista más o menos reciente. Sin embargo, es muy útil leer un artículo interesante y al mismo tiempo disponer de otro medio: que, a través de una asociación de ideas – que parece haber germinado de las páginas escritas – abre la mente y ofrece un ángulo inimaginable desde el que mirar el objeto de estudio. Por supuesto, la tristeza de las estanterías repentinamente vaciadas de la secuencia de volúmenes y colores parece abrir un abismo mental, que la continuidad virtual no puede llenar. Obviamente son pensamientos y emociones de los nacidos en eras analógicas. Pero si hay editoriales (como

la nuestra) que las comparten, sería un error eliminarlas y no pasarlas a las nuevas generaciones de académicos e investigadores.

Sin embargo, sería igualmente incorrecto no darse cuenta de que todo cambia drásticamente en la edición y en el mundo de la investigación, incluso jurídica. Por tanto, es imposible no utilizar la infoesfera para optimizar el trabajo de procesamiento y difusión de ideas. Existe, por tanto, una demanda urgente de investigación publicada en acceso abierto, garantizando de forma más o menos permanente el máximo disfrute a quienes estudian para formar o profundizar y verificar la propia investigación. Este es un gran desafío, muy peligroso para la supervivencia de los viejos "contenedores", que una revista moderna no puede dejar de aceptar. De hecho, gracias también a la iniciativa de la Editorial, ya se ha comenzado a asumir el reto ofreciendo acceso abierto, aunque sea de forma temporal, a los Quaderni della Rivista (que, sin embargo, quedando "fuera de suscripción", deben ganarse la existencia permanente en el "mundo del papel").

Debemos ir más allá, precisamente en la consideración de los desarrollos y metamorfosis que afectan a la investigación jurídica en general y, en particular, en el ámbito del derecho laboral. Este ir más allá está precisamente en el origen de la nueva línea editorial de la Revista, a la que se decidió denominar *Diritti Lavori Mercati International* (abreviado *DLM.int*). Será una sección específica de *Diritti Lavori Mercati*, caracterizada por contenidos (*amplius* más adelante), idiomas (especialmente español e inglés), medios de comunicación (siempre en acceso abierto). Una sección en la que los Directores mantendrán su rol y relativa responsabilidad, haciendo uso de dos reconocidos académicos como los Responsables Científicos – Edoardo Ales y Massimiliano Delfino – más jóvenes, inmersos en la nueva era, por lo tanto, preparados para la nueva tarea. Evidentemente, el organigrama de la revista se verá enriquecido por una redacción especializada, con representantes de ordenamientos jurídicos extranjeros y *referees* expertos. La necesaria adaptación del organigrama general verá entonces a Paola Saracini flanqueada por Massimiliano Delfino, ambos en la función de jefes de redacción.

La nueva sección responde a la necesidad de ofrecer a los autores y lectores una participación más amplia en el debate científico sobre la regulación del trabajo: donde este tenga lugar y sobre cualquier aspecto. Una participación que *DLM.int* pretende asegurar, por los tiempos, idiomas y usuarios, ya que está íntegramente diseñada para la difusión digital y para el uso abierto, es decir, no reservada a los suscriptores de la revista en papel ni

a los compradores de ejemplares individuales en la pagina web de la Editorial. Por supuesto, siempre cumpliendo con todas las normas y procedimientos que debe garantizar una revista de categoría A (empezando por el *referee* doble ciego).

El corte de la sección internacional de la revista implica el uso de dos herramientas imprescindibles: la digital y los lenguajes más utilizados en el mundo en el ámbito del derecho laboral, con sus múltiples entrelazamientos interdisciplinares. La calificación de Internacional se basa, por tanto, en estos dos aspectos, pero no excluye que en la misma sección también se publiquen contribuciones relativas al derecho nacional, siempre que sean utilizables por una comunidad científica más amplia que la de estudiosos y académicos que piensan y leen en idiomas de menor difusión en el mundo. Desde este punto de vista, la decisión de crear una nueva línea editorial parte de la sencilla creencia de que hoy, para ser verdaderamente efectivas, las ideas que animan la investigación deben difundirse más rápidamente y con menos limitaciones de espacio físico. Y la dimensión "internacional" es ahora casi idéntica a la digital: que, gracias a la fórmula de acceso abierto, brinda a todos la oportunidad de leer y escribir sin preocuparse por fronteras, envíos postales, archivos, accesos y todo lo relacionado con el mundo físico.

Es superfluo decir que una revista científica debe garantizar en todo caso la calidad de lo que publica. Las aportaciones, por tanto, no pueden tener un contenido exclusivamente informativo/divulgativo y deben responder siempre a la finalidad elemental de la ciencia: la reflexión crítica/problemática sobre lo existente. Es inútil negar que esto es más difícil a escala global, aunque solo sea porque la información por sí sola suele ser más difícil y el estudio crítico-reconstructivo es mucho más complicado. Lo cual, por supuesto, no debe ser una vacilación. Por lo tanto, intentamos equiparnos pidiendo una contribución adicional a quienes ya practican la investigación científica a nivel supranacional y comparada.

Nuestra intención, sin embargo, va más allá. La esperanza es que el desafío sea asumido por colegas más jóvenes que apreciaron con entusiasmo la inauguración de la nueva sección. La intención se puede resumir en estos términos: la dimensión internacional – entendida en un sentido amplio, es decir, que incluye el estudio de los sistemas supranacionales y la comparación entre diferentes sistemas – ha adquirido en los últimos veinte años una profundidad que no permite a ningún estudioso considerarlo un adorno o un nicho en el panorama de la investigación nacional. Este es quizás uno de

los efectos más relevantes de la globalización de los mercados, pero a estas alturas no es un fenómeno que se pueda remontar a una lógica puramente económica. Las tecnologías y la información, y sobre todo, la información "errónea", rompen fronteras, erosionan y transforman la lógica y el comportamiento de todo el mundo. Ningún grupo social, y mucho menos los intelectuales e investigadores, están protegidas de este tsunami. Por tanto, el derecho laboral del futuro – y con él quienes lo cultiven – tendrá que nacer y moverse en contextos culturales muy amplios, absolutamente irreductibles a las fronteras de un solo Estado o de una sola macrorregión del vasto mundo; incluso con el único propósito de volver a abordar con mayor conciencia los problemas específicos que aún afligen a este o aquel país, en primer lugar a nuestra República. *Diritti Lavori Mercati*, con la nueva línea editorial, quiere estar a la vanguardia para afrontar al máximo estas transformaciones.

La revue *Diritti Lavori Mercati* a atteint sa majorité le jour de son dix-huitième anniversaire: une réussite remarquable et très significative pour un sujet qui vit essentiellement dans le monde des idées. Il n'y a en effet aucun automatisme biologique qui préside à sa croissance et encore moins à sa maturation. Tout dépend de ceux qui promeuvent, encouragent et diffusent ces idées. Par conséquent, ce ne sont pas seulement et surtout les rédacteurs, mais toute l'équipe qui s'est consacrée sans relâche à la revue et plus encore les nombreux auteurs qui, au fil des ans, ont cru au potentiel et au succès de l'initiative originelle. Grâce à toutes ces contributions fondamentales, la revue a pu atteindre sa majorité et la plénitude de son objectif. En témoignent tant la périodicité quadrimestrielle – avec ses rythmes quantitatifs (grâce aussi à la tolérance de l'éditeur pour certains excès) et qualitatifs ponctuels – que la nouvelle série (depuis 2015) des *Quaderni monografici* qui avance à grands pas. En effet, les *Quaderni* non seulement doublent pratiquement le nombre de numéros, mais surtout servent de moteur à une analyse scientifique approfondie des questions importantes, ce qui n'est pas toujours possible avec la périodicité normale. Les *Quaderni* permettent également une plus grande présence, dans la programmation de la revue, de spécialistes et de compétences (par exemple, les magistrats ou autres opérateurs) qui, dans la formulation originelle, ne trouvaient qu'occasionnellement un espace adéquat.

Forts de ces résultats, tous les architectes de l'entreprise – à commencer par les rédacteurs et l'éditeur – auraient pu dormir sur leurs deux oreilles, se limitant peut-être à la tâche toujours indispensable d'affiner la qualité des nombreuses étapes de production requises par une revue qui figure depuis dix ans dans la classe A du *ranking* de *l'*Agence nationale d'évaluation du

système universitaire et de la recherche (ANVUR). Il y a quelques décennies, cela aurait peut-être été suffisant. Aujourd'hui, cependant, les résultats obtenus ne sont pas satisfaisants: un journal présentant les caractéristiques susmentionnées ne peut se permettre de vieillir dans une paresse sereine. Les communautés scientifiques en particulier ne peuvent se reposer sur leurs lauriers, même s'ils sont mérités. Il existe une abondance de maximes bon marché à cet égard, et il n'est même pas nécessaire de les rappeler. Sauf une: *publish or perish!* Une maxime qui, si elle est cruelle pour le chercheur individuel – car elle le condamne à sacrifier l'étude approfondie à la diffusion de son travail – pour une revue, c'est même une condition d'existence: soit elle publie avec des contenus et des méthodes qui lui permettent d'être présente et opportune dans le débat scientifique mondial au plus haut niveau, soit elle se résigne à ne pas vraiment exister.

C'est pourquoi les rédacteurs, éditeurs et collaborateurs, plutôt que de fêter leur majorité, c'est-à-dire le passé, ont décidé de se tourner vers l'avenir et de l'affronter de la meilleure façon possible, malgré les inconnues et les difficultés singulières rencontrées ces deux dernières années en raison de la pandémie.

D'une manière générale, si le succès des revues scientifiques repose encore sur la publication sur papier, au mieux par la numérisation, il est impossible d'ignorer que leur avenir dépend de l'utilisation appropriée des moyens digitaux les plus modernes. Les idées doivent naître et vivre dans un espace aussi large que possible, sans être confinées à une seule dimension. C'est pourquoi le cher vieux papier – qui a également été transformé par les processus qui le considèrent comme un véhicule de la recherche actuelle – doit coexister avec l'info-sphère, qui apporte de nombreux avantages de nature immatérielle et matérielle (notamment l'avantage commercial, qui tient à cœur à l'éditeur). Il est sans doute important de pouvoir toujours compter sur les lecteurs – publics et privés – qui garantissent la continuité et la préservation des publications imprimées. Il est vrai que tous les universitaires et chercheurs, lorsqu'ils préparent un nouvel article ou des rapports, des conférences, des interventions, feuillettent avec gourmandise les fascicules d'une revue, plus ou moins récente. Cependant, il est très utile de lire un article intéressant avec un autre outil à sa disposition: par une association d'idées – qui semble germer des pages écrites – il ouvre l'esprit et offre un angle inimaginable pour regarder l'objet d'étude. Certes, la tristesse des étagères soudainement vidées de la séquence des volumes et des

couleurs semble ouvrir un gouffre mental, que la continuité virtuelle ne peut combler. Ce sont évidemment les pensées et les émotions de ceux qui sont nés à l'ère de l'analogique. Mais s'il existe des éditeurs (comme le nôtre) qui les partagent, ce serait une erreur de les effacer et de ne pas les transmettre aux nouvelles générations d'universitaires et de chercheurs.

Toutefois on aurait tort aussi de ne pas se rendre compte que tout change à une vitesse vertigineuse dans l'édition et dans le monde de la recherche, y compris la recherche juridique. Il est donc impossible de ne pas utiliser l'info-sphère pour optimiser le traitement et la diffusion des idées. La demande de recherches publiées en *open acces* se fait donc de plus en plus pressante, garantissant un accès maximal plus ou moins permanent à ceux qui étudient à des fins de formation ou pour approfondir et vérifier la recherche elle-même. C'est un grand défi, très dangereux pour la survie des anciens "conteneurs", qu'un journal moderne ne peut qu'assumer. En effet, *Diritti Lavori Mercati*, grâce aussi à l'initiative et à la clairvoyance de l'éditeur, a déjà commencé à relever le défi en offrant un *accès libre* – bien que temporaire – aux *Quaderni* (qui, toutefois, restant "sans abonnement", doivent gagner leur existence permanente dans le "monde du papier").

Il est également nécessaire d'aller au-delà, compte tenu des évolutions et des métamorphoses qui affectent la recherche juridique en général et, en particulier, le domaine du droit du travail. Ce dépassement est précisément à l'origine de la nouvelle rubrique éditoriale de la Revue, qui a été intitulée *Diritti Lavori Mercati International* (en abrégé *DLM.int.*). Il s'agira d'une section spécifique de *Diritti Lavori Mercati*, caractérisée par ses contenus (*nous y reviendrons* dans un instant), les langues utilisée (surtout l'espagnol et l'anglais) et ses moyens de diffusion (tous et toujours en *open access* ). Une section pour laquelle les éditeurs conserveront leur rôle et leur responsabilité, mais se serviront de deux collègues renommés comme directeurs scientifiques – Edoardo Ales et Massimiliano Delfino – plus jeunes, immergés dans la nouvelle ère, et donc préparés à la nouvelle tâche. L'organigramme de la *Rivista* sera évidemment enrichi par une rédaction spécialisée, avec des référents d'ordres étrangers et des experts référents. L'ajustement nécessaire de l'organigramme général est assuré par l'arrivée de Paola Saracini et Massimiliano Delfino, tous deux en qualité de rédacteurs en chef.

La nouvelle section répond à la nécessité d'offrir aux auteurs et aux lecteurs une participation plus large au débat scientifique sur la réglementation du travail: où qu'il ait lieu et quel que soit l'aspect qu'il concerne. Une

participation que, en termes de calendrier, de langue et d'utilisateurs, *DLM.int* vise à assurer, puisqu'il est entièrement conçu pour une diffusion numérique et un accès ouvert, c'est-à-dire non réservé aux abonnés du magazine papier ou aux acheteurs de numéros/essais individuels sur le site de l'éditeur. Toujours, bien sûr, dans le respect total de toutes les règles et procédures qu'un journal de classe A doit garantir (à commencer par le *double blind peer review*).

La section internationale de la revue utilise deux outils essentiels: la technologie numérique et les langues les plus utilisées au monde dans le domaine du droit du travail et de ses nombreux liens interdisciplinaires. La qualification *international se* fonde donc sur ces deux aspects, mais n'exclut pas la publication dans la même section de contributions relatives au droit national, à condition qu'elles soient mises à la disposition d'une communauté scientifique plus large que celle des étudiants et des chercheurs qui pensent et lisent dans des langues moins répandues dans le monde. De ce point de vue, la décision de créer une nouvelle rubrique éditoriale découle de la simple conviction qu'aujourd'hui, pour être vraiment efficaces, les idées qui animent la recherche doivent se diffuser plus rapidement et avec moins de contraintes d'espace physique. Grâce à la formule du *open access*, chacun peut lire et écrire sans se soucier des frontières, des envois postaux, des archives, de l'accès et de tout ce qui est lié au monde physique.

Il va sans dire qu'une revue scientifique doit en tout état de cause garantir la qualité de ce qu'elle publie. Les contributions ne peuvent donc pas avoir un contenu exclusivement descriptif et doivent toujours répondre à la finalité élémentaire de la science: la réflexion critique/problématique sur ce qui existe. Il n'est pas nécessaire de nier que cela est plus difficile à l'échelle mondiale, ne serait-ce que parce que l'information elle-même est souvent plus difficile et que l'étude critique/reconstructive en profondeur est beaucoup plus compliquée. Ceci, bien sûr, ne devrait pas être une contrainte. Nous avons donc essayé de nous équiper en demandant une contribution supplémentaire à ceux qui pratiquent déjà la recherche scientifique à un niveau supranational et comparatif.

Cependant, notre objectif va au-delà: nous espérons que le défi sera relevé par des collègues plus jeunes qui ont accueilli avec enthousiasme l'inauguration de la nouvelle section. Notre objectif peut être résumé comme suit: la dimension internationale – entendue au sens large, c'est-à-dire incluant l'étude des systèmes juridiques supranationaux et les comparaisons entre différents systèmes juridiques – a acquis une telle profondeur au cours

des vingt dernières années qu'aucun chercheur ne peut la considérer comme un ornement ou une niche dans le panorama de la recherche nationale. Il s'agit peut-être de l'un des effets les plus significatifs de la mondialisation des marchés, mais ce n'est pas un phénomène qui peut désormais être ramené à une logique purement économique. La technologie et l'information – ainsi que, et surtout, la "mauvaise" information – font tomber les frontières, érodent et transforment la logique et le comportement de toutes les classes. Aucune classe, et surtout pas les intellectuels et les chercheurs, n'est à l'abri de ce tsunami. Par conséquent, le droit du travail du futur – et avec lui de ceux qui le cultivent – devra naître et se mouvoir dans des contextes culturels très larges, absolument pas réductibles aux limites d'un seul État ou d'une seule macro-région du vaste monde; peut-être aussi dans le seul but de revenir ensuite traiter avec une plus grande conscience des problèmes spécifiques qui concernent encore tel ou tel pays, *en premier lieu* notre République oscillante. *Diritti lavori mercati*, avec sa nouvelle rubrique éditoriale, veut être à l'avant-garde de ces transformations.

# Edoardo Ales, Massimiliano Delfino
# The European Social Dialogue under siege?

Contents: **1.** Why starting with the *Epsu* cases. **2.** The "boundaries" of the principle of horizontal subsidiarity. **3.** The discretionary power of the Commission within the legal framework of the Treaties. Is it the end or a new beginning of the European Social Dialogue?

## 1. *Why starting with the* Epsu *cases*

Starting the new "adventure" of *DLM.int* with an editorial concerning the *Epsu* cases decided by the General Court EU (hereinafter GC) in 2019 and the Court of Justice EU (hereinafter the Court) in 2021 is not an odd choice. The reason for that is twofold.

On the one hand, both judgments provide an opportunity to check the extent of one of the key principles of the European Union, i.e. the principle of horizontal or "social" subsidiarity in the supranational legal order.

On the other hand, the judgments, although not so positive from the social dialogue's point of view, at least provide a final word on social partners' role within the legal framework of the Treaty on the Functioning of the European Union (hereafter TFEU).

## 2. *The "boundaries" of the principle of horizontal subsidiarity*

The principle of horizontal or social subsidiarity is referred to for the first time in a Communication adopted by the Commission twenty years ago[1] it

[1] See the Communication from the Commission of 26 June 2002, COM (2002) 341 final, according to which the consultation of social partners "is a practical application of the principle

complements the more traditional vertical subsidiarity referred to in Article 5.3 TEU[2].

The principle of horizontal subsidiarity has its cornerstone, however, in the TFEU and, specifically, in Articles 154 and 155 included in Title X on Social Policy. The reference is first to Article 154.2.3 and 4, which, as well known, provides for the involvement of the European social partners in the "making" of EU Law. In summary, in the application of the principle of vertical subsidiarity, the Union intervenes, in all the subject matters of 'shared competence' only if its action is more effective than at the national level. By implementing the principle of horizontal subsidiarity, the Union intervenes instead, in the matter of social policy, with a legislative act of its own issued through the "ordinary legislative procedure", only if this is more effective than European collective bargaining.

The functioning of the principle of subsidiarity in the field of social policy, in its twofold dimension, passes through the identification of the role of the "contractual relations, including agreements" signed by the European Social Partners in the system of the sources of EU Law. It should be remembered that those agreements, once concluded, can be implemented in two different ways: either 1) "in accordance with the procedures and practices specific to management and labour and the Member States" (Article 155.2, first sentence); or 2) "in matters covered by Article 153" (in fact the whole social policy), "at the joint request of the signatory parties, by a Council decision on a proposal from the Commission" (in practice the directive is used) (Article 155.2, second sentence)[3].

Of course, the key point in the matter of subsidiarity is represented by the second path indicated because it is only through the implementation by a directive of the European collective agreement that the social partners have

of social subsidiarity. It is for the social partners to make the first move to arrive at appropriate solutions coming within their area of responsibility; the Community institutions intervene, at the Commission's initiative, only where negotiations fail" (par. 1.1, 8).

[2] According to this provision, in fact, "in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level".

[3] The Council shall adopt such a directive by qualified majority or unanimity, depending on the subject matter. On these profiles see Ales, *EU Collective Labour Law: if any, how?*, in B. ter Haar, A. Kun (eds.), *EU Collective Labour Law*, Edward Elgar, 2021, 26 ff.

the possibility to take part in the procedure of making Union law on a par with Council and the European Parliament. The *Epsu* judgments deal precisely with this issue, wondering whether the European Commission has any discretion when proposing the implementation of the agreement.

The issue is complex and therefore it is necessary to start from the (few) established certainties in this regard.

As it is known, the Treaty provides for a negotiation between the European social partners that can have a dual origin. There is a "voluntary" negotiation regulated by Article 155.1 TFEU, according to which "should management and labour so desire, the dialogue between them at Union level may lead to contractual relations, including agreements"[4]. This type of negotiation is flanked by "induced" negotiation, to which reference was made previously regarding the duty incumbent on the Commission to consult the social partners before making proposals in the social field.

At the first sight, for our purposes, the origin of the social dialogue is irrelevant since both in the case of induced negotiation and in that of voluntary negotiation the Commission's position does not change, in the sense that, in neither of the two circumstances, the European institution is (formally) aware of the content of the collective agreement.

It is true that Article 154.2 refers to the consultation of the social partners on the content of the envisaged proposal, but it is also undeniable that paragraph 4 of the same provision allows the social partners to "block" the ordinary procedure of making EU Law at that precise moment or even at the time of the first consultation and, therefore, in both the cases, prior to the elaboration of any collective agreement. Therefore, at least up to a certain stage, the role of the Commission in the implementation of the collective agreement concluded at the supranational level does not differ according to the origin of the agreement at stake[5].

[4] On the voluntary negotiation, see Guarriello, *Ordinamento comunitario e autonomia collettiva*, Franco Angeli, 1993 and, in more recent times, Peruzzi, *L'autonomia nel dialogo sociale europeo*, Il Mulino, 2011.

[5] On this point, one can agree with Dorssemont, Lörcher, Scmitt, *On the Duty to Implement European Framework Agreements: Lessons to be Learned from the Hairdressers Case*, in *ILJ*, 2019, 1 ff. According to these authors, "nothing in Article 155 TFEU suggests that an obligation to propose a decision to the Council would only exist where the Commission has consulted the social partners" (33). This seems to be confirmed by the 2019 judgement of the GC, which considers the fact that the social dialogue at the time was started by the Commission is not indicative of the application of the principle of subsidiarity. The EU judges declare that "on

In the *Epsu* cases, the European social partners had signed a framework agreement aimed at extending to the public sector the protection provided to private workers concerning information and consultation. The same parties had asked the Commission to implement the agreement and the European institution had refused to submit a proposal for a directive on that matter.

The Commission may exercise the control over the representativeness of the signatories parties to the collective agreement and shall do it on the legality of the clauses of the agreement itself with respect to the provisions of Union law, as it is not possible to pass a legislative act contrary to the primary sources of EU law[6]. Therefore, in both the hypotheses that have been highlighted above, the Commission is required to carry out at least the legality test[7].

### 3. *The discretionary power of the Commission within the legal framework of the Treaties. Is it the end or a new beginning of the European Social Dialogue?*

The problem arises with regard to the assessment of the appropriateness of the contents of the collective agreement[8]. Both the judgements ruled that "before using its power of initiative, [the Commission] determines … whether the initiative proposed is appropriate. Therefore, when it receives a request to implement at EU level an agreement concluded between management and labour, the Commission must not only verify the strict legality of the clauses of that agreement, but also assess whether implementation of the agreement

that occasion the Commission merely launched a debate without prejudging the form and content of any possible action to be undertaken" (*Epsu* GC par. 134).

[6] See Lo Faro, *Regulating Social Europe. Myths and Reality of European Collective Bargaining in the EC legal system*, Hart Publishing, 2000.

[7] For further details see Delfino, *The reinterpretation of the principle of horizontal subsidiarity*, Working Paper CSDLE "Massimo D'Antona".INT, 152/2020 (www.lex.unict.it).

[8] See Lo Faro, *Regulating Social Europe*, cit., according to whom the Commission certainly cannot be denied assessing the contents of a collective EU agreement intended to be implemented by a Council decision to be adopted on the basis of a proposal, but it does not seem possible that such discretionary assessments are presented as part of a legality check. This is a real "approval clause", whose consistency with the repeated intention of the Commission to guarantee the autonomy and independence of the social partners is at least doubtful. See also Lo Faro, *Articles 154, 155 TFEU*, in Ales, Bell, Deinert, Robin-Olivier (eds.), *International and European Labour Law*, Beck, Hart, Nomos, 2018, 173.

at EU level is appropriate, including by having regard to political, economic and social considerations"[9].

The opinion of those who found the existence of a duty for the Commission to propose a directive implementing a collective agreement on Article 152 TFEU appears unconvincing[10], as it will be thoroughly demonstrated hereinafter. In fact, this provision merely states that "the Union recognises and promotes the role of the social partners at its level" and facilitates "dialogue between the social partners, respecting their autonomy".

As a matter of fact, the Court highlights that the autonomy of the social partners enshrined in Article 152 TFEU is safeguarded since "they may engage in dialogue and act freely without receiving any order or instruction from whomsoever and, in particular, not from the Member States or the EU institutions"[11].

Nevertheless, this autonomy has to be guaranteed only at the stage of negotiation of a possible agreement between social partners while it "does not mean that the Commission must automatically submit to the Council a proposal for a decision implementing such an agreement at EU level at the joint request of the social partners, because that would be tantamount to according the social partners a power of initiative of their own that they do not have"[12].

The same conclusion can be reached on the right to negotiate and conclude collective agreements, enshrined in Article 28 of the Charter of Fundamental Rights of the European Union, which was respected at the stage of negotiation of the agreement[13].

[9] *Epsu* GC par. 79 and *Epsu* CJEU par. 35, according to which "the imperative formulations used in the French-language version of the first subparagraph of Article 155(2) TFEU ('*intervient*') and in the English-language version of that provision ('shall be implemented') do not in themselves permit the conclusion that the Commission is obliged to submit a proposal for a decision to the Council when it receives a joint request to that effect from the signatories to an agreement".

[10] Dorssemont, Lörcher, Schmitt, *On the Duty to Implement*, cit. Those authors believe that "Article 152(1) TFEU obliges the Commission to try to bring about the translation of the regulations stemming from the exercise of collective autonomy into the realm of the EU legal order" (17). Later, the same authors state that "there is an obligation for the Commission to submit a proposal if a joint request was made by the signatory parties" (22).

[11] *Epsu* CJEU par. 61.

[12] *Epsu* CJEU par. 62.

[13] *Epsu* CJEU par. 67.

Such a duty on the European institution can also not be derived from the combined reading of this provision with Articles 154 and 155 TFEU[14]. The judgment of 2021 is the clearest one on this profile. "Article 155(2) TFEU has conferred on management and labour a right comparable to that possessed more generally, under Articles 225 and 241 TFEU respectively, by the Parliament and the Council to request the Commission to submit appropriate proposals for the purpose of implementing the Treaties". According to the Court, there is no legal reason for recognizing the social partners a greater power in comparison to that one of the Parliament and the Council that cannot impose on the Commission to submit a proposal for a directive[15].

In the Court's words, if the social partners had such a power "the institutional balance resulting from Articles 154 and 155 TFEU would be altered, by granting the social partners a power *vis-à-vis* the Commission, which neither the Parliament nor the Council has"[16].

The reasoning about that is interesting since the Court of Justice goes further on the topic of the general interest expressed by the GC. As a matter of fact, the GC referred to Article 17.1 TEU – according to which "the Commission shall promote the general interest of the Union and take appropriate initiatives to that end" – ruling that such a function "cannot, by default, be fulfilled by the management and labour signatories to the agreement alone. Management and labour, even where they are sufficiently representative and act jointly, represent only one part of multiple interests that must be considered in the development of the social policy of the European Union"[17].

In the Court's view, an interpretation of Article 155(2) TFEU under which the Commission would be obliged, in the exercise of its power of initiative, to submit to the Council a proposal for a decision implementing at EU level the agreement concluded by management and labour would result in "that the interests of the management and labour signatories to an agreement alone would prevail over the task, entrusted to the Commission, of promoting the general interest of the European Union"[18]. This "would be contrary to the

[14] Scepticism about the potential of Article 152 TFEU is also expressed by NUNIN, *Pluralismo e* governance *istituzionale dei sindacati a livello europeo*, *DLM*, *Quaderno*, 2019, 6, 235-236.

[15] *Epsu* CJEU par. 62.

[16] *Epsu* CJEU par. 63.

[17] *Epsu* GC par. 80.

[18] *Epsu* CJEU par. 49.

principle, as laid down in the third subparagraph of Article 17(3) TEU, that the Commission is to carry out its responsibilities independently"[19]. Nor "the Commission's independence would be safeguarded since it would, in any event, be able to present its view to the Council by means of an 'explanatory memorandum'. Indeed, the explanatory memorandum that accompanies a Commission proposal is supposed merely to state the grounds that justify the proposal"[20].

This point is not convincing at all: there is no evidence whatsoever that the explanatory memorandum cannot contain a grounded dissenting opinion by the Commission, thus safeguarding the general interests of the EU and providing arguments to the Council that could deny its decision.

More in general, although not expressing its view on it, the Court qualifies the principle of "horizontal subsidiarity" as "alleged"[21], thus seeming to share the view of the GC, according to which "that principle does not have a horizontal dimension in EU law, since it is not intended to govern the relationship between the European Union, on the one hand, and management and labour at EU level on the other. Furthermore, the principle of subsidiarity cannot be relied on in order to alter the institutional balance"[22].

The claim of a "political discretion" by the European Commission, supported and endorsed by the Court, clearly jeopardizes the same existence of the horizontal subsidiarity principle, at least at a supranational level, thus emphasizing the embeddedness of European Social Dialogue[23], the relevance of recognition and the trade-off between the importance of the agreements and the constraints they are subjected to by the EU institutions[24].

Therefore, the two judgments can be considered as a negative turning point for the European social dialogue. However, in a more optimistic view, they may be supposed to play a different role in that procedure that is more similar to that played in the domestic legal systems of most of the Member States where, within the trilateral social dialogue (involving the Government, trade unions and employers' associations), the Government has discretionary

[19] *Epsu* CJEU par. 50; *Epsu* GC par. 78.
[20] *Epsu* CJEU par. 51.
[21] *Epsu* CJEU par. 72.
[22] *Epsu* GC par. 98.
[23] Ales, *EU Collective Labour Law: if any, how?*, cit.
[24] Lo Faro, *Regulating Social Europe*, cit.

power in transforming the agreements signed by the social partners into statutory provisions or bills.

In the end, this turning point might be a starting point for a more mature social dialogue where the social partners propose to the Commission an agreement and that institution can decide whether or not to submit it to the Council. The difference after the *Epsu* judgments stands in the discretionary power of the Commission in submitting the proposal for a directive but this can also be considered as a positive aspect, since sometimes the social partners, especially the employers' associations, were worried about stipulating collective agreements that could become Union law and for that reason decided not to sign them, as happened in the case of temporary agency work.

