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From global justice to supply chain ethics

Ioannis Kampourakis *

ABSTRACT
This article traces a transition in the aspirations of social justice on global scale. The 'welfare world' vision of global justice, as it was captured most prominently by the proposals for a New International Economic Order in the mid-1970s, is contrasted with the contemporary ambitions of 'supply chain ethics', which seek to infuse transnational corporations with social responsibilities. These visions differ drastically in their ambitions, their epistemologies, and the role they reserve for the state but share a structural outlook on issues of social justice. Following the theme of the Special Issue, the shortcomings and the potential of the current supply chain ethics agenda in addressing the 'human problems' associated with corporate irresponsibility are reviewed. The paper suggests that mediating between structure and agency in a way that recontextualises the democratic principle is necessary to challenge power asymmetries in global regimes of production.

KEYWORDS Global justice; supply chain ethics; transnational law; New International Economic Order; Global Value Chains

1. Introduction

The globalisation of production means changing patterns of global division of labour. During the second half of the twentieth century, manufacturing moved to a significant extent to developing countries, where entry barriers and costs of basic production were low. The current phase of economic globalisation involves the outsourcing of production, with the industrial capacity owned by producers in developing countries and Global North lead firms only coordinating the links of the supply chain and inter-firm trade.[1] As Global Value Chain (GVC) analysis has since long pointed out, lead firms should then be understood as core actors of global economic

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[1] Peter Gibbon, Jennifer Bair and Stefano Ponte, 'Governing Global Value Chains: an Introduction' (2008) 37(3) *Economy and Society* 315, 317–319.

governance.[2] Importantly, the governance of GVCs is more than a technocratic process of management and coordination; it involves the production of endogenous systems of ordering that apply to suppliers and subcontractors across supply chains.[3] Based on this premise, an emerging normative agenda of 'supply chain ethics' or, more ambitiously, 'supply chain justice' aspires to hold lead firms responsible for the actions of suppliers and subcontractors across the supply chain. Even more ambitiously, the goal becomes to infuse transnational corporations with social values, encouraging them to internalise what has so far been understood as corporate 'externalities': Aspects of the outsourced production that have nothing to do with product quality standards, such as the respect of labour rights or environmental standards. As inequality becomes a global phenomenon and economic globalisation links actors seemingly unrelated, social justice is conceived in global terms.

Yet, this impetus is not new. This article, contrasts supply chain ethics with the 'welfare world' vision of global justice as it was captured most prominently by the proposals for a New International Economic Order (NIEO) in the mid-1970s, which focused on distributive justice and sovereignty. These sets of aspirations differ drastically in the role they reserve for the state and the market, in their ambitions, and in their epistemologies. The aspirations of the 'welfare world' depended on legal centralism and international cooperation to regulate and direct transnational economic activity. Based on the epistemological premise that the global economy is 'knowable' and thus governable, it was a vision aiming to curb inequalities between countries. Supply chain ethics operates on the premise that the global economy is hyper-complex, governed by a multiplicity of actors with conflicting motivations. The maximum law can achieve is to operate *through*, not *against*, market processes, harnessing social and market dynamics to set a social minimum against the worst forms of exploitation. Considering that contemporary market-oriented approaches operate in a legal framework established by national and international law in the first place, however, a simple dichotomy between *statist* and *market* approaches is misleading. State and international law should instead be seen as constitutive of GVCs. As such, state and international law retain the potential to reverse the negative effects of the processes of economic integration that supply chain ethics attempts to only secondarily mitigate.

Following the theme of this Special Issue, this paper investigates how the vision of supply chains ethics overcomes the variance in the legal definitions of societal conflicts to address the shared, unifying 'human problems' that

[2] Gary Gereffi, 'Beyond the Producer-driven/Buyer-driven Dichotomy The Evolution of Global Value Chains in the Internet Era' (2001) 32(3) *IDS Bulletin* 30, 32; Jennifer Bair, 'Global Capitalism and Commodity Chains: Looking Back, Going Forward' (2005) 9(2) *Competition & Change* 153, 157.

[3] See, Dan Danielsen, 'How Corporations Govern: Taking Corporate Power Seriously in Transnational Regulation and Governance' (2005) 46(2) *Harvard International Law Journal* 411.

arise from border-transcending economic processes.[4] Despite replacing state co-ordination with market co-ordination, supply chain ethics follows the structural outlook of the NIEO welfarism onto issues of social justice. It does not primarily focus on the agency of specific social actors, such as those at the bottom of corporate supply chains or the victims of corporate irresponsibility and human rights violations, but rather on structures of governance. While recognising the benefits of this approach, this paper suggests that by overlooking the social relations and public autonomy of 'real, flesh and blood actors', current normative visions of repurposing GVCs may encounter limits in their aspirations for social transformation.[5] In that sense, mediating between structure and agency becomes key in challenging the power dynamics within GVCs. The normative component of a transnational law framework of supply chain ethics involves a balancing between, on the one hand, feasible, structural, top-down legal fixes and, on the other hand, the kind of institutional imagination that may recontextualise the democratic principle in the transnational arena.

In Part 2, the state-centred vision of global justice that culminated in the 1970s is explored, drawing from the principles of the welfare state. In Part 3, the private and public law dimension of the agenda to achieve social goals through GVC governance is discussed in more detail. In Part 4, by probing the structure-agency dynamics of supply chain ethics, also with reference to the earlier vision of global welfarism, the paper attempts to contribute more specifically to the agenda of 'bringing the human problem back into transnational law'. Finally, the conclusions serve to recapitulate the key points of the article and to juxtapose the main aspects of the two approaches to global social justice, drawing attention to the constitutive role of national and international law for the creation of GVCs and global structures of inequality in the first place.

