

# ARTICLES

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## UP AND DOWN THE MULTINATIONAL CORPORATIONS' GLOBAL LABOR SUPPLY CHAINS: Making Remedies that Work in China\*

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*Today, multinational and domestic corporations in many industries are no longer self-contained vertical structures with permanent staff, but increasingly are horizontal organizations with fissured employment characteristics using outsourcing, franchising, and subcontracting with contractors and chains of subcontractors. Too often, the workers of the subcontractors suffer the consequences of the subcontractors' cost cutting measures, work in unfavorable conditions, and have low wages and few benefits, all for the purpose of serving the interests and profitability of the primary corporation.*

*This paper therefore focuses on domestic laws that provide workers with an additional avenue of remedy from an expanded employment relationship—a doctrine of joint employer liability that places obligations “up the chain” on the in-country originating contractor who benefits from the supply chain or operates it for the benefit of the offshore multinational corporation. Some form of this doctrine is already used to provide workers with wage remedies against Chinese construction companies and to provide dispatch workers wage and “employee” benefit remedies. Given China’s extensive role in multinational supply chains, this paper examines the doctrine of joint employer liability up the chain and evaluates whether it can be expanded in China to remedy labor law violations and protect workers in the labor supply chains.*

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## INTRODUCTION

China may soon realize that foreigners are once again ravishing its citizens. While the ravishing is not directly done by foreign hands, it is orchestrated by foreign investors. Foreign investors set up shop in China and use their multinational corporations' (MNCs') labor supply chain networks in ways that have Chinese contractors and subcontractors ultimately inflicting the damage.

In the search for remedies, making MNCs liable for abusing workers would result in their pushing the liability down the chain, through their fissurization model,<sup>1</sup> in ways that ought to provide adequate remedies to workers at the bottom of the chain. In the status quo, MNCs shift legal liability by using contracts to establish employer and employee legal relationships while using the workers of subcontracted labor chains in foreign locations to supply their goods.<sup>2</sup> Many of the chain workers at

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1. This describes the global phenomena of fragmented workplaces where employers use subcontracting, outsourcing, and franchising for formerly core operations. See DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* (2014); David Weil, *Enforcing Labor Standards in Fissured Workplaces: The U.S. Experience*, 22 *ECON. & LAB. REL. REV.* 33 (2011).

2. A supply chain is the system that companies use to source and distribute their products and services from origin to customer usually through subcontractors and their workers. There are shifts in employment relationships as production processes and distribution of control evolve within global production networks (GPN)

the bottom levels of the subcontracted labor chains are underpaid and work in substandard conditions in violation of domestic laws while the MNCs benefit from of this global web of workers.<sup>3</sup>

In June 2016, the International Labour Organization (ILO) called for the imposition of new legal remedies for labor supply workers worldwide.<sup>4</sup> Of course, Chinese labor laws and legal institutions should also seek to protect Chinese workers. However, the current reality is that some Chinese workers in the labor supply chain are not effectively protected.

The International Trade Union Confederation (ITUC) reported in 2016 that “60 per cent of global trade in the real economy is dependent on the supply chains of our major corporations” and “[the global supply chains of 50 companies] only employ six per cent of people in a direct employment relationship.”<sup>5</sup> The ITUC notes these companies have

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using multiple companies, including in overseas locations. Companies linked through GPNs are related through various legal forms, with exchanges between firms structured so that transnational corporations (TNCs) do not legally own overseas subsidiaries or franchisees but only outsource production to them, thus shifting legal responsibilities to the suppliers.

This production structure allows brands and retailers to drive coordinated production of goods by capitalizing upon new technology, relaxed regulatory frameworks and a supply of low wage labour in developing countries. While brands and retailers do not carry out production, they drive sourcing and production patterns overseas. This production model has been characterized as a buyer-driven value chain.

INT’L TRADE UNION CONFED., *PRECARIOUS WORK IN THE GAP GLOBAL VALUE CHAIN 15* (2016).

3. U.N. CONFERENCE ON TRADE AND DEV., *WORLD INVESTMENT REPORT 2013: GLOBAL VALUE CHAINS: INVESTMENT AND TRADE FOR DEVELOPMENT 122* (2013):

About 60 per cent of global trade, which today amounts to more than \$20 trillion, consists of trade in intermediate goods and services that are incorporated at various stages in the production process of goods and services for final consumption. The fragmentation of production processes and the international dispersion of tasks and activities within them have led to the emergence of borderless production systems—which may be sequential chains or complex networks and which may be global, regional or span only two countries. These systems are commonly referred to as global value chains (GVCs).

4. Int’l Labour Org. [ILO], *Fourth Item on the Agenda: Decent Work in Global Supply Chains*, ILC105-PR14-1-En (June 9, 2016), [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---relconf/documents/meetingdocument/wcms\\_489115.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_489115.pdf) [<https://perma.cc/78VN-4UTW>] [hereinafter *Decent Work in Supply Chains*]. The UN Guiding Principles on Business and Human Rights (UNGPs) (Guiding Principle 2) underscores this need, stating all “States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights through-out their operations.” This includes workers’ rights in the supply chain. Int’l Trade Union Confed., *Global Supply Chains and Decent Work: Trade Union Input to the G7*, ITUC (Mar. 15, 2015), [http://www.ituc-csi.org/IMG/pdf/tu\\_paper\\_for\\_g7\\_2015.pdf](http://www.ituc-csi.org/IMG/pdf/tu_paper_for_g7_2015.pdf) [<https://perma.cc/F6GX-M7K7>] [hereinafter Int’l Trade Union Confed., *Global Supply Chains*].

5. INT’L TRADE UNION CONFED., *SCANDAL: INSIDE THE GLOBAL SUPPLY CHAINS OF 50 TOP COMPANIES 4* (2016).

“combined revenue of \$3.4 trillion and the power to reduce inequality. Instead they have built a business model on a massive hidden workforce of 116 million people.”<sup>6</sup> The ITUC thus accuses the MNCs of corporate greed in denying or ignoring workers’ demands for a minimum wage. A core demand from workers at ILO’s 2016 “general discussion” on decent work in global supply chains was that the conference agrees on the “need to develop a legal standard which would include requirements that governments hold companies based in their countries legally accountable for treatment of their whole supply chain workforce, and to mandate ‘due diligence’ by companies throughout their supply chains.”<sup>7</sup>

This raises the issue: Who has and who should have legal responsibility over the wages and welfare of the subcontracted labor supply chain workers—the MNC or the subcontractor-employers who employ them? Is there any justification for these beneficiaries of the labor supply chain economies that operate as interrelated “enterprises” to have responsibility over their suppliers and the wages and benefits of the workers who labor for them?<sup>8</sup> Could there be joint employment and/or joint liability?

Under developing legal theories of joint employers and joint liability, MNCs and their suppliers could be held accountable.<sup>9</sup> Emerging

6. INT’L TRADE UNION CONFED., *New ITUC Report Exposes Hidden Workforce of 116 Million in Global Supply Chains of Fifty Companies* (Jan. 18, 2016), <https://www.ituc-csi.org/new-ituc-report-exposes-hidden> [<https://perma.cc/8XTV-7VBH>].

7. *ILO Supply Chains Debate a Test for Tackling Poverty*, INT’L TRADE UNION CONFED. (May 30, 2016), <http://www.ituc-csi.org/ilo-supply-chains-debate-a-test> [<https://perma.cc/ZB8U-5NC3>].

8. The author recognizes this obligation may apply differently to labor supply chains not configured as an “enterprise,” but as a “search engine” buying from different suppliers on an opportunistic basis. And, there are arguments that besides the issue of responsibility, there are strong arguments to support offshoring. Offshoring brings substantial benefits to the global economy, and the lion’s share will likely go to the U.S. economy.” MCKINSEY GLOBAL INSTITUTE, *OFFSHORING: IS IT A WIN-WIN GAME?* 15 (2003).

9. For an argument for joint liability, see JENNIFER GORDON, INT’L LAB. ORG., *GLOBAL LABOUR RECRUITMENT IN A SUPPLY CHAIN CONTEXT I* (2015). An argument for joint liability is made as follows:

It is the firm at the top of the chain that makes the decision to structure its enterprise through subcontracting relationships, usually because such a structure allows the firm to lower its costs and risks. These savings are largely the result of the firm’s transfer of risk and legal liability for employment to its subcontractors, the lower wages and costs it achieves by putting jobs out to bid, and its release from obligations to pay benefits. At the same time, the firm retains functional control over the key aspects of work it has contracted out to other companies, because it has the power to dictate their processes and fire them if they fail to meet its standards. Where control flows down the product/service supply chain from the firm at the top, and financial benefit flows up to it, the argument goes, some form of liability for the payment and treatment of the workers who make the profits possible should follow. . . . The justification for applying this approach to the labour supply chain . . . [is that] when an employer decides to outsource its recruitment function, it reduces its costs while retaining functional control. [The MNC] has the power to correct the

global developments show some acceptance of joint liability at the domestic level,<sup>10</sup> and this Article explores whether joint liability is also a possibility under Chinese law, particularly in dealing with the foreign global labor supply chains operating in China.

This Article focuses on China especially, as China continues to be a top global supply chain partner with global trade in the trillions of dollars, and China is predicted to emerge as the world's largest economy between 2020 and 2030.<sup>11</sup>

China is already the world's largest manufacturer, accounting for nearly a quarter of global value added in this sector. . . . Even though some production is moving to countries nearer its consumers, China remains at the heart of a network known as Factory Asia. It has an excellent infrastructure and an enormous, hard-working and skilled workforce. Though wages are rising, its labour productivity is far higher than that of India, Vietnam and other rivals, and is forecast to keep growing at 6-7% a year to 2025.<sup>12</sup>

And yet, as wages in manufacturing increase, a possible labor shortage looms. With China's working-age population declining from 900 to 700 million, and with its "Made in China 2025" policy of introducing robotization into the manufacturing industries, the impact on labor and labor supply chains will be dramatic.<sup>13</sup> Terry Gou, head of Foxconn,

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problems in its recruitment chain by changing recruiters or demanding more of its current one, and by paying more to cover the actual price of its decisions.

*Id.* at 19–20.

10. Because these fissured work arrangements "often convolute chains of ownership and cloud lines of accountability" in Australia, it is asserted that the government is looking beyond the traditional focus of liability of the contractual employer and piercing the corporate veil to find liability. Tess Hardy & John Howe, *Chain Reaction: A Strategic Approach to Addressing Employment non-Compliance in Complex Supply Chains*, 57 J. INDUS. REL. 563, 565–66 (2015).

11. Amita Jhangiani & Carl Stocking, *China: Top Global Supply Chain Partner*, CHINA BUS. REV., Sept.–Oct. 2006, at 78.

12. *Still Made in China*, ECONOMIST (Sept. 12, 2015), <http://www.economist.com/news/special-report/21663332-chinese-manufacturing-remains-second-none-still-made-china> [<https://perma.cc/NFS7-XUG5>].

13. "According to the International Federation of Robotics, China will have more installed manufacturing robots than any other country by 2017, and is expected to deploy some 150,000 annually by 2018, more than three times the 44,000 robots projected in the North American market that year." *Supply Chain News: Now, Labor Shortage Is Issue in China, as Global Manufacturing Trends Likely to See Major Shifts in Coming Years*, SUPPLY CHAIN DIG. (Nov. 30, 2015), <http://www.scdigest.com/ontarget/15-11-30-1.php?cid=9980&ctype=content> [<https://perma.cc/H7UV-WVAK>]. One prediction suggests that man may come to assist robots rather than the opposite.