As a result, the presence of the discretionary power of the Commission could facilitate the social dialogue in the sense that the social partners act on the social dialogue's ground where the aim is to promote the interest of the signatory parties and in the end the collective interest. That is the natural ground of operation for the social partners where they feel freer to play their natural role, which does not usually include the promotion of the general interest.

**Charles Szymanski**

# The Window Closes: *Nestle, Inc. v. Doe* and the Lost Promise of the U.S. Alien Tort Statute as a Means of Enforcing International Labor Law

Summary: **1.** Introduction. **2.** The use of the ATS as a means to combat violations of international labor law. The scope and context of the ATS. **2.1.** Enforcing international labor law through the ATS. **2.2.** The Window begins to close: the U.S. Supreme Court restricts most ATS litigation. **3.** The window closes: *Nestle USA, Inc. v. Doe* and the *de facto* end of the promise of using the ATS to redress violations of international labor law. **4.** Giving life to the idea of the ATS: using federal law against torture and human trafficking to the same effect and the development of state law ATS equivalents. **4.1.** The Torture Victims Protection Act and the Trafficking Victims Protection Reauthorization Act. **4.2.** The adoption of state law equivalents to the ATS. **5.** Conclusions.

## 1. *Introduction*

A structural problem exists within labor law that makes it difficult to evolve and adjust to the realities of globalization. The general rule is that the labor law of the country in which a person works is the law that applies to her or him[1]. As corporate supply chains become more and more stretched, and businesses look to move production and services to locations with the lowest wages and labor standards, an unfortunate scenario emerges. Corporations from high wage countries, with high union density and strong national labor laws, relocate operations to places where such standards are non-existent and the old rules no longer apply. Even if by chance these states nominally have labor laws on the books, corruption and/or inefficient courts

[1] See, *e.g.*, MUNDLAK, *De-territorializing Labor Law*, in *Law & Ethics Hum. Rts.*, 2009, 3 (2), p. 188 and 189.

prevent employees from enforcing whatever protections may exist. In this way the paradox is created whereby a European Union or American multinational, subject to rather stringent labor law rules at home, need not follow them abroad where their workforces are in an even more vulnerable situation[2].

To be sure, policy makers and scholars have not ignored this problem. A number of soft law and hard law proposals have been enacted and are in the process of being developed to protect such workers. In the category of soft law are the International Labor Organization's (ILO) focus on its four core standards in its Declaration on Fundamental Principles and Rights at Work (no discrimination, the right to organize and collectively bargain, no forced labor, and no child labor)[3], the United Nations (UN) Global Compact (repeating the four ILO core standards among its 10 principles)[4], as well as voluntary efforts to link business and labor rights through Corporate Social Responsibility (CSR) programs[5]. They are soft law in the sense that they cannot normally be directly enforced when they are ignored or violated, and rely on the goodwill of states and corporations to be effective[6]. More hard law solutions have been the introduction of social clauses (with labor protections) in free trade agreements which are subject to mandatory arbitration[7], and proposals to require companies to perform

[2] Ellinikos, *American MNCs Continue to Profit from the Use of Forced and Slave Labor Begging the Question: Should America Take a Cue from Germany?*, in *Colum. J.L. & Soc. Probs.*, 2001, 35, pp. 1, 2; Ramasastry, *Corporate Complicity: From Nuremberg to Rangoon an Examination of Forced Labor Cases and their Impact on the Liability of Multinational Corporations*, in *BJIL*, 2002, 20, pp. 91, 92-93; Raigrodski, *Creative Capitalism and Human Trafficking: A Business Approach to Eliminate Forced Labor and Human Trafficking from Global Supply Chains*, in *Wm. & Mary Bus. L. Rev.*, 2016, 8, pp. 71, 72-76.

[3] ILO Declaration on Fundamental Principles and Rights at Work, https://www.ilo.org/declaration/thedeclaration/textdeclaration/lang—en/index.htm (last accessed October 14, 2021).

[4] UN Global Compact, Principles 3-6, https://www.unglobalcompact.org/what-is-gc/mission/principles (last accessed October 14, 2021); O'Konek, *Corporations and Human Rights Law: The Emerging Consensus and its Effects on Women's Employment Rights*, in *Cardozo J.L. & Gender*, 2011, 17, pp. 261, 278-279 (describing the four core ILO principles and the Global Compact, among other instruments, as forms of soft law).

[5] Raigrodski, *op. cit.*, n.3, pp. 88-94.

[6] O'Konek, *op. cit.*, n.4, p. 267.

[7] Szymanski, *Le Clausole Sociali e la Tutela dei Diritti dei Lavoratori Negli Accordi di Libero Scambio: Il Modello Statunitense*, in Baylos Grau, Zoppoli L. (eds.), *La Libertà Sindacale nel*

due diligence in ensuring that their transactions and supply chains are not rife with labor or other human rights abuses[8]. Time will tell as to whether these mechanisms will be effective, although early signs suggest that they may require complex, fact intensive and time consuming inquiries to establish a violation[9].

The U.S. Alien Tort Statute (ATS)[10], in contrast, offered – at least in theory – a simpler solution. This one sentence statute, adopted in 1789 in the aftermath of the American Revolutionary War, gives federal courts in the U.S. jurisdiction to hear claims brought by aliens for torts committed in violation of international law[11]. Tort claims in the U.S. may be remedied by an award of punitive and compensatory damages, which, depending on the case, can reach many millions of dollars[12]. Moreover, under the American contingency fee system – where lawyers, by agreement with the client, may be paid a percentage of the amount recovered rather than an hourly fee – tort claims may be pursued without little or no up front cost to the client. In this context, foreigners subject to forced labor, or possibly violations of

*Mondo: Nuovi Profili e Vecchi Problemi*, EditorialeScientifica, 2019, pp. 113-145, (examining labor clauses in U.S. free trade agreements, which contain arbitration provisions).

[8] Chambers, Vastardis, *Human Rights Disclosure and Due Diligence Laws: The Role of Regulatory Oversight in Ensuring Corporate Accountability*, in *CJIL*, 2021, 21, pp. 323, 327-28 (reviewing the main international due diligence and disclosure laws applicable to corporate labor practices, including "the E.U. Non-Financial Reporting Directive (enacted 2014); the French Law on the Corporate Duty of Vigilance of 2017; the California Transparency in Supply Chains Act of 2010 (CTSCA); the U.K. Modern Slavery Act 2015 (MSA); the Australian Modern Slavery Act 2018 (AMSA); the U.S. Dodd-Frank Act of 2010 § 1502; the E.U. Conflict Minerals Regulation (enacted 2017); and the Dutch Child Labor Law (enacted 2019)"; see also *European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability*, at https://www.europarl.europa.eu/doceo/document/TA-9-2021-0073_EN.html, last accessed October 14, 2021.

[9] Szymanski, *op. cit.*, n. 7, pp. 125-127 (giving the example of a labor arbitration case arising out of the Central American Free Trade Agreement (CAFTA) which took many years to litigate and where the arbitrator ultimately did not find any violation of CAFTA).

[10] 28 U.S.C. § 1350 (also sometimes known as the Alien Tort Claims Act (ACTA), but most recently definitively described as the Alien Tort Statute (ATS) by the U.S. Supreme Court in *Nestle USA Inc. v. Doe*, 593 U. S. ____ (2021)).

[11] Torres, *Labor Rights and the ATCA: Can the ILO's Fundamental Rights be Supported through ATCA Litigation?*, in *Colum. J.L. & Soc. Probs.*, 2004, 37, pp. 447, 449-450.

[12] Einbinder, *Mass Torts: Dispute Resolution in France and the United States - The Vioxx and Mediator Cases Compared*, in *Wash. Int'l L.J.*, 2020, 29, pp. 575, 609 (providing the example of multi-billion dollar mass tort recoveries, in comparison to more modest French civil remedies).

the other ILO core principles – i.e., a violation of international law – could sue in tort to recover damages in an American court under the ATS. The possibility of a large punitive damage award would be an incentive for lawyers to take the case on a contingency fee basis, and if the case was successful, any large monetary award or settlement would act as deterrent to multinational corporations committing violations of international labor law in the future[13].

Despite some initial promise with using the ATS to enforce international labor law, in the past 20 years the U.S. Supreme Court has in a series of decisions severely limited its application. This process culminated with its June, 2021 decision in *Nestle, Inc. v. Doe*, involving a claim of forced labor by workers in the Ivory Coast, which all but foreclosed the use of the ATS except in the most narrow of circumstances. This article will examine the ATS and its initial application to labor cases; review the *Nestle* decision and its scope and impact; and offer prospects for similar laws that may be able to curtail employers from violating international labor law. While *Nestle* may have almost closed the window on the use of the ATS, the concept of using something like the ATS to fight labor abuses still has merit and should be explored in the future.

## 2. *The use of the ATS as a means to combat violations of international labor law. The scope and context of the ATS*

The ATS is one of the older American statutes, having been enacted in 1789. Its text is straightforward and concise: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States"[14]. The statute is purely jurisdictional, and does not create any new substantive legal rights[15]. In the American legal system the "district courts" referred to in the ATS are federal trial courts, and if the requirements of the statute are met, these courts have jurisdiction to hear such claims.

[13] Rosen-Zvi, *Just Fee-Shifting*, in *Fla.St.U.L.Rev.*, 2010, 37, p. 717 (generally noting the American contingency fee system does increase access to justice for poorer clients, but argues more needs to be done to increase access further).

[14] 28 U.S.C. § 1350.

[15] *Nestle USA*, 141 S.Ct. at 1935.

There are three prerequisites for bringing an ATS claim under the language of the statute. The plaintiff must be an "alien"; the claim itself must be a tort; and allege a violation of "the law of nations" or a treaty of the U.S. The first two requirements are relatively clear. An alien is a foreign citizen, and a tort is a civil injury or wrong. The third requirement, the necessity of a violation of the law of nations or a U.S. treaty, has been subject to interpretation. In particular, the phrase "law of nations" contains some ambiguity[16].

At the time the statute was enacted, Congress had in mind three aspects of the law of nations: the prohibition against 1) interference with safe conduct in transit, 2) violations of the rights of Ambassadors, and 3) piracy. The concern was that, for example, an ambassador who was assaulted in the U.S., or a foreigner who was the victim of an American pirate attack, should have a means to vindicate his or her rights in the federal court system. Otherwise, the risk was that if such victims did not have an effective means of judicial redress in the U.S., their respective countries might take action (including military action) against the fledgling American republic. However, the meaning of the law of nations was not necessarily restricted to only the three examples contemplated by Congress in 1789. While the ATS was sparsely used over the next 190 years, claims involving prizes of war and admiralty fraud were also found to be within its ambit during that period[17].

The 1980 decision of the Federal Court of Appeals for the Second Circuit in *Filartiga v. Pena-Irala*[18] was a watershed moment in the expansion of the use of the ATS and the scope of the term "law of nations"[19]. In *Filartiga*, a Paraguayan physician, Joel Filartiga, had been opposed to the dictatorship of Paraguayan President Stroessner. His daughter, Dolly Filartiga, traveled and then lived in the U.S. by the late 1970s. Before her move, an agent of the government, Mr. Pena-Irala, tortured and executed her brother in retaliation for Dr. Filartiga's support of the opposition. Subsequently, Pena also moved to the U.S. Ms. Filargita discovered his presence in the U.S. and

[16] Torres, *op. cit.* , pp. 449-450.

[17] Wilkinson, *Piercing the Chocolate Veil: Ninth Circuit Allows Child Cocoa Slaves to Sue under the Alien Tort Statute in Doe I v. Nestle USA*, in *Vill. L. Rev.*, 2018, Vol. 63, Tolle Lege 20, pp. 24-27.

[18] 630 F.2d 876 (2nd Cir. 1980).

[19] Dhooge, *A Modest Proposal to Amend the Alien Tort Statute to Provide Guidance to Transnational Corporations*, in *U.C. Davis J. Int'l L. &Pol'y*, 2007, 13, pp. 119, 124 (describing *Filartiga*as a watershed decision).

together with her father sued him for torture under the ATS[20]. The court ruled that her claim under the ATS could go forward, since the Filartigas were aliens, bringing a tort claim in violation of the law of nations. Specifically, the court defined the law of nations as customary international law[21]. Citing the numerous international treaties, declarations and national law prohibiting torture, and finding that they had been universally accepted by the international community, the court ruled that torture violated customary international law[22]. The *Filartiga* decision therefore brought new life into the ATS, expanding its reach beyond relatively archaic claims by ambassadors or victims of piracy, and opened the gates for foreign plaintiffs seeking redress for broader violations of customary international law[23].

In the wake of *Filartiga*, courts interpreting the ATS likewise held that the term "law of nations" meant contemporary customary international law[24]. However, since public international law (which encompasses customary international law) traditionally applied to the relations between states, courts also added a state-action requirement to ATS claims. That is, drawing parallels to aspects of American civil rights law, ATS plaintiffs would normally have to show that the person or entity that they were suing for a violation of the law of nations was acting on behalf of a state or otherwise was conspiring with a state in order for the claim to go forward. An exception to this rule existed when the customary international law at issue was not only applicable to states. This would be the case with certain wartime violations of international law, such as genocide and torture, or more broadly to the preemptory norms known as *jus cogens* (including genocide and torture but also encompassing piracy and slavery among other conduct), where both states and non-state actors are equally subject to these prohibitions[25].

In 2004 the U.S. Supreme Court in *Sosa v. Alverez-Machain*[26] essentially

[20] *Filartiga*, 630 F.2d at 878-879.

[21] *Id*. at 880-881, citing *The Paquette Habana*, 175 U.S. 677, p. 700 (1900).

[22] *Id*. at 883-884.

[23] Diskin, *The Historical and Modern Foundations for Aiding and Abetting Liability under the Alien Tort Statute*, in *Ariz. L. Rev.*, 2005, 47, pp. 805, 815-816.

[24] *Balintulo v. Ford Motor Co.*, 796 F.3d 160, at 163 n.3 (2nd Cir. 2015) (collecting cases noting the equivalence of the terms "law of nations" as used in the ATS and "customary international law").

[25] Torres, *op. cit.*, pp. 453-454.

[26] 542 U.S. 692 (2004).

confirmed that the ATS could encompass other torts in violation of customary international law, beyond safe conduct, the rights of ambassadors and piracy, but stressed that courts should tread cautiously in this area[27]. To be covered by the ATS, the international law alleged to have been violated must be "a norm that is specific, universal, and obligatory'"[28]. Even if this standard is met, the court must consider whether adding the "new" tort is a proper exercise of judicial discretion, keeping in mind any potential adverse foreign policy considerations that may result[29].

Notwithstanding these limitations, ATS litigation increased exponentially (relative to the amount of pre-1980 cases) and had particular promise in the area of prosecuting violations of international labor law.

### *2.1. Enforcing international labor law through the ATS*

The extent to which international labor law may be enforced through the ATS first depends on what kind of labor law qualifies as customary international law, and relatedly, under the *Sosa* standard, whether it is "a norm that is specific, universal and obligatory." The initial, obvious candidates would be the 4 core ILO standards: no forced labor, no child labor, no discrimination, and the right to organize and collectively bargain[30]. These standards have been ratified by an overwhelming majority of the world's nations: 168 have ratified the convention on the right to organize and collectively bargain[31], 175 the convention on discrimination in employment[32], 187 the worse forms of child labor convention[33], and 176 the abolition of forced labor convention[34]. These

[27] *Id.* at 725.

[28] *Id.* at 733.

[29] *Id.* at 727-728.

[30] Torres, *op. cit.*, pp. 456-457.

[31] Ratifications of C098 - Right to Organise and Collective Bargaining Convention, 1949 (No. 98), at https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312243, last accessed at October 15, 2021.

[32] Ratifications of C111 - Discrimination (Employment and Occupation) Convention, 1958 (No. 111), at https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312256, last accessed October 15, 2021.

[33] Ratifications of C182 - Worst Forms of Child Labour Convention, 1999 (No. 182), at https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312327, last accessed October 15, 2021.

[34] Ratifications of C105 - Abolition of Forced Labour Convention, 1957 (No. 105), at

conventions therefore appear to meet the basic two-part test for customary international law, namely that a near-universal practice among the states exists recognizing these rights, as does *opinio juris*, in that these conventions represent a legal obligation for the states to follow their terms[35].

Some questions, however, may arise due to the fact that several large states, representing a good portion of the world's population and economic output, *have not* ratified all of these conventions. China and Japan have not ratified the abolition of forced labor convention[36]; China, the U.S. and India have not ratified the convention on the right to organize and collectively bargain[37]; and Japan and the U.S. have not ratified the convention on discrimination and employment[38]. Since the ATS is an American statute, courts have appeared to be at least superficially troubled recognizing as customary international law a convention which the U.S. has not ratified[39]. At the same time, the U.S. (or any one country) does not hold a veto power over what is or is not customary international law; this is determined by the practice of states in general[40].

More problematic than the number of ratifications is the alleged lack of specificity contained in the ILO core conventions. In *Flomo v. Firestone*

https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312250, last accessed October 16, 2021.

[35] See *U.S. v. Bellaizac-Hurtado*, 700 F.3d 1245, at 1253 (11th Cir. 2012) (restating this two part test); Torres, *op. cit.*, p. 457 (noting that the high number of ratifications of the ILO conventions that form the basis of the 4 core labor standards suggest "a near universal acceptance that could possibly establish them as norms of customary international law").

[36] Ratifications of C105, *supra*, at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11310:0::NO:11310:P11310_INSTRUMENT_ID:312250:NO, last accessed October 16, 2021 (listing countries which have not ratified the convention).

[37] Ratifications of C098, *supra*, at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11310:0::NO:11310:P11310_INSTRUMENT_ID:312243:NO, last accessed October 16, 2021 (listing countries which have not ratified the convention).

[38] Ratifications of C111, *supra*, at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11310:0::NO:11310:P11310_INSTRUMENT_ID:312256:NO, last accessed October 16, 2021 (listing countries which have not ratified the convention).

[39] *Flomo v. Firestone Nat. Rubber Co.*, LLC, 643 F.3d 1013, at 1022 (7th Cir. 2011) (most helpful for plaintiffs in ATS case was the child labor convention ratified by the U.S.); *Villeda Aldana v. Fresh Del Monte Produce, Inc.*, 305 F.Supp.2d 1285, 1297 n.7 (S.D. Fl. 2003) (observing that the U.S. has not ratified the ILO conventions relating to the right to organize and bargain, which were relied upon by the plaintiffs).

[40] *Flomo*, *supra*, 643 F.3d at 1021-1022.

*Rubber Co.*[41], child laborers from Liberia worked on a rubber plantation, often to help their parents fulfill unreasonable production quotas set by the company for tapping rubber from trees. They brought suit under the ATS, relying in particular upon the ILO's Worst Forms of Child Labor convention, which the U.S. had ratified. In pertinent part that convention prohibited work for child under 13 that could endanger their health, morals or safety. The convention also indicated that the specific types of prohibited work should be determined by national laws. The court found that this language was vague and did not clearly indicate what type of work was banned, particularly whether the conduct in this case was illegal. Here, the company paid the adult workers well above the average Liberian wage, and there was no evidence that the work performed by the children helping their parents was especially onerous. Consequently, the court found that no customary international law existed that prohibited this type of child labor. However, in contrast, the court indicated that other provisions of the convention dealing with the sexual exploitation of children at work, and child forced labor, *were* specific enough to be considered customary international law within the meaning of the ATS[42].

There has been a split of opinion on whether the right to organize and bargain is actionable under the ATS, mostly because of doubts on the lack of specificity of the scope of this right in the relevant ILO conventions and international treaties. In *Villeda Aldana v. Fresh Del Monte Produce*[43], the court found that the right to organize and bargain set forth in the applicable ILO conventions as well as the freedom of association in the International Convention on Civil and Political Rights (ICCPR) did not contain enough specificity to amount to customary international law that is enforceable through the ATS. The court distinguished between aspirational rights and concrete, defined and enforceable rights, and found that the right to join a trade union was more on the amorphous side. More specifically, under the facts of this case, there was no clear international guidance on whether the detention and abuse of union activists for a day by a private security service violated the right to organize[44]. On the other hand, in *Estate of Lacarno*

[41] 643 F.3d 1013 (7th Cir. 2011).

[42] *Id.* at 1022–1024.

[43] 305 F.Supp.2d 1285(S.D. Fl. 2003)*aff'd* in pertinent part, 416 F.3d 1242, at 1246–1247 (11th Cir. 2005).

[44] 305 F.Supp.2d at 1297–1299.

*Rodriquez v. Drummond*[45], another district court did find that claims for violation of the right to organize and freedom of association could be pursued under the ATS, although it came to this conclusion "reluctantly"[46].

Whether or not the right to organize and bargain is actionable under the ATS, claims for torture or arbitrary detention of union activists in violation of international law may still be independently pursued under that statute. Unfortunately, in some parts of the world governments or government supported paramilitary forces have resorted to kidnapping and torturing union leaders and other members in order to suppress the labor movement in their respective countries. The prohibition of torture has been recognized as customary international law and so these types of claims can proceed under the ATS so long as the state action requirement (discussed below) is satisfied[47].

The prohibition on discrimination in employment may arise to the level of an enforceable international law right within the meaning of the ATS in certain extreme circumstances. Where the allegations involved systemic discrimination – for example, the kind of state sponsored racial discrimination against blacks that existed under the apartheid system – the courts have allowed ATS claims to go forward. The prohibition against systemic discrimination could even arise to the level of *jus cogens*, in which case it would automatically be actionable under the ATS. However, other types of general or individual claims of discrimination in employment would not rise to the level of specificity required by the Court in *Sosa*[48]. Consequently, the pool of potential employment discrimination claims actionable under the ATS are actually quite limited.

Forced labor is the outlier of the four core ILO labor standards, in

[45] 256 F.Supp.2d 1250 (N.D.Ala.2003).

[46] *Id*. at 1264.

[47] See *Baloco ex rel. Tapia v. Drummond Co., Inc.*, 640 F.3d 1338 (11th Cir. 2011) (murder of union leaders by paramilitary group which had a symbiotic relationship with the Columbian state actionable as extrajudicial murder and torture under the ATS); *Villeda Aldana, supra*, 416 F.3d at 1247-1253 (brutal detention of union activists, which included credible threats of death and bodily harm, amounted to a viable claim of torture under the ATS; the involvement of a town's mayor in the torture satisfied the state action requirement).

[48] See *Sarei v. Rio Tinto*, PLC, 671 F.3d 736, at 768-770 (9th Cir. 2011) (though dealing with a claim based on the Convention on the Elimination of All Forms of Racial Discrimination Convention, and not with ILO Convention No. 111 regarding discrimination in employment).

that the prohibition on slavery has long been recognized to be a peremptory norm under *jus cogens.* Consequently, courts have regularly concluded that allegations of forced labor fall within the ambit of the ATS. While the question of what specific conduct may fall under the definition of forced labor may be at issue in particular cases, severe cases are clearly actionable[49].

In sum, of the four core ILO labor standards, the prohibitions against forced labor, some types of child labor, severe systemic discrimination, and possibly the right to organize and bargain (but normally the ban on torture as applied to trade unionists), may be theoretically enforceable through the ATS. However, even in these cases, plaintiffs may be required to prove satisfy a state action requirement for their claims to proceed. As public international law traditionally has been applied to the relations between states, most claims for violations of international law likewise must involve the conduct of states or those acting on their behalf (under the color of state law). In labor cases, this requirement can be problematic when a private employer or other person or entity has caused the harm in question to an employee.

Thus, in *Sinaltrainal v. Coca Cola Bottling Co.*[50], union leaders at bottling plants in Columbia were systematically tortured and executed by right-wing paramilitary death squads. The families of the deceased union leaders brought suit against Coca Cola under the ATS, arguing among other points that the death squads were connected to the Columbian government, the local bottling plants and ultimately Coca Cola in the United States under conspiracy and *alter ego* theories[51]. The court found that a claim for torture was cognizable under the ATS, but it required either 1) state action or 2) to

[49] TORRES, *op. cit.*, pp. 457-458; DOWNEY, *Modern-Day Pirates: Why Domestic Parent Corporations Should Be Liable Under the Alien Tort Statute for Violations of Workers' Rights within Global Supply Chains*, in *Am. U. L. Rev.*, 2019, Vol. 68, 5, pp. 1933, 1969; see, *e.g.*, *Adhikari v. Daoud & Partners*, 697 F.Supp.2d 674, at 687 (S.D. Tex. 2009) ("[T]rafficking and forced labor alleged in this [complaint] qualify as universal international norms under *Sosa*, such that they are actionable under ATS"); *Doe I v. Unocal Corp.*, 395 F.3d 932, at 945 (9th Cir. 2002) (forced labor is a *jus cogens* violation and as a result is a *per se* violation of international law subject to the ATS); *Aragon v. Che Ku*, 277 F.Supp.3d 1055, at 1067 (D.Minn. 2017) (international norm against the use of forced labor is specific enough to be encompassed by ATS); *Velez v. Sanchez*, 693 F.3d 308, at 321-322 (2d Cir. 2012) (not every claim of poor working conditions and inadequate wages amounts to forced labor withing the meaning of international law).

[50] 578 F.3d 1252 (11th Cir. 2009).

[51] *Id.* at 1258-1259.

the extent the torture was committed by private entities, that it was carried out in the context of a war or civil conflict, or 3) a conspiracy existed between state officials and the private actors to carry out the torture[52]. Here, there was no evidence that the Columbian state either controlled or directed the actions of the paramilitary groups. As a result, there was no state action[53]. Further, there likewise was no evidence that the torture committed by these groups was connected with the ongoing civil war in Columbia, even though it occurred during a time of civil unrest in the country[54]. Finally, while some plaintiffs alleged that local police were involved in the plan to detain and harm the union leaders, they did not show that a conspiracy existed between the police and the private defendants[55]. Consequently, the plaintiffs' claims under the ATS were dismissed[56]. This decision illustrates the difficulties the state action requirement poses for the victims of international labor law violations.

However, as even the court in *Sinaltrainal* recognized, there are some limited exceptions to the state action requirement, where international law itself is directly applicable to private actors (in that case, if private individuals carried out torture during wartime)[57]. Most relevant for labor issues, under international law the prohibition on forced labor is not predicated on a state action requirement; it applies to both states and non-state actors alike[58]. Therefore private employers and individuals potentially may be liable for forced labor under the ATS. With respect to other international labor law violations, the associated rape, murder, and torture of workers or union members committed by private actors connected to a *jus cogens* violation such a forced labor or genocide, or otherwise in the course of a conflict, may also be subject to the ATS.

This is illustrated in what may have been the high-water mark of labor-related ATS litigation, *Doe I v. Unocal, Inc.*[59]. In *Unocal*, workers subject to forced labor on a multinational oil pipeline project in Myanmar filed an ATS suit against an American corporation (Unocal) involved in

[52] *Id.* at 1266.
[53] *Id.*
[54] *Id.* at 1266-1267.
[55] *Id.* at 1267-1269.
[56] *Id.* at 1270.
[57] *Id.* at 1266-1267.
[58] See TORRES, *op. cit.*, p. 458.
[59] 395 F.3d 932(9th Cir. 2002).

that project[60]. Myanmar, which had a long-standing, atrocious record in using forced labor as documented by the ILO, supplied security and related work to the consortium of oil companies building a pipeline on Myanmar's territory. The security forces openly used forced labor and Unocal allegedly was aware of and aided and abetted this practice[61]. The court ruled that since forced labor was considered *jus cogens*, claims alleging the use of forced labor *per se* alleged a violation of international law within the meaning of the ATS[62]. Moreover, since international law recognized that private actors as well as states were subject to the prohibition on forced labor, the workers' claims against Unocal could proceed and a theory that it had aided and abetted Myanmar's use of forced labor on the project. Likewise, associated claims of murder and rape connected to the state's forced labor program, to the extent they were aided and abetted by Unocal, were also permitted to go forward[63]. The case was ultimately settled after the court rendered its opinion, with the workers receiving monetary compensation[64].

*2.2. The Window begins to close: the U.S. Supreme Court restricts most ATS litigation*

While ATS claims have been difficult to prosecute, in the post-*Filartiga* era, a framework did exist to enforce some types of international labor law through that statute. In the most severe cases, for example in *Unocal*, workers victimized by violations of international labor law were able to recover a favorable financial settlement through ATS litigation in U.S. courts, which would have been otherwise impossible in their home countries[65]. Unfortunately, in two decisions in the past decade, *Kiobel v. Royal Dutch Petroleum Co.*[66] and *Jesner v. Arab Bank, PLC*[67], the U.S. Supreme Court grossly limited the scope of the ATS.

[60] *Id.* at 937-943.

[61] *Id.*

[62] *Id.* at 945 & n. 15.

[63] *Id.* at 946-956.

[64] KNOTT, *Unocal Revisited: On the Difference between Slavery and Forced Labor in International Law*, in *Wis. Int'l L.J.*, 2010, 28, p. 201.

[65] *Id.*

[66] 569 U.S. 108 (2013).

[67] 138 S.Ct. 1386 (2018).

In *Kiobel*, the Court ruled that the ATS could not be applied extraterritorially. A presumption exists in American law that federal statutes should not be applied extraterritorially unless there is a clear indication from the text that Congress intended to do so. Such an intention was not present in the ATA, according to the Court[68]. Therefore, in the wake of *Kiobel*, only ATS claims which involved wrongful conduct in the U.S. were permissible. This decision was justly criticized since the historical context of the ATS suggested a different result. As recited by the Court in its earlier decision in *Sosa*, one of the original violations of the "law of nations" that the ATS was designed to address (and provide a remedy for) was piracy. Acts of piracy occur on the high seas and, relevant to the U.S. in 1789, off of the barbary coast in the Mediterranean Sea, far from the territory of the U.S.[69].

Later, in 2018, in *Jesner* the Court went even further and decided that suits against foreign corporations were not permitted under the ATS. In that case, victims of terrorist attacks in the Middle East sued a Jordanian bank for its role in financing the groups that carried out these attacks. Some of that financing was routed to the bank electronically through its U.S. accounts[70]. The Court avoided the question of whether these U.S. financial transactions were enough not to make this an impermissible "extraterritorial" case, and instead ruled that the ATS simply did not apply to foreign corporations such as the defendant Jordanian bank[71]. A major concern was the policy issue of making foreign corporations generally subject to human rights and other litigation in the U.S., which could disturb relations with other states and ultimately cause such states to take comparable jurisdiction over American corporations in retaliation[72].

Under these two decisions, much labor law litigation brought under the ATS was placed in jeopardy. The use of forced labor and torture against union officials that has been the subject of most ATS lawsuits has occurred outside the U.S., in countries with poor labor rights records and unreliable legal systems. Likewise, the defendants in these cases have often been directed against or at least included foreign corporations. In the age of globalization

[68] *Kiobel*, 569 U.S. at 124-125.
[69] *Id.* at 130-131 (concurring opinion of Justice Breyer).
[70] *Jesner*, 138 S.Ct. at 1394-1395.
[71] *Id.* at 1407-1408.
[72] *Id.*

even if an American corporation were involved in a supply chain with questionable labor practices, it could argue that these practices were the responsibility of the foreign contractor, which is not subject to the ATS[73]. The window for bringing any labor related ATS claims was not completely closed by these decisions, however. Important questions still remained over whether a U.S. corporation was still subject to the ATS, as there was some language in the *Jesner* decision suggesting that corporations in general were not subject to liability under international law[74]. Assuming U.S. corporations were still covered by the statute, the other debatable issue was if they could be held liable for aiding and abetting foreign actors for violating international law, via corporate decisions made in the U.S[75]. In 2021 the Supreme Court grappled with these issues in *Nestle USA, Inc. v. Doe*[76].