2. From the welfare state to the welfare world: a state-centred vision of global justice

State-centrism and the important role of the welfare state until the mid-1970s formed a political basis upon which visions of 'global justice' were articulated. The concept of the 'Welfare State' designates a system of social organisation that restricts free market operations by protecting vulnerable groups, delivering social services, and guaranteeing the maintenance of income through transfer payments.[6] In its more ambitious form, the welfare state

[4] See, Philip Jessup, *Transnational Law* (Yale University Press 1956) 16–34.
[5] Amy J Cohen, 'Negotiating the Value Chain: A Study of Surplus and Distribution in Indian Markets for Food' (2020) 45 (2) *Law & Social Inquiry* 460, 461.
[6] Derek Fraser, *The Evolution of the British Welfare state: A History of Social Policy Since the Industrial Revolution* (4 ed Palgrave Macmillan 2009) 1. An emblematic document of the time, the 1942 Beveridge

was not only a guarantee of a social minimum against the worst forms of deprivation, but a forward-looking reformist strategy, aimed to transform capitalist society through incremental reforms that displaced capitalist production and the market value of profit maximisation. The commitment to full employment, social security, health care, education, and housing constituted the core of a political project that aspired to set the basis for a society with fewer inequalities.

Indicated by the term itself, the welfare state was first and foremost a 'state' bound by the collective self-interest of people belonging to the same political community. Indeed, the welfare state was intrinsically connected with the notion of democratic citizenship. As T. H. Marshall has noted, the welfare state corresponded to an evolution in the notion of citizenship. Citizenship ceased being the architect of legitimate social inequality and instead became the drive toward social equality.[7] In other words, the abstract, formal equality of modern citizenship which legitimised social inequalities by promoting the equal treatment of unequal individuals, now acquired a substantive content, expressed through social rights, such as fair wage, healthcare, and housing.[8] Furthermore, this social citizenship carried with it a sense of entitlement over social provisions that are the result of citizens' participation, input legitimacy, and financial contributions.

Yet the attachment to citizenship reflected the national character of the political economy of the welfare state. The bonds of solidarity that defined distributional obligations were considered to exist only within the national community – which was in itself exclusionary, focusing on white male citizens – and could not be expanded beyond national space. For example, the European Convention of Human Rights of 1949 completely excluded social rights from its ambit. Nevertheless, the nationalist premise of the welfare state did not remain unchallenged. Already from 1944, the Declaration of Philadelphia by the International Labour Organization (ILO) imagined a world where labour would be made more humane around the world based on standards framed in terms of social rights. It was, however, the process of decolonisation that had the most far-reaching implications in the imaginaries of global justice, forging a strong link between global justice, state sovereignty, and national development.

Within developed countries, ideas about global justice were often shaped by the institutionalisation of welfare principles at the domestic level.[9] One

Report for the United Kingdom, came to epitomize the universalistic aspiration to ensure all citizens, 'from cradle to grave', against any eventuality that might lead to loss of income, Rodney Lowe, *The Welfare State in Britain since 1945* (2 ed. Palgrave Macmillan 1998) 13.

[7] T H Marshall, 'Citizenship and Social Class' in T H Marshall and T B Bottomore (eds), *Citizenship and Social Class* (Pluto perspectives. Pluto Press 1992) 7.

[8] *Ibid* 45–46.

[9] Alain Noël and Jean-Philippe Thérien, 'From Domestic to International justice: the Welfare State and Foreign Aid' (1995) 49(3) *International Organization* 523.

early approach to development stemming from the Swedish model of social democracy was the quest to transform the 'welfare state' into the 'welfare world'. According to one of its pioneering and major proponents in the 1950s, Gunnar Myrdal, the main obstacle to this course was one of circular causation. This meant that instead of a stable equilibrium between countries, the economic advantage of one country begets another.[10] In other words, if market forces are left unchecked?, economic growth will cluster in certain localities, where the return for economic activities is bigger than average, leaving the rest of the world in a disadvantaged situation. Within countries, the centralised agency of the state is meant to intervene and correct this localisation of economic growth through distributive policies and social services. For Myrdal, this intervention had to be mirrored on the international stage by creating the institutions that prohibit the exclusive accumulation of wealth by certain countries only. Concretising such intervention would entail the protection of internal markets and natural resources of developing countries as well as international coordination.

In a new world setting of vast power asymmetries combined with increased leverage of postcolonial states with the UN, international coordination among Global South countries in the 1970s culminated in the UN resolutions adopting a Charter of Economic Rights and Duties and proposals for a 'New International Economic Order' (NIEO) of 1974. Prior to these developments, the International Covenant on Economic, Social, and Cultural Rights of 1966 had already consecrated economic self-determination and sovereignty over natural resources.[11] The NIEO propelled a more radical vision of global justice that sought the equalisation of rich and poor states.[12] Full permanent sovereignty of every state over its natural resources and all economic activities, regulation of foreign investment, transfer of technology, equitable relationships on exports and imports, and credit on favourable terms were some of the concrete proposals that would contribute to this vision of state equality.[13] This paradigm relied on active control of capital-exporting countries and an international framework of cooperation under the United Nations to mitigate the adverse impact of transnational corporations on development.[14] At the same time these proposals were

[10] See, Gunnar Myrdal, *Rich Lands and Poor: The Road to World Prosperity* (Harper 1958).