When thinking about the future of global supply chains, it is worth speculating on truly revolutionary technological developments. One such possible development concerns Computer Integrated Manufacturing (CIM). This has already produced a tectonic shift in manufacturing in high-wage nations—moving from a situation where machines helped workers make things to a situation where workers help machines make things. Perhaps manufacturing will be called "compufacturing in the future."

claims that “within five years the 30% of [Foxconn’s] labor force doing the most tedious work will be replaced by robots, releasing them to do something more valuable.”<sup>14</sup>

For China and the companies that source from China, these changes threaten the traditional manufacturing model. Kathy Chu and Bob Davis of the Wall Street Journal recently wrote,

Over the coming decades, a labor shortage will force Western brands to remake their China operations or pack up and leave. The changes will mark a new chapter in the history of globalization, where automation is king, nearness to market is crucial and the lives of workers and consumers around the world are once again scrambled.<sup>15</sup>

While it is unclear whether a labor shortage and the impact of robotization and digitalization will offset rising wages and displace the need for large numbers of cheaply paid workers in the manufacturing processes, one thing is certain: There will be a reconfiguration in many of the traditional labor supply chains that have labor and economic issues yet to be sorted out.<sup>16</sup>

This Article therefore focuses on the extent to which this and other legislative approaches might be possible in China. Part I discusses global approaches directed at remedying labor violations in MNC labor supply chains both domestically and internationally. Part II describes labor supply chains in China, China’s current joint liability standards, and China’s guidelines for its overseas mining operations. Part III analyzes the remedies possible in China to protect labor supply chain workers and

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Richard Baldwin, *Global Value Chains in a Changing World*, in GLOBAL SUPPLY CHAINS: WHY THEY EMERGED, WHY THEY MATTER, AND WHERE THEY ARE GOING 13, 46 (Deborah K. Elms & Patrick Low eds., 2013) (citations omitted).

14. *Still Made in China*, *supra* note 12:

Kirk Yang of Barclays Bank, believes the manufacturing sector is moving from “Made in China” to “Made by China.” In the 1980s and 1990s most factories were owned by firms from Taiwan (like Foxconn) or the West (like Flex). Increasingly, he predicts, the sector will be run by Chinese firms.

15. Kathy Chu & Bob Davis, *As China’s Workforce Dwindles, the World Scrambles for Alternatives*, WALL ST. J. (Nov. 23, 2015, 10:52 AM), <https://www.wsj.com/articles/as-chinas-workforce-dwindles-the-world-scrambles-for-alternatives-1448293942> [<https://perma.cc/Q728-FF56>]. *But see* SHAHID YUSUF & KAORU NABESHIMA, *CHANGING THE INDUSTRIAL GEOGRAPHY IN ASIA: THE IMPACT OF CHINA AND INDIA* (2010), *cited with approval* in Philip Schellekens, *A Changing China: Implications for Developing Countries*, 118 ECON. PREMISE, May 2013, at 1, 7:

Indeed, the concern among lower-income countries is precisely that, while China moves up the value chain and acquires new comparative advantages, it continues to encapsulate within its borders the wage-sensitive chunks of the cross-border supply chain. Thus, the fear is that China, being a vast country of multiple regions with varying endowments, is not only acquiring new comparative advantages, but also keeping its existing ones, whereby China would straddle the full span of technologies and labor intensities.

16. Mitali Das & Papa N’Diaye, Mitali Das and Papa N’Diaye, *The End of Cheap Labor*, 50 FIN. & DEV. June 2013, at 34.

the impacts on labor supply chains of the anticipated twin-force changes of automation and declining labor supply. To conclude, Part IV suggests remedial paths used in other countries that could work in China.

## I. GLOBAL MODELS OF REMEDIES FOR CHAIN WORKERS

### A. *Internally-Directed Law: Domestic Laws Protecting Supply Chain Workers of MNCs' Subcontractors*

If there is a political will to provide labor protections to the workers of subcontractors in the labor supply chains, the alternatives are many and increasing. One option is for the workers' home countries to pass and enforce protective legislation. However, domestic protective labor laws may be politically unwelcomed, since they undermine national economic goals to attract foreign investors with cheap labor and lax law enforcement. In addition, domestic protective labor laws might not be effective; even existing laws could not prevent disasters such as the Rana Plaza building collapse in Bangladesh.

The current model of many MNCs is to use a fissured configuration of contractors and workplaces in such a way as to maintain sufficient control over its subordinate operations to preserve its core brand or products, while at the same time avoiding direct responsibility and liability.<sup>17</sup> This shift of liability to the overseas chain contractors and their employees creates problems when workers down the chain work in substandard conditions, and are not paid, and local laws are not enforced.

The use of contracts to protect employers' interests is also carefully monitored and limited by the MNCs due to MNCs wanting to maintain sufficient control without. Thus, the use of non-legally-binding corporate social responsibility provisions (CSRs)<sup>18</sup> and codes of conduct contrasts with the sophisticated legally binding contractual agreements that protect intellectual property and minimize tax liabilities within the complex system of labor supply chains.<sup>19</sup>

To better protect the employees in MNC supply chains, countries could institute a joint liability regime for MNCs that exercise substantial over their supply chains. Providing for "joint employers" and "joint

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17. WEIL, *supra* note 1.

18. See Radu Mares, *The Limits of Supply Chain Responsibility: A Critical Analysis of Corporate Responsibility Instruments*, 79 NORDIC J. INT'L L. 193 (2010).

19. See Andreas Schotter & Mary Teagarden, *Protecting Intellectual Property in China*, MIT SLOAN MGMT. REV., Summer 2014, at 41; Leslie Benton, *Protecting Intellectual Property in Global Supply Chains*, WORLD ECON. FORUM (Dec. 26, 2012), <https://www.weforum.org/agenda/2012/12/protecting-intellectual-property-in-global-supply-chains> [<https://perma.cc/7ABP-3VKG>]; Ayako Hobbs, *Guest Post: Tax Issues in the Supply Chain*, GLOBAL SUPPLY CHAIN L. BLOG (April 11, 2016), <http://www.globalsupplychainlawblog.com/international/guest-post-tax-issues-in-the-supply-chain/#more-6263> [<https://perma.cc/JKW4-FEY5>]; Hau L. Lee & Pamela Passman, *What do Business Supply Chains and IP Protection Have in Common?* GUARDIAN (Aug. 5, 2014), <http://www.theguardian.com/sustainable-business/business-supply-chain-intellectual-property-ip-protection> [<https://perma.cc/H32J-VNR9>].

liability” is a legal concept that expands the employment relationship and inserts an additional responsible employer who is more likely able to pay the absent wages. This is a legal concept used in many countries and is typically implemented through legislation. For example, in the United States, the legal doctrine of joint employers with joint liability has existed for some time under varying labor laws, often by finding “actual” control of the workers by the host employer. Recent law has expanded the concept to more easily find joint liability of employers, requiring only a “potential” right to control rather than the more difficult standard of “actual” control.<sup>20</sup> This same issue, whether joint liability can similarly be found under Chinese labor or contract laws and possibly be applied to labor supply contracts, will be discussed below in Part II.

Moreover, there are models existing outside of China that expand the employment relationship by use of joint liability regulations to provide remedies for labor violations. Likewise, China could use specific legislation to make contractors jointly liable for the payment of wages by their subcontractors.

Countries such as Australia, the Netherlands, Spain, Germany, Austria, France, Norway, South Korea, and to some extent, the United States, have addressed the dilemma of substandard labor conditions and wages with specific domestic legislation mandating joint responsibility in certain sectors of their economies.<sup>21</sup> Other economically developed countries outside China, such as Australia, Norway, Germany, France, Austria, Spain, and South Korea, have directly regulated the contractor-subcontractor relationship on the domestic level, making contractors jointly liable for wages of subcontractors’ workers and sometimes even for injuries in the case of labor supply chains.<sup>22</sup>

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20. *Browning-Ferris Indus. of Cal., Inc.*, 362 NLRB No. 186 (2015); *Board Issues Decision in Browning-Ferris Industries*, NAT’L LAB. REL. BOARD (Aug. 27, 2015), <https://www.nlr.gov/news-outreach/news-story/board-issues-decision-browning-ferris-industries> [<https://perma.cc/8NFG-P6WU>]; Michael Lotito et al., *NLRB Imposes New “Indirect Control” Joint Employer Standard in Browning-Ferris*, INSIGHT (Aug. 28 2015), <https://www.littler.com/publication-press/publication/nlr-imposes-new-indirect-control-joint-employer-standard-browning> [<https://perma.cc/J826-J629>]; Michael S. Pepperman & Alexander V. Batoff, *Browning-Ferris: The NLRB Redefines Joint-Employer Status*, HR LEGALIST (Oct. 8, 2015), <http://www.hrlegalist.com/2015/10/browning-ferris-the-nlr-redefines-joint-employer-status> [<https://perma.cc/BZY3-SBLE>].

21. The Netherlands, Spain, Germany, Austria, France, Norway, and South Korea; and, the U.S. (California) have adopted some legal mechanism of joint liability between lead user companies, main contractors, and subcontractors. NAT’L EMP. LAW PROJECT, *CONTRACTED WORK POLICY OPTIONS* 51–56 (2013). Australia also has levied liability on a joint basis. *Id.* For commentary on Australia, see Hardy & Howe, *supra* note 10. See also Richard Johnstone & Andrew Stewart, *Swimming Against the Tide? Australian Labour Regulation and The Fissured Workplace*, 37 COMP. LAB. L. & POL’Y J. 55 (2015). In California, apparel brand companies are liable for payment of wages not paid by their domestic contractors. CAL. LAB. CODE § 2673.1 (West, Westlaw through 2016 Reg. Sess.).

22. NAT’L EMP’T LAW PROJECT, *supra* note 21.



Australia legislatively mandates the joint and several liability of the contractor and subcontractor for unpaid wages of the subcontractor's workers.<sup>23</sup> Norway requires the contractor to be a "guarantor" of the subcontractor's wages and overtime obligations.<sup>24</sup> German law makes the contractor liable for the failure of the subcontractor to comply with the "minimum conditions of employment," and liability arises when offenses occur through a chain of subcontractors.<sup>25</sup> In France, there is legal responsibility of the client or contractor for violations of labor laws by its subcontractor or by the subcontractors' subcontractors ("cascade subcontracting").<sup>26</sup> Austria, like Norway, makes the contractor liable as a

23. *Fair Work Act 2009* (Cth) (Austl.):

(1) Each indirectly responsible entity (or the indirectly responsible entity, if there is only one) is liable to pay the unpaid amount. . . . (3) If there are 2 or more indirectly responsible entities, those entities are jointly and severally liable for the payment of the unpaid amount. (4) Subject to subsection 789CE(1A), this section does not affect the liability of the responsible person to pay the unpaid amount.

Division 3 (Recovery of unpaid amounts) of Australia's Fair Work Act only applies to the textile, clothing, and footwear (TCF) industries. For commentary on Australia, see Hardy & Howe, *supra* note 10. See also Johnstone & Stewart, *supra* note 21.

24. Act of 4 June 1993 [General Application Act] no. 58 § 13 (Nor.):

Contractors and subcontractors that contract out work or hire employees shall be liable in the same way as an absolute guarantor for payment of wages and overtime pay pursuant to general application of regulations and accrued holiday pay, cf. the Act of 29 April 1988 No. 21 relating to Holidays, to employees of the undertakings' subcontractors.

In line with its purpose, the act applies to all workers/employers.