### 3. *The window closes*: Nestle USA, Inc. v. Doe *and the* de facto *end of the promise of using the ATS to redress violations of international labor law*

Ivory Coast is the center of the world's cocoa industry, producing 70% of the global supply of cocoa beans used to make chocolate. Unfortunately, its cocoa plantations have poor working conditions, rife with the use of child labor[77]. Some of these children brought a claim against the primary European and American chocolate manufacturers under the ATS (including Europe-based Nestle SA and its American subsidiary, Nestle USA Inc.), alleging they worked as forced laborers on the plantations that supplied these companies in violation of international law. While the corporations did not own these plantations, they did fund them and also supplied equipment and training, with allegedly full knowledge of the abusive labor practices taking place. In

[73] See HAYS, *My Brother's Keeper: A Framework for a Legal Obligation to Respect Human Rights in Global Supply Chains*, in *Geo. Wash. L. Rev.*, 2020, 88, pp. 454, 465.

[74] *Alien Tort Statute – Domestic Corporate Liability – Ninth Circuit Denies Rehearing En Banc of Case Permitting Domestic Corporate Liability Claim. – Doe I V. Nestle, S.A., 929 F.3d 623 (9th Cir. 2019)*, in *HLR*, 2020, Vol. 133, p. 2643 (observing that in *Jesner* "some Justices suggested that corporate liability generally is not the kind of universal norm required by the ATS.").

[75] UDOBONG, *Post-Kiobel: What Remedies Exist for Foreign Victims of Corporate Human Rights Violations?*, in *Liberty U. L. Rev.*, 2016, 1, pp. 559, 582-601 (outlining perspectives for the liability of corporations under the ATS after *Kiobel* using an aiding and abetting theory).

[76] 141 S.Ct. 1931 (2021).

[77] WILKINSON, *op. cit.*, p. 36 (describing the background of the *Nestle USA* case).

this manner, the children argued that the companies "aided and abetted" the plantation owners use of forced labor[78].

The procedural history of the case was somewhat drawn-out and complicated[79]. Initially, the Ninth Circuit Court of Appeals found that the claims could go forward, as forced labor was within the ambit of the ATS and corporate liability was possible under an aiding and abetting theory. On remand to the trial court, the claims were dismissed, however, based on the Supreme Court's intervening decisions in *RJR Nabisco v. European Community*[80]. (which followed *Kiobel*holding that generally U.S. statutes should not be applied on an extraterritorial basis) and *Jesner.* The plaintiffs again appealed to the Ninth Circuit.These Supreme Court decisions created serious roadblocks for the children's claims, but the Court of Appeals did not find them to be insurmountable. *Jesner* did require the dismissal of the foreign corporate defendants, but their claims against the remaining American corporations could proceed[81]. These claims arguably did not violate *Kiobel*'s holding that the ATS did not apply extraterritorially, since the children alleged that the unlawful conduct of which they complained was the general corporate decision-making process, all of which took place in the U.S.These decisions involved the continued funding, training and sale of equipment to the Ivory Coast plantations that used forced child labor, which arguably amounted to aiding and abetting the practice of forced labor on those plantations. Ultimately, the Court of Appeals decided that the case could proceed on this basis[82]. However, the corporate defendants sought review of this decision by the Supreme Court, and Court agreed to hear the case[83].

The primary issue on appeal was whether lawsuits against domestic (U.S.) corporations were permissible under the ATS[84].This was a question left open by *Jesner*; while that decision only precluded ATS claims against foreign corporations, there was a suggestion that any type of private corporations were

[78] *Id.* at 39-41.

[79] See generally, *Alien Tort Statute*, *supra*, n.74 (outlining the procedural history of the case before the Federal Court of Appeals for the Ninth Circuit).

[80] 579 U.S. 325, 337(2016).

[81] *Doe v. Nestle, SA*, 906 F.3d 1120, 1126 (9th Cir. 2018).

[82] *Id.* at 1124-1126.

[83] *Nestle USA*, 141 S.Ct. at 1936.

[84] *Id.* at 1950 (Justice Alito, dissenting).

not proper subjects of international law[85]. Curiously, however, the Court elected not to decide the case on this issue, but instead focused on whether the claims violated the prohibition on the extraterritorial application of the ATS. Admittedly the forced child labor activities took place abroad, in the Ivory Coast, but the plaintiffs' claim was based on the argument that the companies violated the ATS by aiding and abetting these activities through corporate operational decision-making which took place in the U.S.[86].

However, the Court concluded that this argument was not sufficient to transform the case from an extraterritorial one to a domestic one. As an initial matter, there were doubts about whether an "aiding and abetting" claim was even cognizable under the ATS. Arguably it was beyond the authority of the Court to create such a "new" secondary tort under the ATS, and moreover even if it could do so, the tort still occurred outside the territory of the U.S. since the direct injury (forced labor) happened in the Ivory Coast[87]. Assuming *arguendo* that aiding and abetting was a proper ATS tort claim, the plaintiffs' allegations that the aiding and abetting occurred through the corporations' general conduct in the U.S. were not sufficient to show that it was a domestic claim. As the Court explained: "Nearly all the conduct that they say aided and abetted forced labor – providing training, fertilizer, tools, and cash to overseas farms – occurred in Ivory Coast… Because making "operational decisions" is an activity common to most corporations, generic allegations of this sort do not draw a sufficient connection between the cause of action respondents seek – aiding and abetting forced labor overseas – and domestic conduct…To plead facts sufficient to support a domestic application of the ATS, plaintiffs must allege more domestic conduct than general corporate activity"[88].

While not part of the majority opinion, three justices (Thomas, Gorsuch and Kavanaugh) wrote separately to present their view that the only claims that could ever be cognizable under the ATS were the original three torts contemplated by Congress in 1789 – violation of safe conduct, interference with ambassadors and piracy. Since forced labor was not among these torts, any international law claim based upon it should be dismissed *per se*[89]. Three

[85] See *Jesner*, 138 S.Ct. at 1400-1401; *Alien Tort Statute*, *supra*, at 623.
[86] *Nestle USA*, 141 S.Ct. at 1936-1937.
[87] *Id*. at 1936.
[88] *Id*. at 1937.
[89] *Id*. at 1940 (Justice Thomas), 1942-1943 (Justices Gorsuch and Kavanaugh).

additional justices (the so-called liberal bloc of Sotomayor, Kagan and Breyer) made the point of rejecting this analysis in their own separate opinion[90]. Finally, two justices (Gorsuch and Alito) actually tried to answer what was supposed to be the main issue before the court, indicating that a U.S. corporation should be covered within the scope of the ATS[91]. Since the aforementioned "liberal bloc" disagreed with the majority in *Jesner* and would have found that foreign corporations could be within the reach of the ATS, they likewise would have agreed with Gorsuch and Alito on this point giving a 5 justice majority for this proposition[92].

Still, taken together with the Court's earlier decisions in *Kiobel* and *Jesner*, the decision in *Nestle USA* has further narrowed the potential use of the ATS to remedy violations of international labor law to almost the point of nonexistence. Foreign corporations are not covered, extraterritorial conduct is not covered, and now, with *Nestle USA*, "general" corporate decision making (including financing and other decisions) that might aid and abet forced labor in foreign countries are likewise not covered. Moreover, it is not at all clear whether "aiding and abetting" may be an actionable tort under the ATS, which is one of the few remaining conceivable theories to hold American corporations liable for primary international labor law violations occurring abroad. Assuming that aiding and abetting is found to be actionable under the ATS, plaintiffs would still have to plead specific, particular actions taken by corporations beyond general corporate activity. This would likely have to be close to the proverbial "smoking gun", *i.e.*, specific (and explicit) corporate decisions to encourage or support existing forced labor carried out by suppliers abroad. Simply buying products from suppliers using forced labor or selling them equipment, without more, would not be enough.

A second, smaller category of ATS claims may also have survived, involving claims for violations of international labor law against foreigners working *in* the U.S. This might involve extreme cases using foreigners for forced labor in U.S. sweatshops[93]. However, while any additional means to

[90] *Id.* at 1943-1950.

[91] *Id.* at 1941-1942 (Justice Gorsuch); 1950 (Justice Alito).

[92] *Id.* at 1947 n. 4 (Justice Sotomayor) (making this point).

[93] See *Aragon*, *supra*, 277 F.Supp.3d at 1064-1069 (allowing ATS suit against U.S. corporate and individual defendants to proceed, in which foreign plaintiffs working in U.S. grocery stores made allegations of forced labor); see also FREE THE SLAVES, WASHINGTON, D.C., AND THE

combat labor abuses in the U.S. would be welcome, existing American tort, anti-discrimination and wage and hour laws might also provide remedies for these victims. The promise of the ATS was to help workers in foreign countries who have no laws or judicial means to protect themselves.

In this sense, the window for using the ATS, may not be completely shut, but remains open only by a literal millimeter. The hope ushered in with the *Filartiga* decision has been just about extinguished.

## 4. *Giving life to the idea of the ATS: using federal law against torture and human trafficking to the same effect and the development of state law ATS equivalents*

### *4.1. The Torture Victims Protection Act and the Trafficking Victims Protection Reauthorization Act*

At the same time the U.S. Supreme Court was drastically limiting the scope of the ATS, various justices mentioned that Congress itself passed two statutes that would continue to give plaintiffs the right to challenge unlawful torture and forced labor[94]. These are the Torture Victims Protection Act (TVPA)[95] and the Trafficking Victims Protection Reauthorization Act (TVPRA)[96]. Justice Thomas, for example, emphasized the existence of this

HUMAN RIGHTS CENTER OF THE UNIVERSITY OF CALIFORNIA, BERKELEY, *Hidden Slaves Forced Labor in the United States*, in *Berkeley J. Int'l L.*, 2005, 23, 47 (providing an early report on the problem within the U.S.).

[94] *Nestle USA*, 141 S.Ct. 1939-140 (opinion of Justice Thomas, referencing the Trafficking Victims Protection Reauthorization Act (TVPRA)); *Jesner*, 138 S.Ct. at 1398, 1403-1404 (pointing to Torture Victims Protection Act (TVPA)); *Kiobel*, 569 U.S. at 120 (concurring opinion of Justice Kennedy, citing TVPA).

[95] 28 U.S.C. § 1350 note.

[96] Originally passed as the Trafficking Victims Protection Act in 2000, a criminal law statute, which was then amended as the Trafficking Victims Protection Reauthorization Act in 2003 (as amended in 2008) to add civil causes of action for plaintiffs. 114 Stat. 1464 (original act); 117 Stat. 2878 (TVPRA of 2003); and 122 Stat. 5067–5068 (creating present civil cause of action), codified in various sections of the U.S. Code, including Sections 18 and 22 (see *e.g.* 22 U.S.C. § 7101 (purposes); 22 U.S.C. § 7102(11)(B) (general prohibitions); 18 U.S.C. § 1589 (definition of forced labor); 18 U.S.C. § 1595(a) (right to bring private civil action); 18U.S.C. § 1589(b) (extending liability to those who benefit or receive anything of value from forced labor); 18 U.S.C. § 1596 (making law applicable extraterritorially)).

legislation to buttress his argument that it was the job of the legislature to create new causes of action for forced labor, and not the judiciary to invent them through a creative reinterpretation of the ATS[97]. Whatever the merits of this contention, as a practical matter by making this point the Court raised the profile of these two statutes, which do present an alternative option for pursuing certain violations of international labor law in the post-*Nestle USA* era. While the TVPA and TVPRA only deal with torture and human trafficking, and thus are not as potentially broad as the ATS, they do fulfill at least some of the ATS's initial promise[98]. That is, they provide a means for workers from economically less developed countries to seek redress for forced labor and torture (due to their union affiliation, for example) in a reliable legal system (the U.S.), with the possibility of receiving large monetary damages. Such damage awards may also finally act as a deterrent for corporations with poor international labor practices.

The TVPA prohibits torture and extrajudicial killings, and creates a civil cause of action for both American citizens and foreigners subject to such action[99]. This law was enacted in response to the torture litigation brought under the ATS, but is distinct from the ATS. It contains its own definition of torture rather than exactly copying the usage of that term under international law[100]. The TVPA also expressly has a state action requirement, and thus requires plaintiffs to show that a state actor or a private individual acting under color of state law carried out or was involved with the alleged torture[101]. Other key distinctions with the ATS are that

[97] *Nestle USA*, 141 S.Ct. 1939-140 (opinion of Justice Thomas).

[98] Beale, *The Trafficking Victim Protection Act: The Best Hope for International Human Rights Litigation in the U.S. Courts?*, in *Case W. Res. J. Int'l L.*, 2018, 50, pp. 17, 29-30 (while "the TVPA cannot reach the wide range of cases that were brought under the ATS prior to the Supreme Court's limiting decisions…" it can reach at least some of conduct that formed the basis of a number of these cases).

[99] 28 U.S.C. § 1350 Note; *Penaloza v. Drummond Company, Inc.*, 384 F.Supp.3d 1328, at 1340 (N.D. Ala. 2019) ("The TVPA authorizes a cause of action against "[a]n individual" for acts of extrajudicial killing and torture committed under authority of color or law of any foreign nation.""); *Chowdhury v. Worldtel Bangladesh Holding, Ltd.*, 746 F.3d 42, at 51 n.8 (2nd Cir. 2014) (both aliens and U.S. citizens may bring claims under the TVPA).

[100] *Del Monte*, 416 F.3d at 1250; *Sinaltrainal*, 578 F.3d at 1269; *Adhikari*, *supra*, 697 F.Supp.2d at 687-688; *cf. Jesner*, 138 S.Ct. 1404 (relying upon the TVPA to determine "the proper structure for a right of action under the ATS.").

[101] *Jane W v. Thomas*, 2021 WL 4206665, *14-15 (E.D. Pa. 2021); *Sinaltrainal*, 578 F.3d at 1270.

only individuals – and not corporations – are liable for TVPA violations[102], and that the statute does apply extraterritorially[103]. For the most part the TVPA has been used to prosecute torture claims in the general, human rights context, but in limited circumstances it has been also used by union members who have been tortured or killed in order to discourage employees from unionizing. In *Sinaltrainal*, the union members' claims were dismissed because the torture was committed by private "death squads" which were not controlled by or in a symbiotic relationship with the state[104]. However, in *Del Monte*, the claims were allowed to proceed since the Mayor of a town was alleged to have been involved in the torture of the unionists, and there was an allegation of conspiracy and coordination between the state actors and private defendants[105]. It must be stressed that even where state action is present, union members can only bring claims against individuals under the TVPA, and not corporate employers[106], limiting the statute's usefulness in many respects.

More broadly relevant to the enforcement of international labor law rights is the TVPRA, which prohibits human trafficking. Originally a criminal statute, the act was amended in 2003 to permit civil claims and again in 2008 to extend its reach to defendants indirectly involved with forced labor and to extraterritorial conduct[107]. It was designed to especially

[102] *Mohamad v. Palestinian Authority*, 566 U.S. 449, 453–456 (2012).

[103] *Chowdhury*, *supra*, 746 F.3d at 51; *Garcia v. Chapman*, 2014 WL 11822750, *7 (S.D.Fl. 2014); *Penaloza*, *supra*, 384 F.Supp.3d at 1340 n.6 ("Jurisdiction over TVPA claims under § 1331 is not constrained by the presumption against extraterritoriality"); *Hernandez v. Mesa*, 140 S.Ct. 735, at 748-749 n.11 (2020) (noting that TVPA claims are often brought "to seek redress for acts committed abroad.").

[104] *Sinaltrainal*, 578 F.3d at 1270.

[105] *Del Monte*, 416 F.3d 1251-1252.

[106] *Mohamad*, 566 U.S. at 453-456, overruling the Eleventh Circuit's finding in *Sinaltrainal*and *Del Monte* that corporate liability existed under the TVPA; *see also Penaloza*, *supra* (claims for extrajudicial murder of trade unionists under TVPA made against natural persons allowed to proceed).

[107] *Nestle USA*, 141 S.Ct. at 1939 (opinion of Justice Thomas); *Ratha v. Phatthana Seafood Co., Ltd*. 2016 WL 11020222, *5-6 (C.D. Ca. 2016) (civil provisions of TVPRA apply to extraterritorial corporate conduct) (collecting cases)); *Abafita v. Aldukhan*, 2019 WL 6735148, *5 (S.D.N.Y. 2019). However, the amendments covering extraterritorial conduct only apply to U.S. persons or permanent residents or to anyone who is present in the U.S. irrespective of nationality. 18 U.S.C. § 1596(a). Thus a TVPRA claim against Thai company with no presence in the U.S. for enslaving workers in Thailand was properly dismissed. *Ratha v. Phatthana Seafood Co., Ltd*., 2017 WL 8292391 (C.D. Ca. 2017).

protect child and women who were predominantly the victims of trafficking, including sex trafficking[108]. However it applies generally to forced labor claims as well. "To establish a claim of forced labor under TVP[R]A § 1589(a), plaintiff must show that defendants knowingly provided or obtained her labor or services by means of 'serious harm or threats of serious harm,' 'the abuse or threatened abuse of law or legal process,' or 'any scheme, plan or pattern intended to cause [her] to believe that, if [she] did not perform such labor or services, that [she] or another person would suffer serious harm or physical restraint.'" … "The 'threat of financial harm constitutes serious harm within the meaning of the TVP[R]A'"[109]. Serious harm may also include withholding workers' passports and threatening them with deportation if they do perform the labor demanded of them[110]. Unlike the TVPA, corporations are subject to the TVPRA[111], and the statutory language appears to directly encompass corporate aiding and abetting claims. Pursuant to Section 1595(a) of the TVPRA, "…whoever knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in an act in violation of this chapter"[112]. Therefore, a corporation aware (or which should have been aware) of a "venture" using forced labor in its supply chain, and received benefits from forced labor (through cheaper supplies or products), could theoretically be liable for forced labor under the TVPRA[113]. There is also an exceptionally long 10 year statute of limitations in the TVPRA, giving

[108] Ocen, *(E)Racing Childhood: Examining The Racialized Construction Of Childhood And Innocence In The Treatment Of Sexually Exploited Minors*, in *UCLA L. Rev.*, 2015, 62, 6, p. 1617.

[109] *New York State Nurses Association v. Albany Medical Center*, 473 F.Supp.3d 63, at 67 (N.D.N.Y.2020) (internal citations and quotation marks omitted).

[110] Beltran, *The Hidden "Benefits" of the Trafficking VictimsProtection Act's Expanded Provisions for TemporaryForeign Workers*, in *Berkeley J. Emp. & Lab. L.*, 2020, 41, 2, pp. 229 and 253; *Aragon*, 277 F.Supp.3d at 1069-1070.

[111] Boutilier, *Statutory Analogy and Liability of American Corporations under the Alien Tort Statute*, in *N.Y.U.J.L.&Lib.*, 2020, 264 ("the TraffickingVictims Protection Reauthorization Act allows corporate liability"); Beale, *op. cit.*, pp. 37-40 (though raising potential arguments that corporations may not be subject to civil liability for extraterritorial conduct).

[112] 18 U.S.C. § 1595(a).

[113] Ezell, *Human Trafficking in Multinational Supply Chains: A Corporate Director's Fiduciary Duty to Monitor and Eliminate Human Trafficking Violations*, in *Vand.L.Rev.*, 2016, 69, 2, pp. 499 and 527-530.

workers extensive time to bring their claims[114]. Finally, a wide range of damages, including punitive damages, are available pursuant to the provisions of the statute[115].

Commentators have noted that, given the favorable provisions of the TVPRA, it is something of a mystery why more forced labor claims have not been brought under that that statute[116]. The child laborers from the Ivory Coast in the *Nestle USA* case did not use the TVPRA since their claims predated the 2008 amendments to that law[117], but one would have expected more claims involving foreign workers since that time. There are several possible explanations. First, the act has mainly been used in sex trafficking cases, and not "traditional" forced labor at factories, plantations or sweatshops[118]. Therefore there may be a perception that the law should only be used to stop prostitution amounting to sexual slavery, rather than other types of forced labor[119]. Second, no matter how favorable the TVPRA is, it is still difficult for the victims of forced labor – who often lack basic education – to be both aware of the law and then find competent legal help who could bring a claim on their behalf thousands of kilometers away in a U.S. court. While NGOs focusing on labor rights and unions may ultimately fulfill the role of both informing exploited workers of their rights and connected them with competent and sympathetic legal help in the U.S., this is an ongoing, developing process. One obstacle may be the disconnect between unions and labor rights activists and more general human rights organizations[120]; the

[114] PRICE, *Better Together? The Peril and Promise of Aggregate Litigation for Trafficked Workers*, in *YaleL.J.*, 129, pp. 1214 and 1248.

[115] *Id.* at 1247-1248 (noting the courts have shown a willingness to grant significant damages to the victims of human trafficking, given the inhumane conditions they have often endured); BELTRAN, *op. cit.*, p. 269 ("A recentreport has highlighted that both compensatory and punitive damage awards in civil trafficking cases have been quite high.").

[116] PRICE, *op. cit.*, p. 1226; BEALE, *op. cit.*, pp. 46-47.

[117] *Nestle USA*, 141 S.Ct. at 1940.

[118] SMITH, *The Underprosecution of Labor Trafficking*, in *S.C.L.Rev.*, 2020, 72, 477, pp. 495-496 (94-96% of federal human trafficking prosecutions were for sex trafficking, while approximately 5% were for labor trafficking).

[119] BELTRAN, *op. cit.*, p. 246 ("With the assumption that real trafficking victims were female or child victims of sex trafficking, it was all too common for victims of labor trafficking to be overlooked.").

[120] KOLBEN, *Labor Rights as Human Rights?*, in *VJIL*, 2010, 50, 2, pp. 449-450 (describing the disconnect).

recognition of labor rights *as* human rights may go a long way towards alleviating this problem. Third, a climate of fear and desperation may discourage workers from pursuing TVPRA claims even if they were aware of the statute's protection. These workers are often in desperate situations where work means survival, and it would be unreasonable for them to risk their life for the uncertain possibility of winning a lawsuit many years in the future[121].

More recently, however, the TVPRA has seen more use in traditional forced labor cases. Perhaps counterintuitively, to this point these have often involved foreign workers *in* the U.S. who have been exploited as forced laborers. Examples include foreigners employed under the U.S. H-1b visa program for skilled workers, foreign nurses, and even grocery store workers[122]. This may be due to increased awareness of this law in the U.S. and also the absence of a geographical barrier in bringing the suit, as the plaintiffs are still living in the U.S. Still, forced labor claims of foreigners working abroad are also emerging, such as the case of Nepali and Indian contract workers hired by a Jordanian intermediary to work for various U.S. contractors at U.S. military installations in Iraq[123]. It is likely that these latter types of claims under the TVPRA will continue to increase as lawyers and NGOs become more aware of the statute and its potential for combatting the use of forced labor at the international level.

### *4.2. The adoption of state law equivalents to the ATS*

With the U.S. Supreme Court making the ATS more and more impotent with each passing decision, and Congress only taking limited action to correct this problem (through the adoption of the TVPA and the TVPRA), it has been suggested that individual states should take matters into their own hands and enact parallel legislation akin to the ATS[124].

[121] See generally PRICE, *op. cit.*, p. 1226; BEALE, *op. cit.*, pp. 46-47.

[122] BELTRAN, *op. cit.*, pp. 268-282 (reciting TVPRA cases involving foreign temporary workers in the U.S.).

[123] *Adhikari*, 697 F.Supp.2d 674; *Adhikari v. KBR Inc. (Adhikari II)*2017 WL 4237923 (S.D. Tex. 2017). Ultimately the plaintiffs' claims under the TVPRA were dismissed, because the court concluded that they occurred prior to the 2008 amendments to the TVPRA making extraterritorial conduct actionable. *Adhikari II*, at *2-5; *Adkhikari v. Kellogg, Brown & Root, Inc.*, 845 F.3d 184, at 191 (5th Cir. 2017).

[124] SALDIVAR, *An Oasis in the Human Rights Litigation Desert? A Roadmap to Using California*

California, in fact, has already done so, passing a statute that would enable foreign victims to sue in California courts for torture, extrajudicial killings, genocide, war crimes and other crimes against humanity, among other claims[125]. The term "crimes against humanity" expressly includes "enslavement"[126].This is consistent with California's other efforts to enforce international labor standards, including a mandatory transparency law requiring corporations doing business in the state to disclose whether or not they use forced labor in their supply chains or at least whether or not they have checked whether or not this is the case. Given California's size and economic power (the world's 5th largest economy, if California were a separate country), these efforts appear to carry some weight[127].

While at least one scholar was enthusiastic about the potential of the California "ATS", it is worth noting that there are few reported cases interpreting this statute since its passage[128]. This suggests its potential has not been utilized, perhaps due to the lack of awareness of its existence. Indeed, it is actually entitled as a statute of limitations provision, providing a 10 year limitations period for bring ATS-like claims, rather than a stand-alone tort or jurisdictional statute[129]. Its apparent limited use thus far as a means to vindicate international labor law (and other international law) violations does not provide a great incentive for other states to adopt similar laws.

Moreover, individual states may lack an incentive to pass a law giving foreigners essentially a forum to litigate international labor and human rights claims. Perhaps particularly progressive states, such as California, may feel it is simply the right thing to do and will not weigh the economic value of adopting this type of law. If the California law is finally discovered and utilized, and other states follow this lead, certainly state ATS laws may eventually become a viable vehicle to pursue certain labor related torture as well as forced labor claims.

*Code of Civil Procedure Section 354.8 as a Means of Breaking out of the Alien Tort Statute Straitjacket*, in *Colum. Hum. Rts. L. Rev*, 2020, 51, 2, p. 507; DAVIS, WHYTOCK, *State Remedies for Human Rights*, in *B.U. L. Rev.*, 2018, 98, pp. 397-398.

[125] SALDIVAR, *op. cit.*, pp. 543-544.

[126] Cal. Civ. Proc. Code § 354.8(a)(1)E(ii)(III).

[127] SALDIVAR, *op. cit.*, pp. 560-563.

[128] *Id.* at 512 (noting the invisibility of the law during the four years since its passage).

[129] *Id.* at 513.

## 5. *Conclusions*

The promise of the ATS to enforce international labor law was largely based on the use of the American courts as a venue to vindicate recognized, basic rights that were unenforced in the workers' home countries. Highly economically developed countries, such as the U.S., over time had developed advanced legal protections for workers that were largely enforced. With the advent of globalization, American and European corporations relocated production overseas to countries with minimal labor protections. While international trade and investment law protected the rights of these corporations, a large gap developed for the commensurate enforcement of the rights of foreign workers employed by those same companies. The ATS, in the post-*Filartiga* era, had the potential to close that gap. As the statute allowed foreigners to sue in tort (and therefore recover compensatory and even punitive damages) for violations of customary international law, workers could bring actions against multinational corporations for breaches of international labor law (to the extent such labor law rose to the level of customary international law). High damage awards would provide further incentive for workers to protect their rights and at the same time could act as incentive for companies to terminate particularly bad labor practices that violated international norms.

Unfortunately, through the decisions of the U.S. Supreme Court, up to and including its decision in *Nestle USA*, the promise of the ATS was not kept. Claims beyond the original three torts contemplated by Congress when drafting the ATS – safe passage, the rights of ambassadors and piracy – are exceedingly difficult to bring. In any case they cannot be brought if they are based on extraterritorial conduct or are against a foreign corporation. To the extent they are brought against an American corporation, the claims must allege specific acts made by the corporation in the U.S. that violated customary international law, beyond general corporate decision-making[130]. This is almost an impossibly high standard.

In the wake of *Nestle USA*, a shift is necessary to bring claims that implicate core international labor law rights – namely torture and forced labor – through different, more specific federal statutes, namely the TVPA and the TVPRA. The TVPRA, which prohibits human trafficking (and thus

[130] *Nestle USA*, 141 S.Ct. at 1935-37.

forced labor), has particularly strong provisions but has been underutilized. State law analogs to the ATS could also hold some potential, but the one such state law that does exist, in California, has been nearly invisible. The key, then, seems to be to increase labor rights (and human rights) activists' awareness of these laws and ultimately bring more actions based upon them.

**Abstract**

Globalization has had an extraordinary impact on both businesses and workers. While various international treaties and contracts have in large part evolved in response to globalization, and offer a high degree of protection to corporations doing business internationally, workers still lack commensurate protections. A key problem is that in many parts of the world, there is no way for ordinary employees to enforce any international labor rights that may exist. The federal Alien Tort Statute (ATS) in the United States offered a straightforward way around this enforcement problem. It gave jurisdiction to U.S. federal courts over claims by foreigners suing in tort for a violation of recognized international law. Consequently, the ATS could be utilized by workers around the world who have been denied the basic protections of international labor law, for example, victims of forced labor. Since plaintiffs may receive punitive and compensatory damages for tort claims in the U.S., large damage awards could serve to both deter multinationals from violating international labor law and make the claims economically feasible for workers to bring them. While there were some effective efforts to use the ATS in this fashion, the U.S. Supreme Court essentially closed the door to the vast majority of such claims in its recent decision in *Nestle, Inc. v. Doe*. This article examines the scope and implications of the *Nestle* decision and the prospect of using similar laws to continue the unfulfilled promise of the ATS.

**Keywords**

International labor law, forced labor, trafficking, Alien Tort Claims, extraterritoriality.

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# Multinational Enterprises and Labour Standards in International Investment Law and Arbitration

Summary: **1.** Introduction. **2.** The Traditional Asymmetry of International Investment Law. **3.** The Development of International Labour Standards and Corporate Social Responsibility. **4.** Solutions Aimed at Protecting Non-Investment Related Interests at the Substantive Level. **4.1.** The 'In Accordance with Host State Law' Clause. **4.2.** The 'Right to Regulate' Doctrine. **4.3.** The Principle of Proportionality. **5.** Solutions Aimed at Protecting Non-Investment Related Interests at the Procedural Level: Counterclaims. **6.** Towards a New Deal in the Policy-Making of International Investment Agreements? **7.** Final Remarks.

## 1. *Introduction*

This inquiry aims at assessing whether international law and investment arbitration can represent a legal system capable of promoting and guaranteeing compliance with labour standards by multinational enterprises (MNEs).

In this respect, it should be stressed here that the point is not whether MNEs have labour standards obligations in general; they certainly do as a matter of domestic law as well as under different treaty regimes[1], or even

[1] For example, at the universal level the eight fundamental International Labour Organization (ILO) Conventions: 1. Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87); 2. Right to Organise and Collective Bargaining Convention, 1949 (No. 98); 3. Forced Labour Convention, 1930 (No. 29) (and its 2014 Protocol); 4. Abolition of Forced Labour Convention, 1957 (No. 105); 5. Minimum Age Convention, 1973 (No. 138); 6. Worst Forms of Child Labour Convention, 1999 (No. 182); 7. Equal Remuneration Convention, 1951 (No. 100); 8. Discrimination (Employment and Occupation) Convention, 1958 (No. 111). As regards the United Nations (UN), it is worth mentioning arts. 23-24 of the

under customary international law. Rather, the question is whether international investment law and arbitration, as such, promote multinational enterprises' compliance with labour standards. To answer this question, the analysis will focus on both substantive and procedural law.