[11] Similarly, the 'right to development', proposed in 1972 and endorsed by the UN General Assembly in 1986 was also inextricably linked to the state, see Daniel J Whelan, '"Under the Aegis of Man": The Right to Development and the Origins of the New International Economic Order' (2015) 6(1) *Humanity* 93.

[12] Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Harvard University Press 2018) 110 – 118.

[13] United Nations General Assembly, 'Declaration on the Establishment of a New International Economic Order' (1974) A/RES/S-6/3201.

[14] United Nations Conference on Trade and Development, 'Report of the Trade and Development Board' (1972 –1973). According to Doreen Lustig, contrary to the anti-formalist, policy-oriented approach of capital exporting countries to the question of investment regulation, the NIEO argument was cast in

advanced, take-overs of US-owned firms in the Global South peaked, reflecting in practice the rhetoric of sovereignty and national development.[15] The redistributive project of the 'welfare world' was to be concretised through international legal norms, state-oriented resource allocation mechanisms, and political co-operation.[16] In its most ambitious aspects, the NIEO was an attempt to replace decentralised market economy mechanisms by a type of UN-led, centralised planning.[17]

The NIEO was never implemented and its central themes of distributive justice and emphasis on sovereignty dwindled under the pressure of ideological transformations – most emphatically the rise of human rights in the late 1970s[18] and the influence of free market ideology.[19] The turn to human rights as a form of individual entitlements transcribed a move away from more collective and state-based understandings of social justice. At the same time, the championing of free trade and expansive foreign investment managed to politically displace the aspiration of postcolonial states to maintain a regulatory supremacy against corporate investors.[20] In a perhaps counter-intuitive development, certain features of the embryonic attempt to regulate transnational corporate actors were co-opted into the emerging international investment regimes. The recognition of the corporation as an international actor was integral in enhancing the legal protection of investors. At the same time, the reinforcement of the use of voluntary rules as a suitable framework for corporate responsibility[21] canalised concerns over corporate conduct to the issue of respecting human rights, as

formalist terms, based on a positivist understanding of the international legal order as an inter-state regime, Doreen Lustig, *Veiled Power: International Law and the Private Corporation 1886 –1981* (Oxford University Press 2020) 182.

[15] Quinn Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (Harvard University Press 2018) 220.

[16] In that direction, see the commentary of Robin C A White, 'A New International Economic Order' (1975) 24(3) The International and Comparative Law Quarterly 542 and N. S Rembe, 'Prospects for the Realisation of the New International Economic Order: An African Perspective' (1984) 17 *Comparative and International Law Journal of Southern Africa* 322.

[17] E U Petersmann, 'The New International Economic Order: Principles of Politics and International Law' in Ronald J St. Macdonald and Douglas M Johnston (eds), *The International Law and Policy of Human Welfare* (Sijthoff & Noordhoff 1978) 466.

[18] See, Samuel Moyn, *The Last Utopia: Human Rights in History* (Harvard University Press 2012). See also, Jessica Whyte, *The Morals of the Market: Human Rights and the Rise of Neoliberalism* (Verso 2019) for the argument that neoliberals defined the agenda of human rights and deployed its language to promote their own morals.

[19] More specific reasons for the failure of the NIEO to produce a lasting Code of Conduct on Transnational Corporations included arguments in favour of bilateral arrangements and flexible rules as a result of the difficulties in reaching an agreement between capital exporting countries and developing countries, the development of the OECD guidelines, the Barcelona Traction decision, the alliance of Northern countries in the form of the G7, and the rising influence of bilateral investment treaties. See Lustig (n 14) 212–215.

[20] This displacement was not always achieved by purely political means but also through post-colonial enforcement to protect foreign-owned property, Sundhya Pahuja, 'Corporations, Universalism, and the Domestication of Race in International Law' in Duncan Bell (ed) *Empire, Race and Global Justice* (Cambridge University Press 2019) 82.

[21] For example in the initiatives at the OECD and the ILO, Lustig (n 14) 218.

opposed to debates about distributive justice or the extent of sovereignty of host states.[22]

The 'welfare world' of the NIEO, just like the 'welfare state', relied on two pillars: first, collective self-determination of a political community, in opposition to ordering by anonymous market forces, and second, the belief in the capacity of knowledge, plans, and calculation to achieve an end result of distributive justice. As both pillars lost influence from the 1980s onwards, variations of more modest, market-embedded visions of social justice have been attempting to undo the worst effects of economic globalisation.

3. Internalising corporate 'externalities': toward supply chain ethics

Following the wane of ambitious, state-centred visions of global justice, new conceptualisations of social justice on global scale focused on a necessary 'moral minimum' of standards against deprivation, on poverty alleviation, and on critiques against abuses of state power.[23] Within this ideologically transformed landscape, the corporation's image gradually changed from that of an entity to be heavily regulated in order to comply with public goals to that of an entity that is integral in the materialisation of such goals.[24] Transnational corporations and foreign investment became parts of the puzzle of development, supposedly delivering on the narrative of the 'moral responsibility' of the 'developed West' that has the technical expertise and the scientific knowledge towards the global 'poor'.[25] The shift from antagonism to synergy fostered new 'social responsibility' and, eventually, 'sustainability' discourses. These increasingly took the form of steering transnational corporate power towards goals of social justice. Private voluntary programmes of Corporate Social Responsibility (CSR) began to emerge as early as the 1970s, addressing issues of corruption and questionable payments to eventually expand to labour and environmental issues.[26]

[22] Lustig (n 14) 218.