25. An employer is liable if a contractor commissioned by the employer, or any of that contractor's subcontractors, fail to ensure compliance with the minimum conditions of employment. Within the meaning of the law, an employer is liable if, when entering the contractual relationship with the contractor, the employer passes on or fulfills a contractual obligation that already had arisen to a third party (client), or who intends to use the contractor for fulfilling a contractual obligation which will typically arise as part of that person's business model. It also applies in cases where administrative offences are committed through a chain of subcontractors. This law makes employers liable for the net wages of contracted employees in enumerated categories. Mindestlohngesetz [MiLoG] [Minimum Wage Act], Aug. 11, 2014, BGBl I at 1348, § 21, no. 2 (Ger.), [http://www.gesetze-im-internet.de/englisch\\_milog/index.html](http://www.gesetze-im-internet.de/englisch_milog/index.html) [<https://perma.cc/FM3X-XR22>]; Arbeitnehmer-Entsendegesetz [AEntG] [Posting of Workers Act], Apr. 20, 2009, BGBl I, §§ 14, 23 no. 2 (Ger.). See discussion in *Employer's Liability*, BUNDESZOLLERWALTUNG [ZOLL] [GERMAN FEDERAL CUSTOMS SERVICE], [https://www.zoll.de/EN/Businesses/Work/Foreign-domiciled-employers-posting/Minimum-conditions-of-employment/Employers-liability/employers-liability\\_node.html](https://www.zoll.de/EN/Businesses/Work/Foreign-domiciled-employers-posting/Minimum-conditions-of-employment/Employers-liability/employers-liability_node.html).

26. Loi 2014-790 du 10 juillet 2014 [Law 2014-790 of July 10, 2014 on the reinforced regulations on subcontracting under labor law] JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], July 11, 2014. The law reinforces these provisions, particularly by reinforcing the responsibility of the client or contractor in case of violation of labor laws by their subcontractors or subcontractors' subcontractors. The law "specifies the obligations of employers established outside France who post workers in France." *Posting of Workers*, EUR. LAB. L. NETWORK, [http://www.labourlawnetwork.eu/national%3Cbr%3ELabour\\_law/national\\_legislation/legislative\\_developments/prm/109/v\\_\\_detail/id\\_5645/category\\_12/index.html](http://www.labourlawnetwork.eu/national%3Cbr%3ELabour_law/national_legislation/legislative_developments/prm/109/v__detail/id_5645/category_12/index.html) [<https://perma.cc/VQR7-RQRJ>]. Employers' obligations "include prior declaration

“guarantor.”<sup>27</sup> Spain goes further, with legislation stating that the main employer shall be jointly liable to their workers for the salary obligations assumed by the contractors and subcontractors.<sup>28</sup> In South Korea, the law that applies to employers of construction workers makes the contractors jointly and severally liable for the subcontractor’s unpaid wages.<sup>29</sup>

of the planned posting, appointment of a representative in France and maintenance of documents to be presented in case of inspection.” *Id.* The law also specifies when the contractor is responsible for failing to fulfill the above obligations and when contractors incur sanctions for violating those obligations. *Id.* The law also defines the duty of care and the responsibilities of the main contractor, key subcontractors, and co-contractors. *Id.*

Decree No. 2015-364, published in the Official Journal on 31 March 2015 (page 5872) applies the provisions of Law No. 2014-790 of 10 July 2014 to fight unfair competition and to transpose Directive 2014/67/EU of the European Parliament and the Council of 15 May 2014 related to the transposition of Directive 96/71/EC concerning the posting of workers.

*Id.*

27. ARBEITSVERTRAGSRECHT-ANPASSUNGSGESETZ [AVRAG] [EMPLOYMENT CONTRACT LAW ADAPTATION ACT] BGBl I, No. 459/1993, § 7 (c)(2) (2011) (Austria):

(1) Anyone who, within the scope of his/her entrepreneurial activities, subcontracts at least part of the work he/she shall perform under a project to a different entrepreneur (subcontractor) . . . shall be a general contractor. (2) If the general contractor has subcontracted a project or part of a project in a way that is unlawful . . . he/she shall, pursuant to Section 1355 of the General Civil Code (Allgemeines Bürgerliches Gesetzbuch; ABGB), be liable as guarantor for the remuneration entitlements determined by law, ordinance or collective agreement for the workers employed by the subcontractor to carry out the work and to which they are entitled within the scope of the agreed performance of work. The same shall apply if a subcontractor unlawfully subcontracts a project or part of a project. (3) Pursuant to Section 1356 ABGB, the general contractor shall be liable as deficiency guarantor for entitlements to the remuneration determined by law, ordinance or collective agreement for the workers employed by the subcontractor to carry out work at construction sites. . . .

28. Workers’ Statute art. 42 (2) (B.O.E. 1995, 75) (Spain):

The main employer shall jointly respond for the salary obligations assumed by the contractors and subcontractors with their workers and those referring to Social Security during the period of validity of such contract during the year following the termination of his/her job order, unless the interval previously set forth with respect to Social Security has elapsed.

*See also* Workers’ Statute art. 1 (4) (B.O.E. 1995, 75) (Spain):

Spanish [labor] law shall be applicable to the work rendered by Spanish workers contracted in Spain at the service of Spanish companies abroad, without restriction to the public regulations that may be applicable to the workplace. Said workers shall enjoy at least the economic rights that would correspond to them had they been working in Spanish territory.

29. This Act only applies to construction workers/employers.

If a project in the construction industry is carried out through two or more tiers of contracts under subparagraph 11 of Article 2 of the Framework Act on the Construction Industry (hereinafter referred to as “construction contracts”) and its subcontractor who is not a constructor under subparagraph 7 of Article 2 of the same Act fails to pay wages (limited to

Finally, in the United States, California has a statute making certain that contractors in the apparel industry are jointly liable for the wages of their subcontractors.<sup>30</sup>

Other labor laws may have legal mechanisms to protect chain workers the same way they protect all workers. For example, in the United States, the Fair Labor Standards Act (FLSA) seeks to deter wage and hour violations of workers in a chain of operation with a “hot cargo” provision that permits the Department of Labor to enjoin the transportation, shipment, delivery, or sale across state lines of goods produced by any employee who has not been paid minimum wage or overtime in an accordance with the FLSA.<sup>31</sup>

Contracts, like legislation, can also expand liability. For example, collective bargaining agreements can secure joint liability. Such agreements, referred to as “jobbers” agreements, were common in the early 1900s garment industry in New York, where joint liability was negotiated among outsourcing companies and their contractors and unions in order to counter the declining wages and working conditions of the garment workers.<sup>32</sup> The “jobbers” agreements are similar to the modern-day

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wages incurred for the construction work concerned) to a worker it has employed, the immediate upper tier contractor shall take responsibility for paying wages to the worker employed by the subcontractor, jointly with the subcontractor.

The Labor Standards Act, Act. No. 5309, Mar. 13, 1997, art. 44-2 (S. Kor.), *translated* in MINISTRY OF EMPLOYMENT AND LAB., REPUBLIC OF KOREA, LABOR LAWS OF KOREA 450 (2014).

30. In California, apparel brand companies are liable for payment of wages not paid by their domestic contractors. CAL. LAB. CODE § 2673.1 (West, Westlaw through 2016 Reg. Sess.). See also, Hina Shah, *Broadening Low-Wage Workers' Access to Justice: Guaranteeing Unpaid Wages in Targeted Industries*, 28 HOFSTRA LAB. & EMP. L.J. 19 (2010) (citing CAL. LAB. CODE § 26731.1 as evidence that California enacted a wage guarantee system in the garment industry). A small inroad on the ability of contractors to shift liability down the chain in the construction industry is found in CAL. CIV. CODE § 2782(a) (West, Westlaw through 2011 legislation). Since 2013, under California law, provisions in construction contracts whereby a downstream contractor or subcontractor indemnifies an owner or upstream contractor against liability caused by the upstream indemnitee’s “sole negligence or willful misconduct” are unenforceable. CAL. CIV. CODE § 2782(a) (West, Westlaw through 2011 legislation). Thus, the attempted shift of liability from up the chain to down the chain is barred with the upstream contractor/owner’s liability limited to only sole negligence or willful misconduct. John R. Heisse, Robert A. James & Chris R. Rodriguez, *Shifting of Liability Nixed by New California Contractor’s Law*, PILLSBURY L. (Oct. 19, 2011), <http://www.pillsburylaw.com/publications/shifting-of-liability-nixed-by-new-california-contractors-law> [<https://perma.cc/KHH9-7NPC>].

31. Fair Labor Standards Act of 1938, 29 U.S.C.A. § 215(a)(1) (Westlaw through Pub. L. No. 114-318 to 114-327). For jurisdictional purposes, perhaps there could be a minimum dollar threshold like the \$100 million threshold in California’s Transparency in Supply Chains Act. CAL. CIV. CODE § 1714.43 (2013).

32. See Mark Anner et al., *Toward Joint Liability in Global Supply Chains: Addressing the Root Causes of Labor Violations in International Subcontracting Networks*, 35 COMP. LAB. L. & POL’Y J. 1, 3–4, 24–25 (2013) [hereinafter Anner et al., *Toward Joint Liability*], for an excellent discussion of a broad array of approaches to find joint

version of collective bargaining provisions or international framework agreements used to negotiate joint liability.<sup>33</sup>

Another approach used to promote better labor practices is for the MNC to, voluntarily or by legislative mandate, require contractor suppliers in the chain to provide a payment bond that guarantees payment of required labor law obligations by the contractor to its workers and the subcontractors' workers.<sup>34</sup> A related protection, common in most of the United States, is to have mechanics lien legislation to prevent workers from not being paid by the contractor, wherein the worker would have a property interest in the goods worked on until paid.<sup>35</sup> Ensuring payment

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liability in global supply chains). *See also*, Mark Anner et al., *Buyer Power, Pricing Practices, and Labor Outcomes in Global Supply Chains* (Univ. of Colo. at Boulder, Inst. of Behav. Sci., Institutions Program Working Paper Series, Paper No. 2012-11, 2012), <http://www.colorado.edu/ibs/pubs/pec/inst2012-0011.pdf> [<https://perma.cc/F2E5-2YFT>].

33. *See* Sarah Coleman, *Enforcing International Framework Agreements in U.S. Courts*, 41 COLUM. HUM. RTS. L. REV. 601 (2010), Rudiger Krause, *Session IV: Enforcing European Corporate Commitments to Freedom of Association by Legal and Industrial Action: The European Perspective: International Framework Agreements as Instrument[s] for the Legal Enforcement of Freedom of Association and Collective Bargaining? The German Case*, 33 COMP. LAB. L. & POL'Y J. 749 (2012). Felix Hadwiger, *Global Framework Agreements: Achieving Decent Work in Global Supply Chains*, 7 INT'L J. LAB. RES. 75 (2015).

34. *See* Ronald C. Brown, *FTAs that Also Protect Workers: Expanding the Reach of Social Dimension Provisions on Labor to Promote, Compel, and Implement ILO Core Labor Standards*, in EMPLOYMENT RELATIONS AND TRANSFORMATION OF THE ENTERPRISE IN THE GLOBAL ECONOMY 109 (Ales et al. eds., 2016) [hereinafter Brown, *FTAs that Protect Workers*]. In California, apparel brand companies are liable for payment of wages not paid by their domestic contractors. CAL. LAB. CODE § 2673.1 (West, Westlaw through 2016 Reg. Sess.). *See also* Liability of Manufacturers and Contractors, N.Y. LAB. L. § 345-A (2014).