The protection of labour rights seems particularly crucial at present. The outbreak of the COVID-19 pandemic has caused incalculable economic damages and social costs. The result has been an unprecedented recession that only finds comparable historical precedents in the 1929 Great Depression and the Great Recession of 2007-2013. Against this backdrop, States will likely try to improve their capacity to attract foreign investment in order to encourage recovery and relieve their economies. In this respect, one should be aware that supply chains and markets are strictly integrated in a globalized world. This means that MNEs represent the primary economic non-State actor.

From this perspective, international investment law and arbitration represent an effective regulatory system which satisfies States' desire to increase their investments attractiveness, enabling them to ensure adequate substantive and judicial protection for foreign investors. For the sake of clarity, it is worth briefly recalling here that international investment law is a branch of the international legal order aimed at regulating the relationships between foreign investors and host States. In this field, the primary legal source is bilateral investment treaties (BITs), which grant investors substantive treatment standards and access to Investor-State Dispute Settlement (ISDS) mechanisms.

On the other hand, the ongoing pandemic notably increases the reasons for promoting MNEs' compliance with human rights, especially regarding labour standards. This need – the satisfaction of which cannot be taken for granted at all – poses a double challenge. In the first place, States and other international organisations such as the EU or economic institutions like the

Universal Declaration of Human Rights, UNGA Res. 217 A (III) of 10 December 1948 and the International Covenant on Economic, Social and Cultural Rights (ICESCR), UNGA Res. 2200A (XXI) of 16 December 1966, in force 3 January 1976, in *UNTS*, vol. 1976, 993, p. 3 ff.; certain Conventions aimed at protecting (or prohibiting the discrimination against) traditionally vulnerable categories such as children or women. At the European regional level, the European Social Charter, signed at Turin on 18 October 1961, in force 26 February 1965, in *ETS*, No. 35; (revised) Strasbourg 3 May 1996, in force 1 July 1999, in *ETS*, No. 163; as well as much of the European Union (EU) legislation.

International Monetary Fund (IMF) and the World Bank (WB) strongly support the necessity of public investments. In this context, there are serious risks that direct benefits from the recovery will be narrowly distributed among only a few groups. Indeed, the latter may result in an increase in social inequalities worldwide if it is not accompanied by a concerted effort to make investment law not only an efficient system but also a 'fair' one. In the second place, shoring up MNEs' compliance with labour rights represents a fundamental condition for this branch of international law to survive. In recent decades, this matter has already given rise to significant controversies, which have undermined the social legitimacy of international investment law. In fact, from a substantive point of view, the system provides for obligations exclusively for States, which are called upon to guarantee substantial standards of treatment in favour of foreign investors. From a procedural point of view, investment arbitration arouses mistrust for the structural asymmetry that characterizes it, as only investors are entitled to file a legal claim. Therefore, States increasingly perceive international investment law as an investor-biased system and suffer undue pressure because of the fear of being involved in expensive arbitration procedures. The result is a 'chilling effect' that deters them from introducing measures to protect public interests[2].

The legitimacy crisis of international investment law could even worsen in the present situation, where States are compelled to heavily intervene in the economy to correct the adverse effects produced by the pandemic. Following the saying (very familiar to internationalists) "never miss a good crisis", it is perhaps time to intervene to ensure greater coherence among the various branches of international law so that investment law becomes more sensitive to the protection of non-economic interests. Indeed, it is worth underlining that although scholarship has focused its attention on the shortcomings of international investment law for quite some time, it has generally analysed compliance with labour standards in the broader context of the protection of human rights[3]. While this approach may seem fully

[2] TIENHAARA, *Regulatory chill and the threat of arbitration: A view from political science*, in BROWN, MILES (eds.), *Evolution in Investment Treaty Law and Arbitration*, Cambridge University Press, 2011, pp. 606-628; LAVRANOS, *After Philip Morris II: The "regulatory chill" argument failed – yet again*, in *Kluwer Arb. Blog*, 18 August 2016.

[3] Among the others, see DUPUY, FRANCIONI, PETERSMANN (eds.), *Human Rights in International Investment Law and Arbitration*, Oxford University Press, 2009; PUMA, *Human Rights*

justified by the fact that there is indeed an overlap between the two sectors, this trend has ended up dispersing the autonomy of labour law concerns.

In light of the above, this inquiry will first outline the asymmetric character of international investment law (Section 2). Secondly, it will turn to the claim for a change by analysing the most relevant labour standards, particularly as regards their origin and nature (Section 3). Thirdly, it will address the legal solutions that international policy-makers and adjudicators have shaped over time to meet the necessities of protection of non-economic concerns at both substantive and procedural levels (Sections 4 and 5). Lastly, attention will be drawn to how States have exercised their treaty-making power in the last generation of international investment agreements (IIAs) to promote the protection of labour standards and make corporations accountable for the social impact of their activities (Section 6). By way of conclusion, the paper will provide an assessment of whether international investment law and arbitration, in their current status of development, are effectively able to ensure MNEs' compliance with labour standards (Section 7).

## 2. *The Traditional Asymmetry of International Investment Law*

As already recalled, international investment law and arbitration have long been impervious to labour law issues as is fully confirmed by the fact that on this specific matter there is very little (if any) case law[4]. This is for

*Law and Investment Law: Attempts at Harmonization through a Difficult Dialogue between Arbitrators and Human Rights Tribunals*, in ARCARI, BALMOND (eds.), *Judicial Dialogue in the International Legal Order: Between Pluralism and Legal Certainty*, Editoriale Scientifica, 2014, pp. 193-243; BALCERZAK, *Investor-State Arbitration and Human Rights*, Brill Nijhoff, 2017; RADI (ed.), *Research Handbook on Human Rights and Investment*, Elgar, 2018; BUSCEMI *ET AL.* (eds.), *Legal Sources in Business and Human Rights: Evolving Dynamics in International and European Law*, Brill Nijhoff, 2020; CHIUSSI CURZI, *General Principles for Business and Human Rights in International Law*, Brill Nijhoff, 2020.

[4] Two interesting arbitral proceedings which explicitly dealt with labour law issues are *Piero Foresti, Laura de Carli & Others v. The Republic of South Africa*, ICSID Case No. ARB(AF)/07/01, Award, 4 August 2010 and *Veolia Propreté v. Arab Republic of Egypt*, ICSID Case No. ARB/12/15, Award, 25 May 2018. As regards the former, the Complainants challenged two measures adopted by South Africa, which allegedly amounted to expropriation and were therefore in breach of the BITs with both Italy and Luxemburg. Indeed, the twin operation of

more than one reason. In the first place, States usually grant investors a series of substantive standards of treatment but do not impose any kind of obligation upon them. Indeed, one of the structural characteristics of international investment law is the well-known asymmetric relationship between host States and investors. This regulatory gap is due to a race to the bottom among States in the protection of non-investment concerns. In the second place, labour standards obligations deriving from other fields of the international legal order cannot be automatically imported into international investment law, as international law is fragmented in a plurality of branches that are quite autonomous from one another. Last but not least, even if there were a common legal framework, the problem is that most international treaty regimes introduce human rights and labour standards obligations essentially upon States and bind individual legal persons only indirectly. This substantial asymmetry is reflected, at a procedural level, in the exclusive right of investors to bring claims before the competent international arbitral tribunals[5]. The situation just described has caused a severe legitimacy crisis of international investment law, which is perceived as overly protective of investment interests to the detriment of non-economic concerns, while at the same time it has fuelled a claim for change and rebalancing[6].

the Mining Charter and the Mineral and Petroleum Resources Development Act pursued a Black Economic Empowerment (BEE) by introducing equity divestiture requirements. Foreign investors, in particular, were requested to sell 26% of their shares in relevant mining companies to 'historically disadvantaged South Africans' (HDSAs). Unfortunately for those who foster theoretical interests, all the claims were dismissed as the Claimants sought a discontinuance of the arbitral proceedings. The latter arbitration originated from the fact that the Governorate of Alexandria enacted a new labour legislation aimed at raising and stabilizing the minimum wage. As a reaction, Veolia, a French utility company operating in waste management services, filed a claim against Egypt for 175 million euros in compensation, based on the 1974 Egypt-France BIT. On 25 May 2018, the tribunal decided in favour of the State, but sadly enough the award is confidential.

[5] In this respect, it is worth mentioning KOSKENNIEMI, *It's not the Cases, it's the System:* [Book Review] *M. Sornarajah, Resistance and Change in the International Law on Foreign Investment. Cambridge: Cambridge University Press, 2015*, in *JWI&T*, 2017, 18(2), pp. 343-353, p. 351, where the author notes that: "[w]hen one of the parties and only *one of them*, may say to the other 'if you do not agree with my conditions, then see you in court', then the balance of power has shifted decisively in favour of that party".

[6] SAUVANT, *Multinational Enterprises and the Global Investment Regime: Toward Balancing Rights and Responsibilities*, in CHAISSE, CHOUKROUNE, JUSOH (eds.), *Handbook of International Investment Law and Policy*, Springer, 2021, pp. 1783-1829.

### 3. *The Development of International Labour Standards and Corporate Social Responsibility*

Against this backdrop, the adoption of several international soft law instruments marked a turning point, to the extent that they established new international labour standards[7]. The latter were mainly adopted by (or within) different international organisations and authorities acting in the fields of international labour law, human rights, or in matters of economic cooperation. They provide a decisive contribution in filling the gap left by a State-centric conception of international relations by developing a number of principles directly addressing individuals' obligations, especially those of MNEs[8].

In this respect, it is worth starting with the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy (1977)[9]. Adopted under the auspices of the ILO, it constitutes the outcome of a long-standing claim for social justice supported by developing countries since the 1960s. The ILO Declaration deals with training, wages, benefits and conditions of work or with employment issues such as social security, elimination of forced or compulsory labour as well as the abolition of child labour. Under the section on industrial relations, it enshrines the freedom of association, the right to organise and that to collective bargaining as a way to find agreed solutions between workers' representatives and their counterparts[10]. Later, it was complemented by the ILO Declaration on Fundamental Principles and Rights at Work (1998), which enshrines some

[7] KAUFMANN, *Trade and Labour Standards*, in *MPEPIL*, July 2014; ADDO, *Core Labour Standards and International Trade: Lessons from the Regional Context*, Springer, 2015; GÖTT *Labour Standards in International Economic Law*, Springer, 2018.

[8] As regards the limits of the State-centric model in making MNEs responsible for human rights violations, see MUCHLINSKI, *The Regulatory Framework of Multinational Enterprises*, in BANTEKAS, STEIN (eds.), *The Cambridge Companion to Business and Human Rights Law*, Cambridge University Press, 2021, pp. 173-194.

[9] ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy, adopted by the Governing Body of the International Labour Office at its 204th Session (Geneva, November 1977) and amended at its 279th (November 2000), 295th (March 2006) and 329th (March 2017) Sessions.

[10] MUCHLINSKI, *Part II. Substantive Issues, Ch. 17. Corporate Social Responsibility*, in ID. *ET AL.* (eds.), *The Oxford Handbook of International Investment Law*, Oxford University Press, 2008, pp. 637-684, p. 646 ff.

'core labour standards' as it affirms that all ILO State parties, "even if they have not ratified the [ILO Conventions …], have an obligation arising from the very fact of membership in the Organization to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions"[11].

Other significant instruments with the same universal scope of application are those adopted in the context of the UN. We are referring to the UN Global Compact of 1999 (principles 3-6)[12], the Guiding Principles on Business and Human Rights (2011)[13] and, more recently, the 2030 Agenda for Sustainable Development (2015)[14]. At the regional level, one should mention the Guidelines for Multinational Enterprises that were adopted within the framework of the Organisation for Economic Co-operation and Development (OECD) in 1976 and then revised on several occasions[15]. In

[11] ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, adopted by the International Labour Conference at its Eighty-Sixth Session, Geneva, 18 June 1998 (Annex revised 15 June 2010).

[12] UN Global Compact, World Economic Forum, Davos, 1999, which deals with the freedom of association and the right to collective bargaining, the abolition of forced labour and child labour, the elimination of discrimination in respect of employment and occupation.

[13] UN Human Rights Council, Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie (A/HRC/17/31, 21 March 2011). As regards this instrument, see KARP, *Business and Responsibility for Human Rights in Global Governance*, in HANSEN-MAGNUSSON, VETTERLEIN (eds.), *The Routledge Handbook on Responsibility in International Relations*, Routledge, 2021, pp. 318-330, p. 323 ff.; DEVA, *The UN Guiding Principles on Business and Human Rights and Its Predecessors. Progress at a Snail's Pace?*, in BANTEKAS, STEIN, *op. cit.*, pp. 145-172; *ID.*, *International Investment Agreements and Human Rights: Assessing the Role of the UN's Business and Human Rights Regulatory Initiatives*, in CHAISSE, CHOUKROUNE, JUSOH, *op.cit.*, pp. 1733-1758.

[14] Transforming our World: The 2030 Agenda for Sustainable Development, UNGA Res. 70/1, 21 October 2015.

[15] OECD, Guidelines for Multinational Enterprises, adopted 21 June 1976 and revised in 1979, 1982, 1984, 1991, 2000 and 2011 (OECD Pub 2011). See also the OECD Due Diligence Guidance for Responsible Business Conduct (OECD, 2018). Scholarship highlighted the importance of this instrument: among others, see ACCONCI, *The Promotion of Responsible Business Conduct and the New Text of the OECD Guidelines for Multinational Enterprises*, in *JWI&T*, 2001, 2(1), pp. 123-149; BUCHHOLTZ, *Social and Labour Standards in the OECD Guidelines: Enforcement Mechanisms*, in *IntlOrgLRev*, 2020, 17(1), pp. 133-152. More recently, RASCHE, *The UN Global Compact and the OECD Guidelines for Multinational Enterprises and Their Enforcement Mechanisms*, in BANTEKAS, STEIN, *op. cit.*, pp. 195-214.

this context, it is also worth highlighting that more recently, on 10 March 2021, the European Parliament adopted a resolution under art. 225 of the Treaty on the Functioning of the European Union (TFEU)[16], by which it has requested the Commission to submit a proposal of Directive on Corporate Due Diligence and Corporate Liability. Interestingly enough, para. 3 of the resolution "[c]alls on the Commission to always include, in the external policy activities, including in trade and investment agreements, provisions, and discussions on the protection of human rights"[17].

All these instruments gradually shaped international corporate social responsibility (ICSR) to the extent that they are explicitly addressed to MNEs and promote a socially sound approach to the communities where companies carry out their own business[18]. They are some of the most important vehicles for the establishment of an international horizontal responsibility (*Drittwirkung*)of corporations as they deal with the relations among individuals, in particular those between workers and MNEs, upon which they pose due diligence obligations.

These codes of conduct produce some of the typical effects of soft law sources[19]. Firstly, they provide an authoritative interpretation on the exiting obligations under treaty regimes and even customary international law. Secondly, they contribute to establishing a general consensus in the international community as regards the minimum standards of treatment in matters of labour rights. Thirdly, they complement existing IIAs as long as ICSR clauses or labour standards clauses are introduced in the latter's text[20]. This incorporation results in a 'hardening' process.

Against this backdrop, once more, soft law proves to be a valuable tool

[16] Consolidated version of the Treaty on the Functioning of the European Union, in *OJ*, 7.6.2016, C 202/3, pp. 47-199.

[17] Corporate due diligence and corporate accountability. European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)).

[18] Muchlinski, *op.cit.*, pp. 643-645; Mbengue, *Les obligations des investisseurs*, in Société Française pour le Droit International, *Colloque de Paris 8 Vincennes - Saint Denis*, *L'entreprise multinationale et le droit international*, edited by Dubin*et al.*, Pedone, 2017, pp. 295-339.

[19] Blanpain, Colucci, *The Globalization of Labour Standards. The Soft Law Track*, Kluwer Law International, 2004; Alvarez, *Reviewing the Use of "Soft Law" in Investment Arbitration*, in *Eur. Int'l Arb. Rev.*, 2018, 7(2), pp. 149-200.

[20] van der Zee, *Incorporating the OECD Guidelines in International Investment Agreements: Turning a Soft Law Obligation into Hard Law?*, in *LIEconI*, 2013, 40(1), pp. 33-73.

to overcome the boundaries of treaty regimes and thus an antidote to the fragmentation of the international legal system, as long as it is able to progressively harmonise normative systems otherwise destined to remain hermetically separated from each other. However, labour standards also share some shortcomings with this kind of normative source; since their application remains mainly voluntary, they do not raise binding obligations and, therefore, are not judicially enforceable.

### 4. *Solutions Aimed at Protecting Non-Investment Related Interests at the Substantive Level*

In the last decade, IIA policy-makers, scholarship and international adjudicators have made a valuable effort to amend the asymmetries traditionally affecting international investment law. Hereafter, the inquiry will present and discuss possible remedies at the substantive level.

#### *4.1. The 'In Accordance with Host State Law' Clause*

Today, a number of BITs contain a provision which sets forth that investment shall be made in accordance with the host State law. Based on this clause, arbitral tribunals have denied their jurisdiction over claims related to illegal investments[21]. This practice is essentially aimed at countering corruption, by preventing investors from taking advantage of their own illegal acts and from benefiting from the protection of BITs. Some authors support the idea that this approach ought to be generalised[22] so that the clause may apply to cases where investments are in violation of human rights treaties incorporated in the legislation of the host State.

Indeed, as expressly underlined by the tribunal in *Phoenix Action Ltd. v. Czech Republic* (2009), "ICSID Convention's jurisdictional requirements – as well as those of the BIT – cannot be read and interpreted in isolation from public international law, and its general principles. […N]obody would

[21] *Inceysa Vallisoletana S.L. v. Republic of El Salvador*, ICSID Case No. ARB/03/26A, Award, 2 August 2006. On this matter, see CARLEVARIS, *The Conformity of Investments with the Law of the Host State and the Jurisdiction of International Tribunals*, in *JWIT*, 2008, 9(1), pp. 5-34.

[22] ZARRA, *International Investment Treaties as a Source of Human Rights Obligations for Investors*, in BUSCEMI *ET AL.*, *op. cit.*, p. 52-73, p. 57.

suggest that ICSID protection should be granted to investments made in violation of the most fundamental rules of protection of human rights, like investments […] in support of slavery"[23]. In addition, it is worth noting here that some tribunals have affirmed that the 'in accordance with host State' requirement stems directly from the good faith principle as enshrined in arts. 26 and 31 of the 1969 Vienna Convention of the Law of Treaties (VCLT)[24]. It follows that, being the latter a pillar of the law of treaties, it precludes the legitimate invocation of BITs' protection even in absence of a written clause[25].

The same logic may hold true with breaches of fundamental labour standards such as the prohibition of child, forced or compulsory labour. Nonetheless, a significant limitation here consists in that the 'in Accordance with Host State Law' rule has been interpreted as only addressing cases where the violation of domestic law occurs in the phase of investment establishment. If this requirement may more easily be met in cases of corruption or fraud, it can hardly encompass breaches of labour law.

A possible solution may be found, *de iure condendo*, in clauses drafted with a wider scope of application by requiring that investments are made in compliance with the host State law not only in the phase of establishment but for their whole duration. In this respect, an example is art. 2, para. 2, of the 2009 China-Malta BIT, which provides for that "[i]nvestments of either Contracting Party shall be made, and shall, for their whole duration, continuously be in line with the respective domestic laws".

[23] *Phoenix Action, Ltd. v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, p. 30, para. 78.

[24] It is worth highlighting that, based on international arbitral case law, some scholars have addressed whether the systemic integration under art. 31, para. 3, let. c), VCLT may represent an effective tool to harmonise different branches of the international legal system. In this respect, see, among others, Dupuy, *Unification Rather Than Fragmentation of International Law? The Case of International Investment Law and Human Rights Law*, in Dupuy, Petersmann, Francioni (eds.), *Human Rights in International Investment Law and Arbitration*, Oxford University Press, 2009, pp. 45-62; Rosentreter, *Article 31(3)(c) of the Vienna Convention on the Law of Treaties and the Principle of Systemic Integration in International Investment Law and Arbitration*, Nomos, 2015, p. 363 ff.; Ascensio, *Article 31 of the Vienna Conventions on the Law of Treaties and International Investment Law*, in *ICSID Rev.*, 2016, 31(2), pp. 366-387.

[25] In this vein, see *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, pp. 39-40, paras. 138-139; *Phoenix v. Czech Republic*, cit., pp. 39-40, para. 101; *Gustav F W Hamester GmbH & Co KG v. Republic of Ghana*, ICSID Case No. ARB/07/24, Award, 18 June 2010, p. 36, para. 123.

If this remedy does not establish MNEs' responsibility at the international level, it at least allows arbitral tribunals to deny their jurisdiction so that investors acting illicitly cannot enjoy the protection of international investment law in accordance with the general principles *ex iniuria ius non horitur* and *nemo commodum capere potest de iniuria sua propria*.

### *4.2. The 'Right to Regulate' Doctrine*

Host States hold the power to adopt measures interfering with investors' rights to ensure that investments are carried out respecting general interests such as labour rights and standards, provided that these measures are non-discriminatory, reasonable and proportionate (the latter principle will be specifically addressed in the following Section).

This doctrine, named 'power/right to regulate', is provided for under both conventional and customary international law. As regards the former, it should be noted that many IIAs contain so-called 'non-precluded measures' (NPMs) clauses, which allow States to act in a way that would otherwise be inconsistent with the treaty, when the action is taken to pursue certain fundamental objectives such as the maintenance of public order or international peace and security, or the protection of security interests[26]. Some of these provisions expressly refer to labour laws: in this respect, one could mention art. 228 of the Association Agreement between the EU and Georgia[27], or art. 10, para. 1, of the Colombia-United Arab Emirates BIT[28]. A provision on the right to regulate for social and

[26] On NPMs clauses in general, see Burke-White, Von Staden, *Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures provisions in Bilateral Investment Treaties*, in *VaJIntlL*, 2008, 48(2), pp. 307-410; Wang, *The Non-Precluded Measure Type Clause in International Investment Agreements: Significances, Challenges, and Reactions*, in *ICSID Rev.*, 2017, 32(2), pp. 447-456; Pathirana, McLaughlin, *Non-precluded Measures Clauses: Regime, Trends, and Practice*, in Chaisse, Choukroune, Jusoh, *op. cit.*, pp. 484-505.

[27] Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part, 27 June 2014, into force 1 July 2016, available at https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:22014A0830(02).

[28] "Subject to the requirement that such measures are not applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or investors, nothing in this Agreement shall be construed to prevent a Contracting Party from adopting, maintaining, or enforcing any measure that it considers appropriate to ensure that an investment activity in

economic objectives is contained in art. 23 of the 2016 Morocco-Nigeria BIT[29]. In other cases, such as art. 10 of Argentina-Qatar BIT[30] or art. 9, para. 1, of the Rwanda-United Arab Emirates BIT[31], the relevant clause reads in more broad terms.

If provisions of such a kind go way back in the treaty practice[32], they nonetheless represent the main symptom of the contemporary tendency of States to integrate non-investment concerns in IIAs. In this respect, even more significant is their inclusion in Model BITs[33]. It was precisely this practice which led several arbitral tribunals to affirm that the host State's right to regulate is today part of general international law[34]. In this vein,

its territory is undertaken in accordance with the applicable environmental and labour law of the Contracting Party": art. 10, para. 1, of the Bilateral Agreement for the Promotion and Protection of Investments Between the Government of the Republic of Colombia and the Government of the United Arab Emirates, 12 November 2017, not yet in force, available at https://investment-policy.unctad.org/international-investment-agreements/treaty-files/5728/download.

[29] Reciprocal Investment Promotion and Protection Agreement Between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria, 3 December 2016, not yet in force, available at https://investmentpolicy.unctad.org/-international-investment-agreements/treaty-files/5409/download.

[30] Reciprocal Promotion and Protection of Investments between the Argentine Republic and the State of Qatar, 6 November 2016, not yet in force, available at https://-investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5383/download.

[31] "Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting, maintaining, or enforcing any measure that it considers appropriate to ensure that an investment activity in its territory is undertaken in accordance with the applicable public health, security, environmental and labour law of the Contracting Party, such measures should not be applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or investors": art. 9, para. 1, of the Agreement between the Republic of Rwanda and the United Arab Emirates on the Promotion and Reciprocal Protection of Investments, 1 November 2017, not yet in force, available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5722/download.

[32] An example of NPMs clause could be found in the 1959 Germany-Pakistan BIT, 25 November 1959, in force 28 April 1962, replaced by the 2009 Germany-Pakistan BIT.

[33] See, *e.g.*, art. 33, para. 1, nn. (ii-iii), of the India Model BIT, available at https://dea.gov.in/sites/default/files/ModelBIT_Annex_0.pdf; art. 12 of the 2012 US Model BIT available at https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20-Meeting.pdf; art. 15 of the Belgium-Luxembourg Economic Union Model BIT, 28 March 2019, available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5854/download.

[34] In this vein, see the case law of the Iran-US Claims Tribunal in *Sedco, Inc v. National Iranian Oil Company and The Islamic Republic of Iran*, IUSCT Case Nos. 128 and 129,

should an NPMs clause be lacking in the relevant investment agreement, recourse could be had to the power to regulate (or police powers) doctrine under customary international law. The power to regulate can be defined as "the legal right exceptionally permitting the host state to regulate in derogation of international commitments it has undertaken by means of an investment agreement without incurring a duty to compensate"[35].

A relatively recent example of application of the doctrine can easily be found in the 2016 *Philip Morris v. Uruguay* award. The complainant companies alleged an indirect expropriation in violation of art. 5 of the Switzerland-Uruguay BIT as Uruguay had imposed certain restrictive measures on the trade of tobacco, by preventing manufacturers from marketing more than one variant of cigarettes per brand and by increasing the size of health warnings appearing on cigarette packages. However, the ICSID tribunal acknowledged that Uruguay acted to protect the health of its population and the measure at issue represented an exercise of police power as it was proportionate and non-discriminatory[36]. In greater detail, the tribunal

Interlocutory Award No. ITL 55-129-3, 17 September 1985, in *Iran-US Claims Trib. Rep.*, vol. 1985, 9, p. 248 ff., para. 90; *Emanuel Too v. Greater Modesto Insurance Associates and The United States of America*, IUSCT Case No. 880, Award No. 460-880-2, 29 December 1989, in *Iran-US Claims Trib. Rep.*, vol. 1989, 23, p. 378 ff., p. 387, para. 26. As regards ICSID arbitral jurisprudence, see *Marvin Roy Feldman Karpa v. United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, 16 December 2002, p. 37, para. 103; *TécnicasMedioambientalesTecmed, SA v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, pp. 45-46, para. 119; *LG&E Energy Corp, LG&E Capital Corp, and LG&E International, Inc v. Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 25 July 2007, pp. 58-59, paras. 194-197. As for UNCITRAL, see *Ronald S Lauder v. The Czech Republic*, UNCITRAL, Final Award, 3 September 2001, p. 42, para. 198; *Methanex Corporation v. United States of America*, NAFTA/UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, Part IV, Chapter D, p. 4, para. 7; *Saluka Investment B.V. v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, p. 52, para. 254 ff.; *Chemtura Corporation v. Government of Canada*, NAFTA/UNCITRAL, Award, 2 August 2010, p. 78, para. 266.

[35] TITI, *The Right to Regulate in International Investment Law*, Nomos, 2014, p. 33. In the same vein, see LEVASHOVA, *The Right of States to Regulate in International Investment Law: The Search for Balance between Public Interest and Fair and Equitable Treatment*, Wolters Kluwer, 2019; ACCONCI, *The Integration of Non-Investment Concerns as an Opportunity for the Modernization of International Investment Law: Is a Multilateral Approach Desirable?*, in SACERDOTI *ET AL.* (eds.), *General Interests of Host States in International Investment Law*, Cambridge University Press, 2014, p. 163-193, p. 178.

[36] *Philip Morris Brands Sàrl, Philip Morris Products SA and Abal Hermanos SA v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016, p. 81, para. 287 ff.

derived the customary nature of the doctrine from art. 10, para. 5, of the Harvard Draft Convention on the International Responsibility of States for Injuries to Aliens[37] and the US Third Restatement of the Law of Foreign Relations[38]. In addition, it relied on a 2004 OECD working paper on "'Indirect Expropriation' and the 'Right to Regulate' in International Investment Law"[39]. Lastly, the tribunal noted that the doctrine is today mentioned in a number of model investment agreements and IIAs, such as the 2012 US Model BIT[40], the 2004 Canada Model BIT[41], the Free Trade Agreement between the EU and Singapore[42] and the Comprehensive Economic and Trade Agreement between the EU and Canada[43].

### *4.3. The Principle of Proportionality*

The principle of proportionality represents a general principle of international law[44]. In a nutshell, under this principle a measure can be considered proportionate if it satisfies a three-tier test: *i*) first, it must actually be suitable to contribute to the achievement of a certain objective (suitability); *ii*) it must be – among all the potential alternative measures – the least harmful for the investor (necessity); and *iii*) it has to be intended to

[37] "An uncompensated taking of an alien property or a deprivation of the use or enjoyment of property of an alien which results from the execution of tax laws; from a general change in the value of currency; from the action of the competent authorities of the State in the maintenance of public order, health or morality; or from the valid exercise of belligerent rights or otherwise incidental to the normal operation of the laws of the State shall not be considered wrongful", *Draft Convention on the International Responsibility of States for Injuries to Aliens*, prepared by the Harvard Law School, edited by Sohn, Baxter, in *AJIL*, 1961, 55(3), p. 548-584, p. 554; cf. *Philip Morris v. Uruguay*, cit., p. 83, para. 292.

[38] *Restatement of the Law Third. Foreign Relations Law of the United States*, 2 voll., American Law Institute, 1987, vol. I, para. 712, comment (g); cf. *Philip Morris v. Uruguay*, cit., p. 83, para. 293.

[39] OECD, *"Indirect Expropriation" and the "Right to Regulate" in International Investment Law*, in *OECD Work. Pap. on Int. Invest.*, 2004, 4, p. 5, nt. 10.

[40] Annex B "Expropriation", art. 4, let. b); cf. *Philip Morris v. Uruguay*, cit., pp. 85-86, para. 300.

[41] Annex B, art. 13, para. 1, let. c); cf. *Philip Morris v. Uruguay*, cit., pp. 85-86, para. 300.

[42] Annex 1, art. 2; cf. *Philip Morris v. Uruguay*, cit., pp. 85-86, para. 300.

[43] Annex 8-A "Expropriation", art. 3; cf. *Philip Morris v. Uruguay*, cit., pp. 85-86, para. 300.