[23] See Moyn (n 12) 119 –145. On the notion of 'moral minimum' as that which "every person, every government, and every corporation may be made to do", see Henry Shue, *Basic Rights* (Princeton University Press 1996).

[24] For the change in the attitude towards transnational corporations see Lustig (n 14) 216. See Pahuja (n 20) for the juxtaposition between an earlier Third World approach of assessing the conduct of a corporation on the basis of its contribution to the economic development of the country as a whole and a Global North-driven perspective, according to which corporations had to be the recipients of a stable, apolitical framework in return for their technical expertise, scientific knowledge, and contribution in development.

[25] See, Thomas Pogge, 'Moral Universalism and Global Economic Justice' (2002) 1 *Politics, Philosophy and Economics* 30.

[26] For the development of systems of CSR and private governance, see Rhys Jenkins, 'Corporate Codes of Conduct: Self-Regulation in a Global Economy' (2001) online: www.unrisd.org/80256B3C005BCCF9/(httpAuxPages)/E3B3E78BAB9A886F80256B5E00344278/$file/jenkins.pdf; Dara O'Rourke, 'Outsourcing

Developments in the field of CSR dovetailed with the crisis of Keynesianism and with broader socio-political developments in western societies. These included a mounting critique against the predominant role of the state in the economy and in shaping social life,[27] new strategies of political activism, including the emphasis on human rights and ethical individualism,[28] the advent of the 'nexus-of-contracts' understanding of the corporation which advanced ideas of non-state regulation of the corporation,[29] and the prevalence of outsourcing with the shift from hierarchical to 'vertically disintegrated' corporations.[30] Codes of conduct and monitoring schemes developed by lead firms aimed to promote supplier compliance have since become widespread practices that nevertheless vary widely in their content and form depending on the industry or company.[31] Voluntary CSR programmes have been consistently criticised as vehicles for limiting the legal liability of global brands, pre-empting more intrusive forms of public regulation, deflecting civil society pressures and reputational risks associated with the production process ('whitewashing', 'greenwashing', etc), expanding market-embedded morality, or constituting new forms of western imperialism.[32]

In response to these critiques and limitations, scholarship in private law theory has been attempting to open new pathways that would allow to harness the potential private governance still holds for sustainability and labour rights protection. This could be achieved, most emphatically, by 'piercing the corporate veil' and establishing lead firm liability within regimes of

Regulation: Analysing Nongovernmental Systems of Labor Standards and Monitoring' (2003) 31(1) *Policy Studies Journal* 1; David Vogel, 'Private Global Business Regulation' (2008) 11(1) *Annual Review of Political Science* 261; Frederick Mayer and Gary Gereffi, 'Regulation and Economic Globalization: Prospects and Limits of Private Governance' (2010) 12(3) *Business and Politics* 1.

[27] See, Luc Boltanski and Ève Chiapello, *The New Spirit of Capitalism* (Verso 2007) and their emphasis on the 'artistic critique' to capitalism.

[28] On the advent of 'sub-politics', see Ulrich Beck, 'The Reinvention of Politics' in Ulrich Beck, Anthony Giddens and Scott Lash (eds), *Reflexive modernization: Politics, Tradition and Aesthetics in the Modern Social Order* (Stanford University Press 1994); On how individuals, as opposed to classes, became the principal agents of social change, see André Gorz, *Adieux au proletariat: Au delà du socialisme* (Ed. Galilee 1980); On the emergence of 'human rights' as a hegemonic discourse in the late 1970s, see Moyn (n 18).

[29] Michael C Jensen and William H Meckling, 'Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure' (1976) 3 *Journal of Financial Economics* 305; William W Bratton, JR, 'Nexus of Contracts Corporation: A Critical Appraisal' (1989) 74 *Cornell Law Review* 407.

[30] Ronald J Gilson, Charles F Sabel and Robert E Scott, 'Contracting for Innovation: Vertical Disintegration and Interfirm Collaboration' (2009) 109(3) *Columbia Law Review* 431.

[31] This diversity prompts Richard Locke to assert that it is difficult to holistically evaluate whether such programs have been effective, Richard M Locke, *The Promise and Limits of Private Power* (Cambridge University Press 2013) 27. For the 'capability-building' approaches as a further private, non-governmental alternative to the traditional compliance model, see Locke (n 23) 78.

[32] Indicatively, see Timothy Bartley, 'Corporate Accountability and the Privatization of Labor Standards: Struggles over Codes of Conduct in the Apparel Industry' (2005) 14 *Research in Political Sociology* 211; Ronen Shamir, 'Corporate Social Responsibility: Towards a New Market-Embedded Morality?' (2008) 9 (2) *Theoretical Inquiries in Law* 371; Farzad Rafi Khan and Peter Lund-Thomsen, 'CSR As Imperialism: Towards a Phenomenological Approach to CSR In the Developing World' (2011) 11 *Journal of Change Management* 73.

supply chain governance. Understanding corporate codes as binding parts of contractual arrangements could be instrumental in that regard.[33] Indeed, new cases of supply chain liability give credence to such a possibility[34] and transnational activist networks have struggled to establish joint liability rules.[35]

Even more ambitiously, strands of such theoretical inquiries invite us to think beyond the traditional dichotomies of 'public/private' and 'mandatory/voluntary' and envision how interlocking systems of ordering can be 'constitutionalized' through a seemingly agentless and decentred process.[36] Building on the premise that law is *endogenous* to GVCs – that is, transnational corporations are not simply rule-takers but instead actively participate in the rules that govern their operations[37]–the normative agenda becomes to inject social values within regimes of private governance. Lead firms govern and coordinate the production process to ensure product or service quality standards ('internalities' of the chain). At the same time, however, they remain purposefully agnostic as to how outsourced production is managed and organised or its impact on labour standards and the environment ('externalities' of the chain).[38] The aspiration is to see these 'externalities' *internalized* within systems of supply chain governance. According to