35. A mechanic's lien is a security interest in the title to property for the benefit of those who have supplied labor or materials that improve the property. The lien exists for both real property and personal property. More specifically, a mechanic's lien is

A security interest that may be acquired in property by someone who spends material or labor working on that property. A mechanic's lien usually stays in effect until the lien holder gets paid for services provided. The failure to pay for services as agreed may allow the lien holder to keep possession of the property involved. . . . To prevent confusion, other names may be used for the same concept (e.g., construction lien, laborer's lien, artisan's lien, supplier's lien, garageman's lien, materialman's lien, and design professional's lien).

*Mechanic's Lien*, LEGAL INFO. INST., CORNELL U. L. SCH., [https://www.law.cornell.edu/wex/mechanics\\_lien](https://www.law.cornell.edu/wex/mechanics_lien) [<https://perma.cc/BJ83-8RYZ>].

One expert suggests the difference in the U.S. generally, as follows.

If you're unpaid on a state, county, municipal, government or federal construction project you're allowed to file a bond claim, and not a mechanics lien claim against the project's bond. . . . Even when a payment bond is placed on a private construction project, your *right* to file a mechanics lien claim is usually still in-tact. The only difference is that the lien will get "bonded off" soon after you file.

Scott Wolfe Jr., *Mechanics Lien Claim or Bond Claim? Which Should You File?*,

of laborers and improving their treatment can therefore be a normal and socially responsible cost of business as well as a “fulfillment of promises” beyond the often illusory CSRs and Codes of Conduct.

B. *Externally-Directed Law: Foreign Laws Affecting MNCs’ Overseas Operations*

A country can also regulate a domiciled MNC’s domestic and overseas activities. Recent domestic regulations in the United States have affected MNCs’ overseas joint responsibilities under various statutes operating at the domestic level.<sup>36</sup> Some labor laws affecting or potentially affecting overseas labor activities have mandated the reporting of the names of overseas subcontractors used by MNCs and have banned foreign importation of goods produced by prison, child, or slave labor.<sup>37</sup> There is also the possibility of using domestic laws with extra-territorial application, such as the Foreign Corrupt Practices Act (FCPA) and certain civil rights laws,<sup>38</sup> to directly regulate overseas MNCs’ activities.<sup>39</sup>

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ZLEIN (Jan. 17, 2013), <http://www.zlien.com/articles/mechanics-lien-claim-or-bond-claim-which-should-you-file> [<https://perma.cc/CFA7-EZLC>].

36. An analogous approach of using domestic legislation in the areas outside of labor, except where it might overlap with human rights issues, has been described as follows:

Domestic supply chain-related regulation is an avenue by which home states can potentially set environmental and human rights-related norms for third-party suppliers and their host governments via multinational companies. These regulations not only affect companies; they also serve as an alternative to international law for shaping the behavior of host governments. Under pressure from third-party suppliers, developing countries may pass legislation and strengthen their rule of law in order to prevent global companies from shifting their supply chains to other regions.

Galit A. Sarfaty, *Shining Light on Global Supply Chains*, 56 HARV. INT’L L.J. 419, 420 (2015).

37. The California Transparency in Supply Chains Act of 2010, CAL. CIV. CODE § 1714.43 (2013), for example, requires companies to disclose what efforts and auditing procedures they conduct to prevent human trafficking in supply chains.

38. *See, e.g.*, The Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended in scattered sections of 15 U.S.C.); the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074 (codified at 42 U.S.C. § 2000e-2(k) (2006)); and the Americans with Disabilities Act, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101-12213 (2006 & Supp. V 2011)) (“ADA”). *See* U.S. Equal Emp. Opportunity Comm’n, Opinion Letter on Enforcement Guidance on Application of Title VII and the Americans with Disabilities Act to Conduct Overseas and to Foreign Employers Discriminating in the United States (Oct. 20, 1993), <https://www.eeoc.gov/policy/docs/extraterritorial-vii-ada.html> [<https://perma.cc/DG2M-R92J>] [hereinafter EEOC, Enforcement Guidance].

39. *See* Sarfaty, *supra* note 36, at 420. The EU has been critical of the U.S. use of extraterritorial legislation. Professor Scott examines the global reach of EU law in the context of the use of global regulatory power. While the enactment of extraterritorial legislation by the EU is extremely rare, the author states that the EU may use it to “to galvanize third country or global action to tackle transboundary problems and to pursue objectives that have been internationally agreed upon.” Joanne Scott, *Extra-territoriality and Territorial Extension in EU Law*, 62 AM. J. OF COMP. L. 87, 87 (2013).

More recently, in 2015, the United States Government took a lead in regulating specific areas of supply chains of federal contractors.<sup>40</sup> Government contractors are now being asked to effectively police their supply chains in order to address, among other risks, counterfeit parts, human trafficking, business ethics, and cyber threats. The rule that seeks to eliminate human trafficking mandates the creation of procedures to effectively address the trafficking risk through monitoring the supply chain.<sup>41</sup> Prime contractors are primarily responsible for conducting adequate due diligence on potential suppliers and for the award and administration of subcontracts in support of the prime contract, and penalties for supply chain violations include the exclusion of contractors from government contracting.<sup>42</sup> Perhaps a similar legal standard of due diligence could be created for ensuring the payment of wages to the workers of subcontractors.<sup>43</sup>

The California Transparency in Supply Chains Act, beginning in January 2012, requires certain companies to report on their specific actions to eradicate slavery and human trafficking in their supply chains<sup>44</sup>:

Aimed at mid-size and large retailers and manufacturing companies with worldwide annual revenues of \$100 million or more, the law's chief goal is to ensure companies provide consumers with information that enables them to understand which ones manage their

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The International Trade Union Confederation (ITUC) made arguments in a recent meeting of G-7 leaders that the issue should be addressed by legislation at the home and destination of the MNC. Int'l Trade Union Confed., *Global Supply Chains*, *supra* note 4.

40. Defense Federal Acquisition Regulation Supplement: Requirements Relating to Supply Chain Risk (DFARS Case 2012-D050), 56 Fed. Reg. 210 (Oct. 30, 2015) (to be codified at 48 C.F.R. pts. 202, 208, 212–15, 233, 239, 244, 252). Effective March 2, 2015, the new mandates come from the just-released Federal Acquisition Regulation provisions that stem from the September 25, 2012, Executive Order 13627, "Strengthening Protections Against Trafficking in Persons in Federal Contracts." Cynthia L. Cordes, *U.S. Government Requires All Companies with a Federal Contract to Comply with Stringent New Human Trafficking Regulations*, HUSCH BLACKWELL (Mar. 17, 2015), <http://www.huschblackwell.com/businessinsights/us-government-requires-all-companies-with-a-federal-contract-to-comply-with-stringent-new-human-trafficking-regulations> [https://perma.cc/UM5Y-G653].

41. The federal government now requires all companies with a government contract for supplies or services obtained outside the United States with a value over \$500,000 to comply with newly-enacted human trafficking regulations. "These regulations impact over 300,000 contractors nationwide and countless subcontractors. Companies and prime contractors are now on the hook to take responsibility for their subcontractors and independent agents. The era of getting by without knowledge of how, or by what means, subcontractors obtain labor is over." Cordes, *supra* note 40.

42. THE GOVERNMENT CONTRACTOR SUPPLY CHAIN TOOLKIT, STEPTOE & JOHNSON LLP 1, 7 (2016).

43. See *Human Rights in Supply Chains: A Call for a Binding Global Standard on Due Diligence*, HUMAN RIGHTS WATCH (May 30, 2016), <https://www.hrw.org/report/2016/05/30/human-rights-supply-chains/call-binding-global-standard-due-diligence> [https://perma.cc/B99Y-P8SU].

44. California Transparency in Supply Chains Act of 2010; CAL. CIV. CODE § 1714.43(a)(1) (West, Westlaw through 2017 legislation).

supply chains responsibly. . . . Specifically, the law requires a company to disclose on its website its initiatives to eradicate slavery and human trafficking from its direct supply chain for the goods offered for sale. A company must disclose to what extent it: (1) engages in verification of product supply chains to evaluate and address risks of human trafficking and slavery; (2) conducts audits of suppliers; (3) requires direct supplies [sic] to certify that materials incorporated into the product comply with the laws regarding slavery and human trafficking of the countries in which they are doing business; (4) maintains accountability standards and procedures for employees or contractors that fail to meet company standards regarding slavery and human trafficking; and (5) provides employees and management training on slavery and human trafficking.<sup>45</sup>

Another related legal concept put forward is to expand tort liability to MNCs for overseas workplace harms that occur under the operations of their outsourced contractors.<sup>46</sup>

To China's credit, in 2015 it initiated voluntary, non-legally-binding extra-territorial labor requirements for its overseas companies and their chain suppliers for treatment of workers, specifically within the mining industry. The guidelines were promulgated in *Guidelines for Social Responsibility in Outbound Mining Investments* and they call for due diligence in maintaining a global mining supply chain and they include standards that seek to align supply chains with ILO core labor standards on value chain management, human rights, labor issues, and occupational health and safety.<sup>47</sup>

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45. *California Transparency in Supply Chains Act of 2010*, Bureau of Int'l Lab. Aff., U.S. DEP'T OF LAB., <https://www.dol.gov/ilab/child-forced-labor/California-Transparency-in-Supply-Chains-Act.htm> [<https://perma.cc/7DK4-XDN2>]. It is estimated that the reporting requirement will impact about 3,200 companies headquartered in California or doing business in the state. See also VERITÉ, COMPLIANCE IS NOT ENOUGH: BEST PRACTICES IN RESPONDING TO THE CALIFORNIA TRANSPARENCY IN SUPPLY CHAINS ACT 3 (2011). For suggestions on how investors can go beyond mere compliance, see *Effective Supply Chain Accountability: Investor Guidance on Implementation of The California Transparency in Supply Chains Act and Beyond*, INTERFAITH CTR. ON CORP. RESP. (Nov. 2011), <http://www.iccr.org/sites/default/files/2011SupplyChainGuide.pdf> [<https://perma.cc/82D3-63YD>].

46. Naima Farrell, Note, *Accountability for Outsourced Torts: Expanding Brands' Duty of Care for Workplace Harms Committed Abroad*, 44 GEO. J. INT'L L. 1491 (2013). The note

proposes a limited expansion of the current U.S. employment-based liability regime to hold multinational firms, or "brands," to a duty of reasonable care to prevent violations of core labor standards throughout their global supply chains. Under this framework, a brand that purchased goods or services that were produced in violation of certain fundamental labor standards would be liable if the brand had notice of the violations, had power to deter them, and failed to take reasonable steps to do so.

*Id.* at 1494. There was a contrary holding in the Ninth Circuit where the Ninth Circuit denied negligence claims by foreign workers against a Wal-Mart for labor violations committed by foreign contractors. *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 684 (9th Cir. 2009).