[44] Cannizzaro, *Il principio della proporzionalità nell'ordinamento internazionale*, Giuffrè, 2000; Palombino, *Fair and Equitable Treatment and the Fabric of General Principles*, Asser, 2018, p. 124 ff.

pursue an objective which, balancing the different interests at stake, has to prevail for its importance (proportionality *stricto sensu*).

In the latter context, proportionality serves to assess the legitimacy of State conduct in relation to the right of ownership of investors[45]. In the absence of proportionality, if a State initiative leads to deprivation (in law or fact) of the right of ownership it can be qualified as expropriation (direct or indirect), while if investors suffer *minoris generis* injuries, it may result in a violation of fair and equitable treatment (FET).

As regards expropriation, as pointed out in the previous sub-section, proportionality can provide a parameter to assess the legitimacy of the concrete exercise of the right to regulate by host States. In this case, if there is a taking originating from the need to protect public interests, proportionality excludes that State action can be qualified as expropriation, with the consequence that no compensation is due[46]. Some authors support an alternative solution. According to their view, proportionality can be used as a criterion for reducing the amount due by way of compensation in the presence of measures that, according to the 'sole effects' doctrine, can be qualified as expropriation in all respects[47]. Therefore, in this case the importance of the public interests at the basis of the State action only affects the quantum due.

As far as FET is concerned, it is today accepted that proportionality is an element of this standard[48]. Therefore, arbitral tribunals are always called upon to evaluate whether a measure interfering with investors' rights can be justified by a relevant host State's interest. In the words of the arbitral tribunal in the *El Paso v. Argentina* case, "it is inconceivable that any State would accept that, because it has entered into BITs, it can no longer modify

[45] For a comprehensive analysis, see VADI, *Proportionality, Reasonableness and Standards of Review in International Investment Law and Arbitration*, Elgar, 2018.

[46] *Tecmed v. Mexico*, cit., pp. 46-47, para. 122; *Marfin Investment Group v. The Republic of Cyprus*, ICSID Case No. ARB/13/27, Award, 26 July 2018, pp. 242-243, paras. 981-985. As regards scholarship, see ZARRA, *Right to Regulate, Margin of Appreciation and Proportionality: Current Status in Investment Arbitration in Light of* Philip Morris v. Uruguay, in *BJIL*, 2017, 14(2), p. 94-120, p. 107.

[47] KRIEBAUM, *Regulatory Takings: Balancing the Interests of the Investor and the State*, in *JWI&T*, 2007, 8(5), p. 717-744, p. 743. More recently, FACCIO, *Indirect Expropriation in International Investment Law. Between State Regulatory Powers and Investor Protection*, Editoriale Scientifica, 2020, p. 228 ff.

[48] PALOMBINO, *op. cit.*, p. 134 ff.

pieces of legislation which might have a negative impact on foreign investors, in order to deal with modified economic conditions and must guarantee absolute legal stability"[49]. FET is "a standard entailing reasonableness and proportionality. It ensures that the foreign investor is not unjustly treated, with due regard to all surrounding circumstances. FET is a means to guarantee justice to foreign investors"[50]. Thus, arbitral case law has long confirmed that the existence of an obligation upon the host State to grant fair and equitable treatment in no way prevents the State from enacting proportionate regulatory actions[51].

Borrowing from the case law of the European Court of Human Rights (ECtHR), arbitral tribunals have sometimes also made reference to the 'margin of appreciation' doctrine, to justify measures directed to safeguard public interests while adversely affecting investors' expectations[52]. This approach has attracted the criticism of those who allege that "[t]he 'margin of appreciation' is a specific legal rule, developed and applied in a particular context, that cannot properly be transplanted to the BIT […]. There are well-considered legal rules, already applicable to questions of fair and equitable treatment, which serve similar purposes to those of the 'margin of appreciation,' but in a more nuanced and balanced manner"[53].

However, what is important to stress here is the common approach followed by arbitral tribunals in acknowledging the host States' power to

[49] *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, p. 126, para. 354.

[50] *Ibidem*, p. 134, para. 373.

[51] For a more recent case law, see *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA No. 2012-2, Award, 15 March 2016, para. 6.18; *Blusun S.A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, ICSID Case No. ARB/14/3, Final Award, 27 December 2016, p. 112, para. 319; *Eiser Infrastructure Limited and Energía Solar Luxembourg S.àr.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/36, Final Award, 4 May 2017, pp. 111-112, para. 362; *Hydro Energy 1 S.àr.l. and Hydroxana Sweden AB v. Kingdom of Spain*, ICSID Case No. ARB/15/42, Decision on Jurisdiction, Liability and Directions on Quantum, 9 March 2020, p. 169 ff., para. 550 ff.; *PL Holdings S.à.r.l. v. Republic of Poland*, SCC Arbitration No. V 2014/163, Partial Award, 28 June 2017, pp. 153-154, paras. 390-391.

[52] *Philip Morris v. Uruguay*, cit., p. 115, paras. 398-399.

[53] *Philip Morris v. Uruguay*, cit., Concurring and Dissenting Opinion of Co-Arbitrator Gary Born, 8 July 2016, p. 21, para. 87. In this vein, see Zarra (2017), *op. cit.*, p. 108 ff.; Palombino, Minervini, *Apropos of the External Precedent: Judicial Cross-Pollination Between Investment Tribunals and International Courts*, in Gourgourinis (ed.), *Transnational Actors in International Investment Law*, Springer, 2021, p. 133-150, p. 145.

limit investors' rights without incurring international liability. In this case, public interests (which certainly include the need to protect labour rights) may well justify measures that, in compliance with the principle of proportionality, limit investors' rights to a more or less invasive extent.

Lastly, it is worth noting that, as some authors have pointed out[54], in applying the proportionality test some arbitral tribunals took into account the specific conduct of the investor within the assessment of host State responsibility every time the former's wrongdoing may have led the latter to adopt measures aimed at protecting public interests while adversely affecting the investments[55]. In the context of the present inquiry, one could think to a situation of systematic violations of labour rights by the investor which leads the host State to adopt draconian measures. On this point, it suffices here to underline that the so-called 'contributory fault' approach can play a role both when ascertaining host State responsibility (*i.e.*, when the proportionality of the State measure is assessed *strict sensu*) as well as when assessing the amount of damages to be compensated.

### 5. *Solutions Aimed at Protecting Non-Investment Related Interests at the Procedural Level: Counterclaims*

International arbitral tribunals have proved to be responsive to the claim of a need for change and have tried to strike a new balance between different social needs[56]. At the procedural level, therefore, they tried to extend their jurisdiction over counterclaims filed by host States alleging violations of non-

[54] See FACCIO, *op. cit.*, pp. 242-245.

[55] "The Tribunal agrees that an award of damages may be reduced if the claiming party also committed a fault which contributed to the prejudice it suffered and for which the trier of facts, in the exercise of its discretion, considers the claiming party should bear some responsibility": *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, 5 October 2012, p. 264, para. 678. In the same vein, see *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, UNCITRAL, PCA Case No. 2005-03/AA226, Final Award, 18 July 2014, pp. 509-510, paras. 1633-1637; *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA No. 2012-2, Award, 15 March 2016, paras. 6.100-6.102.

[56] As regards the different grounds which could justify the invocation of human rights in investor-State arbitration, see PETERSMANN, *Human Rights in International Investment Law and Adjudication: Legal Methodology Questions*, in CHAISSE, CHOUKROUNE, JUSOH, *op. cit.*, p. 1707-1732, p. 1718 ff.

investment concerns. To achieve this objective, they affirmed that international investment law should not be seen in a vacuum, and BITs should be interpreted within the broad context of public international law as provided for by art. 31, para. 3, let. c), VCLT.

The apex of this trend is represented by two arbitral awards which recognised a new function to counterclaims[57]. In *Urbaser v. Argentina* (2016), the dispute originated from the concession for the supply of water and sewerage services in the Province of Buenos Aires to a company of which Urbaser was a shareholder[58]. When the Province terminated the concession, Urbaser initiated an ICSID arbitral proceeding against Argentina under art. X of the Argentina-Spain BIT[59]. Argentina, for its part, filed a counterclaim, alleging that the concessionaire's failure to provide the necessary level of investment in supply services negatively affected the local population's human right to water.

In the end, the arbitral Tribunal came to affirm its jurisdiction over Argentina's counterclaim[60]. It interpreted the arbitration clause extensively and considered that when an arbitration clause is drafted in broad terms and refers to disputes "relating to an investment" or "arising from an investment", then arbitrators have "a wider margine of manouvre"[61]. The Tribunal based its reasoning on soft law instruments[62] such as, *inter alia*, the aforementioned ILO Tripartite Declaration on Principles concerning Multinational Enterprises and Social Policy and the UN Guiding Principles on Business and Human Rights.

[57] On counterclaims in general, see LALIVE, HALONEN, *On the Availability of Counterclaims in Investment Treaty Arbitration*, in *CYBIL*, 2011, 2, pp. 141-156; HOFFMANN, *Counterclaims in Investment Arbitration*, in *ICSID Rev.*, 2013, 28(2), pp. 438-453; DUDAS, *Treaty Counterclaims under the ICSID Convention*, in BALTAG (ed.), *ICSID Convention after 50 Years: Unsettled Issues*, Kluwer Law International, 2017, pp. 385-405; LAMPO, *Le domande riconvenzionali*, in MANTUCCI (ed.), *Trattato di diritto dell'arbitrato*, vol. XIII. *L'arbitrato negli investimenti internazionali*, Edizioni Scientifiche Italiane, 2020, pp. 439-463; ANNING, *Counterclaims Admissibility in Investment Arbitration. The Case of Environmental Disputes*, in CHAISSE, CHOUKROUNE, JUSOH, *op. cit.*, pp. 1277-1325.

[58] *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoav. Argentina*, ICSID Case No. ARB/07/26, Award, 8 December 2016.

[59] Agreement on the Reciprocal Promotion and Protection of Investments between the Argentine Republic and the Kingdom of Spain, 3 October 1991, in force 28 September 1992, in *UNTS*, 1992, 1699, p. 202 ff.

[60] *Urbaser v. Argentina*, cit., paras. 1151, 1155.

[61] ZARRA (2020), *op. cit.*, p. 69.

[62] *Urbaserv. Argentina*, cit., paras. 1195-1198.

Turning to the second case, it is worth noting that in *David Aven v. Costa Rica* (2018)[63] US citizens initiated a proceeding against Costa Rica under Chapter 10 of the Central America-Dominican Republic-United States Free Trade Agreement[64]. The claimants alleged that Costa Rica breached its obligations when it illegitimately revoked the construction permits that they had obtained from the municipal authorities and prevented them from developing a real estate project in Esterillos Oeste, where they had a concession. On the other side, the respondent State affirmed that it had acted to protect the local environment, as there were wetlands and forests within the project site, and that its right to pursue such environmental policy was acknowledged under the FTA. In addition, Costa Rica filed a counterclaim alleging that the works carried out by the claimants negatively affected the environment in the project site.

At the end of the proceedings, the arbitral tribunal affirmed its jurisdiction over the counterclaim and acknowledged that, in general, investors are under the obligation to perform their investment in compliance with the protection of the environment.

In both cases, arbitral tribunals interpreted arbitration clauses extensively in order to establish their jurisdiction on counterclaims filed by respondent host States, which act as procedural remedies to challenge violations of human rights by investors. Moreover, they acknowledged that "it can no longer be admitted that companies operating internationally are immune from becoming subjects of international law" and that, if corporations may hold rights under international law, they may also "be subjects to international law obligations"[65]. These awards represent a significant judicial effort to interpret existing sources of international investment law in a way that allows the striking of a new balance between investors and States interests, between investment-related aspects and non-economic concerns[66].

[63] *David Aven et al. v. The Republic of Costa Rica*, ICSID Case No. UNCT/15/3, Award, 18 September 2018.

[64] Central America-Dominican Republic-United States Free Trade Agreement (DR-CAFTA), Washington 5 August 2004.

[65] *Urbaserv. Argentina*, cit., paras. 1194-1195.

[66] On counterclaims as a tool to rebalance investment and non-investment concerns, see Bjorklund, *The Role of Counterclaims in Rebalancing Investment Law*, in *LCLR*, 2013, 17(2), pp. 461-480; Abel, *Counterclaims Based on International Human Rights Obligations of Investors in International Investment Arbitration. Fallacies and Potentials of the 2016 ICSID* Urbaser v. Argentina

Today, after long doctrinal and jurisprudential debates the right to file counterclaims is generally admitted, even in cases where the relevant instrument does not provide for it. This notwithstanding, for reasons of legal certainty several IIAs expressly set forth such right[67].

Nonetheless, this approach has more than one shortcoming, as it moves in a normative framework which is substantially unchanged. The main problem is that investors keep being under no substantive obligation of compliance with human rights and labour standards *under international investment law* when BITs do not outline them explicitly. Even if substantive obligations were to be found in other branches of international law, their incorporation by virtue of systemic integration is anything but obvious. It follows that there would bea concrete risk of incoherence as arbitral tribunals must rely on uncertain interpretative solutions to establish their jurisdiction on counterclaims.

## 6. *Towards a New Deal in the Policy-Making of International Investment Agreements?*

Turning to the last part of the analysis, it should be noted that to date, although praiseworthy, the mentioned remedies have given rise to a rather isolated practice and still unsatisfactory outcomes. Nevertheless, soft law instruments and arbitral tribunals' commitment certainly contributed to initiating a new deal of hard law policy-making. In fact, it is worth highlighting that in the most recent practice a new 'new-generation' of IIAs and Model BITs include ICSR, labour standards and the right to regulate, at the substantive level, as well as the host State right to file counterclaims, at the procedural one[68]. The OECD itself has recently

*Award*, in *BOL-IJ*, 2018, 1, pp. 61-90; ISHIKAWA, *Counterclaims and the Rule of Law in Investment Arbitration*, in *AJIL Unbound*, 2019, 113, pp. 33-37.

[67] Under art. 28, para. 9, of the Common Market for Eastern and Southern Africa "A Member State against whom a claim is brought by a COMESA investor under this Article may assert as a defence, counterclaim, right of set off or other similar claim, that the COMESA investor bringing the claim has not fulfilled its obligations under this Agreement, including the obligations to comply with all applicable domestic measures or that it has not taken all reasonable steps to mitigate possible damages". In the same vein, see art. 14, para. 11 of the Indian Model BIT.

[68] As regards human rights-related provisions in IIAs, see CHOUDHURY, *Human Rights in*

welcomed this trend[69]. If some references to the conventional practice related to the right to regulate and that to file counterclaims have been indicated above (Sections 4.2. and 5 respectively), hereafter the inquiry will address the current practice concerning ICSR and labour standards.

As regards the former, an example is art. 12 of the Argentina-Qatar BIT, which provides that "[i]nvestors operating in the territory of the host Contracting Party should make efforts to voluntarily incorporate internationally recognised standards of corporate social responsibility into their business policies and practices"[70].

As regards labour standards, art. 17.2, of the United States-Colombia Trade Promotion Agreement represents an outstanding example as it states that "1. Each Party shall adopt and maintain in its statutes and regulations, and practices there under, the following rights, as stated in the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-

*International Investment Law*, in *EYIEL*, 2020, 11, pp. 175-194; SEIF, *Business and Human Rights in International Investment Law: Empirical Evidence*, in CHAISSE, CHOUKROUNE, JUSOH, *op. cit.*, pp. 1759-1782, p. 1764 ff. On ICSR clauses in IIAs or models, see MONEBHURRUN, *Mapping the Duties of Private Companies in International Investment Law*, in *BJIL*, 2017, 14(2), pp. 50-71; BERNASCONI-OSTERWALDER, *Inclusion of Investor Obligations and Corporate Accountability Provisions in Investment Agreements*, in CHAISSE, CHOUKROUNE, JUSOH, *op. cit.*, pp. 464-482. As regards labour provisions, see BOIE, *Labour related provisions in international investment agreements*, in *ILO Employment Work. Pap.*, 2012, 126; PRISLAN, ZANDVLIET, *Labor Provisions in International Investment Agreements: Prospects for Sustainable Development*, in *YBIntInvestL&Pol*, 2012-2013, pp. 377-411; AGUSTÍ-PANAREDA, PUIG, *Labor Protection and Investment Regulation: Promoting a Virtuous Circle*, in *StanJIntlL*, 2015, 51, pp. 105-117; BOLLE, *Overview of Labor Enforcement Issues in Free Trade Agreements*, Congressional Research Service, 2016; ARAUJO, *Labour Provisions in EU and US Mega-Regional Trade Agreements: Rhetoric and Reality*, in *ICLQ*, 2018, 67(1), pp. 233-253.

[69] OECD, *The future of investment treaties Background note on potential avenues for future policies*, 6th Annual Conference on Investment Treaties, 29 March 2021, p. 8, available at https://www.oecd.org/daf/inv/investment-policy/Note-on-possible-directions-for-the-future-of-investment-treaties.pdf.

[70] Argentina-Qatar BIT, cit. In the same vein, see art. 810 of the Canada-Peru Free Trade Agreement, 29 May 2008, in force 1 August 2009, available at https://www.international.gc.ca/-trade-commerce/trade-agreements-accords-commerciaux/agr-acc/peru-perou/fta-ale/08.aspx?lang=eng. In even more detailed worlds, see art. 9 of the Investment Cooperation and Facilitation Agreement Between the Federative Republic of Brazil and the Republic of Malawi, 25 June 2015, not yet in force, available at https://investmentpolicy.unctad.org/-international-investment-agreements/treaty-files/4715/download and art. 12, para. 2, of the Brazil-India Investment Cooperation and Facilitation Treaty, 25 January 2020, not yet in force, available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5912/-download.

Up (1998) (ILO Declaration): (a) freedom of association; (b) the effective recognition of the right to collective bargaining; (c) the elimination of all forms of compulsory or forced labour; (d) the effective abolition of child labour and, for purposes of this Agreement, a prohibition on the worst forms of child labour; and (e) the elimination of discrimination in respect of employment and occupation"[71].

The same trend holds true if one considers model agreements. With respect to corporate social responsibility, art. 7 of the Netherlands Model Investment Agreement is satisfied to reaffirm "the importance of each Contracting Party to encourage investors operating within its territory or subject to its jurisdiction to voluntarily incorporate into their internal policies those internationally recognised standards, guidelines and principles of corporate social responsibility"[72], whereas art. 18 of the Belgium-Luxemburg Economic Union (BLEU) Model BIT is drafted with hard law terminology where it states that "[i]nvestors [… shall…] act in accordance with internationally accepted standards applicable to foreign investors to which the Contracting Parties are a party".

Turning to labour standards, the same Model BIT, under art. 16, provides for that "The Contracting Parties, in accordance with their obligations under relevant ILO instruments, recognise that the violation of fundamental principles and rights at work cannot be used as an encouragement for the establishment, acquisition, expansion and retention in their territories, of an investment".

An explicit reference to the 1998 ILO Declaration appears in art. 13 of the US Model BIT which reads "1. The Parties reaffirm their respective

[71] In a similar vein, see art. 10 of the Agreement between the Slovak Republic and the Islamic Republic of Iran for the Promotion and Reciprocal Protection of Investments (Slovakia-Iran), 19 January 2016, in force 30 August 2017.

[72] Netherlands Model Investment Agreement, 22 March 2019, available at https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5832/download. In this vein, see also art. 22, para. 2, of the African Union Commission Economic Affairs Department, Draft Pan-African Investment Code, December 2016, Chapter 4, available at https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf; art. 16 of the Canada 2014 Model FIPA, available at https://www.italaw.com/si-tes/default/files/-files/italaw8236.pdf; art. 15, para. 1, of the Southern African Development Community, Model BIT Template, July 2012, available at https://www.iisd.org/itn/wp-content/-uploads/2012/10/sadcmodel-bit-template-final.pdf.

obligations as members of the International Labour Organization (ILO) and their commitments under the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up. 2. The Parties recognise that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic labour laws".

As regards the European region, there is a settled practice relevant to both aspects. Indeed, it is worth underlining that in its implementing decisions on authorisations granted to EU Member States, the EU Commission strictly defines the boundaries of their power to negotiate BITs. Interestingly enough, the Commission systematically requests them to include clauses reflecting the following standards: "(h) prohibition of investment enhancement by lowering or relaxing domestic environmental or labour legislation and standards, or by failing to effectively enforce such legislation and standards; (i) reference to human rights and sustainable development and promotion of internationally recognised standards of corporate social responsibility, such as OECD Guidelines for Multinational Enterprises and the UN Guiding Principles on Business and Human Rights"[73].

To conclude this Section, the 2016 Morocco-Nigeria BIT should be mentioned[74], which, although not yet in force, represents one of the most advanced examples of IIA. Its art. 24, entitled "Corporate Social Responsibility", is drafted in a weak form and it only provides that "[i]nvestors *should* apply the ILO Tripartite Declaration on Multinational Investments and Social Policy as well as specific or sectorial standards of responsible practice where these exist" (emphasis added). However, art. 18, para. 3, expressly provides that "investors […] *shall act* in accordance with core labour standards as required by the ILO Declaration on Fundamental Principles and Rights of Work, 1998" (emphasis added). It is worth highlighting that this obligation deals with investment post-establishment phase.

[73] See, *e.g.*, art. 2 of the Commission implementing decision authorising Hungary to open formal negotiations to amend a bilateral investment agreement with the State of Kuwait, Brussels 12.3.2020, C(2020) 1506 final; art. 2 of the Commission implementing decision authorising the Kingdom of Spain to open formal negotiations to conclude a bilateral investment agreement with the Republic of Cote d'Ivoire, Brussels, 29.5.2020, C(2020) 3400 final.

[74] See Reciprocal Investment Promotion and Protection Agreement Between the Government of the Kingdom of Morocco and the Government of the Federal Republic of Nigeria, cit.

## 7. *Final Remarks*

By way of conclusion, it is possible to affirm that the analysis carried out so far shows that international investment law is at a turning point in its story. The promotion of MNEs' compliance with labour standards no longer seems to be exclusively left to soft law instruments, whose application is essentially voluntary. Indeed, policy-making as well as judicial and scholarly efforts contributed to the establishment of the institutions examined above. Even if with different nuances, nowadays the latter represent structural features of both international investment law and arbitration.

In this context, therefore, they may play a valuable role in progressively raising the level of labour protection worldwide to make globalization a 'globalization of rights'. Indeed, MNEs know that if they do not comply with labour laws and standards, they face one of the following situations, satisfied certain conditions. In the first place, they may risk being accorded no compensation (or a significantly reduced amount) when their investments would be adversely affected by a measure that the host State has introduced to safeguard labour protection in a proportionate, reasonable, and non-discriminatory manner. In addition, they may be found liable for damages by consequence of a counterclaim filed by the host State. In this respect, however, it should be acknowledged that while this scenario recently materialised for environmental law claims, *e.g.*, in the *Burlington v. Ecuador* award (2017)[75], it seems to be rather theoretical for labour law issues, at least at the present moment.

From this, follow at least three consequences. First, those institutions may promote compliance with labour standards in countries where labour protection (if any) is settled at a deficient level. Second, they make it possible to raise labour law issues in international investment proceedings and, in so doing, they mitigate the 'regulatory chill' which prevents countries desiring to increase their own level of protection of labour rights from doing so. Third, they prevent social dumping in countries traditionally more sensitive to labour rights, as long as they provide means to resist both unfair competition and market blackmail.

At the same time, whereas legal imagination is at work and may more

[75] *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Ecuador's Counterclaims, 7 February 2017, pp. 468-469, para. 1099.

easily run, there is no room here for false expectations. From a strictly realistic perspective, it must be stressed that a long road lies ahead. This inquiry was in essence aimed at presenting the few key features available for the purpose. Then, the challenge to shape the future of the global market is open. It is not (only) for legal scholars to manage this trajectory. As a way of paradox, a further step in this direction could hopefully be marked by the COVID-19 pandemic.

**Abstract**

This inquiry aims at providing a comprehensive assessment of the effectiveness of the labour protection granted by both international investment law and arbitration. More in detail, it starts by retracing the long process which, progressively overcoming the traditional fragmentation of the international legal system, led to the development of legal solutions aimed at satisfying the claim for harmonisation between investment concerns, on the one hand, and labour protection, on the other. Against this backdrop, the analysis addresses institutions such as corporate social responsibility, the 'right to regulate' doctrine and the principle of proportionality, as well as – at the procedural level – the counterclaim. It concludes trying to outline a trend for the current evolution of conventional investment law practice.

**Keywords**

Multinational enterprises, labour standards, international investment law and arbitration, corporate social responsibility, 'right to regulate' doctrine, proportionality, counterclaim.

**Sofia Gualandi**

# Addressing MNEs' violations of workers' rights through Human Rights Due Diligence. The proposal for an EU Directive on Sustainable Corporate Governance

Summary: **1.** Introduction. **2.** Sustainable corporate governance: EU political and regulatory context. **3.** Interests at stake: the EU lobbying battle. **3.1.** NGOs. **3.2.** Trade Unions. **3.3.** Joint initiatives. **3.4.** Business. **3.5.** European Parliament Working Group. **4.** An analysis of the European Parliament's proposal in the light of the stakeholders' influence. **5.** Conclusions.

## 1. *Introduction*

As a consequence of globalisation, multinational enterprises (MNEs) have achieved unprecedented economic as well as political supremacy and influence across the world[1]. However, parent companies can escape responsibility for fundamental labour and social rights violations perpetrated by their local subsidiaries, subcontractors, and suppliers throughout their global supply chains[2].

From a legal perspective, the difficulties of holding parent companies accountable derive from two sets of legal boundaries. First, the "shield" of

[1] STRANGE, *The Retreat of the State. The Diffusion of Power in the World Economy*, Cambridge University Press, 1996, p. 218; CHAVAGNEUX, LOUIS, *Le pouvoir des multinationales*, Puf, 2018, pp. 9-19, pp. 79-93.

[2] WEIL, *The Fissured Workplace. Why Work Became So Bad for So Many and What Can Be Done to Improve It*, Harvard: HUP, 2014; GOLDIN, *Enterprise Transformations, Externalization Processes and Productive Decentralization*, in PERULLI, TREU (eds.), *Enterprise and Social Rights*, Kluwer Law International, 2017, pp. 75-91; PESKINE, *De la solidarité à la vigilance. À propos de la responsabilité dans les organisations pluri-sociétaires*, in SUPIOT (ed.), *Face à l'irresponsabilité: la dynamique de la solidarité*, Paris: Collège de France, 2018, pp. 37-51.

limited liability, which allows the parent company to externalize labour rights costs and risks of litigations to its subsidiaries, subcontractors, and suppliers, while avoiding liability for the damages suffered by workers down the supply chain[3]. Second, the transnationality of supply chains allows MNEs to take advantage of private international law (PIL) issues linked to jurisdiction and applicable law[4]. Indeed, EU PIL does not contain general procedures for suing non-EU companies in Member States' courts[5] and it does not allow victims to call for the application Member States' substantive legislation as, in tort claims, the applicable law is the law of the place where the damage occurs (*lex loci damni*-rule), which often points to the law of a third State[6].

In light of the failure of corporate social responsibility policies[7], policymakers have recently turned their attention to a new regulatory solution: the corporate Human Rights Due Diligence (HRDD). HRDD is a risk management approach imposing on parent companies an ongoing duty to monitor the respect of human rights along their supply chains as well as to prevent, mitigate and account for how they address their adverse human rights impacts[8].

Launched by the 2011 UN Guiding Principles on Business and Human Rights[9] (UNGPs), HRDD experienced a broad support from international

[3] Skinner, *Rethinking Limited Liability of Parent Corporations for Foreign Subsidiaries' Violations of International Human Rights Law*, in *Wash. & Lee L. Rev.*, 2015, Vol. 72, No. 1769.

[4] Van Hoek, Aukje, *Transnational Corporate Social Responsibility: Some Issues with Regard to the Liability of European Corporations for Labour Law Infringements in the Countries of Establishment of Their Suppliers*, 2008, available online.

[5] Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I-recast), Article 4.

[6] Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), Article 4.

[7] Daugareilh, *La responsabilité sociale des entreprises en quête d'opposabilité*, in Supiot, Delmas-Marty (eds.), *Prendre la responsabilité au sérieux*, Paris: PUF, 2015, pp. 183-199.

[8] Bonnitcha, McCorquodale, *The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights*, in *EJIL*, 2017, Vol. 28, No. 3, pp. 899-919; Ruggie, Sherman III, *The Concept of 'Due Diligence' in the UN Guiding Principles on Business and Human Rights: A Reply to Jonathan Bonnitcha and Robert McCorquodale*, in *EJIL*, 2017, Vol. 28, No. 3, pp. 921-928.

[9] Human Rights Council, *Guiding Principles on Business and Human Rights: Implementing the UN "Protect, Respect and Remedy" Framework*, 2011, Principle 17.

organisations, such as the ILO[10], the Council of Europe[11] and the OECD[12], while a Working Group (OEIGWG) was established[13] at the UNHRC in Geneva with the mandate to draft and negotiate a legally binding instrument to regulate, in international human rights law, the activities of MNEs and other business enterprises (so-called "Binding Treaty on Business & Human Rights"). Indeed, HRDD is at the heart of its third Revised Draft[14], which was released in 2021.

At national level, several legislative and political developments are a testament to this process of mainstreaming, such as the 2017 French Duty of Vigilance Law[15], the 2019 Dutch Child Labour Due Diligence Law[16] and the 2021 Dutch bill on Responsible and Sustainable International Business Conduct[17], as well as the 2021 German Supply Chain Due Diligence Law[18]. As developments taking place in "larger" EU Member States tend to influence the debates and initiatives at the EU level, it is not a surprise that this growing consensus eventually reached EU legislators. Indeed, the recent

[10] ILO, *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, 2017.

[11] Committee of Ministers, *Recommendation on Human Rights and Business*, 2016, CM/Rec(2016)3.

[12] OECD, *OECD Due Diligence Guidance for Responsible Business Conduct*, 2018.

[13] Human Rights Council, *Elaboration of an international legally binding instrument on transnational corporations and other business enterprises with respect to human rights*, 2014, Resolution 26/9, A/HRC/RES/26/9.

[14] OEIGWG chairmanship, *Third Revised Draft - Legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises*, 17 August 2021.

[15] LOI n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, JORF n° 0074 du 28 mars 2017 texte n° 1. For an analysis of the law see, *inter alia*, the contributions in: dossier *Droit social n° 10/2017: le devoir de vigilance*, Dalloz, 16 octobre 2017; dossier spécial *Le Big Bang des devoirs de vigilance ESG: les nouveaux enjeux de RSE et de droits de l'homme*, in *RLDDA*, 2015, n° 104. See also Danis-Fatôme, Viney, *La responsabilité civile dans la loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre*, in *RD*, Dalloz, 2017; Sachs, *La loi sur le devoir de vigilance des sociétés mères et sociétés donneuses d'ordre: les ingrédients d'une corégulation*, in *RDT*, 2017.

[16] Wet van 24 oktober 2019 houdende de invoering van een zorgplicht ter voorkoming van de levering van goederen en diensten die met behulp van kinderarbeid tot stand zijn gekomen, Staatsblad 2019, 401.

[17] Https://bit.ly/3yAT4il; https://bit.ly/3hThugY.