[33] Indicatively, Jaakko Salminen, 'The Accord on Fire and Building Safety in Bangladesh: A New Paradigm for Limiting Buyers' Liability in Global Supply Chains?' (2018) 66 *American Journal of Comparative Law*, 411, 432ff; Anna Beckers, *Enforcing Corporate Social Responsibility Codes: On Global Self-Regulation and National Private Law* (Hart 2015); James J Brudney, 'Envisioning Enforcement of Freedom of Association Standards in Corporate Codes: A Journey for Sinbad or Sisyphus?' (2012) 33(4) *Comparative Labor Law & Policy* Journal 555; Benedikt Reinke and Peer Zumbansen, 'Transnational Liability Regimes in Contract, Tort and Corporate Law: Comparative Observations on 'Global Supply Chain Liability' *King's College London TLI Think! Paper* 4/2019.

[34] For two recent cases of supply chain liability see, *Four Nigerian Farmers and Milieudefensie v. Shell* (2021), where The Hague Court of Appeals found a limited duty of care of parent companies for the actions of their subsidiaries, and *Okpabi and others v Royal Dutch Shell Plc and another* (2021), in which the English Supreme Court recognized that the parent company could owe a duty of care to those harmed by the acts of a foreign subsidiary. More specifically on corporate codes, see *Doe v Wal-Mart*, 572 F.3d 677 (9th Cir. 2009), where, the court declined to satisfy the complaint that Walmart had failed to enforce its code of conduct, asserting that the language used by Wal-Mart only granted a right to Wal-Mart to monitor suppliers and did not impose an obligation. See, also the case *Jabir v KiK Textilien und Non-Food GmbH*, Landgericht Dortmund [LG] [Dortmund Regional Court], 7 O 95/15 (Ger.) (filed Mar. 13, 2015), which eventually was rejected on the basis that the statute of limitations had expired

[35] César A Rodríguez-Garavito, 'Nike's Law: The Anti-Sweatshop Movement, Transnational Corporations, and the Struggle over International Labor Rights in the Americas' in Boaventura de Sousa Santos and César A Rodríguez-Garavito (eds), *Law and Globalization from Below* (Cambridge University Press 2009).

[36] Gunther Teubner, 'Self-Constitutionalizing TNCs? On the Linkage of "Private" and "Public" Corporate Codes of Conduct' (2011) 18(2) *Indiana Journal of Global Legal Studies* 617; Klaas H Eller, 'Private Governance of Global Value Chains From Within: Lessons From and For Transnational Law' (2017) 8(3) *Transnational Legal Theory* 296.

[37] The IGLP Law and Global Production Working Group, 'The role of law in global value chains: a research manifesto' (2016) 4(1) *London Review of International Law* 57; Danielsen (n 3).

[38] Jaakko Salminen, 'Contract-Boundary-Spanning Governance Mechanisms: Conceptualizing Fragmented and Globalized Production as Collectively Governed Entities' (2016) 23 *Indiana Journal of Global Legal Studies* 709, 713 –4.

Gunther Teubner, companies are not immune to 'learning pressures', that is, external pressures that lead to internal self-limitation.[39] Such pressures may result from court cases of supply chain liability, soft international or national legal norms (eg, UN Guiding Principles or transparency regulation), or civil society pressures and ethical consumerism. The resulting internal corporate norms become the 'civil constitutions' of transnational economic regimes, fulfilling a function of self-limitation that extends beyond their formal bindingness or enforceability. In a similar direction, Jonathan Lipson suggests that despite the possible under-enforceability of social clauses in supply chain contracts, they could still encourage iterative improvement by the promisor/supplier as the process of articulating such terms is in itself conducive to internalising them.[40]

While it is fit not to exaggerate the aspirations of this private law direction into a holistic vision of global justice, it constitutes a vision of a fairer global social order through the incorporation of social values within the functioning of private institutional structures. *Supply chain ethics* could then be phrased in terms of relational–as opposed to distributive– justice.[41] While transnational moral obligations of distributive justice must overcome the challenge that there is no prior political relation between different peoples,[42] relational justice does not presuppose such a political relation. Instead, relational justice refers to the non-statist obligations born out of the interaction of specific moral agents, no matter how distant.[43] This would imply that the transnational contractual governance of global supply chains as a form of voluntary, private-law interaction between private agents entails *in itself* an obligation of respect for the self-determination and equality of the parties and a duty of reasonable accommodation of their socio-economic condition. This then protects against certain forms of deprivation or exploitation (eg, poverty wages at sweatshops).[44] A shortcoming of this conceptualisation is that while it addresses some of the risks at the bottom of supply chains, it offers no framework through which the distribution of wealth in the upper echelons of the chain can be challenged. A more just supply chain–in terms of relational justice–is still compatible with extreme wealth inequality.

[39] Teubner, 'Self-Constitutionalizing TNCs? On the Linkage of "Private" and "Public" Corporate Codes of Conduct' (n 36) 635.

[40] Jonathan C Lipson, 'Promising Justice: Contract (as) Social Responsibility' (2019) *Wisconsin Law Review* 1109, 1150 –1152.

[41] Hanoch Dagan and Avihay Dorfman, 'Just Relationships' (2016) 116(6) *Columbia Law Review* 1395, 1420, according to whom "economic disparities ought to be taken into account when fixing just terms of interactions between individual persons even when thus fixing cannot come close to a scheme of systematic redistribution of resources".