47. It is reported that "Chinese outbound investment has been rapidly

C. *International Obligations Under ILO Standards, Free Trade Agreements, and OECD Guidelines*

While the author acknowledges and urges the use of obligations in free trade agreements, OECD Guidelines, and ILO labor standards, these approaches and remedies are supplemental and beyond the intended scope of this paper.<sup>48</sup>

II. FINDING CHINA'S LEGAL STANDARD FOR MNC RESPONSIBILITY

A. *China and Labor Supply Chains*

Global supply chains have transformed the world. They revolutionized development options facing poor nations; now they can join supply chains rather than having to invest decades in building their own. The offshoring of labor-intensive manufacturing stages and the attendant international mobility of technology launched era-defining growth in emerging markets, a change that fosters and is fostered by domestic policy reform. This reversal of fortunes constitutes perhaps the most momentous global economic change in the last 100 years. Global supply chains, however, are themselves rapidly evolving.<sup>49</sup>

However, in the wake of these developments, too many subcontracted workers in the domestic labor pools of the labor supply chain are underpaid and work in substandard working conditions.<sup>50</sup> Alleged

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increasing to over \$100 billion in 2013. The extractive sector, claimed \$24.8 billion in 2013, dominates Chinese outbound investment in non-service sectors." Yifan Song, *China's Resource Governance Leadership*, ESTELLE LEVIN (Jun. 10, 2015), <http://www.estellelevin.com/chinas-resource-governance-leadership> [https://perma.cc/P9FK-5RJ7]. Though the Guidelines appear to be legally non-binding, it may be an indication of China's apparent willingness to embrace ILO standards in its overseas business arrangements. The China Chamber of Commerce of Metals, Minerals, and Chemicals Importers and Exporters (CCC MC) that issued the Guidelines pledged to assist, evaluate, and report on companies' performance. *Id.* Its relationship with the Chinese government is unclear. The labor provisions can be found at CHINA CHAMBER OF COMMERCE OF METALS, MINERALS & CHEMICALS IMPORTERS & EXPORTERS, GUIDELINES FOR SOCIAL RESPONSIBILITY IN OUTBOUND MINING INVESTMENTS 33–38, [http://www.estellelevin.com/wp-content/uploads/2015/06/CCC MC\\_Guidelines\\_for\\_Social\\_Responsibility\\_in\\_Outbound\\_Mining\\_Operations\\_EN.pdf](http://www.estellelevin.com/wp-content/uploads/2015/06/CCC MC_Guidelines_for_Social_Responsibility_in_Outbound_Mining_Operations_EN.pdf) [https://perma.cc/U6F6-UXCM] [hereinafter GUIDELINES FOR SOCIAL RESPONSIBILITY].

48. For discussion, see Ronald C. Brown, *China—U.S. Implementation of ILO Standards by BITs and Pieces (FTAs)*, in *FUNDAMENTAL LABOUR RIGHTS IN CHINA—LEGAL IMPLEMENTATION AND CULTURAL LOGIC* (Ulla Liukkunen & Yifeng Chen eds., 2016); Ronald C. Brown, *Fostering Labor Rights in a Global Economy: The Efficacy of the Emergent US Model Trade and Investment Frameworks to Advance International Labor Standards in Bangladesh*, 155 INT'L LAB. REV. 50 (2016); Ronald C. Brown, *FTAs in Asia-Pacific: "Next Generation" of Social Dimension Provisions on Labor?*, 26 IND. INT'L & COMP. L. REV. 69 (2016); Brown, *FTAs that Protect Workers*, *supra* note 34; Ronald C. Brown, *Mega-Regionalism: TPP Labor Provisions: A Game Changer?* (East-West Center Workshop on Mega-Regionalism, Working Paper 2016), <http://ssrn.com/abstract=2745524> [https://perma.cc/UH9F-2RH3].

49. See Baldwin, *supra* note 13, at 13.

50. A study by Professor Bill Taylor showed labor standards "do decline down



violations of China's labor protection laws and harsh conditions by contractors in the China labor supply chains are regularly cataloged and often reported in the media, involving MNCs such as Apple and Foxconn. *China Labor Watch* in a recent study compiled areas of common violations by subcontractors, including toxic working conditions, long work hours and excessive overtime, as well as failure to pay for workers' social insurance, work injury insurance, and other insurances required by law.<sup>51</sup>

Many of the officials of the MNCs say they have been working to improve the labor conditions of the subcontracted workers through codes of conduct, corporate social responsibility, and inspections, but worker advocates argue they are ineffective and not legally binding. In 2015, Apple Inc.'s Chief Executive Tim Cook, who was instrumental in setting up its supply chain in China, reportedly said he was "outraged" by reports of unsafe working conditions at companies that make Apple products<sup>52</sup>: "We care about every worker in our worldwide supply chain [and] any accident is deeply troubling, and any issue with working conditions is cause for concern."<sup>53</sup> Cook also said the company inspects more factories every year and has made a great deal of progress and improved conditions for hundreds of thousands of workers: "We know of no one in our industry doing as much as we are, in as many places, touching as many people."<sup>54</sup>

Yet, when labor conditions remain substandard, who should be responsible? Should it be the Chinese contractors cutting corners on the labor law obligations? Or should it be the contracting party up the chain, i.e. the MNC or its Chinese contractors who may have "squeezed" the subcontractors for the lowest cost, anticipating that labor standards may have to be compromised to meet the contract? Should both have some responsibility? This article argues that contractors and subcontractors should bear joint responsibility for the treatment of workers in their supply chains.

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the hierarchy of the supply chain, and decline is relative to ownership," and that "[s]upply chain strategies, ownership form and industry are all determinants of the relationship." Bill Taylor, *Supply Chains and Labor Standards in China*, 41 PERSONNEL REV. 552, 566 (2012). His study showed the size of the subcontractor employer in the labor supply chain did not provide a determinative basis for predicting labor standard violations and he concluded "there is no uniform or single deterministic relationship between supply chains and labor standards." *Id.* at 566. See also Anner et al., *Toward Joint Liability*, *supra* note 32.

51. *Beyond Foxconn: Deplorable Working Conditions Characterize Apple's Entire Supply Chain*, CHINA LAB. WATCH (Jun. 27, 2012), <http://www.chinalaborwatch.org/report/62> [<https://perma.cc/5PXG-NM23>].

52. *Apple CEO Defends Company's Supply-Chain Labor Efforts*, PIONEER PRESS, <http://www.twincities.com/2012/01/26/apple-ceo-defends-companys-supply-chain-labor-efforts> [<https://perma.cc/VL4J-TXEY>].

53. *Id.*

54. *Id.*

B. *Legislative Joint Responsibility: Dispatch Workers and the Construction Industry*

In China, acceptance of joint responsibility as a legal concept under existing laws between contractors and subcontractors is illustrated in two sectors and arguably could be found under applications of other labor laws. Under recent legislation in China regulating the use of dispatch workers, labor violations of the workers can render either or both the user and the sender jointly liable for wages and benefits.<sup>55</sup> Likewise, in the construction industry in China, contractors and subcontractors can be held jointly liable for wages and often for workers' injuries.<sup>56</sup> A further issue to examine is whether joint liability can be found under other Chinese laws and possibly apply to labor contracts in the labor supply chain.<sup>57</sup>

In China, the new Interim Provisions on Labor Dispatch workers amending the Labor Contract Law (LCL) authorizes joint employer liability for violations by the labor dispatch service employer or the host company employer using the dispatched workers.<sup>58</sup> Any violation of the

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55. FANG L. COOKE & RONALD BROWN, INT'L LABOUR ORG. [ILO], THE REGULATION OF NON-STANDARD FORMS OF EMPLOYMENT IN CHINA, JAPAN AND THE REPUBLIC OF KOREA (2015); *see also* Ronald C. Brown, *Chinese "Workers Without Benefits,"* 15 U. RICHMOND J. GLOBAL L. & BUS. L.J. 1 (2016) [hereinafter Brown, *Workers Without Benefits*].

56. The Labor Contract Law and a construction law should render the workers of the subcontractors entitled to a labor contract and the protections of the labor laws. However, due to the use of "independent contractors" and illegal middlemen, and failure to provide required labor contracts, they most often fall outside those protections, but are covered by Contract Law; and as discussed subsequently can render the contractor up-the-chain jointly liable with the middleman-subcontractor. Brown, *Workers Without Benefits*, *supra* note 55, at 52 n.158; Contract Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 15, 1999), art. 2 (China).

57. Since China has a Civil Law legal system, the inquiry is whether there is other legislation that allows for a "joint employer responsibility" application/interpretation? The Labor Contract Law distinguishes between workers with *contracts for labor* and those with *labor contracts*, with only the latter entitled to the full protections of the labor laws and the former, as independent contractors, entitled primarily to contract claims in the courts. RONALD C. BROWN, UNDERSTANDING LABOR AND EMPLOYMENT LAW IN CHINA 30–33 (2009) [hereinafter BROWN, UNDERSTANDING LABOR AND EMPLOYMENT LAW]. *See* Dawu Hu, *The Criteria for Employment Relationship in China* 1, 4, (unpublished article), [https://www.upf.edu/documents/3298481/3410076/2013-LL-RNConf\\_Dawu.pdf/cbbdd091-9b68-40fd-a33b-e3ac4e4a164b](https://www.upf.edu/documents/3298481/3410076/2013-LL-RNConf_Dawu.pdf/cbbdd091-9b68-40fd-a33b-e3ac4e4a164b) [<https://perma.cc/D8YJ-BHL7>]. While it seems clear there are available legal doctrines to find the immediate employer of an apparent independent contractor liable for wages and possibly work injuries, there is no clear path, absent a clear showing of control, to finding employers "up the chain" liable as *joint employers*. The terms for employer vary in different labor legislation. *See* BROWN, UNDERSTANDING LABOR AND EMPLOYMENT LAW, *supra*, at 25–29. This would militate in favor of specific legislation holding those employers jointly responsible for the injuries of their subcontractors.

58. *China Interim Provisions on Labor Dispatch*, HRONE, <http://www.hrone.com/article/-China-Interim-Provisions-on-Labor-Dispatch> [<https://perma.cc/MK4Q-KZF5>]. On December 28, 2012, the Standing Committee of the National People's Congress issued the Decision on Amending the People's Republic of China Labour

LCL and the relevant interim provisions concerning labor dispatch by a labor dispatch service provider or an employer shall be dealt with in accordance with Article 92 of the LCL.<sup>59</sup> Article 92 provides that when a labor dispatch agency violates the LCL, both the host company and the dispatch agency “shall bear joint and several liability of compensation” for any damage caused to the dispatched workers.<sup>60</sup>

Joint liability is also used to regulate China’s construction industry. In this case, liability can flow up the supply chain for workers of the subcontractors to recover wages from the contractors. The subcontractors commonly contract and subcontract their work, creating further subcontracting chains with each contractor paid at a lower rate with the difference being pocketed; in the end, the workers of the last contractor are paid at the lowest rates. This is especially significant since China’s construction industry comprises a substantial part of China’s GDP and often involves many projects with long chains of contractors and subcontractors.<sup>61</sup>

These contractors, as employers, must meet the legal requirements of business and licensing down the chain. Construction laws require that the workers they hire be in a formal employment relationship, with entitlement to a labor contract as well as social security benefits and labor law protections.<sup>62</sup> However, it has become an accepted practice to break the chain of legal business contractors and insert a person or entity that lacks the required legal credentials to conduct business. This person is usually called a “baogongtou.”<sup>63</sup> The baogongtou hires workers who, because of its non-“employer” status, are not considered “employees,”

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Contract Law (effective from July 1, 2013), and in January 2014, the Ministry of Human Resources and Social Security of China issued the Interim Regulations on Labour Dispatch (effective from March 1, 2014) [hereafter Interim Regulations].

59. Labor Contract Law of the People’s Republic of China (promulgated by the Standing Comm. Nat’l People’s Cong., June 29, 2007), art. 20 (China) [hereinafter Labor Contract Law]. For discussion of newly emerging cases, see Grace Yang, *China Labor Dispatch Rules: Why Did You Ever Think It Would Be Easy?*, CHINA L. BLOG (July 18, 2016), <http://www.chinalawblog.com/2016/07/china-labor-dispatch-rules-why-did-you-ever-think-it-would-be-easy.html> [<https://perma.cc/FR6V-4Y3N>].