[18] Https://bit.ly/2U4WJpp ; https://bit.ly/2VF9kzL; for a first analysis of the law, see the Löning briefing and the Initiative Lieferkettengesetz briefing.

European Commission's initiative for a Directive on sustainable corporate governance[19] perfectly embodies this trend.

This paper presents the European political and regulatory context (2), as well as the role of the actors in work and employment relations in the negotiation of this legislative initiative (3), while reviewing the content of the European Parliament's draft Directive in the light of the stakeholders' positions (4). In conclusion, (provisional) "winners" and "losers" of the lobbying battle are identified and the respective influences and points of compromise are assessed, while discussing the litmus tests for the ambition of the upcoming European Commission's proposal to grant effective remedies to victims of fundamental social rights violations (5).

## 2. *Sustainable corporate governance: EU political and regulatory context*

The European Commission's legislative initiative was announced in July 2020, after Commissioner Reynders expressed his commitment[20] during a high-level webinar hosted by the European Parliament's Responsible Business Conduct Working Group[21]. Later in October 2020, the Commission released its 2021 work programme[22] that includes a legislative proposal for a Directive on sustainable corporate governance to be published in the second quarter of 2021.

The Commission declared its proposal will be based on two DG JUST external studies, namely the BIICL study on due diligence requirements through the supply chain[23] and the EY study on directors' duties and sustainable corporate governance[24]. The stated goal of the Commission's initiative is to improve the EU company law and corporate governance regulatory framework, better aligning the interests of companies, shareholders, managers, stakeholders, and society as well as supporting

[19] Https://bit.ly/30OFsLM.

[20] Speech by Commissioner Reynders on 29th April 2020 in the webinar on due diligence hosted by the RBC Working Group.

[21] https://bit.ly/3fhyFr1.

[22] Communication from the Commission, Commission Work Programme 2021, 19 October 2020.

[23] SMIT *ET AL.*, *Study on due diligence requirements through the supply chain*, 2020, London: British Institute of International and Comparative Law.

[24] ERNST & YOUNG, *Study on directors' duties and sustainable corporate governance*, 2020.

companies to better manage sustainability-related matters in their own operations and value chains as regards social and human rights, climate change and the environment. The EY study supports the Commission in this sense, assessing the causes and identifying possible EU-level solutions to the "short termism" of corporate decision-makers, who are mainly oriented at shareholder value maximisation rather than at the long-term economic, social, and environmental sustainability of the European businesses. However, what is more interesting for the purposes of this article is the BIICL study. It examines four options[25] for EU regulatory proposals through desk research, country analyses, interviews, and surveys with relevant stakeholders[26], in order to make recommendations to EU legislators. Near 70% of respondents consider mandatory HRDD requirements coupled with civil remedy, and coupled with criminal liability and/or fines, as the most effective regulatory option[27]. While it is not astonishing that civil society is united in this call, it is interesting to see a majority of company respondents recognising the value of enforceable EU rules, with 86% of them agreeing on their positive social impacts[28] and 68% on their positive human rights[29]. The preferences of business organisations are, however, in reverse order[30].

As for the progress of the initiative, the Commission's 2020 Inception Impact Assessment[31] showed that the issues to be regulated include a corporate duty of HRDD in companies' operations and value chains. The summary report[32] of the public consultations (26 October 2020 - 08

[25] No change (Option 1), new voluntary guidelines (Option 2), new reporting requirements (Option 3) and mandatory due diligence as a legal standard of care (Option 4). Option 4 includes sub-options limited to sector and company size, and enforcement through state-based oversight or judicial/non-judicial remedies.

[26] SMIT *ET AL.*, *op. cit.*, Executive Summary, p. 16. Survey responses were representative of all sectors, company sizes and Member States and included 334 business survey respondents (from individual companies) as well as 297 stakeholders (including business associations and industry organisations, civil society, worker representations or trade unions, legal practitioners, and government bodies).

[27] SMIT *ET AL.*, *op. cit.*, Survey results statistics, Q15, p. 22.

[28] *Idem*, Q38, pp. 59-60.

[29] *Idem*, Q49, pp. 81-82.

[30] SMIT *ET AL.*, *op. cit.*, Final Report, p. 137.

[31] European Commission, Directorate-General Justice and Consumers, *Sustainable corporate governance initiative. Inception Impact Assessment*, 30/07/2020.

[32] European Commission, Directorate-General Justice and Consumers, *Sustainable corporate governance initiative. Summary report – public consultation*, June 2021.

February 2021), released in June 2021, obtained 473.461 public responses most of which have been submitted through campaigns (see Section 3 – Joint initiatives). As regards the need for developing an EU legal framework for HRDD, most of the respondents expressed support for action (81.8%)[33] with a strong preference for a horizontal approach over a sector specific or thematic approach (92,4%) and for the extension of the new obligations to third-country companies carrying out activities in the EU (97%). As for the enforcement mechanism, overall respondents answering indicated a preference for supervision by national authorities with a coordination at EU level (70.6%)[34] followed by judicial enforcement with liability (49.4%)[35]. On the contrary, the issue of stakeholders' engagement has been more divisive[36]. The outcome of the public consultations will serve as a basis for the Impact Assessment examining the economic, environmental, and social costs and benefits of the future initiative, which is still underway. According to what Commissioner Reynders had repeatedly stated, the proposal for a Directive should have been published in the second quarter 2021, but the press[37] has recently reported that DG JUST postponed its launch at least after summer which was still missing in early 2022. In the meantime, the Commission together with the European External Action Service presented a non-binding document[38] to provide EU companies with practical guidance to implement HRDD practices to address the risk of forced labour in their supply chains, which refers as well to the legislative proposal under preparation.

As for the position of the European co-legislators, the Conclusions[39] released by the Council of the EU in December 2020 supported the initiative,

[33] NGOs supported the need for action with 95.9% (185 respondents), companies with 68.4% (121 respondents) and business associations with 59.6 % (93 respondents).

[34] In favour: 86% of NGOs and 58,7% of companies and business association.

[35] In favour: 84,9% of NGOs but (not surprisingly) only 14,2% of companies and business association.

[36] 93.1% of NGOs respondents were supportive while 68% of companies and business associations disagreed.

[37] https://politi.co/3bVhqtz.

[38] European Commission, European External Action Service, *Guidance On Due Diligence for EU Businesses to Address the Risk of Forced Labour in Their Operations and Supply Chains*, 12.07.2021.

[39] Council of the European Union, *Council Conclusions on Human Rights and Decent Work in Global Supply Chains*, 13512/20, 1st December 2020.

calling for a proposal for an EU legal framework on sustainable corporate governance, including HRDD obligations along global supply chains. On its part the European Parliament, after several reports and resolutions related to responsible business conduct[40], strongly encouraged the Commission to act, by adopting a legislative own-initiative report on corporate due diligence and corporate accountability[41] (see Section 4), in addition to an own-initiative procedure on sustainable corporate governance[42]. These positions are corroborated by an exploratory opinion[43] of the European Economic and Social Committee (EESC) stating that it is time for the Commission to propose a legislation on mandatory HRDD coupled with a liability regime and a revision of the EU PIL resulting in effective remedies for victims of business misconduct and their representatives.

It should be noted that this initiative forms part of a broader reform momentum in favour of the strengthening of duties and responsibilities of MNEs within the EU, including the entry into force of the EU Conflict Minerals Regulation[44] and the Commission's proposal for an EU Corporate Sustainability Reporting Directive[45] (*i.e.*, the Non-Financial Reporting Directive[46] reform), as well as two other HRDD-oriented initiatives, namely the Commission's proposal for a Regulation to modernise EU legislation on sustainable batteries[47] and the Parliament's legislative own-initiative report with recommendations for a legal framework to halt and reverse EU-driven global deforestation[48].

[40] Https://bit.ly/30QvauA.

[41] European Parliament resolution of 10 March 2021 with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)).

[42] European Parliament resolution of 17 December 2020 on sustainable corporate governance 2020/2137(INI).

[43] European Economic and Social Committee, *Exploratory Opinion on Mandatory due diligence*, INT/911-EESC-2020, 18 September 2020.

[44] Regulation (EU) 2017/821 of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas.

[45] Proposal for a Directive amending Directive 2013/34/EU, Directive 2004/109/EC, Directive 2006/43/EC and Regulation (EU) No. 537/2014, as regards corporate sustainability reporting.

[46] Directive 2014/95/EU of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups.

[47] Proposal for a Regulation of 10 December 2020 concerning batteries and waste batteries, repealing Directive 2006/66/EC and amending Regulation (EU) No. 2019/1020.

[48] European Parliament resolution of 22 October 2020 with recommendations to the

## 3. *Interests at stake: the EU lobbying battle*

### *3.1. NGOs*

Civil society organisations (CSOs) have expressed strong support for a mandatory legislation on HRDD for EU companies. Over 100 NGOs called[49] on the EU to adopt such an act, while NGOs more involved in the lobbying battle released a joint statement[50] in September 2020, setting their key demands for an HRDD mandatory legislation able to promote human rights in business activities. The principal elements of this paper include a business obligation to respect human rights and the environment as well as an obligation to conduct HRDD in their own operations, in their global value chains and within their business relationships. A business "liability for harm", as well as a "liability for failure to carry out due diligence" regime should be put in place in case of own causation, own contribution, or control of the responsible entity, while stricter and joint and several liability options could be considered in specific cases, and the burden of proof should stay with the company. Eventually, the paper calls for amending the EU Regulation Rome II, so that the provisions of this future Directive can apply in cases brought by foreign claimants by virtue of an overriding mandatory provision, regardless of the applicable law (*i.e.*, the law of the place where the harm occurred).

### *3.2. Trade Unions*

As for the trade union front, the European Trade Union Confederation (ETUC) has been calling for an EU Directive on mandatory HRDD and responsible business conduct since 2019[51]. According to the ETUC, Article

Commission on an EU legal framework to halt and reverse EU-driven global deforestation (2020/2006(INL)).

[49] Http://bit.ly/3usT0zk.

[50] Action Aid, Amnesty International, Anti-Slavery International, Clean Clothes Campaign, CIDSE, European Centre for Constitutional and Human Rights, European Coalition for Corporate Justice, FIDH, Friends of the Earth Europe, Global Witness, Oxfam, *An EU mandatory due diligence legislation to promote businesses' respect for human rights and the environment*, September 2020.

[51] ETUC Executive Committee, *ETUC Position for a European directive on mandatory Human Rights due diligence and responsible business conduct*, 17-18 December 2019.

153(1)(e) TFEU (information and consultation of workers) and Article 154 TFEU (structured consultation of management and labour) should be included among the legal bases of the initiative. Unions and workers' rights should be considered as main components of the material scope of the future legislation, which should as well empower trade unions and workers' representatives both trough the involvement in the negotiation and enforcement of the HRDD process and the access to justice representing victims. While ETUC did not propose a "liability for harm" regime at EU level, liability should be introduced for cases where companies fail to respect HRDD, without prejudice to other subcontracting and joint and several liability frameworks in force at national and EU level. Above all, companies should not be able to escape liability established in other legal instruments by arguing that they have carried out HRDD (exclusion of the "diligence defence"). In addition, the future HRDD initiative should not weaken other trade union efforts aiming at strengthening business liability in subcontracting chains and should be complemented by renewed initiatives in this area[52]. In terms of procedure, ETUC suggested amending EU Regulation Brussels I-recast to allow victims to submit claims in a Member State's jurisdiction against non-EU companies which conduct business activities or have otherwise a link with that Member State. Moreover, appropriate support schemes for victims should be implemented to facilitate their access to justice within the EU, and interim proceedings should be foreseen to allow the halting of operations violating their rights.

In this framework, ETUC continues its cooperation with the International Trade Union Confederation, which collaborated with Professor Olivier de Schutter to develop its recommendations[53] for effective mandatory HRDD laws. In its study[54], de Schutter warned that HRDD should not degrade into a formalistic exercise, leading companies to adopt a minimalistic approach simply to shield themselves from the risk of liability, buying legal immunity by ticking the boxes (the so-called "due diligence defence"

[52] ETUC suggests deleting the HRDD exception from the subcontracting (joint and several) liability regime in the Enforcement Directive on Posting Workers (Directive 2014/67/EU, Article 12.5).

[53] ITUC, *Towards mandatory due diligence in global supply chains*, June 2020.

[54] De Schutter, *TOWARDS MANDATORY DUE DILIGENCE IN GLOBAL SUPPLY CHAINS. Study prepared at the request of the International Trade Union Confederation*, 2020.

exercise). Therefore, the HRDD (*i.e.*, duty to prevent) and the civil liability for harms occurring in the supply chain (*i.e.*, duty to redress, when preventative measures have failed) should be treated as two separates, albeit complementary, duties.

### *3.3. Joint initiatives*

Nevertheless, the originality of this lobbying battle lies in the alliance between NGOs and trade unions. While a joint statement[55] calling for an EU HRDD legislation had already been signed by over 80 CSOs in October 2019, a few European NGOs and national and European trade unions joined forces early 2021 launching a campaign[56] that collected almost half a million signatures across the globe in support of their joint response[57] to the Commission's consultation on this file.

This exercise proves the growing consensus around the idea that the protection of labour and social rights is an integral part of the protection of human rights[58], and that these are to be considered as fundamental rights within the EU. Moreover, this coalition is a promising example of successful cooperation between human and labour rights organisations[59], that helped strengthening the efforts of both parties.

### *3.4. Business*

As for the business front, employers' associations are lobbying for a less ambitious legislation, if not clearly against it, although the BIICL study from February 2020 showed that a majority of business survey respondents believed there were benefits of EU HRDD legislation. Many of those affirmed that an EU action would ensure a better harmonisation and a level playing field by avoiding fragmentated national approaches harmful to the competitiveness of EU companies, while increasing leverage in their business relationships and the supply chains through a non-negotiable standard.

[55] *A call for EU human rights and environmental due diligence legislation*.

[56] #HoldBizAccountable.

[57] Https://bit.ly/34uCtz7.

[58] On the issue of whether labour and social rights are human rights, see MANTOUVALOU, *Are Labour Rights Human Rights?*, in *ELLJ*, 18 February 2012.

[59] KOLBEN, *Labor Rights as Human Rights?*, in *VJIL*, 2010, Vol. 50, p. 449 and p. 468 ff.

While several business lobbies made no pretence of their hostility towards the mandatory HRDD agenda, many companies presented themselves as supporters while silently trying to weaken and shape the proposal in their own interests[60]. For example, on 2 September 2020, 26 companies (Unilever, H&M, Aldi etc.) released a joint statement[61] calling for an EU-wide, cross-sectoral HRDD legislation. Almost one year before, world's major chocolate manufacturers (Mars, Mondelez, Barry Callebaut etc.) had already encouraged[62] the EU – the largest importer and consumer of cocoa – to adopt an HRDD legislation to promote sustainable cocoa production and support consumer trust.

On the contrary, national and European business associations are openly lobbying against the initiative. After the publication of its letters to Commissioner Reynders[63] and to the European Parliament Legal Affairs Committee[64], BusinessEurope – the biggest business lobby group representing enterprises of all sizes in the EU – has released its reply[65] to the Commission's public consultation on sustainable corporate governance and HRDD. Through these documents, BusinessEurope expressed its strong concerns about the file, trying to push the Commission to radically reconsider the initiative. Key concerns include the critical impact that such a legislation would have on EU business' supply chains' operations and relationships they are engaged in, as well as on their global competitiveness, because of the excessive administrative burden and the exposure to litigation risks. Nevertheless, the employees' association set a list of conditions for a "workable and balanced instrument", should the Commission decide to go ahead. First, any framework should be based on an obligation of means rather than obligation of results. As for the scope, BusinessEurope called for the limitation of the HRDD obligation to the companies' own operations and

[60] Friends of the Earth Europe, European Coalition for Corporate Justice, Corporate Europe Observatory, *Off The Hook? How business lobbies against liability for human rights and environmental abuses*, June 2021.

[61] Https://bit.ly/3fls5IZ.

[62] Https://bit.ly/3fm7ivK.

[63] BusinessEurope, *Due diligence and sustainable corporate governance - Letter from Markus J. Beyrer to Didier Reynders*, 13 October 2020.

[64] BusinessEurope, *Vote on draft report on corporate due diligence and corporate accountability - Letter from Markus J. Beyrer to the European Parliament Legal Affairs Committee*, 21 January 2021.

[65] BusinessEurope, *Sustainable corporate governance and due diligence - BusinessEurope reply to the European Commission public consultation*, 4 February 2021.

first-tier suppliers or subcontractor, excluding the rest of the supply chain. This obligation shall apply to European and third country's large companies only, fully exempting SMEs. Regarding accountability rules, it is not surprising to read BusinessEurope's rejection of any kind of vicarious liability to make parent companies responsible for right's violations committed by separate legal entities along their supply chains. Indeed, the employees' association strongly defended the function and purpose of the "limited liability company" as fundamental principle of national company law. Quite the opposite, BusinessEurope suggested developing the legal notion of "safe harbour"[66], meaning companies should not be held liable for human and labour right's impacts if they demonstrate that HRDD measures were taken (i.e., establishing a "due diligence defence"). Eventually, as for procedural rules, BusinessEurope declared that, by reversing the burden of proof and by reforming EU PIL (Brussels I-recast and Rome II Regulations), the EU would be opening the door of Member State courts to frivolous claims and abusive litigation.

At national level, French employers' associations AFEP[67] and MEDEF[68] are strongly supporting the lobbying efforts of their European representative[69], after having successfully watered down the bill of the French Duty of Vigilance Law before 2017. Recently, the most prominent Dutch industry lobby group VNO-NCW has joined efforts to weaken the future EU legislation[70].

### *3.5. European Parliament Working Group*

In order to organise a dialogue with these diverse stakeholders' groups, the European Parliament Working Group on Responsible Business Conduct[71] (RBC WG) was funded. The RBC WG is an informal cross-party and cross-committees group of Members of the European Parliament (MEPs) interested in promoting responsible business conduct and HRDD at EU level. The RBC WG brings expertise to the Parliament by fostering collaboration with experts

[66] Smit, Bright, *The concept of a "safe harbour" and mandatory human rights due diligence,* CEDIS Working Papers, 2020, VARIA, ISSN 2184-5549, N° 1.

[67] Association française des entreprises privées, *Position sur la Gouvernance Durable des Entreprises et le Devoir de Vigilance*, February 2021.

[68] Https://bit.ly/3wzj63O.

[69] FoEE, ECCJ, CEO, *op. cit.*, pp. 15-18.

[70] Van Teeffelen, *The lobby by VNO-NCW against legislation on corporate accountability*, May 2021.

[71] Https://bit.ly/3cbx8B1.

and stakeholders and it engages in regular discussions within the other EU institutions, CSOs, private sector and other stakeholders on issues related to HRDD. After having launched a Shadow EU Action Plan for implementing the UNGPs within the EU in 2019[72], the RBC WG took the lead of the lobbying efforts to push the Commission to advance a legislative initiative on this issue. MEP Lara Wolters (S&D, Netherlands), one of the most active members of the RBC WG, eventually obtained the role of rapporteur of the legislative initiative procedure on corporate due diligence and corporate accountability[73]. Together with other RBC WG colleagues appointed as shadow rapporteurs[74] in Legal Affairs Committee, MEP Wolters took up the demands of civil society and finally drew up an INL report with recommendations to the Commission which was endorsed by the Parliament Plenary in March 2021. Through the analysis of this report (Section 4) it will be possible to identify the (provisional) winners and losers of the ongoing lobbying battle

## 4. *An analysis of the European Parliament's proposal in the light of the stakholders' influence*

As for the legal bases for the proposal, provision 32 of the report requests the Commission to base its future initiative on the principle of freedom of establishment (Article 50 TFUE) as well as on the approximation of Member States' criminal laws (Article 83(2) TFUE) and the approximation of legislations which have as object the establishment and functioning of the internal market (Article 114 TFUE), in line with the request of business to strengthen the level playing field and the competitiveness of EU companies. No reference is made, however, to Article 153(1)(e) TFEU (information and consultation of workers) and Article 154 TFEU (structured consultation of management and labour), as ETUC had been invoked for a long time.

The Annex to the report puts in place a detailed HRDD strategy (Article 4, 6, 7, 8 and 9) which is defined as a preventative ongoing process

[72] European Parliament Working Group on Responsible Business Conduct, *Shadow EU Action Plan on the Implementation of the UN Guiding Principles on Business and Human Rights within the EU*, 19 March 2019.

[73] 2020/2129(INL).

[74] MEP AUBRY Manon (GUE/NGL, France), MEP DURAND Pascal (Renew, France), MEP HAUTALA Heidi (Greens/EFA, Finland).

and obligation of means (Recitals 20, 30 and 34), in line with BusinessEurope's strong warning to avoid any obligation of results.

As for its scope, the obligation shall apply to large EU undertakings and to publicly listed and high-risk EU SMEs, as well as to non-EU undertakings operating in the internal market (Article 2). This provision represents a compromise between the lobbying action of trade unions and NGOs and the one of the business side *i.e.*, between those who wanted all companies covered by the HRDD obligation and those who wanted to exempt all SMEs. The efforts of the right wing of the Parliament (ECR Group and ID Group) to exempt all SMEs from the obligation by means of numerous amendments in the plenary session were finally not successful. The HRDD exercise shall cover all undertakings' own activities as well as those of their value chains and business relationships (Article 1), meaning that the resulting obligation is very wide and in line with the request of the NGOs' and trade unions' calls, despite the BusinessEurope's request to limit its scope to the first-tier supplier or subcontractor. Regarding the normative scope of the obligation, the trade unions' invitation has been taken up as the definitions provision specifies that "adverse impact on human rights" include "social, worker and trade union rights" (Article 3(6)).

What is disappointing for the trade union side, however, is Article 5 on the role of stakeholder engagement, as the provision only provides for an obligation to discuss with relevant stakeholders leaving a lot of company discretion regarding their involvement in the establishment and implementation of the HRDD strategy, while remaining as well unclear on how information requests by workers' representatives will be enforced. On the other hand, both the provision protecting stakeholders participating in these discussions and the provision calling for full respect of collective bargaining rights are to be welcomed.

The report includes a section on public enforcement, according to which Member States shall designate independent administrative authorities for the supervision of the application of the future Directive (Article 12) coordinated by a new European Due Diligence Network (Article 16). Competent authorities shall have the power to carry out undertakings' investigations, to adopt interim measures or temporary suspensions of activities, as well as to impose a ban on the operating in the internal market for non-EU companies (Article 13). Although national authorities would need to be given the power to impose proportionate sanctions with deterrent effect (Article 18 includes

fines, the exclusion from public procurement, from state aid, and from public support schemes), no right of victims to make judicial complaints for HRDD failures (as in the case of the 2017 French Duty of Vigilance Law) or to obtain injunctive relief is provided in this framework.

Special attention shall be paid to Article 19 setting the legal framework for civil liability of companies, which represents the litmus test for the ambition of the proposal. According to Article 19(2), "Member States shall put in place a civil liability regime under which undertakings can (..) be held liable and provide remediation for any harm arising out of adverse impacts on human rights (..) that they, or undertakings under their control, have caused or contributed to by acts or omissions". Standard tort law causality criterion applies therefore, while the narrower scope of liability, which only refers to the "controlled" subsidiaries, suppliers, and subcontractors, as opposed to the broader HRDD obligation, which covers the entire value chain and business relationships, stands out. Moreover, an internal contradiction in the provision should be highlighted. On the one hand, Article 19(1) as well as Recitals 16 and 52, by transposing the commentary of Principle 17 of the UNGPs, states that undertaking respecting HRDD obligations shall *not be absolved of any liability* which it may incur pursuant to national law, in line with ETUC call. On the other hand, Article 19(3) clarifies that "Member States shall ensure that (..) undertakings that prove that *they took all due care* in line with this Directive to avoid the harm in question, or that the harm would have occurred even if all due care had been taken, *are not held liable* for that harm", introducing a due diligence defence escape clause in line with the request of BusinessEurope, while adding another layer of confusion with the different concept of "due care". In short, the weakness of the provision lies in the possibility of the companies conducting HRDD along their value chain to be exempted from civil liability, even if an infringement of human or labour rights has occurred, depriving victims of the right to compensation for damage.

Finally, the report contains promising but still insufficient developments in the area of facilitating access to justice for victims. The ambitious reforms of the Brussels I-recast and Rome II Regulations, which trade unions and NGOs have been campaining for on the basis of the recommendations contained in a 2019 Parliament's study[75] and originally proposed in the draft

[75] European Parliament, Policy Department, Directorate-General for External Policies, *Access to legal remedies for victims of corporate human rights abuses in third countries*, February 2019, pp. 110–115.

prepared by the JURI committee[76], were not incorporated in the report approved by the Plenary. This choice resulted from a compromise between S&D, The Left, Greens and Renew parliamentary groups after consultations with the Commission, which made it clear that reforms of PIL regulations were not realistically possible in the context of this proposal, that is to be limited to company law and corporate governance. Regarding issues linked to applicable law and victims' choice of law in EU courts, Article 20 makes it possible to overcome third-countries victims' interdiction to refer to substantive legislation of Member States because it defines the provisions of the future Directive as "overriding mandatory" irrespective of the law otherwise applicable[77] to the non-contractual obligation, in line with Article 16 of Rome II Regulation. This means that if the Member State in which the court sits imposes statutory duties on its corporations with regard to extraterritorial compliance with human and labour rights standards, such duties will override the otherwise third-country applicable law[78]. As for jurisdictional issues, while EU companies can always be sued in EU courts[79], the report does not extend this possibility neither to victims of non-EU companies operating in the internal market nor to victims of non-controlled non-EU subsidiaries and business partners of EU parent companies. While this extension would be complex, as it would oblige the European legislator to amend the Brussels I-recast Regulation, the lack of this reform makes the report's key provision on civil liability non-enforceable for a number of cases[80] of violations perpetrated in third countries. In short, these steps backwards on procedural rules are mainly in line with BusinessEurope's warning that EU would be opening the door to frivolous claims and abusive litigation.

[76] European Parliament's Committee on Legal Affairs, *Report with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL))*, 11 February 2021, pp. 43-46.

[77] *I.e.*, the general rule contained in Article 5 of the Rome II Regulation, according to which "the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs", which points to the (often less protective) law of a third State.

[78] Van Hoek, Aukje, *op. cit.*, p. 17.

[79] Brussels I-recast Regulation, Article 4: "persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State".

[80] For an in-depth analysis of a few cases with a focus on the legal, procedural and practical obstacles faced by claimants in accessing legal remedy, see the Parliament's Study *Access to legal remedies for victims of corporate human rights abuses in third countries*, cit., p. 18 ff; see also Skinner, McCorquodale, De Schutter, Lambe, *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business*, December 2013, p. 106 ff.

As for other relevant provision in this framework, Article 19(4) of the report recommends Member States to ensure "reasonable time limits" for bringing civil liability claims concerning harm covered by the Directive, while Recital 53 suggests the reversal of the burden of proof from the claimant (the victim) to the defendant (the company). Notwithstanding the weakness of this last provision, given the lack of legal value of the recitals, these rules would constitute an improvement compared to 2017 French Duty of Vigilance Law, and would be in line with NGOs' call as well as with recommendations contained in a 2020 FRA study[81] showing that provisions on the burden of proof and victims' access to evidence are a major obstacle for those who claim an infringement of their rights by businesses. However, the report does not offer effective solutions to practical obstacle such as massive legal costs and disparity of resources between claimants and defendants, and limited availability of collective redress or representative action allowing for legal standing of CSOs and trade unions on behalf of victims[82], to the detriment of their demands.

## 5. *Conclusions*

In the light of the analysis of the Parliament report in Section 4, it is now possible to draw out conclusions about which actors are the drivers of continuity and change in the field of business and human rights within the EU, as well as to provisionally take stock of who are "winners" and "losers" of this lobbying exercise. Even if the NGOs and trade unions' coalition, as a driver of change in the field of business accountability, has achieved significant progress, some compromise provisions of the report are disappointing, while the text lacks some key elements to ensure the protection of victims, especially in terms of procedural rules and civil liability. This is even more true now that the Commission has delayed[83] the publication of the Directive's proposal at least until the fall 2021, which provoked a prompt reaction from the presidents of the major political groups in the European Parliament[84]. While

[81] European Union Agency for Fundamental Rights, *Business And Human Rights – Access to Remedy*, 2020, pp. 6-8 and 59-63.

[82] *Idem*, pp. 8-9, pp. 12-13, pp. 64-67, pp. 73-77.

[83] June 2021 agenda for College of Commissioners' meeting did not listed the initiative for discussion.

[84] European Parliament Groups' Presidents' Letter To President Von Der Leyen On Sustainable Corporate Governance, 23 June 2021.

it seems that the reason for the delay lies in the fact that the Commission's internal Regulatory Scrutiny Board[85] in charge of quality control gave a negative opinion to the impact assessment of the future proposal, which obliges the Commission to review the file and to resubmit it to the Board before it can proceed, it is impossible not to recognise a big win of the corporate lobby, which has been trying to block and undermine the initiative for a long time. The question arises as to whether the proposal has been questioned as a whole, or whether its preparation simply requires more time and consultation than expected. Notwithstanding these political considerations, it is undeniable that the business lobby, as driver of continuity and the *status quo*, scored a major victory over several key contents of the Parliament report, such as the neglected negotiating and representing role of trade unions, the due diligence defence escape clause weakening the liability regime and the absence of suggestions for EU PIL reforms. Nevertheless, it should not be forgotten that the analysis presented in this paper focuses on a parliamentary report with no proper legislative value. The lobbying game is therefore still open, especially now that the Commission has postponed the publication of the actual legislative initiative. While the HRDD strategy and the prevention provisions of the future text are ground for compromise between the various factions and do not require further negotiation efforts, the NGOs-trade unions coalition will still have to focus on the access to justice and remedy elements of the initiative, asking for support from its national members and the scientific community committed to this cause.

Finally, it is crucial to identify the key elements expected in the future Commission's proposal in order for it to be effective. Indeed, there is still room for scientific research to support the European legislators in this context. First, a strict or vicarious liability regime of the parent company, without any due diligence defence replicating the shortcomings of the 2017 French Duty of Vigilance law, is needed. While part of the scientific community already supports this perspective[86], further research is essential to formulate the most

[85] Https://bit.ly/3yBd6JF.