[42] See Thomas Nagel, 'The Problem of Global Justice' (2005) 33 *Philosophy & Public Affairs* 113.

[43] Hanoch Dagan and Avihay Dorfman, 'Interpersonal Human Rights' (2018) 51 *Cornell International Law Journal* 361, 373.

[44] On the operational constraints of implementing accommodation for poverty, see Hanoch Dagan and Avihay Dorfman, 'Poverty and Private Law: Beyond Distributive Justice' Forthcoming.

In parallel with the developments in private law scholarship and the (comparatively fewer) developments in supply chain liability case law, a recent wave of public law regulation of 'corporate sustainability laws' has emerged. Despite their origin in the state and their more conventional 'bindingness', these laws can nevertheless be subsumed under the same paradigm of 'internalizing externalities'. Their goal is less to directly hold lead firms accountable and more to facilitate the exercise of 'learning pressures', to enhance self-regulatory dynamics of corporate actors, and to promote the reflexive adoption of codes and the embeddedness of social values within corporate activity.

One category of such 'corporate sustainability laws' is that of non-financial transparency regulations on lead firms (eg, California Transparency in Supply Chains Act 2010, EU Directive 2014/95, UK Modern Slavery Act of 2015, German CSR Directive Implementation Act of 2017). While there are important differences in how these obligations are enforced, transparency regulation ultimately relies on the power of reputational sanctions in order to achieve the underlying policy objective of making transnational production more sustainable or respectful of labour rights.

Another emerging category of such laws goes beyond transparency regulation and imposes human rights due diligence obligations on lead firms (eg, French Duty of Vigilance Law of 2017, EU Regulation 2017/821 on conflict minerals). Yet the 'hardness' of the French law, for example, refers to the obligation of establishing a 'vigilance plan', which is set by the company itself. Adhering to these self-imposed standards could possibly cap and pre-empt corporate liability for human rights violations along the supply chain.[45] Once again, the pressure is on lead firms to develop the kind of self-regulatory dynamics that will maximise the internalisation of corporate externalities. Nonetheless, human rights due diligence legislation is still at a nascent stage and has the potential to eventually advance top-down logics, conveying a disenchantment with reflexive legal approaches and the aspiration of corporate self-change.[46]

4. Structure and agency in addressing corporate 'externalities'

This Special Issue calls our attention to how the methodological framework of transnational law can address human problems. Facing the particular problem of corporate irresponsibility and, more broadly, the absence of

[45] Doug Cassel, 'Outlining the Case for a Common Law Duty of Care of Business to Exercise Human Rights Due Diligence' (2016) 1 *Business and Human Rights Journal* 179.

[46] See for example the Draft Report of the European Parliament with recommendations to the Commission on corporate due diligence and corporate accountability (2020/2129(INL)) or the current Draft of a 'Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and Other Business Enterprises' (Binding Treaty on Business and Human Rights).

equitable relationships in transnational economic interactions, the question becomes how to design and frame institutional interventions.

The described accounts in private law theory, as well as the existing public regulations of GVCs, manifest a concert with 'governance gaps', which 'provide the permissive environment for wrongful acts by companies of all kinds without adequate sanctioning or reparation in supply chains'.[47] The solution that appears to be favoured in both theory and new forms of public regulation is that of internalisation of externalities. It is lead firms that should assume such responsibilities within their transnational 'legal bubbles'. The market, given the appropriate triggers, incentives, and occasional threat of liability, can deliver a new, more modest, but realisable vision of 'supply chain ethics'.[48] Through this lens, the externalities of working conditions or environmental impact of corporate activity are not understood as a 'human problem' in the sense of a problem encountered by specific individuals but rather as a question of structure and governance.

There is, indeed, good reason for avoiding a rights-based, individualist outlook on the processes of the globalised economy. From the system-theoretical perspective that animates some of the discussed analyses on processes of self-constitutionalisation in GVCs,[49] human rights are more than just a vehicle for the legal articulation of fundamental individual interests. Instead, they function as 'social and legal counter-institutions to the expansionist tendencies of social systems'[50] including the economic system. Human rights and, by extension, human agents themselves, are immersed and make part of broader, global societal structures of exploitation. The transformation of such structures is not possible through the invocation of an agency that has been shaped by them in the first place. Conceiving of social transformation through the notion of a 'subject' is bound to restrict the spectrum of transformative possibilities to the particularities of a given social context.

In more grounded terms, as Mark Anner et al point out, 'labor violations are not simply a factory-level problem that can be corrected by improved compliance monitoring; they are a pervasive and predictable outcome in an industry dominated by lead firms whose business model is predicated

[47] John Ruggie, 'Protect, Respect and Remedy: a Framework for Business and Human Rights' (Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, 7 April 2008) A/HRC/8/5.

[48] See, Christian Scheper, 'Labour Networks under Supply Chain Capitalism: The Politics of the Bangladesh Accord' (2017) 48(5) *Development and Change* 1069.

[49] On the structural perspective of constitutionalization in GVCs, see Eller (n 38), Teubner (n 38), Peer Zumbansen, '"Economic Law" and the Contractual Constitution of Global Supply Chains' (2019) 52 *Kritische Justiz* 670, and Anna Beckers, 'Towards Constitutionalizing Global Value Chains and Corporations' (2020) *Verfassungsblog*, available at https://verfassungsblog.de/towards-constitutionalizing-global-value-chains-and-corporations/.