60. Labor Contract Law, *supra* note 59, art. 92. Likewise, Article 94 provides for joint or several liability. Where an individual that contracts for the operation of a business recruits workers in violation of the provisions of this Law, thus causing losses to the workers, the organization giving out the contract and the individual contractor shall bear joint and several liability for compensation. *Id.* art 94; see also Ka Ni Li, *Re-Conceptualizing the Notion of “Employer”: The Case of Labor Dispatch Workers in China*, 40 BROOK. J. INT’L L. 619, 633–34 (2014).

61. Pun Ngai & Lu Huilin, *A Culture of Violence: The Labor Subcontracting System and Collective Action by Construction workers in Post-Socialist China*, 64 CHINA J. 143, 144 (2010). See also Brown, *Workers Without Benefits*, *supra* note 55.

62. For an excellent and detailed exposition of the law and practices in this area, see the recent and yet unpublished dissertation of University of Cologne graduate student, Pilar Czoske, *Protection of Workers’ Rights in the Chinese Building Industry* (on file with author).

63. *Id.*

but independent contractors performing contractual employment services. As such, these workers, usually migrant workers, have only contractual claims to wages and must often go to court to enforce their rights.

Wage disputes are common in the construction industry, and many workers in the broken chains are not really sure who their employer is (other than the baogongtou who orders the work). Predictably, the upper chain contractors want the baogongtou to assume the role of the construction worker's employer in order to negate their own employer responsibilities. While a de facto employment relationship with upper level contractors could be argued to exist, it will more likely be found to be an informal relationship outside the LCL. But under provisions issued by Ministry of Labor and Social Security (MOLSS) in 2005, where the construction company has illegally sub-contracted parts of its obligations to a baogongtou, the construction company would have to "bear the employer entity responsibility for workers."<sup>64</sup> This is confirmed in Article 94 of the LCL.<sup>65</sup>

Likewise, by law in China's Guangdong province, if a baogongtou does not pay the employees' wages, "the employing entity that provides the project" has to assume the payment of wages.<sup>66</sup> The regulation states that if a construction company has failed to pay the agreed construction funds and thus causes the failure of the construction workers' wage payment, the company is liable to pay wages up to the amount that remains unpaid.<sup>67</sup>

A form of joint liability is also found in legislation regarding workers' injuries, where a worker of the subcontractor can go back up the chain to find liability.<sup>68</sup> The Ministry of Human Resources and Social

64. Guanyu Queli Laodong Guanxi Youguan Shixiang de Tongzhi (关于确立劳动关系有关事项的通知) [Notice Regarding the Relevant Points of Establishing Employment Relations], (promulgated by the Ministry of Labor and Social Security, May 25, 2005, [http://www.mohrss.gov.cn/Ldgs/LDGXzhengcefaui/LDGXzyzc/201107/t20110728\\_86296.htm](http://www.mohrss.gov.cn/Ldgs/LDGXzhengcefaui/LDGXzyzc/201107/t20110728_86296.htm) [<https://perma.cc/Y5L3-PE48>] (China). Provision 5 states that labor arbitration committees have jurisdiction over such disputed claims. *Id.*

65. Labor Contract Law, *supra* note 59, art. 94. Art. 94 of the Labor Contract Law regulates that individual contractors that are not qualified to serve as employers according to labor laws (namely the "baogongtou") has to assume a joint liability for any damages caused to the employee that was hired by the individual contractor together with the entity or company that contracted the individual contractor.

66. Art. 32 of the Regulation of Guangdong Province on the Payment of Wages further regulates that after having paid the wages, he (the liable contractor) is entitled to claim the paid sum from the 'baogongtou.' Regulation of Guangdong Province on the Payment of Wages (promulgated by the Standing Comm. Nat'l People's Cong., Jan. 19, 2005), art. 32 (China).

67. *Id.* art. 33.

68. See Supreme People's Court Provisions on Several Issues Relating to Trial of Workplace Injury Insurance Administrative Cases (adopted by the Supreme People's Court Adjudication Comm., Apr. 21, 2014), art. 3 (China): Where social insurance administrative departments find that the following work units bear workplace injury insurance responsibility, the people's courts should sustain: (2) Where employees dispatched by a labor dispatch unit are injured or killed while working at the employing

Security (MOHRSS) specifies that if an employee hired by a baogongtougou suffers a work-related injury, the construction entity that is legally qualified to officially engage employees but has outsourced its employer responsibilities to a baogongtougou must assume the liabilities under the work-related injury insurance.<sup>69</sup>

C. “Guidelines” and China’s Overseas “Good Citizen Employer”

MNCs care about their public image, as their public image affects their commercial success. Some MNCs also sincerely seek to ensure that the workers in their labor supply chains are treated well under foreign labor laws. However, although MNC-initiated internal codes of conduct and social responsibility requirements are prevalent and often reflect the external standards of the ILO or OECD, internal codes are almost always voluntary, not legally binding, and lack a real grievance mechanism.

Sometimes guidelines specify good labor and employment practices by employers operating overseas. For example, in China, the China Chamber of Commerce of Metals, Minerals, and Chemicals Importers and Exporters (CCCME) promulgated the *Guidelines for Social Responsibility in Outbound Mining Investments*, which require due diligence in its global mining supply chain, including standards that seek to align with the ILO’s core labor standards on value chain management, human rights, labor issues, and occupational health and safety.<sup>70</sup> Article 2.4, for

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work unity, the dispatching unit is the unit that bears workplace injury insurance responsibility. (3) Where an employee assigned by a unit to work in another unit is injured or dies, the assigning unit is the unit that bears workplace injury insurance responsibility. *Id.*

69. Zhixing 《Gongshang Baoxian Tiaoli》 Ruogan Wenti de Yijian (执行《工伤保险条例》若干问题的意见) [Opinions on the Implementation of the Work-Related Injury Insurance] (promulgated by the Ministry of Human Resources and Social Security, Apr. 25, 2013), at no. 7, [http://www.gov.cn/zwggk/2013-05/03/content\\_2395049.htm](http://www.gov.cn/zwggk/2013-05/03/content_2395049.htm) [<https://perma.cc/W9MW-GKSZ>] (China). China’s Tort law confirms that liability. If a worker is subjected to work-related injury, liabilities for damages caused by the accident are allocated between parties in accordance with the principle of fault liability. “If the party providing labor services causes any harm to himself as the result of the labor services, both parties shall assume corresponding liabilities according to their respective faults.” Tort Law of the People’s Republic of China (promulgated by the Standing Comm. Nat’l People’s Cong., Dec. 26, 2009, effective July 1, 2010), art. 35, para. 2, [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=182630](http://www.wipo.int/wipolex/en/text.jsp?file_id=182630) [<https://perma.cc/AE3H-6WU7>]; see Hu, *supra* note 57, at 1, 4; see generally Gongshang Baoxian Tiaoli (2010 Xiuding) (工伤保险条例(2010修订)) [Regulation on Work-Related Injury Insurance] (promulgated by St. Council of the People’s Republic of China, Apr. 27, 2003, amended Dec. 20, 2010), art. 2, CLI.2.142905(EN) (Lawinfochina).

70. Though the Guidelines appear to be legally non-binding, it may be an indication of China’s apparent willingness to embrace ILO standards in its overseas business arrangements. The China Chamber of Commerce of Metals, Minerals, and Chemicals Importers and Exporters (CCCME) that issued the Guidelines pledged to assist, evaluate, and report on companies’ performance. Song, *supra* note 47. The labor provisions can be found GUIDELINES FOR SOCIAL RESPONSIBILITY, *supra* note 47, at 33–38.

example, outlines requirements relating to “Labor Issues,”<sup>71</sup> and calls for the banning the use of child labor, providing equal employment and non-discriminative opportunity, paying minimum wages and overtime, and establishing a collective bargaining mechanism.<sup>72</sup>

The Guidelines section on “Value Chain Management” also requires not only the Chinese companies, but also the first-tier suppliers, to adhere to guidelines and enforce them in their supply chains.<sup>73</sup> Likewise, guidelines insist that chain contractors agree to a voluntary code of conduct embracing the guidelines and providing for due diligence.<sup>74</sup>

It would seem China could therefore get credit as a “good citizen employer” for specifically addressing the labor supply chains’ labor issues in this overseas sector. However, in reality, the non-binding guidelines do not differ much from other MNCs’ codes of conduct and CSR provisions in providing meaningful labor rights for the labor supply workers. Again, one wonders if a similar set of legally binding guidelines could be fashioned for foreign MNCs coming into China, obligating them as guarantors of the contractors and subcontractors in the labor supply chain to promote the payment of wages and decent working conditions, thus providing workers, especially those without labor contracts, another remedy.

### III. ANALYSIS

#### A. *What Is Workable in China? Capturing Legal Standards with Remedies*

There is a growing consciousness within China, as evidenced by its new *Guidelines for Social Responsibility in Outbound Mining Investments*, that it is good policy to not allow Chinese overseas employers to exploit workers in a foreign country. So perhaps the Chinese might consider whether it also should have improved enforcement of its own domestic laws to better protect its own supply chain workers from similar exploitation in the absence of the MNC’s home government (e.g., the U.S., EU) passing similar guidelines? Or, perhaps the Chinese government would consider initiating legislation to curb abusive labor practices involving foreign labor supply chain systems. Guidelines, though non-binding, can still attempt to direct good conduct by employers operating overseas regarding labor and employment practices. For example, in China the *Guidelines for Social Responsibility in Outbound Mining Investments*

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71. GUIDELINES FOR SOCIAL RESPONSIBILITY, *supra* note 47, at 34–36.

72. *Id.* at 36–38. It provides for grievances without retaliation, but there are no procedures. *Id.* at 38.

73. *Id.* at 33.

74. *Id.* Article 2.3.4 of the guidelines requires *due diligence* as follows: “Companies that are engaged in upstream activities of mineral development—e.g. processing, trading or sourcing from artisanal miners or cooperatives—should adopt a due diligence and internal control system to assess risks in their supply chain.” *Id.* Smaller contractors down the chain are also to regularly assess the risks of labor standard violations. *Id.* at 34.

requires due diligence within China's own global mining supply chain, including standards that seek to align domestic policies with ILO's core labor standards on value chain management, human rights, labor issues, and occupational health and safety.<sup>75</sup>

### 1. Enforcement of Chinese Labor Laws by Governments and Trade Unions

Most countries, including China, have labor and employment laws, as well as administrative agencies and courts to enforce such laws. Additionally, labor unions and worker legal clinics that detect, report, and seek to remedy labor violations could provide great assistance in enforcement efforts. Of course, enforcement is ineffective unless the national and local government is committed to making it work at every level.

On paper, workers in the labor supply chains do have rights and labor protections. In practice, there are recurring problems and legal violations in labor supply chains since unscrupulous employers at the contractor and subcontractor levels often "squeeze" the next contractor down the line to a point where there is not enough money for the workers, especially the workers from the countryside. Contractors cut corners by not entering into required labor contracts that allow application of the labor laws or by instituting substandard wage payments and workplace standards. In short, many Chinese contractors, not merely foreign contractors, are responsible for legal violations, and it is not currently clear who may hold responsibility and who can remedy it.

Certainly, however, labor law violations could be reduced by a combination of swift and consistent enforcement of laws against the violators and against employers "up the chain," including the lead contractors. In the status quo, there are governmental labor inspection agencies that could ferret out these violators and punish them as well as provide remedies to the workers.<sup>76</sup> Also, in 2017, a new legislative "penalty" was

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75. Though the Guidelines appear to be legally non-binding, it may be an indication of China's apparent willingness to embrace ILO standards in its overseas business arrangements. The China Chamber of Commerce of Metals, Minerals, and Chemicals Importers and Exporters (CCCME), which issued the Guidelines, pledged to assist, evaluate, and report on companies' performance. Song, *supra* note 47. The labor provisions can be found GUIDELINES FOR SOCIAL RESPONSIBILITY, *supra* note 47, at 33-38.