[86] Skinner, *op. cit.*; Mares, *Legalizing human rights due diligence and the separation of entities principle*, in Deva, Bilchitz (eds.), *Building a Treaty on Business and Human Rights: Context and Contours*, CUP, 2017, pp. 266-296; Muchlinski, *Limited Liability and Multinational Enterprises: A Case for Reform?*, in *CJE*, 2010, 34(5), pp. 915-928; Daugareilh, *La ley francesa sobre el poder de vigilancia de las sociedades matrices y contratistas: entre renuncias y promesas*, in Sanguineti Raymond, Vivero Serrano (dir.), *Impacto laboral de las redes empresariales*, Comares, 2018, p. 357.

suitable liability scheme for the EU context. As part of this research, it could be interesting to explore the potential of joint and several liability regimes for the regulation of workers' rights in subcontracting chains already in place in some Member States, which proved to be useful tools for circumventing the corporate veil. Second, in order to further support victims from the practical point of view of access to justice, appropriate financial support schemes should be foreseen as well as the reversal of the burden of proof and the availability of collective redress and representative action allowing for legal standing of CSOs and trade unions. Regarding the latter, this would not be a novelty in EU law, as the Posting of Workers Enforcement Directive[87] already provides for the right of trade unions and other third parties which have a legitimate interest to engage, on behalf or in support of the workers or the employer and with their approval, in any judicial or administrative proceedings. Third, a lean and mean reform of the Brussels I-recast Regulation is needed to guarantee victims access to Member States courts even when harms have been perpetrated by non-EU formally autonomous business entities, thus reconstructing the power-profit-responsibility chain of parent companies that will no longer be able to hide behind the shield of limited liability. In addition, once access to the court has been obtained, victim seeking compensation should be able to choose to base his or her claim on the law of the Member State where the trial takes place. As suggested by paragraph 4.4 of the abovementioned EESC exploratory opinion, this would not be a novelty in EU PIL, as for example Article 7 of the Rome II Regulation already allows a victim's choice of laws in cases of environmental damage.

Without these elements, the future Directive risks to prove incapable of enhancing the protection of human, social and labour rights along value chains. Such a scenario will entail the end of the political momentum in favour of the accountability of MNCs, signalling the lack of political will from the EU institutions in playing a leading role in the area of corporate responsibility.

[87] Directive 2014/67/EU of 15 May 2014 on the enforcement of Directive 96/71/EC concerning the posting of workers in the framework of the provision of services and amending Regulation (EU) No. 1024/2012 on administrative cooperation through the Internal Market Information System, Article 11(3).

**Abstract**

This paper presents the current political and regulatory efforts at EU level around the issue of regulating multinational enterprises' subcontracting and supply chains with regard to the violation of human rights, workers' rights and the environment. The spreading of the legal concept of Human Rights Due Diligence has reached the European Commission, which made it the basis of its legislative initiative on sustainable corporate governance. Pending the publication of the official Commission proposal for a directive, the content of the European Parliament's report supporting the initiative is reviewed in the light of the stakeholders' positions, with a focus on the role of the actors in work and employment relations in the current negotiations. The paper concludes with a provisional assessment of the "winners" and "losers" of this lobbying battle regarding the key legal issues of the debate to grant effective remedies to victims of fundamental labour and social rights violations.

**Keywords**

Human rights due diligence, liability, EU private international law, European Parliament, stakeholders.

**Carla Spinelli**

# Regulating Corporate Due Diligence: from Transnational Social Dialogue to EU Binding Rules (and Back?)

Summary: **1.** Global Trade and Working Conditions: Comprehensive Tools for Global Governance. **2.** Transnational Social Dialogue. **3.** Global Framework Agreements. **4.** Supporting Transnational Social Dialogue. **5.** The Due Diligence Regimes. **5.1.** Definition. **5.2.** Models. **6.** Claims under the French Duty of Vigilance Law. **6.1.** The Total Case. **6.2.** The Teleperformance Case. **7.** Proposal for EU Binding Regulation on Due Diligence. **8.** Concluding Remarks.

## 1. *Global Trade and Working Conditions: Comprehensive Tools for Global Governance*

To guarantee a basic core of fair working conditions in global value chains led by multinational enterprises (MNEs), an increasingly important number of instruments, of both public and private origin, has been implemented.

First of all, the "quasi" legal international Corporate Social Responsibility (CSR) norms[1] should be mentioned, which include UN Guiding Principles on Business and Human Resources of 2011; the OECD Guidelines for MNEs of 2011; and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy of 2017 (last update).

As far as private regulation is concerned, either unilateral sources of CSR, such as codes of conduct and auditing scheme, or negotiated instruments, like Global Framework Agreements (GFAs) and social clauses in bilateral and multilateral Free Trade Agreements, have been developed.

[1] Ter Haar, *Corporate social responsibility in times of the COVID-19 pandemic*, in *Z Problematyki Prawa Pracy i Polityki Socjalnej*, T. 2(19). Katowice, 2021, (2), 1 ff.

As is well known, attempts to address labour rights violations and improve working conditions made by MNEs in their global supply chains through private regulation have not resulted in sustainable improvements in working conditions or advancements in workers' rights.

One of the reasons which can explain this lack of progress is the *opaque* nature of private regulation. In a recent study, the main weaknesses of private regulation have been identified in terms of: *behavioural invisibility*, which refers to the difficulty in observing and measuring the behaviour of actors since suppliers have a low incentive to disguise their non-compliance "pretend[ing] to be substantively compliant"; *practice multiplicity*, which signifies the diversity of practices adopted by actors across different geographic, institutional, economic and cultural contexts, which makes it difficult to identify and engage in compliant behaviour; and *causal complexity*, involving the difficulty in understanding what drives compliant behaviour and inhibits lead firms' ability to implement effective practices[2].

This essay aims to analyse the role of Transnational Social Dialogue and GFAs in enhancing working conditions in Global Supply Chains from the perspective of what synergies can be established among them and the other instruments of global governance of MNEs[3]. More precisely, it is worth considering in this respect the impact of the forthcoming EU legislative initiative on mandatory due diligence.

## 2. *Transnational Social Dialogue*

Developing an enhancing social dialogue at transnational level is highly recommended by the ILO, even more so since the Covid-19 pandemic has exposed the fragility of global supply chains and dramatically worsened the living conditions of miners, farmers, workers in the garment industry and

[2] Lowell Jackson, Burger, Judd, *Mapping Social Dialogue in Apparel,* Cornell University School of Industrial and Labor Relations & The Strategic Partnership for Garment Supply Chain Transformation, January 2021, pp. 3-4.

[3] On this topic in the most recent Italian debate see, at least: Brino, *Diritto del lavoro e catene globali del valore*, Giappichelli, 2020; Guarriello, Nogler, *Violazioni extraterritoriali dei diritti umani sul lavoro: un itinerario di ricerca tra rimedi nazionali e contrattazione collettiva transnazionale*, in *DLRI*, 2020, 2, p. 173 ff.; Borelli, Izzi, Speziale, *Quali responsabilità per l'impresa sostenibile?*, in *RGL*, 2021, I, p. 489 ff.

many others around the world. The ILO strategy for sustainable and equitable recovery is based on four pillars, which include social dialogue, since this consensus building mechanism of participation supports a human-centred response to the crisis[4].

However, there are major barriers that can prevent or hinder an impactful social dialogue, starting from diverse legal frameworks and several degrees of coordination among suppliers, unions, governments and other actors, shifting to industrial relations systems characterised by different structures of work organization not less than the peculiar habits of social dialogue and democratic interaction.

Therefore, the real added value of transnational collective bargaining can be found in the ability of union networks, under the aegis of Global Union Federations, to link the different levels of workers' representatives inside global companies. In particular, the involvement of local actors appears to be of fundamental relevance for the implementation of GFAs, in order to let them cover all workers along the supply chain.

## 3. *Global Framework Agreements*

GFAs represent the development of forms of bargaining coordination across national borders as a consequence of the social partners' role in redirecting the proliferating private corporate codes of conduct away from unilateral and discretionary forms of CSR towards global social dialogue and industrial relations.

Transnational collective agreements are based on voluntary and autonomous negotiation among social partners, as a legitimate exercise of the freedom of association and the right to collective bargaining enshrined in the ILO Conventions (n. 98/1949; n. 154/1981) and the EU Charter of Fundamental Rights (art. 28)[5].

The widespread use of these agreements relies on the existence of convenient reasons for the signatory parties to engage in negotiation. On

[4] ILO, *The role of social dialogue in formulating social protection responses to the COVID-19 crisis*, Social Protection Spotlights, 6 October 2020.

[5] According to their scope of application, Global Framework Agreements are usually classified as International Framework Agreements (IFAs) and European Framework Agreements (EFAs).

the MNEs' side, a major concern in this respect is linked to the willingness to gain social reputation by investing in trustworthy economic relations, or is a consequence of any kind of institutional pressure or legal obligation[6]. For trade unions, the conclusion of GFAs is intrinsically linked to forging solidarity links and facilitating unionization as well as linkages between trade union networks.

Most GFAs signed between an MNE and a global union, applicable in the global value chain, make reference to the ILO instruments – mainly those concerning fundamental principles and rights at work, such as Freedom of association/collective bargaining, non-discrimination, child labour, and forced labour. Less frequently they go beyond the core labour standard, dealing with wages and working time; health and safety; training, and restructuring.

Since the beginning of this century, a constant growth in the number of GFAs can be appreciated, but what is more, there is a qualitative evolution of the topics dealt with. According to a content analysis of 54 GFAs signed between 2009 and 2015, in comparison to prior agreements two trends are visible: an increasing number of GFAs – about 80 per cent – include a reference to the global supply chain, and an increasing number of MNEs – about 30 per cent – treat the respect of provisions in GFAs as a criterion for establishing and continuing business relations with suppliers and subcontractors. What these two trends suggest is a growing need for more effective social regulation in global supply chains, with respect to which GFAs and sound labour relations might represent an added value[7].

Some examples of best practice worth are mentioning. The *Inditex-IndustriALL* agreement makes reference to the entire supply chain when establishing the MNE's commitment to the enforcement of the International Labour Standard. All workers are concerned, "whether they are directly employed by Inditex or by its external manufactures or/and suppliers". The *ENI-IndustriALL* agreement foresees the potential termination of the contractual relationship with the company concerned in case of "any serious violations, also concerning health and safety of

[6] Giaconi, Giasanti, Varva, *The Value of "Social" Reputation: The Protection of MNE Workers from the Consumer's Perspective*, in *GJ*, 2021, available online: https://www.degruyter.com/document/doi/10.1515/gj-2020-0076/html.

[7] Hadwiger, *Global Framework Agreements. Achieving Decent Work in Global Supply Chains*, Geneva: ILO, 2016.

employees, regulations on protection of the environment or human rights, which are not eliminated". The *LUKOIL-IndustriALL* agreement provides for continuous consultation meetings, which may address the following topics: "LUKOIL's general corporate health, safety and environment policy that covers personnel of LUKOIL Group organizations and, where appropriate, personnel of organizations related to LUKOIL, including suppliers and subcontractors".

The main limit of GFAs concerns the nature of the commitments made and their scope. Such agreements ordinarily generate fiduciary obligations, which create a legitimate expectation of their application, without giving them the characteristic of enforcement. The efficacy of the clauses for each company of the group (and, therefore, in labour relations) is left mainly to the next stage of collective bargaining at national level or, from the employers' side, to the directives coming from the parent company to the subsidiaries.

Bargaining at trans-national level is a dynamic process, depending very much on the initiative of the actors. Thus, a fundamental role is played by the attitude of the home country towards industrial relations.

The involvement of Global/European Trade Union Federations is pursued as an essential guarantee of the implementation of the trans-national collective agreements by the subsidiaries because they can obtain a formal negotiating mandate from their national partners. Nevertheless, workers' representatives such as Global Work Councils or European Work Councils, being involved in discussing, challenging and influencing companies' strategies, can play a key role, especially in preparing and facilitating the negotiation.

National trade unions are only sometimes signatory parties; more often they benefit from TCAs as a means of spreading the positive gains achieved, especially in those countries where they are weaker.

Creating a synergy among all these actors is not an easy goal, even if building a solidarity strategy beyond borders appears to be helpful in protecting labour rights. Moreover, implementing TCAs could prevent social dumping inside the company group and along the supply chain.

### 4. *Supporting Transnational Social Dialogue*

Notwithstanding the limits described above, Global Framework Agreements are considered by the OECD and the ILO to be particularly suitable tools for strengthening the CSR processes in supply chains, creating a bond of trust between the various stakeholders.

This was the case, for example, in the clothing sector with the Agreement on Fire and Building Safety in Bangladesh in 2013 following the Rana Plaza tragedy, with the Honduras Labour Framework and with the Indonesia Freedom of Association Protocol, as well as with the IFAs signed by multinational companies Inditex and H&M with the international federation IndustriAll[8].

The ILO has confirmed the key role of social dialogue in formulating social protection responses to the Covid-19 crisis, joining the call for action made by International Organisation of Employers (IOE), International Trade Union Confederation (ITUC) and IndustriAll with the aim of supporting business continuity as well as the livelihoods of workers in the garment industry during this disruptive period[9].

On the contrary, the external support for Transnational Collective Bargaining by the European Union has seen a progressive decline. At the very beginning of its development, the increasingly central role of private actors as rule-makers in a multi-level system of governance was not hindered but actually endorsed by the European institutions[10].

According to the European Commission: "providing an optional framework for transnational collective bargaining at either enterprise level or sectoral level could support companies and sectors to handle challenges dealing with issues such as work organization, employment, working conditions, training. It will give the social partners a basis for increasing

[8] Guarriello, *Learning by doing: negotiating (without rules) in the global dimension*, in Guarriello, Stanzani (eds.), *Trade union and collective bargaining in multinationals*, Franco Angeli, 2018.

[9] In October 2021, the *Code of practice on health and safety in textiles, clothing, leather and footwear* was adopted to provide comprehensive and practical advice on how to eliminate, reduce and control all major hazards and risks. It is a milestone in these industries, which have been hit hard by the Covid-19 crisis.

[10] GFA *database* of EU Commission http://ec.europa.eu/social/main.jsp?catId=978 updated May 2019.

their capacity to act at transnational level. It will provide an innovative tool to adapt to changing circumstances, and provide cost-effective transnational responses"[11].

However, initiatives undertaken by the European Commission towards the introduction of an optional European framework[12] for transnational negotiations remained in the background, even as a complementary tool, considering that the EU Commission itself has shown a declining interest in the possibility of an EU regulation of TCAs.

From the perspective of protecting workers' rights in the global supply chain, the due diligence regimes have gained major attention at EU level. The European Commission has undertaken some preliminary steps, including publishing a study and conducting public consultations, towards a possible legislative initiative on mandatory due diligence. Its 2021 work programme includes a proposal for a directive on sustainable corporate governance that would also cover human rights and environmental due diligence. It has been planned as an essential part of the European Green Deal and the Covid-19 recovery package.

## 5. *The Due Diligence Regimes*

### *5.1. Definition*

The concept of due diligence introduced by the United Nations Guiding Principles on Business and Human Rights and the ILO Tripartite declaration of Principles Concerning Multinational Enterprises and Social Policy, later incorporated into the OECD Guidelines for Multinational Enterprises, is the main reference in the current international context.

According to these documents due diligence processes must "identify, prevent, mitigate and account for" adverse corporate impacts on human rights and the environment, with an extension to other areas of responsible business conduct (UN Guiding Principle 2011, p. 17).

[11] Communication from the European Commission on the Social Agenda 2005-2010, available at eur-lex.europa.eu/LexUriserv/LexUriser.do?uri=COM:2005:33:FIN:EN:PDF.

[12] Ales, *Transnational collective agreements: the role of trade unions and employers' associations*, Comm. UE, DG Employment, March 2018, available at https://eu.eventscloud.com/-file_uploads/185fe09c1a16e079ad008e8927fc6c8a_Ales_Final_EN3.pdf.

The due diligence practice is based on risk management systems, which MNEs carry out to avoid causing or contributing to adverse impacts through their own activities and address such impacts when they occur, even when those impacts are directly linked to their operations, products or services by means of a business relationship (OECD Guidelines for MNE, Ch. 2- General policies, pp. 10-12).

For the purpose of achieving the aims identified by the international legal framework on MNCs' due diligence, this process should involve meaningful consultation with potentially affected groups and other relevant stakeholders, including workers' organisations, as appropriate to the size of the enterprise and the nature and context of the operation. The due diligence process "should take account of the central role of freedom of association and collective bargaining as well as industrial relations and social dialogue as an ongoing process" (ILO Tripartite Declaration of Principles on MNE, General Policies, p. 10, lett. c, d, e).

### *5.2. Models*

Businesses can play a major role in contributing to economic, environmental and social progress, especially when they minimise the adverse impacts of their operations, supply chains and other business relationships. In this respect, two broad approaches of due diligence for responsible business conduct have been identified: the *reporting* model, based on disclosure, typified by the *UK Modern Slavery Act*; and the *mandatory human rights due diligence* model, illustrated by the *French Duty of Vigilance Law*[13].

The *UK Modern Slavery Act* of 2015 was designed to tackle slavery and human trafficking through the consolidation of previous legislation and the introduction of new measures. According to the UK Government's issued guidance, any organisation in any part of a group structure will be required to comply with the Act provisions and produce a statement if it is: a body corporate or a partnership, wherever incorporated; carries on a business, or

[13] BRIGHT, *Mapping human rights due diligence regulations and evaluating their contribution in upholding labour standards in global supply chains*, in DELAUTRE, MANRIQUE, FENWICK (eds.), *Decent Work in Globalised Economy: Lessons from Public and Private Initiatives*, ILO: Geneva, Switzerland, 2021, p. 75 ff. Available online: https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_771481.pdf.

part of a business, in the UK; supplies goods or services; has an annual turnover of £ 36,000,000 or more.

Any organisation must produce an annual statement setting out the steps it has taken to ensure there is no slavery in its business and supply chains. Among the required information, there is the effectiveness in ensuring that slavery and human trafficking is not taking place in its business or supply chains, measured against some performance indicators as considered appropriate. If no steps have been taken, it must be declared.

If a business fails to produce a slavery and human trafficking statement for a particular financial year, the Secretary of State may seek an injunction through the High Court requiring the organisation to comply. If the organisation fails to comply with the injunction, they will be in contempt of a court order, which is punishable by an unlimited fine[14].

The *French Duty of Vigilance Law* of 2017 was the first to require companies to establish a vigilance plan to identify and prevent violations[15]. Plans must cover their own activities and those of subcontractors and suppliers, with whom they maintain a commercial relationship. The legislation seeks to prevent large companies from hiding behind their status as buyers. It establishes liability between the parent company of a corporation and its subsidiaries and subcontractors in the event of human or environmental rights violations. In other words, it puts limits to the "corporate veil" doctrine, under which companies were always seen as a collection of separate legal entities, even in the case of parent companies and subsidiaries, and, as a consequence, a parent company could not be held liable for misbehaviour of the lower echelons of a production or services chain. The law imposes a duty of vigilance on large companies employing 5,000 employees in France, or 10,000 globally. As the law provides for civil remedies, it is the first to move from a *soft* to a *hard* law approach[16].

However, according to the findings of a survey of a dozen companies and an analysis of vigilance plans published in 2018 and 2019 to explore how companies internalise and operationalise their obligations, some authors have shown that the law leaves companies significant room to interpret the scope

[14] Https://www.gov.uk/government/collections/modern-slavery.

[15] Moreau (dir.), *Dossier "Le devoir de vigilance"*, in *DS*, 2017, p. 792 ff.

[16] Lyon Caen, *Verso un obbligo legale di vigilanza in capo alle imprese multinazionali?*, in *RGL*, 2018, 2, p. 240 ff. In the same vein, see the *Supply Chain Due Diligence Act* passed by the German Parliament on June 2021, which will come into force in 2023.

of their obligations[17]. Hence, companies tend to define risk management around their existing actions – rather than in terms of human rights outcomes – and the risk mapping they undertake varies widely. There is also only limited consultation with key stakeholders, including unions, in elaborating the plans[18].

## 6. *Claims under the French Duty of Vigilance Law*

The normative force of the law on the duty of vigilance also rests on a judicial dynamic. The following two cases show the lights and shadows of the due diligence approach, which should be taken into account by the EU legislator in the forthcoming directive.

### *6.1. The Total Case*

A first legal action was brought by six French and Ugandan NGOs against Total on the basis of Article L.225-102-4-II of the Commercial Code. Non-governmental organizations denounced a project to exploit oil in Uganda in which Total was a shareholder, as well as the future 1,400 km pipeline that will transport crude from this landlocked country in Central Africa to Tanzania. The conditions for compensating displaced families were at the centre of their criticism. After putting Total on formal notice to comply with its duty of vigilance, non-governmental organizations took the company to court.

Two aspects require attention in this lawsuit. First, the judges considered that a French union has an interest in taking action when human rights and the environment are at stake. Then, on two occasions, the judges considered that the dispute falls within the competence of the commercial courts, the implementation of the duty of vigilance being qualified as "an act of management"[19].

[17] Cremers, Houwerzijl, *Subcontracting and Social Liability*, Tilburg University-ETUC, September 2021, pp. 17-18.

[18] Barraud de Lagerie *et al.*, *Mise en oeuvre de la loi sur le devoir de vigilance. Rapport sur les premiers plans adoptés par les entreprises*, HAL Id: hal-02819496, 6 June 2020, available online: https://hal.archives-ouvertes.fr/ hal-02819496.

[19] Court of Appeal of Versailles, December 2020.

However, according to the French jurisdiction, the duty of vigilance escaping the ordinary civil courts risks weakening the judicial basis of it and of retaining a reductive assessment of the duty of vigilance, which would be a simple obligation of means.

In such a legal liability regime, human rights due diligence could thus be considered as a ground for excluding corporate liability. Thus, the most widespread fear is that human rights due diligence could become a "shield" for the company, a sort of "safe harbour", which the company could use to exclude its responsibility for violations of the human rights rules accomplished within its value chain.

However, a teleological interpretation of the legal obligation would make it possible to see it as an obligation of reinforced means and would lead the judge to rule on the relevance of the preventive procedures put in place by the company in the vigilance plan.

### *6.2. The Teleperformance Case*

Teleperformance is the Paris-based world's largest provider of outsourced customer service for clients like Apple, Facebook, Amazon and Google, with 331,000 employees in 80 countries. It is the second largest French employer outside of France and the majority of its workforce operates in countries with a high risk of labour rights violations.

In a complaint filed with the French government on 17 April 2020, a coalition of labour unions has called for immediate intervention to stop violations of workers' right to a safe workplace at Teleperformance. UNI Global Union filed the complaint along with its French union affiliates: CFDT Fédérationcommunication conseil culture, CGT-FAPT, CGT Fédération des Sociétés d'Etudes, and FO-FEC.

The complaint, delivered to the French OECD National Contact Point (NCP) in Paris, is the first-ever filed under the OECD Guidelines for Multinational Enterprises alleging workers' rights violations during the Covid-19 crisis. It documents unsanitary conditions, such as hundreds of workers having to sleep on crowded call centre floors and multiple employees sharing equipment such as headsets during the coronavirus crisis. The complaint also alleges retaliation against workers who organized for basic personal protections and dismissals of trade union leaders.

The issues are the company's compliance with local law, the duty of

vigilance, human rights, occupational health and safety, and the workers' freedom of association and collective bargaining.

In its defence, Teleperformance claimed that it has a code of ethics and a vigilance plan, is a member of the Global Compact, has very high extra-financial ratings, and was awarded a very good rating on 1 April 2020 by the Central Works Council for compliance with employee hygiene and safety standards at its worksites in Europe.

Nevertheless, in a 26 June 2020 statement, the French NCP decided to pursue the specific instance procedure and offer mediation to the parties.

One of the aims that Uni Global Union pursued through calling in the law of the duty of vigilance, on one side, and referring to the NCP for mediation and reconciliation, on the other, was to compel the multinational to consult with unions about the vigilance plan and open negotiations on an International Framework Agreement, which the company had refused to bargain in 2018.

Indeed, signing an agreement is a possible – even if not a necessary – outcome of the specific instance procedure. From this perspective, the OECD guidelines, as well as the French law on the duty of vigilance, may offer relevant support for opening or consolidating various forms of international social dialogue[20].

In August 2021, the French OECD National Contact Point issued recommendations for Teleperformance to better address workers' health and safety concerns, and to ensure the right of freedom of association of workers is respected throughout its global operations. These recommendations included strengthening due diligence processes and engagement with stakeholders.

### 7. *Proposal for EU Binding Regulation on Due Diligence*

On 10 March 2021 the EU Parliament adopted a recommendation for drawing up a Directive on Due Diligence and Corporate Accountability[21].

According to its expected intrinsic positive impact, such legislation

[20] DAUGAREILH, *Covid-19 and Workers' Rights: The Téléperformance Case*, in *ILRCL*, 2021, p. 129.

[21] P9_TA(2021)0073.

would provide for important advantages, in terms of creating a *level playing field* among all companies operating on the EU market; bringing legal clarity and establishing effective *enforcement and sanction* mechanisms, while possibly improving *access to remedy* for those affected, by establishing civil and legal liability for companies.

Drawing some lessons from the French experience, the draft Directive has adopted a procedural approach towards mandatory due diligence, consistent with the regulatory role the EU is willing and committed to play in the global scenario, according to the European Green Deal Strategy.

Under the proposed text, companies would be required to carry out due diligence "aimed at identifying, ceasing, preventing, mitigating, monitoring, disclosing, accounting for, addressing, and remediating" the risks related to the operations of their global supply chains. The covered risks are threefold: *human rights,* including social and labour rights; the *environment*, including climate change; and *good governance* (art. 3).

Rather than impose requirements on specific companies above a certain size, the EU law would bind companies across all sectors of economic activity and all firms that are either registered under the laws of an EU Member State, or that are registered outside the EU but nevertheless maintain operations within the single market.

For the purpose of this study, the more interesting provision is article 5, concerning the involvement and consultation of the stakeholders, including trade unions. More precisely, "Member States shall ensure that undertakings carry out in good faith effective, meaningful and informed consultations with stakeholders when establishing and implementing their due diligence strategy in a manner that is appropriate to their size and the nature and context of their operations, and shall guarantee, in particular, the right for trade unions at the relevant level to be involved in the establishment and implementation of the due diligence strategy in good faith with their undertaking" (par. 1). In addition to that (par. 5), workers or their representatives shall be informed and consulted on the due diligence strategy of their undertaking in accordance with all Directives on democracy at work (2002/14/EC; 2009/38/EC; 2001/86/EC). Finally, in case an undertaking "refuses to carry out consultations with stakeholders, fails to involve trade unions in good faith, or does not adequately inform and consult workers or their representatives", Member States shall ensure that stakeholders and trade unions may refer the matter to the competent national authority (par. 6).

## 8. *Concluding Remarks*

In light of the above, the EU is surely setting the stage for new legislation on supply chain due diligence[22], but the legislative process is going slowly[23]. The European Commission's proposal for a directive on sustainable corporate governance was originally expected in June, then should have been released in October 2021, but was postponed to 8 December and remains outstanding at the time of writing.

In the meantime, the Office of the UN High Commissioner for Human Rights (OHCHR)[24] issued Recommendations to the European Commission on 2 July 2021, in order to ensure alignment with the United Nations Guiding Principles on Business and Human Rights (UNGPs) in the Commission's forthcoming legislative proposal. The OHCHR note draws attention to some critical issues emerging from the European Parliament model legislation, which concern, among other aspects, stakeholders' engagement, companies' role of leverage in addressing risks, liability and enforcement mechanisms.

Regarding stakeholders, the OHCHR highlights that the European Parliament Proposal does not make any reference to the need to consult them when business enterprises "identify and assess" their adverse impacts, since stakeholder engagement is required only *after* the identification stage (Art. 4(2)). According to OHCHR, postponing the involvement of potentially affected stakeholders, which is necessary to understand their concern, can weaken the effectiveness of the law. More precisely, "this is particularly problematic as undertakings that conclude they have not caused or contributed to, and are not directly linked to, adverse impacts do not need to establish and implement a due diligence strategy".

Trade unions and workers' representatives shall be included among stakeholders according to art. 5 of the Draft Directive, which enforces their

[22] The most recent step in this direction is the new *Guidance on due diligence for EU companies to address the risk of forced labor in their operations and supply chains*, released on 12 July 2021 by the EU Commission and the European External Action Service (EEAS). The document builds upon the OECD due diligence framework as a best practice example, offering some good insights into the common indicators – *"red flags"* – of forced labour.

[23] See the ETUC criticism, available online https://www.etuc.org/en/time-act-human-rights-due-diligence-and-responsible-business-conduct.

[24] OHCHR is the UN agency responsible for leading the business and human rights agenda within the UN system.

participation to the due diligence process providing for all Directives on democracy at work shall apply. Organisational issues – such as risk management practices – have to be dealt with by workers' representatives, where they exist. Therefore, Global Work Councils and European Work Councils can open the floor to collective bargaining at transnational level, jointly with the unions, as a result of the information and consultation procedure on due diligence regimes. Trade unions' and worker representatives' roles can even be enhanced, acting for example as internal supervisors involved in shaping and monitoring the vigilance plan[25].

Indeed, mandatory human rights due diligence regimes may have a very important role to play as part of a "smart mix" of measures to effectively foster business respect for human rights. Taking into account the broader environmental, social, and governance concerns at EU level, the due diligence regulation needs to keep up. The effective enforcement of mandatory human rights and environmental due diligence legislation, when paired with strengthened social dialogue, would be conducive to a more equitable and sustainable industry in global supply chains[26].

[25] CLERC, *The French 'Duty of Vigilance' Law: Lessons for an EU directive on due diligence in multinational supply chains*, ETUI Policy Brief, No. 1/2021, p. 5. According to this proposal, "an internal 'vigilance committee' should be set up to prepare the vigilance plan and monitor its implementation. This committee should be independent by design and be provided with the appropriate legal and financial means to carry out its duties".

[26] JUDD, JACKSON, *Repeat, Regain, Renegotiate? The Post-COVID Future of the Apparel Industry*, Better Work Discussion Paper No. 43, July 2021, Geneva: ILO and IFC.

**Abstract**

The added value of EU mandatory regulation requiring companies to carry out due diligence on social and environmental risks in their operations and supply chains will be to overcome the insufficient voluntary approach, proposed by the international regulatory framework. As far as the involvement of workers' representatives and trade unions is expected to be fully recognised by the forthcoming Directive on Corporate Due Diligence and Corporate Accountability, the social dialogue practises foreseen by transnational collective agreements shall not be overlooked. The effective enforcement of mandatory human rights and environmental due diligence legislation, when paired with strengthened social dialogue, could be conducive to a more equitable and sustainable industry in global supply chains.

**Keywords**

Global supply chain, corporate social responsibility, transnational social dialogue, due diligence, EU directive proposal.

**Ana Teresa Ribeiro***

# Collective bargaining and MNEs (and their supply chains)

Summary: **1.** Introduction. **2.** The role of collective bargaining. **3.** The importance behind consumers' perception and concluding remarks.

## 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.

**Mariangela Zito**

# The implementation of Global Framework Agreements (GFAs) to protect workers' rights throughout the global supply chains during the Covid-19 pandemic and beyond

Summary: **1.** Introduction. **2.** What is the fate of labour rights within the global supply chains during the global crisis?. **3.** The implementation of GFAs to protect workers' rights throughout the global supply chains. **4.** Conclusions.