[50] Gunther Teubner, 'Transnational Fundamental Rights: Horizontal Effect?' (2011) 40(3) *Netherlands Journal of Legal Philosophy* 191, 210.

on outsourcing apparel production via highly flexible, volatile, and cost-sensitive subcontracting networks'.[51] Addressing the root causes of poor working conditions in outsourced production requires going beyond the particular victims in the particular context. This is even more necessary if the broader aspiration is not just the respect of certain minimum social standards, as is primarily the case in the contemporary private-led vision of global welfare, but also something akin to equality, as it was in the state-centred vision of global justice. Rights-based approaches, such as for example those captured in the effort to adopt a Binding Treaty on Business and Human Rights, run the risk of being less ambitious than originally imagined, because they focus on victims and ex post remedy of violations, rather than on challenging the power dynamics within GVCs.

On the other hand, not seeing the human agency in such externalities and addressing them as simple 'governance gaps' can also be reductive, diverting social justice aspirations toward top-down fixes. This is a point that the global welfarism of the NIEO was also not immune to. From a critical perspective, the NIEO entailed a promise of national redistribution of international gains, as opposed to a direct involvement of a plurality of social actors, while it focused on the state and forces of production as opposed to relations of production. This means that the NIEO could have ended up simply drawing up a new international division of labour instead of achieving lasting change in global power asymmetries.[52]

From a contemporary perspective within supply chain capitalism, transformative visions focusing solely on structure may divert attention from the non-economic factors of exploitation along supply chains or, in other words, from the diversity *within* supply chain capitalism.[53] Singular portrayals of the process of exploitation and singular sets of principles through which to confront it, regardless of whether these belong to the direction of global justice or supply chain ethics, cannot capture the intersectionality of contemporary capitalism. Indeed, according to Anna Tsing, the key in understanding the workings of supply chain capitalism is the exploitation that can only be attributed to non-economic factors of 'culture', which preclude negotiation of wages in the ways imagined by neo-classical economics (*superexploitation*).[54] Constructing a unitary figuration of labour does not simply risk being underinclusive of the diversity within supply chain

[51] Mark Anner, Jennifer Bair and Jeremy Blasi, 'Toward Joint Liability in Global Supply Chains: Addressing the Root Causes of Labor Violations in International Subcontracting Networks' (2013) 35(1) *Comparative Labor Law & Policy Journal* 1, 3.

[52] Indicatively, see Robert W Cox, 'Ideologies and the New International Economic Order: Reflections on Some Recent Literature' (1979) 33 (2) *International Organization* 257, Samir Amin, 'Some Thoughts of Self-Reliant Development, Collective Self-reliance, and the New International Economic Order' in Sven Grassman and Erik Lundberg (eds.) *The World Economic Order: Past & Prospects* (Macmillan Press 1981)

[53] Anna Tsing, 'Supply Chains and the Human Condition' (2009) 21(2) *Rethinking Marxism* 148, 152.

[54] *Ibid* 158–159.

capitalism. Rather, it fails to capture the structural role this diversity plays in shaping processes of exploitation. In that sense, the irreducibility of labour to generic figurations becomes an essential aspect of global justice imaginaries.

Addressing a 'human problem' requires a certain recognition of the agency of the humans immersed in such problems. Yet, the structural bent of current versions of supply chain ethics may obfuscate the importance of such agency. This is particularly obvious in the lack of input legitimacy and public autonomy of the workers that are supposed to benefit from social clauses in supply chain contracts. As B.S. Chimni has rightly observed, there is a lack of 'public voice' in the emergence of a corporate law without a state.[55] Even if trade unions can use corporate codes as part of elaborate and contingent strategies to achieve a concrete amelioration of working conditions,[56] they have not participated in the elaboration of such codes in the first place. The 'learning pressures' that are supposed to trigger the adoption of corporate codes are dependent on possible reputational sanctions for corporate misconduct. Yet, such sanctions will most likely come from the influential consumer and capital markets of the Global North, rather than from the Global South where extraction and production is located.[57] Foregoing the 'human' component of the transnational 'human problem' – where 'human' relates to the agency of actual workers and, as a result, the time-honoured principle of democracy that the affected people must be the authors of their own laws – leads to reproducing neo-colonial dynamics and to cementing the functional sovereignty of lead firms over all aspects of transnational chains of production.[58]

Mediating between structure and agency, between abstractions and concrete social agents, becomes key in challenging the power dynamics within GVCs. This could then constitute the horizon of the transnational law framework, when understood as entailing a normative dimension: Not only aspiring to functionality and effectiveness (eg, by establishing joint liability rules), but also being committed to the emancipation of concrete individuals from

[55] B S Chimni, 'Third World Approaches to International Law: A Manifesto' (2006) 8(1) International Community Law Review 3, 13. Ethnographic research also points to how local communities may lack effective participation mechanisms and yet be conceptualized as consenting contractual parties to corporate operations, see Laura Knöpfel, 'An Anthropological Reimagining of Contract in Global Value Chains: The Governance of Corporate-community Relations in the Colombian Mining Sector' (2020) 16 *European Review of Contract Law* 118, 135.

[56] See, Tim Bartley and Niklas Egels-Zandén, 'Beyond Decoupling: Unions and the Leveraging of Corporate Social Responsibility in Indonesia' (2016) 14(2) *Socio-Economic Review* 231; Rodríguez-Garavito (n 27).

[57] Ioannis Kampourakis, 'The Postmodern Ordering of the Economy' (2021) Forthcoming *Indiana Journal of Global Legal Studies*.