76. "On July 25, 2016, the Ministry of Human Resources and Social Security issued the *Measures for the Rating of Enterprises' Labor Security Compliance* . . . [wherein] the labor authorities will rate each company each year on [the company's] compliance with labor [and] employment law requirement[s]." *New Measures Increase Company Responsibility for Labor Unrest*, BAKER & MCKENZIE NEWSLETTER (Aug. 2016), <http://bakerxchange.com/rv/ff002a17ab229804324cf8c3454580a83d4cec3a/p=4618868> [<https://perma.cc/SG7K-KCZP>]. "[A]uthorities will gather information about compliance through routine on-site inspections, document reviews, labor complaints, etc. to determine whether the company complies with labor [laws]." *Id.* The measures provide that "a company will receive a [low] rating if the company has created labor conditions that give rise to collective unrest or other serious or negative consequences for society." *Id.* Thereafter, there will be more frequent inspections,

introduced—a “*Name and Shame*” law that publicizes labor law violators and thereby damages MNCs reputations and sales back home.<sup>77</sup> Likewise, better informed workers could alert the government agencies, and the trade unions could be at the vanguard of this protection of Chinese workers. Moreover, the imposition of joint liability and the creation of legal duties to conduct due diligence—as many countries have implemented—could help address these violations.

## 2. Domestic Regulation: Joint Liability by Statute and Insurance

One alternative, as discussed earlier, would be for China to pass legislation regulating labor supply chains within its borders. Australia and numerous other countries, for example, have passed legislation to mandate joint responsibility.<sup>78</sup> Another alternative would be to amend Article 94 of the LCL to include the MNCs’ “leading companies” inside China and hold them jointly liable for violations of labor laws by contractors in their supply chain.<sup>79</sup> In modifying the law, consideration should be given as to whether liability would be limited to wages or would also include workers’ injuries and social insurance benefits, which should be provided to similarly situated workers who had been given or should have been given a labor contract, as well as access to labor arbitration and full benefits.

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and requirements of future compliance. *Id.*

77. Dezan Shira et al., *Name and Shame: Employers’ Labor Law Violations to Be Made Public in China*, CHINA BRIEFING (Oct. 20, 2016), <http://www.china-briefing.com/news/2016/10/20/name-shame-employers-labor-law-violations-made-public.html> [<https://perma.cc/QMH7-E69M>]. “The Ministry of Human Resources and Social Security (MOHRSS) has issued provisions for labor and social security offences committed by employers to be made public.” *Id.* The law is effective January 1, 2017, and applies “to all companies operating in China that commit significant violations,” and attempts to provide a deterrent to companies who violate China’s labor regulations. *Id.*

The full name of the employer, address, social credit code or registration number, name of legal representative, details of the violation and verdict outcome will be made public by newspapers, magazines, television and other such media each quarter at county level, and twice yearly at provincial and national level. The information will also be published on the MOHRSS Administration Department’s online portal, and will be included on an employer’s integrity and legal compliance file, entered into the MOHRSS credit system, and shared with other social organizations and governmental departments.

*Id.*

78. *See supra* Part I.A.

79. Labor Contract Law, *supra* note 59, art. 94. Article 94 of the Labor Contract Law establishes that individual contractors who are not qualified to serve as employers under Chinese labor laws must assume joint liability for any damages caused to employees who the individual contractor hired. *Id.* The entity or company that contracted the individual contractor also bears joint liability for damages to employees who the individual contractor hired. *Id.*



Statutory remedies imposing joint liabilities “up the chain” on companies and contractors for non-payment of wages by subcontractors to their workers is becoming more common-place in developed countries. This joint liability is an attempt to address the global problem of companies seeking to shift legal responsibilities to entities farther down the chain in what has been described as “fissured” workplaces or labor supply chain networks. Creating “guarantor” liability would logically bring greater efforts to deter violations, especially since the publicity attached to the liability has business and reputational costs. The potential remedy of imposing liability is said to have two effects<sup>80</sup>: (1) to cause the entity up the chain to use techniques designed to ensure compliance by the subcontractor; and (2) to provide the worker wage payment relief, as promised. Still, these laws are usually applicable domestically and not extraterritorially.<sup>81</sup>

In Australia, a more innovative remedial approach is sometimes used in determining liability “up the chain.” Under its Fair Work Act (FWO), Australia uses the “strategic enforcement” model put forward by David Weil<sup>82</sup> and targets the lead company. Australia, under the FWO, legally considers the lead company an “accessory” to the violations and responsible for “sham” contracting when the lead company in the chain knows that, to meet the offered contract price, the subcontractor will likely need to shave costs by using below legal labor standards.<sup>83</sup>

Another rather simple solution would be to have the MNC, its leading company contractor, and/or its supply chain network contractors create a payment bond, voluntarily by contract or by legislative mandate, which would guarantee payment to workers for obligations due under local labor laws. These bonds are common in the United States for public projects,<sup>84</sup> and such payment bonds are available for purchase in China.<sup>85</sup> Perhaps purchasing a payment bond could be required as part of a

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80. Hardy & Howe, *supra* note 10, at 567.

81. Insurance, performance and payment bonds, etc. are common tools used and included as a cost of business to manage their risks. In the U.S., while traditionally, employment practices liability policies have excluded coverage for wage and hour claims, specialty wage and hour insurance products are now emerging as a form of added protection. Also, *see* discussion of remedies in BROWN, *FTAs that Protect Workers*, *supra* note 34, at 132–33.

82. DAVID WEIL ET AL., *IMPROVING WORKPLACE CONDITIONS THROUGH STRATEGIC ENFORCEMENT* 75–96 (2010).

83. *See* discussion in Hardy & Howe, *supra* note 10, at 583.

84. *See, e.g.*, The Illinois Public Construction Bond Act 30 Ill. Comp. Stat. 550/1 (2006). Bonds are typically obligations issued by insurance companies guaranteeing performance of contracts by contractors. Bonds are typically obligations issued by insurance companies guaranteeing performance of contracts by contractors. A *payment* bond obligates the surety to pay subcontractors, material suppliers, and laborers the amounts that the general contractor would have paid but for the general contractor’s default and/or insolvency. For further explanation of the utility of a *payment* bond, *see* Robert J. Duke, *Surety Bonds: The Best Way to Prevent Subcontractor Default*, CONSTRUCTION BUS. OWNER, July 2008, at 24.

85. Insurance companies freely advertise the usefulness and need for these

business registration so as to ensure payment of wages by means of an insurance contract.<sup>86</sup> A related protection, common in the United States, is to have mechanics lien legislation that protects workers against not being paid by the contractor by giving the worker a property interest in the goods worked on until the worker is paid. However, as discussed earlier, a mechanic's lien would dramatically disrupt the flow of encumbered

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bonds. For example, "AIG Insurance Company China Limited [formally Chartis China] provides property and casualty insurance products for customers in China. . . . The company provides business insurance solutions, such as . . . surety bonds." *Company Overview of AIG Insurance Company China Limited*, BLOOMBERG, <https://www.bloomberg.com/research/stocks/private/snapshot.asp?privcapId=35862952> [https://perma.cc/EW99-9K7C]; *The Surety Bond Market Is Growing in China*, BOND-PRO, <http://www.bond-pro.com/blog/the-surety-bond-market-is-growing-in-china> [https://perma.cc/8BFQ-2SXF] ("[A] number of insurance companies have started offering [surety bonds], and it is very much modelled towards the US surety market."). In the early 2000s, a paper was published urging use of payment bonds and other bonds in the construction industry. See Pengtao Zhang & Lixiang Wang, *Research on Construction Surety Bond Types in Land Consolidation in China* (unpublished article), at 741 <http://www.seiofbluemountain.com/upload/product/201002/1265351470x6suqqmd.pdf> [https://perma.cc/G2H9-BVVM]. As early as 2000, when China was entering the WBO, it was reported that

China is allowing foreign insurance companies to enter the domestic surety-bond business, the weekend edition of the official China Daily said Sunday. A surety bond is a three-party agreement among project owners, building contractors and insurance firms. The insurance firms are usually property and casualty insurers. The bond will guard against payment defaults as well as ensure on-time delivery by requiring the contractor to comply with its schedule. There is currently only one surety company in China, the state-owned Chang'an Surety Co., which has underwritten surety bonds for domestic construction projects in major cities such as Beijing, Shanghai and Shenzhen. "Foreign surety and insurance companies are...encouraged to cooperate with domestic surety businesses and project contractors, such as by offering reinsurance, which will distribute more widely the risks involved in a big project," the newspaper said.

*China Opens Surety-Bond Business to Foreign Insurance Companies*, WALL STREET J. (May 21, 2000, 8:11 AM), <http://www.wsj.com/articles/SB958909973161584000> [https://perma.cc/ZFX6-YNC6].

86. Failure to obtain the proper business registration including the bond would seem to trigger Art. 94 of the LCL, imposing joint liability "up the chain" with other contractors. Another legislative approach used in the U.S. is a law requiring that the wages prevailing in the area of the work must be paid to the workers. In the U.S. there is a federal law and numerous state laws requiring this so-called *prevailing wage law*, that is usually applicable to public projects. A 'prevailing wage' law regulates the wages that must be paid on a particular project. In addition, most prevailing wage laws prescribe how these rates are determined and provide sanctions and penalties against those who violate the prevailing wage law by failing to pay the applicable rate. In the United States there are in fact numerous laws which govern wage and hour requirements on public and private construction projects. "On the federal level, the Fair Labor Standards Act, 29 U.S.C. § 201 et seq., and the Davis-Bacon Act, 40 U.S.C. § 276a et seq., are the most noteworthy." John W. Rourke et al., *A Survey of Prevailing Wage Laws and Their Implications for the Surety* (unpublished article), <http://www.forcon.com/userfiles/file/nesfcc/2000/06.Rourke.pdf> [https://perma.cc/Z76T-MM4B].

goods in the labor supply chain, just as an injunction in the United States' FLSA "hot cargo" provision would.

Alternatively, business insurance<sup>87</sup> or contractual guarantor provisions, which would cover labor law violations such as unpaid wages, could be required by law. While a trade union could negotiate such a term in a collective bargaining agreement, similar to the old United States "jobbers' agreements" establishing joint liability as previously discussed, "jobbers' agreements" are not likely in China and would not necessarily result in national coverage.

Depending on the type of remedy the Chinese Government prescribes, if the remedy were not connected with a labor contract and its access to labor arbitration, a method of enforcement would need to be created and included that provided in-court enforcement, access to a required fund set up by the MNC, or some other easy and efficient remedy for the unpaid worker.

Of course, the easiest remedy is for China to be more proactive in inspecting working conditions in the subcontractors' locations, enforcing the existing labor rights of the labor supply chain workers, and expanding the definitions of "workers" under the LCL to those who were not given the required labor contracts.

### 3. Foreign Countries' Regulation of Overseas Labor Supply Workers

As discussed, there would seem to be at least two avenues to regulate domiciled MNCs doing business overseas with labor supply chains. The first is to use the extraterritorial application of home country laws to regulate the conduct of overseas home country employers and place duties on them. Domestic laws with extraterritorial application exist in the U.S. and cover a number of areas, including the safety of food<sup>88</sup> and consumer products,<sup>89</sup> corruption,<sup>90</sup> and human trafficking.<sup>91</sup> Still, the access to rights may only be afforded to U.S. citizens, under legislation

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87. "Traditionally, in the U.S., employment practices liability (EPL) policies have excluded coverage for wage and hour claims. Directors and officers (D&O) insurance also frequently excludes wage and hour claims from coverage. Specialty wage and hour insurance products are now emerging as a form of added protection." Britton D. Weimer, Webinar and Q & A: Wage and Hour Insurance Coverage: Mitigating Risk with EPL, D&O, and Emerging Specialty Wage and Hour Insurance Policies (Aug. 17, 2016); *see also*, David A. Gauntlet, Insurance Coverage for Wage and Hour Claims Under a Variety of Insurance Policies (Feb. 23, 2012) (manuscript at 16–22).