## 1. *Introduction*

The coronavirus pandemic (Covid-19) is having an unprecedented impact on economies all over the world, exacerbating the already precarious workers' conditions at all levels of the global supply chains and highlighting how fragile they are. The global crises revealed the existence of a system based on precarious forms of work, low wages, unsafe and dangerous workplaces, excessive working time and hostility to the trade union phenomenon. Such a system has direct effects on employees of the lead companies, as well as on contractors, suppliers, and third parties who reiterate these precarious conditions due to low costs of production and globalization processes not governed by rules of law. In this scenario, the challenges for companies are: to overcome the extraordinary economic crises, resume activities on a global scale, making their businesses work better, and building more secure and resilient[1]

[1] The OECD defines resilience as "the ability of households, communities and nations to absorb and recover from shocks, whilst positively adapting and transforming their structures and means for living in the face of long-term stresses, change and uncertainty. Resilience is about addressing the root causes of crises while strengthening the capacities and resources of a system in order to cope with risks, stresses and shocks" in OECD, *Risk and resilience*, 2019, https://www.oecd.org/dac/conflict-fragility-resilience/risk-resilience/.

supply chains. According to *Fortune*[2], the 94% of the biggest companies have suffered supply chain disruptions, due to the closing of borders and manufacturing sites. The emergency context has caused the incapacity of businesses to cope with shortages in supplies, therefore pushing them to find alternative solutions for productions, as well as to manage and reduce risks related to a single geographic area of supply. The pandemic has led disruptions across different sectors, especially at the beginning of the crisis (March-April 2020). These disruptions have highlighted the opportunity for more agile supply chains, which are characterized by their shortening and a greater risk diversification-strategy covering a larger number of suppliers from different countries, accentuating the regionalisation of the value chains, rather than reshoring, backshoring, and nearshoring. Such terms bring in mind of businesses in times of economic crises as strategies to fortify their production capabilities against (potential) disruptions: while reshoring and backshoring companies move production into their own countries, nearshoring is the repositioning of those activities in countries nearer to the companies' headquarter.

Nonetheless, are greater risk management strategies at firm level, which make global value chains more resilient and stronger, sufficient to guarantee the respect of labour rights during and after the pandemic? And how such rethinking of the global supply chains could really improve the protection of labour rights? In this context, while governments are strongly committed to find solutions for saving jobs, enterprises, and for coping with the crises' effects on economies, the Global Framework Agreements (GFAs) signed in this challenging and uncertain scenario may be the tool of the global social dialogue, which guarantees the social cooperation and cohesion in the dealing of the immediate consequences of the pandemic, such as: promoting workers' income, health and employment, and the management of the most serious human rights' risks in supply chains. In the following pages will be highlighted some joint declarations signed by the multinational corporations and the global trade unions as evidence of their longstanding and trustful relationship. Underlying this established relationship is the parties' common goal of finding shared solutions against the risks of abuse and violations of workers' rights, also linked to the current global crisis.

[2] SHERMAN, *94% of the Fortune 1000 are seeing coronavirus supply chain disruptions: Report*, in *Fortune*, 21 February, 2020. Available at https://fortune.com/2020/02/21/fortune-1000-coronavirus-china-supply-chain-impact/.

2. *What is the fate of labour rights within the global supply chains during the global crisis?*

In a study carried out in the period between November 2020 and March 2021 by the European Parliament[3], the overall view from sectors and experts is that value chains can be strengthened by increasing diversification. Three findings have emerged in the report: *i*) it is a common trend across the sectors that the second wave of infections seems to have been less harmful than the first one, where factories and borders were largely open and new adaptation to workplaces were established, as security and distance requirements; *ii*) in order to remain internationally competitive, the European Union will need to continue relying on the global value chains. All value chains need to remain global and cannot be reallocated to the national level, thus strengthening of such chains at European level and focusing on circular economy, innovation, diversification of sources and international partnership with the third countries is needed; *iii)* finally, to reinforce value chains at European level, Member States need to consider how to contribute with their national measures and recovery plans. For a long-term development, it is important to identify different solutions for specific characteristics of the various sectors, supporting the diversification of raw material sources and promoting the circular economy to reduce the pressure on value chains.

In a Resolution of the 17th April 2020, the European Parliament (EP) affirmed, for a stronger post-crisis European Union, "corporate human rights and environmental due diligence are necessary conditions in order to prevent and mitigate future crises and ensure sustainable value chains"[4]. This is one of the many resolutions the EP adopted to call for the introduction of a binding European due diligence law, which obliges companies to identify, address and remedy aspects of their value chains in terms of human rights (including social, trade union and labour rights), the environment (including contributing to climate change) and good governance.

[3] European Parliament, *Study on Impacts of the COVID-19 pandemic on EU Industries*, 2021. Available at https://www.europarl.europa.eu/RegData/etudes/STUD/2021/662903/IPOL_STU(2021)662903_EN.pdf.

[4] European Parliament Resolution on EU coordinated action to combat the COVID-19 pandemic and its consequences (2020/2616(RSP), 17 April 2020. Available at https://www.europarl.europa.eu/doceo/document/TA-9-2020-0054_EN.pdf.

Similarly, the Council of the European Union, in its Conclusions on human rights and decent work in global supply chains of December 1st, 2020, stated: "in order to manage crises effectively and flexibly, companies are well advised to have an overview of their value chains, know their suppliers and cooperate with them" and that "corporate due diligence, in particular human rights due diligence, is the key for responsible supply chain management in line with the UN Guiding Principles on Business and Human Rights, the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy and the OECD Guidelines for Multinational Enterprises"[5]. However, the duty for corporations to act proactively to prevent the risks of human rights violations in their business relationships is not new. It was first introduced in the United Nations Guiding Principles on Business and Human Rights (UNGPs) in 2011, as a component of the responsibility of business enterprises to respect human rights. Since then, it has been incorporated in the OECD Guidelines on Multinational Enterprises, the ILO Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy. In 2018, the OECD adopted the Due Diligence Guidance for Responsible Business Conduct providing a detailed guide on how companies should avoid infringing on the rights by identifying, preventing, mitigating and accounting for how they address their impacts' operations on human rights.

Another step forward towards the improvement of enterprises' human rights performances was the adoption of the EU Directive on the Disclosure of Non-financial Information (2014/95/EU), introducing transparency mechanisms to the disclosure of the non-financial and diversity information by certain large undertakings and groups. The EU Directive is consistent with the use of sustainability reports as a general transparency instrument, but it does not provide specific guidance. Within the Communication on the European Green Deal of the 11 December 2019[6], the Commission committed to review the Non-Financial Reporting Directive in 2020 as part

[5] Council of the European Union, *Council's Conclusions on Human Rights and Decent Work in Global Supply Chains*, 1 December 2020. Available at https://data.consilium.europa.eu/doc/-document/ST-13512-2020-INIT/en/pdf.

[6] European Commission, *Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions*, 11 December 2019. Available at https://eur-lex.europa.eu/resource.html?-uri=cellar:b828d165-1c22-11ea-8c1f-01aa75ed71a1.0002.02/DOC_1&format=PDF.

of the strategy to strengthen the foundations for sustainable investment. In line with the commitment, on 20 February 2020 the Commission launched a public consultation on the reviewing of the Non-Financial Reporting Directive (NFRD), closed on 11 June 2020. In the agendas for the forthcoming Commission meetings published on 9 March 2020, the review of the NFRD was scheduled in the Commission meeting on 21 April 2021[7].

Considering these premises and the current lack of conceptual and legal clarity on the due diligence process, where companies are applying different standards, the European institutions has invited the EU Commission to foster the responsible management in the global supply chains. This invitation is done to present a proposal of a legal framework on sustainable corporate governance, including cross-sectoral corporate due diligence obligations throughout the global supply chains. The European Commission, for its own part, expressed its commitment to adopt in 2021 due diligence obligations to all different sectors and to create a level playing fields along the European Union. To this end, it commissioned an external study on due diligence requirements through the supply chains and launched a public consultation (closed on 8 February 2021) seeking the views of stakeholders on this legislative instrument. In due diligence processes, it is important to rely on the social dialogue and industrial relations: strengthening the capacity of employers' and workers' organizations, improving workers' participation by respecting the freedom of association and collective bargaining. Since the discussion on a compliant corporate governance to international labour standards started, from the trade unions' perspective, the European Trade Union Confederation (ETUC) expressed its position. In the Action Programme for 2019-2023, the ETUC included – amongst its objectives – the aim to adopt a EU directive on human rights (including labour rights) due diligence and a legally binding treaty on multinational companies and human rights (currently under negotiation within the UN). The proposal is finalized to establish due diligence obligations in line with social and environmental standards and objectives of the EU focusing on prevention of human rights violations, but also on effective controls, sanctions and remedies. To this end, according to ETUC's hihghlights the directive should ensures the full involvement of trade unions and workers' representatives,

[7] It is dated April 21, 2021, the European Parliament proposal for a Corporate Sustainability Reporting Directive (CSRD), to revise and extend the scope of the sustainability reporting requirements introduced by the NFRD.

considered the most central actors of the whole due diligence process, on the basis of a combinations of legal provisions, including Article 153(1)(e) (information and consultation) and Article 154 TFEU.

Over the years, cross-border actions and initiatives, carried out by social partners, have contributed to the development of social dialogue with regards to the adoption of soft law instruments regulating labour conditions at transnational level, including value chains. In the absence of a legal framework, these soft law instruments may be adopted, thus pushing multinational enterprises towards the full application and respect of principles regarding social and labour rights. Many global enterprises have decided autonomously to develop corporate policies and other forms of private regulations (like Code of conduct, Code of Ethics, Corporate Social Responsibility (CRS), Auditing, Reporting initiatives) to resolve environmental issues, promote and ensure the respect of social and labour standards. These initiatives, however, are voluntary actions of enterprises to adopt sustainable and responsible behavior as a result of a reputational strategy. In these private regulations, the role and the voice of trade unions and workers' representatives are limited; also the effectiveness of these regulations is not guaranteed. Moreover, as to the global value chains, due to the lack of involvement of workers' representatives in the monitoring processes, the supervision about the implementation of core labour standards – where applicable – is not guaranteed. With the increase of the transnational dimension for companies and their operations, an ever greater need for transnational negotiations within companies has grown. Multinational enterprises – with a solid industrial relations culture[8] – and global trade unions have started a cross-border cooperation which will help to finalize the negotiations and to adopt Global Framework Agreements[9]. The aim of GFA is to improve the application of labour standards at a global level, including global value chains, starting from a different ground unlike with

[8] It means that when MNEs are headquartered in States with Industrial Relations systems based on collective representation and bargaining at industry level ensuring the promotion and protection of labour standards through social dialogue between social partners, the management are more proactive to put in place processes of social dialogue at global level.

[9] Global Framework Agreements include international framework agreements (IFAs), between Global Union Federations (GUFs) and MNEs, and European Framework Agreements (EFAs), between MNEs and European trade union federations and/or European Works Councils.

private regulations, such as CSR initiatives. In the transnational collective bargaining, the trade unions, at global or European level, are active players in the negotiation and implementation of such agreements. In this kind of collective bargaining, the transnational regulation of social and labour rights, also within the global value chain where the multinational enterprises operate, is negotiated with trade unions rather than being a unilateral initiative. In these agreements, signatory parties establish to organize, in a more responsible way, the multinational enterprises' operations and practices along the value chains, stating that subcontractors and suppliers must comply with GFAs' principles and providing joint grievance mechanisms. Best practices of GFAs demonstrate that the cross-border cooperation, which is realized by signing such agreements, have positive results when they have an extending application among all parties and sites enterprises' activities, such as providing solutions to manage corporate restructuring, promoting living wages and health and safety, supporting small and medium enterprises within the supply-chains, maintaining the social cohesion via the effective involvement of workers' representatives in all the implementation phases (from the negotiation of the agreement's contents to the resolution of disputes arising globally)[10].

In the transnational bargaining conducing to the negotiation of GFAs, it is important to mention the role assumed by European Works Councils (EWCs) – at European level – and Global Works Councils (GWCs) – at global level –. These workers' representative bodies, according to the recognition they have by companies, could be drivers for the negotiations of GFAs as well as they are fully involved in the monitoring and implementation processes of these agreements. When the workers' representative body is established at global scale, the global committee (GWC) has the responsibility to monitor the application of the GFA beyond the local/European borders, including value chains.

Due to the weaknesses of legally binding frameworks for the private regulations examined above and the inadequacy of remedies offered by Corporate Social Responsibility, different national legislations initiatives were gradually adopted (or are going to be) across Europe[11]. The national

[10] Guarriello, Stanzani, *Trade union and collective bargaining in multinationals*, Franco Angeli, 2018, p. 256.

[11] For istance, the pioneer French law on due diligence was adopted in 2017, and the latest German mandatory human rights due diligence law, adopted in June 2021, will enter into force in 2023.

legislations will not be explored in the essay, but it is important to mention that these initiatives adopted at national level have introduced human rights due diligence obligations to prevent and regulate abuses of labour rights within the global supply chains. The main goal of the policy-makers is to balance business strategies adopted for cross-border activities with the respect of human and workers' rights, creating duties to report the accordance of these requirements in order to avoiding abuses related to high demand in a short timing.

### 3. *The implementation of GFAs to protect workers' rights throughout the global supply chains*

Before the Covid-19 pandemic spread with its extraordinary health, social and economic consequences, the violations of workers' rights throughout the global value chains have already existed. Rather than to face reputational risks, multinational companies have started to sign, rapidly since 2000s, Global Framework Agreements with the employees' representatives negotiating on procedures for compliance of international labour standards, regulating employment relations within companies worldwide, transforming the global value chains to a place of improved working conditions and, last but not least, increasing unionization in the countries where the signatory multinational company operates. Although these agreements operate in a legal void, they have the typical effect of private contracts, i.e. they have the full force of law between the signatories. Even though they are instruments of soft law, they have promoted the development of social dialogue culture, which is a mechanism of democratic involvement, for workers and their representatives, in the decisions taken by the company, exercising the rights of information, consultation and participation. The GFA normally has procedural contents, enriched over the time by the provision of monitoring processes, disputes resolution mechanisms and implementation practices to ensure the effectiveness of the agreement on a global scale. When the monitoring and supervision procedures are properly implemented, the development and growth of unionization in many areas of the world is achieved.

Good examples of transnational company agreements have been reached and implemented by the following multinational companies:

Schneider Electric, Volkswagen, Thales, SKF, Santander, Unicredit, BNP Paribas, Enel, Eni, Bosch, Electolux, OHL, ThyssenKrupp, Salini Impregilo, Solvay, Renault, Engie (ex GDF Suez)[12]. In the analysis of the texts of these agreements and their renewals, a greater focus on subsidiaries, suppliers and subcontractors has emerged, where the respect of decent work principles are seriously at risk. The trend to extend the implementation of transnational agreements towards suppliers and subcontractors, as well as the sanctioning mechanisms envisaged for agreement violations by third parties linked by contractual and business relations, emphasises the procedural-institutional aspects of these agreements, thus creating a system of social dialogue and mutual engagement to promote labour and trade unions' rights on a global scale. Such form of transnational collective bargaining, of course, needs good system of industrial relations and solid relationships between the national trade unions (of the parent company and of the countries where the multinational company operates) and with the Global Works Councils (GWCs), representing employees globally. The presence of consolidated relations among workers' representatives in the countries involved, shows the predisposition towards a form of dialogue with the central management at transnational level. Such social dialogue allows the company to identify and negotiate common interests and issues that need to be jointly regulated signing such agreement, that will be then effectively implemented in all the ramifications and third-party companies with which the enterprise has commercial connections. The reference to subcontractors is present in every agreement analyzed, but not all of the agreements give it the same relevance. Subcontractors are required to respect the fundamental principles envisaged in the agreements, however some of them mention these principles in general and potential terms provision, others, specifically provide that the lack of compliance with these principles will make the businesses and commercial relations with the third parties involved null. In terms of effective monitoring, however, it is quite complicated to evaluate whether the subcontractors in question, respect these principles or not. At this regard, the abovementioned agreements establish the setup of joint monitoring bodies that include the participation of company and union representatives. GUFs

[12] The agreements were analyzed within two European projects – EURACTA and EURIDE – financed by the DG Employment, Social Affairs and Inclusion of the European Commission.

are usually part of these bodies and often represent those countries where the threshold of such representation is limited. European Works Councils (EWCs) and Global Works Councils (GWCs) play an important role in the monitoring and implementing phase.

As an evidence that a dialogue and cooperation among social partners may be an important tool in giving a chance for the protection of supply chains' workers, particularly effected due to Covid-19 impacts, some joint declarations signed by the major groups of the garment, electronic and e-commerce sectors (Inditex, H&M, Tchibo, ASOS) and of the food services sector (Sodexo) with their counterparts sectoral Global Unions, has to be mentioned. These declarations of "reaffirmed commitments" stem from previous Global Framework Agreements are the result of the longstanding relationship existing between corporations and the global unions of the sector concerned.

Regarding the GFA of Inditex and IndustriALL Global Union, in the signed agreement of 2019, parties (re)affirmed "the crucial role that freedom of association and collective bargaining play in developing mature industrial relations […] in the shared belief that cooperation and collaboration are keys to strengthen human rights within Inditex's supply chain". Compared to the previous text[13], Inditex's GFA provides the introduction of supervision measures for the parent company to identify, as well as prevent, severe violations of human and workers' rights committed by subsidiaries, suppliers and subcontractors. Inditex's GFA recognizes the involvement of trade unions' representatives in the monitoring process of its implementation throughout the global supply chains: "Local trade unions have an important role to play in ensuring in the implementation of the agreement within the Inditex's supply chain. Local trade unions will participate in the implementation of the agreement in their respective countries". The flow of communication between Inditex local management and the local affiliates of IndustriALL Global Union allows a continuous exchange of information based on sharing all the necessary data, contributing to a better understanding of the supply chain and to further information related to any type of potential issue which may arise. Furthermore, to allow the active role of trade unions' representatives in the monitoring process, the agreement

[13] The longstanding relationship between the company and the global union started in 2007, when the first GFA was signed.

states: the commitment of the company to provide the list of plants of the supply chain; the duty for contractors to able trade unions' representatives, either local representatives, accessing all plants; finally, the duty for both parties to exchange information on violations occurred and remedies applied. The solid cooperation, existing between Inditex and the sectoral global union IndustriALL since the signature of the agreement in 2007 (which was renewed in 2019), has been the premises for the adoption – in August 2020 – of the joint declaration to support the recovery of global garment industry during the Coronavirus pandemic. The negative impacts of the Covid-19 pandemic on economies and activities, due to restrictions measures applied all over the world by governments to limit the contagion, have particularly effected global supply chains and their workers with cancellation of orders, which are done without any payments, factory closures, unpaid workers and massive job losses worldwide[14]. In the absence of a legal framework requiring the parent company to impose certain requirements upon its subsidiaries to comply with the labour standards and within the global supply chain, the risks for human and labour rights, which are to be faced with, are enormous. In the statement, Inditex reiterated its commitment to work together with the global union to support the supply chain and other sectors throughout this period. In order to minimize the impacts of the global pandemic "the company has involved the union representatives in the company's operations in key supplier markets and among its suppliers as it starts to deliver on its responsibilities of its Global Union Committee established as part of the renewed GFA", aiming to ensure, throughout its supply chains: health and safety standards, collective bargaining rights and workers' rights to unionise, stabilizing of payment terms to allow suppliers to honour payments for workers.

The reaffirmed commitment of GFA's signatories Inditex and IndustriALL to face, in a such scenario, the issues related to pandemic, was invoked to deal with a conflict occurred due to the Romanian supplier for Inditex, Tanex. Tanex refused to allow union access to the plant as the agreement provides to oversee the respect of workers' rights by suppliers. On this basis, an agreement was reached between Tanex management and

[14] International Labour Organization says "Almost 25 million jobs could be lost worldwide as a result of COVID-19", March 18, 2020, see: https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_738742/lang—en/index.htm.

UNICONF (Clothing and Knitwear Trade Unions Federation), based on the renewed GFA of 2019 and the Romanian law on social dialogue, with the aim to construct a fruitful dialogue with unions and to recover the local industry affected by the pandemic effects. As a result, Tanex management is committing to: respect freedom of association, ensure compliance with the provisions of the GFA, inform IndustriALL (through its affiliate UNICONF) on the implementation of those provisions.

Concluding on the priority to foster commitment among social partners at cross-border level, also to be faced with challenges related to pandemic impacts and beyond, it has to be mentioned the joint declaration signed on December 2020 by the management of the textile group Inditex and its European Works Council on the digital transformation strategic plan of the group, accelerated by the closing of shops and the increase of online shopping demands. For this reason, the declaration commits to involve workers' representatives in the relocation of employees via the creation of new positions nearby, emphasizing the priority to maintain employment throughout the digital transformation process and providing training for those who need new skills. The declaration is also important for the recognition of workers' voice and their involvement in the management's decisions taken towards the digital transition process by which they will be directly affected.

The German firm Tchibo, is the second major global brand after Inditex that signed, in November 2020, a joint commitment with IndustriALL with the aim to guarantee the suppliers' resilience. The agreement underlines the importance of social dialogue at all levels as a tool to protect workers along supply chains and contributes to the economic and social recovery after the pandemic, "with the view to prepare the sector for future". Tchibo is one of the leading retailers for consumer goods in Germany, Switzerland, and Austria. A GFA was signed by Tchibo and IndustriALL in 2016, with the aim to ensure the effective application of the international labour standards throughout the Tchibo's non-food supply chain. The agreement "shall cover the Tchibo Non-Food supply chain with all its vendors, suppliers, their producers and subcontractors and applies to all employees, regardless whether employed directly or indirectly by Tchibo's business partners and regardless the contractual basis of this employment, whether in the formal or the informal sector".

In the global framework agreement, the group is committed to recognize a more active role to workers' representatives for the

implementation of labour standards along the supply chain and creating an enabling environment for mature industrial relations and collective negotiations, both at sectoral and company level. Another principle stated in the agreement is the cooperative involvement in solving problems that may arise in the implementation and monitoring of measures as stipulated in the agreement. Such problem solving is to be reached by enabling working groups at a local level to set out their strategies in order to resolve any disputes. Moreover, in the event that parties will not able to find an appropriate mutual solution for a remote breach, they "shall agree to seek assistance of the ILO for mediation and dispute settlement" and "to abide by the final recommandations of the ILO". Finally, the company agreed to allow workers' representatives to access at suppliers' and subcontactors' sites, with the consensus of the local management. However, access to the plants is not unconditional, as the agreement states that "the specific realization of such access shall be provided based upon the mechanisms that both the management of IndustriALL Global Union and Tchibo might deem necessary. IndustriALL Global Union recognizes and agrees that any union access to the premises of a Tchibo Non-Food supplier is conditional on the prior consent of the business partner. Consequently the parties agree that in the event IndustriALL Global Union or its affiliated unions want to meet with workers at a premises of a Tchibo Non-Food supplier, IndustriALL Global Union or its affiliated unions shall ask Tchibo to obtain the requisite consent from the business partner".

Within this framework, and signing the joint statement with the Global Union, Tchibo assumed the responsibility to be proactive and cooperative in taking all the necessary actions to protect labour rights along the value chain and to seek a mitigation of the Covid-19 impact, as well as to prepare the sector for the future.

Another good example of joint declaration was recently adopted (in March 2021) following the need to safeguard workers from abuses due to the socio-economic recession related to pandemic and to protect the garment value chains. The agreement has been signed by IndustriALL Global, the Swedish Union IF Metall and the giant H&M on the basis of the previous GFA which occurred in 2015. Under this agreement, the group recognizes the Global Union as a partner on the discussion of human and labour rights in the workplaces, extending the protection of these rights in all production sites where the group operates. In order to achieve such

protection, the agreement has established National Monitoring Committees, for the monitoring of the agreement's implementation locally, to facilitate a dialogue between parties on the labour market, and also for the resolution of any conflicts, which shall to be solved primarily at factory level. These national committees are composed by local trade unions and H&M representatives and they are situated in six countries: Bangladesh, Cambodia, Myanmar, Indonesia, Turkey and, most recently (2019), India. Furthermore, a Joint Industrial Relations Development Committee is provided by the agreement, which is composed by equal numbers of representatives for each party and has the responsibility for planning and overseeing practical implementation of the agreement at a global level. The agreement, contrary to Inditex's GFA, does not state any duty for the lead company to prevent abuses perpetrated by subsidiaries, suppliers, and subcontractors, but it states the commitment of the group to provide the list of the supply chain's plants to allow the role of unions in the monitoring process. "H&M will actively use all its possible leverage to ensure that its direct suppliers and their subcontractors producing merchandise/ready made goods sold throughout H&M group's retail operations respect human and trade union rights in the workplace"; on the basis of this statement, foreseen in the GFA, cross-border social partners establish a powerful initiative to reinforce the signatory parties' cooperation and to reaffirm their commitment to support the recovery of the garment industry, culminated in the adoption of a joint statement by H&M group and IndustriALL Global Union. The joint statement was adopted as a result of unfair practices put in place by suppliers who failed to comply with the commitments made in the GFA to protect workers' rights, breaching their obligations regarding proper and fair rules in the event of temporary redundancies and layoffs. "IndustriALL and H&M fully agree that this is un-acceptable and that initiatives will be developed to prevent similar behaviours in the future. IndustriALL and H&M also will make efforts and will actively use its possible leverage with suppliers and unions to remedy violations of workers' rights involving un unlawful layoffs / redundancies, closure and denial of trade union rights".

ASOS has signed, in February 2021, a bilateral declaration with the IndustriALL Global Union to reaffirm the commitment stated in their GFA, which was established by the online fashion retailer and the Global Union in 2017. In the new joint statement the signatory parties renewed their engagement to work together – also with suppliers – to find solutions for

overcoming and mitigating effects caused by the pandemic. ASOS's GFA was the first agreement signed by an e-commerce brand. With it, the group recognizes the role of freedom of association and collective bargaining and decides to formalize the partnership with the trade unions, thus creating a framework of strong industrial relations and for the implementation of employment rights to all workers within the global value chain. In the agreement, ASOS recognizes its duty to guarantee the implementation of principles stated: "all workers producing products for ASOS whether or not they are employees of ASOS"; at this aim "the signatories will observe and require they contractors, subcontractors and principle suppliers to observe the internationally recognized standards as set down in the agreement". To facilitate the implementation of the agreement, ASOS agreed to disclose all data and information regarding suppliers, but, similarly to the Tchibo's GFA, the physical access to sites is conditioned to the prior consent of the supplier. The commitment in working together to find and share solutions to overcome the pandemic effects reaffirmed in the joint declaration represents, also for ASOS, a necessary action to reinforce the relationship and to create new or change "roles that protect lives, social protection systems and business resilience in an unfamiliar new reality, while also seeking to support businesses, the wider economy, and above all, the health, safety, employment and income of workers".

Going towards the conclusion of the analysis of joint commitments' best practices delivered by companies and global unions on the basis of previous global agreement which establishes a framework of powerful cross-border social dialogue and industrial relations, the bilateral initiative adopted during the pandemic which is struggling to recede (March 2021), needs to be mentioned. It is about the joint statement signed by the corporation Sodexo[15] and the International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tourism, Tobacco and Allied Workers' Associations (IUF). The food service sector is certainly one of industries which is mostly severe damaged, due to social distancing regulations, thus, closing of restaurants and hotels globally, the remote working (or working from home) measures adopted to reduce the contagion and the spread of the delivery food service which, on the long-term, will change consumers' demands. In this contest, and based on the global framework agreement signed on

[15] Sodexo is a French food services and facilities management company.

December 2011, signatory parties reached a declaration of intent "On health and safety, including the pandemic as prompted by COVID-19 Crisis". The focus of this declaration is: to improve the protection of employees', even when they work at clients' premises; to stimulate negotiations at national and/or local level; and to promote the implementation of health and safety standards across its global operations. Regarding health and safety in the workplace, the group has developed over the years a preventive approach, usually take place with employees' representatives, by means of identification of the major health and safety risks and the development of prevention programmes, and by the sharing of information on work-related accidents and the reporting of the company's health and safety results to ensure their improvement. The parties to the declaration agreed to transpose commitments in agreement at national or local level, foreseen the election of health and safety representatives and the consultation of employees' representatives to developing health and safety plans and to improving/-reviewing/implementing the existing ones. These kind of measures are improved in the new statement in order to guarantee safe working conditions for employees, above all during the pandemic. Finally, as stated in the GFA, parties agreed to guarantee the implementation of commitments via regularly exchange of information and fruitful communication, also "to review the implementation of the agreement, to jointly work for resolving any differences arising from the implementation of the agreement and for finding ways to advance social dialogue relating to labour and human rights issues covered by the agreement", done by regular contact between parties and the provision of an annual meeting. Local visits are foreseen by the agreement "based on modalities and planning to be defined by a joint agreement".

## 4. *Conclusions*

The solid relations and the transnational social dialogue built among companies and trade unions arising from transnational agreements, demonstrate the engagement of both parties in the implementation of international labour standards established in the GFA and the promotion of workers' involvement in the creation and fulfilment of due diligence processes. All the measures highlighted are part of a global action plan of joint commitments from various stakeholders (such as governments, bank

and finance institutions, international organisations, brands and retailers/e-tailers, manufacturers, employers organisations and trade unions), to urgently develop concrete and specific measures to support and protect workers from the impact of the global crisis. Doubtless, the GFAs mentioned above demonstrate they are important tools of transnational collective bargaining and that social dialogue at global level is recognized – both by companies and trade unions – as essential for the promotion and the protection of workers' rights around the world.

However, the voluntary approach can create competitive disadvantages for companies that do undertake due diligence. Such as GFAs are soft law mechanisms, multinational companies are not obliged to start this kind of negotiation processes, neither for their content, nor for the provision of monitoring procedures and dispute resolution mechanisms in case of violations or issues which can arise throughout the company's operations and its global supply chain. Nonetheless when companies decide – voluntarily – to start a cooperation with the global unions to protect human and workers' rights, they create a ground for transnational collective bargaining and a mutual trust among stakeholders. The lack of legal binding force becomes more pronounced when the implementation of international labour standards are not guaranteed throughout the value chain and workers' rights are abused and violated by the local firms of the global supply chain. In this scenario, when there are no rules imposing the parent company's responsibility for these kind of violations, the involvement of unions and workers' representatives at all levels plays an important role in monitoring and identifying violations. Probably, the adoption – at national and supranational level – of legislative measures could improve due diligence processes in the global supply chain. If so, what will change (if it will change) within the role of social dialogue and workers representatives and the capacity of transnational collective bargaining to guarantee the protection of workers rights? Meanwhile, we see the transnational collective bargaining does not stop, not even in the middle of a global health, economic and social disaster. International social dialogue is having an important input to support workers and giving them responses: the challenge will be the real implementation of the principles stated and the monitoring of this effectiveness.

**Abstract**

The article aims at analyzing some joint declarations reached by Multinational companies of the garment, e-commerce, and food services sectors (Inditex, H&M, Tchibo, Asos, Sodexo) and the global trade unions of the sectors concerned. These declarations of 'reaffirmed commitment', stem from the previous Global Framework Agreements, are the result of the longstanding relationship existing between the groups and the global unions, as well as the evidence that the dialogue and the cooperation among the social partners may be an important tool for the protection of workers' rights violated throughout the global value chains. These violations are exacerbated due to the spread of Covid-19 pandemic and its extraordinary consequences.

**Keywords**

Global Framework Agreements, Global Trade Union, Social dialogue, Workers' rights' violations, Global value chains.

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# abbreviations

The list of abbreviations used in this journal can be consulted on the website www.ddllmm.eu/dlm-int/.