[58] For example, Lipson (n 40) 1151 suggests that 'contract social responsibility' terms create 'mechanisms for educating the parties', meaning, of course, the suppliers. This betrays the unilateral, North-to-South operationalisation of supply chain ethics. This does not include hybrid regimes of private governance, such as the Bangladesh Accord or regimes of Worker-Driver Social Responsibility like the Fair Food Program.

conditions of exploitation (eg, through an emphasis on their participatory rights in private decision-making settings). As such, the normative dimension of the transnational law framework is linked to the institutional imagination required to truly recontextualise the democratic principle.[59] While current critiques of 'transnational constitutions without democracy' have a basis,[60] the possibility of a transnational demos cannot be excluded by default. Insofar as the demos is not a natural category but rather a product of social institutions, democracy – and thus the question of agency – remains a function of our institutional and moral imagination.[61]

5. Conclusions

Both the global justice aspirations of the NIEO and the supply chain ethics of 'socialising' the endogenous law of GVCs point to structural solutions to global inequalities and welfare, sidelining more individualistic, rights-based approaches. However, they also represent different ways of thinking about the global economy, development, and inequalities.

The vision of the 'welfare world' was a political and a statist vision. It was premised first on legal centralism and the assertion of collective public orderings over private ones in the domestic sphere and, second, on the transposition of these in the international arena through international legal norms. On the contrary, supply chain ethics, or, more ambitiously, the fragments of a vision of 'supply chain justice', is embedded in transnational market processes, operating though the 'normative orders' of GVCs.[62]The attempt to regulate cross-border flows through the reconfiguration of private law instruments or through a reimagination of bindingness, pluralism, and normativity does not sufficiently question the constitutive role of state law in the formation of GVCs. Through a nexus of prohibitions and permissions,[63] it was state (and subsequently international) law that enabled the vertical disintegration of transnational corporations, the expansion of free trade, outsourcing, and legal protections for corporate investors, as well as the decline of collective labour power that provided the underpinnings for the emergence of supply chain capitalism. Accordingly, state and international law have the potential to reverse these processes. In addition, as

[59] For one such attempt, see Gunther Teubner, '*Quod omnes tangit*: Transnational Constitutions Without Democracy?' (2018) 45 *Journal of Law and Society* 5.

[60] See, Emilios Christodoulidis, `On the Politics of Societal Constitutionalism' (2013) 20 *Indiana Journal of Global Legal Studies* 629.

[61] On institutional imagination, see Roberto M Unger, 'Legal Analysis as Institutional Imagination' (1996) 59 *Modern Law Review* 1.

[62] Klaas H Eller, 'Is 'Global Value Chain' a Legal Concept? Situating Contract Law in Discourses Around Global Production' (2020) 16 *European Review of Contract Law* 3.

[63] Wesley Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26(8) *Yale Law Journal* 710; Duncan Kennedy, 'The Stakes of Law, or Hale and Foucault!' (1991) 15(4) *Legal Studies Forum* 327.

demonstrated, the attempt to embed social values within private regulation still has an anchor in state–public or private–law. The dichotomy between *statist* and *market* approaches is therefore misleading: the market approach is also a state approach, only oriented towards different normative goals. The nature and the extent of the normative aspirations behind a transnational framework of supply chain ethics are dependent on the existing national and international institutional setup. Aspirations of state equality and global justice can be served by existing national and international democratic institutions before, or at least in tandem with, a complete reconceptualization of the democratic principle.

Furthermore, the two approaches to global social justice differ in their ambitions. While the statist model of the NIEO understood global justice as a matter of relative standards, supply chain ethics aspire to provide a minimum limit against the worst forms of exploitation and environmental degradation. The introduction of standards in GVCs could mitigate some of the risks at the bottom of supply chains but this would not necessarily disrupt the distribution of wealth in the upper echelons of the chain. A more sustainable supply chain is not incompatible with more extreme wealth inequality. However, this outline of ambitions is not meant to preclude the possibility that, in the future, the – still malleable – vision of 'socializing the law of GVCs' will acquire a distributive dimension, expressing more holistic aspirations of global justice.

Finally, the two approaches differ in their epistemologies. The NIEO follows a functionalist tradition, holding that human reason and calculation make global economic planning possible.[64] Not unlike the domestic economy, the global economy is knowable and governable, which means that it is possible to prescribe goals and ideal distributional end-states. On the contrary, contemporary attempts to infuse transnational corporations with social values often have as their starting point that the global economy is 'unknowable' and, therefore, it is impossible to unilaterally direct it toward arbitrary end goals.[65] Instead, solutions to social problems will only come through the internal workings of the particular social system, as the necessary knowledge for addressing social complexity cannot be built from external observation points, such as that of the state.[66] In that sense, a return to the 'big thinking' that underpinned the global justice aspirations of the NIEO would require challenging currently

[64] Slobodian (n 15) 235. See, also Thomas E Uebel and Robert S Cohen, *Otto Neurath Economic Writings Selections 1904–1945* (Kluwer Academic Publishers 2005) 494 for Neurath's call for a 'comprehensive functional economy'.

[65] See, Friedrich A v Hayek, 'The Use of Knowledge in Society' (1945) 35(4) *The American Economic Review* 519.

[66] In that direction, Gunther Teubner, 'A Constitutional Moment? The Logics of "Hitting the Bottom" in Poul F Kjaer, Gunther Teubner and Alberto Febbrajo (eds), *The Financial Crisis in Constitutional Perspective: The Dark Side of Functional Differentiation* (Hart 2011).

hegemonic epistemologies and their impact on the regulation of the global economy.

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