88. Food Safety Modernization Act, Pub. L. No. 111-353, 124 Stat. 3885 (2011) (codified in scattered sections of the U.S. Code).

89. Consumer Product Safety Improvement Act, 15 U.S.C. §§ 2051-2089 (2008).

90. Foreign Corrupt Practices Act (FCPA), 15 U.S.C. § 78dd-1 (1977).

91. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 112(a)(2), 114 Stat. 1464, 1486-88 (2000) (codified as amended at 18 U.S.C. § 1591 (2008)); and enhanced by President Obama in Exec. Order No. 13,627, 77 Fed. Reg. 60029 (Oct. 1, 2012) wherein federal contractors and subcontractors must contractually agree to allow compliance audits and investigations for anti-trafficking activities.

such as Title Seven of the Civil Rights Law.<sup>92</sup> But domestic laws also can go beyond that to require contractual commitments by the foreign contractors. While this new form of outsourcing supply chain regulation has worthy goals of legal conduct overseas, it has some downsides, as pointed out by Professor Sarfaty<sup>93</sup>:

Domestic regulations on supply chains pose a unique compliance challenge to companies because these laws operate extraterritorially. Multinational companies are more than just regulated entities; they now also serve as regulators themselves, imposing standards on their third-party suppliers in other countries. . . . While the outsourcing of supply chain regulations may create opportunities for states to govern firms abroad typically outside their reach, this practice raises accountability concerns. Supply chain laws transfer authority from regulators to private actors who are responsible for implementation and who may then further outsource to private consultants. Assigning private parties the role of implementing regulation is concerning given the lack of government oversight and transparency to the public.<sup>94</sup>

The second avenue for improving labor supply chain operations through domestic regulations would be to require disclosure of all the contractors and subcontractors in the chain, which would help identify the actual employers of the labor supply chain workers and expose them for further inspection by the government and non-governmental organizations. Also, MNCs operating overseas could be required to upgrade their CSRs and codes of conduct and mandate obligations and real grievance arbitration provisions already required of all MNC contractors. In addition, MNCs operating overseas could perhaps require payment bonds down the chain from all contractors and subcontractors in the labor supply chain as part of doing business up the chain.

There are many innovative remedies available to look after the workers lowest down the labor supply chain, and many remedies could be implemented to match the rhetoric of the CEOs who say they are trying their best to provide decent working conditions all the way down the chain. As indicated above, there are legal approaches already being used in many countries to provide some relief and remedies for these workers.<sup>95</sup>

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92. Civil Rights Act of 1991, Pub. L. No. 102-166, § 109, 105 Stat. 1071 (1991); Americans with Disabilities Act, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101-12213 (2006 & Supp. V 2011)) (“ADA”); see EEOC, Enforcement Guidance, *supra* note 38.

93. See Sarfaty, *supra* note 36, at 427–29.

94. *Id.* at 421, 437.

95. Professor Jennifer Gordon has assembled many of these legal theories for the ILO and has urged adoption of the joint liability approach.

Actors higher up the supply chain can be brought into a joint liability regime in different ways, as the case studies demonstrate: A law in the destination country can make employers legally and financially responsible if their recruiters violate the standards. . . . A law in the origin country can require the employer to sign a contract agreeing to joint liability for recruitment abuses before hiring workers from that country. This is

B. *Anticipating Changing Labor Supply Chains Affected by Made in China 2025's Robotization*

With declining and aging labor pools in China,<sup>96</sup> many MNCs operating their labor supply chains in China must anticipate the possible labor shortages and determine if their business will benefit from China's current push to robotize certain manufacturing industries by 2025.<sup>97</sup> While it is unclear whether the impact of robotization and digitalization will offset rising wages and displace the need for large numbers of cheaply paid workers in the manufacturing processes, one thing is certain: Many of the traditional labor supply chains, which have labor and economic issues yet to be sorted out, will need to be reconfigured.<sup>98</sup> One such reconfiguration is for MNCs to manufacture at home with "cheap-labor-robots" and eliminate the overseas manufacturing part of their supply chain.

MNCs might also relocate their labor supply chains. While some MNCs have already relocated from China to countries with lower wages such as Vietnam, some studies show Chinese workers' productivity often

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unlikely to be successful unless there is active enforcement in both the origin and destination country.

GORDON, *supra* note 9, at 45.

96. "The magnitude of change is astonishing if we consider that, as of 2010, China had a surplus of 150 million laborers. The net reduction in the nation's labor supply from 2010 to 2025, according to this study, could be close to 180 million." *How Can China Address its Looming Labor Crisis?*, FORTUNE (Feb. 6, 2013), <http://fortune.com/2013/02/06/how-can-china-address-its-coming-labor-crisis> [<https://perma.cc/6F3Z-V8CL>]. It is reported that people

between 15 and 24 are "the cheapest, most mobile and flexible in the Chinese workforce," but their numbers have been declining since 2005, a situation that has led to significant wage growth and demand outstripping supply. UN data show there were 225 million people in this age group in 2010. By 2025, the number will fall by nearly 30 percent to 164 million. And in 2050, it will shrink to 124 million. A cheap and young labor force that gave China its reputation as the manufacturing capital of the world is fast eroding. Plus, China's youth are now reluctant to take up low-paying factory jobs that come with long working hours under tough conditions.

Deirdre Wang Morris, *China's Aging Population Threatens Its Manufacturing Might*, CNBC (Oct. 24, 2012, 4:20 PM), <http://www.cnbc.com/id/49498720> [<https://perma.cc/W8QQ-NWUH>].

97. Scott Kennedy, *Made in China 2025*, Ctr. for Strategic & Int'l Stud. (Jun. 1, 2015), <https://www.csis.org/analysis/made-china-2025> [<https://perma.cc/7FRC-DKTF>].

98. "China is laying the groundwork for a robot revolution by planning to automate the work currently done by millions of low-paid workers." Will Knight, *China Wants to Replace Millions of Workers with Robots*, MIT TECH. REV. (Dec. 7, 2015), <https://www.technologyreview.com/s/544201/china-wants-to-replace-millions-of-workers-with-robots> [<https://perma.cc/ESK9-DHDQ>]. China's domestic reconfigurations are already making China manufactured products competitive with the products of the foreign MNCs. See Melissa Twigg, *China's Factory Brands: Clones or Clever Business?*, BUS. OF FASHION (July 31, 2016), <https://www.businessoffashion.com/articles/global-currents/chinas-factory-brands-clones-counterfeits-copypcats-business> [<https://perma.cc/7JSF-VPO4>].

offsets some of the perceived benefits of relocating.<sup>99</sup> With the assistance of robots and fewer workers needed for production, one might envision a re-make of the labor supply chain into a more contractually-based and controlled subcontracting system that could efficiently mobilize the necessary labor without labor strikes and low production during the holidays.

With such a reconfiguration, joint responsibility could become more acceptable as an efficient way to fix substandard treatment of workers while still permitting mass production. If joint liability is implemented, perhaps with additional requirements of payment bonds, etc., better labor conditions can be a normal and socially responsible cost of business and a “fulfillment of promises” beyond the often-illusory CSRs and codes of conduct.

### CONCLUSION

China may want to consider reforms that better protect its citizens working in the labor supply chains of MNCs. There are legal approaches for regulating the foreign entities that operate in concert with Chinese entrepreneurs while still allowing profits and promoting fair dealing. Some approaches are implemented through domestic laws in China, while other approaches use laws in the foreign MNCs’ home countries.

To underscore the depths of the problem of unprotected labor supply chain workers, the ITUC reported that ninety-four percent of the top MNC labor supply chain workers do not have a direct employment relationship with the MNC but are contracted out to shift legal responsibility to their contractors in the chain.<sup>100</sup> Moreover, in June 2016, the ILO conducted a global conference to develop legal standards that would address the needs of global labor supply chain workers, and the ILO concluded that “current ILO standards may not . . . achieve decent work [conditions] in global supply chains.”<sup>101</sup>

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99. *Still Made in China*, *supra* note 12.

100. The International Trade Union Congress (ITUC) issued a report [that] analyzed the global supply chains of fifty multinationals in U.S., Europe, and Asia including McDonalds, Wal-Mart, H&M, Samsung and Apple. Only six percent of the employees on the global supply chains of these fifty multinationals, with combined revenue of \$ 3.4 trillion, are in a direct employment relationship with the multi-national brand. And of the other 94%, many are employed as contract workers in violation of the national laws of the countries where they work. The ITUC is specifically calling on the multinational brands to accept joint responsibility for minimum living wages, health and safety, and collective bargaining.

Jennifer Rosenbaum, *Guest Post: 2016 Steps Forward on Joint Employer Liability*, ON LABOR (Feb. 2, 2016), <https://onlabor.org/2016/02/02/guest-post-2016-steps-forward-on-joint-employer-liability> [<https://perma.cc/3HL6-NRPY>]. For discussion on the elusive and changing definition of employer, see JEREMIAS PRASSL, *THE CONCEPT OF THE EMPLOYER* (2015).

101. *Decent Work in Supply Chains*, *supra* note 4, at no. 25. The UN Guiding Principles on Business and Human Rights (UNGPs) (Guiding Principle 2) underscores this need, stating “all ‘States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human

In taking action, China could require “good citizenship” and fair dealing, just as it does for its own employers in foreign lands through its *Guidelines for Social Responsibility in Outbound Mining Investments*. If that proves as ineffective as voluntary CSRs and codes of conduct, then China should mandate it for the foreign MNCs. And, if it is obvious that Chinese MNCs create the same issues in China down the labor supply chain, China should require its Chinese MNCs to adhere to good citizenship and fair dealing requirements domestically as well. MNCs supply chain workers are still victims in the same way, notwithstanding the funding source of the projects.

Additionally, China could take a politically gentle approach by incrementally requiring greater transparency and the listing of all contractors and subcontractors used in the labor supply chains. California disclosure laws, for example, require similar listing, and listing of contractors could alert local labor bureaus and help ensure that labor contracts have been issued, which would better enable the workers to use the labor arbitration system for redress of violations.

Foreign governments can also lessen the impact of exploitative MNCs that routinely outsource labor supply chain systems and use the most vulnerable workers to maximize profits by better regulating MNC’s overseas operations.

The time for reconfiguration of labor supply chains is fast-approaching. It is time for governments, Chinese and foreign, to be innovative and to remove the competitive advantage that MNCs derive from using underpaid chain workers. In the status quo, the internal self-help tools of CSRs and codes of conduct are not protecting those workers at the far end of the chain. To improve treatment of workers, MNCs must begin to share joint responsibility for the labor conditions in their supply chains, and not just share in the profits.

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rights through-out their operations.’ This includes workers’ rights in the supply chain.” *Global Supply Chains and Decent Work Trade Union Input to the G7*, INT’L TRADE UNION CONFEDERATION (Mar. 16, 2015), [http://www.ituc-csi.org/IMG/pdf/tu\\_paper\\_for\\_g7\\_2015.pdf](http://www.ituc-csi.org/IMG/pdf/tu_paper_for_g7_2015.pdf) [<https://perma.cc/V2XN-R9YR>].